A Claremont Reader

A Compilation of Essays Demonstrating the Constitutional and Policy Deficiencies of the Claremont Series of Public School Funding Decisions 1993 - 2006

Foreword, Article Introductions, and Epilogue by

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FOREWARD

It is the purpose of this collection of writings to demonstrate both the utter lack of constitutional legitimacy of the *Claremont* series of public school funding decisions and the right and imperative constitutional *duty* of the Legislature to repudiate them.

The central majoritarian, representative organizational principles of the constitutions of those governments, including that of the State of New Hampshire, that were patterned after the British model, contain a glaring anomaly: the judiciary, which is not elected but appointed by the executive, to serve not for a short period but "during good behavior." The principle of judicial independence enshrined in this constitutional arrangement originated in the British Act of Settlement of 1689 as a typically practical British response to the experience of the constitutional struggles of the Seventeenth Century, in which Parliament was always at a disadvantage in legal controversies against a King who not only appointed all the judges, but could remove them at will. Being exempted from periodic accountability to any other person, group, or entity, courts are enabled to render judgments strictly on the merits of the cases brought before them, free of political pressure.

The benefit to the judiciary of this constitutional *quid pro quo* carries, however, a countervailing burden**:** the judicial branch must refrain from involvement in politics, and it must be candid in its opinions. The writings in this collection will show how, in the *Claremont* series of cases, the New Hampshire Supreme Court has failed abysmally in the performance of its share of the constitutional settlement.

In the tradition of Aesop and Jesus, this collection begins with a parable, in the form of Hans Christian Andersen's *The Emperor's New Clothes*, in order to illustrate with a simple story the larger picture that might otherwise be obscure. The succeeding Section II contains essays that show the social and political landscape existing prior to the first *Claremont* decision in 1993. Section III consists of the verbatim texts of the primary school funding decisions that changed this landscape. Section IV contains a sampling of the writings of deniers of the virtual palace *coup* the *Claremont* decisions have accomplished. Section V contains all fifteen numbers of attorney Eugene Van Loan's towering 1998 critique of the process by which the New Hampshire Supreme Court, under the protection and cover of judicial independence, has constituted itself the enemy of constitutional government by its chronic, pervasive abuse of its solemn adjudicatory function. Section VI contains a sampling of the best of the published essays that followed attorney Van Loan's pioneering exposé. Section VII is my own deconstruction of the myths that have contributed to the general preemptive surrender of the people and their elected representatives to the pretensions of the Supreme Court.

It is not expected that the user will read this collection straight through, but rather that it will serve as a reference tool and educational aid in addressing the school funding issue and its implications for the future of representative government in New Hampshire.

Gregory M. Sorg
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Since December, 1993, the people of New Hampshire, through the Claremont series of school funding cases, have been participating in a performance of "The Emperor's New Clothes" that never ends. At the conclusion of the original, the people overcome their fear of appearing foolish in the eyes of their "betters," and are at last willing to believe the evidence of their own senses once it has been confirmed by one of the least of their own, and to recognize the perfidy of the swindlers. In the real-life contemporary performance, however, the people, evidently fearful of exposure as "unfit for office or unforgivably stupid," continue to cower in their timorous apathy and blindly accept the outlandish pronouncements of the swindlers.

Hans Christian Andersen:
The Emperor's New Clothes

Many, many years ago there was an emperor who was so terribly fond of beautiful new clothes that he spent all his money on his attire. He did not care about his soldiers, or attending the theater, or even going for a drive in the park, unless it was to show off his new clothes. He had an outfit for every hour of the day. And just as we say, "The king is in his council chamber," his subjects used to say, "The emperor is in his clothes closet."

In the large town where the emperor's palace was, life was gay and happy; and every day new visitors arrived. One day two swindlers came. They told everybody that they were weavers and that they could weave the most marvelous cloth. Not only were the colors and the patterns of their material extraordinarily beautiful, but the cloth had the strange quality of being invisible to anyone who was unfit for his office or unforgivably stupid.

"This is truly marvelous," thought the emperor. "Now if I had robes cut from that material, I should know which of my councilors was unfit for his office, and I would be able to pick out my clever subjects myself. They must weave some material for me!" And he gave the swindlers a lot of money so they could start working at once.

They set up a loom and acted as if they were weaving, but the loom was empty. The fine silk and gold threads they demanded from the emperor they never used, but hid them in their own knapsacks. Late into the night they would sit before their empty loom, pretending to weave.

"I would like to know how they are getting along," thought the emperor; but his heart beat strangely when he remembered that those who were stupid or unfit for their office would not be able to see the material. Not that he was really worried that this would happen to him. Still, it might be better to send someone else the first time and see how he fared. Everybody in town had heard about the cloth's magic quality and most of them could hardly wait to find out how stupid or unworthy their neighbors were.

"I shall send my faithful prime minister over to see how the weavers are getting along," thought the emperor. "He will know how to judge the material, for he is both clever and fit for his office, if any man is."

The good-natured old man stepped into the room where the weavers were working and saw the empty loom. He closed his eyes, and opened them again. "God preserve me!" he thought. "I cannot see a thing!" But he didn't say it out loud.

The swindlers asked him to step a little closer to the loom so that he could admire the intricate patterns and marvelous colors of the material they were weaving. They both pointed to the empty loom, and the poor old prime minister opened his eyes as wide as he could; but it didn't help, he still couldn't see anything.

"Am I stupid?" he thought. "I can't believe it, but if it is so, it is best no one finds out about it. But maybe I am not fit for my office. No, that is worse; I'd better not admit that I can't see what they are weaving."

"Tell us what you think of it," demanded one of the swindlers.

"It is beautiful. It is very lovely," mumbled the old prime minister, adjusting his glasses. "What patterns! What colors! I shall tell the emperor that it pleases me ever so much."

"That is a compliment!" both the weavers said; and now they described the patterns and told which shades of color they had used. The prime minister listened attentively, so that he could repeat their words to the emperor; and that is exactly what he did.

The two swindlers demanded more money, and more silk and gold thread. They said they had to use it for their weaving, but their loom remained as empty as ever.

Soon the emperor sent another of his trusted councilors to see how the work was progressing. He looked and looked just as the prime minister had, but since there was nothing to be seen, he didn't see anything.

"Isn't it a marvelous piece of material?" asked one of the swindlers; and they both began to describe the beauty of their cloth again.

"I am not stupid," thought the emperor's councilor. "I must be unfit for my office. That is strange; but I'd better not admit it to anyone." And he started to praise the material, which he could not see, for the loveliness of its patterns and colors.

"I think it is the most charming piece of material I have ever seen," declared the councilor to the emperor.

Everyone in town was talking about the marvelous cloth that the swindlers were weaving.

At last the emperor himself decided to see it before it was removed from the loom. Attended by the most important people in the empire, among them the prime minister and the councilor who had been there before, the emperor entered the room where the weavers were weaving furiously on their empty loom.

"Isn't it *magnifique*?" asked the prime minister.

"Your Majesty, look at the colors and the patterns," said the councilor.

And the two old gentlemen pointed to the empty loom, believing that all the rest of the company could see the cloth.

"What!" thought the emperor. "I can't see a thing! Why, this is a disaster! Am I stupid? Am I unfit to be emperor? Oh, it is too horrible!" Aloud he said, "It is very lovely. It has my approval," while he nodded his head and looked at the empty loom.

All the councilors, ministers, and men of great importance who had come with him stared and stared; but they saw no more than the emperor had seen, and they said the same thing that he had said, "It is lovely." And they advised him to have clothes cut and sewn, so that he could wear them in the procession at the next great celebration.

"It is magnificent! Beautiful! Excellent!" All of their mouths agreed, though none of their eyes had seen anything. The two swindlers were decorated and given the title "Royal Knight of the Loom."

The night before the procession, the two swindlers didn't sleep at all. They had sixteen candles lighting up the room where they worked. Everyone could see how busy they were, getting the emperor's new clothes finished. They pretended to take the cloth from the loom; they cut the air with their big scissors, and sewed with needles without thread; At last they announced: "The emperor's clothes are ready!"

Together with his courtiers, the emperor came. The swindlers lifted their arms as if they were holding something in their hands, and said, "These are the trousers. This is the robe, and here is the train. They are all as light as if they were made of spider webs! It will be as if Your Majesty had almost nothing on, but that is their special virtue."

"Oh yes," breathed all the courtiers; but they saw nothing, for there was nothing to be seen.

"Will Your Imperial Majesty be so gracious as to take off your clothes?" asked the swindlers. "Over there by the big mirror, we shall help you put your new ones on."

The emperor did as he was told; and the swindlers acted as if they were dressing him in the clothes they should have made. Finally they tied around his waist the long train which two of his most noble courtiers were to carry.

The emperor stood in front of the mirror admiring the clothes he couldn't see.

"Oh, how they suit you! A perfect fit!" everyone exclaimed. "What colors? What patterns! The new clothes are magnificent!"

"The crimson canopy, under which Your Imperial Majesty is to; walk, is waiting outside," said the imperial master of court ceremony.

"Well, I am dressed. Aren't my clothes becoming?" The emperor turned around once more in front of the mirror, pretending to study his finery.

The two gentlemen of the imperial bedchamber fumbled on the floor, trying to find the train which they were supposed to carry. They didn't dare admit that they didn't see anything, so they pretended to pick up the train and held their hands as if they were carrying it.

The emperor walked in the procession under his crimson canopy. And all the people of the town, who had lined the streets or were looking down from the windows, said that the emperor's clothes were beautiful. "What a magnificent robe! And the train! How well the emperor's clothes suit him!"

None of them were willing to admit that they hadn't seen a thing for if anyone did, then he was either stupid or unfit for the job he held. Never before had the emperor's clothes been such a success.

"But he doesn't have anything on!" cried a little child.

"Listen to the innocent one," said the proud father. And the people whispered among each other and repeated what the child had said.

"He doesn't have anything on. There's a little child who says that he has nothing on."

"He has nothing on!" shouted all the people at last.

The emperor shivered, for he was certain that they were right; but he thought, "I must bear it until the procession is over." And he walked even more proudly, and the two gentlemen of the imperial bedchamber went on carrying the train that wasn't there.

This is a standard history of New Hampshire, easily discoverable by anyone truly interested in the general history of education in this State and of what that history suggests as to both the intentions of the authors of the Constitution and the understanding of successive Legislatures and Supreme Courts over more than a century as to the "duty…to cherish the interest of…all seminaries and public schools." Pillsbury informs us on page 984 that "It was not until 1919 that a law was passed in New Hampshire giving any real centralized State authority over our entire public school system;" he gives, from pages 997 through 1002, a full summary of the Education Tax Law of 1789 and its progeny until the Act of March 28, 1919; and, as an added bonus, he informs us on page 1002 that the 1921 education law recodification was authored by Judge John E. Young and Judge Robert J. Peaslee of the New Hampshire Supreme Court!

NEW HAMPSHIRE

RESOURCES, ATTRACTIONS AND ITS PEOPLE

A History

By Hobart Pillsbury

The Lewis Historical Publishing Company, Inc., New York
1927

CHAPTER XLI
EDUCATION

System of Common Schools—Number of Schools in New Hampshire-Early History of Education—First Schoolmasters—First School Laws —Literacy Among the Early Settlers—The First Schoolhouse— Methods of Discipline—District Schools—How Schools were Financed —Districts Established in 1827—First State Commissioners of Common Schools, 1846—Somersworth Act, 1848—Regulation of Child Labor—Teachers' Institutes—State Department of Education—The School Law of 1919—Plymouth Normal School—Keene Normal School—St. Anselms College—Phillips Exeter Academy—New Ipswich Academy—Atkinson Academy—Gilmanton Academy—Haverhill Academy—Francestown Academy—Effingham Union Academy— First Normal School—St. Paul's School—Holderness School—Steams

School—Robinson Seminary—St. Mary's School—Mount St. Mary's Academy—New Hampton Institute—Brewster Academy—Tilton School—Proctor Academy—Colby Academy—Kimball Union Academy—Austin-Cate Academy—Sanborn Seminary—Pinkerton Academy—Manchester Institute.

System of Common Schools—(By Huntley N. Spaulding)—The founders of our Republic recognized the necessity of properly educating the youth of the land if our country was to endure throughout the forthcoming generations. George Washington, in his farewell address of 1796, spoke of the great necessity of properly educating future generations, and John Jay, the first chief justice of the United States said that he considered knowledge to be "the soul of the Republic." It was the fourth President of the United States, James Madison, who wrote "a popular government without proper information or the means of acquiring it is but a prologue to a farce or a tragedy."

While these forefathers realized, as individuals, the importance of education, it is a fact that there was no real national educational consciousness until about 1820, forty-four years after New Hampshire became a State. Thaddeus Stevens, who did more towards establishing the public schools than any other individual, spoke in defense of the Pennsylvania educational bill passed in 1834 before the Legislature of that State. At that time he said in part:

"If an elective Republic is to endure for any length of time, every elector must have sufficient information not only to accumulate wealth and take care of his pecuniary concerns, but to direct wisely the Legislature, the ambassadors, and the executive of the Nation—for some part of all these things, some agency in approving or disapproving of them, calls to every freeman. If, then, the permanency of our Government depends upon such knowledge, it is the duty of Government to see that the means of information be diffused to every citizen. This is a sufficient answer to those who deem education a private and not a public duty."

Abraham Lincoln, when a candidate for the Illinois Legislature in 1832, stated that he believed education to be the most important subject which we as a people could be engaged in, and said that every man should receive a proper education in order to appreciate the value of our free institutions.

As changes have occurred in our country since the time of Lincoln, the public school system has been changed to meet the need. It has now become a generally accepted idea in the United States that the proper unit for education should be the State. New Hampshire adopted this principle, in a small way, as far back as 1847, when John W. Rust was chosen commissioner of education. He served for three years, after which ten commissioners of education were appointed, one for each county. In 1860 New Hampshire changed back to the system of one commissioner of education for the entire State.

It was not until 1919 that a law was passed in New Hampshire giving any real centralized State authority over our entire public school system. Since this time we have made great strides in public education work in this State. We have practically succeeded in equalizing the educational opportunities of children in city and rural districts.

One of the chief factors in bringing about this equalization of educational opportunities has been the State superintendents. There are in New Hampshire sixty-four supervisory unions, so divided that each rural section has practically the same attention as a city section. The public school work in each district is now supervised by a high grade superintendent, who must have had a college education and at least five years of successful teaching experience.

Our normal schools, under the direct charge of the State Board of Education, are at the present time graduating enough students to fill the vacancies in public school teaching staffs throughout the State.

In 1919 there were 924 schools that had school years of less than 36 weeks, and some schools had as low as 16 to 20 weeks in their respective school years. In 1926 there were only 20 schools with less than 36 weeks in their school years. In 1919 we had only 240 students attending our normal schools, and 860 pupils were registered in 1926 at these important institutions where we train our teachers. In 1919 one-third of our teachers were normal school graduates and, as we have already noted, at present we are graduating enough teachers from normal schools to fill all vacancies in the State. One of the serious things connected with a good school system is the changes made during the school year by resignations of teachers. In 1918 we had 540 changes in teaching staffs throughout the State during the school year, but in 1926 we had only 109 such changes. In 1919 we had approximately 500 school buildings in the State of New Hampshire which were considered unsuitable for school purposes. At the present time we have 75 unfit buildings.

In 1919 people were leaving our State in order that they might give their children a better education. Today we are inviting them to come to New Hampshire to enjoy the school privileges which we can now offer them. Our system is built on a solid foundation and it should continue to be of real service in producing that splendid type of men and women citizens for which New Hampshire has been noted since it was founded 150 years ago.

Daniel Webster, one of New Hampshire's most illustrious sons, must have had education in mind when he said:

If we work upon marble, it will perish; if we work upon brass, time will efface it; if we rear temples, they will crumble into dust; but if we work upon immortal minds, if we imbue them with principles, with the just fear of God and love of our fellowmen, we engrave on those tablets something which will brighten to all eternity.

Early History of Education—From the first settlement by David Thompson at Pannaway, in 1623, until the union of New Hampshire with Massachusetts eighteen years later, there is no record that any form of education was provided for the youth of the colony; but after the union, the small settlements at Hampton, Portsmouth, Dover and Exeter came under the excellent school laws of Massachusetts.

The most important of these laws was enacted in 1647, and the characteristic way in which the Puritan forefathers were wont to look for and strive to intercept the machinations of Satan, even in educational matters, is most clearly brought out in the preamble of this law:

> "It being one chiefe project of that old deluder, Sathan, to keep men from the knowledge of the scriptures, as in former times, keeping them in an unknowne tongue, so in these latter times, by perswading them from the use of tongues, so that at least, the true sence and meaning of the originall might be clouded with false glosses of saint seeming deceivers; and that learning may not be buried in the grave of our forefathers in church and commonwealth, the Lord assisting our endeavors:
>
> "It is therefore ordered by this Courte and authority thereof, that every towneshipp within this jurisdiction, after that the Lord hath increased them to the number of fifty howsholders, shall then forthwith appointe one within theire towne, to teach all such children as shall resort to him, to write and read; whose wages shall be paid either by the parents or masters of such children, or by the inhabitants in generall, by way of supplye, as the major parte of those who order the prudentials of the towne shall appointe: provided, that those who send theire children, bee not oppressed by paying much more than they can have them taught for in other townes".

The First Schoolmasters—

> "And it is further ordered, That where any towne shall increase to the number of one hundred families or howsholders, they shall sett up a grammar schoole, the masters thereof, being able to instruct youths so far as they may bee fitted for the university: and if the towne neglect the performance hereof, above one yeare, then every such towne shall pay five pounds per annum, to the next such schoole, till they shall performe this order."

At this time each of the settlements at Dover and at Exeter, certainly, had a man with experience in teaching, since the records of Massachusetts Colony show that Philemon Purmont and Daniel Maud had taught schools in Boston for several years. Subsequently both of these men moved to New Hampshire, Purmont going into voluntary exile with Wheelwright in 1638, while Maud was called to become the minister at Dover in 1642.

A little later the following items are found in the records at Dover:

> “At a Publicke towne meiting hilled the last of August (1656) Charles Buckher chosen by voet A Schoellmaster for this towne, (and in 1658) It is agreed by ye select men together with ye Towne that twenty pounds per annum shall be yearly raysed for the Mayntenance of a schoolmaster in the Towne of Dover:—That is to say for the teach-inge of all the children within the Towneship of Dover, the said Scholemaster haveing the preveleges of all strangers out of the Towneship. The sd master also teach to read, write, cast a Compt, and Latine, as the parents shall require.”

An early and an active interest was taken also in the higher education. Harvard College, which was the only institution where young men could be properly trained for the ministry, was aided by voluntary contributions.

The amount recommended to be raised for this purpose was "One peck of corn or twelve pence money or other commodity, of every family, that so the college may have some considerable yearly healp towards their occasions."

Moreover in 1669 the towns of Portsmouth, Dover, and Exeter granted an annual subscription of £102 for seven years toward the support of the college. In presenting this amount the colonists sent the following address to the General Court of Massachusetts:

Though we have articled with yourselves for exemption from public charges, yet we have never articled with God and our own consciences for exemption from gratitude; which to demonstrate, while we were studying, the loud groans of the sinking college in its present low estate came to our ears; the relieving of which we account a good work for the house of our God, and needful for the perpetuating of knowledge both civil and religious, among us, and our posterity after us.

All of the towns in New Hampshire did not take kindly to the compulsory law in regard to the keeping of the common school. Even in Portsmouth as late as 1697 there was a dissenting vote against raising "thirtey pounds mony pr anum for sd scollmasters sallery," signed by *21* citizens of Portsmouth; and the following year the town disputed a bill of 50 shillings incurred by the teacher for a school-room. Doubtless their reasons were the same as those expressed by a minority report in the town of Croydon several years later, in which it was contended "that to be obliged to pay money for the tuition of other peoples' children, or even our own, is unjust, tyrannical and oppressive." Some individuals in the same town even went so far as to refuse to pay their school taxes except by process of law. It is to the credit of the majority of the New Hampshire people, however, that in spite of this active opposition, some of which was, and is still, to be found in all communities, public schools were insisted upon and maintained.

During the troublesome period between 1679 and 1692 in which New Hampshire had been separated from Massachusetts, again united by petition of the people, and again separated by action of the crown, little was done for education. Indeed the fact that,

out of 374 signers of a petition presented to the court of Massachusetts in 1690 for protection against the Indians, nearly 25 per cent were obliged to make their marks, would indicate a lack rather than an abundance of educational privileges.

The germs of education, however, were strongly implanted in the majority of our New Hampshire citizens. In fact the first year after their separation from the Bay Colony (1693) the following law was passed:

> “It is enacted and ordained, that for the building and repairing of meeting houses, minister's houses, schoolhouses, and allowing a salary to a school master in each town within this Province, the selectmen, in the respective towns, shall raise money by an equal rate and assessment upon the inhabitants—and every town within this Province (Dover only excepted during the war) shall from and after the publication hereof, provide a schoolmaster for the supply of the town, on penalty of ten pounds; and for neglect thereof, to be paid, one half to their majesties, and the other half to the poor of the town.”

The next important law relating to education was passed in 1719. It compelled every town having more than 50 householders to hire a schoolmaster to teach the youth to read and write, and where the town numbered 100 householders a grammar school was also to be kept by "some discreet person of good conversation, well instructed in the tongues." The selectmen were to hire the schoolmaster and were to levy a tax upon the inhabitants in order to pay his salary. The penalty for the neglect of this law was £20 which was to go "towards the support of schools within the province, where there may be most need."

In 1721 because of the general neglect to provide grammar schools it was found necessary to hold the selectmen personally responsible. The law provided that "if any town or parish is destitute of a grammar school for the space of one month the selectmen shall forfeit and pay out of their own estates the sum of twenty pounds, to be applied towards the defraying the charges of the province."

In some of the frontier towns the law relating to grammar schools worked rather a hardship, especially upon the selectmen, and several instances are on record where petitions were granted excusing these newly settled parishes from the grammar school condition; but in no instance was any town or parish excused from keeping a school for reading and writing, "to which all towns of fifty families were obliged."

The vast majority of the towns, however, did not come under either one of the above laws and in most of these small scattered hamlets all the "schooling" which the children received was obtained from their fathers and mothers at home.

In the first settlements near Massachusetts most of the early teachers were men and a great many were college graduates. It has been said that in the town of Hampton, one of the earliest to be settled, all the masters previous to the Revolutionary War were

college bred. Dow, however, disputes this fact, but admits that the great majority had had liberal training.

The dame schools were usually taught in the summer and were for the smaller children and the girls. The boys at this time were getting in the hay and assisting their fathers. The women who had charge of the summer schools were expected to teach the girls sewing and knitting as well as spelling and reading. Arithmetic was considered entirely superfluous for girls and in fact it was very little taught even in the winter schools which the boys attended. Frequently the maiden ladies who taught these "marm" schools earned something more than their school wages by spinning between school terms for the family with whom they boarded. They sometimes earned as much as fifty cents per week by this means.

Literacy Among the Scotch-Irish—About the year 1720 the influence of the Scotch-Irish settlers, who came to this colony in large numbers and settled in Londonderry and the surrounding towns, began to be felt. They were all people of thrift and intelligence. One of the direct descendants of this hardy race writes as follows:

> “It has been said that the Scotch in Ireland had better schools than the common people in England had at the same time. Of three hundred and thirteen who signed the celebrated "Memorial to Governor Shute" (March 26, 1718) three hundred and six signed their names in a legible and generally handsome hand.”

Twelve of the signers were graduates of the university. Most of these men came to America, and they were fair samples of the intelligent, capable, and well-informed Scotch people, that sought these shores. They and their descendants were set on education, religion, and liberty. It is said that every Scotch settler coming to this town, whether born beyond the water or in some older New England settlement, had a fair common school education for those times.

The other settlers were quick to appreciate the intelligence and broader education of these Scotch-Irish emigrants and soon there was a goodly sprinkling of "Macs" and other broad Scotch names in the list of schoolmasters throughout the colony. This led not only to the spreading of the Scottish education but also to the proverbial Scottish wit. A story is told of a certain "Master" Russell who one winter had charge of a school in Chester. One day Master Russell called upon a boy in one of his classes to read a list of some of the proper names in the Old Testament. The lad, not being well skilled in the proper pronunciation of the old worthies, was making somewhat hard work of his task, in fact it is to be feared that if the old worthies had been present in person they themselves would scarcely have recognized their names, when the master said: "Stop, stop, Elijah! You bring tears to my eyes, for you are calling the names of my old friends in Ireland."

Something of the repute in which the Scotch-Irish schoolteachers were held may be found in the following: At one time a Dr. Hoit was master of a school in Weare. During the morning session the school was visited by the chairman of the selectmen together with a Scotch-Irish schoolmaster named Donovan. The town's chief

magistrate proceeded to ask Dr. Hoit for his credentials, saying that he was anxious to have a teacher who understood English grammar. When the dignitaries had departed one of the older boys asked the master what the word credentials meant. The master, turning upon him with a frown, said: "I don't know and I don't care, but I suppose it is some Latin word Donovan put into his head."

Fortunately we have quite an accurate picture preserved to us of a typical Scotch-Irish schoolmaster in the person of "Master Kirby," who had taught school in Portsmouth, and who afterwards settled at Barnstead :

> “He was middle-aged, thickset, rather short; his hat, three-cornered, buttoned. His shoes were of heavy leather, high cut, and a large sized button of steel on the instep. His coat was rather of the long-jacket style with massive pockets outside, and a standing collar. His breeches buckled snug at the knees, were of corduroy, his stockings long and inclined to the snuff color. His vest was of vast proportions, buttoned snug at the neck, and made of black and white wool. Snugly ensconced was his "bull's eye" under its righthand fold. His three-cornered hat much of the time covered the glistening baldness of his pate while his frosted locks gathered and tied in the rear hung in a graceful queue, ornamenting the collar of his coat upon his spacious round shoulders. His pleasant and graceful bearing bespoke the truthfulness of his early training, and his dialect indicated a nationality of which he was always proud.”

The First Schoolhouses—The first structures used for schools were made of logs and were extremely crude affairs. The only apparatus necessary were a fireplace for warmth, hewn benches for the children and a rough table for the master. A little later, when sawmills became plentiful, framed buildings with their rude covering of boards and shingles began to replace the log schoolhouse.

A most interesting picture of this type of schoolhouse is given in the "History of Chester":

> “The house was fifteen by sixteen feet, six feet stud. The outside boarding was "feather-edged"; the walls on the inside were ceiled; a loose floor overhead; the door opened into the room and was furnished with a wooden latch and string. There were at first three windows of nine panes each, but afterwards another was added. At first there were on a part of three sides, writing benches, composed of planks some fifteen or eighteen inches wide, one edge supported against the walls of the house, the other by legs inserted in auger holes. For seats, slabs with legs were used. The writers, of course, sat with their backs to the teacher.
>
> “Inside of the writers' seats were smaller ones for the younger urchins. The "Master" had a chair and a pine table in the center, and "Master Russell" swayed a scepter in the form of a hickory switch long enough to reach every scholar in the house. There was a brick chimney, with a wooden mantel-piece in one corner of the house, which so far counteracted the laws of nature that the smoke came down into the house, instead of rising. Green wood was used,

> which was out in the snow until wanted, so that it took a considerable part of the forenoon before the house was warm, the scholars rubbing their eyes meanwhile on account of the smoke. By this time the mantel-piece was on fire, and some one must get snow and quench it.”

Another picture is painted of a schoolhouse in Littleton of a later period. "The desks, if we examine them, will have, hollowed out upon their upper side, coarse images of Indian fights, canal boats, tomahawks, fox and geese and checker boards, miniature river systems, and many a cut and hack, made in the mere exuberance of youthful spirits, without any apparent design. A look at the walls reveals to us the stucco work of spit-balls and paper quids, fired at flies or imaginary targets, by mischievous boys, and places, too, bare of plaster and whitewash, where some ball or ink bottle has struck in the absence of the teacher."

In some towns where the families were widely scattered and large, (the families in those days were almost always large) the schoolmaster and the school would move from one section to another. An interesting account of a school of this kind is found in Lancaster. There were at least twenty children in this district of school age, and they lived nearly two miles apart. The school would commence in a room at Coffin Moore's, where there were twelve children, but some of them were away. Reading, writing and arithmetic were taught. The school would continue at Moore's two or three weeks, or what was his proportion of the time, determined by the number of pupils, when it would be announced that the school would move. The time having arrived for moving, the larger boys would take the benches (which were made of slabs, with sticks set in auger-holes for legs) upon their sleds, and go to J. W. Brackett's, where there were ten children. A room would be vacated and the benches moved in. A table on which to write would be borrowed, or rudely constructed of pine boards, and the school opened again. The teacher boarded with the family until their proportion of the time was filled out. Then the school would make another move to J. B. Week's and from there to Mr. Bucknam's, from whence it next would go to Abiel Lovejoy's and round out its terms." These moving schools were common to all towns before schoolhouses were erected.

Besides teaching the pupils to improve their minds, the teachers were supposed, by precept and example, to teach "manners" and good behavior. It is said that Master Abraham Perkins as he approached the school-house dressed in his broad-tailed coat, velvet breeches with silver buckles at the knee, and with a large ivory-headed cane in his hand, always saluted the children by gracefully removing his three-cornered cocked hat on entering the schoolroom. It was proper also for the pupils as he approached to form in two lines from the schoolroom door, the girls on one side and the boys on the other, arranged according to their ages. First came the salute by Master Perkins, the three-cornered hat being held in his hand as he marched in review between the lines; the boys' caps were doffed in a twinkling and the girls made deep courtesies, as he passed. The children were counter-marched into the schoolhouse behind him. About nine o'clock in the morning the school began. First the small children read from the New England Primer and recited the catechism which it contained. Then the larger pupils were given the Psalter and the Bible from

which some read glibly and fluently, while others drawled and stumbled through the passages in a manner wonderful to hear.

In some instances the more advanced pupils were allowed to bring from home any reader or book which they might chance to possess. These older pupils sat upon the benches in the back part of the room and read around one after another; the teacher, meantime, pretended to listen, but, having no book, the exercise was tiresome in the extreme and the criticisms usually lacking. An account of this kind of exercise is given by Miss Rankin of Littleton: "The monotony of such a dull exercise often threw our master into a profound slumber, and I remember, one time, I, and another mischievous girl, tried to see how hard we could punch our sleeping pedagogue without awaking him. He was so moderate in returning to consciousness that we had ample time to return to our books with the most intense application, leaving him in entire ignorance as to where the ones were who would presume to disturb his pleasant dreams."

The reading was followed by arithmetic taught by the teacher orally or by rote, as it was called. Usually the rules were written out on pieces of birch bark or on scraps of paper if any pupil was so fortunate as to possess them, and then memorized. After the arithmetic came recess, and it is needless to say that the decorum of the boys on their entrance to school was not maintained on their exit at recess time.

The sports of those early times, indulged in at recess and at noon intermission, were not so very different from those of the children of today. As one of the early chroniclers has put it: "They had 'pizen gool,' or goal, tag, snap the whip, high-spy, 'eny, meny, miny, mo'; the larger boys 'rasseled,' at arms length, side holts and backs, and lifted at stiff heels. At a later day when school kept in autumn or in winter they snowballed, slid down hill or skated on the glare ice."

After recess came the writing lesson, for which it was the duty of the teacher not only to "set the copy" in the writing books, but also to make and mend the pens for the pupils' use. These pens were made of quills plucked from the wings of geese, and considerable skill and experience were needful to make a serviceable article. To make or mend a score or so of pens each day was something of a task. Occasionally pens were made from quills which had been boiled in oil. They were much superior to the common pens and were called "Dutch quills." The latter were not commonly used since they must be brought from Boston or Newburyport.

After the writing lesson came the spelling which was entirely oral and was usually conducted by choosing sides and spelling down. The best speller in the school was a noted personage, and in choosing sides he was always the first to be called. Sometimes school districts would unite for a spelling match and great glory awaited the boy or girl who came off victor and brought honor to his or her district.

The spelling of words was always done by syllable; each syllable was spelled, pronounced, then the next syllable was spelled, pronounced, then both were

pronounced together, the same method being followed throughout the word. When a word like Constantinople was spelled in this way it took considerable time and not a little breath.

Frequent mention is found of singing schools conducted by some master of the art, and usually held in the evening in a schoolhouse centrally located. These singing schools were largely attended by the young men and women of the entire township, and to escort the young maids to and from the singing school was not the least of its attractions. One system of singing in vogue at the time was invented by Mr. Tufts, minister of the church in Newbury. His book was published in 1712 and contained twenty-eight tunes with rules for singing the same. His "system" was to print on the staff the first letters of the Italian syllables instead of notes, thus d would stand for do, r for re, m for mi, etc. It is said that this method became very popular. At any rate, whatever scheme was used was much better than singing by rote, as the people usually did, whereby "the meledies underwent many transformations." Rev. Mr. Walters, evidently a man of some humor and with not a little knowledge of music, hands down to us the following account of chorus singing in the early times: "Singing sounds like five hundred tunes roared out at the same time. The singers often are two words apart, producing noises so hideous and disorderly as is bad beyond expression. The notes are prolonged so that I myself have twice in one note paused to take breath."

The rules of behavior were very accurately laid down and woe betide the youth who thoughtlessly or recklessly disobeyed them. The ways of punishment were exceedingly varied and ingenious; even the ordinary "black strap" had its variations as will be shown later. Indeed much of the school time was consumed, not to say wasted, in violent exercise, participated in both by the teacher and pupil. Among the milder forms of punishment was "sitting on nothing" or "on the top end of an old-fashioned elm bark seat chair, turned down." Again the pupil would be compelled to hold out horizontally a heavy book. Stooping down to hold a nail or peg in the*floor, "with an occasional smart rap on the rear," to keep the culprit from bending his knees, standing in the corner, and sitting with the girls were also very mild forms of punishment.

"Horseing" the Bad Boys—Master Hogg, one of the earliest teachers in Sutton, employed a unique form of punishment which he called "horseing," and an appropriate term it was. The *modus operandi* was as follows: As soon as a boy was caught misbehaving he was promptly called onto the floor. It was usually not long before two other youngsters were ready to keep number one company. The requisite number now having been obtained, the "circus" began. The first offender was made to get down on his hands and knees, number two must mount on his back, while a third culprit was compelled to whip them soundly around the room. This punishment was made perfectly fair, since the boys were obliged to "swap" places until each had taken his turn at "whipping once and being whipped twice."

It was not all fun for the teachers in those early schools. Often the larger boys would combine forces, boldly advance upon the master, and if successful in their onslaught,

they would carry him forth from the schoolhouse and boldly pitch him into a snowdrift or duck him in some nearby creek. It required a man with some nerve to take a school where his predecessors had been severally and in turn ejected in this manner. John Gillett, on coming to a school of this kind in one of the New Hampshire towns started the morning services after the pupils had assembled by striding back and forth through the schoolroom several times; then, turning suddenly, he said with a voice which made the windows rattle, "Boys, if you don't behave I'll lick you, then if you don't behave I will follow you home and lick your parents."

It is told also of Master Richard Adams, who taught the Sugar Hill district in Weare, that he had in his school as many as twenty strapping boys, each one of whom was over six feet tall. One day, at a preconcerted signal, they all arose and marched in single file around the room. As the foremost boy passed the fireplace, he seized a burning branch from the hearth and shouted to his followers, "Shoulder firelock!" But at that point Master Adams took a hand in the affair and ordered "Ground firelock! consarn ye." At the same instant he gave the leader a blow which stretched him at full length on the floor. It is said that no better ordered school was ever taught in that district than the one taught by Master Adams.

Some of the punishments seemed needlessly cruel and unnecessary, but it must be remembered that corporal punishment was part of the spirit of the times. The parents knew that they had received thrashings when they went to school, and it seemed to them in some indefinable way a necessary though painful part of the child's education. Doubtless the wisdom of Solomon was often quoted in relation to the need of not sparing the rod. A certain Master Thurston, who taught for many years in Boscawen, was a noted disciplinarian, and when in those days a master was noted for "discipline" you may be sure that he deserved it. It is related that Master Thurston had as one of his instruments a black leather strap, made in two pieces with sheet lead stitched between them. On one end of this strap he had punched four holes and on the other five. His mode of procedure was this: Holding the strap in full view of the trembling youngster, he would ask, "Which will you have, four holes or five?" If the boy said four the master would reply, "For fear of making a mistake I will give you both." It was a current remark in West Salisbury, where Thurston taught several terms, "that the surrounding farms would not have been cleared of birches if Master Thurston had not been employed so long as a teacher."

A One-Armed Tanner—McDuffee, in his "History of Rochester" speaks of a. one-armed schoolmaster, a veteran of the Revolution, who was a noted wielder of the birch and rod; the strength of his lost arm seeming to supplement the muscle of the one remaining. His name, Tanner, seemed peculiarly appropriate; the boys, indeed, deeming it the most fitting thing about him. His successor, Master Orne, was said to have been remarkable, in fact unique, in the way in which he dealt out punishment. "He flogged singly, and by classes, and by the whole school; just as officers review their soldiers, by squads, by companies, by battalions, and by regiments." It was of no use for the boys to rebel, they obtained little sympathy at home. The parents

considered that it was what they had received when they went to school, "and what was good enough for them was good enough for the children." It is strange how history repeats itself, even in educational matters.

There is preserved among the writings of Master Jacob N. Knapp, who taught school more than 100 years ago, an accurate picture of the school life of that time. The account runs as follows:

> “In the winter of my 17th year, I received an invitation to teach school for three months in Loudon, near Concord. A schoolmaster's wages were at that time $6 a month and board. My school consisted of about 40 pupils. It was composed of both sexes and all ages. Most of the children under 10 years of age wore leather aprons, reaching from their chins to their ankles. These aprons, after being worn a little time, became striped and shining with bean porridge, which in winter made the principal food of the children. Many of the little girls took snuff; it was the fashion.
>
> “In my school I had often used signals instead of words. The exercises in reading and spelling for the day were about to commence. I, as usual, gave with the ferule one tap upon the table. The first class came out from their desks on to the open floor, and stood in line. On receiving a slight sign, the head pupil read; then the next, and so on to the last. At receiving a bow from their teacher, each one bowed or courtesied and returned noiselessly to his or her desk. Two raps upon the table called up the second class, who were exercised and dismissed in the same manner. Three raps called up the third class. This division closed the exercises. The school was dismissed.
>
> “The people then and there considered it a privilege to board the schoolmaster. To accommodate them, I boarded in 13 different families, and thus became intimately acquainted with every individual in the district. The price of board was 4 shillings and 6 pence a week. Lived well; fat beef and pork, lambs and poultry, in their seasons; butter, honey and drop cakes abounded; coffee, tea and cream were liberally supplied.”

As seen from Master Knapp's account a schoolmaster's wages were about six dollars a month. Sometimes they ran as low as four dollars a month, and in some instances the master was not paid in money at all, but drew his salary in so many bushels of grain, wheat or rye, as the case might be. The town of Bath voted one year to raise sixty bushels of wheat for the support of the school. In fact this item of raising grain to be used for school purposes is frequently met with in town records. The use of grain for money at a time when specie was very scarce and when the country was overrun with paper money, whose value was almost nothing, is not surprising. Good grain could always be exchanged for the necessities of life and its value as a medium of exchange was more or less fixed.

The two following receipts not only show instances of this kind of payment, but also indicate the relative value placed upon the master's teaching as compared with that of the marm's teaching.

March 21, 1792.

> Then my son Robert Hogg, received seventeen bushels of Rie from Simon Kezar of Sutton which was due to me for teaching schooling two months in Sutton.
>
> Per me,
> ROBERT HOGG.

Methuen, Feb. 1, 1791.

> Received of Jacob Mastin and Hezekiah Parker six bushels of Rye, it being in full
> for my keeping school for them and others last fall six weeks.
>
> LYDIA PARKER.

It must not be thought that this was all the money the teacher lived upon during the year. The schools were generally so arranged in the different neighborhoods that they would begin one after another. The master could thus travel from one district to the next and be pretty constantly supplied with a school.

In addition to the funds raised directly for the support of the schools there was usually a little revenue from the "town lot." In all grants of township made by the Masonian Proprietors, by Massachusetts and by John Wentworth II, one lot or share, generally about 100 acres of the land, was set aside for the use of schools. This was usually done also by other governors. Frequent mention is made of this school lot or lots in different town records; in some instances it was voted to lease the land and to use the money for the support of schools. Other towns appropriated the land for public purposes and occasionally the lot was sold. The town of Rochester, March 12, 1749, "Voted that the selectmen of this town let out the school lot to those that will give the most for it for the present year. And the rent to be combarted to the towns youce."

Besides the methods above indicated for raising school money, in the very earliest schools it was the custom "that every man should bring two feet of wood for each scholar that he sent to school," and "that every man should chop his own wood that he brings to the schoolhouse." Later, however, this custom changed somewhat, and the task of furnishing the school firewood was generally set up at auction and struck off to the lowest bidder. It was sometimes bid in by a man who had a quantity of cheap wood which he wished to get rid of and who accordingly determined to dispose of it to the schools for the boys to work up. The amount was not stipulated, the agreement usually being that as much wood would be hauled as was necessary. A certain Abner Hoit was furnishing brown ash, and poor at that, to a school in the central part

of the State, much to the disgust of the boys. Finally, when there were but three more days to the close of school, Abner drew a cord of ash and said that it must last the term out. The large boys determined not to be dictated to as to the quantity of wood even if they were obliged to accept the quality, and cut and burned the entire cord in one day. The pitch fried out of the pine knots in the ceiling, but at sundown not a stick of wood remained, and Hoit was obliged to haul another load.

In the same neighborhood lived a certain Moses Mudgett, an easygoing individual, who found it less troublesome to borrow wood from the schoolhouse pile, already chopped by the boys, than to chop his own wood. The larger boys soon suspected who was taking such an interest in their wood pile, and they determined to fix the old gentleman. Accordingly they bored holes in a few of the larger sticks, filled them with powder and drove in a tightly fitting wooden plug. This scheme worked to perfection; Moses got some of the loaded sticks that very night and put them on his fire under a boiling pot. When the explosion came it is said that "the pot shot up through the great chimney flue into the clear sky and landed in the field over behind the barn." The lesson was thoroughly taught and the schoolhouse wood was thereafter untouched.

The burning of such quantities of wood during the term naturally caused an accumulation of ashes. These ashes were not then used for fertilizer, but were considered of value by the housewives for making soft soap and also in the manufacture of potash. It was a long established custom in many of the New Hampshire schools for the big boys who had worked up the wood to have the ashes. These, sorrowful to state, were sold to buy rum with which to celebrate the last day of school. When we consider that it was customary for boys to attend school until they were 22 or 23 years old and sometimes older, this custom does not seem so surprising, particularly as the use of New England rum was so common. The way in which the use of "spirits" was looked upon is seen in the following anecdote.

It seems that one day while "Good Mother Winslow" was visiting a country school in Northfield, through some accident, the fore stick, back log and all came rolling down out of the fireplace onto the broad hearth. The room instantly filled with smoke, and before matters could be "set to rights" again, there being no shovel and tongs, pupils and all were nearly suffocated. Mother Winslow, so the story goes, with great indignation exclaimed, "It were better to sett the ashes for shovel and tongs than to buy rum for the scholars." She was silenced at once by a voter present, who replied, "Let 'um have their rum—let 'um have it. It'll do them as much good as salt does sheep once in a while." And so the ashes did not go for shovel and tongs.

The district school as it existed in our forefather's time differed but little from many of the country schools in existence today. The "master" however, has been displaced and the master's daughter reigns in his stead.

There were many undeniable advantages in the old-fashioned district school, particularly for the bright boys and girls. They listened daily to the instruction of all

the classes from the primer to the Latin grammar, and they unconsciously absorbed in a few terms a working knowledge of subjects which would have taken a much longer period to obtain under the graded system so universal at present. On the other hand, the pupils of average or mediocre ability labored under a distinct disadvantage in the old-time schools as compared with those of today. This was a direct result of the multiplicity of classes, the brief recitation period, the impossibility of individual help in the ungraded school and the absence of these disadvantages in the graded schools.

Common Schools—In 1789 the general court of New Hampshire repealed all previous laws in regard to the common schools and started anew on the basis of taxing all the inhabitants of the several towns except non-residents, on the polls and real estate at the rate of five pounds for every 20 shillings that each town paid to the support of the State. The first year it was in operation this tax amounted throughout the entire State to nearly £5,000, and the law read "that the money thus raised to be expended for the sole purpose of keeping an English Grammar School, or schools for teaching reading, writing, and arithmetic; but in each shire or half shire town, the school kept shall be a grammar school for the purpose of teaching the Latin, and Greek languages, as well as the aforesaid branches." The above law also required that each candidate for a school should bring letters regarding his qualifications from some well-known teacher, minister, principal of academy or president of a college.

The selectmen were held responsible for collecting the full amount thus assessed for school purposes. The idea of compelling each town to provide at least a certain definite amount for school purposes was found to be a great improvement over the old methods, and in 1791 the amount was increased from five pounds on every twenty shillings of the State assessment to seven pounds ten shillings. This law stood in force until 1805, when a law of far-reaching importance was passed enabling towns to divide into school districts, the districts to raise money by taxation for the purpose of building and repairing schoolhouses. This law produced the desired effect, and a great many schoolhouses were erected under its provisions. It is interesting to note that in some towns a vote was passed to divide the township into "squadrons" instead of districts. Just where this term squadron originated is not clear, unless it was taken from the military idea.

The location of the district school was often the source of endless quarrels, although generally a compromise was agreed upon so that all pupils would have to travel about the same distance, which accounts for finding schoolhouses perched in the most out of the way and unlooked for places, with sometimes not a single farmhouse in sight.

In 1807 a fourth law was passed raising the school rate to $70 for every dollar of the State tax, the money to be expended for teaching reading, writing and arithmetic, and at the same time annulling the law that required a school to be held in shire and half shire towns in which Latin and Greek were to be taught. Whether this was because the general court deemed that the eleven academies then in existence

were amply sufficient to take care of such students as wish to taste the higher education, or whether it was believed that greater general good would come to the State by the expenditure of the entire amount for the betterment of the common schools, is not known. It is certainly true, however, that from this time academies took the place of the old grammar schools and flourished in great numbers.

The effect these academies have wrought upon the towns in which they were located is hard to measure. They have wrought an air of culture and an appreciation of educational values to homes which, without the academic influence, would have been without mental or moral uplift. The day of the academy may be past, but its influence is not past, and it will last so long as the town forms the unit of New England life.

The school law of 1807, which, indirectly, was so effective in the establishment of academies, was followed a year later by a law containing a clause in regard to the supervision of schools, which is the first official mention we have in the New Hampshire records that there was deemed any need of such supervision. The law read that the towns should appoint a committee of three or more persons who should inspect the schools annually in "a manner which they might judge most conducive to the progress of literature, morality and religion." This law also increased the number of branches to be taught, and besides reading, writing, and arithmetic, English grammar and geography were added. School mistresses, however, were allowed to do away with arithmetic and geography, and "in place thereof to substitute such other branches as are deemed necessary for female education."

In 1812 the State established a literary fund. This was done for the sole purpose of founding a State college. The funds were to be raised by taxing each year the banking corporations throughout the State one-half of one per cent on their actual capital stock. In 1828 the idea of founding a college was abandoned, and the funds then available, amounting to $64,000, were distributed to the different towns according to their apportionment of the public taxes. The money was to go toward the support of the public schools, and it was in addition to the amount required by law. In 1848 the basis of distribution was changed, and made upon the relative number of children attending two weeks or more in the several towns during the year.

School Districts Established—In 1827 the Legislature passed a law which defined how the town should be divided into districts, and laid down provisions regarding the authority of school districts and their officers. It also proportioned the money to each school district. The qualifications for teachers were raised and the law required all pupils to be provided with books, either by parents or guardians, or at the public expense in case of the needy. A superintending school committee were also to be appointed annually, who were to visit all the schools in their respective towns at least twice a year, determine upon the proper text books and aid the teacher to maintain a full and regular attendance.

In addition to the above mentioned duties this superintending committee were to make an annual report stating the time each school had to run, the names of the teachers, the whole number of pupils between four and fourteen that had not attended school and the number between fourteen and twenty-one who could not read and write. The only difficulty with this law was the fact that there was no provision for collecting the statistics from the several towns into one report.

In 1829 a law was passed that each school district, except in the town of Portsmouth, for which a special law had been passed, should appoint a committee not greater than three which should be called the prudential committee. This committee was supposed to have charge of the school moneys. They called the district school meetings, selected teachers, furnished fuel for the schoolhouses, attended to the minor repairs, and made such report to the superintending committee as would be of assistance to them in their work. By the law of 1833 the superintending committees were practically done away with and all of their powers were assumed by the prudential committees.

The rate of assessment had steadily increased by various acts of the Legislature. In 1840 it was $100 for every dollar of the public tax. In 1852 it was $135, in 1853 it was $I50, in 1854 it was $175, in 1855 $200, and in 1870 $250. A town was not restricted to the sum thus raised, but could add to the amount as much as it pleased. About 1840 the advantages of graded schools began to appear, and the men interested in educational matters throughout the State strove to get some law upon the statute books which would enable the New Hampshire schools to take advantage of the graded system. Accordingly in 1840 an act was passed allowing a school to be graded when the pupils should number fifty or more, and the most progressive towns were quick to avail themselves of this privilege. In 1845 the authority was given to "any two or more contiguous school districts in any town or towns in this State to associate together and form a union for the purpose of establishing and maintaining a high school or schools for the instruction of the older and more advanced scholars belonging to the associated districts."

In 1846 a State commissioner of common schools was appointed whose duty compelled him "to spend at least twenty weeks in the different counties of the State for the purpose of promoting, by inquiries, addresses and other means, the cause of education." He was also required to make an annual report from the statistics which the committees of the several towns were obliged to furnish. Two years later the "Somersworth Act" was passed, which allowed school districts, independent of the town, to raise money for the maintenance of high schools. The effect of this law was far reaching, and many districts took advantage of its provisions and founded high schools.

The exact status of the town superintending committee is a difficult one to define. From 1827 until 1848 their duties ranged from having entire control of the schools to being merely an advisory body. In fact, as has been noted, between 1833 and 1846 the superintending committee could be dispensed with entirely if the town so desired.

In 1859 a bill was passed somewhat enlarging the duties of the superintending committee, although in all important points it was identical with the law of 1827. They were to select and dismiss teachers, prescribe rules of conduct for the pupils, decide what text books should be used and also the courses of study to be followed. Each teacher was to be supplied with a register, and the committee was obliged, at the end of the year, to summarize and return to the State officer certain statistics from the same.

Child Labor Regulated—The first law restricting the employment of children in manufacturing establishments was passed in 1848. Since this time the law has been greatly strengthened by enactment at various sessions of the Legislature.

In 1850 the office of the State commissioner of common schools was abolished, and in its place a board of county school commissioners was appointed, the board to elect its own secretary who was to prepare statistics and reports. It was the duty of this county board to recommend books, methods of instruction, rules of discipline, etc. Each commissioner was obliged to spend at least one day in each town of his district at some time during the year. He was also obliged to take charge of county institutions, which were becoming popular, and for their time served an excellent purpose. This board of county school commissioners continued until 1867, when it was discontinued, and again one man was placed at the head of the educational affairs of the State.

In 1868 a bill was passed requiring each county to hold a teachers' institute annually at the expense of the State. This law, followed closely by one passed in 1870, establishing a State Normal School, marks a period of decided awakening to the needs of educational improvement, and aside from a slight setback in 1874, when the State failed to make any appropriations for institutes and did away for a short time with a State superintendent, the progress in educational matters has been steady if not rapid.

The district system, which at the time of its inception, had proved useful to the educational interest of the State, was abolished and the town was again made the unit; and as was the case previous to 1805, all the schools in the town were placed in charge of one board of education. This law, however, did not apply to such districts as had availed themselves of the "Somersworth Act," and had formed special districts. The boards of education were to consist of three members each and they were elected at the annual town meeting, each member to hold office for three years. This "town district" act made the length of the school year uniform, gave the same advantages to all children living in the town, which had been impossible under the old law, equalized the burdens of taxation and in many other ways improved the educational condition.

In 1895 a law was passed looking toward the State certification of all teachers. The law as passed, however, has amounted to but little, since it placed no obligation upon school boards to engage certified teachers only. A law was also passed requiring school boards to appoint some agent to take an annual census of the children of school age. The same year a law was enacted allowing two or more towns to unite and hire a superintendent of

schools. Very little was done, however, under this provision, but four years later the State agreed to pay half of the superintendent's salary where towns united for the purpose of hiring a skilled supervisor. With this inducement many such supervisory districts were formed. At the same session a law was passed giving State aid for the support of schools in the poorer towns. In 1901 the Legislature passed a most excellent law by which all towns not having a high school were obliged to pay tuition to some town which did maintain a high school of such pupils as were fitted to enter. It was also arranged for the State to aid the towns upon which the above would work a hardship.

State Department of Education—The organization of the State department has seen a number of changes. After four years the office of Com- missioner of Common Schools was abolished and a State Board of Education was legalized. This board consisted of one member appointed from each county. This board chose its own secretary. Lectures were given, schools visited and an annual report printed. Several of the secretaries were able men but the work done was unsystematic and the reports are of varying worth and reliability. After seventeen years this Board of Education was abolished and the office of Superintendent of Public Instruction was created. For the first sixteen years the Governor and council served as a State Board of Education, working with the Superintendent of Public Instruction. Then educational authority was taken from the Governor and council and given completely to the Superintendent of Public Instruction. For forty-five years there was no further change in the title of the office. Finally in 1919 the laws were rewritten, a State Board of Education appointed and the title of the executive officer changed to Commissioner of Education.

The Great Law of 1919—In 1918 it was evident to all students of education that New Hampshire was ready for another step forward in its school development. The war had emphasized the great need for trained and educated men and women and had turned the attention of many to social ideals and economic necessities. It was realized that the school legislation of seventy years needed to be written in a simple and harmonious codification. The last attempt at complete school legislation was in 1849, when previous laws were repealed and reenacted in comprehensive form.

In 1918 the superintendent of public instruction, realizing the inadequacy of the existing school laws and the great need of the children in poorer parts of the State, asked Governor Keyes to appoint a committee of citizens to study with him the school situation in the State and to recommend to the next Legislature an adequate school code. The committee was some months later appointed by Governor-elect Bartlett.

When this plan was completed, it was given the highest possible publicity, its proposals studied, explained and in many details amended. In this form it was adopted and enacted into law on March 28, 1919.

Following this the entire school laws of the State were rewritten by Judge John E. Young and Judge Robert J. Peaslee of the Supreme Court of the State and the codification was enacted by the Legislature of 1921.

The law of 1919 made progressive advance in other lines, also. It proposed to wipe out illiteracy by the obligation of evening schools for all minors who were illiterate in the English language. It took the approval of private elementary schools from local school boards and gave this to the State Board of Education. It made care of the health and physical welfare of all children a school duty, and it made possible the certification of all teachers.

In the context of the Claremont controversy, what is most instructive about the events chronicled in this outstanding article, occurring as they did in the years immediately following ratification of the Constitution, is the fury of the Legislature's response to Inferior Court judges' refusal in at least six, possibly in as many as eight, cases to enforce what was clearly an unconstitutional law. Nothing could demonstrate better the lack of an intention by the authors of the Constitution to invest the judiciary with the power of "judicial review," so-called; and the fact that the Legislature eventually gave up the fight and repealed the "Ten Pound Act" was hardly an endorsement of and surrender to that power, but simply a recognition that the judges had been right; the Act was unconstitutional and not a worthy vehicle upon which to base impeachment proceedings.

***Richard M. Lambert*:**

The "Ten Pound Act" Cases and the Origins of Judicial Review in New Hampshire*

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PREFACE

Conventional wisdom holds that the doctrine of judicial review originated from the case of *Marbury v. Madison* in 1803.[1] Even at the federal level, however, indications of the concept were evident in earlier cases. In *Hayburn's Case* (1792), for example, five of the seven Supreme Court justices and two district judges, sitting in three different circuits, had refused to carry out an act imposed on them by Congress on the ground that it violated the Constitution's separation of powers provision.[2] Because, however, individual judges, not the court as a whole, made the assertion, this case is not thought to have established the doctrine. Likewise, in *United States v. Hylton* (1796), the justices of the Supreme Court asserted their power but decided that the particular act did not violate the Constitution.[3] Accordingly, the power was not, in fact, both asserted *and* utilized by the United States Supreme Court until *Marbury v. Madison* was decided.[4]

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In contrast, by the time the United States Supreme Court decided *Marbury*, a relatively mature doctrine of judicial review was already more than fifteen years old in the State of New Hampshire and, less clearly, in two other states. One of the unanswered questions facing Americans at the early period of their state governments was how they would force government to adhere to the terms of their newly-adopted constitutions. It was uncertain, for example, how a court of law should respond when presented with a case involving a law passed by the legislature in seemingly clear violation of a specific provision of a constitution. Just such a circumstance arose in New Hampshire in 1785-1787 with the passage of the Ten Pound Act when at least one court - the Inferior Court of Common Pleas for the county of Rockingham - boldly answered that question by asserting that it was the role of the judiciary to protect the state's constitution and the rights of its citizens under it. For more than a year, this court - under the threat of impeachment - steadfastly held to its position in at least six cases and refused to yield to a law it viewed as "unconstitutional" despite numerous legislative actions in support of the law.

On November 9, 1785, the New Hampshire General Court enacted a law entitled "An Act for the Recovery of Small Debts in an Expeditious Way and Manner." It read in relevant part:

> Be it enacted by the Senate and House of Representatives in General Court convened that every Justice of the peace in the Town where he resides be and hereby is, fully authorized and Impowered to hear try and determine all pleas and actions of Debt and trespass where Title of Land is not concerned arising or happening within this State to the value of Ten pounds or under and to give Judgment therein and to award Execution thereupon, and either party aggrieved at the Judgment given by any such Justice may appeal therefrom to the next Inferior Court of Common Pleas to be holden in and for the County where such action may be commenced & the party appealing shall give security with sufficient sureties by way of Recognizance before such Justice unto the appellee in a reasonable sum not exceeding Twenty pounds to prosecute his appeal with effect and pay such costs & damages as shall be awarded against him.
>
> And be it further enacted that no action shall be commenced to or sustained by, any Inferior Court of common pleas within this State in which the sum demanded does not exceed the sum of five pounds or title of Land concerned unless by appeal from the Judgment of a Justice of the Peace.[5]

This law, more commonly known as the "Ten Pound Act," was one of several debtor relief laws passed by the legislature in the 1780's. The measure came at a time when the state, like the rest of the nation, was under the strains of the severe economic depression which followed the Revolutionary War. The law represented a response by the legislature to the desperate petitions of debtors for various forms of relief. The Ten Pound Act was designed to help debtors by reducing the costs of defending small civil suits filed by

creditors in the state's existing judicial system; because court costs were assessed against the loser and because jury trials were more expensive than bench trials, allowing debt claims involving less than ten pounds to be tried before a justice of the peace was thought to favor debtors. Within six months, however, the Ten Pound Act was declared to be "unconstitutional" by the Inferior Court of Common Pleas for Rockingham County, which ruled that it violated the constitution's guarantee of the right to trial by jury in civil cases.

The ensuing political and constitutional confrontation, which lasted for over a year, eventually involved most of the leading figures of the state at the time. Men such as John Langdon (merchant, shipbuilder and statesman), General John Sullivan (attorney and state President), John Pickering (attorney and chief author of the state's Constitution), Nathaniel Folsom (Revolutionary general and judge), attorney Samuel Sherburne, and William Plumer (later governor and United States Senator) were forced to take a stand as the legislative and judicial branches squared off in the constitutional and political dispute. By the time the controversy had come to a conclusion, a major precedent for the power of judicial review had been established and a fascinating chapter in the state's history had been written.

The events in New Hampshire also gained notoriety beyond the state's borders. In fact, they may have influenced the very design of our federal Constitution and the role of our judiciary under it. At least four newspapers distributed in Philadelphia during the Constitutional Convention published accounts of the final showdown between the New Hampshire court and legislature. Moreover, these newspapers were distributed on the same day that the delegates were debating proposals for the federal judiciary.[6]

The Inferior Court's action pitted the General Court - the state's "supreme legislative power" - against a mere county court of limited civil jurisdiction at a period in our nation's history when the notion of vesting courts with the power of overturning laws enacted by popularly-elected legislatures seemed usurpitous and undemocratic to many. The outcome would help determine the meaning of New Hampshire's Constitution of 1784 and the power and functions of the legislative and judicial branches under it.

NEW HAMPSHIRE'S CONSTITUTION OF 1784

As the controversy unfolded, the legislative branch seemingly held the upper hand. Indeed, the powers conferred upon the General Court were extraordinary. It was the first branch of government whose powers were established by the Constitution, and it was given, overwhelmingly, the most attention. Of the eleven sections comprising the Constitution's Part II, or "Form of Government," the first three, which concerned the legislature, accounted for over forty percent of Part II's text. Even the terminology used - the name, "General Court" (suggesting a sort of medieval law-making *and* law-judging authority) and the branch's designation as the "supreme legislative power" - reflects the dominant position the Constitution's authors intended the legislature to occupy.[7]

In contrast, the judicial branch received little attention. Mention of this branch appeared in that original Constitution seemingly only as an afterthought. Nowhere in the Constitution were any courts vested with the "supreme judicial power" of the state. The short section labeled "Judiciary Power" (which follows sections pertaining to the "Executive Council," the "Secretary, Treasurer, Commissary-General, etc." and the "County-Treasurer") only briefly mentioned relatively insignificant matters such as the tenure of justices of the peace, the means of obtaining advisory opinions from the Superior Court, and the times and places probate courts would be held. The section provided nothing except the barest mention of the state's highest court, the Superior Court, and no mention at all of the courts which had the heaviest case loads, the Inferior Courts of Common Pleas. In short, no court's membership size, jurisdiction, or power was established or defined in either this "Judiciary Power" section or elsewhere in the Constitution in the other scattered, brief references to the judiciary. Instead, the Constitution simply carried over the prior existing court system and left it to the legislature to alter that arrangement as it deemed appropriate. This lack of provision left the judiciary far from coordinate and also extremely vulnerable to legislative domination. Most important, the judiciary was without a clearly established function under the Constitution other than to act as courts had acted traditionally.

Nevertheless, as the lines were drawn in the dispute, it became evident that each branch could look to the Constitution and find support for the position it took. For although the many strengths of the legislative power and the many weaknesses of the judicial power were readily apparent, a closer look reveals restraints on the legislature and ample justification for the position taken by the Rockingham County Inferior Court.

The Plenary Powers of the Legislature:

Following Part I, the "Bill of Rights," Part II of the 1784 Constitution established the "Form of Government." The section was introduced by a short preamble which attests to the Framers' belief in the popular origins of governmental power. "The people" the document proclaimed, "do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign, and independent Body-politic, or State, by the name of the State of New Hampshire." The "Form of Government," which the people were compacting to establish, was then laid out, and was divided into some eleven headings and subheadings labeled: "The General Court," "Senate," "House of Representatives," "President," "Council," "Secretary, Treasurer, Commissary-General, &C," "County-Treasurer, &C," "Judiciary Power," "Clerk of Court," "Delegates to Congress" and "Encouragement of Literature &C." The first three sections established the General Court and defined it as the "supreme legislative power." This power was further divided into two separate bodies-a Senate and a House of Representatives-each possessing a negative upon the other with bills having to pass both houses in order to become law. This section was fairly straightforward. But soon thereafter, in the fourth paragraph of the same section-in what might be termed the "plenary powers" clause-the legislature was granted an arguably unlimited (blanket) delegation of power. This key passage allocated to the legislature "full power and authority...to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions,

either with penalties or without...as they may judge for the benefit and welfare of the State, and the governing and ordering thereof...." Certainly a law designed to help debtors by allowing civil suits to be tried before justices of the peace (as the Ten Pound Act did) would have seemed to many to have been sanctioned by this provision.[8]

This broad grant of power was joined by another in the provision to grant to the legislature "full power and authority to erect and constitute judicatories and courts of record." This power made the judiciary dependent on the legislature and threatened their independence. The power to create courts implies the power to destroy them. In fact, the Constitution provides three methods by which the legislature could remove judges with whom they might find themselves at odds. First, they could indirectly remove a judge or group of judges by abolishing the court. This power extended over even the state's highest court. Second, judges could be directly removed through an "address" of both houses and concurrence by the President and Council. And third, judges could be removed through the more traditional process of impeachment for "misconduct or mal-administration in their offices."[9]

The judiciary was also dependent on the legislature for its financial support and salaries. Although the Constitution stated that "permanent and honorable salaries" were to be provided for the judges of the Superior Court, the language was left vague for that court, and no provision at all was made for the support of the rest of the state's judges-particularly the Inferior Court judges and justices of the peace who then comprised the bulk of the judicial system.[10]

Finally, the legislature was given the power to directly exercise a number of judicial powers itself-thus blurring any notion of separation of powers. In Part II it was given the power to "impose fines, mulcts, imprisonments and other punishments." And in the judiciary power section, the legislature was granted the unspecified power to "by law make provision for" the hearing and trying of "all causes of marriage, divorce and alimony, and all appeals from the respective judges of probate."[11]

Legislature Supremacy:

While the Constitution of 1784 seemed to largely incorporate the doctrine of legislative supremacy, it nevertheless did include several provisions intended to place restraints on the legislature and government in general. With only a few exceptions, however, these limits were implicit rather than explicit.

First, the apparently unlimited delegation of power in the so-called plenary powers clause did include the restriction that any law passed by the legislature, however "wholesome and reasonable" it might appear, must not be "repugnant, or contrary to the constitution." But this clear acknowledgment of the superiority of the written constitution over legislative power did not go on to state who should make such a determination. The legislature itself? The people through the annual election of their representatives? The courts? In order for courts to attempt that role, they would have needed a considerable degree of independence. Perhaps the most solid source of independence was provided by

Article 37 of the Constitution's Bill of Rights which declared the fundamental doctrine of the separation of powers. The article established the legislative, executive and judicial branches as the "three essential powers" of government and decreed they "ought to be kept separate from, and independent of each other, as the nature of free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble band of union and amity." This statement, while not establishing a "pure" separation of powers in which no judicial power would ever be exercised by the legislature, did move in the direction of a balanced separation. It allowed for the combining of functions necessary for government to work with the checks needed to maintain the three separate branches.[12]

To be sure, there were some specific limitations placed upon the legislative power. Article 16 protected persons against double jeopardy in all criminal cases and also stated that the legislature shall not "make any law that shall subject any person to a capital punishment...without trial by jury." Article 23 declared that "retrospective laws" were so "highly injurious, oppressive and unjust" that "no such laws, therefore, should be made, either for the decision of civil causes or the punishment of offences." And Article 20 (as we shall see) guaranteed jury trials in all civil cases in which they had been "used and practiced" before the adoption of the Constitution.[13]

Another provision near the end of Part II also affected the relationship between the legislative and judicial branches. Under the so-called reception provision, "All the laws which have heretofore been adopted, used and approved, in the province, colony, or State of New Hampshire, and usually practiced on in the courts of law" were to "remain in full force until altered and repealed by the legislature." Significantly, this provision included the common law and constituted an invitation to the courts to root out, through judicial interpretation, all such laws which conflicted with the Constitution because the provision specifically excepted the continuation of those laws which were "repugnant to the rights and liberties contained" in the new Constitution. Such a determination would inescapably arise through the course of litigation because courts would have to decide what parts of the law were valid and were to be preserved and what parts were unconstitutional. This provision, however, applied only to the prior-existing body of law; it was not intended to sanction judicial review of new legislation.[14]

New Hampshire's Courts in the 1780's:

Because New Hampshire's Constitution, like those of most states at the time, merely carried over the pre-Constitution court structure until the legislature acted to revise it, the judiciary remained basically what it had been since 1769. In that year the state had been divided into five counties in order to permit the courts to be organized on that basis. In 1786, then, the state's judiciary consisted of a Superior Court of Judicature, composed of four justices, which held jurisdiction and authority in both civil and criminal cases over the whole state; one Inferior Court of Common Pleas for each county, also composed of four justices, each of which tried or reviewed civil cases arising within its jurisdiction within its county; a Court of Quarter Sessions of the Peace in each county which held jurisdiction over criminal cases within its county; numerous justices of the peace

throughout the state, each with jurisdiction over local civil cases; a Judge of Probate for each county; and a Maritime Court composed of four judges with jurisdiction throughout the state for cases arising on the high seas.[15]

THE TEN POUND ACT CASES

> *In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred....*
>
> Article XX of the Bill of Rights of New Hampshire's Constitution of 1784[16]

Wallace v. Tarlton:

The controversy began uneventfully. On the twentieth day of January 1786, William Wallace Jr., a "yeoman" from the town of Deerfield, initiated a small civil suit before justice of the peace Thomas Bartlet at Nottingham. Wallace sought to collect damages from Richard Tarlton, a "cordwainer" from the town of Greenland, who, as Wallace claimed in his statement to the justice, owed him the sum of £9 for five months of work he had performed at Tarlton's house during 1784. On that January day, a writ of attachment with summons issued ordering the sheriff of Rockingham County to attach the goods or estate of Tarlton "to the value of ten pounds [or] for want thereof to take the Body of the Said Richard so as to insure his appearance at the trial of the case scheduled for Monday February 6, 1786 at ten A.M. at Bartlet's dwelling house."[17] Wallace had acted in accordance with the provisions of the Ten Pound Act, enacted only two and one-half months earlier. Before that law's passage he would have had to file and prosecute his suit at Portsmouth before the Inferior Court of Common Pleas for Rockingham County. This would have required him to journey, by horse, at least twenty miles, perhaps many times, over snow-covered, perhaps icy, winter roads to Portsmouth or Exeter to attend the trial while he waited for that overburdened county court to hear his case-probably after numerous continuances. Under the new law he was spared not only the inconvenience of extended travel but also the considerably higher court costs and lawyers' fees associated with the Inferior Court.

As a result of the writ, Deputy Sheriff David Page, on January 27, symbolically attached a hat belonging to "the property of the within named Richard Tarlton value of one shilling," and, as he recorded in his return of service inscribed on the back of the writ, "at the same time left a Summons at his respective place of abode."[18]

On February 6, as scheduled, the trial took place before Justice Bartlet at Nottingham. The plaintiff, William "Wallis" Jr., as Bartlet recorded his name, was represented by a young Dover attorney, Jonathan Rawson. According to Bartlet's brief account of the trial, there were, apparently, no constitutional arguments put forth at this time. Tarlton was

simply defended by his attorney Samuel Sherburne against the plaintiff's claim, with the plea that he had never promised "in manner and form aforesaid" and thereby put himself on trial while "reserving liberty to give any special matter in Evidence upon trial." Sherburne, moreover, offered an "offset" based on an account of various goods and services ("one pair of shoes," "trowsers," "wollen stockens," "a tobacco box," etc.) amounting to over ten shillings which Tarlton claimed he had advanced Wallace. The trial record indicates that this counterclaim was then disputed by Wallace. Justice Bartlet then, "after a full hearing of the parties by their Counsel," pronounced judgment in favor of the plaintiff, declaring "it appears to the said Justice that the said Tarlton did promise in manner and form aforesaid-It is therefore considered by said Justice that the said William recover against the said Tolton Nine pounds damage, and costs of suit taxed nineteen shillings and eight pence...."[19]

From this judgment Tarlton immediately initiated an appeal to the next session of the Inferior Court of Common Pleas to be "holden" at Portsmouth on the first Tuesday of February 1786, which was granted. As principal he "recognized," posting a bond in the amount of five pounds, while Sherburne and another party, Jonathan Cilley, a "Gentleman," posted another fifty shillings each-all to assure "Tolton shall prosecute his appeal with effect and pay all intervening damages and costs."[20]

The next action occurred on February 24 when depositions were taken from two witnesses in Greenland before justice of the peace Stephen March. March's record of this proceeding indicated the case was to be "heard and tryed" at the Inferior Court to be at Portsmouth "by Adjournment on the 28th day of Feb.y next...." And so it was there, apparently on February 28, that the case of *Richard Tarlton, Appellant v. William Wallace Jr., Appellee* was heard and soon after committed to a jury of twelve men. When that jury returned its verdict, it too found for Wallace, the appellee, thus, in effect, upholding Justice Bartlet's decision. It apparently allowed, however, a portion of Tarlton's counterclaim because it awarded Wallace a lesser amount in damages-only £2 17S ld, and costs.[21]

Then, however, Sherburne took an extraordinary step. He rose before the court and presented a plea-probably for the first time in the history of the state-that the Ten Pound Act was unconstitutional and that the foregoing trial and appeal were contrary to the Constitution and should be reversed.[22]

The account of this historic plea is brief-only a short paragraph recorded by the Inferior Court's clerk, Noah Emery, in that court's *Minute Book*. The terse record shows that Sherburne began with a summary of what had occurred in the case.

> And afterwards the said Richard Tarlton comes into Court by Samuel Sherburn Esq. his Attorney and moves that Judgment in this Action be Arrested because it Appears that this Action was Originally commenced before a Justice and the sum therein Demanded was nine pounds and the verdict thereon given at this Court in favor of the original plaintiff thereon is two pounds seventeen shillings and One penny....

Sherburne then presented his argument against the Ten Pound Act by making reference to Article XX of the state's constitution.

> ...that at the Time of forming the present Constitution for this State it was & for a long time before even beyond the Memory of man it had been the Law & Custom of this State for Inferior Courts to Try all Matters of more than forty shillings Value & for Justices of the peace to Try only Civil Matters under that value & by the same Constitution it is Declared that all Trials of Property should be as had before that time been used & Accustomed *& this action being brought Against the Express Letter & Spirit of said Constitution & Against the Law of the Land & Verdict thereon obtained Judgment Ought to be Arrested....*[23] (Emphasis supplied)

Upon hearing Sherburne's plea, the judges of the Inferior Court ordered the case continued "for Advisement." The next action on the case occurred at the court's May term which began on the fourth Tuesday of May. It was then that the Inferior Court took a bold step by agreeing with Sherburne's plea, thereby ruling that the Ten Pound Act was unconstitutional. The court's *Minute Book* for its May term repeats Sherburne's plea verbatim and then adds "...And now at this Term the Court having Advised upon the aforesaid plea, they are of Opinion that Judgment in this Case ought to be Arrested-Therefore it is Considered by the Court that Judgment be Arrested." And so ended the case *Tarlton v. Wallace*.[24]

Macgregore v. Furber:

Undoubtedly, the argument against the Ten Pound Act was quickly circulated among New Hampshire's small fraternity of lawyers, which in 1786 numbered fewer than thirty. For, soon after Sherburne's plea in late February before the Rockingham County Inferior Court, the argument would surface in at least four other cases and no less of a figure than Speaker of the House and state President-elect John Sullivan would make the argument in a case tried before a justice of the peace in Londonderry. In the case of *James Macgregore v. Joshua Furber* the justice, John Neal, recorded the proceedings in greater detail-as did William Plumer, who, at the time, was studying law at Londonderry with Macgregore's attorney, John Prentice.

Justice Neal's record shows that the case originated on March 2 when Macgregore, a locally powerful politician, merchant and farmer, who was, more importantly, the excise master for "wine, rum & brandy and other distilled spirits" for Rockingham County, brought suit against Joshua Furber, a "Gentleman" of Northwood, for £10 damages. Macgregore claimed Furber had sold rum without a license at "five different times" between October 1785 and February 14, 1786-an offense which under the law called for a penalty of forty shillings for each offense, or a total of £10. Macgregore was suing on his own behalf as well as that of the county-the £10 "to be disposed of according to Law."[25]

A writ of attachment with summons issued on that day demanded Furber's appearance at Londonderry on March 27 to answer the claim at trial. The return of service as recorded by John Parker, the Sheriff of Rockingham County, attests that on "March 2d 1786-

Pursuant to the within Precept I have attached a Hat of the within named Joshua Furber value [one shilling] and gave him a Summons." Next, on March 21, summons issued to seven witnesses, including, significantly, Samuel Sherburne, to appear at the trial.[26]

Justice Neal's account of the trial shows that all parties met on March 27 at "Ten Oclock forenoon" at his dwelling house and, after an hour, "Adjourned to the house of Capt. Jacob Martin Inholder in this Town 11 Oclock forenoon...." There, after an unspecified period of time, the trial adjourned to April 10. It is unclear from the surviving court records when Sullivan made his plea. However, according to Plumer, the trial and Su1livan's plea were heard on March 27, after which Neal then adjourned the proceedings until April 10 to consider the arguments of the attorneys.[27]

Both Plumer's and Neal's accounts show that Sullivan made a direct plea to the jurisdiction of the justice on constitutional grounds citing Article XX of the Bill of Rights:

> ...and the said Joshua comes & defends and for Plea saith that the said Justice ought not to take cognizance of this Action, because (he says) that prior to the making & ratifying the present constitution of New Hampshire it was and ever had been the Law and Custom of this State in controversies between party & party of more than the value of forty shillings for the parties to have a Trial by Jury *in the first instance*-And in and by the said Constitution it is declared in the 20th Article of the Bill of Rights upon which said Constitution is founded-that in all Controversies concerning property & in all suits between two or more persons except in cases in which it had been before that time otherwise used and practiced-The parties should have right to a trial by Jury....[28] (Emphasis supplied)

Sullivan recounted the proceedings of the case stating that the plaintiff "has by this said writ and declaration sued for and demanded more than forty shillings (viz.) ten pounds," thus seeking damages in excess of the traditional jurisdiction of justices. He then supported this plea by referring to the state's long-standing legal practice in civil cases as it related to both the jurisdiction of justices and inferior courts and the right to jury trials. In doing so he had in mind provincial law dating back to 1647 when "commissioners" (many of whose functions were later assumed by JP's) were granted jurisdiction in civil cases up to the value of forty shillings, or two pounds, and inferior courts were granted jurisdiction in civil cases above that amount. Because, even then, jury trials were unavailable at the local commissioner's court, it was a common practice for plaintiffs to increase the *ad damnum* amount of their claims in order to obtain a jury trial then available only at the Inferior Court. Gradually, the office of justice of the peace more fully emerged and replaced commissioners.

When the state's judiciary was more formally established by provincial laws in 1692 and 1699, the jurisdictional limits of the justices and inferior courts were basically retained as they had evolved. This left a justice of the peace with jurisdiction "in the same Town where he resides" over civil matters "of Debt and Tresspass...to the Value of forty shillings or under..."where title of land was not concerned, and the county inferior courts

with jurisdiction over "all Actions, Matters and Causes triable at Common Law, not exceeding the Sum or value of Twenty Pounds...where Title of Land is not concerned...." Thus Sullivan was able to argue for his client that "by Law and Custom" a right to trial by jury in the first instance existed for cases "where more than forty shillings was demanded." Because, therefore, "the said Bill of Rights having guaranteed a continuance of Tryal by Jury in all Cases where Tryals by Jury had been practiced," he argued that the justice ought not to take cognizance of the action.[29]

In replication John Prentice then responded to Sullivan's plea by arguing that "notwithstanding any thing by the said Joshua in his Plea aforesaid alledged, the said Justice has a right and ought to take cognizance of the said writ and declaration...." He promptly cited the provisions of the Ten Pound Act which he claimed "fully impowered" every justice of the peace in his respective county to hear, try, and determine all pleas and Actions of debt and Trespass where Title of Land is not concerned to the value of ten pounds...." This law, he said, was alone "sufficient Warrant For the said Justice to take cognizance of try and determine the said Action..." Having found a statutory basis for the justice to try the case, Prentice addressed the constitutional question:

> Neither does the said Constitution say that in Causes triable of more than forty shillings value, that the party shall have a right to trial by Jury *in the first instance* nor does the Law restrain the party aggrieved from appealing to the Inferior Court where he may have the same Cause tried by a Jury in as full and ample a manner as if it had originated at an Inferior Court....[30] (Emphasis supplied)

Here, Prentice's argument was indeed supported by the Ten Pound Act which did provide for an appeal to the Inferior Court where a jury trial could be obtained by the parties. Apparently that argument was conclusive. Prentice ended his argument and asked "the said Justice to overrule the Plea to the Jurisdiction of the Court and compel the said Justice to plead to the merits...." Which Neal then did: "And I said Justice having considered the above plea of the said Furber overruled the same and the Deft. having said Plea for issue, pleads not guilty in manner and form as the Plaintiff declares and therefore puts himself on trial...."

The parties then presented their arguments concerning Furber's alleged sale of liquor without a license ("Issue being joined") and Neal pronounced judgment in favor of the plaintiff, Macgregore:

> ...the parties being fully heard it appears to me the said Justice that the Plaintiffs declaration is well supported and the Deft. is guilty as the Plaintiff declares-It is therefore ordered by me the said Justice that the said James Macgregore recover of the said Joshua Furber the Sum of Ten pounds Lawful-money and cost of Court tax'd at Five pounds one shilling and eight pence like money....

Furber then initiated an appeal to the Inferior Court of Rockingham County "to be holden at Portsmouth...on the fourth Tuesday of May next," having posted bond on an undisclosed amount.[31]

Treferrin v. Cate:

Apparently, the next argument against the Ten Pound Act occurred in the case of *Robinson Treferrin v. Samuel Cate*. This case was first heard at Rye before justice of the peace Joseph Parsons on March 29 and then adjourned until May 20. Treferrin, an innholder from Portsmouth, claimed that Cate, a "Gentleman" also from Portsmouth, owed him £ 9 from a "note of hand" Cate had passed to a third party who, in turn, had assigned the note to the plaintiff. Like Furber, Cate was represented by Samuel Sherburne. Fortunately, Justice Parsons' record of the proceedings is relatively extensive and Sherburne's plea-which is presumably the same as he presented in the other cases in which he was involved-is presented in detail.

Parsons' records shows that Sherburne at the outset refused to argue the merits of the plaintiff's claim and immediately challenged the validity of the proceedings:

> ...and the Sd. Samuel Cate by his Attorney comes and defends the force and Injury etc. and says that the Sum sued for & demanded in the Plaintiff's declaration is more than Forty Shillings Lawfull Money Viz the sum of Nine Pounds Lawfull Money and that by the Laws and Constitution of the State of New Hampshire Justices of the Peace may hear and determine Causes of forty shillings and under and no more.

Sherburne then went on and cited Article XX:

> ...in all controversies concerning property and in all suits except wherein it has been heretofore otherwise used and practised the Parties have a right of trial by Jury...

He then cited what had been the previous legal practice:

> ...it has not been heretofore used and practised for Justices to hear and determine causes of more than forty Shillings Value, that all causes of more than forty Shillings Value have been heretofore usually heard and tried in the several Counties in this State before the Inferior Court of Common Pleas and for Sd. County's and by Jurors duly returned & impanelled by them to hear and determine the same that the Inferior Court of common Pleas and in for the County of Rockingham by the Laws and Constitution of this State have Cognizance and Jurisdiction of Sd. Action and ought to hear and determine the same and this the Sd. Samuel is ready to verify....

In concluding his plea Sherburne then asked the justice not to hear the case:

> ...and Said Samuel prays Judgment whether the sd. Justice will contrary to the Laws and Ancient usage of this State take further Cognizance of Sd. Action and whether he the sd. Samuel ought by the Laws and Constitution aforesaid to answer thereto.[32]

The plaintiff Treferrin then, in the replication, cited the Ten Pound Act and asked that "notwithstanding any thing the Sd. Samuel is pleading alledg'd the sd. Justice hath and ought to take cognizance of...hear try and determine..." the case, and that "the sd. Samuel may be compell'd to answer thereto." In turn, Sherburne argued that the Ten Pound Act was "not sufficient in Law to give the Justice cognizance of the aforesaid Action...or to compel the Sd. Sam. to answer thereto..."[33]

It was then that Sherburne supported his plea against the constitutionality of the Ten Pound Act by presenting an eloquent five-point demurrer which contained several important constitutional principles arguing why the act and the proceedings before the justice were in violation of the state's Constitution. The plea is a remarkable statement for what it reveals about the state of constitutional thought in 1786 as it clearly demonstrates a very definite belief in a government in which even the legislature had only limited power and in which it was the function and duty of the judiciary to protect the rights of the people, preserve the provisions of their Constitution and check unconstitutional exercises of power by the legislature.

Points one through three speak to the supremacy of the written constitution and the limits of legislature power under it. Point four alludes to Article XX of the Constitution's Bill of Rights and argues that a law like the Ten Pound Act that is so clearly contrary to that article could not be law. Point five is the most significant because it attributes to the courts a power which today we would clearly define as judicial review. As Justice Parsons recorded the argument:

> And for causes of Demurrer in Law the sd. Samuel here shews the following-
>
> 1st That the Constitution of this State is the source from whence all Legislative Power flows
>
> 2d That the Legislature of course canot exercise a Power which is not deriv'd from the constitution-
>
> 3d That every attempt of the Legislature to exercise Power not deriv'd from the Constitution is A tyranical usurpation of an Authority never delegated to them and an infringement of the Peoples Liberty A treasonable conspiracy against the Constitution and no Law-
>
> 4th That the Constitution has not vested the Legislature with Power to enable Justices to try causes of more than forty shillings Value consequently the aforesaid Statute is an Arbitrary & unwarrantable usurpation and cannot have the force of Law-
>
> 5th because the first buddings of Tyrany ought to be carefully watched by *the Judicial Courts of this State which are the constitutional Barriers between the Power of the Legislature and the liberty of the People* and ought early to be

> blasted before they increase to A size that may involve the People in the Dark shades of slavery-[34] (Emphasis supplied)

Justice Parsons then overruled Sherburne's plea ruling that it was "insufficient" and that Cate "be compelled to answer." To which the defendant, "reserving his Right of exception to the Jurisdiction of this Court appeals to the Inferior Court... [and] thereof put himself on Tryal." After hearing both parties Parsons found for the plaintiff Treferren and awarded him the full damages he sought-£9 and court costs of fifteen shillings and three pence. Cate then sought an appeal, posting the sum of eighteen pounds as surety, and the appeal was scheduled for the Rockingham County Inferior Court at its May term.[35]

Furber v. Mason:

In a fourth case, that of *William Furber v. Samuel Bickford Mason*, it is uncertain whether a challenge was presented to the Ten Pound Act at the trial before the justice of the peace. In the terse record of the proceedings, how ever, such a plea is suggested. The trial took place on March 30 before justice of the peace Samuel Penhallow at Portsmouth. Furber, a "Gentleman" of Newington and apparently no relation to that other "gentleman" Joshua Furber, brought suit against Mason, a "Gentlemen" of Barnstead, for £4 l0s 4d in damages for various goods and services he claimed he had "delivered and sold" to Mason between December 1782 and March 1783. Furber was represented by attorney Oliver Whipple while Mason had the good fortune to be represented by Samuel Sherburne.[36]

Penhallow's account of the trial indicates that the parties appeared and that an unspecified plea was entered by Sherburne which Penhallow, in turn, overruled as "bad and insufficient." Only then did the defendant present his case against Furber's claim, "having wave[d] his Plea...to issue on the Trial at the Inferior Court..." Then, after hearing the parties argue the merits of the case, Penhallow found in Furber's favor and allowed him the £4 l0s 4d damages he sued for with an additional 32 shillings, 6 pence in costs of court. From this judgment Mason also appealed to the Rockingham County Inferior Court at its May term.[37]

Bartlet v. French:

In the case of *Joseph Hall Bartlet v. Gould French*, there is no indication of an argument against the Ten Pound Act on constitutional grounds at the trial before the justice of the peace. What is known is that the case originated on March 24 when Bartlet, a tanner from Newbury, Massachusetts, swore out a writ before justice of the peace Benjamin Butler at Nottingham. Bartlet claimed that French, a "husbandman" from Epping, owed him £2 8s 0d plus interest in damages due on a note of hand which French had given to another party who had subsequently signed the note over to the plaintiff. The trial took place on April 10. Bartlet was represented by attorney Jonathan Rawson, who had represented William Wallace in the first Ten Pound Act case, while the name of French's attorney is not recorded. Butler's account is very brief, stating only that "after a ful hearing of the pleas of Both parties it appears to Said Justice that the Pl.t has proved his Declaration...." Bartlet was awarded the £2 lls 9d in damages he sought and £l 4s in costs. French then

appealed to the Rockingham County Inferior Court at its May term, posting a bond of £5, which was matched by two other individuals who posted fifty shillings each.[38]

The Court's Reasoning:

And so by the time that the Inferior Court of Common Pleas for Rockingham County began its May 1786 term, the argument on constitutional grounds against the Ten Pound Act had been made before that court once in February in *Tarlton v. Wallace*, and at least two, and possibly three, other times in trials before justices of the peace. Before the May term ended, the constitutional issue first raised in February by Sherburne in *Tarlton* would also be raised by counsel in four other cases appealed from decisions of justices of the peace. And in each of these, the court maintained its stand. For, immediately after *Tarlton*, the Inferior Court handed down four more rulings which held that the Ten Pound Act was unconstitutional.

In each of these five cases the attorney for the appellant moved that because the original trial had taken place before a justice of the peace, and the sum demanded exceeded forty shillings, the proceedings must be "quashed." Without going into the merits of the claim, the attorneys argued that although the actions had been brought before the justices under the provisions of an act which the legislature had duly passed into law, this act could not have the force of law because it violated the state's Constitution in Article XX of the Bill of Rights. Thus it was the duty of the Inferior Court to vacate the proceedings. The Inferior Court agreed with this plea and ruled in favor of the appellants in each case. In doing so, it seems that the court, having arrived at a position in *Tarlton*, formulated a bolder, more lucidly stated, judgment which it then expressed in nearly identical form in each of the subsequent four cases. Thus in *Furber v. Macgregore*, *French v. Bartlet*, *Mason v. Furber* and *Cate v. Treferrin*, the Rockingham County Inferior Court, composed of four distinguished Revolutionary-era leaders in General Nathaniel Folsom, Timothy Walker, Jr., Abiel Foster and John Calfe held to the position that the Ten Pound Act was unconstitutional. As the court's *Minute Book* for its May term shows, the court declared in each case:

> On Motion, it Appearing to the Court that the Act of the Legislature impowering a Justice to hear & Determine civil Actions of More than Forty Shillings *is Manifestly Contrary to the Constitution of this State* & this Action being Originally Commenced before a Justice for more than forty shillings. It is therefore Considered by the Court that the Original Plat. . . . take nothing by his Writ & that the Original Deft. . . . Recover Against the Said . . . . his costs Taxed at . . . .[39] (Emphasis supplied)

Therefore, the court reasoned that the Ten Pound Act was unconstitutional because it violated the guarantee of Article XX to a trial by jury in all cases in which the right had existed before the adoption of the Constitution. This right extended to all civil cases in which the sum demanded exceeded forty shillings and allowed defendants the right to a jury trial in the first instance. Although the Ten Pound Act had provided for jury trials upon appeal this was only after the aggrieved party had posted bond (which could be as

much as twenty pounds) and had faced the added expenses of higher court costs and lawyers' fees and the inconvenience of having to plead the case twice-all of which constituted a new burden which was not permitted. This new burden, the court must have reasoned, had substantially diminished the right to a trial by jury, which the legislature was not allowed to do. Therefore, it held that the Ten Pound Act was unconstitutional.

In each of the five cases the writ of execution issued to the county sheriff ordered the appellant to pay costs of the suit. This was not an insubstantial amount. The costs ranged from just over two pounds to over three and one-half pounds. Accordingly, the original plaintiff-creditor had not only failed to recover his debt but instead faced additional costs of several pounds! Although the original plaintiff was seemingly free to prosecute the case before the Inferior Court, this was done in only one case, that of *Treferrin v. Cate*. In that case a new trial was held in February 1787 and the jury, unlike the justice of the peace, found for the defendant Cate, and awarded him £2 ls 6d in costs of court.

Duty v. Kelley:

The claim that the Ten Pound Act was unconstitutional may have been raised in two other cases in Rockingham County, though the extant court records are too incomplete to establish that fact. The two cases involve the same parties. The plaintiff was William Duty, an "Esquire" of Salem (and crony of Nathaniel Peabody), and the defendant was Samuel Kelley, a "Gentleman," also of Salem. Both suits were heard before justice of the peace Dr. Moody Morse (also a crony of Peabody) at Salem on July 4, 1786, and involved sums of over forty shillings and under £10.[40]

In the first suit, an action of debt, Duty sought to recover the sum of £9 he claimed Kelley owed him for various legal services he had performed. In the second case, an action of trespass, he claimed Kelley's wife Elisabeth had taken "with force of arms" a recognizance, and promptly "tore in pieces" the legal document by which Kelley stood bound to the state as principal. Justice Morse ruled for Duty in both cases, awarding the full £9 damages plus 11 shillings and 8 pence costs of court in the first case, and £6 damages plus another 11 shillings and 8 pence costs of court in the second. Kelley appealed in both cases to the Rockingham County Inferior Court at its August 1786 term. That court then overturned both decisions of the justice. According to the brief notation in that court's *Minute Book*, the court ruled that "On Motion of the Appellants Counsel this Action is quashed for want of regularity in Proceedings." The court awarded costs of court to Kelley.[41]

Davis v. Young:

Although one cannot be sure that it was, in fact, the Ten Pound Act that had been declared unconstitutional in the two *Kelley v. Duty* cases (if in fact any law had been ruled unconstitutional), it is certain that at least one other case did result in such a ruling by the Rockingham County Inferior Court. The case of *Joseph Young, Appellant v. John Davis, Appellee* originated on October 17, 1786, when the plaintiff, Davis, a "husbandman" from Nottingham, appeared before justice of the peace Thomas Bartlet at

Nottingham to initiate a suit in a case of trespass against Joseph Young, a "trader" from Newmarket. Bartlet was the same justice who, in trying the first Ten Pound Act case, had rejected Sherburne's claim. Davis alleged that Young had in his possession "sixteen hundred and fifty feet of Marchantible Pine Boards" which were the property of the plaintiff until they had disappeared from his land and subsequently turned-up in the possession of Young. After discovering this, Davis confronted Young, who refused to return the boards which Davis valued at £2 9s 6d.[42]

On November 6, the trial took place before Justice Bartlet at Nottingham. There were apparently no pleas to the jurisdiction of the justice or against the Ten Pound Act. Bartlet's record shows that the defendant for his plea "Says his is Not Guilty in Manner and forme as the Plt. Declares against him and there of Puts him selfe on tryal...." Thereafter ("the Partys with there witnesses fully heard"), Bartlet pronounced judgment for the plaintiff awarding him £2 9s 6d in damages and £3 2s 8d in costs of court.[43]

Young immediately appealed to the Inferior Court of Rockingham County at its next term, posting a bond of £lO, while two other individuals posted £5 each. At that court, in November, Young was represented by attorney John Pickering, who challenged the proceedings on constitutional grounds. The judges of the Inferior Court then, once again, declared the Ten Pound Act to be unconstitutional. As the *Minute Book* for the court's November 1786 term records:

> On Motion it Appearing to the Court from Inspecting of the said Justices proceedings & Judgment in this Case, that the sum Demanded Exceeds the Jurisdiction of the said Justice, and that no Justice of the peace can take cognizance thereof according to the Constitution of this State-wherefore it is Considered by the Court that the said proceedings be quashed, and that the said Young recover Against the said Davis Costs of Courts-Taxed at £2 13s 0d.[44]

An execution issued on November 10 ordering the sheriff of Rockingham County to collect the costs from Davis.

Hills v. Wason:

In still another case, the Ten Pound Act was challenged in front of a justice of the peace, but before the Inferior Court could hear the appeal, the Ten Pound Act had been repealed. In the case of *Isaac Hills v. John Wason*, the plaintiff Hills, a "trader" from Chester, claimed that Wason, a "yeoman" from Candia, owed him the sum of 60 shillings which represented the balance between two offsetting accounts the two parties had owed each other. The trial took place before justice of the peace John Neal. Wason was represented by John Pickering, who presented what had, by then, become a familiar argument. As Neal's records shows:

> ...the said John Wason comes and defends and say the said Justice ought not to have or hold forth cognizance of the declaration or plea aforesaid; because he says by a Law of this State no Justice is impowered to try any issue or hear any plea

> where the matter or thing in contest exceeds the nominal sum of forty shillings and by the constitution of said State all matters exceeding the sum of forty shillings aforesaid, are and ought to be tried by Jury as has been heretofore used and practiced in this State....[45]

Prentice countered Pickering's argument saying it "was not sufficient in Law" to preclude the said Hills from having his case tried. He then went on to argue that Hills was under "no necessity," nor was he "bound by the Laws of the Land," to make any answer to the defendant's constitutional challenge.[46]

Neal rejected the constitutional challenge, just as he had done over a year earlier in *Macgregore v. Furber*. He ruled that the defendant's pleadings were "bad and no legal answer to the plaintiff's declaration" and ordered the case tried on its merits. He then found for Hills the sum of 10 shillings and five pence in damages plus costs of court amounting to £l 8s 6d.[47]

Wason appealed the decision to the Rockingham County Inferior Court at its May 1787 term. The case was then continued "by order of Court for Advisement." In August, nearly two months after the repeal of the Ten Pound Act, the case was tried by a jury which found for the appellant Wason the sum of 1 shilling and 6 pence in damages and costs of courts amounting to £7 ls 8d.[48]

Strafford County Cases:

In the Strafford County Inferior Court, there were three cases in which that court also may have ruled against the act's constitutionality: those of *Jonathan Gilman v. Benjamin Butler*, *Richard Perkins v. Solomon Lord*, and *Ebenezer Horn v. Samuel Austin*. Although the scant surviving court records are inconclusive, there are several reasons to believe that such rulings were made. First, the language used in the court's *Book of Judgments and Levies* is very similar to that recorded in the Rockingham County Inferior Court's *Minute Book*. The cases were each appeals from decisions of justices of the peace and were heard upon appeal during the period when the Ten Pound Act was in force. In addition, the Strafford County Inferior Court, meeting usually at Dover, was very close geographically to its counterpart in Portsmouth. Presumably its judges were well aware of the actions of the Rockingham County judges and, more importantly, the same lawyers who presented the challenge to the Ten Pound Act at Portsmouth (Samuel Sherburne, John Sullivan, John Pickering) frequently practiced in the Strafford County courts. In the three Strafford County cases, all that is known for certain is that the Inferior Court overturned the decision of the local justice of the peace before whom the cases had been originally tried on the ground that the justice in each case had exceeded his authority. In each case:

> It appear[ed] to the Court that the Justice could not by the law of this state, nor by the Constitution hold forth Cognizance of the original Plea-It is therefore ordered by the Court that the Action be dismissed and that the appelt. recover against the appellee Costs of Court....[49]

Summary:

Thus ended the Ten Pound Act cases insofar as the involvement of the Rockingham and Strafford County Inferior Courts were concerned. In the period of just over one year, the Rockingham County court had ruled the Ten Pound Act to be unconstitutional in at least six cases. The episode had begun in February 1786 when Sherburne made his constitutional challenge in *Tarlton v. Wallace*. The court agreed with Sherburne in *Tarlton* and handed down its decision in that case in May. This action had been followed by four other such rulings in its May term in the cases of *Furber v. Macgregore*, *Cate v. Treferrin*, *Mason v. Furber* and *French v. Bartlet*. Then, six months later in its November term, the court once again held the Ten Pound Act to be unconstitutional in *Young v. Davis*. In the interim the court may well have made the same ruling in the two *Kelley v. Duty* cases - although the court records do not prove this. And, finally, in the case of *Hills v. Wason*, the court almost certainly would have made the ruling against the act had it not already been repealed.

THE GENERAL COURT REACTS

The actions of the Rockingham County Inferior Court, of course, did not take place in a vacuum. On the contrary, they had fueled a political and constitutional crisis of significant proportions. Articles in the state's newspapers debated the propriety of the court's actions, as did at least a few important men in their private correspondence. Angry petitions were submitted to the legislature and that body increasingly became the forum for the debate over jurisdictional challenges to the Ten Pound Act and the legislature's power to enact it.

Reaction to the rulings in May was sharply divided as news of the actions quickly spread throughout the state. Conservatives (who tended to be creditors) were generally pleased. Not only had the continued viability of one specific pro-debtor law been called into question, but they had found in the courts a more general vehicle to stem what they saw as a rising tide of populist legislation and a check on the legislative despotism they feared. As Plumer wrote on May 31:

> The aspect of public actions in this State are gloomy. Money scarce, business dull and our Feeble government unhinged. [But] our courts of law are firm, and i, n these degenerate days dare to be honest. The Inferior Court of Common Pleas have resolved that the Law authorizing justices to try actions under £l0 is unconstitutional.... I am glad the Court have had firmness to act their own opinion. *If our elected government is long supported, it will owe its existence to the Judiciary. That is the only body of men who will have a effective check on a numerous Assembly*.[50] (Emphasis supplied)

On the other hand, debtors were not at all pleased. In their view the elite, particularly the lawyers and courts, had conspired, once again, to turn back a measure designed to help them in a period of economic depression.

Also angered were the losing parties (all of whom ironically were creditors) in the five cases in which the Inferior Court had reversed the decisions of the justices of the peace. Within days of the Inferior Court's May 1786 rulings, two of these parties submitted angry petitions to the legislature at its June session at Concord. In both instances the petitioners were politicians of note in the state. On June 6, James Macgregore, in Concord, submitted a lengthy petition to the General Court in which he related what had happened in the trials before the justice and the Inferior Court, complaining:

> ...the said Joshua being brought before a Justice, for Plea gave that a Justice of the peace had no right to take cognizance of any matter where the damages alleged ammounted to more than forty shillings, which plea to the Justice having considered and overruled.... From which Judgment the said Furber appealed to the Inferior Court of Common Pleas...that upon the full hearing of the partys by their Council, the said Inferior Court, did Determine that the said Furber plea is good and that a Justice has no right to try any matter where the Damages aleged ammount to more than Forty shillings....[51]

Macgregore then asked the legislature what he could do to recover the damages which he felt Furber owed him and what he could do to prosecute such cases in the future. As he said:

> That by the Determination of the said Inferior Court your Petitioner has been put to great Cost and has Sustained Damages ammounting...to the sum of Twenty Seven pounds, fourteen shillings & ten pence, besides which he is greatly impeded in the collection of the Exise as he knows not in what manner to inforce the payment of any sum or sums due to him where the ammount is between forty shillings and five pounds which is the case in many instances....[52]

Macgregore concluded, asking the legislature "to restore him in some way to his Law or other ways order him a restitution of the damages he has sustained when pursuing a plain Law of the State...." He then attached an account specifying the £27 pounds in costs he faced-all because that law "is by the Hon.bl Justices of the Inferior Court Judged unconstitutional & the Cause by them Dismised."[53]

The other petition, dated June 12, 1786, was submitted by Thomas Bartlet as attorney for Joseph Hall Bartlet. Thomas Bartlet, who had been the justice of the peace in *Wallace v. Tarlton*, was also a veteran House member who would later serve in that chamber as Speaker. Bartlet's petition went beyond Macgregore's; his called for the impeachment of the Inferior Court judges. First, he described what had happened in *Bartlet v. French* at the JP trial:

> Your Petitioner having full faith to the Laws of the State of New Hampshire...in order for to Recover his money brought an action agreeable to the Laws of Said state before a Justice of the Peace for Said County of Rockingham and Recovered Judgment against Said French.

Bartlet then denounced the action of the Inferior Court judges:

> the said French appealed to the then next Inferior Court...at which Court the said appeale was Entered and *to his great surprise the Justices of Said Court by the assistance of the Bar were in there own opinion wiser than the whole Legislature* & would not Sustaine Said action but Dismised the Same and ordered your Petitioner Contrary to Law for to Pay a bill of cost beside Loosing his Debt. (Emphasis supplied)

Bartlet concluded:

> Wherefore your Petitioner humbly Prays your Honours for to take his Case under your wise Consideration *& Impeach said Justices for Male Conduct* and that they may be Tried before the Senate and if it Should appeare that they have acted Contrary to Laws that they may be Dismissed from there Said office and others may be appointed in there stead, that will make the Laws there Rule of Conduct....[54]

These petitions reached the legislature at a time when they were under the increased pressure from the debtor party to enact even more legislation to relieve their burdens. Now the legislators were faced with the action of the Inferior Court seeking to turn aside one of the debtor laws they had passed. In the House, in its June session, several important events occurred, all in rapid succession. By the end of the month, the House had put itself on record squarely in opposition to the actions of the Rockingham County Inferior Court.

Repeal or Revision:

The first action, though, was an attempt on June 15, led by conservatives, to repeal the act. This failed overwhelmingly, 16 to 64, with only the usual pro-creditor members from the Portsmouth area and a few other conservatives joining to repeal the law. A majority must have felt there was a need to reconsider some of the law's provisions for, on the following day, the House appointed a committee of five members to "take under consideration" the Ten Pound Act, "and to report such alterations they may judge necessary." The Senate, likewise, joined the committee, naming two of its members to it. The committee, chaired by Matthew Thornton, reported back on June 22, recommending two alterations in the act. The first one was that, at the request of either party at the trial of the justice of the peace, the justice would have to call for a jury to hear the case; the second was that appeals from this judgment could go to either the Inferior or Superior Court-at the appellant's option. The House voted to accept the report with an amendment

that the appeal would go directly to the Superior Court only (thereby bypassing the Inferior Court). The report was sent up to the Senate, which took no action on it.[55]

Reaffirmation:

On the same day, the House considered Macgregore's petition and passed two sternly-worded resolves in response, affirming the law's constitutionality and instructing the judges to abide by and respect it.

> Therefore Resolved that said Act *is a Constitutional Law of this State and ought to be observed as such*--
>
> And be it further Resolved that the Judgment of the Inferior Court aforesaid be and hereby *is rendered null and void* and that the said Macgregore shall have liberty & he is hereby impowered to enter his said Action at the Superior Court of Judicature....[56] (Emphasis supplied)

The resolves were sent up to the Senate, but it again took no action on them. Perhaps in response to the Senate's non-action, the House next, on June 27, considered and voted that there should be no further action in all the cases until the General Court could further consider the affair. As the *House Journal* shows:

> Upon reading and considering the Petition of Joseph Hall Bartlet, Voted, That in all actions brought by appeal to the Inferior Court of Common Please, in the County of Rockingham, that exceed forty shillings, which the Court did not sustain, there be no further process until further order of the General Court.[57]

This resolution was sent up to the Senate, which responded that, "The Senate are of opinion that the Vote of the honble. House, on the within Petition does not constitutionally come before them for their consideration," and there was no further action by the legislature, which then adjourned until September. The legislature, however, had been made aware of the actions of the Inferior Court and the House had and responded twice with clear directives for the judges to abide by the act.[58]

Reconsideration:

When the legislature re-convened in Exeter, in September, the pressure to enact paper money and other pro-debtor laws was at its greatest. Against this backdrop, the General Court was presented with a second petition from James Macgregore, submitted on September 13. The new petition asked why there had been no action on his previous petition:

> ...that from the more Important Business (as he presumes to think) then before the Honbl. Court, this matter was not then decided upon.

He stated that, as excise master, he needed a means to collect debts owed him in order to pay the state its share of the tax, however:

> ...by the present Determination of the Court of Law, he conceives it verry unsafe for him to attempt the recovery of any considerable sums.
>
> Wherefore, he Humbly Prays your Honours as the Guardains of the Liberty and Property of all the free subjects of this State, to direct him to some mode for the recovery of the monies due him...[59]

In response, on September 15, the House and Senate appointed another committee to consider altering the Ten Pound Act. This committee, however, reported back on the following day that "the said act stands in need of no alterations or amendments." Thus, the legislature had hardened its position and decided to stand by its law. At this point the House may have felt it had successfully curbed the defiant Rockingham County judges and ended the problem. Such was not the case, however, as they soon discovered in early November when the Inferior Court issued its judgment in *Young v. Davis*. The House responded on December 25 with a roll call vote, once again reaffirming its support for the Ten Pound Act. The vote asking "whether said act is a constitutional act," passed in the affirmative by a margin of 44 to 14. Then, perhaps in preparation for possible action against the Rockingham County Inferior Court judges, the House voted on December 27 to instruct its Clerk, John Calfe, himself a member of that court, to write to the clerk of the Rockingham County Inferior Court "and request of him, a Copy of the proceedings of said Court in each Action brought before them by appeals from the Justices of the Peace, in cases which exceeded forty shillings." Having taken this action, the legislature put aside the Ten Pound Act controversy and adjourned on January 18 until June.[60]

Impeachment Considered:

According to Plumer, by the end of April 1787, the whole affair "after much ado [had] vanished in smoke."[61] In June 1787, however, the controversy flared up again. Two incidents may have triggered the sudden climax. First, there was the case of *Hills v. Wason*, which was tried before Justice Neal at Londonderry on April 23, 1787. This case reminded the state's leaders that the Ten Pound Act was still under constitutional challenge. It was therefore apparent that the confusion about where to bring civil suits of under £lO needed to be resolved. But it was the second incident, the filing of James Macgregore's third petition on June 19, which was the catalyst for the final showdown between the legislature and the court.

Macgregore, in his third petition, complained of the mounting debts he faced "owing to the want of power to collect the same by the Laws." He criticized the General Court for neither resolving the confusion over the Ten Pound Act in general or granting him any particular relief; "for want of a determination upon the Justices Act (so called) he has lost a verry considerable part of the Monies due him...." In addition he owed the state a large sum; "whilst the power of the Honbl. Court is called in question in the matter of the Justices Act it is pecularily distresing to him that the Honble. Treasurer should think

himself justified to Issue an Extent against him...." He asked the legislature to "restore him to his law" and grant him a delay in paying the state its share of the excise tax on liquor. On June 20, the House voted to form a committee to consider the petition, which the Senate joined on the same day. This committee reported back on June 22 and recommended granting Macgregore's request to delay making excise payments to the Treasury.[62]

With the immediate issue of Macgregore temporarily resolved, matters took a dramatic turn which eventually brought the constitutional crisis to its conclusion. One of the House members, possibly Thomas Bartlet, had drawn papers "purporting to be an impeachment of the Honbl. Justices of the Inferior Court of Common Pleas for the Court of Rockingham." On June 26 this member, along with several others, mounted a formal attempt to initiate the impeachment proceeding by bringing the issue to a vote.[63]

The motion to read the impeachment papers passed by the margin of 31 to 25. Again the pro-debtor members voted to proceed with the impeachment process and those opposed were the same conservatives who had been against the Ten Pound Act and other such laws (John Sparhawk, John Pickering, George Gains, John Prentice). Although the impeachment papers were read, supporters of the judges managed to get any further consideration of the matter postponed until the following day.[64]

Justices' Conduct "Justified:"

On June 27, the House appointed a committee of thirteen members, led by John Sparhawk, "to take under consideration" the impeachment papers received the day before. This committee reported back later that afternoon, but instead of recommending the impeachment of the judges, it dramatically sought a reversal in the House's position. They reported "as their Opinion that the said Justices are not Impeachable for Mal-administration as their conduct is justified by the constitution of the State."[65]

The House then voted, 35 to 21, to receive and accept the committee's report without amendment. Another committee was then formed to draft a bill to repeal the Ten Pound Act. On the following day, this committee reported back a bill to repeal the act and on a roll call vote, the House voted to repeal the act by the margin of 32 to 18. The Senate quickly followed suit and, remarkably, the Ten Pound Act had been repealed and the crisis averted.[66]

THE IMPACT AND SIGNIFICANCE OF THE NEW HAMPSHIRE PRECEDENTS

And so, in the brief span of just two days the New Hampshire House of Representatives had dramatically reversed itself. It had switched from considering the impeachment of the four defiant judges of the Rockingham County Inferior Court, to acceding to the judges' view and voting to repeal the law that the judges had ruled was unconstitutional. More

significantly, the legislature clearly recognized the court's authority to declare laws to be unconstitutional when the House voted that the judges' "conduct" was "justified by the constitution of this State." Indeed, the Inferior Court's "conduct" had consisted of a very clear-cut exercise of judicial review.

The court's unyielding stand had forced the legislature to reexamine its law and, ultimately, to repeal it. By so doing, the legislature sanctioned the notion that courts of law could legitimately declare acts of the other two branches of government to be null and void whenever those acts violated the "higher law" embodied in a constitution. In many ways the development of judicial review in New Hampshire anticipated the national experience, which was only then emerging in America. For, as we shall see, the Ten Pound Act cases appear to have been the strongest, clearest example of a court's exercise of the doctrine from among all the pre- Convention precedents.

Because the power of judicial review was not expressly provided in either the United States Constitution or in any of the early state constitutions, some scholars have challenged the legitimacy of the court's exercise of it, claiming that exercise of the power was a usurpation by the courts in gross violation of what the Framers intended. Opposing scholars have argued that the Framers did intend the courts to exercise the power, but because they viewed it as a normal function of the judiciary, they felt no need to make express provision for it. As a result of this debate, a great deal of effort has been expended in analysis of the debates at the federal Constitutional Convention, in the writings of the delegates subsequent to the Convention, in the debates over the ratification of the document, and in a search for pre-Convention precedents of judicial review.[67]

Even if it cannot be proved that the Framers really intended the courts to possess such power, judicial review was the natural outgrowth of ideas that were taking shape at about the same time as the drafting of the Constitution. Most of these ideas were the result of Americans' experiences with their state governments during the decade following the Declaration of Independence. During that tumultuous decade, as historian Gordon Wood has demonstrated, a fundamental transformation in political thought occurred which altered American attitudes toward politics and law, redefining such political notions as popular sovereignty, republicanism and the nature of representation. As Americans attempted to incorporate these evolving concepts into their new constitutions there was a further rethinking of such constitutional principles as the separation of powers, checks and balances and limited government. This process was primarily a reaction to the "excesses" of the state legislatures and their virtually unchecked powers which had spawned fear among conservatives and moneyed men, in particular, of a legislative despotism. As these changed attitudes took hold, there was a growing realization that a strong, independent judiciary was needed in order for a balanced, limited constitutional system to succeed. These factors, and no doubt others less obvious, led to the doctrine of judicial review by the courts.[68]

By the war's end the inherent weaknesses of America's political institutions had grown painfully obvious to many Americans. Although most of the early state constitutions had

separation of power clauses and paid lip-service to the importance of three independent, coordinate branches of government, in practice, these provisions had been largely ignored. As Jefferson wrote in 1781 concerning the Virginia Constitution:

> All the powers of government, legislative, executive, and judiciary result to the legislative body. The concentrating [of] these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands. 173 despots would surely be as oppressive as one.... An elective despotism was not the government we fought for.[69]

By the mid-1780's, many of the state legislatures had begun interfering with the rights of individuals guaranteed by the state constitutions, particularly in their bills of rights. Madison wrote that it was this infringement upon "the security of private rights and the steady dispensation of Justice" that, more than anything else, had produced the Federal Constitutional Convention. In particular, nearly every state had enacted laws adversely affecting the rights of creditors, such as paper money and legal tender laws, laws curtailing the right to trial by jury (such as the Ten Pound Act), bankruptcy measures, and private acts interfering with decisions of courts in individual cases. The struggle between creditor and debtor even threatened public order. Shays' Rebellion especially brought that point home and demonstrated the need for a stronger national government. Conservatives throughout the country increasingly believed that the state governments and the ineffectual Confederation were inherently too weak to cope with the problems of a growing nation in peacetime.[70]

By the time of the Constitutional Convention of 1787, courts in several states had issued decisions that challenged laws passed by their legislatures. Altogether, over the years, only about nine instances of this kind have been cited as having occurred before the delegates to the Constitutional Convention met at Philadelphia beginning in May 1787. Even today, scholars disagree over the validity of several of these precedents. After conducting an exhaustive analysis of what several of the courts actually held, two influential studies have discounted all but two of the precedents. Other scholars have advanced arguments in support of a third.[71]

In several of the other cases, however, it appears that men of that day believed that the courts in question had voided laws on constitutional grounds and this impression, in itself, contributed to the doctrine's development elsewhere. This misperception was understandable when one considers that there was, during this period, virtually no official reporting of judicial decisions. Instead, knowledge of cases of this kind often depended on second-hand newspaper accounts, pamphlets, private letters and word of mouth. The cases sometimes gained notoriety only after aggrieved parties had petitioned their legislatures and members of those bodies instituted actions against the judges who had been involved in the decisions. Thus, even if the other cases had not been true precedents, many men, including delegates to the Constitutional Convention, could have believed they were. As one commentator has concluded, "What the materials do show incontestably, as other records of the time confirm, is that the idea of judicial review was in people's minds. The power had been repeatedly asserted, seldom if ever flatly

negatived, and on at least three occasions actually exercised before the Constitution was signed."[72]

All three of these "actual" precedents involved legislative encroachment on the same basic constitutional right-the right to jury trial. These cases, the Ten Pound Act cases, *Trevett v. Weeden* (R.I., 1786), and *Bayard v. Singleton* (N.C., 1787), each enjoyed considerable notoriety in their day and were, no doubt, known to many of the Convention delegates. By far, however, the New Hampshire cases were the most important.

The Rhode Island Case:

In *Trevett v. Weeden*, the Superior Court for the County of Newport, in effect, decided that a Rhode Island law passed in August 1786 was unconstitutional because it provided no right to jury trial or provision for appeal. The law in question was intended to enforce the state's recently enacted paper money laws by providing criminal penalties for any person who refused to accept the bills. Instead of allowing offenders to be prosecuted through the established methods of judicial practice, the act provided that complaints of violations were to be brought to judges of the Superior Courts, who were directed to convene special courts to try the cases without a jury. The penalties were fairly severe. Those convicted faced heavy fines plus possible jail terms. Soon after the law's passage, merchants and creditors complained vociferously that the law was unconstitutional. A test of the law quickly arose.[73]

In September, John Weeden, a butcher, refused to accept payment in the bills for the purchase of meat from a customer named John Trevett. Trevett then, under the terms of the new law, filed a complaint with the Superior Court and, on September 25, arguments were heard in the case. Weeden was represented by James Varnum, who subsequently published his plea in a pamphlet which was circulated widely throughout the country, including at Philadelphia during the Convention. Varnum's argument incorporated most of the emerging premises for judicial review. He first harked back to Coke and Otis, stating that laws contrary to common right and reason were not law and that courts should *construe* such laws in such a way as to bring them into conformity with the common law. But he focused his argument on the emerging notion that there was a distinction between the fundamental law embodied in a constitution and ordinary statute law enacted by a legislature. He argued that the fundamental law must always take precedence over statutory law and, further, that it was the duty of the judiciary to make certain it did. As Varnum put it, "the Legislature have the uncontrollable power of making laws not repugnant to the Constitution: the Judiciary have the sole power of judging those laws, and are bound to execute them; but cannot admit any act of the Legislature as law which is against the Constitution." This, he argued, was because the principles of the constitution "were ordained by the people anterior to and created the powers of the General Assembly." The "powers of legislation," he went on to say, "in every possible instance, are derived from the people at large, are altogether fiduciary, and subordinate to the association by which they are formed." Only the people-and not the legislature-could alter the fundamental law which they had created and the judiciary, as

the agents of the people, were obliged "to reject all acts of the Legislature that are contrary to the trust reposed in them by the people."[74]

Varnum's arguments, eloquent and compelling as they were, faced a monumental obstacle-Rhode Island had no written constitution. The state had been founded under a charter granted by Charles II in 1663 and had continued to operate under that document, even after independence. Accordingly, Varnum was forced to build his case for both a fundamental "higher law" and a right to jury trial upon that charter, the common law and Magna Carta.

Significantly, the judgment of the court, issued on the following day, does not include any ruling against the constitutionality of the act. It is primarily this fact that commentators cite in rejection of *Trevett v. Weeden* as a pre-Convention precedent. The court record simply shows that the judgment was as follows:

> "Whereupon, all and singular the premises being seen and by the Justices of the Court aforesaid fully understood: it is Considered, Adjudged and Declared that the Said Complaint does not come under the Cognizance of the Justices here present, and that the same be and is hereby dismissed."[75]

But according to a newspaper account at least three of the five judges deciding the case stated orally in court, when delivering the judgment, that the court's refusal of jurisdiction resulted from their belief that the exclusion of jury trial made the law unconstitutional.[76] Certainly many of the state's political leaders believed that the decision had been made on constitutional grounds because, upon hearing of the action, the governor called the legislature into special session and the judges were promptly summoned before that body. The resolution, summoning the judges, passed by both houses and addressed to the sheriffs throughout the state, stated:

> Whereas it appears that the honorable the judges of the Supreme Court of Judicature, at the last September term...*adjudged an act of the Supreme Legislature of this State to be unconstitutional and so absolutely void*; and whereas it is suggested that the said judgment is unprecedented in this State and may tend to abolish the legislative authority thereof: it is therefore voted and resolved that all the justices ...be forthwith cited...to give their immediate attendance upon this assembly, to assign the reasons and grounds for the aforesaid judgment.... (emphasis supplied)[77]

Before the legislature-in what amounted to an unofficial impeachment proceeding-the judges gingerly avoided a direct challenge to the lawmaking power of the legislature. Only three of the five judges attended as two claimed to be ill. Of these, only Justice Howell said anything of consequence. He objected to the legislative investigation of the court's action and stressed that the independence of the judiciary must be maintained. He offered that if the order "by which the Judges were [called] before the House might be considered as calling upon them to assist in matters of legislation" they would comply,

but if the order were intended to "render the reasons for their judicial determination," then they would decline because for this "they were accountable only to God."[78]

Howell then demonstrated to the legislature, "by a variety of conclusive arguments" that the law, in his view, "was unconstitutional [and] had not the force of a law, and could not be executed." At this point, though, his defiant posture became one of respectful denial. He insisted that "the legislature ha[d] assumed a fact in their summons...which was not justified or warranted by the record. The plea of the defendant in a matter of mere surplusage mentions the act of the General Assembly as unconstitutional and so void; but the judgment of the court simply [wa]s that the information [wa]s not cognizable before them. Hence it appears that the plea ha[d] been mistaken for the judgment." He concluded with the statement that "[w]hatever might have been the opinion of the Judges, they spoke by their records, which admitted of no addition or diminution" and that record indicated that the court had only taken the narrow, technical legal position that they could not take jurisdiction in that particular case; they had claimed no general power to disregard or nullify any act of the assembly.

One can only conclude that the Rhode Island court, apparently believing that it lacked constitutional and political footing to maintain a direct challenge to an act of the legislature, chose to equivocate by hiding behind a narrow technical judgment. There was a move to impeach the judges, but this ultimately failed. When the judges stood for reelection in May 1787, however, the people of Rhode Island expressed their disapproval. Four of the five were voted out of office. The one judge to enjoy reelection had maintained his silence throughout the affair.[79]

The North Carolina Case:

In *Bayard v. Singleton*,[80] a North Carolina Superior Court eventually (but with considerable hesitation) declared an act of that legislature unconstitutional and void because it denied the plaintiff his right to jury trial. The law in question, passed in 1785, directed the courts to dismiss, on motion of defendants and without regard to the merits of a particular case, any suit brought before them which sought to recover lands sold under the state's Revolutionary confiscation act. The plaintiff, Bayard, brought such a suit against Singleton at the May 1786 term of the Superior Court. Singleton's attorney immediately moved for dismissal. Bayard's co-counsels, James Iredell and William Davie, who would both later become justices of the United States Supreme Court, challenged the law as unconstitutional and sought a jury trial before the court. Unfortunately, the pleas of the attorneys were not recorded by the court reporter, whose account of the case was not published until 1796. That account only indicates that after the justices heard "long arguments from the counsel on each side on constitutional points," the justices made comments of their own regarding the separation of powers. They also hinted their belief that the law was unconstitutional. They then continued the case for advisement.[81]

During the winter of 1786-7, the legislature called the justices before them to explain their action. An attempt to instruct the justices to abide by the act failed by a wide

margin, 58 to 24. Thereafter, a committee appointed to investigate the matter reported that the justices had acted improperly by "disregarding or suspending one of the legislature's acts," but it recommended no disciplinary action. Another committee then recommended that the judges be discharged from the investigation because "they had not been guilty of malpractice in office."[82]

At the May 1787 term of the court, the defendant moved, once again, for dismissal. The court sought a compromise attempting unsuccessfully to persuade the defendant to voluntarily submit to a jury trial. The report states that the justices "then, after every reasonable endeavor had been used in vain for avoiding difference between the legislature and the judicial powers of the State, at length with much reluctance," denied the motion, took jurisdiction of the case and granted a jury trial. The jury then returned a verdict for the defendant. The report relates what was supposed to have been the court's reasoning, namely that the act was unconstitutional because "by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury."[83]

New Hampshire's Contribution:

Even more than the Rhode Island and North Carolina cases, the New Hampshire cases were the most completely realized exercise of the power of judicial review which fully anticipated *Marbury v. Madison*. The New Hampshire cases were free of the objections one could raise in each of the others preceding the Convention, including the Rhode Island and North Carolina cases. In the Ten Pound Act cases, all members of the court had not only asserted the power, but actually used it. There had been no equivocation or delay by the judges. They had stated clearly in their judgments from the outset their declaration that the Ten Pound Act was "manifestly contrary to the Constitution" and that, as a consequence, they must disregard it. They then voided the judgments obtained under it. Most significantly, the judges held their ground against the legislature for over a year until, in the end, the law they opposed was repealed.

Sherburne's argument, as recorded in *Treferrin v. Cate*, anticipated the classic articulation of the doctrine of judicial review by Hamilton in *The Federalist*, #78 and Marshall in *Marbury v. Madison*: the superiority of the Constitution over statutory law, the limitation of the power of the legislature under the Constitution, the role of courts to interpret the fundamental law, and the unique responsibility of courts to be "the Constitutional Barriers between the power of the Legislature and the Liberty of the people." In the years to come, such notions would be established as the most basic principles of American constitutional law.

ENDNOTES

1. 1 Cranch 137 (U.S. 1803).

2. 2 Dallas 409 (U.S. 1792).

3. 3 Dallas 171 (U.S. 1796).

4. For other instances in which federal courts or individual judges either asserted or tentatively exercised judicial review, see: *United States v. Todd*, 13 Howard 52 (U.S. 1794); *Vanhorne's Lesse v. Dorrance*, 2 Dallas 304 (PA 1795); and *Calder v. Bull*, 3 Dallas 386 (U.S. 1798).

5. 5 *Laws of New Hampshire* 101.

6. Charles Warren, *The Making of the Constitution* (Boston: Little, Brown & Company, 1937), pp. 336-7, quoting the following dispatch from Portsmouth, NH that was carried in the *Independent Gazetter*, *Pennsylvania Packet*, *New York Daily Advertiser*, and *New York Journal*, and distributed in Philadelphia on July 19, 1787: "The General Court during their late session repealed the ten pound act, and thereby justified the conduct of the Justices of the Inferior Court who have uniformly opposed it as unconstitutional and unjust."

7. Albert S. Batchellor, ed., *Early State Papers of New Hampshire* (Manchester, N.H.: John E. Clarke, Public Printer, 1891), 20:9.

8. Ibid., p. 15.

9. Ibid., pp. 15-16.

10. Ibid., p. 24.

11. Ibid., pp. 16, 26.

12. Ibid., pp. 1-15.

13. Ibid., pp. 12-13.

14. Ibid., pp. 28-29; Julius Goebel, Jr., *History of the Supreme Court of the United States, Vol. 1: Antecedents and Beginnings to 1801*, II vols. (New York: The Macmillan Company, 1971), 1: pp. 109-118.

15. *Laws of New Hampshire*, 4: 34-36.

16. 60 *NHSP* , 20: 12.

17. Records of the Inferior Court of Common Pleas for Rockingham County, New Hampshire State Archives, Concord, N.H.; hereinafter cited as Records.

18. Ibid.

19. Ibid.

20. Ibid.

21. Ibid.

22. Ibid.

23. *Minute Book of the Inferior Court of Common Pleas for Rockingham County. February 1786 Term*, New Hampshire State Archives, Concord, N.H.

24. Records; *Minute Book.*

25 Records.

26 Ibid.

27. Ibid.; William Plumer, *William Plumer's Book*, William Plumer Papers, New Hampshire State Library, Concord, N.H., pp. 244-7.

28. Records; Plumer, *William Plumer's Book*, pp. 244-7.

29. Records.

30. Ibid.

31. Ibid.

32. Ibid.

33. Ibid.

34. Ibid.

35. Ibid.

36. Ibid.

37. Ibid.

38. Ibid.

39. *Minute Book, May 1786 Term*.

40. Records; *Minute Book*.

41. Records; *Minute Book*.

42. Records.

43. Ibid.

44. *Minute Book, November 1786 Term*.

45. Records.

46. Ibid.

47. Ibid.

48. Ibid.

49. *Book of Judgments and Levies*, Strafford County Superior Court, Dover, N.H.

50. Letters, Plumer, p. 384.

51. Petitions to the General Court, New Hampshire State Archives, Concord, N.H., hereinafter cited as Petitions.

52. Ibid.

53. Ibid.

54. Ibid.

55. *NHSP*, 20: 634, 638, 592, 652.

56. *NHSP*, 20: 652.

57. *NHSP*, 20: 666.

58. Ibid.

59. Petitions.

60. *NHSP*, 20: 704, 759, 762.

61. William Plumer, *Plumer's Book*, p. 247.

62. Petitions; *NHSP*, 21: 60, 67, 24.

63. *NHSP*, 21: 73.

64. Ibid.

65. *NHSP*, 21: 78-9.

66. *NHSP*, 21:79, 83, 31.

67. See generally, Louis E. Boudin, *Government By Judiciary*, 2 vols. (New York: Russell and Russell, 1932); Edward S. Corwin, *The Doctrine of Judicial Review* (Princeton, NJ: Princeton University Press, 1914); William W. Crosskey, *Politics and the Constitution in the History of the United States*, 2 vols. (Chicago, IL: The University of Chicago Press, 1953), Vol. 2; Julius Goebel, Jr., *History of the Supreme Court of the United States, Vol. 1: Antecedents and Beginnings to 1801* (New York: The Macmillan Company, 1971); and Raoul Berger, *Congress vs. the Supreme Court* (Cambridge: Harvard University Press, 1969).

68. Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, NC: 1969).

69. Thomas Jefferson, *Notes on Virginia*, ed. Peden, p. 120, quoted in Wood, *Creation*, pp. 451-2.

70. Max Ferrand, *The Records of the Federal Convention of 1787*, 4 vols. (New Haven, CT: Yale University Press, 1911), Vol. 1: 134, quoted in Berger, *Congress*, p. 10; Berger, *Congress*, pp. 8-46.

71. Leonard W. Levy, *Judicial Review and the Supreme Court* (New York: Harper & Row, 1967), pp. 1-42; Crosskey, *Politics*, 2: 938-75; Berger, *Congress*, pp. 8-46.

72. Henry M. Hart, Jr., "Professor Crosskey and Judicial Review," 67 *Harvard Law Review* (June 1954): 1463.

73. For a more complete discussion of this case, see: Goebel, *History of the Supreme Court*, pp. 137-141; and Crosskey, *Politics*, 2: 965-8.

74. Ibid.; James M. Varnum, *The Case, Trevett against Weeden, Tried before the Honourable Superior Court in the County of Newport, September Term, 1786.*

75. *Rhode Island Acts and Resolves*, October 1786, pp. 5-6.

76. Crosskey, *Politics*, p. 966.

77. *Rhode Island Acts and Resolves*, October 1786, pp. 3-7.

78. Ibid.

79. Varnum, *The Case, Trevett against Weeden*; Goebel, *History of the Supreme Court*, pp. 137-141; Crosskey, *Politics*, 2: 965-8.

80. 1 Martin 42 (N.C. 1787).

81. For a more complete discussion of this case, see: Goebel, *History of the Supreme Court*, pp. 129-131; and Crosskey, *Politics*, 2: 971-4.

82. Ibid.

83. Ibid.

This outstanding survey on the historical development of Article 37 of Part I is as remarkable for its neutrality as for its scholarship. When all is said and done, however, the recurring theme of that development is that whenever the Legislature defers to the Court on a particular matter, that deference is taken by the Court as an acknowledgement of full judicial authority over the subject, whereas whenever the Court defers to the Legislature, it is treated by the Court merely as an isolated instance of courtesy, or "comity," the Court otherwise claiming full authority over the subject. In this way does the power of the Court – in its self-appointed role as final authority of the meaning of the Constitution – always grow, and that of the Legislature always shrink. A conscientious member of the Legislature can hardly help cringing at Attorney McNamara's concluding with the mantra that "the New Hampshire Supreme Court's role is that of guardian of the New Hampshire Constitution;" was the Constitution not surviving very nicely in the stewardship of the Legislature in the days when the adjudicatory branch confined itself to adjudication? And how does an all-powerful judiciary, whose authority knows no bounds other than the sense of self-restraint of its members, square with the fundamental constitutional concept of limited self-government?

Richard B. McNamara:

The Separation of Powers Principle and the Role of the Courts in New Hampshire

(From The New Hampshire Bar Journal, June 2001, pages 66-87)

Questions about the role of each of the three branches of New Hampshire's state government have engendered what is, by historical standards, an extraordinary amount of litigation in the last quarter century. Most of this litigation has centered around the role of the courts. A judiciary which is separate and independent from the other branches of government, a radical idea in the 18th century, has in the 217 years since the enactment of the New Hampshire Constitution took effect, become accepted and established. Yet, what the powers of the courts, the least democratic branch of government, are or should be, is far from settled.

An analysis of the decisions of the New Hampshire Supreme Court and its predecessors over the centuries demonstrates adherence to certain immutable principles, but an evolution of the role of the courts and of their relation to other branches of government. In considering this evolution, it is, ironically, as important to consider cases in which power is exercised without reference to the principle as it is to consider the

relatively few cases in which the principle is explicitly discussed. It is the purpose of this article to briefly trace the development of the separation of powers principle in New Hampshire and to provide a description of the role of the New Hampshire judiciary in the New Hampshire system of government since the Constitution of 1784 took effect.

I. THE THEORETICAL BASIS FOR THE PRINCIPLE

To understand the development of the principle, it is necessary to examine, at least in a cursory way, the theory of the principle.

The theory of mixed government, i.e., diffusion of governmental power, is often said to extend to Greek and Roman times.[1] While some believe that the mixed government of the Roman republic was the precursor of the separation of powers principle, others note that a division of governmental power into separate executive, judicial and legislative branches never existed in antiquity.[2] In any event, there is no dispute that a government of three separated branches, when proposed in the United States, was a theory, not a description of any then functioning republic. As one scholar has noted, "the *Federalist* presents its version of the separation of powers not as emerging from the practice of republics, let alone the English monarchy, but as one cure for the weakness and disorders of previous republics, including the American states which had been independent since 1776, and above all, the Federal Government under the Articles of Confederation."[3]

The principle of divided government was conceived as a check on absolute government. Nonetheless, many scholars consider Thomas Hobbes, perhaps the greatest exponent of absolute government, to be the creator of the social contract theory which provided the theoretical underpinning for the principle.[4] While Hobbes posited the equality of man, for him an equality of men did not imply equality of right to rule. He reasoned that since all men have an equal right to self-preservation which, by themselves, they cannot individually guarantee, they may contract with other men to give up their individual rights to an absolute sovereign so that in the end absolute government secures individual rights.[5] It was the English political philosopher John Locke who, drawing upon this social contract theory, developed the concept of a government which separated the legislative power from the executive, which he called the federative power — the power to conduct external affairs.[6] The French philosopher Charles, Baron de Montesquieu, refined Locke's analysis to transform Locke's executive power into the judicial power and Locke's federative power into the executive power.[7] Montesquieu argued for a mixing of hereditary, aristocratic and popular elements, a scheme which, of course, was rejected in the American Republics, the first governments to embody the separation of powers principle.

The concept of a government formed pursuant to a social contract was very real to the colonists. The Americans who rebelled against England did so because they believed that English law recognized inalienable rights which had been violated by the English Government. The purpose of their rebellion was to protect those rights. The framers of the United States Constitution were wary of a government which would become too powerful and threaten those rights. At the core of the framers' political philosophy is a

pragmatic, if not altogether cynical, view of human nature. As explained in the *Federalist*:

> But what is Government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[8]

Without doubt, this view was shared by the framers of the New Hampshire Constitution. The New Hampshire Constitutional Convention of 1781 stated that: "The love of power is so alluring that few have ever been able to resist its bewitching influence" and "[a] despotic government is that where any men or set of men have the power of making what laws they think proper, or executing them in their own way."[9] By the time the New Hampshire Constitution too effect in 1784, New Hampshire citizens had developed a 150-year-old political tradition. The New Hampshire Constitution of 1784 can best be understood considered in that historical context.

II. DEVELOPMENT OF THE SEPARATION OF POWERS PRINCIPLE IN NEW HAMPSHIRE IN THE CONSTITUTION OF 1784.

A. The Political History of the Province of New Hampshire Prior to the Revolution

New Hampshire never received a charter from the Royal Government. Rather, it was awarded to a proprietor, one Captain John Mason, who took no interest in the grant. In 1641, the four settlements existing in New Hampshire sought to be annexed by Massachusetts. In 1660, Mason's heirs sued in England to recover their grant and succeeded in obtaining a decree in their favor in 1677.[10] Thereafter, commissions issued by the King formed the basis of government in New Hampshire until the Revolution in 1775. The pre-Revolutionary period was characterized by a powerful executive, a subservient judiciary, and a weak Legislature.[11] The president, or governor as he was called after 1686, had extensive powers. He could, with the assent of the governor's council, appoint all public officers and justices of the peace as well as judges and suspend them for cause.[12] His council served as the upper house of the Legislature. The lower house, called the Assembly, was elected, but could be prorogued at the will of the governor who possessed the right to veto legislation.[13] Throughout the colonial period, the populace strongly suspected the integrity of the courts. In 1761, the commissions of all colonial judges were altered to make their tenure of office "during pleasure only." The judges were not paid a salary, but were compensated by the fees of their office.[14]Illustrative of pre-revolutionary litigation is the action of ejectment brought in

Hilton v. Fowler, described in the briefs of counsel in *Perkins v. Scott*[15] in 1875. Governor Wentworth and his wife were plaintiffs in interest in *Hilton v. Fowler*. Although the defendant prevailed at trial in 1761, appeal was taken to the Court of Appeal which consisted of Governor Wentworth and his council, which reversed the judgment and ordered judgment for the plaintiffs.[16] After the Revolution, the revolutionary legislature awarded the defendant a new trial.[17]

B. The Revolution of 1775

The first New Hampshire Constitution, which took effect on January 5, 1776, was a brief document which created a government of complete legislative supremacy. The Legislature had the authority to carry out all functions of government. The constitution of 1776 provided for a legislature, called the General Court, or General Assembly, which consisted of an elected house of representatives, and a Committee of Safety, a smaller group of 12 men selected by the House.[18]

The Committee of Safety was in session only when the Legislature was not in session from 1775 to 1778, but from 1778 to 1784, it was in continuous session.[19] The General Assembly delegated to the Committee of Safety broad authority to perform legislative, judicial, and executive functions.[20] The broad range of power possessed by the Legislature under the 1776 Constitution is illustrated by the statutes enacted by it. Between 1776 and 1778, the Legislature enacted laws: "establishing a system of courts, regulating voting, taxing citizens, providing for privateering against British ships, incorporating towns, issuing notes for the payment of bounty to enlisting troops, regulating the militia, re-establishing the common law, suppressing and persecuting dissenters, repairing roads, regulating prices, granting legislative relief in private disputes, and setting a bounty for wolves."[21]

All governmental power was concentrated in the Legislature, also called the General Court, and in local committees of safety to which authority had been delegated. The Legislature exercised judicial as well as legislative and executive power. The dissatisfaction with corrupt colonial rule led to a "tidal wave of new trial legislation;" the legislature became "the poor man's court."[22] This legislative response to a corrupt British judiciary would provide the first critical test of the machinery of the new government in *Merrill v. Sherburne* [23] in 1819.

The power vested in the legislature could be used in a summary fashion. The members of the House of Representatives "were elected not to administer a constitutional government, but to contend for the privilege of constructing such a government when time should be found for work of that kind."[24] The property of Tories was, in some cases, confiscated[25] and swift action was taken against those suspected of harboring anti-revolutionary views. The Committee of Safety was authorized to issue warrants for "any person whom the said Committee of Safety shall deem the safety of the commonwealth requires shall be restrained of his individual personal liberty or whose enlargement within this state is dangerous thereto."[26] The Committee was given the power of examination and trial and was given power to confine suspects in such way and for as long as required by the public good.[27] While records of trials of dissenters are scarce, historians have

concluded that "trials before the New Hampshire Committee of Safety in 1777 could not have differed much from the procedure in the French Revolutionary Tribunals."[28] Prosecutions during this period of time were sometimes pretextual and unfair.[29] Illustrative is the inquiry into the beliefs of Captain George Marsh of Stratham. In the forenoon of July 5, 1776, the General Court voted that the constable seize Marsh and keep him to be examined and tried on suspicion of being inimical to the liberties of the country. In the afternoon, the council and house, "taking into consideration the accusations laid against Captain George Marsh... a full hearing being had thereon by both houses and sundry witnesses having been sworn in and examined... it appears to this court that the said George Marsh has uttered many words against the liberties and privileges of the country: It is therefore voted that the said George Marsh confine himself to the farm which he now improves in Stratham, on pain of imprisonment, and that he recognize, in the sum of £100 pounds, with two sureties, for his good behavior... and that in the meantime he be disarmed by the committee of Stratham."[30]

The most famous trial of a loyalist by the Legislature was that of Colonel Asa Porter, who based his defense upon the principle of separation of powers, seeking a trial in the regular courts.[31] His defense was unsuccessful, and he was convicted and sentenced to indefinite confinement.[32]

None of the liberties which would appear in the constitution of 1784 existed. While such measures were no doubt necessary during a time of civil disorder, it did not take long for discontent with the 1776 Constitution to be expressed. A resolution passed by the Town of Newmarket in 1778 was illustrative of the concerns expressed:

> Respecting the Constitution of Government, we are of opinion that the present, tho' it appears to be free of right, is not so in fact, nor no other Government can be, when the same persons make themselves judges of their own laws and executors of their power which they give themselves as Legislators.[33]

By 1783, criticism was sharper still. An article published in a Portsmouth newspaper stated "the general assembly... exercises all the powers of government; they make the laws and appoint persons to judge of and execute them. Every judicial and executive officer of the State and all general and field officers are their servants... The members of the committee of safety... are their servants. The justices of the several courts... are their creatures; and all of the executive officers of State stand indebted to them for their existence - is it possible that Europe or even Asia itself can present a more perfect tyranny?[34]

Various attempts to pass a constitution were undertaken in 1778, 1781, and 1782, but all failed. The 1778 Constitution resembled the constitution of 1776. The 1781 and 1782 Constitutions contained provisions for a strong executive, but were defeated. Finally, in 1783, the present Constitution, which has been amended over 137 times since that time, was adopted and took effect in 1784.

C. The Constitution of 1784

The New Hampshire Constitution of 1784 must be considered in light of the experience of its framers. Perhaps their greatest achievement was to create a government of limited power when the need for a war constitution had passed, establishing a rule of law, rather than, like so many revolutionary regimes, a rule of blood.

The Constitution contained two broad divisions. Part I was called the Bill of Rights. Part II was called the Form of Government. In the 1784 Constitution, the office of the executive, then called the president, was relatively weak. The amendments adopted in 1792 strengthened the executive branch, providing that the governor could veto legislation subject to legislative override, changing his title from president to governor and eliminating his duty to preside over the senate. Indeed, the amendments to the Constitution adopted in 1792 were so extensive, that some judges in the 19th century referred to the state constitution as the "Constitution of 1792."[35]

The judicial power of the state was to be vested in courts established by the Legislature. Part II, Article 4 provided:

> Power of General Court to Establish Courts. The General Court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be holden, in the name of the state, for the hearing, trying, and determining all manner of crimes, offenses, pleas, processes, plaints, actions, causes, matters and things whatsoever arising or happening within the state, or between or concerning persons inhabiting or residing, or brought, within the same, whether the same be criminal or civil, or whether the crimes be capital, or not capital, and whether the said pleas be real, personal, or mixed, and for the awarding and issuing execution thereon. To which courts and judicatories are hereby given and granted, full power and authority, from time to time, to administer oaths or affirmations, for the better discovery of truth in any manner in controversy or depending before them."

The Constitution of 1784 did not create a constitutional court. It was not until 1966 that Part II, Article 72-a would be added to the Constitution providing that the judicial power of the state shall be vested in the Supreme Court, a trial court of general jurisdiction known as the Superior Court, and such lower courts as the Legislature may establish under Article 4 of Part II.

The Constitution as enacted in 1784 also contained a specific article relating to separation of powers:

> Article Thirty-seventh: [Separation of Powers] In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.

Although the New Hampshire framers copied much of the 1780 Massachusetts Constitution, including 23 articles of the Bill of Rights almost word for word, the

New Hampshire provision relating to separation of powers differed markedly from the Massachusetts version. Article XXX of the Massachusetts constitution provided:

> Article XXX. Separation of Legislative, Executive and Judicial Departments. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers; or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers or either of them, to the end it may be a government of laws and not of men.

It is unclear why this is so, although several explanations are possible, including the prior experiences under corrupt Royal governors and judges, and the influence of an opponent of the principle, General John Sullivan.[36]

The Constitution of 1784 followed Locke's theory of government as a social contract.[37] Unlike the Federal Constitution, which creates a form of government and then appends a Bill of Rights protecting the states and individuals, the New Hampshire Constitution begins with a recognition of the rights of the individual:

> Unlike the Federal Constitution, the New Hampshire Bill of Rights is not a series of Amendments glossed on the end as a belated afterthought. If anything, it is a qualifying Preamble...Before the creation of the government, the people lay the foundation and preserve their personal liberties.[38]

Nor is the concept of separation of powers merely a theory which describes the functioning of the government. In Chief Justice Charles Doe's words, the Constitution of 1784 "terminated the era of unlimited power, and introduced an era of liberty and equality secured by a supreme written law, and an organic division of government into three parts."[39]

The government created by the Constitution of 1784 was not a perfect explication of the rights of individuals. Women had virtually no legal rights under it.[40] It reflects concerns that seem curious today and can only be understood by reference to the period in which its framers lived. It prohibited (and continues to prohibit) forfeiture of estates of suicides, and deodands, articles forfeited if they accidentally caused the death of a person.[41] Indeed, it contained provisions offensive to modern sensibilities like Articles 14, 29, 42, and 61 of Part Second of the Constitution which provided that the governor, councilors, senators, and representatives must be of the Protestant religion.[42] This religious test, although perhaps more a reflection of the antipathy arising from the French and Indian Wars than of religious intolerance, was specifically intended to, and did for a time, prohibit Roman Catholics from holding any civil office, and it was not eliminated by amendment until 1875.[43] While the Constitution contained a then ringing explication of the rights of a person charged with a crime,[44] its drafters knew, and assumed, that a person charged with a crime would be deemed incompetent to testify in his own behalf, and the common law incompetency of criminal defendants was not removed by statute in criminal cases for almost 90 years.[45]

Yet the Government created on June 2, 1784 has endured. With amendments and through custom and usage, it has proven to be flexible enough to bend with each political wind without losing its integrity and its ability to protect the rights of individual New Hampshire citizens. At the heart of its ability to endure is the 18th century decision, then revolutionary, and even now relatively uncommon, to divide governmental power.

III. A FRAMEWORK FOR ANALYSIS

It is possible to divide New Hampshire constitutional jurisprudence into roughly four periods. The first period, from 1784 to shortly after the Civil War, is characterized by the judicial branch's first attempts to delineate its powers under a constitutional system. The second period, from about 1865 to approximately 1900, during most of which time Charles Doe was a member of the Judiciary, saw the development of a doctrinal basis for New Hampshire constitutional law which has endured to the present day. The third period, from approximately 1900 through 1960, reflects the accommodation of the 18th century principles to the demands of a modern industrial society; the delegation of legislative authority to administrative agencies, and government's attempt to regulate ever more powerful aggregations of economic power. The fourth period, from 1960 to the present, saw the Constitution amended to provide a constitutional basis for the courts and saw a dramatic increase in litigation over individual rights, and the proper roles of each branch of government.

IV. BEGINNINGS: DELINEATION OF THE ROLE OF THE JUDICIARY: 1784-1865

While Chief Justice Doe could write from the distance of a century that the Constitution that went into operation in 1784 "terminated the era of unlimited power and introduced an era of liberty and equality secured by supreme law,"[46] he recognized that the enactment of the Constitution did not, all at once, change the day-to-day life of the populace. For a time there was an “ascendancy of usage over legal rights."[47] Both before and after the enactment of the Constitution, the Legislature taxed slaves like other property.[48] It was not until 1789 that the word "slaves" was omitted from the general tax law. The likely cause of the omission was decisions in Massachusetts jury trials that slavery was illegal and inconsistent with the Declaration of Freedom in the Massachusetts Bill of Rights:

> Our ancestors thus acknowledged that by adopting the constitution, they had unintentionally abolished slavery... By their acknowledgment and correction of this constitutional error, a precedent was established that is entitled to consideration in other cases (if others are found) in which their practice was not consistent with the express forms and conditions of their constitution.[49]

A theory of the role of the courts developed slowly in New Hampshire. Not until 1843 was it finally determined that the judge and not the jury is the judge of the law in criminal cases. In so holding, Justice Parker noted that "even after the Revolution and

the adoption of the Constitution, although perhaps substantial justice was administered in most cases, little can be claimed for the courts on the score of their scientific administration of the law according to strict legal rules."[50] By the latter part of the 19th century, New Hampshire judges, therefore, did not look with confidence to the period immediately succeeding the Revolution for precedents.[51]

A. **Judicial Review**

The idea that the courts could set aside acts of Parliament was unknown in England in 1784. While it was at least suggested in 1804, the year after *Marbury v. Madison*[52] was decided, that if the Legislature passed an act which would violate the constitution, it "would be an unconstitutional act which no court could or would regard,"[53] the Legislature regularly acted to award new trials — a process called "restoring a party to law."[54] The antipathy toward the corrupt pre-revolutionary courts lingered. As late as 1818 and 1819, each branch of the legislature had a standing committee on "restoration to law, etc."[55]

It was not until 1819 that the New Hampshire Courts decided that the Legislature had no authority to grant a new trial to a disappointed litigant, in *Merrill v. Sherburne.*[56] In doing so, the Court established a rationale which would endure:

> It must be admitted that courts ought to decide, according "to the laws of the land," all cases, which are submitted to their examination. To do this, however, we must examine those laws. The constitution is one of them, and is in fact, and must be regarded by the judges as a fundamental law. It was created by the people, who in our republics, are "the supreme power," and, it being the expression of their will, their agents, as are all the branches of government, can perform no act which, if contrary to that will, should be deemed lawful... "If then there should happen to be an irreconcilable variance between the constitution and a statute, that which has the superior obligation and validity ought of course to be preferred: in other words, the intention of the people ought to be preferred to the intention of their agents…Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes, that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that people, declared in the constitution, the judges ought to be governed by the latter rather than the former."[57]

The Court noted that no particular definition of judicial powers is given in the Constitution, and given the general nature of the instrument, "none was to be expected."[58] But the Court distinguished the legislature and the judiciary by noting it is the province of the judiciary to determine what is the law in certain cases. "In fine, the law is applied by one and made by the other."[59] Recognizing that the language of Part I, Article 37 is somewhat ambiguous, and was clearly not intended to make a total separation of the three powers of government, the Court concluded that what it called the "connections and dependencies" between the departments were not left to implication, but were defined by the provisions in other parts of the Constitution; for example, "the executive was to be united with the Legislature in the passage of law; and the former was to depend upon the

latter for his salary."[60] The Court finally recognized that its decision was a break from tradition:

> The long usage of our legislatures to grant new trials has also been deemed an argument in favor of the act under consideration. But that usage, commenced under colonial institutions, where legislative powers were neither understood nor limited as under our present constitution. Since the adoption of that, the usage has been resisted by sound civilians, and often declared void by courts of law... Nor could it be pretended on any sound principles, that the usage to pass them, if uninterrupted for the last 27 years, would amount to a justification, provided both the letter and spirit of the written charter of our liberties forbid them."[61]

The Court recognized in its opinion that as a result of the structure of the government, it was likely that "jealousies" should arise between the branches, and stated that it "had experienced considerable embarrassment, but duty has compelled us to act."[62]

In fact, *Merrill v. Sherburne* was greeted with bitterness in the press and incredulity in the Legislature.[63] After the decision, the Legislature asked the Court if it had the right to grant a new trial in any case, and in response received a copy of the *Merrill* decision and a statement that all three judges, including Justice Richardson, a staunch Jeffersonian, concurred in the result.[64] Only then was the principle accepted. In 1827, the Court stated in an Opinion of the Justices[65] that the Legislature could not enact a law that would authorize a guardian to make a valid conveyance of the property of his ward. The Court stated succinctly that: "It is the province of the Legislature to prescribe the rule of law, but to apply it to particular cases is the business of the courts of law.[66] But the memory of the corrupt pre-revolutionary courts lingered, and long usage apparently had an effect. As late as 1843 Justice Parker could state that the soundness of the decision in *Merrill* was only "generally, if not universally, admitted."[67]

B. Reconstruction of the Courts

Part of the reason for the Court's caution in *Merrill v. Sherburne* may have been the ephemeral nature of the judges' positions. The Constitution of 1784 provided in Part II, Article 73 that the Governor and Council could remove the judges upon the address of both houses of the Legislature. Distrust of the King's courts had led the framers of the Constitution to create a "right to reconstruct the judiciary" by address, a right which still exists, although significantly modified in 1966. Throughout the 19th century it was assumed that the Legislature could reconstruct the judiciary by reorganizing the courts, and simply legislating them out of existence. In 1813, when the Federalists were elected, the Legislature abolished the Superior Court and the Court of Common Pleas and created a Supreme Judicial Court and a Circuit Court in its place. The Legislature rejected a petition urging repeal of the act and a House Committee specifically reported that it was necessary that the Legislature have the power to abolish courts as a check on the power of courts to declare acts unconstitutional.[68] In 1816, the Jeffersonians gained power and a new judicial system was established and three Jeffersonians, including William Richardson, were appointed to the Superior Court.[69]

Further reconstruction of the judiciary occurred in 1855, 1874, 1876, and 1901. Indeed, in 1861, Justice Bellows noted that "the power of the Legislature to change the constitution of courts of justice, and thus incidentally to affect the remedies of parties, even in pending suits, has been repeatedly exercised in this state, and may be regarded as well established."[70] All of the reorganizations, save that of 1901, were for purely political reasons. In 1901 a "gentlemen's agreement" was reached between the leaders of the two major political parties that in the future appointments to the two major courts would be made from both political parties with the party in power holding a bare majority.[71] This arrangement survived until the 1970's, even though in 1966 the constitution was amended to provide in Part II, Article 72-a that the Supreme and Superior Courts were constitutional courts and that judges could be addressed from office only for "reasonable cause."

C. The Operation of the Courts

1. Civil Procedure

After the Revolution, legal knowledge was linked in the popular mind with Great Britain and held in disrepute. During the time shortly after the Revolution, which came to be called the "common sense era," judges, who were non-lawyers, instructed juries that they should not be concerned with the law but simply concerned with "what is just." In the words of John Philip Reid, the common sense era "was not law. It was unequal, crude, uncertain, and often unfair, for partisan and corrupt interests sometimes entered into judgment."[72] No modern state could ever prosper under such a regime. Businessmen needed predictability in their dealings and legal democracy was simply insufficient.[73]

When Jeremiah Smith became Chief Justice of New Hampshire in 1802, the judicial system operated without rules, had no guiding written principles or maxims, no published reports, and virtually no precedents. Smith undertook a reform of the court system, creating a system of procedural rules by instituting special pleading.[74] Smith's reforms were revolutionary:

> The reform which Chief Justice Smith effected was nothing less than the complete overhauling of the judiciary. He took a disorganized court and made it function in the "modern" manner. Among other things, he ended separate charges to the jury by each presiding judge, a practice which was confusing, to say the least, since the judges often disagreed on the law and told the jury to follow different legal principles; later he was able to introduce the single judge system at trial term; he granted new trials for errors in matters of law and innovation which was strongly opposed; he formulated rules of procedure in pleadings, he ended the practice of rendering immediate judgments on all questions, and initiated the policy of reserving the more difficult problems for careful study during vacations; and he was the first to recognize the importance of written opinions and wrote out his, diligently citing precedents and maxims even though he never succeeded in getting an appropriation to cover publication. *He carried out all his reforms without the aid of legislation* and left it to his greatest successor during the common law era, Joel Parker, to effect two statutory reforms necessary to solidify them, the introduction of chancery practice and the institution of law term."[75] (emphasis supplied)

Smith's reforms, which ironically would be undone by Charles Doe's court after the Civil War, did succeed in creating order from the chaos of the common sense era and in fleshing out the extent of the power of the "judicatories and courts of record" to be constituted pursuant to Part II, Article 4 of the New Hampshire Constitution.

While Chief Justice Smith believed procedural reforms could be carried out without enabling legislation, the Court plainly recognized that the Legislature had authority to alter established procedure. For example, while suggesting that New Hampshire courts always had the authority to examine absent witnesses through a commissioner by statutory "chancery powers" as well as those incident to courts of law, the Court recognized that statutes which authorized depositions to be taken and used, were a lawful exercise of the Legislature's power.[76] Such statutes were in derogation of the common law right to have a witness testify *viva voce*, providing a substitute for, "in many respects less desirable than oral testimony."[77] Thus, the Court held that when depositions were taken under provisions of the statute, the statutory requisites must be strictly complied with.[78] This judicial concern expressed itself in decisions like the 1851 decision in *Cater v. McDonald,*[79] in which the Court held that even a technical defect such as a failure to give formal notice to a party who actually attended a deposition was fatal since "the practice of taking depositions in New Hampshire has always been governed by the statute on that subject from the first organization of the courts and the courts have no authority to dispense with any requisites of the statute."[80] But by 1860, the Court began to recognize that strict application of the statute could interfere with substantive rights and to begin to articulate the role that the Court and the Legislature play in regulating procedure. In holding in *Deming v. Foster8*[1] that a deposition taken without notice must be set aside, Justice Bell stated that the Court "has all the powers of the highest judicial tribunals" but could not "dispense with or disregard any enactment of the Legislature passed in a due exercise of its constitutional powers" and that "it must be taken as an invariable rule that depositions cannot be admitted as evidence without the notice required by the statute" unless the notice is waived.[82] But he went on to state that the Court may, to further the general object of the legislation, make specific rules for specific cases as to what notice is reasonable:

> Courts of justice have power, as a necessary incident to their general jurisdiction, to make such orders in relation to the cases pending before them, as are necessary to the progress of the cases and the dispatch of business. When the same rules come to be generally required in the cases as they arise, the courts have found it convenient, instead of special rules in each case, to establish general rules, applicable to all cases of the same class, and their power in this respect is recognized by statute... The practice here seems consistent with the theory of the law, that the court may make such orders in each case, from time to time, as justice may require. A general rule, in its application to any particular case being neither more nor less than a special rule to the same effect.[83]

By 1906, while not overruling cases which required that to admit a deposition the caption must reflect that the provisions of the statute have been strictly followed, such technical objections as those expressed in *Cater v. McDonald* were given short shrift:

> The defendant also excepted to the deposition as evidence because the caption does not state whether he was or was not there... While it has been held that in order to make a deposition competent evidence, it must appear from the caption that the provisions of the statute have been strictly followed [citation omitted] it is probably unnecessary to decide the legal question raised by the exception in this case. The defendant either was or was not present at the caption; and if he is in a position to take advantage of the omission in the commissioner's certificate to state that fact, the defect may be obviated by an amendment."[84]

2. The Contempt Power: Inherent Rights Appurtenant to Branches of Government

In 1851, the Court held that it had the power of contempt to punish a person attempting to obstruct justice. The Court did not, in its opinion, allude to the provisions of Part II, Article 5 which gives to the Legislature the power to "make, ordain and establish …all manner of reasonable orders, laws... either with or without penalties." The Court reasoned:

> It is said by Blackstone, that the process of an attachment for a contempt must necessarily be as ancient as the laws themselves. For laws without a competent authority to secure their administration from disobedience and contempt, must be vain and nugatory."[85]

Only 10 years later, in *State v. Towle,*[86] the Court held that contempt is a specific and substantive offence of common law which belongs to the court before which the contempt is committed. The Court did not even discuss a separation of powers issue. The Court reasoned that the authority to punish contempt is a "necessary incident inherent in the very organization of all legislative bodies and of all courts of law and equity independent of statute provisions."[87]

The view that branches of Government possess implied powers was also applied to the executive in this era. The power to pardon exists in the Governor and Council pursuant to Part II, Article 52 of the Constitution. However, in 1845, the Court held that while courts have the power to reprieve, such a power is also vested in the governor as chief executive magistrate and not in the Governor and Council as part of the pardoning power.[88]

3. Regulation of Attorneys

Prior to the Revolution, there were few lawyers in New Hampshire. Prospective attorneys were required to present themselves to the court for admission to practice.[89] After the Revolution, in 1788, the Bar organized and established rules for admission to the Bar on a statewide basis.[90] Between approximately 1788 and 1838, admission to the Bar was regulated entirely by the courts, which admitted attorneys based upon the candidates' compliance with the rules, which required education and an investigation into the proposed attorney's character. However, with the rise of Jacksonian democracy in New Hampshire in the 1830s, the view that educational qualifications for admission were "undemocratic and unwise"[91] gained currency. In 1838, the Legislature

passed a statute providing any citizen of the age of 21 and of good moral character, on recommendation of any attorney, might petition the superior court to be examined for admission, and if the court should be satisfied as to his requirements and qualifications, he should be admitted to practice.[92] This legislation nullified the 50 years of admission pursuant to rules created by the Bar.

In 1842, at the flood tide of Jacksonian democracy, the Legislature passed a bill which provided that any person twenty-one years of age and of good character *shall* be admitted to the bar.[93] This resulted in a de-professionalization of the Bar which was harmful to the public. The admission of an incompetent, pursuant to this statute, prompted the first analysis of the power of the Court and the power of the legislature to regulate admissions to practice, in 1851.[94] One Bryant, a "statute" lawyer, as lawyers admitted pursuant to the 1842 Act were called, had engaged in improper conduct resulting from what the Court characterized as "gross lack of knowledge" of the law. The Court phrased the issue before it as whether mere ignorance of the law could authorize the Court of Common Pleas to remove an attorney from office, since the statute required no education in the law or knowledge thereof.

The Court's opinion is notable for the recognition of the potential harm caused by the statute: "Anything that tends to lower the standard of professional requirements among those whose duty it is to investigate and defend the rights of others is to be lamented.... It would seem to be more for the public good that when [a client] applies to an attorney for advice he should have security... that [the attorney] is reasonably competent to discharge his trust."[95] Chief Justice Gilchrist concluded that ignorance of the law does not authorize the Court to suspend an attorney, since the statute required no such knowledge.[96] But the Court also stated that persons admitted on grounds of good moral character could be removed or suspended upon good cause shown since the statute had not deprived the Court of its power: "Such a power is necessarily inherent in every court, in order to enable it to discharge its duties, as much as the power to preserve order." [97]

In 1876 in *Delano's Case*[98] a "statute lawyer" was disbarred for theft committed outside his role as an attorney. A statute authorized the Court to suspend attorneys for misfeasance, but since the misfeasance did not occur in office, the Court concluded it did not apply. Apparently assuming concurrent powers, the Court held disbarment was nonetheless proper since:

> The legislature could not have intended to abolish the ancient requirement of his continued integrity and require another branch of the government to continue to hold him out as worthy of confidence when the holding out becomes false and fraudulent.[99]

By 1890, the Court suggested that it had the inherent authority to order that a woman could be admitted to practice, in *Ricker's Petition.*[100] While not deciding the issue, the Court cited a Wisconsin case for the proposition that:

> The constitution... vests in the courts all the judicial power of the state. The constitutional establishment of such courts appears to carry with it the power to establish a bar to practice in them. And admission to the bar appears to be a

> judicial power. It may, therefore, become a very grave question for adjudication here, whether the constitution does not entrust the rule of admission to the bar, as well as expulsion to it, exclusively to the discretion of the courts.[101]

The Court stated that the constitutional question need not be decided because the statute regulating attorneys made no change in the common law applicable to the case.[102]

V. THE DEVELOPMENT OF A JURISPRUDENCE OF SEPARATION OF POWERS - 1865-1900

A. Constitutional Theory

In the later part of the nineteenth century, the New Hampshire Court was one of the most influential courts in the United States. A sophisticated body of constitutional law grew up,[103] premised upon the limitations of powers of government embodied in the constitution. The Court interpreted the constitution as a social contract designed to protect individual rights rather than a description of governmental power, explicitly adopting John Locke's theory.[104] This distinction was critical, because "by the ordinary rules of constitutional construction, under which a constitution is organic law, not a social contract, the government is held to have inherent powers limited by certain enumerated provisions (such as the federal Bill of Rights)."[105] The core purpose of the New Hampshire Constitution was not to define the power of the state, but rather to protect the liberty of the individual. The principle of separation of powers was not "a theory implied in the constitution by an arrangement dividing governmental power;" but became a right explicitly guaranteed the people which had, as its main function, the protection of private rights.[106] As the Court explained in *Ashuelot Railroad v. Elliot*[107] in 1878, "[i]n this State, the unlimited power transferred from the British Parliament to the Revolutionary and Provisional Government of 1776, and exercised by that government in legislative decrees — banishing persons and confiscating property without trial and without notice — came to an end on the 2nd day of June 1784. On that day, private rights were protected by a separation of the powers of government"[108]

The view that separation of powers was a part of the social contract entered into for the purpose of protecting rights, meant, as a practical matter, that in determining whether or not governmental action violated the separation of powers principle, the practical effect of the proposed action would be examined carefully. An equally important principle was confirmed at the same time, about 100 years after the Constitution was drafted: that in determining the meaning of a constitutional provision, the Court must interpret words in the fashion in which they were understood at the time of the adoption of the Constitution.[109]

B. Attacks on the Courts

Party politics had an important impact on every citizen's life in the late 1800's; though men might change parties, "they did so with the same feeling with which they

might change their religion or their wives."[110] The bitter political divisions which resulted in a civil war had an effect upon the policies of the state, and in turn, upon the judicial branch. While criticism of the judiciary was at times vituperative, it was sometimes followed by action. The Democrats' assumption of power in 1874 resulted in their legislating the existing courts out of existence only to have the Republicans, upon regaining power in 1876, reverse the process. On three occasions in 1875, 1877, and 1890, the Court declined to pass upon the validity of the election of state officers recognizing that the constitution had committed the determination of elections to other branches of the government.[111] In 1883, the Senate requested the Court to give its opinion whether the Senator whose term would begin in 1885 should be elected by the Legislature of 1881 or 1883.[112] The House Judiciary Committee declined to follow the Court's opinion.[113]

C. Functional Analysis of Separation of Powers

In the relatively few cases concerning Part I, Article 37, in this period, the Court focused its inquiry upon the practical effect of the challenged activity. In 1870, for example, the Court held that the Legislature did not have the authority to pass a special act which would affirm the fraudulent sale of a corporation, reasoning that the legislative act would be judicial in character.[114] In 1873, the Court held that the Legislature could not, by legislative act, foreclose a mortgage since the foreclosure was a judicial act.[115] The Court saw a direct connection between the limitation of powers of the branches of government and the idea that the government itself was a government of limited powers: "as neither of the branches of government can acquire, by its own act of reservation, any power exclusively vested by the Constitution in either of the others, so neither can acquire, by its own act or reservation, that unlimited power which passed from the British Parliament to the provisional government of 1776, and was abolished in 1784."[116]

The Court also first recognized that executive officers, such as city councilors and selectmen, exercise both legislative and judicial power. The Court recognized that the duties of municipal officers are both administrative and judicial, and that "it is the policy of the law that each, when acting in the scope of its authority, is supreme in the exercise of the powers committed to it."[117] Thus, the Court held that it had no power to restrain a city council in legislating with regard to local matters, but that it could review their actions and administration, since such officers act in a trust capacity much as directors of a corporation act for their stockholders.[118] And since tax assessments were judicial in character, assessors could not be held liable for damages.[119]

The Court, however, did not accept the delegation of legislative power to it to approve laws, holding that a law which would appoint a commissioner to revise, codify, and amend the school laws of the state, subject to approval by the Court, would be unconstitutional.[120] The Court reasoned that the proposed act would impair its ability to operate as a court by, in substance, eliminating the adversary process. The Court's concern was that its passing upon the validity of laws would "furnish an occasion for contesting before us, the soundness of our advice."[121]

Without much discussion, in 1902, the Court, in a one paragraph *per curiam* opinion held that an act to provide for uniform blanks and uniform rules of practice and procedure in the courts of probate, to be submitted to the Court for approval as required by the act, "does not confer upon the Court any power of approval or disapproval, legislative, judicial, or advisory."[122] It is difficult to understand why the Court would have concluded as it did, since the rationale of its prior decision, that in passing upon the school law manual it would be determining the validity of a law before a litigant had an opportunity to challenge it, would not be applicable to a statute simply authorizing it to create procedures. Moreover, the Court had, by this time, been creating procedures for the preceding 100 years.

D. The Revolution in Civil Procedure

Between 1870 and 1900, the New Hampshire Supreme Court revolutionized common law pleading by liberalizing the common law forms of action so that matters were decided on their merits rather than on technicalities,[123] ruling that pleadings at law and equity are mutually convertible,[124] that unrelated counts may be joined in a declaration on a common cause of action,[125] that judgments in severalty through joinder can be allowed,[126] and that amendments would be freely allowed to avoid the harsh common law result of cases lost because a lawyer selected the wrong form of action.[127] Without reference to the issue of separation of powers, and in an environment in which judicial criticism was frequently bitter, the Court, under the leadership of Chief Justice Doe, reformed common law civil procedure so that in substance by the end of the century there was in New Hampshire simply one form of action.

The Court's reforms resulted in New Hampshire remaining a common law state throughout the entire 20th century. No specific statute authorized the Court to reform its procedures; rather, as Justice Smith had, the Court took the view that it had the authority to fashion appropriate procedures to vindicate rights created by the Legislature. As the Court stated in 1885 in Owen *v. Weston,*[128] "the progressive introduction of oral and written forms and methods of pleading, proof, trial, judgment, and process, initial, intermediate, and final, under the common law, from the beginning to the present time has not been illegal." There can be no doubt that the Court legislated the forms of action out of existence and there can be no doubt that the Court's critics knew exactly what the Court was doing.

Perhaps the seminal decision is *Boody v. Watson,*[129] in which the defendants sued because a court had held that an exemption given to industrial property owned by one Pillsbury was illegal. Before final judgment in the plaintiff's favor, the terms of the defendants, who were selectmen of the town, and who were supposed to collect the tax, expired. The defendants then argued they could not be forced to assess the tax because their terms had expired. Over a dissent of Justice Carpenter, who believed that the owners of the mill had a right not to have the mill taxed unless the assessment was made in the year of taxing and the formalities of the law were complied with,[130] the Court held that the legal process could be brought against the selectmen's successors.

The Court concluded that, the merits of the case having been determined, it was the obligation of the Court to fashion a remedy that "in the absence of statutory regulation in

this country, the general judicial superintendence is vested by the common law in the highest court of general common law jurisdiction."[131] The Court based its authority to proceed both on statute and common law:

> The writs named in the statute are not restricted to the uses that have been made of them. They may be modified and adapted to the wants of particular cases "on grounds of convenience and expediency." [citation omitted] By a principle of our common law, for ascertaining, establishing, and vindicating legal rights, such procedure is to be invented and used as justice and convenience requires. [citation omitted] "The court may... prescribe forms of proceedings in all cases not provided for." G.L., c. 208, §6. The statutory authorization of certain writs "and all other writs and processes," is a confirmation of the common law power of issuing whatever process is necessary "for the furtherance of justice and the due administration of the laws." Until a change is made in the established common law procedure of this state "all other writs and processes" will include the best that can be invented.[132]

In revolutionizing court procedure, the Court perhaps most clearly illustrated the exercise of concurrent power which would be articulated in other areas in the 20th century.

VI. APPLICATION OF THE SEPARATION OF POWERS PRINCIPLE IN AN INDUSTRIALIZED STATE: 1900-1960

A. The Development of Administrative Law

The State's transformation from an agrarian to an industrial society in the first half of the 20th century created new legal issues to which the state's governmental machinery would need to respond. Close public control of large or complex economic institutions was inconsistent with the traditional concept of legislative control. A recognition that close public control was necessary led to the first attempts to regulate the institutions. In the late 1880's, the Legislature delegated to the Court the authority to approve combinations of competing railroads if the Supreme Court determined it in the public interest. The Court applied the Act with no suggestion that it was an unconstitutional delegation of power.[133] However, the attempt to regulate the most complex economic entities of their time, the railroads, through the courts was ultimately unsuccessful and, in fact, led to harsh political criticism of the courts.[134]

By the turn of the century, administrative boards began to proliferate. In 1915, the Court considered the argument that legislation authorizing an appeal from the Public Utilities Commission to the Supreme Court was violative of the Constitution, because the duties imposed on the Public Utilities Commission were legislative in character and the duties of passing on questions by the Commission in the exercise of its power could not constitutionally be imposed upon the courts by appeal. The Court rejected the argument, reasoning that the questions before it on appeal of the value of property and whether the public interest required incorporation were simply questions of fact. While conceding that the Legislature itself could have settled the questions conclusively, the Court found

that an appeal of findings made pursuant to the delegated power was "not beyond judicial power."[135]

Similarly, in 1914, the Court held that the Legislature had the authority to fix the maximum charge per mile of passenger transportation by railroads, but also suggested that the Courts would have the authority to consider a claim that the rate fixed by the statute is unreasonable and confiscatory.[136] The Court began to articulate the concurrent power principle implicit in cases dealing with procedure and regulation of attorneys in the preceding 50 years, in the developing area of administrative law:

> [T]he constitution contemplates no absolute fixation and rigidity of powers between the three great departments of government in its order that they shall be "kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one in dissoluble bond of union and amity." CONST. part I, art. 37. This provision of interrelation, as a practical need of the proper functioning of government, has been recognized with no narrow interpretation by the courts. Areas of concurrent authority have been held properly constituted when exact boundary lines, not prescribed, give rise to undue interference with the reasonable exercise of valid governmental activities.[137]

The Court emphasized the fact that Part I, Article 37 acted as a check on departments of the government rather than on individuals, in holding that the article did not prohibit a person from holding office as a legislator, city councilman and supervisor of the checklist, even though a person in those positions would exercise legislative and judicial power.[138] Gradually, a body of state administrative law developed,[139] and the Court recognized that administrative agencies could exercise both legislative power, properly delegated, and judicial functions with respect to purely statutory rights.[140] As the Court noted in 1959, the administrative law doctrine came about because the separation of powers was given a "practical and workable application."[141]

However, in the 1930's, the Court firmly adhered to the view that the legislature could not enact laws which would impair the ability of the courts to function as courts. In rejecting a legislative proposal to set up a commission to resolve motor vehicle cases in1937, the Court, after recognizing the interrelation between the branches of government, stated:

> In the connection between the departments, some overlapping is permissible and there is a region of authority, alternative and concurrent, the boundaries of which are fixed by no final rule. As a rule which meets most situations, when an executive board has regulatory functions, it may hear and determine controversies included incidental thereto but if the duty is primarily to decide questions of a legal right between private parties, the function belongs to the judiciary. Courts of justice, in the popular sense, may not be set up and established in the executive organization. They pertain exclusively to the branch of the judiciary.[142]

By 1959, a majority of the Court held that Part I, Article 37, did not prohibit delegation by the Legislature to the Court of the power to appoint Public Utilities Commission commissioners.[143] The Court noted that appointive powers do not violate the separation of powers principle "since they do not interfere with or encroach upon the judicial function of the court."[144]

B. The Contempt Power

The Great Depression of the 1930's and the attendant economic upheaval are reflected in the Court's decisions of that time. In 1933, while recognizing that there was no absolute division between the branches of government, the Court rejected the argument that "the constitutional separation of the three departments of government should not be regarded as a vital limitation upon powers, but rather as a convenient and variable assignment of duties."[145] The Court considered a bill, obviously drafted by pro-labor politicians, modeled after the federal Norris-LaGuardia Anti-Injunction Act, which denied employers the right to contract with their employees relative to membership in labor organizations, denied employers equitable remedies against labor unions, and limited the power to punish for indirect contempt, to 15 days in jail and a $100 fine.[146] While holding that a provision which allowed a defendant to disqualify a judge when the alleged conduct was an attack on the judge was reasonable because "it in no way undertakes to limit the power of the court to act in the matter of contempt; nor is it a limitation of jurisdiction,"[147] the Court held that a limitation on the power of contempt would itself be unconstitutional. Once again the Court's rationale in holding the legislation unconstitutional was that the proposed legislation would impair the Court's ability to function: the legislature could not "take from the judicial department a power which had always, here and elsewhere, been regarded as an essential element of judicial tribunals."[148]

C. Executive Functions

The Court also rejected a 1931 legislative scheme which would have required probate courts to administer pauper relief.[149] The Court recognized that in administering the bill, many of the acts performed would be judicial and that "in the nature of things, there must be overlapping powers," but since the main thrust of the bill was to require the judges to execute the law, it was held invalid. While recognizing that "there has been but little disposition to confer executive power on the judiciary," the Court emphasized that the principle which provided rationale for *Merrill v. Sherburne* - that "there is no liberty if the power of judging is not separated from the legislature and executive powers" - compelled its conclusion.[150] If such duties were imposed upon the courts, they would not be functioning as courts.

Only a few years later, however, in 1943, the Court upheld an act authorizing a fiscal agent for Coos County which was to report to the Court.[151] In upholding the statute, the Court relied on the historical record which preceded the Constitution of 1784 to suggest that the framers of the Constitution were familiar with judges performing acts other than determining controversies before the parties. More importantly, given the expressed reluctance of New Hampshire judges to rely on precedents from the pre-constitutional or even the early post-constitutional period,[152] the more recent statutes imposing upon courts

the obligation to exercise control over county finances apparently led the Court to believe that exercising such authority would be consistent with the Constitution.

VII. SEPARATION OF POWERS FROM 1960 TO THE PRESENT

The New Hampshire Reports reflect an increase in litigation regarding the scope of the separation of powers provision in the latter part of the 20th century. The increase in litigation was likely the result of several factors in addition to the rapid growth and expansion of Government. First, although the New Hampshire executive had traditionally been considered a weak branch of government, governors in the 1970's and 1980's played a far more significant role in government.[153] Second, the increase in federal aid to the state, in 1978, for example, 28 percent of the state's budget,[154] raised issues about which branch of government could spend those funds. Third, in the latter half of the 20th century, far more resources were focused upon litigation of individual civil rights. This focus led the Court to decide, for example, that persons acquitted of a crime by reason of insanity could only be committed if found dangerous beyond a reasonable doubt,[155] and a subsequent amendment of Part I, Article 15 of the constitution to basically overrule the Court's decision and establish a "clear and convincing standard" of dangerousness.[156] Fourth, although the Constitution was amended in 1966 to establish the Supreme and Superior Courts as constitutional courts,[157] which could not be abolished by the Legislature, and to limit the power of address to cases of "reasonable cause" insufficient for impeachment,[158] the "gentlemen's agreement" regarding appointment to the courts from both political parties fell into disuse in the late 1970's. It could be argued that the Supreme Court lost whatever political constituency it had and that cutting the Court loose from a political mooring resulted in its being buffeted by political winds. Finally, in 1978, the Constitution was amended to provide that the chief justice of the Supreme Court shall be administrative head of all courts and shall, with the concurrence of the majority of the Supreme Court justices, make rules governing administration of all the courts in the state.[159]

A. **The Primary Function Approach to the Separation of Powers**

In discussing the separation of powers principle, the Court explicitly recognized the overlapping nature of the provisions of the various branches. In 1978, for example, the Court stated:

> It is well established in our opinions that the three coordinate branches of government cannot be completely separate, and in the nature of things there must be some overlapping of power. In the link which bonds the coordinate branches, a measure of overlapping authority and function occurs, and indeed is essential. There exists what has been described as a “region of authority, alternative and concurrent, the boundaries of which are fixed by no final rule.”[160]

The propriety of the exercise of power depends upon whether the function being performed is executive, legislative, or judicial;[161] but the Court recognized as it had implicitly in earlier decisions,[162] that there are "governmental powers of doubtful

classification which may properly belong to either one or more department of government."[163] The touchstone of the Court's decisions was that the separation of powers principle must be given a practical and variable construction[164] while ensuring that each branch of government can carry out its constitutionally assigned functions.[165] In the second half of the 20th century, the reported decisions reflect the view that the ultimate inquiry is whether the act of one branch impairs the ability of another branch to perform its constitutionally assigned functions.

Thus, for example, the Court held that the Legislature's authority to create and modify municipalities allowed it to recreate a dissolved village district, even though doing so would affect pending judicial proceedings, since in exercising its power, the Legislature was operating in an essentially legislative sphere.[166] Similarly, the Court held that the judiciary's general authority to regulate charitable trusts did not prohibit enactment of a bill for management of endowment funds,[167] emphasizing that while "matters relating to trusts are usually within the jurisdiction of the judiciary," "Part I, Article 37 does not require the erection of impenetrable barriers between the branches of government. On the contrary, the three departments must move in concert without improper encroachments by one branch on the function of the other."[168] The Court distinguished bills which would allow particular kinds of charitable trusts to be used for purposes other than those intended by the creator of the trust, finding that such legislation would be an invasion of the courts' equitable power of *cy pres.*[169] Despite the executive interest in ensuring efficiency in governmental contracts, the governor could not regulate the internal affairs of the Legislature by establishing a conflict of interest policy.[170] The Legislature could promulgate its own rules which would limit copying of an official tape of its proceedings despite the Right-to-Know Law.[171] While the Court held that the Legislature could require approval of the fiscal committee for certain salaries, since the Constitution places the obligation to set salaries in the Legislature,[172] it held that the Legislature could not require fiscal committee approval of expenditure of funds by the executive.[173]

Adhering to its view that the attempt to fix duties on a branch that does not belong to it would violate Part I, Article 37, the Court held in 1978 that the Legislature could not constitutionally require courts to appoint guardians for incompetents.[174] Executive functions may be exercised by a court only when those functions are clearly related to an integral judicial function, such as courtroom security.[175] In 1998, in *Petition of Mone,*[176] the Court considered whether a statute which placed responsibility for court security and custody and control of criminal defendants in the sheriff's departments violated Part I, Article 37. The Court analyzed the issue before it by using a functional analysis: "The doctrine is violated... when one branch usurps an essential power of another...[citation omitted]. Accordingly, we must consider whether chapter297 prevents the judiciary from performing an essential judicial function..."[177] The Court reasoned that executive branch control of court security could effect the Court's ability to ensure impartiality in the adjudicatory process, stating: "For example, it is vital that bailiffs, who guard juries and relay their messages to the presiding judge, be under the direct supervision of the presiding justice to ensure impartiality in the adjudicatory process."[178] The Court held that to the extent the statute would have placed supervision of court security and courtrooms, jury assembly rooms, deliberation rooms, the judges

chambers, and court staff facilities under the control of the sheriff, the statute was unconstitutional.[179] However, the Court stated that the provisions of the statute relating to custody and control of criminal defendants and security in other parts of the courtroom would not violate the separation of powers principle.[180]

While holding that Rules established by the House Judiciary Committee regarding an impeachment inquiry would in most cases be nonjusticiable, because the Constitution assigns the Legislature the responsibility for impeachments, the Court has suggested that if the Committee were to act in an arbitrary way, which was far beyond the scope of its constitutional authority, judicial interference might be appropriate.[181]

B. Federal Funding

The increased role of federal funding awarded to the State led to the decision in *Monier v. Gallen*[182] in which a divided Court held that a governor could not accept federal funds and create new agencies without the approval of the legislative fiscal committee. In so holding in 1980, the majority stated that "the majority recognizes that the issue presented is a difficult one and that administrative activities delegated to the legislative fiscal committee come within the twilight zone of constitutionality."[183] In 1978, the Court had held that the Legislature could constitutionally require the governor to designate particular agencies to receive federal funds.[184] In holding that the State's sunset law did not apply to agencies created by executive order,[185] the Court approvingly cited an analysis of Justice Jackson's concurring opinion in the 1952 *Youngstown Steel*[186] case which suggested that at the federal level there were areas of "fluctuating power" in which both the executive and legislative branches could act, and that there is a twilight area in which the power distribution is uncertain and either branch can act absent the activity of the other.[187]

C. The Judiciary

In 1943, the Supreme Court stated that the historical record suggests that at the time the Constitution was drafted, the prime purpose of Part I, Article 37, was to protect the judicial and executive branches from legislative encroachment.[188] In the latter part of the 20th century, significant litigation occurred over the judiciary's right to suspend judges from office, suspend criminal sentences, and promulgate rules in the face of legislative action. This litigation occurred in the wake of amendments in 1966 to the Constitution (Part II, Article 4, 72-a, and 73), to provide that the Supreme and Superior Courts were constitutional courts, which could not be legislated out of existence, and that judges could not be removed by address other than for reasonable cause.

1. Part II, Article 73-a

In 1978, Part II, Article 73-a, providing that the Supreme Court has administrative authority to make rules, was approved:

> Article 73-a - Supreme Court Administration. The chief justice of the supreme court shall be the administrative head of all the courts. He shall, with a concurrence of a majority of the Supreme Court justices, make rules governing

> the administra-tion of all courts in the state, and the practice and procedure to be followed in all such courts. The rules so promulgated shall have the force and effect of law."

The sparse legislative history regarding this amendment is not particularly illuminating and suggests that the constitutional convention did not believe that in proposing the amendment, they were eliminating the Legislature's ability to enact laws governing procedure.[189] Plainly, however, the amendment would eliminate any questions raised by the 1902 *In Re: Probate Blanks*[190] decision in which the Court held that an act to provide uniform rules of practice and procedure in the Probate Courts to be approved by the Supreme Court would be unconstitutional. However, this amendment became the lightning rod for public dissatisfaction with the Court and the subject, in the 2001 Legislature, of proposals to amend the Constitution to repeal or modify it.

Part II, Article 73-a itself has been the basis of relatively few decisions. In a number of cases decided within a few years of its enactment, the Court utilized the amendment to avoid potential litigation based on claims that New Hampshire statutory procedures violated federal constitutional law in criminal cases. Thus, in 1978, the Court, relying on its supervisory power under Part II, Article 73-a, ordered State trial judges to give a model reasonable doubt charge[191] in order to ensure that the State's procedure complied with the constitutional mandate of a recent First Circuit decision.[192] In other cases, the Court established procedures to avoid constitutional challenges to the state grand jury procedures,[193] *de novo* sentencing procedures,[194] procedures to ensure that a fair and impartial panel of jurors would be selected,[195] and to ensure fair procedures for annulment of criminal record hearings.[196] The Court also relied on Part II, Article 73-a to manage civil litigation.[197] It seems clear that the Court took the view, at least in earlier decisions, that its power to enact rules established by Part II, Article 73-a was, at least in some respects, concurrent with the Legislature's. In *State v. Elbert*[198] in 1981, after holding that a defendant had not established a violation of his Sixth Amendment right to a jury comprised of a fair cross-section of the community, because the record indicated that there was a potential for such a violation in the then current system, the Court ordered a new system for jury selection be established, "pending further order of this Court or until a new statute is enacted which provides a suitable alternative method."

In 1993, the Court held that the article, at least with respect to regulation of attorneys, restated prior law.

> Our prior decisions (with respect to authority to regulate the Bar) were reinforced when the State Constitution was amended in 1978 to provide, in Part II, Article 73-a, that the chief justice of this court, “shall with the concurrence of the majority of the supreme court justices, make rules governing... the practice and procedure to be followed in all [the] courts of New Hampshire.” We must assume that the judicial branch possesses all the authority necessary to perform its judicial functions; otherwise the judicial power vested in the courts by Part II, Article 72-a, becomes meaningless. Because the judicial branch requires a qualified and ethical bar to perform its functions, we hold

> that it has the inherent power to regulate the Bar to ensure that the bar is in fact qualified and ethical.[199]

However, several controversial decisions regarding court rules and admission of evidence, *State v. LaFrance,*[200] and *Opinion of the Justices (Prior Sexual Assault Evidence),*[201] would result in much public discussion of this provision. Ironically, both of those constitutional decisions turned upon interpretation of Part I, Article 37, rather than Part II, Article 73-a, although they did involve legislative conflict with judicial rules.

2. Suspension of Judges by the New Hampshire Supreme Court

In 1972, in *In re Mussman,*[202] the Court held that it had the power to protect the public by suspending judges, rejecting the argument that the constitutional remedies of impeachment or address were exclusive remedies for judicial abuse. Chief Justice Kenison wrote:

> It has been assumed in many cases, without much argument or consideration, that the powers of impeachment and address were completely exclusive and precluded any type of inquiry or corrective action by the judiciary. *Attorney General v. Tufts,* 239 Mass. 458, 478; 131 N.E. 573, 574 (1921). It is significant that this assumption does not persist in more recent cases. *In re: Desaulner, 27 4* N.E.2d 454; 266 N.E.2d 278 (Mass. 1971). For historical reasons, the assumption is rejected in this state. *Ricker's Petition,* 66 N.H. 207, 29 A. 559 (1890); *Boody v. Watson,* 64 N.H. 162, 9 A. 794 (1866).[203]

Citing RSA 490:4, which sets out the statutory authority of the court to exercise "general superintendence of all courts of inferior jurisdiction to prevent errors and abuses," Chief Justice Kenison stated that "the inherent supervisory powers of the court has been supported by consistent custom, is confirmed by statute, [citation omitted]and supported by judicial decisions..."[204] The Court's citation to *Boody v. Watson* and *Ricker's Petition* reflected the traditional view of its powers under the Constitution: that the statutes confirm the Court's common law powers "of issuing whatever process is necessary for the furtherance of justice," the Court's obligation is to allow "such procedure as justice and convenience require" and that the writs and processes the court is authorized to issue "will include the best that can be invented" to provide litigants with a remedy.[205] It is but a small step from these principles to say that a Court has a right to act to suspend dishonest or incompetent judges, in order to ensure the integrity of the mechanism for enforcement of rights.

In *Opinion of the Justices (Judicial Salary Suspension),*[206] the Court held that a bill which would require the Supreme Court to suspend the salary and benefits of any judge suspended by the Supreme Court for misconduct was violative of Part I, Article 37, of the New Hampshire Constitution because the bill would intrude upon the court's superintending power under Part II, Article 73-a, which includes the authority to exercise discretion in determining whether to suspend a judge without pay. The Court stated that its authority to protect the integrity of the Court derived from common law, constitutional authority, statute, and the power to impose rules of court and regulate the Bar. The Court was careful to note that suspending the pay of a judge as a matter of internal discipline by

the Court would not, however, violate the constitutional provision relating to salary and tenure of judges.[207]

3. Suspended Sentence, Pardons and Reprieve

According to the historian Justice Elwin Page, the concept of suspending sentences was invented by "unlearned judges" who were men of vision and willing to experiment.[208] While Part II, Article 5 of the New Hampshire Constitution assigns to the Legislature the power to fix the punishment for crime, the Court has consistently held that New Hampshire courts have the common law power to suspend either the imposition or execution of a sentence.[209] However, in 1975 a divided Supreme Court held that the Constitution does not prohibit the Legislature from constricting the exercise of judicial discretion by providing for mandatory sentences for crimes.[210] The majority (Justice Grimes dissented) reasoned that common law judicial powers, and the authority of courts traditionally described as inherent are constitutional prerogatives only to the extent that constitutions make them so.[211] The Court emphasized that Part II, Article 5 gave to the Legislature the power to define crimes and set punishments. But the unarticulated premise of the Court decision appears to be the recognition that the courts could function as the "Courts and judicatories" described by the New Hampshire constitution without the power to suspend sentences.

In 1974, the Court held that the statutes authorizing judicial annulment of criminal offenses were, like the probation statutes, not a legislative infringement on the governor's pardoning power.[212] Without much discussion, the Court held that the Governor's decision to comply with a request for interstate rendition of a person serving a sentence of imprisonment did not violate the principle.[213]

4. Regulation of Attorneys

In 1968, the Court stated that it was in the interest of the administration of justice, of the legal profession, and the public welfare, that a unified Bar be established.[214] The Court held that it had authority to do so because the Legislature had granted the Court specific authority over the admission of a person to practice law, as well as the power to supervise, control and discipline those admitted, but also cited Judge Doe's opinion in *Ricker's Petition* for the proposition that it had inherent authority to make reasonable rules for admission and removal of members of the Bar.[215] The Court noted in its opinion that the 1961 Legislature had introduced a bill to unify the Bar, and the bill had failed, but stated that since unification of the Bar is a matter within the Court's jurisdiction and which can best be resolved by it, the "negative and inconclusive action in the Legislature should not be regarded of particular significance."[216]

In 1986, in *Rousseau v. Eshleman,*[217] the Court, citing Part II, Article 73-a stated that the admission to the practice of law and regulation of attorneys has been dealt with as an area of shared responsibility between the legislative and judicial branches of government, and held that in view of the practical problems which might attend application of the Consumer Protection Act to attorneys, it was reluctant to apply it in the absence of clear legislative intent. In 1993 in *State v. Tocci,*[218] the Court, citing the pre-Part II, Article 73-a decision in *In re: Unification of the New Hampshire Bar,*[219] referred to Part II, Article

73-a as simply confirming the authority it already possessed to regulate the Bar to ensure that the Bar is qualified and ethical.

5. Rulemaking

An extraordinary amount of litigation concerned judicial rulemaking in the last half of the 20th century. In the 1960's the Court seemed to draw a distinction between two different types of rules; rules which, like the contempt power, were necessary for the Court to carry out its constitutional functions, and rules which were created pursuant to the traditional amalgam of common law and statutory power, subject to legislative control, in order to provide a remedy.

Thus, in 1967 in *Nassif Realty Corporation v. National Fire Insurance Company,*[220] the Court, relying upon the statutory and common law authority referred to in *Boody v. Watson* held that even the constitutional right to a jury trial may be lost by failure to comply with a court rule. The Court recognized the Legislature's authority to regulate procedure in *Gibbs v. Prior,*[221] rejecting a claim that the statutory provision which provided that the jury should not be informed of the damage limitation in wrongful death actions was unconstitutional. However, a distinction was delineated in *Garabedian v. William Co.,*[222] in 1965, between rules which may regulate assertion of rights, and rules essential to the function of the Court. The Court held in *Garabedian* that a trial court could dismiss a Bill in Equity for want of prosecution. In so holding, the Court emphasized that the problems of congestion, delay and calendar control require that the courts be given "muscular power" to deal with the problems effectively.[223] The Court stated that the power to dismiss *sua sponte* for lack of prosecution has generally been considered to be an inherent power, governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.[224]

The Court took a similar approach in 1983 in *State v. LaFrance,*[225] when it faced the stark question of whether a court rule which prohibited police officers from wearing firearms in a courtroom, or a statute which allowed them to do so, would be controlling. The Court characterized the issue as one of control and decorum, analogizing the Court's right to prohibit firearms to the Court's inherent right to control the proceedings before it by the contempt power, a power which it had held in 1935 could not be altered by the Legislature.[226] Such considerations led the Court to conclude in 1998 that the Legislature could not remove control of Court security from the judicial branch and place it with the Legislature.[227]

The *LaFrance* Court referred to the then recently enacted Part II, Article 73-a provision of the constitution which gave it rulemaking power as simply confirming the power it believed it already had to control the proceedings before it:

> The courts' authority to adopt rules of practice and procedure is of ancient origin. Its history is well summarized in *Nassif Realty Corporation v. National Fire Ins. Co.,* [citation omitted] and *Garabedian v. William Co.,* [citation omitted]. The court's conclusion in these cases is that the rulemaking process is

> an inherent judicial power existing independently of legislative authority. In addition, part II, article 73-a of the New Hampshire Constitution, which granted to the supreme court the power to make rules regulating the administration of all courts of the State, makes clear the judiciary has the authority to promulgate and administer rules concerning practice and procedure in the courtroom.[228]

The State had argued that the 1860 case of *Deming v. Foster*[229] established that court rules are subordinate to acts of the Legislature "passed in the due exercise of its constitutional power," but the Court rejected the State's arguments, stating the argument begged the question because "whether this legislation was passed in the exercise of its constitutional power is what this case is all about."[230] That the premise of the decision related to control of the courtroom rather than the issue of which branch of Government could exercise rule making authority is illustrated by the fact that no question has ever been raised about the Legislature's power to bar all individuals from taking guns into court — a power it has exercised in enacting RSA 159:19.

The distinction between rules which merely govern procedure and rules which affect the function of a Court was cast in bold relief in 1995 and 1997, when the Court dealt with proposed legislation relating to rules of evidence in sexual assault cases. In the first, *Opinion of the Justices (Certain Evidence in Sexual Assault Cases),*[231] the Court upheld a statute which would establish a blanket prohibition of evidence of a sexual assault victim's manner of dress. The Court specifically noted that the manner of dress evidence was evidence which "has no relevance to the issue of consent," and therefore, its tendency to humiliate the victim and mislead and confuse the jury *a fortiori* outweighs its probative value and leads to its inadmissability.[232] The Court did not even discuss any separation of powers issue, apparently assuming the Legislature was well within its rights in enacting such legislation.

Only two years later, in *Opinion of the Justices (Prior Sexual Assault Evidence)*[233] the Court considered a statute which would have provided that evidence of prior sexual assaults committed by a defendant charged criminally or civilly with sexual assault, would be subject to a rebuttable presumption of admissibility. The proposed statute, in effect, amended New Hampshire Rule of Evidence 404(b) which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

New Hampshire Rule of Evidence 404(b) was modeled on Federal Rule of Evidence 404(b), and simply restates the common law rule that a person is to be tried for an act he commits, and not for his character and that, therefore, evidence of other bad acts is only admissible in certain narrow circumstances.[234] Indeed, the federal rule, in relevant part, is identical to N.H. Rule of Evidence 404(b) , as are the rules of 41 other jurisdictions.[235] By creating a rebuttable presumption, the Legislature sought to alter one of the most fundamental rules of criminal jurisprudence; as the Court stated in 1876, "[e]vidence of a

person's prior bad acts is not permitted to show in [a] prisoner a tendency or disposition to commit the crime with which he is charged."[236]

The Court held that the proposed legislation would violate Part I, Article 37. The rationale for the decision appears that the Court was concerned that the statute, at least as applied in the criminal context, would violate due process:

> Rule 404(b) goes to the heart of the judicial function; it strikes a balance between the search for evidence that furthers the truth-finding process and the accused's right to due process. [citations omitted] Due process is a substantive right grounded in the constitution and Rule 404(b) is a method by which the right is enforced. [citation omitted.] The constitution vests this court with the responsibility of maintaining and refining this balance...A court's constitutional function to independently decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate.[237]

The Court concluded that "because the proposed bill conflicts with Rule 404(b), a rule concerning a uniquely judicial function, the separation of powers doctrine is violated."[238] In dicta, the Court stated that the Legislature was limited in its rulemaking authority to (1) rules which govern the admission of evidence or create presumptions, where the evidence or presumptions are integral to the definition of an action, or (2) where it acts within its express powers to allocate jurisdiction among the courts. The Court suggested that the Legislature had:

> gone beyond its legislative function and crossed into areas that remain the exclusive domain of the judiciary. *See* RSA 382-A:2-202 (1994) (limitation of parole evidence); RSA 356:4-e (1995) (application of preclusive effect in antitrust proceedings); RSA 632-A:6 III-a (Supp. 1996) (manner of dress of victim inadmissible to show consent.) Although these enactments arguably may interfere with the judiciary's authority over procedural matters, we may apply them as a matter of comity when they are consistent with judicial functions and policies and when no constitutional challenge is made to them.[239]

The Court's suggestion that its rulemaking authority regarding evidentiary or procedural rules is exclusive is inconsistent with prior precedent which suggests, as does practice, that the area of procedural rulemaking is one in which the Judiciary and Legislature share concurrent authority, absent constitutional considerations, such as impairment of the court's ability to function. Moreover, the suggestion that rules enacted by the Legislature would be recognized as a matter of "comity" is arguably at odds with the language of Part I, Article 37, which, by its terms, does not require absolute separation of powers, but requires that the three powers of government be kept as separate from and independent of each other as the nature of a free government will admit "or is as consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity." *Black's Law Dictionary* defines comity as "courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right but out of deference and good will." The use of such a term does not aptly describe the 200 years of concurrent exercise of power by the three branches of

New Hampshire Government. Finally, the suggestion that the Court had exclusive jurisdiction over all procedural rules was inconsistent with the 1981 decision in *State v. Elbert*,[240] in which, pursuant to its rulemaking authority under Part II, Article 73-a, the Court ordered a new system for jury selection "pending further order of this Court or until a new statute is enacted which provides a suitable alternative method."[241] However, the broad statement suggesting that all statutes enacted by the Legislature are only recognized as a matter of comity was narrowed somewhat one year later in *Petition of Mone*[242] in which the Court stated that legislative enactments which encroach on essential judicial functions may be applied where they are consistent with judicial functions and policies and no constitutional challenge is made to them, as a matter of comity.

Ultimately, the Court's dicta regarding its rulemaking authority was unnecessary to its decision. The Court determined that it did not need to determine whether the proposed statute would violate Part I, Article 73-a of the Constitution since the statute would plainly violate Part I, Article 37.[243]

VIII. CONCLUSION

In 1938, the historian Richard F. Upton attempted to determine, after reviewing the legal history of the State, whether the relatively elastic definition of Separation of Powers in Part I, Article 37 resulted in a "less rigid separation of powers in actual practice." He concluded that it was "still too early to answer the question."[244] While the last 63 years have likely resulted in as much appellate litigation about Part I, Article 37 as the preceding 154 years of the State's constitutional history, it is still impossible to answer the question definitively although an implicit and explicit recognition that numerous areas of government are subject to concurrent exercise of powers by the several branches has been reflected in many of the cases, and perhaps more importantly, in practice.

A few conclusions are, however, apparent. First, New Hampshire constitutional law is an area in which the principles, if not immutable, have remained relatively stable over the years. The critical theoretical analysis of the constitutional principles that govern the State was developed in the latter part of the 19th century. There are few other areas of law in which cases over 100 years old can provide relevant rules for decision.

Second, there is little doubt that the bulk of the separation of powers litigation has resulted from tension between the most democratic branch of the government, the Legislature, and the least democratic branch of government, the Judiciary. This would hardly be unexpected in a republic.

Third, analysis of the entire body of New Hampshire law, rather than the relatively few cases in which separation of powers has been actually litigated, leads to a conclusion that the New Hampshire Judiciary and the New Hampshire Legislature, particularly in the last 150 years, have accepted the concept of concurrent powers; that there are areas, such as regulation of the Bar, rulemaking by courts, and administrative law in which the Judiciary, the Executive, and the Legislature exercise concurrent power. Indeed, it is striking to note that three radically different regimes of civil procedure have been

established in New Hampshire in the last 218 years, without the benefit of any specific enabling legislation.

How, then, can an unconstitutional encroachment by one branch on another be defined? To formulate a definitive rule in this area is obviously difficult, since the cases are replete with statements such as there are "regions of authority, alternative and concurrent, the boundaries of which are fixed by no final rule."[245] A review of the case law leads to the conclusion that an attempt to fix duties upon a branch of the Government to which they do not belong will ordinarily be held to violate the Constitution. But even imposition of executive duties on a court may be acceptable if those duties are closely related to an integral judicial function.

Cases involving imposition of power are relatively rare. The more common issue involves tension between the judicial and legislative branches. Review of these cases leads to the conclusion that if there is a conflict between the Legislature and the Judiciary, then the legislative action must control unless its action strikes at the heart of the court's ability to act as one of the "judicatories and courts of record" described in Part II, Article 4 of the New Hampshire Constitution. Thus, while the Legislature may make laws regulating which judges may hear contempts, the Legislature cannot take the contempt power from the courts, or even limit it, since the contempt power is a necessary tool for a court to perform its constitutional tasks. While judges may ordinarily suspend sentences, the Legislature may require that sentences be mandated, except in the extreme case where the sentence would violate Part I, Article 18's prohibition of excessive punishment. While the legislature may regulate admission to the Bar, the Court must be able to bar from practice those who are dishonest or otherwise unfit to be officers of the Court. Similarly, while the Court may invent procedures to protect rights defined by the Legislature, the authority to do so is limited by and subject to the legislative law-making power, as long as the power is exercised in a way which does not violate an express constitutional right, such as due process, or impair the Court's ability to perform its functions. Thus, while the Legislature has ultimate authority to make laws, a court has the right to reject rules which would, for example, allow armed executive officers in a courtroom, and to create rules which would allow it to dismiss actions for want of prosecution which could otherwise clutter the court's docket indefinitely. But the issues involving attorneys, rules and contempt are really only ancillary to the analysis of judicial power under the New Hampshire Constitution.

The discussion of judicial power ends where it begins — with the uniquely American principle of judicial review. The power of the Legislature to pass laws is broad but it is not unlimited. Courts must be able to perform their tasks in our constitutional system — to act as courts in determining controversies, and to determine if the actual will of the people, expressed directly by them in their Constitution, is threatened by the action of their elected representatives, the Legislature. The latter principle is the cornerstone of the social contract created by the New Hampshire Constitution. As the Court noted in 1819:

> It was well known and considered, that “in the distinct and separate existence of the judicial power consists one main preservative of the public liberty;” that indeed “there is no liberty if the power of judging be not separated from the

> legislative and executive powers." In other words that "the union of these two powers is tyranny" or as Mr. Madison observes may justly be pronounced the very definition of tyranny; or in the language of Mr. Jefferson "is precisely the definition of despotick government."[246]

At its very heart, the New Hampshire Supreme Court's role is that of guardian of the New Hampshire Constitution and, therefore, of the rights guaranteed under the social contract, which creates the liberty established under it in June 1784. It is the Court's ability to carry out that task that defines the powers of the Court which must remain inviolate.

ENDNOTES

1. Carl J. Friedrich, *Constitutional Government and Democracy,* (1945) p. 171.
2. *Separation of Powers in the American Constitution, In Separation of Powers and Good Government,* (Bradford P. Wilson, et al., eds., 1994) p. 4.
3. *Id.*
4. *Separation of Powers and Judicial Review, supra* n. 2, at 64.
5. *Id.,* p.66.
6. Friedrich, *supra* n. 1, at 173.
7. *Id.,* p. 174. See *Merrill v. Sherburne,* 1 N.H. 199, 208 (1819), citing Montesquieu's work.
8. *The Federalist,* No. 51, 349, quoted in *Separation of Powers, supra* n. 2, at 71.
9. Gordon S. Wood, *Creation of the American Republic, 1776-1787,* (1969) p. 447.
10. Elwin Page, *Judicial Beginnings in New Hampshire,* (New Hampshire Historical Society, Concord, NH, 1959) pp. 29-31.
11. *See generally,* R. Upton, *Separation of Powers in New Hampshire,* Unpublished Thesis, Harvard Law School, 1938, pp. 4-26 [hereinafter: Upton, *Separation]*.
12. *Id.*
13. *Id.*
14. *Id.* at 20.
15. 57 N.H. 55, 61-63 (1875).
16. *Perkins v. Scott,* 57 N.H. 55, 62 (1875) (brief of John M. Shirley).
17. *Upton, Separation, supra* n. 11, at 19.
18. L. Bravenec, *The New Hampshire Bill of Rights in the Constitution of 1784 and the Treatment of Dissenters,* 8 N.H.B.J. 244, 251 (1966); see *also,* Douglas, *Judicial Review and the Separation of Powers Under the New Hampshire Constitution of 1776 and 1784,* 18 N.H.B.J. 250, 253-256 (1977).
19. Upton, *Separation, supra* n. 11, at 43.
20. *Id.*
21. L. Bravenec, 8 N.H.B.J. 244, 253 (1966).
22. Upton, *Separation, supra* n. 11, at 45.
23. 1 N.H. 1999 (1819).
24. *Gould v. Raymond,* 59 N.H. 260, 272-73 (1879).
25. *Id*. at 274; see *generally* Bravenec, *supra* n. 18, pp. 258-260 (pointing out that while an Act passed in 1782 authorized confiscation of the estates of those who had given aid to Great Britain, it was never generally enforced).
26. Bravenec, *supra* n. 18, quoting 4 Laws of N.H. 93.
27. Bravenec, *supra* n. 18, at 256.
28. Upton, *Separation, supra* n. 11, at 26.
29. Bravenec, *supra* n. 18, at 262-63; see *also,* C. Douglas, *Judicial Review and The Separation of Powers Under The New Hampshire Constitutions of 1776 and 1784,* 18 N.H.B.J. 250, 255-57 (1977) describing a legislative act authorizing a trial for treason allegedly committed in Grafton County to proceed in Strafford County.
30. *Gould v. Raymond,* at 273.
31. Upton, *Separation, supra* n. 11, at 47.
32. *Id.*
33. Newmarket Town Records I, 437, transcript at State Library, quoted in Upton, *Separation, supra* n. 11, at 48.

34. *Attorney General v. Morin,* 93 N.H. 40, 46, 35 A.2d 513 (1943).

35. See e.g., *Copp v. Henniker,* 55 N.H. 179, 191 (1875).

36. Upton, *Separation, supra* n. 11, at 54-55.

37. See e.g., *State v. U.S. & Canada Express Co.,* 60 N.H. 219, 253 (1880) (Doe, C.J. concurring) ("The contract theory of the origin and object of government having become practical law in this state in 1784, we need not inquire into its previous soundness as a matter of political speculation or historical fact."); N.H. CONST. part I, art. 3: [Society, Its Organization and Purposes]. When men enter into a state of society, they surrender up some of their natural rights to that society in order to ensure the protection of others; and without such an equivalent, the surrender is void."

38. Reid, *Chief Justice: The Judicial World of Charles Doe,* (1967) p.231 [hereinafter: Reid, *Chief Justice]*.

39. *Gould v. Raymond,* 59 N.H. 260, 275 (1879).

40. Illustrative is the exposition of the debased state of women at common law in *Harris v. Webster,* 58 N.H. 481, 482-3 (1878) in which Justice Foster, after recognizing that the common law allowed the wife to neither sue nor be sued quoted Bracton to the effect that "the common law shaketh hands with divinity" - which he considered "an illustration of the habit of presenting every established fact which is too bad to admit of any other defense as an injunction of religion." *Id.* at 481. The Court rejected the common law rule, and allowed a wife to sue in her own name, noting "...by changes religious, social, customary, legislative, and judicial, the rule of the common law has been abolished and obliterated; and it is no longer possible to say that in New Hampshire a married woman is a household slave or chattel or that in New Hampshire the conjugal unity is represented solely by the husband." *Id.* at 483.

41. N.H. CONST. part II, art. 89.

42. *Hale v. Everett,* 53 N.H. 9, 53 (1886).

43. Reid, *Chief Justice, supra* n. 38, at 6-7. By the time the Constitution was amended in 1875, the prohibition itself was a dead letter. *Id. See also, Hale v. Everett,* 53 N.H. 9, 172 (1868) (Doe, J. dissenting) ("within a few years past, Catholics have held the representative office in known contravention of the constitution; but this resulted from a change of public opinion as to the necessary and propriety of excluding them.") However, Reid also notes that "...even before the Indian Wars began, there had been anti-Catholic legislation. Afterward, Catholics could enter New Hampshire only at their peril..." Reid, *Chief Justice, supra* n. 38 at 6.

44. N.H. CONST. part I, art. 15, as originally enacted.

45. *State v. Ober,* 52 N.H. 459, 464 (1873); See RSA 516:31. The common law incompetency for parties in civil cases was removed in 1857. *Rice v. Flanders,* 39 N.H. 304, 310 (1859).

46. *Gould v. Raymond,* at 275.

47. *State v. U.S. & Canada Express Co.,* 60 N.H. 219, 248 (1880).

48. *Id.*

49. *Id.*

50. *Pierce v. State,* 13 N.H. 536, 557-58 (1843). Indeed, during this time called the "common sense" era, judges would instruct juries that "[i]t is our business to do justice between the parties, not by any quirks of law out of Coke or Blackstone, books I never read, and never will, but by common sense and common honesty as between man and man." Reid, "From Common Sense to Common Law to Charles Doe; The Evolution of Pleading in New Hampshire." 1 N.H.B.J. 27, 29 (April 1959) [hereinafter: Reid, *Common Sense]*.

51. *State v. U.S. & Canada Express Co.,* at 246-47; *Eyers Woolen Co. v. Gilsum,* 84 N.H. 1, 18, 146 A. 511 (1929); 1 N.H.B.J. 27, 29 (April 1959). *But see, Attorney General v. Morin,* 93 N.H. 40, 47-48, 35 A.2d 513 (1943) in which the Court was apparently willing to consider even pre-revolutionary usage, but ultimately based its conclusion on more recent practices.

52. 5 U.S. 137 (1803).

53. *Morey v. Proprietors of Orford Bridge,* Smith's Reports 91, 94 (1804). In several unreported decisions certain acts granting new trials had been held invalid. *Merrill v. Sherburne, supra* at 216-17.

54. *Perkins v. Scott,* 57 N.H. 55, 70 (1876) (argument of John M. Shirley).

55. *Id.*

56. 1 N.H. 199, 217 (1819).

57. *Merrill v. Sherburne,* 1 N.H. 199, 201-202 (1819) (At the time of this decision, the highest court in New Hampshire was the Superior Court of Judicature. The title of the State's highest courts changed throughout the years as a result of legislative reorganizations, until 1901, when the Courts were constituted in their present form. For convenience, I have referred to the highest court then in existence as "the Court" throughout this article.).

58. *Id.* at 203.

59. *Id.* at 204.

60. *Id.* at 207.

61. *Id.* at 216-217.

62. *Id.* at 200-201.

63. *Perkins v. Scott,* (argument of Shirley at 70).

64. *Id.* at 71.

65. 4 N.H. 565, 572 (1827).

66. *Opinion of the Justices*, 4 N.H. 565, 572 (1827).

67. *Pierce v. State,* at 559.

68. Richard F. Upton, *The Independence of the Judiciary in New Hampshire,* 1 N.H.B.J. 28, 31 (July 1959) [hereinafter: Upton, *Independence]*.

69. *Id.* at 31.

70. *Cummings v. White Mountain Railroad,* 43 N.H. 114, 114 (1861); see *also, Rich v. Flanders,* 39 N.H. 309 (1859).

71. Upton, *Independence, supra* n. 68.

72. Reid, *Common Sense, supra* n. 50, at 30; see n. 50; *In re: Proposed Rules of Civil Procedure,* 139 N.H. 512, 659 A.2d 420 (1995).

73. Reid, *Chief Justice, supra* n. 38, at 94.

74. Reid, *Common Sense, supra* n. 50 at 31-37.

75. *Id.* at 32-33.

76. *Hayward v. Brown,* 38 N.H. 366, 368 (1859).

77. *Hayward v. Brown,* 38 N.H. 366, 370 (1859). New Hampshire Courts, of course, followed the common law rule that statutes in derogation of the common law would be strictly construed. See e.g., *Wendell v. Abbott,* 43 N.H. 68, 73 (1861); *Adams v. Richardson,* 43 N.H. 212, 213 (1861).

78. *Hayward v. Brown,* 38 N.H. 366, 370 (1859). See *also, Carleton v. Patterson,* 29 N.H. 580, 588-89 (1854); *Knight v. Coleman,* 19 N.H. 118, 120 (1848); *Fabyan v. Adams,* 15 N.H. 371, 373 (1844) (caption of deposition not in compliance with statute; deposition excluded); *Clement v. Hadlock,* 13 N.H. 185, 191 (1842). Illustrative is the discussion in *King v. Hutchins,* 28 N.H. 561, 578-80 (1854): "This case 'raises a question of some practical importance, whether the omission of the initial letter between the christian name and the surname is a variance.'"

79. 21 N.H. 231 (1850).

80. *Cater v. McDonald,* 21 N.H. 231, 232 (1850).

81. 42 N.H. 165, 178 (1860).

82. *Deming v. Foster,* 42 N.H. 165, 178-79 (1860).

83. *Id.* at 178-179. See *also, Carr v. Adams,* 70 N.H. 622, 623, 45 A. 1084 (1899).

84. *Gallagher v. Cotton,* 74 N.H. 1, 2, 64 A. 583 (1906).

85. *State v. Tenney,* 23 N.H. 162, 166 (1851).

86. 42 N.H. 540, 544 (1861).

87. *State v. Matthews,* 37 N.H. 450, 453 (1859); see *also, Bates Case,* 55 N.H. 325 (1875).

88. *Ex Parte Howard,* 17 N.H. 545, 547 (1845) The power is now embodied in RSA 4:24. (It appears that in the first half of the 19th century, the legislature believed it had the authority to pass acts for the commutation of death sentences. See Upton, *Separation, supra* n. 11, at 96. In 1867, a statute authorizing the Governor and Council to commute was enacted. The statute exists today in RSA 4:23.)

89. Upton, *Centennial History of the New Hampshire Bar Association,* 15 N.H.B.J. 35, 39 (1973) [hereinafter: Upton, *Centennial]*.

90. *Id.* at 42.

91. *Id.* at 46.

92. *Id.* at 46-47.

93. *Id.* at 47.

94. By 1859, the Superior Court, then the highest court in the state, provided in its rules that those who sought admission under the 1842 statute must provide affidavits of good character of "persons known to the Court." Upton, *Centennial, supra* n. 87 at 47.

95. *Bryant's Case,* 24 N.H. 149, 158 (1851).

96. *Id.*

97. *Id.* at 156. The Court pointedly noted that all the statements made by Bryant "could not be true."

98. 58 N.H. 5 (1876).

99. *Delano's Case,* 58 N.H. 5, 6 (1876).

100. 66 N.H. 207, 29 A. 559 (1890).

101. *Ricker's Petition,* 66 N.H. 207, 210, 29 A. 559 (1890).

102. *Id.* at 210; see *also, In re: Unification of the New Hampshire Bar,* 109 N.H. 260, 263, 248 A.2d 709 (1968).

103. See, e.g., *Fay v. Parker,* 53 N.H. 342 (1872) holding that the New Hampshire Constitution barred punitive damages because punitive damages provided punishment without the protections of procedural due process, illustrative of the constitutional jurisdiction premised upon the primacy of individual civil rights.

104. *State v. United States & Canada Express Co., supra* at 253 (concurring opinion).

105. Reid, *Chief Justice, supra* n. 38, at 230.

106. Reid, *Chief Justice, supra* n. 38, at 231.

107. 58 N.H. 451 (1878).

108. *Ashuelot Railroad v. Elliot,* 58 N.H. 451, 452 (1878).

109. See, e.g., *Opinion of the Justices,* 41 N.H. 550, 551 (1860) ("We regard it as a well settled and unquestioned rule of construction that the language used by the legislature, and the statutes enacted by them, and that used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted." *Id.* at 551); see *also, Warburton v. Thomas,* 135 N.H. 382, 387, 616 A.2d 495 (1992); *Grinnell v. State,* 121 N.H. 823, 826, 435 A.2d 495 (1992); *Keniston v. State,* 63 N.H. 37, 37-38 (1884).

110. Reid, *Chief Justice, supra* n. 38, at 61.

111. *Opinion of the Justices,* 56 N.H. 570, 574 (1875); *Opinion of the Justices,* 58 N.H. 621 (1877); *Bingham v. Jewett,* 66 N.H. 382, 29 A. 694 (1890).

112. *Opinion of the Justices,* 60 N.H. 585 (1881).

113. Upton, *Separation, supra* n. 11, at 163.

114. *White Mountain Railroad v. White Mountain Railroad,* 50 N.H. 50, 56 (1870).

115. *Ashuelot Railroad v. Elliot,* 58 N.H. 451, 458 (1878).

116. *Id.* at 457.

117. *Sherburne v. Portsmouth,* 72 N.H. 539, 541, 58 A 38 (1903); see *also, Boody v. Watson,* 64 N.H. 162, 9 A. 794 (1886).

118. *Sherburne v. Portsmouth,* 72 N.H. 539, 542, 58 A 38 (1903).

119. *Edes v. Boardman,* 58 N.H. 580, 584-85 (1879).

120. *In re: School Law Manual,* 63 N.H. 574, 575-576, 4 A. 878 (1885).

121. *Id.* at 576.

122. *In re: Probate Blanks,* 71 N.H. 621, 52 A. 861 (1902).

123. See *generally,* Reid, *Common Sense, supra* n. 50; Reid, *Chief Justice, supra* n. 38, at 93-108; *In re: Proposed N.H. Rules of Civil Procedure,* 139 N.H. 512, 659 A.2d 420 (1995) in which the Court stated that under the New Hampshire system of pleading "[i]t still is practically impossible to lose an action because of a procedural technicality." *Id.* at 516.

124. *Metcalf v. Gilmore,* 59 N.H. 417 (1879).

125. *Crawford v. Parsons,* 63 N.H. 438 (1885).

126. *Brooks v. Howison,* 63 N.H. 382 (1885).

127. *Stebbins v. Lancashire Insurance Co.,* 59 N.H. 143, 149 (1879). Indeed an amendment may be made after verdict when the verdict could not have been affected by the amendment had it been made before trial. *Elsher v. Hughes,* 60 N.H. 469 (1881); see *also,* Reid, *Common Sense, supra* n. 50, at 36.

128. 63 N.H. 599 (1885); The historian Richard F. Upton stated in 1938 after reviewing the many cases, "It has never been made clear whether the court's power rests solely upon statute or whether the statute is merely declaratory of the power which the court has anyway." Upton, *Separation, supra* n. 11, at 144.

129. *Boody v. Watson,* 64 N.H. 162, 196, 9 A. 794 (1886) (Carpenter dissenting).

130. *Id.* at 170.

131. *Id.* at 170.

132. *Id.* at 171-172.

133. *Dow v. Northern Railroad,* 67 N.H. 1, 63-64, 36 A. 510 (1886).

134. Reid, *Chief Justice, supra* n. 38, pp.280-81.

135. *Grafton County Electric Light & Power Co. v. State,* 77 N.H. 490, 508-09, 92 A. 837 (1915).

136. *State v. Maine Central Railroad,* 77 N. H. 425, 426 92 A. 837 (1914).

137. *Ferretti v. Jackson,* 88 N.H. 296, 299, 188 A. 474 (1936).

138. *Attorney General v. Meader,* 80 N.H. 292, 293, 116 A. 433 (1922).

139. See e.g., *Petition of Boston & Maine Railroad,* 109 N.H. 324, 251 A.2d 332 (1969); *McKay v. Workers' Compensation Appeals Board,* 143 N.H. 722, 732 A.2d 1025 (1999); *In re: Kearsarge Regional School District,* 138 N.H. 211, 636 A.2d 1033 (1994); *Guillou v. DMV,* 127 N.H. 579, 503 A.2d 838 (1986); *Smith Insurance Co. v. Grievance Commission,* 120 N.H. 856, 424 A.2d 816 (1980); *Pomponio v. State,* 106 N.H. 273, 209 A.2d 733 (1965); *Cloutier v. State Milk Control Board,* 92 N.H. 199, 28 A.2d 554 (1942).

140.*McKay v. Workers' Compensation Appeals Board,* at 727-28; *Conway v. Water Resources Board,* 89 N.H. 346, 351, 199 A. 83 (1938); *Kearsarge Regional School District,* at 215.

141. *Opinion of the Justices,* 102 N.H. 195, 197, 152 A.2d 878 (1959).

142. *Opinion of the Justices, 87 N.H.* 492, 493, 179 A. 344 (1935).

143. *Opinion of the Justices,* 102 N.H. 195, 198, 152 A.2d 878 (1959).

144. *Id.* at 196.

145. *Opinion of the Justices, 86 N.H.* 597, 602, 166 A. 640 (1933).

146. *Id.*

147. *Id.* at 600.

148. *Id.* at 600.

149. *Opinion of the Justices,* 85 N.H. 562, 568, 154 A. 217 (1931).

150. *Id.* at 568.

151. *Attorney General exrel Commissioners of Coos County v. Morin,* 93 N.H. 40, 49, 35 A.2d 513 (1943).

152. *Id.* at 47, 48, citing Judge Doe's opinion in *State v. U.S. & Canada Express Company,* 60 N.H. 219, 246-47 (1880), and Judge Peaslee's opinion in *Eyers Woolen Company v. Gilsum,* 84 N.H. 1, 18-19 (1929).

153. Compare Upton, *Separation, supra* n. 11, at 87 ("The veto power has been used very infrequently by the governors of New Hampshire. It has not been unusual for governors to approve all of the bills passed during their term. The seeming reluctance to veto legislation may be explained in various ways. The volume of legislation has never been large. Few governors have been men of vigorous personality. Furthermore, party control of all branches of government has prevailed uninterrupted for long periods in the history of the State.") with C. Douglas, *The Gubernatorial Veto Power in New Hampshire,* 15 N.H. Bar Journal 9 (1973) p.9 ("In the 1973 regular session of the General Court, a record number of 26 bills were vetoed by Governor Meldrim Thomson, Jr.").

154. *Opinion of the Justices,* 118 N.H. 7, 13, 381 A.2d 1204 (1978).

155. *Opinion of the Justices,* 122 N.H. 199, 442 A.2d 594 (1982).

156. N.H. CONST. part I, art. 15.

157. N.H. CONST. part II, art. 72-a.

158. N.H. CONST. part II, art. 73.

159. N.H. CONST. part II, art. 73-a.

160. *Opinion of the Justices,* 118 N.H. 582, 585, 392 A.2d 125 (1978); *Opinion of the Justices,* 110 N.H. 359, 363, 266 A.2d 823 (1970); see *also, Petition of Mone,* 143 N.H. 128, 134, 719 A.2d 626 (1998).

161. *Opinion of the Justices,* 118 N.H. 582, 586, 392 A.2d 125 (1978).

162. See e.g., *Ferretti v. Jackson,* 88 N.H. 296, 300, 188 A. 474 (1936); *Opinion of the Justices,* 87 N.H. 492, 493, 179 A. 344 (1935).

163. *Opinion of the Justices,* 110 N.H. 359, 363, 266 A.2d 823 (1970).

164. *Opinion of the Justices,* 102 N.H. 195, 197, 152 A.2d 878 (1959).

165. *Opinion of the Justices (Prior Sexual Assault Evidence),* 141 N.H. 562, 569, 688 A.2d 1006 (1997).

166. *Lisbon v. Lisbon Village District,* 104 N.H. 255, 258, 183 A.2d 250 (1962).

167. *Opinion of the Justices,* 113 N.H. 287, 290, 306 A.2d 55 (1973).

168. *Id.* at 290.

169. *Opinion of the Justices,* 101 N.H. 531, 535, 133 A.2d 792 (1957).

170. *Opinion of the Justices,* 116 N.H. 406, 413, 360 A.2d 116 (1976).

171. *Union Leader Corporation v. Chandler,* 119 N.H. 442, 445, 402 A.2d 914 (1979).

172. *Opinion of the Justices,* 110 N.H. 359, 365, 266 A.2d 823 (1970).

173. *Opinion of the Justices,* 129 N.H. 714, 718-719, 532 A.2d 195 (1987).

174. *See e.g., In re: Gamble,* 118 N.H. 771, 776, 394 A.2d 308 (1978) (imposition on obligation of probate court to choose guardians for incompetent, violative of Part I, Article 37.)

175. *Petition of Mone,* 143 N.H. 128, 137-38, 719 A.2d 626 (1998).

176. 143 N.H. 128, 719 A.2d 626 (1998).

177. *Petition of Mone,* 143 N.H. 128, 134, 719 A.2d 626 (1998).

178. *Id.* at 137.

179. *Id.* at 138.

180. *Id.* at 138; (The Court did not refer to *Attorney General v. Morin,* 93 N.H. 40, 35 A.2d 513 (1943) in which it had held that imposition of the duty to appoint a fiscal agent for Coos County did not violate the Constitution.).

181. *Petition of Judicial Conduct Committee*_____ N.H. ___,751 A.2d 514 (2000).

182. 120 N.H. 333, 414 A.2d 1297 (1980) (It is notable that the 3 judges in the majority were republican, the two judges in the minority were democrats, including a former democratic governor of the state, and the prevailing party was the republican senate president who sued against the democratic governor.)

183. *Monier v. Gallen,* 120 N.H. 333, 340, 414 A.2d 1297 (1980).

184. *Opinion of the Justices,* 118 N.H. 7, 16, 381 A.2d 1204 (1978).

185. *Opinion of the Justices,* 118 N.H. 582, 589, 392 A.2d 125 (1978).

186. 343 U.S. 579 (1952).

187. *Id.*

188. *Attorney General v. Morin,* 93 N.H. 40, 46, 35 A.2d 513 (1943).

189. Delegate Gross: Is my understanding correct that this amendment, if adopted, would not deprive the legislature of the right that it presently has to regulate court procedure by statute?

Delegate Nighswander: I would think any power that they [the legislature] now have, they would still have. *Journal of the Convention to Revise the Constitution* (1978) p.262.

190. 71 N.H. 621, 52 A. 861 (1902).

191. *State v. Wentworth,* 118 N.H. 832, 838, 395 A.2d 858 (1978).

192. *Dunn v. Perrin,* 570 F.2d 21 (1st Cir.) *cert. denied,* 437 U.S. 910 (1978).

193. *State v. Hastings,* 120 N.H. 454, 455, 417 A.2d 7 (1980) (indictment must occur within 60 days of arrest or it will be State's burden to show that a delay was not unreasonable); see *also, State v. Preston,* 124 N.H. 118, 467 A.2d 243 (1983); *State v. Brown,* 125 N.H. 346, 480 A.2d 901 (1984) (in 1992, the Court concluded that since the *Hastings* rule has "made its mark" and the necessity for prompt indictment is "generally accepted," the rule would be rescinded. *State v. Hughes,* 135 N.H. 413, 419, 605 A.2d 1062 (1992)).

194. *State v. Wheeler,* 120 N.H. 496, 499, 416 A.2d 1384 (1980) (since unexplained substantial increases after *de novo* appeal do not comport with sound judicial policy, the trial judge must, in such a case, state the reason for the change.).

195. *State v. Elbert,* 121 N.H. 43, 47, 424 A.2d 1147 (1981); *State v. Cere,* 125 N.H. 421, 424, 480 A.2d 195 (1984).

196. *State v. Meister,* 125 N.H. 435, 480 A.2d 200 (1985).

197. *Nelson v. Public Service Co.,* 119 N.H. 327, 331, 402 A.2d 623 (1979); *State v. Cooper,* 127 N.H. 119, 498 A.2d 1209 (1985).

198. 121 N.H. 43, 47, 424 A.2d 1147 (1981).

199. *State v. Tocci,* 137 N.H. 131, 135, 624 A.2d 548 (1993).

200. 124 N.H. 171, 471 A.2d 340 (1983).

201. 141 N.H. 562, 688 A.2d 1006 (1997).

202. 112 N.H. 99, 101-02, 289 A.2d 403 (1972); *Snow's Case,* 140 N.H. 618, 674 A.2d 573 (1996); *Petition of W. Stephen Thayer,* 761 A.2d 1052 (2000).

203. *In re: Mussman,* 112 N.H. 99, 100-01, 289 A.2d 403 (1972).

204. *Id.*

205. *Boody v. Watson,* 64 N.H. 162, 169-172, 9 A. 794 (1886); see *also, In re: Proposed Rules of Civil Procedure,* 139 N.H. 512, 659 A.2d 420 (1995).

206. 140 N.H. 297, 666 A.2d 523 (1995.)

207. *Opinion of the Justices (Judicial Salary Suspension),* 140 N.H. 297, 300, 666 A.2d 523 (1995).

208. Page, *supra* n. 10, at 115.

209. *State v. Valrand,* 103 N.H. 518, 520, 191 A.2d 521 (1961); see *also, State v. Peabody,* 121 N.H. 1075, 438 A.2d 305 (1981); *State v. Mullin,* 119 N.H. 703, 406 A.2d 698 (1979).

210. *State v. Dean,* 115 N.H. 520, 523, 345 A.2d 408 (1975) (Justice Grimes dissented, believing that the power to suspend was a part of the court's inherent power which the legislature could not infringe. *Id*. at 525. Of course, a sentence which is too severe may run afoul of other constitutional provisions such as Part I, Article 18); *State v. Peabody,* 121 N.H. 1075, 1078, 438 A.2d 305 (1981); *State v. Farrow,* 118 N.H. 296, 386 A.2d. 808 (1978).

211. *State v. Dean,* 115 N.H. 520, 523, 345 A.2d 408 (1975).

212. *Doe v. State,* 114 N.H. 714, 718, 328 A.2d 784 (1974).

213. *Koch v. O'Brien,* 101 N.H. 11, 131 A.2d 63 (1957).

214. *In re: Unification of New Hampshire Bar,* 109 N.H. 260, 263, 248 A.2d 709 (1968).

215. *Id.*

216. *Id.*

217. *Rousseau v. Eshleman,* 128 N.H. 564, 567, 519 A.2d 243 (1986). The holding in Eshleman that the practice of law falls within the scope of the exemption in RSA 358-A:3, It was affirmed in Averill v. Cox, ___N.H. ___, 761 A.2d 1083 (2000)."

218. *Petition of Tocci,* 137 N.H. 131, 135, 624 A.2d 548 (1993); see *also, Petition of Grimm,* 138 N.H. 42, 51, 635 A.2d 456 (1993) ("The New Hampshire Constitution vests discipline of the legal profession in this Court, NH CONST. part II, art. 73-a..."); *Opinion of the Justices,* 140 N.H. 297, 299, 666 A.2d 523 (1995).

219. 109 N.H. 260, 248 A.2d 709 (1968).

220. 107 N.H. 267, 268, 220 A.2d 748 (1967).

221. 107 N.H. 218, 221, 220 A.2d 151 (1967) The Court also held that the provisions of RSA 516:23 which provided that no party shall be compelled in testifying or giving a deposition to disclose the names of witnesses by which he proposes to prove his case, did not prevent the court from ordering a party to produce the identity of a witness. The Court did not hold that its rules could trump the statute, but relied upon its equitable power which is most likely a creature of statute. See *generally,* Upton, *Separation, supra* n. 11, p.137, 140.

222. 106 N.H. 156, 207 A.2d 425 (1965).

223. *Garabedian v. William Co.,* 106 N.H. 156, 158, 207 A.2d 425 (1965).

224. *Id.* at 157. (Although the Court did not mention it in its opinion, in *Boston, Concord & Montreal Railroad v. State,* 32

N.H. 215, 230-31 (1855) Justice Bell referred to a default judgment as one of the successes of American Jurisprudence: "The first colonists of New England, were fishermen and farmers, their leaders were clergymen, and though they brought with them a general idea of English law and English liberty, the Registers of Writs were sealed books to them, as much as they are to us at this day. Instead of attempting to follow the forms of the "Register" they devised processes of their own. . .We regard it as a historical fact that judgments by default for want of any appearance after due service of a single proper process, was an original invention of New England and has existed here since a very early date after the first settlement of the country. And we have not been so fortunate as to trace it to any legislation of the early colonial legislature. We are not aware of any objection to this ancient New England usage which is constantly applied in civil cases, in the case of corporations as well as individuals, without inconvenience or complaint. The foundation of the English Common Law, with its infinite niceties, was nothing more than usage; and usage here holds as high a place, in our esteem, as usage there. Indeed, we regard the ignorance of the first colonists of the technicalities of the common law as one of the most fortunate things in the history of the law; since, while the substance of the common law was preserved, we happily lost a great mass of antiquated and useless rubbish, and gained in its stead a course of practice of admirable simplicity, and one which seems to us far better than the most improved codes of practice which have been recently introduced elsewhere.")

225. 124 N.H. 171, 471 A.2d 340 (1984).

226. *State v. LaFrance,* 124 N.H. 171, 180, 471 A.2d 340 (1983).

227. *Petition of Mone,* 143 N.H. 128, 719 A.2d 626 (1998).

228. *LaFrance,* at 180.

229. 42 N.H. 165 (1860).

230. *Id.* at 181.

231. 140 N.H. 22, 662 A.2d 294 (1995); The Court held that amendment of RSA 632-A:6, the so-called "Rape Shield Law" which bars evidence of a complainant's prior sexual activity, to provide that the victim's manner of dress cannot be introduced by a defendant, would not violate a criminal defendant's right to produce all proofs favorable to him and to due process under Part I, Article 15 of the New Hampshire Constitution.

232. *Opinion of the Justices (Certain Evidence in Sexual Assault Cases),* 140 N.H. 22, 26, 662 A.2d 294 (1995).

233. 141 N.H. 562, 688 A.2d 1006 (1997).

234. *State v. Blackley,* 137 N.H. 91, 96, 623, A.2d 1331, 1334 (1993).

235. See *Table of State and Military Adaptations of Federal Rules of Evidence,* 6 Joseph McLaughlin, et al., *Weinstein's Federal Evidence* (2001).

236. *State v. LaPage,* 57 N.H. 245, 304 (1876).

237. *Opinion of the Justices (Prior Sexual Assault Evidence),* 141 N.H. 562, 577, 688 A.2d 1006 (1997).

238. *Id.* at 578.

239. *Id.* at 573-574.

240. 121 N.H. 43, 424 A.2d 1147 (1981).

241. *State v. Elbert,* 121 N.H. 43, 47, 424 A.2d 1147 (1981).

242. 143 N.H. 128, 135-36, 719 A.2d 626 (1998).

243. *Opinion of the Justices (Prior Sexual Assault Evidence),* 141 N.H. 562, 578, 688 A.2d 1106 (1997).

244. Upton, *Separation, supra* n. 11, at 170.

245. *Opinion of the Justices,* 118 N.H. 582, 585, 392 A.2d 125 (1978); *Opinion of the Justices,* 87 N.H. 492, 493, 179 A.2d 344 (1935); see *also, Opinion of the Justices,* 110 N.H. 359, 363, 266 A.2d 823 (1970) ("The three branches of Government 'cannot be completely separated' and in the nature of things there must be some overlapping"); *Ferretti v. Jackson,* 88 N.H. 296, 299 188 A.474 (1936) ("The real situation is that the Constitution contemplates no absolute fixation and rigidity of power between the three great departments of government."); *Petition of Mone,* 143 N.H. 128, 134, 719 A.2d 626 (1998).

246. *Merrill v. Sherburne,* 1 N.H. 199, 208-09 (1819).

This article, published in 1959, seven years before the Supreme and Superior Courts achieved constitutional status by the ratification of Article 72-a of Part II, is a fascinating account of the ups and downs of the judiciary under the Legislature's formerly complete power to constitute, abolish and reconstitute the courts of this State pursuant to Article 4 of Part II. Even in 1959, it was far from unanimous that this state of affairs was not desirable. As Attorney Upton notes in his conclusion, "Whether an attempt should again be made to amend the Constitution, this time to establish the Supreme Court and to define its jurisdiction, is a subject which the Bar can well afford to study. The present system affords the utmost in flexibility, and in this there are certain advantages. On the other hand, the Court and its justices are not as well protected against political and other cross-currents as is the case in most other states."

Richard F. Upton:
The Independence of the Judiciary in New Hampshire

(From The New Hampshire Bar Journal, June, 1998, pages 55-61, in which it was reprinted from the July, 1959 issue))

Commenting with unwarranted severity on the advisory opinion of the Supreme Court in "Corbin's Case" *(Opinion of the Justices,* 66 N. H. 629), Senator William E. Chandler of New Hampshire wrote in his newspaper, *The New Hampshire Statesman*, in the issue of April 20,1893, that the recent decisions of the Court "have been bold and indecent assumptions of arbitrary and tyrannical power in defiance of law, from the continuance of which usurpation there is no escape except by the exercise of the people's right to reconstruct a faithless and worthless bench of judges." The key phrase in these remarks, namely "the people's right to reconstruct the bench," may seem puzzling to present-day lawyers, but in Senator Chandler's day, the words had a well known meaning. Therein lies an interesting chapter of our history.

The Constitution of New Hampshire (1784) apparently establishes no definite courts, although it does confirm, by reference, the pre-existence of the Superior Court, which had functioned since the Revolution as the highest law court of the State. Article 4, Part II provides that "the general court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be holden in the name of the state…" Furthermore, Article 73, Part II of the Constitution, provides, with reference to public officers appointed by the Governor and Council, that:

> The tenure that all commissioned officers shall have by law in their offices shall be expressed in their respective commissions, all judicial officers duly appointed, commissioned and sworn, shall hold their offices during good behavior… Provided *nevertheless,* the governor with the consent of the council may remove

> them upon the address of both houses of the legislature.

The so-called “people's right to reconstruct” the judiciary, referred to by Senator Chandler, is found in these two constitutional provisions, namely, the legislative power to reorganize the courts as set forth in Article 4, and the power of removal by address as set forth in Article 73, Part II. To be sure, the power to remove judges by the process of impeachment and trial in the Legislature is also contained in our Constitution (Articles 17, 38, 39, Part II); but the exercise of this power has been attempted only once, and that in-the case of Judge Woodbury Langdon of the Superior Court in 1790. Although impeached by the House for failure to attend the established terms of court, Judge Langdon accepted a federal job, left the state and was permitted to resign. The case was then *nol-prossed* in the Senate. On the other hand, the removal of judges by use of the power of legislative reorganization, and by address, has occurred on numerous occasions in past history.

Removal of members of the judiciary, whether indirectly by legislative reorganization of the court, or directly by address, requires no investigation or trial. Based on past precedents, it does not appear that charges need be stated and proved. And only such hearing will be given as is naturally incident to the legislative process. With this brief introduction, let us review the historical precedents.

The first occasion on which removal by address was attempted was in 1796, when a legislative resolution was passed, addressing the Governor and Council to remove Judge John Dudley of the Superior Court, then the highest law court, on account of “decays of nature and infirmities of age” (see *Laws of N. H., Vol. VI*, page 389). It is understood that Judge Dudley then agreed to and was permitted to resign.

Initially there may have been some doubt as to the power of the Legislature to deprive judges of their offices by a legislative reorganization of courts. (For example, see *Laws of N. H., Vol. VII*, page 325, which reduced the size of the two major courts by providing that vacancies be not filled until the desired reduction in size was achieved.) However, the Congressional Act approved by President Jefferson on March 8, 1802, abolishing the United States Circuit Court and with it the offices of its sixteen judges, furnished a precedent which soon became well known, because it was so widely criticized by the Federalists. The constitutionality of this Act of repeal, so far as it deprived the circuit justices of their positions, was impliedly upheld by the United States Supreme Court in the case of *Stuart vs. Baird* (1803), 1 Cranch 299. Chief Justice Marshall did not participate in the decision because he had presided at the trial below; but he made his views known privately to Alexander Hamilton, who wrote in his papers as follows:

> He [Marshall] considers the late repealing Act as operative in depriving the Judges of all power derived under the Act repealed. The office still remains, which he held to be a mere capacity, without a new appointment, to receive and exercise any new judicial powers which the legislature may confer.

(Quoted in Charles Warren's *History of the Supreme Court, Vol. I*, p. 224)

In 1813 the Federalist Party in New Hampshire gained control of the state government for the last time. The leading lawyers were dissatisfied with the personnel and procedures of the existing courts. Governor John Taylor Gilman in his inaugural address to the

Legislature forecast in part what was to come when he said, “Whatever arrangements you may think proper to make respecting the judiciary system will meet my ready attention.” (*Senate Journal*, June Session, 1813, page 27.)

After some debate the Legislature passed an act abolishing the Superior Court and the Court of Common Pleas, which had been in existence for many years, and creating a Supreme Judicial Court and a Circuit Court in their places, and making certain procedural reforms (*Laws of N. H., Vol. VIII*, page 251). It was generally considered that the abolition of the courts deprived the incumbent judges of their offices and salaries and that there was no need to remove them by address. To the new Supreme Judicial Court, Governor Gilman appointed Jeremiah Smith, a former Chief Justice of the old Superior Court (1803-1809), as Chief Justice; and as Associate Justices he named Caleb Ellis, a prominent Federalist lawyer, and Arthur Livermore, the incumbent Chief Justice of the old Superior Court (1809-1813) who had just been legislated out of office. Chief Justice Smith had been one of the United States Circuit Judges legislated out of office by the Congress in 1802, and he had criticized that action. He was, however, prevailed upon against his inclination to accept the Chief Justiceship in 1813. One of the new judges was outspoken. At his first term, Judge Livermore in the course of a charge to the Grand Jury at Dover paused to denounce the act under which he held office, declaring it beyond the powers of the Legislature. (See Plumer, *Memoir of William Plumer*, page 412, and Morison, *Life of Jeremiah Smith*, page 274.)

The Jeffersonians of the State, without fear of prior inconsistency, actively condemned the new courts as unconstitutional. Two of the judges of the former Superior Court refused to recognize the jurisdiction of the new Supreme Judicial Court and continued to transact judicial business. With the aid of two county sheriffs, they seized partial control of the courthouses in Rockingham and Hillsborough counties. Governor Gilman thereupon called a special session of the Legislature in October 1813. The offending sheriffs were removed from their offices by exercise of the power of address. It is interesting to note that one of the sheriffs so removed was Benjamin Pierce, father of Franklin Pierce and later himself a popular governor (1827-1830).

At the 1813 special session, a petition signed by 841 persons was presented to the Legislature, urging the repeal of the Act of 1813 establishing the new courts, because in the opinion of the signers it violated the Constitution. The Legislature rejected the petition. The report of a committee of the House on the petition stated that it was necessary that the Legislature have the power to abolish the courts as a check on the power of the courts to declare laws unconstitutional (Senate Journal, Special Session 1813, pp. 56-71). The report of the committee further declared that the judiciary held office “during good behavior *so long as the* office *exists*,” and no longer. The report was adopted by both houses and remains to this day as the classic statement justifying the use of the power to reorganize the courts.

One of the strenuous opponents of the new court was William Plumer, leader of the Jeffersonians of the State and a former United States Senator during the Jefferson Administration. Plumer was confirmed in his belief of the unconstitutionality of the Act creating the new court by a conference in 1815 with Joseph Story. Plumer's Journal records Mr. Justice Story's views as follows:

> He mentioned, of his own accord, that he had considered the law of New Hampshire of 1813, establishing the new judiciary, and was of opinion that it was unconstitutional.

(Plumer, *Memoir of William Plumer*, page 431.)

In 1816 the Jeffersonians swept the State elections, and Plumer was elected Governor. In his inaugural address to the Legislature, he urged the repeal of the judiciary act of 1813. He declared that it was unconstitutional, because it removed judges from office by a procedure other than the authorized methods of impeachment and address. The Legislature at once repealed the act of 1813 and established as a new judicial system, a Superior Court as the appellate court and a Court of Common Pleas as the trial court (*Laws of N. H., Vol. VIII*, page 501). To make certain of the legality of its action the Legislature at the same time addressed the Governor and Council to remove all justices of the two major courts holding office under the act of 1813, as well as all justices of the two major courts who had held office prior to the act of 1813 (*Senate Journal*, June Session, 1816, pages 147-148). The resolution of address recited that "whereas judges ought not to be removed from office by an act of the legislature," nevertheless, the abolition of their court is "a good and constitutional reason" for the removal of the several judges thereof through the power of address.

Governor Plumer offered positions on the newly established courts to several of the leading Federalist lawyers, but by prearrangement they all declined appointment. Accordingly, he appointed three Jeffersonians to the Superior Court. As Chief Justice he designated William Richardson, an Ale Massachusetts lawyer, then serving as Federal District Attorney in New Hampshire, and as Associate Justices he selected Samuel Bell, later Governor and United States Senator, and Levi Woodbury, then only twenty-seven years of age and destined to rise successively to the offices of Governor, United States Senator, cabinet officer and Justice of the United States Supreme Court. The Federalists at once accused Governor Plumer of "packing the bench." They dubbed it "Plumer's Court," and predicted that under the dictation of Plumer it would readily sustain the validity of the amendment to the charter of Dartmouth College, when that issue reached the courts. When the new court subsequently upheld the charter amendment, the Federalist partisans felt that their complaints had been justified. However, the ranks of their party were dwindling, and history never gave them the opportunity to "unpack" the Court which they so eagerly sought.

After 1816 the scheme of courts remained relatively stable for many years. In 1833 Judge John Harris of the Superior Court was addressed from office for reasons of "the public good" (*Laws of N. H., Vol. X*, page 435), but was immediately appointed Judge of Probate for Merrimack County, a position regarded as more within the scope of his abilities.

At the Constitutional Convention of 1850, the report of the Committee on the Judicial Department, prepared by Mr. Justice Levi Woodbury, then an Associate Justice of the United States Supreme Court, recommended the abolition of judicial tenure during good behavior and the limitation of the power to remove by address to cases of "incapacity or malversation in office," and proposed an amendment making judges elective for terms of six years (see *Report of the Committee on Judicial Department*, Concord, 1850, page 4).

The Convention which was presided over by Franklin Pierce, soon to be elected to the Presidency, adopted the proposed amendment, but upon submission to the people it was overwhelmingly defeated, there being a majority of about nineteen thousand opposed instead of the required two thirds' majority in favor.

In 1855, a coalition of members of the “Know-Nothing” or American Party, the Whigs and the Free Soilers succeeded in completely ousting the Democratic machine, which Governor Isaac Hill, Judge Woodbury and President Pierce had so laboriously built, from the control of all branches of the State government for the first time since 1827. “To the victor belongs the spoils” was the political maxim of the hour. The Governor and Council, upon address by both houses of the Legislature, removed from office many appointive county officers, probate judges, police-court judges, and other officials and filled the vacancies with men of their own choosing. The Legislature also passed an act abolishing the Superior Court and the Court of Common Pleas, and creating in their places a Supreme Judicial Court and a Circuit Court (Chapter 1659, *Laws of 1855*). This act was considered to have legislated out of office the incumbent judges by the mere fact that it repealed the laws establishing the existing courts and provided for the creation of new courts in place thereof. A few of the justices of the old Superior Court were reappointed to the new Supreme Judicial Court, but some entirely new justices were also named.

In 1856, the coalition which had swept the State in the preceding year became the Republican Party and again won the State elections. Still more officeholders were then removed by exercise of the power of address. Three years later, in 1859, the Republican legislature abolished the Circuit Court and revised the procedure of the Supreme Judicial Court to include both a trial and a law term (Chapter 2211, *Laws of 1859*). Section I of Chapter 2211 provided as follows:

> From and after the taking effect of this act the Court of Common Pleas shall be and hereby is abolished, and all laws establishing such court and providing for the justices thereof shall be and hereby are repealed.

This language was regarded as sufficient to legislate the members of the Court from office.

The Democrats, however, did not forgive or forget these actions. They bided their time, and finally in 1874 they elected a Governor and gained control of both houses of the Legislature. One of the Associate Justices on the existing Supreme Judicial Court was a particular object of their ire. He was Charles Doe, who had deserted their party to become a Republican in the turbulent years immediately preceding the Civil War. With this additional incentive for undoing the “crime of 1855,” the legislature passed an act abolishing the Supreme Judicial Court and creating in its place a Superior Court of Judicature as appellate court and a Circuit Court as trial court (Chapter 97, *Laws of 1874*). Among the judges legislated from office by this act, in addition to Judge Doe, was Judge Jeremiah Smith, (the younger), who later became Professor of Law at the Harvard Law School.

At the same session of the Legislature, the Democrats made nearly a clean sweep of all the appointive county offices, removing many of the probate judges, sheriffs and county

solicitors by use of the power of address. The vacancies thus created were then -filled by the Governor and Council. To illustrate form, one of these acts of address is quoted here:

> To His Excellency James A. Weston, Governor of the State of New Hampshire:
>
> The Senate and House of Representatives in General Court convened, satisfied that the public good requires that E. George Rogers, Sheriff, Edgar Aldrich, Solicitor, Benjamin F. Whidden, Judge of Probate, and John M. Whipple, Register of Probate all of the County of Coos, should no longer hold and retain their said offices, respectfully address and request Your Excellency with the consent of the Council to remove the said persons from their said offices.

(Chapter 137, *Laws of 1874*).

The legislative practice, upon adoption of an address, was to appoint a joint committee of both houses to present it to the Governor and Council. Upon presentation of the address, the Governor, if he approved it, then presented an order of removal to the Council for their assent, and this, when concurred in by a majority of the Council, completed the removal from office. It is interesting to note that County Solicitor Edgar Aldrich, removed from office by the above quoted address, was later appointed United States District Judge for this District by President Harrison in 1891.

The Democrats held control of the State government for only two years, and in 1876 the Republicans were back in the saddle again. The Republican administration promptly retaliated 'by addressing from office all the Democratic appointees to the county offices which had been vacated by the power of address in 1874. The Republican legislature passed an act abolishing the Superior Court of Judicature and the Circuit Court, created just two years previously, and established in their places a new Supreme Judicial Court, which was to hold both trial and law terms (Chapter 25, *Laws of 1876*). As Chief Justice of the new court, Governor Person Cheney appointed none other than Charles Doe.

At the Constitutional Convention of 1876 an effort was made to limit the power of removal by address, by adding at the end of Article 73, Part II, of the Constitution the following clause: “. . .but in no such case shall removal be for political reasons.”

This proposed amendment was adopted by the Convention and submitted to the people. The amendment received 28,038 affirmative votes and 14,523 negative votes, falling short of the required two-thirds' majority necessary to ratify by only a few hundred votes. The Constitutional Convention of 1889 rejected a similar amendment.

In 1901, due to general dissatisfaction of the Bar with the fact that the Supreme Judicial Court held both trial and law terms, with appeal lying from the decision of a single judge at the trial term to the full bench of his colleagues at the law term, the Legislature again completely reorganized the court (Chapter 78, *Laws of 1901*). This chapter repealed the laws establishing the Supreme Judicial Court and established in its place, one Supreme Court as the highest appellate court and one Superior Court as the general trial court. The act did not mention the fate of the justices of the old Supreme Judicial Court; however, the motives behind this legislation were entirely non-political.

Gov. Chester B. Jordan, himself a lawyer, announced his intention, while the act was pending in the Legislature, to-tender appointments in the new judicial system to all the incumbent justices of the Supreme Judicial Court. This pledge was faithfully kept, and all

the incumbent justices of the old Supreme Judicial Court were appointed to positions in the new judicial organization, some to the Supreme Court and some to the Superior Court.

At the Constitutional Convention of 1902, an amendment was introduced to establish permanently the system of courts set up by the act of 1901 and to limit the power of removal by address to cases of "physical or mental disability." This amendment had the support of the platforms of both political parties. Yet, it met with surprising opposition, the opponents arguing that the Legislature ought to retain the power to modify the court system to meet possible increases in the volume of litigation. It was also argued that the courts should not be made "greater than their master, the people." The amendment was unexpectedly defeated in the Convention and by such a surprisingly large majority that the proponents failed to demand a roll call (See debates in *Convention Journal* (1902), pp. 601 and 651.) The basic system of courts established by the act of 1901 is still in existence today.

The two major courts have not been tampered with since 1901. The bitter feelings of the post-civil-war years, which accounted for so much of the "political retaliation," have largely subsided. The late William H. Sawyer, former Justice and Chief Justice of the Superior Court (1913-1937), is authority for the statement that subsequent to the defeat of the proposed constitutional amendment in the Convention of 1901, a "gentlemen's agreement" was reached between the leaders of the two major political parties, to the effect that, in future appointments to the two major courts, members of both political parties would be represented, with the party in power retaining only a bare majority of the seats. No doubt this agreement was an effort to avoid a repetition of the unhappy record of the last century. Since 1901, this agreement has been substantially complied with, down to the present day.

In the present century, there have been two incidents relevant to the present discussion. In 1913 the administration of Governor Samuel Felker (Democrat) secured the enactment of legislation establishing a system of fifty-two district courts throughout the State to replace the previous system of city and town police-courts, all the justices of which were legislated out of office, (Chapter 169, *Laws of 1913*). These fifty-two positions were all filled by Governor Felker, and the usual charges of "politics" were made. Two years later in 1915, the administration of Governor Rolland Spaulding (Republican) secured the repeal this act and the restoration of the former system with some improvements, through the enactment of Chapter 30, Laws of 1915, which by Section 11 thereof provided that:

> All police or district courts established under the provisions of Chapter 169, *Laws of 1913*, are hereby abolished and the tenure of the offices of the justices is hereby terminated.

There persists to the present day a marked lack of political balance in appointments to the municipal courts of the State. The same is true of the probate courts.

During the administration of Governor Styles Bridges (Republican), in 1935, numerous written complaints were submitted to the Governor concerning the conduct in office of Judge David Chase of the Seabrook Municipal Court. These complaints concerned his alleged misconduct with reference to enforcement of the traffic laws and the administration of the marriage laws. A resolution was introduced in the House of

Representatives addressing the Governor and Council to remove him. The resolution was referred to the Rockingham County delegation for a public hearing. The proceedings were like a summary court martial. The complaints were publicly laid before the committee, and the judge, represented by counsel, was permitted to state his defense, subject to cross-examination. Subsequently, the resolution passed both houses by large majorities and was approved by Governor Bridges with the advice and consent of the Council.

It is evident from the foregoing constitutional history that the power to remove judicial officers by address has sometimes been used for political reasons and sometimes for justifiable reasons. Nevertheless, four attempts to amend the Constitution to prohibit the exercise of the power "for political reasons" have been defeated. The power of removal by address seems firmly established today.

This provision of our Constitution was taken directly from Part 11, Chapter 111, Article I of the Constitution of Massachusetts, the original language of which, as drafted in 1790, was largely the work of John Adams. The power of removal by address was not a unique idea of Adams. It finds its origin in English legislation of the colonial period. For example, see Act of I Geo. III, Chapter 23, Section I, which provides that the commissions of judges shall run "during good behaviour…it provided always that it may be lawful for his Majesty, his heirs and successors, to remove any judge or judges upon the address of both Houses of Parliament."

The power to remove by address has never been construed by the New Hampshire courts. However, it has been construed by the Supreme Judicial Court of Massachusetts in the case of *Commonwealth vs. Harriman*, 134 Mass. 314 (1883). In that case the Probate Judge for Barnstable County, who had been removed by address, brought a writ of quo *warranto* against his successor. In upholding the exercise of the power of removal in this case, the Supreme Judicial Court construed the power in the following language:

> It was deemed wise, as a check upon the absolute power and independence of the judicial department, to confide in the other two co-ordinate branches of the government the exceptional power of removing judicial officers when an exigency requires it, of which, from the nature of the case, they must be the sole judges…The Constitution authorizes the removal without any reason being assigned for it; and therefore it is wholly immaterial what evidence or causes induced the legislature to vote the address or led the Governor and Council to act upon it.

The subject is further discussed in an article by Frank W. Grinnell, Esquire, entitled "Removal by Address in Massachusetts", 7 *Massachusetts Law Quarterly* (No. 4), page 17.

In view of the New Hampshire history and the construction given to the same provision in the Constitution of Massachusetts, it is likely that the power of removal by address contained in our Constitution would be interpreted to be an absolute power, not subject to judicial review, and exercisable for any reason or for no reason. Fortunately, the temper of the times has been such that the power has been rarely exercised since 1876.

The validity of the practice of removing members of the judiciary by indirection through the device of abolishing the court is a matter on which there may be ground for some difference of opinion, as applied to the highest appellate court of the State. As applied to all lesser courts, the power seems unquestionable. In the case of *Cummings vs. White Mountain Railroad,* 43 N. H. 114, the power of the legislature to abolish the Court of Common Pleas, as provided by Chapter 2211, Laws of 1859, was upheld, the Court saying:

> The power of the legislature to change the constitution of courts of justice and thus incidentally to affect the remedies of the parties, even in pending suits, has been repeatedly exercised in this state, and may be regarded as well established.

In Massachusetts, whose Constitution was copied in important respects by the New Hampshire framers, the power to remove judges by abolition of the court has been upheld as applied to all courts of rank lesser than the Supreme Judicial Court. However, it has been authoritatively stated that the Massachusetts framers of the Constitution of 1780, in using the words "Supreme Judicial Courts," must have been referring to a court to be newly established under the Constitution, since the preexisting highest law court in Massachusetts was known as the Superior Court. The Governor and General Court of Massachusetts, shortly after the adoption of this constitution, took this view, as a practical construction, by creating a new court pursuant to the Constitution, and named it Supreme Judicial Court. Thus it was urged that this court must be regarded as a permanent constitutional court, beyond the power of the Legislature to abolish. This conclusion was reached by Horace Gray, reporter of court decisions, in a article written by him in 1858 (prior to his appointment as Chief Justice of Massachusetts), entitled "The Power of the Legislature to Create and Abolish Courts of Justice", 21 *Law Reporter* 65. Gray's article was cited and approved by the Supreme Judicial Court in *Commonwealth v. Leach*, 246 Mass. 464 (1923).

A comparison of the Constitution of Massachusetts with the Constitution of Now Hampshire indicates that while this conclusion has some foundation in Massachusetts, it may not have equal foundation in New Hampshire. This is because our Constitution as adopted in 1784 refers to the highest appellate court as "the Superior Court," and a "Superior Court" had already been established by the State at the time of the Revolution; hence the Constitution used words of "description" rather than words of "creation." The first and subsequent Legislatures under the Constitution of 1784 enacted no legislation concerning the courts, permitting the pre-existing system to continue. The constitutional amendments adopted in 1958 substituting the words "Supreme Court" for "Superior Court" were also "descriptive" rather than "substantive" in effect.

Balanced against the Massachusetts construction is the New Hampshire history. The exercise of the power of removal by abolition and reorganization of the highest appellate court was first accomplished in 1813 and was challenged in 1816, when an attempt was made to validate it retroactively by use of the power of removal by address. Nevertheless, the highest appellate court of the State was abolished and reorganized successively in 1855, 1874, 1876 and 1901; and on each occasion it was generally accepted by the judiciary and the public that the offices of the justices thereof had been thereby terminated. When the Constitutional Convention of 1902 refused to adopt a constitutional amendment establishing the Supreme and Superior Courts as constitutional courts, its

action and the content of the debates thereon may be thought to have given the preceding practice some additional sanction.

Whether an attempt should again be made to amend the Constitution, this time to establish the Supreme Court and to define its jurisdiction, is a subject which the Bar can well afford to study. The present system affords the utmost in flexibility, and in this there are certain advantages. On the other hand, the Court and its justices are not as well protected against political and other cross-currents as is the case in most other states. A very strong case can be made for amending the Constitution to give the highest appellate court a fixed status, while retaining for the Legislature its present broad power to reorganize all inferior courts from time to time.

In his short article in The New Hampshire Bar Journal preceding and introducing this one, Attorney Eugene Van Loan stated that "Mr. Lawrie's article… raises some interesting points which challenge the conventional wisdom about the justification for judicial review and its proper limits in our political system. Many Americans today - including many lawyers - uncritically accept the modern notion that the judiciary's authority to determine questions of constitutionality is: (1) legitimate; (2) exclusive; (3) final; and (4) supreme. None of these propositions, however, are God-given. Indeed, as Mr. Lawrie demonstrates, there is good reason to be skeptical about each one of them."(New Hampshire Bar Journal, Winter 2006, pages 32-33)

Timothy A. Lawrie:*

INTERPRETATION AND AUTHORITY: Separation of Powers and the Judiciary's Battle for Independence in New Hampshire, 1786-1818

(From The New Hampshire Bar Journal, Winter 2006, pages 34-46)

In September of 1818, the youthful Justice Levi Woodbury boldly claimed for New Hampshire's Superior Court of Judicature the exclusive power of applying law in particular cases, and with it, the power of judicial review. Speaking for a unanimous court in the case of *Merrill v. Sherburne*,[1] Woodbury declared that legislation granting new trials in particular cases - known as "restoration to law" - was an unconstitutional usurpation of judicial authority.[2]

Not only did these personal acts infringe on judicial authority to "decide private disputes 'between or concerning persons,"'[3] their retrospective nature offended explicit provisions of New Hampshire's Bill of Rights.[4] Further, such acts were simply "by their nature and effect, not within the legitimate exercise of legislative power," Woodbury reasoned, for they unjustly denied parties their vested legal rights.[5] Finally, personal acts undermined the foundations of representative government: since those disadvantaged by special acts did not consent to them, no society whose government drew all its authority from general consent could consider these acts valid law.[6]

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To prevent such encroachments on personal rights, Woodbury argued that all power to decide particular cases should be given to a body wholly constrained by the standing law - the courts.[7] Yet Woodbury argued that the rule of law was only one benefit which would flow from judicial independence. Independent courts - and only independent ones - could also help to enforce the constitution. "One prominent reason for creating the judicial, distinct from the legislative department," Woodbury noted,

> was, that the former might determine when laws were thus 'repugnant' [to the constitution] and so operate as a check upon the latter, and as a safeguard to the people against its mistakes or encroachments. But the judiciary would in every respect cease to be a check on the legislature, if the legislature could at pleasure review or alter any of the judgments of the judiciary.[8]

Thus, while past New Hampshire courts had - with legislative acquiescence - voided unconstitutional laws, as long as the legislature could interfere in adjudication, the court's ability to restrain the legislature within constitutional bounds was fatally limited.

Woodbury's bold claims in *Merrill* drew little contemporary comment. Forty years previous, however, Woodbury would have been opposed by an enraged legislature and citizenry. Following the Revolution, many New Hampshirites considered the legislature supreme, subject only to election. Only after the "licentious" excesses of state legislatures in the 1780s did New Hampshire's reformers begin to develop the separate powers doctrine on which Woodbury relied. Throughout the following decades, political actors sharpened and refined this concept. Most importantly, they discovered in the separate station of each branch the power to check the others.

The justices of the Superior Court played a prominent role in shaping separate powers theory, but they were constrained by it as well. While Woodbury declared it the role of the courts to interpret the constitution,[9] he did not declare the courts supreme. The nature of the court's rise to prominence in New Hampshire demonstrated that he could make no such assertion. The character of Woodbury's claim raises important questions about the nature of judicial review more generally.[10] This account challenges some contemporary analyses[11] and suggests that a broader examination of the judicial role will yield important new insights into the nature of the American constitutional order. The battle waged by New Hampshire's courts was, ultimately, a struggle to define the judicial role within America's unique conception of limited government.

By the time *Merrill* was decided, special legislation was rare.[12] At the close of the Revolution, however, it was the most common form of legislation.[13] Post-Revolutionary courts lacked procedural sophistication and the public stature of the legislature; they were thus unable to offer adequate relief in difficult cases. Dissatisfied litigants turned to the legislature, which - following practices established during the Revolution - stood ready to adjudicate these private complaints. Burdened by limited resources and influenced by habit, the legislature responded with personal legislation on a case-by-case basis. As the prevalence of special legislation indicated, Post-Revolutionary New Hampshirites were little concerned with separating the powers of government. The legislature stood supreme with the courts but a weak appendage.

New Hampshire courts were never well practiced in common law intricacies during English rule, and by the 1780s, they were strangers to all but the most basic forms of judicial practice.[14] Judges, while mostly men of knowledge and experience, were seldom trained in law and had little respect for precedent or procedure; they preferred, "common sense" notions of justice. Even had jurists sought the guidance of precedent, information would have been elusive and incomplete. New Hampshire judicial opinions were not systematically reported until 1818, and the usefulness of English reports was curtailed by limited availability and American prejudice against British institutions.[15] Judges instructed juries, but their instructions were basic, and they deferred to the jury's judgment even in matters of law.[16]

When attorneys attempted to introduce more regular common law procedure, they were often rebuffed. For instance, Jeremiah Mason, a young lawyer soon to rise to the top of his profession, had attempted to introduce the demurrer plea into New Hampshire's courts, but to no avail:

> The effect of a demurrer, if he [Justice Farrar] understood it, was to take the case from the jury, to be decided on some question of law by the court. 'If that is so,' said Judge Dudley, 'I am clean against it as being fatal to the rights of the jury.' 'But, your honor," said Mr. Mason, 'there are, in this case, no facts for the jury to find.' 'So much the better,' said Dudley, 'they will all the sooner bring in their verdict if the facts are undisputed.'[17]

In another case, Justice Dudley had admonished the jury, "It is our business to do justice between the parties, not by any quirks of the law out of Coke or Blackstone, books that I never read, and never will, but by common sense and honesty as between man and man."[18] Others, like Simeon Olcutt, Chief Justice from 1795-1801, also "manifested less regard for the letter of the law than for the spirit of equity."[19]

This deference to juries and "common honesty" often meant—as William Plumer, Jr., related in a biography of his father, New Hampshire statesman William Plumer—that

> [T]he verdict was an expression of the passions or the prejudices of the jury, and their good or ill will towards the parties litigant, quite as often as the application of any known rules of law to the case in hand. It was, perhaps, still oftener secured by the superior skill, talent, or adroitness of the attorney employed by the winning party.[20]

Judges, without the guidance of general statutes, were reluctant to overrule jury decisions and grant new trials.[21] Such review often required equitable rulings, which involved suspending established legal rules in particular cases to obtain a more "just" outcome. During the colonial period, the king had granted these chancery powers to governors and their councils, and colonists came to despise them as tools of tyranny and special interest.[22] Courts had also been granted some equitable authority before the Revolution,[23] but they were reluctant to claim these powers in the democratic atmosphere of Independence. Thus, the first verdict, just or not, often stood.

Although citizens distrusted chancellors, disputes requiring equitable resolution multiplied as the post-war economy expanded. Legislators thus provided equitable relief where courts were afraid to act. The legislature, or General Court, preferred to adjudicate in the same "common sense" manner as judges, proceeding case by case, rather than through the more difficult mode of general statute.[24]

This procedure was not novel, but based on well-established precedent. Since its earliest days, Parliament had proceeded by personal legislation in private cases.[25] Further, the House of Lords had served as the highest court of appeal, and it also tried cases of impeachment, which in England extended to actual criminal and civil prosecution.[26] The exercise of judicial power by colonial legislatures had also played a prominent role in resistance to British rule. Lawmakers had claimed, as representatives of the people, the prerogatives of independent "parliaments," including the power to act judicially.[27] New Hampshire's legislators granted new trials in direct contravention of royal orders, and - claiming sole power to control the courts - they passed laws to free the judiciary from royal control.[28]

Influenced by memories of the legislature's prominent role in protecting individual rights during the Revolution, disgruntled litigants often petitioned the legislature for redress. Legislators responded through the traditional mode of special legislation, which took various forms. Often, these acts "restored parties to their law," granting them new trials to introduce further evidence, or removing the default judgments so common in New Hampshire due to harsh weather and limited transportation.[29] At times, however, the legislature more explicitly overturned court decisions, as in "An Act to annul & make void two judgments of court obtained by Margaret Frost against Thomas Pinkham," in which the legislature reversed two judgments that Frost "had unjustly unfairly and surreptitiously obtained [sic] ... of the inferiour court of common pleas."[30] Most often, however, special acts were far less dramatic, removing procedural roadblocks or "impowering" courts to act in particular cases. Illustrative is "An Act to establish a certain judgment of the Quarter Sessions of the Peace for the County of Hillsborough in favor of John Smith against the selectmen of Peterborough," in which legislators corrected a clerk's mistake which had deprived Smith of a large judgment in his favor.[31]

As the prominence of special legislation indicates, newly independent New Hampshirites were little concerned about separating the powers of government. New Hampshire's colonial and Revolutionary experience had taught that legislative involvement in executive and judicial matters protected personal rights, rather than endangering them.[32] Faced with disorganization caused by war, newly independent states organized their governments in a simple fashion, with the legislature directing most of the basic functions of government.[33]

Revolutionary rhetoric also buttressed the legislature's claims to broad authority. In resisting the crown, legislators had argued within the traditional English concept of government by three equal and independent estates.[34] They claimed to defend the equal position of the commons against encroachments by the king and his nobles.[35] Because the

commons held exclusive control of colonial "parliaments," the struggle for democracy became a struggle for legislative control.[36] With the expulsion of royal power and the absence of entrenched aristocracy in a newly independent America, the legislature - defender of the common people - reigned supreme.[37]

In the 1780s, the nature of legislation began to change. Encouraged by the democratic rhetoric of the Revolution and no longer restrained by the demands of war, radicals began to attack legislatures as unrepresentative and demand populist measures, such as debtor relief and increased special legislation. Concern over this unrest, which some feared was leading to "democratic despotism," prompted New Hampshire's constitutional reformers to propose a new system of separated powers. This system was at first only vaguely defined and imperfectly applied, but it provided the foundation from which New Hampshire's judiciary could begin to battle for interpretive independence.

New Hampshire's neighbors, along with much of the nation, were racked by intense populist discontent during the 1780s. Populist pressures led to "licentious" laws invalidating contracts, issuing devalued paper currency, and the like.[38] National leaders condemned this legislation as "democratic despotism."[39] For example, Noah Webster lamented in 1788, "So many legal infractions of sacred right - so many public invasions of private property - so many wanton abuses of legislative powers!"[40] To New Hampshire's west, Vermont had blocked enforcement of debts and contracts; by mid decade, nearly nine-tenths of all court activity had ceased.[41] In 1786, New Hampshire's parent state of Massachusetts itself experienced Shay's Rebellion, perhaps the most dramatic example of the social discontent that infected the nation.[42]

Even while populist unrest was in its early stages, national observers, like Thomas Jefferson, feared that states were particularly susceptible to populist demands for such legislation because "[a]ll the powers of government, legislative, executive, and judiciary, result to the legislative body."[43] Early on, New Hampshire's reformers heeded Jefferson's admonition.

In 1784, New Hampshire's leaders met in constitutional convention, where they proposed separating the powers of government. Similar proposals had been previously rejected by a populace still afire with the democratic rhetoric of the Revolution and partial to legislative supremacy.[44] The delegates thus crafted a plan which placed weaker restraints on the legislature than earlier proposals, but nonetheless instituted significant reforms. "These three important powers executive, legislative, and judicial we have thought proper to keep as separate and distinct as possible," declared the delegates, "for ... if they should be all united, the government would then be a complete system of tyranny."[45] In particular, delegates feared that "if the legislative and judicial power should be united, the maker of the law would be the interpreter thereof, and might make it speak what language best pleased him, to the total abolition of justice."[46]

Despite their solicitude for judicial independence, reformers concentrated on enhancing gubernatorial powers.[47] They declared the governor, called the President, "a supreme executive magistrate,"[48] and limited the General Court to exercising "the supreme

legislative power."[49] The delegates refrained, however, from declaring the judiciary supreme in its realm; indeed, they barely defined its powers at all.[50] For the delegates, the judicial function was still vaguely understood, and the court had little role to play in limiting legislative excess.[51]

Perhaps concerned over early murmurs of populist unrest, New Hampshirites ratified the convention's proposals.[52] These reforms proved inadequate, however. New Hampshire itself experienced increasing unrest after 1784. In 1786, when legislators ignored their petitions for paper money, radicals armed themselves and marched on the statehouse. While the riot was soon crushed, legislators became increasingly unwilling to oppose popular measures. They issued a paper money referendum soon thereafter, and some legislators began to encourage special legislation as a means to promote populist interests.[53] The paper money referendum was itself defeated, but personal acts became increasingly common.[54]

These developments worried reformers: "Our liberties, our rights & property have become the sport of ignorant unprincipled State legislators!"[55] exclaimed William Plumer in 1787. In particular, reformers were concerned about the large number of personal laws passed by the legislature. They complained that special acts encouraged influence peddling.[56] Influential citizens, like the powerful Sherburne family, could gain favorable rulings for themselves and their friends.[57] Plumer described one such instance:

> The Sherburnes have again applied for a new trial in the case of Mrs. Wallingford against them ... This bill is founded in great injustice. Sound policy requires that a period should be fixed beyond which litigation should not be permitted. And in this particular case I have no doubt but that the justice which the law intended has been done [by the courts].[58]

Special legislation also allowed legislators to play to rising populist sentiment, painting themselves as "friends of the little guy." Jeremiah Mason related one such instance in his autobiography. Early in the 1790s, he was retained to prosecute a poor man for stealing two pigs. When Mason's client stole the poor man's summons, the poor man lost the case by default. Upon learning of the situation, Mason offered to retry the case, but the poor man refused and applied to the legislature for a new trial. Legislators quickly granted his request, without even speaking to Mason's client. While the injustice in the case was blatant, Mason felt the legislature acted carelessly and unnecessarily. Perhaps their desire to correct injustice blinded them to other avenues, or perhaps, Mason suggested, their desire to appear to be correcting injustice was greater.[59]

It is unclear how often special acts were necessary to justly resolve disputes, but as the Sherburnes' bill and the "pig case" demonstrate, they were often used for less noble ends. Yet, concerns about the particular improprieties bred by special legislation were perhaps less important to influential reformers—men who stood to gain handsomely from their connections[60]—than concerns over ramifications for law and commerce more generally. Plumer complained that the legislature was consumed by private bills to the extent that "public business is put off to near the end of the session, when the members become impatient."[61] Not only did this practice bring the legislature into disrepute, but it

severely hampered development of necessary regulations.[62] Further, special acts created uncertainty, extending litigation, and failing to provide clear legal rules around which parties could plan.[63] Finally, reformers feared that precedents allowing legislative review of judicial decisions might lead legislators to interfere further in the decision of particular controversies, to the point that private interest and public passion would determine all outcomes, "to the total abolition of justice."[64]

Thus, worried about recent excesses but emboldened by the success of the federal convention,[65] New Hampshire's leaders again repaired to constitutional convention in 1791. Merely separating government powers had proved insufficient to limit legislative power, so delegates proposed that separate branches be given tools to check one another. Again, delegates focused on strengthening executive authority, giving the "President" limited veto power.[66] However, delegates also attempted more sharply to define the nature of judicial authority. Under Plumer's leadership, the convention proposed eliminating many lower courts, often bastions of incompetence.[67] They also sought to place equitable authority - explicitly including the power to grant new trials - firmly within the judicial branch.[68] Through these reforms, delegates sought specifically to eliminate special legislation.[69]

Voters rejected the convention's judicial reforms, however. Or, at least, some voters did: the constitutional referendum drew a markedly lower turnout, over half less than a gubernatorial election a few months previous. Plumer ascribed voters' apathy to an "inability to decide the questions submitted to them."[70] Perhaps fear of radical reform scared voters away, but other factors also contributed to the referendum's defeat. Some with populist leanings feared vesting chancery powers in unelected courts, warning "a chancellor ... is a man who can do any thing he pleases in spite of the law."[71] Such commentators also appealed to public fear of the legal profession, warning that lawyers were attempting to aggrandize their power at the expense of liberty.[72] Others, less afraid of the legal profession, nonetheless worried that chancery powers would be vested in one person. The dangers of such an arrangement were clear:

> [Judicial discretion, as Lord Camden had stated] is the law of tyrants; it is always unknown; it is different in different men; it is temperamental and depends on constitution, temper, and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable.[73]

Plumer claimed John Samuel Sherburne, infamous for using his influence to gain special legislation, authored this warning.[74] This fact suggests that powerful men with an interest in the viability of special legislation might also have played a role in defeating judicial reform.

Despite partial popular rejection, convention delegates' arguments for reform proved an important innovation. Drawing on their English heritage, New Hampshire's reformers had developed a conception of government similar to that conceived in Philadelphia, an understanding unique to the American experience. Americans were heirs to three different conceptions of limited government. First, they were influenced by the ideas of

England's Whigs, who had emphasized separating powers to prevent one estate from gaining tyrannical control of the government.[75] Second, they looked to Locke and Montesquieu, for whom separated powers ensured the rule of law.[76] Third, reformers drew on the theory—prominent in Roman legal thought and later championed in England by Lord Coke—that legislation must be limited within basic principles of justice and reason drawn from nature; for these theorists, separated powers were a tool for regulating not only the lawmaking process, but the objects of legislation as well.[77]

New Hampshire's leaders combined these theories in a novel form. Separating governmental powers no longer prevented estates from exercising tyrannical control, but prevented the dominance of factions, both minority and majority. In part, this was achieved by the procedural constraints of a separated powers system, which allowed coordinated government action only through the medium of law. The "rule of law" prevented many abuses by forcing government to proceed by general rules which applied to all equally. Yet, merely declaring government powers separate was insufficient. As delegates to the 1791 convention began to discover, separate branches needed tools with which to check the activity of the others. As the development of an executive veto suggests, delegates saw "checks and balances" as a means to limit the objects of legislation. The "licentious" laws of the 1780s offended many citizens' conceptions of basic justice; reformers felt that non-legislative branches should not merely enforce these laws impartially, but that they ought to force the legislature to reconsider its position.

Political developments would soon demonstrate that checks on the legislature could also empower other branches to defend their independence. Special legislation constituted a breakdown of the barrier between legislative and judicial function. In a manner unforeseen by reformers, the court discovered within its independent station tools to check this legislative encroachment on its power. Only when the judiciary claimed true interpretive independence could it also itself claim an independent role in limiting the objects of legislation.

As delegates convened in September of 1791,[78] the Superior Court of Judicature itself began to demonstrate the seminal role it would play in shaping New Hampshire's separate powers scheme. The same month, the court for the first time declared a special act unconstitutional. When lawmakers continued to legislate in individual cases, the court periodically refused to enforce these acts, choosing those which best demonstrated the dangers of special legislation. As those cases illustrate, judges discovered in their separate station, however incomplete, the power to defend both the constitution and their own authority: they simply refused to act within their own judicial sphere. This discovery and its development by New Hampshire's judiciary played a central role in defining judicial review as Woodbury described it in 1818.

In 1790, the Superior Court of Judicature affirmed a ruling against Elisabeth M'Clary in an action for debt brought by Nathaniel Gilman, a Portsmouth merchant.[79] Dissatisfied, M'Clary petitioned the legislature for a new trial. Perhaps at the urging of Michael M'Clary - State Representative from her hometown of Epsom[80] - the legislature granted her request.[81] In 1791, M'Clary appeared before the bombastic John Pickering - Chief

Justice of the Superior Court - to reenter her case. Appearing for Gilman, William Plumer moved to quash the proceedings, arguing that if M'Clary's act truly granted her a new trial, it was void as an unconstitutional usurpation of judicial authority.[82] In a bold and terse opinion, the court embraced Plumer's argument, ruling that "the act is ineffectual and inadmissible, and that the said action be dismissed."[83]

"It [the *M'Clary* decision] was the exercise of a high and delicate act of power," noted William Plumer, Jr., "which struck, in this case, at a long established and cherished usage.... Some clamor was indeed made against the judges, as putting themselves above the Legislature."[84] Another observer noted that "recall of judicial decisions, by popular vote, was adopted as a rallying cry by ambitious politicians for their excited followers ... A apprehensions of ... judicial tyranny because of 'Judge made law' ... possessed the mind of the more vociferous of the free people."[85] Past courts had invalidated unconstitutional laws, and the legislature seemed quick to repeal them;[86] however, they had not before struck at so "long established and cherished [a] usage," nor had they ruled in a case bearing so directly on legislative prerogative. Clearly, the court clung to its power only tenuously at this early date.

Nonetheless, the complaints of reformers and the courts did not fall entirely on deaf ears. The number of special acts began to decline, and 1791 was a signal year for acts of a general nature.[87] In 1792, citing the burdensome volume of petitions for new trials (but not the *M'Clary* case), legislators also empowered the Superior Court to grant new trials. This act provided statutory sanction for an appellate process developed during the colonial era, but which the Superior Court had been unwilling to exercise in the democratic atmosphere of Independence.[88]

This process of legislative reform continued under sustained pressure by the court. While the judges had been unable to arrest special legislation entirely, *M'Clary* suggested a means to that end. By simply refusing to act within its own sphere, the judiciary was able to check the legislature. Unless legislators took the uncomfortable step of trying the case themselves, they would be unable to give M'Clary - or any one else - a new trial unless the court cooperated. The value of judicial obstructionism was limited in the democratic-populist atmosphere of the day, however. The court found it necessary to chose carefully which bills it challenged.

The court learned this lesson early. Soon after *M'Clary*, the court heard the "pig case" noted earlier. After the Superior Court refused to grant the pig thief a new trial, legislators ordered the Court of Common Pleas to hear the case. They too refused to hold a new trial, and the case died.[89] This case proved a poor choice for the court. On its face, the act defended a poor man against the legalistic schemes of the rich, just as special acts were intended to do. With facts so favorable to the legislature, the decision apparently did little to advance the court's position.[90]

The court soon found more favorable ground on which to fight. *Jenness v. Seavy* began in 1786, when the Court of Common Pleas affirmed a ruling against the estate of Richard

Jenness for debts owed.[91] In 1790, claiming to have discovered new evidence, Richard's sons petitioned the legislature for a new trial.[92]

The General Court was familiar territory for the Jenness family. Samuel Jenness, perhaps an uncle of the petitioners, had served from 1784-1787. One of the petitioning sons now sat in the legislature as well.[93] Earlier during that son's tenure, the Jenness brothers had already obtained another special act regarding their father's estate.[94] Undoubtedly aided by their familiarity with legislators and the petition process itself, the brothers soon obtained an act declaring "all proceedings had upon the judgment ... null and void" and ordering a new trial in inferior court.[95] The Superior Court dismissed the case, holding the act unconstitutional.[96] Apparently, the judges particularly objected to the blatant nullification of their ruling and to the vesting of appellate powers in an inferior court.

In June 1794, the legislature again granted the Jenness brothers a new trial, this time in Superior Court. The legislature adopted a more conciliatory tone, however. This bill did not explicitly annul the past judgment, but empowered the brothers to:

> defend said action of Review in their said capacity as fully & in the same manner as if said Cause had never been referred, or any report made or judgment rendered therein & as if the Judgment aforementioned had been given on the verdict of a Jury, that so the merits of said demands maybe tried by their country.[97]

While the act did void the previous ruling, its language seemingly gave the court wide discretion and suggested that the legislature had made only a minor adjustment. Perhaps fearing even this language might prove too strong for the court, legislators also reaffirmed the court's power to grant new trials during the same session.[98]

Apparently the court remained unmollified, for in 1797, the legislature granted the Jenness brothers a third new trial.[99] The legislature was particularly reluctant to challenge the court at this point, perhaps in response to another case decided that year, where the court had again invalidated a special law.[100] Legislators refused even to demand a new trial explicitly, ordering only that the court "take into Consideration all the Circumstances of the aforesaid Action and if in their opinion Justice shall require it to grant to the said Administrators a new trial or review thereof and the process on said review or new trial shall be the same as in other Cases."[101]

In 1799, the court again denied the brothers a new trial,[102] placing this decade-long legal battle to rest.

By standing firm in this particular series of cases, the court was able to highlight the dangers of special legislation. Seavy's claims fell under repeated attack for over a decade, subjecting him to ruinous legal bills and constant insecurity, just as Plumer had warned.[103] Further, the Jenness brothers had used their influence to escape an agreement freely entered into, apparently using spurious claims of new evidence to cloak naked self interest.[104] As the increasing timidity of legislators' responses indicates, the public grew dissatisfied with the brothers and the legislature's role in promoting their interests. While

lawmakers continued to pass some private acts, for nearly a decade after *Jenness* was decided, the legislature refused to grant new trials.

In 1808, however, in the case of *Chickering v. Clark*, the legislature again asserted its power to annul Superior Court decisions. Even nearly a decade after *Jenness*, legislators penitently explained that they had acted only because unusual circumstances rendered the Superior Court deadlocked on granting a new trial in this case.[105] Political factors may also have played a role, however. In 1808, Republicans had gained the legislature after nearly five years of Federalist control.[106] Republican legislators were likely eager to challenge recently appointed federalist judges. Obviously, control over the courts was an important issue at the time, for, when New Hampshire Republicans found themselves challenged at the polls the next year, they made frantic attempts to pack the court.[107] Whatever the legislature's motives, the court declared this act unconstitutional as well.[108]

Constitutional reformers had sought both to separate the powers of government and to limit the objects of legislation. They looked in particular to the executive, granting him veto power and declaring him supreme in his arena. Governors, however, did little to stem populist legislation in general, and special acts in particular. Beholden to a similar constituency, popular pressures proved too great. Ironically, New Hampshire's final special act bore the signature of none other than that great opponent of personal legislation, Governor William Plumer.[109]

It was rather the court that came to check legislative excess. Weak at first, jurists found tools within the separate powers scheme to check the legislature and define their own area of authority. In their struggle for independence, judges had to convince a hostile audience. They found it necessary to limit their activity to bills clearly demonstrating the dangers against which they fought. Democratic sentiments also forced this unelected branch to void laws only sparingly, thus avoiding the appearance of encroaching on jealously guarded legislative prerogative. This careful tradition became an important part of Justice Woodbury's seemingly bold claim to judicial review.

With Dolly Merrill's act, the legislature granted its last new trial.[110] Soon after the Merrill decision, the legislature asked the court whether in any case it might constitutionally pass special legislation. The court forwarded a copy of the *Merrill* decision in response, noting that Woodbury's opinion "involved most of the principles, which would govern our opinion on the questions proposed in the resolve."[111] The court, however, refused to offer an absolute statement of the legislature's authority.[112]

This new relationship between New Hampshire's judiciary and the legislature provides important insights into the nature of judicial review. Woodbury's theory did not establish the court "supreme" arbiter of the constitution, as some have suggested. Rather, it provided judges an independent part in the political functions of government. The nature of this role was limited by the characteristics of judicial power and the separate powers environment within which the court acted. As some scholars have noted, federal courts operated within a similar separate powers scheme. The character of Woodbury's claims can thus highlight important aspects of judicial review on the national level as well.

Ultimately, the judiciary's battle for interpretive independence in New Hampshire was a struggle to define the role courts would play within America's unique conception of limited government.

Relying on this new American theory as formulated by New Hampshire's reformers, Woodbury claimed in *Merrill* the "unquestionable" power to void clearly unconstitutional laws.[113] Citing Hamilton's argument in Federalist No. 78, he argued that this power flowed ineluctably from the court's station as the independent interpretive authority within government.[114] In claiming these important powers, Woodbury stood upon the work of his predecessors, who had played an essential role in defining the extent of the court's power. Almost thirty years after these jurists began their struggle, legislators finally recognized the court's prominent and independent role in republican government.

However, the theory of separated powers from which jurists had carved this powerful role limited their claims as well. The court could act only in clear instances of abuse, and, as Woodbury's elaborate opinion demonstrates, it also needed to formulate extensive arguments in support of its position. These tactics allowed courts to demonstrate that judicial independence was necessary to protect liberty, while also assuring observers that judges wished merely to defend the constitution, not impose their own beliefs on the law. Were the court to step beyond these bounds, it would fall perilously close to the blurry line separating interpretation and legislation.[115] So, to encroach on legislative prerogative was to deny that the powers of government should be separated, fatally undermining the court's own claim to independence.

The *Merrill* decision thus instituted an unspoken peace treaty between the branches, providing the comity between separated powers without which governance under this theory would become impossible. This pact established new ground rules for interbranch relations, but it did not end conflict. This continuing tension would regulate their relationship, just as it had shaped the basic boundary between legislative and judicial power. Through constitutional debate, the legislature would defend its concurrent power to interpret the constitution, helping to define its relationship with the courts and even to guide their reasoning.[116] Were the legislature to neglect constitutional questions, however, the court could claim a greater area of exclusive constitutional interpretation for itself.[117] On the other hand, if the court stepped beyond interpretation into the realm of legislation, the General Court could remove judges by address to the governor. Were legislators to attack the court unfairly, however, jurists could still refuse cooperation, as they had before *Merrill*.

Woodbury's extensive arguments illustrated one of the most important terms governing this "truce." As Robert Burt has noted, national reformers envisioned American government as a "reasoning relationship;" a search by equals for the common good.[118] New Hampshire's reformers shared a similar vision. Like Madison, they feared the power of factions to push through legislation disadvantageous to others. By separating the branches, they sought to force government to act only in ways which benefited the whole. Aided by an increase in legal learning and the recent publication of judicial reports,[119] the court played a uniquely prominent role in this process. The

court's particular function was to explain from established principles why government coercion was proper in a particular case. If constitutional objections prevented the court from effectively exercising this legitimizing function, the authority of the whole government would suffer.[120] Were the legislature to ignore the court's honest constitutional objections, legislators would severely undermine their own authority: their laws would be exposed as mere acts of force, deserving no respect.

Were legislators to ignore the court, jurists would likely return to obstructionism, and the machinery of government would grind to a halt. Thus, the court's reasoning was not merely a means to protect citizens' rights, but also a lubricant for the gears of government. Argument encouraged counter argument and compromise, not obstruction and stalemate. Thus, only through constant "constitutional conversation" could the separate powers system function smoothly. The obstructionism of years past remained a fortress of last resort, but ongoing debate proved a more convenient principle by which to govern everyday relations.

This analysis stands at odds with the observations of many scholars examining judicial review on the federal level. Charles Grove Haines, looking to state practice as precedent for national judicial review, focused on signal cases - like *Merrill* - in which he claimed that courts established themselves as "supreme" arbiters of constitutional meaning.[121] If less explicit about the exact range of their powers, others clearly have imagined that early courts enjoyed broad and unilateral authority to resolve disputes over constitutional meaning.[122]

The analysis offered by other scholars, however, suggests that New Hampshire's experience was illustrative of national trends as well. Donald Morgan describes the importance of "coordinate" theories of judicial review before the Civil War. Under this theory, all three branches of government played a role in defending and interpreting the Constitution. Legislators debated constitutional questions, and the court looked with deference to their reasoning. Only as a last resort, the courts themselves also stood ready to guard constitutional liberties.[123]

Robert Lowry Clinton has described a similar scenario. *Marbury*, he noted, was a decision involving the powers of the judiciary itself. Only much later did the court claim against Congress the power to act outside matters "of a judiciary nature." If each branch exercised only those powers given it within the separate powers scheme, different branches would effectively have the final word on constitutionality in different areas; the courts could speak with finality only on questions involving judicial power and procedure.[124]

Robert Burt has also argued that attempts by the Supreme Court to establish itself as "supreme" enforcer of the Constitution have diminished its authority. When the court stepped away from attempts to create constitutional consensus and forced its own views on the legislature, the court's frustrated opponents grew increasingly recalcitrant and violent. Burt points in particular to *Dred Scott v. Sandford*, which encouraged attacks on the court and contributed in large measure, he argues, to the Civil War.[125]

These scholars' work suggests that the story of *Merrill v. Sherburne* highlights important aspects of American judicial review more generally. Looking beyond particular court precedents to the relationship between the judiciary and other branches illuminates aspects of the court's authority, as well as the constraints under which jurists worked. This account suggests first that judicial review was a political act, just as surely as it was interpretation.[126] Relying on a theory of government which sought to limit the objects of legislation, courts claimed a limited control over substantive aspects of legislation. While constitutional framers may not have foreseen the powerful role courts would play in the policy arena, neither was the role they defined for themselves at odds with the framers' concepts.[127] Only if one argues that the courts claimed "supremacy" does judicial review appear anachronistic; the more limited conception of judicial function expressed in New Hampshire suggests judicial review constituted an integral part of Americans' search for limited government.

Merrill's history also directs our gaze to the role of constitutional debate outside the court. As Morgan notes, many constitutional issues never come before the judiciary and must be resolved outside the legal forum. To concentrate our whole attention on judicial interpretation of the fundamental law is to impoverish necessary debate outside the courtroom.[128] Morgan also notes that controversy and crisis have at times eliminated legislative debate of constitutional issues. As Woodbury's theory suggested, the result has been an aggrandizement of judicial authority.[129] The court has become "supreme" only in those areas of constitutional argument in which other branches have declined to participate.

Finally, the battle over special legislation in New Hampshire shifts our emphasis from the theory of judicial review to the political tools upon which the court relies to support its decisions. Clinton suggests that the court may rule with finality only upon questions involving the extent of its own constitutional authority.[130] New Hampshire's story, however, suggests otherwise. While the court did examine the question of judicial authority, its emphasis was not on its own procedure, as in *Marbury*, but on that of the legislature. The court acted, within the confines of its constitutional authority, to prevent the legislature from itself exercising judicial power. As Burt suggests, the court - while not the final arbiter of constitutional questions - played a central role in protecting the constitution.[131] Relying on strategic choice of issues and persuasive argument, the court exercised both its practical power of obstruction and its moral authority to limit the objects of legislation, whether involving judicial authority or not.

Yet, as surely as the court's arguments instruct public debate, they are guided by it as well. As Morgan explains, valuable constitutional argument involves not only jurists, but philosophers and men of practical political experience as well.[132] If constitutional argument becomes exclusively legal, its persuasiveness is limited for broad sections of the public. If jurists are unable to appeal to familiar chords within the public consciousness, much of the promise offered by Woodbury's bold arrangement proves chimerical. Unable to argue persuasively against particular laws, the court is left merely to obstruct the legislative will in particular cases. Even in less extreme instances, the

court's ability to foster "constitutional consensus" is limited by the tenor of the public sentiments to which it appeals.

Thus, *Merrill's* history illuminates aspects of judicial review largely ignored in debate on the issue. The court's authority was less "supreme" than balanced between extremes. The court claimed an important political power, but one shared with other coordinate branches. The court led public opinion, but was at the same time constrained by it. The court provided an important constitutional safeguard, but not an all-sufficient or exclusive one. Only by viewing judicial review as part of a larger scheme of limited government can we properly understand the role courts have played in the American constitutional order.

APPENDICIES

Appendix 1: Acts of the General Court of NH, 1784-1820.
Appendix 2: The Role of Influence in Obtaining Special Acts in NH, 1784-1820

ENDNOTES

1. 1 NH Reports 203; not all the justices participated in the decision, but they all later endorsed its reasoning. See infra note 111.

2. *Id.* at 203-212.

3. *Id.* at 204, quoting the New Hampshire constitution.

4. *Id.* at 213.

5. *Id.* at 214. Justice Woodbury, quoting the opinion of United States Supreme Court Justice Samuel Chase in *Calder v. Bull*, (3 Dallas' Reports, 386), defined vested rights as "'the right to do certain actions or possess certain things,' which [the citizen] has already begun to exercise, or to the exercise of which no obstacle exists in the present laws of the land." The violation of vested rights was considered to work grave injustice, for it ultimately demanded that the divested party arrange his affairs in accord with legal provisions yet to be formulated in order to retain property and privileges gained in transactions protected by law at the time of their consummation. Woodbury's insistence that laws divesting legal rights were outside legitimate governmental authority and thus void was founded in the old English understanding that acts "contrary to common right and reason" were void in and of themselves. See, eg., Justice Lord Coke in Dr. Bonham's Case. English theorists thought law, by definition, declared preexisting principles of right and wrong. Where laws deviated from "natural reason," they could no longer claim the title of laws. Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," in Edward Loss, ed., Corwin on the Constitution, 3 vol. (Ithaca, 1981), 1:108-117 (hereinafter cited as "CORWIN, HIGHER LAWS"); See also infra note 77.

6. This explanation, of course, ignores the question of representation and majority rule. This apparent contradiction may have been resolved by an argument similar to the following: If a law bound all equally, the approval of a few widely chosen representatives could be considered essentially that of the whole. An unjust general act was considered dangerous for everyone, or at least for a great majority of citizens, and hence the approval of a majority was considered the sufficient (and only practicable) indicator of general public consent. The representative fiction thus rested on the general nature of laws. With special acts, which disadvantaged certain parties over others, the fiction broke down entirely and the act could not be considered a product of consent without the explicit approval of the parties involved.

7. 1 NH Reports 203.

8. *Id.* at 210.

9. *Id.* at 201.

10. See Donald Morgan, *Congress and the Constitution* (Cambridge, 1966) (hereinafter cited as "MORGAN"); Robert Lowry Clinton, *Marbury v. Madison* and *Judicial Review* (Kansas, 1989) (hereinafter cited as "CLINTON"); Robert Burt, *The Constitution in Conflict* (Cambridge, 1992) (hereinafter cited as "BURT").

11. See Charles G. Haines, *The American Doctrine of Judicial Supremacy* (Berkley, 1932) (hereinafter cited as "HAINES"); Raoul Berger, *Congress v. The Supreme Court* (Cambridge, 1969) (hereinafter cited as "BERGER"); Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven, 1990) (hereinafter cited as "SNOWISS").

12. See appendix I.

13. *Id.*

14. See generally, William Plumer, Jr., *The Life of William Plumer* 149- 156 (Boston, 1857) (hereinafter cited as "PLUMER JR."), and Herbert Parker, *Courts and Lawyers of New England* 4 vol., 3:538-542 (NY, 1931) (hereinafter cited as "PARKER"). On February 5, 1793, William Plumer wrote to Jeremiah Smith that "... the court of Common Pleas ... [was] so feeble as to be unable to perfect a trial in any suit ... unless the parties consent. What an absurdity in jurisprudence!" William Plumer Papers, Reel 2 (Library of Congress.)

15. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *Columbia Law Review* 566-572.

16. William E. Nelson, *The Eighteenth Century Background of John Marshall's Jurisprudence*, 76 *Michigan Law Review* 902-917 (hereinafter cited as "NELSON").

17. PLUMER, JR., at 156-157; Chief Justice Pickering, also sitting in this case, referred to common law procedures as "inventions of the bar to prevent justice."

18. *Id.* at 154.

19. *Id.* at 152; see also PARKER, at 541-542, describing the jurisprudence of early national New Hampshire judges like Samuel Livermore in similar terms.

20. PLUMER, JR., at 151.

21. Alfred S. Konefsky and Andrew J. King, eds., *The Papers of Daniel Webster* 64-65 (Hanover, NH, 1982) (hereinafter cited as "KONEFSKY & KING"), NELSON, at 912-917. Courts had developed review procedures during the colonial era, but they were reluctant to exercise them. See infra note 88 and accompanying text.

22. PARKER, at 484; for a similar and more detailed account of chancery law in the colonies see Stanley Katz, "The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century," in Lawrence M. Friedman and Harry N. Scheiber, eds., *American Law and the Constitutional Order* 46-52 (Cambridge, 1988). Katz describes the battle over chancery in New York, where the governor was granted equity powers. Some governors had become embroiled in proprietary controversies and used their position as Chancellor to advance private interests. The people despised this arrangement, and the legislature began to claim that it alone had the power to establish courts, as did the Parliament in England. Resistance was so harsh that several governors refused to exercise equity powers.

23. PARKER, at 495-496.

24. See generally, Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, UK, 1979); Atiyah ascribes the preference for case-by-case action in large part to the limited resources of early legislatures. Parliament, he notes, began to proceed by general statute when its capacity increased. While such organizational innovations likely played a role in New Hampshire, constitutional criticism by the courts provided an equal, if not greater, impetus for change. See appendix I.

25. *Id.* at 91-95. Parliament was thought to act judicially even in areas we would today consider strictly legislative. All law was thought simply to declare and apply preexisting "natural Law," not actually to create new law.

26. Mary P. Clarke, *Parliamentary Privilege in the American Colonies* 5, 31, 40-41 (New Haven, 1943) (hereinafter cited as "CLARKE").

27. *Id.* at 268-269. See also, Jack P. Greene, *Peripheries and Center* 31-32, 35-37 (Athens, GA, 1986).

28. CLARKE, at 31.

29. PLUMER, JR., at 163-164.

30. 5 Laws of New Hampshire, 89.

31. *Id.* at 90-91.

32. Gordon Wood, *The Creation of the American Republic, 1776-1787* 157- 159 (NY, 1969) (hereinafter cited as "WOOD"). During the colonial era, the governor and the courts were the king's agents, and they were used to limit the legislature. Newly independent Americans thus saw these branches as dangerous to liberty, and sought to limit their influence.

33. Edward S. Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," in Edward Loss, ed., *Corwin on the Constitution* 3 vol., 1:63 (Ithaca, 1981) (hereinafter cited as "CORWIN"), See also *the New Hampshire Constitution of 1776* in Benjamin Perley Poore, *Federal and State Constitutions* 1278-1279 (Washington, 1878).

34. Bernard Bailyn, *The Origins of American Politics* 22-23 (NY, 1970); The English government was said to contain the three classical forms of government—democracy, oligarchy, and monarchy—in one system, balancing the benefits of each against the evils of the other. The House of Commons held the power to initiate legislation, but such bills could not become law without the approval of the House of Lords and the king; see also WOOD, at 153.

35. CLARKE, at 1-2.

36. This occurred to an extent in England as well, but for different reasons. For Bollingbrook and other opposition Whigs, limiting the commons and the nobles to legislation and the king to the exercise of executive powers provided for (1) the rule of law and (2) checks and balances between estates. Other opposition figures during the interregnum also had promoted separation of powers in the name of securing the rule of law. See W.B. Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origins to the Adoption of the United States Constitution* 28-65, 82-99 (The Hague, 1965) (hereinafter cited as "GWYN").

37. WOOD, at 155, 344-354; CORWIN, at 60.

38. WOOD, at 403-409.

39. *Id.*

40. *Id.* at 410.

41. TURNER, at 44.

42. *Id.* at 285, 412.

43. Thomas Jefferson, *The Notes on the State of Virginia* (1782) in Merrill Peterson, ed., *The Portable Jefferson* (NY, 1975) 164.

44. TURNER, at 44.

45. Address of the Convention, *Journal of the Convention*, 1784, in appendix, NH State Papers 847 (Concord).

46. *Id.*

47. WOOD, at 435; the convention termed the governor "the soul ... without [which] the body politic is but a dead corpse."

48. New Hampshire Constitution, 1784, THE PRESIDENT.

49. *Id.* THE GENERAL COURT, THE SENATE, THE HOUSE OF REPRESENTATIVES.

50. *Id.* THE JUDICIARY.

51. Early Americans had little concept of an independent judiciary. Often, they would refer to both the executive and judicial power together as "the magisterial power." See, WOOD, at 454.

52. TURNER, at 44.

53. PARKER, at 541-542.

54. Lynn W. Turner, *William Plumer of New Hampshire, 1759-1850* 20-25 (Chapel Hill, 1962) (hereinafter cited as "TURNER").

55. William Plumer to Daniel Tilton, Dec. 16, 1787, in *Id.* at 25-26.

56. Plumer to U.S. Senator Jeremiah Smith, January 2, 1795, William Plumer Papers (Library of Congress) Reel 2. Plumer wrote, What a ridiculous figure does the legislature make? How inconsistent! They inform the governor that they think the business for which he convened them was important; but when they act on that very business they resolve it is a meer [sic] private suit in which the state has no interest, & in which they will do nothing but lend their name to a complaint!"

57. See Plumer to Smith, January 2, 1792, Id.; TURNER, at 40.

58. *Id.*

59. Jeremiah Mason, *Autobiography*, in *Memoir and Correspondence of Jeremiah Mason*, 126-127 (G.S. Hillard, ed.) (Cambridge [Riverside Press], 1873) (hereinafter cited as "MASON").

60. PLUMER, JR., at 171.

61. Plumer to Smith, January 2, 1792, reel 2.

62. Proceeding by special act itself hindered the development of general rules, beyond crowding out other proposals on the legislative calendar. The Pennsylvania Council of Censors highlighted this problem: the people "have been taught to consider an application to the legislature as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process of law." WOOD, at 408. Thus, special legislation provided a "band aid" solution to problems, lessening pressure to institute the fundamental reforms—general regulations and refinement of judicial procedure—needed truly to remedy deficiencies.

63. Plumer to Smith, January 2, 1792, reel 2. "Sound policy requires that a period should be fixed beyond which litigation should not be permitted." Plumer's son also alluded to this problem in a biography of his father: "The chances of protracted litigation, as the law then stood, were very great ... it will readily be believed that suitors seldom got what the bill of rights promised them—'Justice freely, without being obliged to purchase it; completely, without denial; and promptly, without delay."' PLUMER, JR., at 120. Justice Woodbury also appealed to these concerns, quoting from James Madison's Federalist No. 44 on this question. 1 NH Reports 215.

64. Address of the Convention, *Journal of the Convention*, 1784, in appendix. NH State Papers 847 (Concord).

65. TURNER, at 45.

66. *Id.* at 47.

67. See *supra* note 14.

68. Journal of the Convention, 1791.

69. TURNER, at 49.

70. *Id.* at 51.

71. "Part of a letter found open in the street," from the March 7, 1792, Concord Herald in Osborne's New Hampshire Spy, March 17, 1792.

72. *Id.*

73. A Freeman (John Samuel Sherburne [?]), "Strictures on 'some remarks on the proceedings of the late Convention & c.,"' (NH, 1792), American Bibliography (NY, 1941) vol. 8, no. 24823.

74. Plumer to Smith, February 17, 1792, reel 2. See also *supra* note 58 and accompanying text.

75. GWYN, at 82-99; WOOD, at 14-16.

76. GWYN, at 66-81; 100-128; CORWIN, at 64. This view was also shared by many English Whigs. See supra note 36.

77. WOOD, at 391-467; CORWIN, HIGHER LAW; In centering on the English separate powers theory informing Americans, Gwyn neglects the "Natural Law" understanding which constituted one of the most unique aspects of American separate powers doctrine: many Americans believed "Natural Rights" and "Natural Law" limited what government could rightfully do, and separation of powers was instituted to restrain government, and particularly the legislature, within these bounds. Using separate branches to limit the objects of legislation was a novel innovation, even for Coke's doctrine, which practically embraced the supremacy of Parliament: for Coke, the legislature might be limited by "Natural Law," but no human authority could restrain it. Contemporary English theory centered explicitly on protecting the interests of estates within government; the more moralistic "higher law" tradition

on which Americans drew appears to have been neglected in England during the eighteenth century. It was to this conception of "natural" limits on government that Justice Woodbury turned in Merrill. Woodbury considered his textual analyses "clear" (even if the meanings he drew from the text alone, while not unreasonable, were not the simplest and most straightforward interpretations possible) because he had interpreted them with the framers' "higher law" goals in mind. Thus, Woodbury explained that special acts were void, "no more from the express prohibition, than, that, in their nature and effect, they are not within the legitimate exercise of legislative power," claiming also that "an act which operates on the rights or property of only a few individuals, without their consent, is a violation of the equality of privileges guaranteed to every subject." In so arguing, Woodbury referred explicitly to the Roman tradition, quoting from Cicero one of the most important principles of Roman law: "*Vetant leges sacrae, vetant duodecem tabulae leges privatis hominibus irrogare, id emin est privilegium*," or "according to the sacred laws, according to the Twelve Tables, laws which penalize particular individuals are forbidden, for that is what a law of personal exception is." See CLINTON, at 33 (noting the importance of this principle in Roman law). Woodbury felt constrained so to argue from first principles even after he seemed to have established textual authority for his position, because these higher law arguments established his interpretation as "the clearest." On the importance of "the clearest manner" standard, see infra section IV. On "higher law" interpretations in early American jurisprudence see generally Hadley Arkes, *Beyond the Constitution* Ch. 1-4 (Princeton, 1990); NELSON, at 917-960 (Nelson describes judicial appeals to "accepted understandings" of rights.); CLINTON, at 31-43 (Describing the American doctrines of separate powers and judicial review as part of a long lineage of attempts to "encapsulat[e] political power, arbitrary in its nature, within some 'binding rule of right."')

78. PLUMER, JR., at 116.

79. "An Act to Restore Elisabeth M'Clary to her Law," manuscript record, *Gilman v. M'Clary*, Rockingham County Superior Court, 1791 (Records and Archives, Concord). Gilman claimed M'Clary owed him for several barrels of rum, and M'Clary claimed she never ordered the liquor.

80. 5 Laws of New Hampshire 508.

81. "An Act to Restore ..." manuscript record.

82. PLUMER, JR., at 170-171.

83. *Gilman v. M'Clary*, manuscript record.

84. PLUMER, JR., at 171.

85. PARKER, at 541-542.

86. PLUMER, JR., at 59, 171; CLINTON, at 53-54. The doctrine of judicial review found expression in numerous judicial opinions before this time, as several scholars have noted. HAINES, at 148-170. Undoubtedly, Woodbury and his predecessors drew heavily on this tradition, and I do not mean to suggest that the accommodation in *Merrill* presented an entirely new conception of the judicial function. Rather, it represented an application of this theory within the particular structure of New Hampshire government; Merrill's story represents the establishment of effective judicial review, not the formulation of a new concept.

87. See appendix I.

88. KONEFSKY & KING, at 64-65; 5 Laws of New Hampshire 524-625.

89. MASON, at 126-127.

90. Woodbury does not cite this case in *Merrill*, and the law itself seems to be absent from compilations of period statutes.

91. *Jenness v. Seavey*, manuscript record (Records and Archives, Concord) Inferior Court record.

92. In granting a new trial, the legislature would excuse the brothers from an agreement to abide by the decision of referees in the case. *Id*.

93. 5 Laws of New Hampshire 440.

94. 5 Laws of New Hampshire 404-405.

95. J*enness v. Seavey*, manuscript record (Records and Archives, Concord) Inferior Court record. In an agreement with the referees, the brothers had removed the case to Superior Court.

96. *Id.* Rockingham Superior Court record (1792).

97. 6 Laws of NH, 120.

98. KONEFSKY & KING, at 64-65; 6 Laws of NH 141-142.

99. 6 Laws of NH, 412-413.

100. *Butterfield v. Morgan* (1797), cited in *Merrill*, 1 NH Reports 216.

101. 6 Laws of NH, 412-413.

102. 1 Cited in *Merrill*, 1 NH Reports 216.

103. See *supra* note 63.

104. The brothers claimed to have evidence their father never incurred the debt sued on, but court records contain the signed affidavits of two witnesses to the pact between the deceased and Seavey.

105. 7 Laws of NH 699-700.

106. MASON, 52.

107. TURNER, at 189.

108. Cited in *Merrill*, 1 NH Reports, 216.

109. "An act to restore ..." manuscript record.

110. See appendix I.

111. Manuscript record, Journal of the House of Representatives, "Report of the Justices," June 24, 1819 (Records and Archives, Concord).

112. *Id.*

113. 1 NH Reports 203.

114. *Id.*

115. This important factor was highlighted by Professor Thayer:

"[W]e introduced for the first time into the conduct of government through its great departments a judicial sanction, as among these departments,—not full and complete, but partial. The judges were allowed, indirectly and in a degree, the power to revise the action of other departments and to pronounce it null. In simple truth, while this is a mere judicial function, it involves, owing to the subject matter with which it deals, taking a part, a secondary part, in the political conduct of government. If that be so, then the judges must apply methods and principles that befit their task.... They must not step into the shoes of the law-maker, or be unmindful of the hint that is found in the sagacious remark of an English bishop nearly two centuries ago, quoted lately from Mr. Justice Holmes:—'Whoever had an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver ...'" James Bradley Thayer "The Origin and Scope of the American Doctrine of Constitutional Law," in Ezra Ripley Thayer, ed., *Legal Essays* 32-33 (Cambridge, 1972) also, see generally 20-33 (hereinafter cited as "THAYER").

116. MORGAN, at 241, 333.

117. *Id.* at 7-8.

118. BURT, at 34-102, 155-199.

119. 1 NH Reports; PLUMER, JR., at 172-173.

120. MORGAN, at 29, 330-333. Morgan notes that Congress has an important role to play in establishing governmental legitimacy because of its representative nature. The courts have assumed this role almost exclusively with the rise of "judicial monopoly" theory.

121. HAINES, at 148-170.

122. See, e.g., George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815* (New York: McMillan Publishing Company, 1981) (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States vols. I-II) (Paul A. Freund, ed.). xiii-xiv, 7 (It will be a "pervading theme" that Chief Justice John Marshall was able to "establish the authority of the Court" and "establish [it] as an arbiter of fundamental issues of governmental power.… A relatively feeble institution during the 1790s, … [the Court] acquired in only a few years time, and largely under the guiding hand of John Marshall, more power than even the framers of the Constitution may have anticipated."); G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (New York: McMillan Publishing Company, 1988) (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States vols. III-IV) (Paul A. Freund and Stanley N. Katz, eds.) 964-975 (The decisions of the Marshall Court "furnish … evidence of the impressive discretion of the Justices to function as substantive rule makers. No Court in American history was freer to make up its own rules of law.").

123. MORGAN, at 45-139.

124. CLINTON, at 18, 116-127.

125. BURT, at 34-102, 155-199.

126. THAYER, at 32.

127. See *supra* note 77.

128. MORGAN, at 11, 16-42.

129. *Id.* at 7-8.

130. See *supra* note 124.

131. BURT, at 34-102.

132. MORGAN, at 26-29.

APPENDIX 1: *Acts of the General Court of New Hampshire; 1784-1820*

Year	Total Acts	General Acts	Gen Acts Jud	Pvt Acts Jud	Restorations
1784	25	2	1	6	3
1785	50	9	1	13	3
1786	79	20	1	22	8
1787	72	10	3	11	8
1788	32	4	0	7	2
1789	87	16	4	22	13
1790	59	4	2	20	10
1791	163	55	18	18	15
1792	71	12	0	12	5
1793	21	1	0	2	2
1794	71	7	4	11	4
1795	68	5	3	11	1
1796	69	8	1	4	1
1797	74	7	4	6	3
1798	59	2	0	4	1
1799	46	5	0	1	1
1800	43	2	1	2	0
1801	32	4	0	2	0
1802	47	7	0	5	0
1803	84	6	0	9	0
1804	40	8	3	3	0
1805	51	13	1	2	0
1806	37	4	1	2	0
1807	66	8	2	2	0
1808	109	15	3	2	1
1809	41	8	0	2	0
1810	46	7	2	2	0
1811	53	7	1	2	0
1812	84	13	3	1	0
1813	50	12	6	5	0
1814	70	10	4	0	0
1815	68	7	2	2	0
1816	96	17	4	1	0
1817	55	8	2	1	1
1818	82	16	3	1	0
1819	88	11	3	0	0
1820	77	15	3	1	0

DEFINITIONS

Total Acts: All enactments, general and private.

General Acts: All general statutes.

General Acts Judicial: General acts relating to judicial procedure.

Private Acts: Measures settling the rights of private parties, including: instruments vacated, construed, affirmed, altered, or replaced; power to sell land granted; granting new trials from final judgments of the Superior Court; construing or granting special powers of attorney; "impowering" or directing courts to decide particular matters; determining the rights of heirs to land.

Private Acts - In represent private legislation obtained when a family member was in the legislature

Private Acts - Out represent private legislation obtained when no family member was in the legislature.

Restorations: New trials; stopped actions; vacated decisions; exemptions from general laws.

Family relationship was recorded when the petitioner had the same uncommon last name as a member of the legislature, and also if the petitioner had the same common last name as a member of the legislature when that member also represented the petitioner's town of residence.

APPENDIX 2: *Role of Influence in Obtaining Special Acts in New Hampshire, 1784-1820*

Date	Private Acts-In	Private Acts-Out
1784	3	6
1785	1	11
1786	5	25
1787	2	17
1788	2	7
1789	7	28
1790	7	23
1791	10	23
1792	6	11
1793	1	3
1794	3	12
1795	4	8
1796	0	9
1797	2	6
1798	3	5
1799	0	3
1800	1	1
1801	1	1
1802	3	1
1803	3	2
1804	1	6
1805	1	2
1806	1	1
1807	1	1
1808	2	1
1809	1	1
1810	1	1
1811	1	1
1812	1	1
1813	2	0
1814	0	3
1815	0	0
1816	0	2
1817	1	1
1818	0	0
1819	0	1
1820	0	0

This case is often cited as New Hampshire's "Marbury v. Madison;" the fountainhead of the Supreme Court's supposed authority to rule on the constitutionality of any legislative enactment with binding effect not only upon the judicial branch but upon the legislative and executive branches as well, the practical effect being that no rule established by a supreme court on constitutional grounds can be changed for future cases except by amending the Constitution. In reality this case is much more limited, holding merely that any act of the Legislature having the effect of nullifying a judgment of a court is invalid by reason of its being a "judicial" act (that is, retrospective in nature), rather than a "legislative" act (that is, prospective in nature). The subject of the case was a long-followed colonial and pre-constitutional era legislative practice of passing bills granting dissatisfied litigants new trials, something the Court ruled was inconsistent with the separation of powers provided for under Article 37 of Part I of the 1784 Constitution. Levi Woodbury, who died in 1851 while a Justice of the Supreme Court of the United States, had a reputation both for intellectual acuity and prolixity, neither of which is placed in doubt by this opinion.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE

DOROTHY MERRILL, ADMINISTRATRIX
V.
JOSEPH SHERBURNE, ET. AL.

1 NH 199; 8 Am. Dec. 52 (1818)

WOODBURY, J. delivered the opinion of the court.

RICHARDSON, C. J. having been of counsel, did not sit.

This case was an appeal from a decree of the court of probate in this county, approving an instrument which purported to be the last will of Nathaniel Ward.

It appeared from the copies of the proceedings, and the admissions of the parties, that, on the sixth day of June, A. D. 1806, Ward died: that in the instrument before mentioned, all

his property was devised to Benjamin Merrill, the plaintiff's intestate; that on the twenty-third day of the same month, Merrill obtained a decree of the court of probate, approving and allowing in common form, said instrument as the last will of Ward; that Merrill thereupon took and retained quiet possession of said property, till December 28, 1812, when the defendants, being heirs at law of Ward, petitioned the court of probate to reconsider, in solemn form, the decree before mentioned, and to disallow said instrument; that on the 4th of February, A. D. 1813, said court did re-consider and affirm the former decree; that the defendants claimed an appeal therefrom to the Superior Court, in which, the appeal having been entered, all the issues, joined between the parties, were, at Nov. term 1813, found against said Merrill; that he then made a motion for a new trial, which after a full hearing, was refused, and at November term, 1814, final judgment was rendered, that the decree of the court of probate be reversed and said instrument disallowed. Merrill then petitioned the legislature for another trial; and they, at their June session, A. D. 1817, passed an act, granting to the plaintiff, as Administratrix of Merrill, at that time deceased, liberty to re-enter said cause in the Superior court, and there have it retried like common cases of review. Pursuant to that act, the plaintiff served a copy of it on the defendants, which required them to appear in this court at September term, 1817, and proceed to a new trial of the cause. The names of the parties were at that term, entered on the docket, and the defendants appearing moved the court to quash the proceedings, on the ground, that the act of the legislature was unconstitutional. The cause was continued for argument upon that motion and is now to be decided.

It involves a question of no small magnitude. For the motion contains a charge, that encroachments have been made upon constitutional rights; and though in form the measures of a branch of the government towards a few individuals only are arraigned, yet in substance, those measures affect the interest of all, as the rule of construction adopted to-day, may become a precedent to-morrow, and be adduced to vindicate, or oppose, similar conduct towards every member of society. The alarm thus excited induces most people to listen to such charges with great readiness; and it would not be unnatural for courts in examining these charges, sometimes to fancy the existence of what is only feared.

Perhaps, also it is inseparable from the structure of the legislative and judicial departments that jealousies should arise between them as to the exercise of their respective powers. For they were intended, in some degree, to be mutual checks;[1] and though thus situated, both ought to rejoice that their own errors can be discovered and corrected: yet such are the dispositions of mankind, that collision is often the consequence of these checks; and encroachments are suspected where none are meditated, and when in truth the obnoxious measures were only new exercises of legitimate powers. To detect mistakes in others is likewise flattering to the vanity and ingenuity of some.

***3** From these, and similar circumstances, therefore, it has happened, that questions of this nature have not always been examined with that coolness, and patience, which their importance deserved; and that since the adoption of our constitutions, courts of justice, as well as legislative bodies, have furnished some complaints, that their jurisdiction has

been violated, when those complaints were not founded upon sound principles or respectable precedents. Conscious of the force of these considerations, we have in the present cause, experienced considerable embarrassment: but duty has compelled us to act, and it hardly need be repeated, that we have attempted to divest ourselves of every feeling, except an earnest desire to perform what duty dictated. It must be admitted that courts ought to decide, according "to the laws of the land," all cases, which are submitted to their examination. To do this, however, we must examine those laws.[2] The constitution is one of them, and "is in fact, and must be regarded by the judges as a fundamental law."[3] It was created by the people, who in our republics, are "the supreme power,"[4] and, it being the expression of their will, their agents, as are all the branches of government,[5] can perform no act which, if contrary to that will, should be deemed lawful. "To deny this, would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of power may do, 'not only what their powers do not authorize, but what they forbid." Their oaths of office too, prohibit, and the constitution itself, in express terms, prohibits the legislature from making "laws repugnant or contrary to the constitution." "If then there should happen to be an irreconcilable variance between the constitution and a statute, that which has the superior obligation and validity ought of course to be preferred: in other words," "the intention of the people ought to be preferred to the intention of their agents. "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes, that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decision by the fundamental laws, rather than by those, which are not fundamental." Our confidence, also, in the liberality of the legislature is such, that when through inadvertence or mistake, they have passed an unauthorized act, we believe, that should the unpleasant task of adjudging it void, devolve upon us, they would think the task is performed only from a conviction that the act is in the *clearest* manner, unconstitutional, and that our right and duty so to pronounce it are both unquestionable.[6] To determine whether its act, which awarded a new trial to the plaintiff, was thus unconstitutional, it is necessary to ascertain what was the nature and effect. When *Ward* died, all his estate descended to the defendants, unless by him devised to other persons," (Stat. 207.) *Merrill* claimed, that it had been ""devised" to him: the defendants questioned it: a controversy commenced; legal proceedings were instituted; and after two hearings on the merits, and after a new trial had been asked and refused, it was adjudged, that *Ward* had made no valid devise of his estate. Being dissatisfied with these decisions, *Merrill* transferred his application for a new trial to the legislature. They examined his testimony and heard counsel. They, then, by the present act, enabled him "to enter said cause anew at the superior court," and directed, "that said cause have a day in said court and shall be heard, tried and determined in said court upon pleadings had in the former trial, and the said court are hereby authorized and empowered upon said new trial, to affirm or reverse the former judgment, or decree, had on the appeal aforesaid, as the said new trial may terminate for or against either party," &c.

This does not empower the court in their discretion to grant or refuse a new trial; but

directs that "the cause shall be heard" again; and thus amounts to an absolute reversal of the judgment in November, 1814, against the motion of Merrill for another trial, and also to an alteration of the judgment on the merits from a final and absolute judgment to a judgment which this court might "affirm or reverse," as the said new "trial might terminate for or against either party." Whether in their inquiries the legislature and the court proceeded upon the same or different evidence doth not change the nature and effect of the act, when stripped of the forms of legislation; because, unless it virtually reversed the judgment, which was rendered against the motion of the plaintiff, and altered, as above mentioned, the judgment on the merits, they could be pleaded in bar, to the present proceedings, and we should not be justified in holding another trial, and in rendering another judgment in this case, while the first judgment remained in full force.

Such being the operation of the act, it becomes proper to examine:

First, Whether the passage of it was not an exercise of judicial powers.

Second, If it was, whether our legislature are a branch of the judiciary.

Third, If they are not, it will then remain to enquire, whether the legislature, either by special clauses in the constitution, or as a mere legislative body, possess authority to pass an act, containing such provisions as the act under consideration.

1. No particular definition of judicial powers is given in the constitution; and considering the general nature of the instrument, none was to be expected. Critical statements of the meanings, in which all important words were employed-would have swollen into volumes; and when those words possessed a customary signification, a definition of them would have been useless. But ""powers judicial," "judiciary powers," and "judicatories" are all phrases used in the constitution: and though not particularly defined, are still so used to designate with clearness, that department of government, which it was intended should interpret and administer the laws. On general principles therefore, those enquiries, deliberations, orders and decrees, which are peculiar to such a department, must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct; the latter make rules, upon which, in connexion with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases.[7] In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore, to compare the claims of parties with the laws of the land before established, is in its nature a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is in its nature, a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law, "as a rule of civil conduct;"[8] because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated.

It is the province of judicial power also, to decide private disputes "between or concerning persons;"[9] but of legislative power to regulate publick concerns and to "make

laws" for the benefit and welfare of the state.[10] Nor does the passage of private statutes conflict with these principles; because such statutes, when lawful, are enacted on petition, or by the consent of all concerned; or else they forbear to interfere with past transactions and vested rights.[11] As the legislature, then, in the act under consideration, adjudicated on a case, which had already happened, and had been litigated between individuals, their proceedings must on general principles, be deemed an exercise of judicial powers. But regarded in a more particular sense, the character of their proceedings cannot be different.

A legal process had been instituted in a subordinate court; had been heard; and then by appeal, carried to a higher tribunal. It had been re-heard in that tribunal, and, after a motion for a new trial was overruled, a final judgment had been rendered, which by existing statutes closed the controversy forever. The legislature then undertake to revise these proceedings; they convene the parties; canvass the evidence; and, afterwards reverse in substance, the interlocutory judgment, and materially alter the effect of the final judgment of this court. If these doings of the legislature are considered a mere continuation of the former doings of the courts, then, as those former ones were judicial, so are these. But if they are considered as disconnected with the former doings, they are still judicial on account of their nature and effect. The grant of a new trial belongs to the courts of law from immemorial usage. The power to grant a new trial is incidental to their other powers. It is a judgment in relation to a private controversy: affects what has already happened; and results from a comparison of evidence and claims with the existing laws. It will not be denied, that the consideration and decision, by the Superior Court, of the motion for this same new trial was an exercise of judicial power. If so a consideration and decision upon the same subject by the legislature must be an exercise of power of the same description; for what is in its nature judicial to-day, must be judicial to-morrow and forever. The circumstance, also, that the legislature themselves did not proceed to make a final judgment on the merits of the controversy between these parties cannot alter the character of the act granting a new trial. To award such a trial was one judicial act, and because they did not proceed to perform another, by holding that trial before themselves, the first act did not become any more or less a judicial one. We apprehend, therefore, that the character of the act under consideration must be deemed judicial. This position will probably be less doubted, than the position that our constitution has not confided to the legislature the power to pass such an act. But that power, if confided, must be exercised by the legislature as a branch of the judiciary, or under some special provision, or as a mere legislative body.

2. Our next enquiry, then, is, whether they, as a branch of the judiciary, are enabled to exercise it. No article in the constitution can be designated, which in specific terms makes the legislature a branch of the judiciary. Consequently, if they are, it must depend upon inference, and that inference, it is admitted, can be drawn from nothing but the grant of powers to the general court, and from the 31st and 37th articles in the bill of rights. By that grant they are invested "with full authority to make all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant, or contrary to this constitution." But nothing is here said of decrees or judgments, or of judicial power. The phraseology is altogether peculiar to legislative subjects. Though styled the "general court of New-

Hampshire,"[12] they are considered in the first section to be merely "the supreme legislative power."--The constitution then proceeds to state, not that this general court shall be a branch of the judiciary, but that "they shall forever have full power and authority to erect and constitute judicatories; not that they themselves shall hear and try private controversies, but that the "courts of record" so constituted "shall be holden in the name of the state for the hearing, trying and determining all manner of crimes, offences, pleas, processes, plaints, actions, causes, and things whatsoever arising or happening within this state, or between, or concerning persons inhabiting or residing or brought within the same."

As to the 31st article of the bill of rights it merely provides, that "the legislature shall assemble for the redress of public grievances and for making such laws as the publick good may require." Yet "the grievance" attempted to be redressed by the act under consideration was not a "*publick*" one; and if it were, the obvious meaning of the article is, that such grievances should be redressed by "laws," and not by proceedings, which are in their nature, judgments. The constitution afterwards confers upon the legislature, only legislative power for the purpose of effecting that "redress."

The 37th article is more ambiguous. It declares, that in the government of this state, "the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from, and independent of each other as the nature of a free government will admit, or as is consistent with that chain of connexion, which binds the whole fabrick of the constitution in one indissoluble bond of union and amity."

It has been contended, and we with readiness admit, that from the close of this article, the inference is clear, that our constitution did not intend to make a total separation of the three powers of the government. The executive was to be united with the legislature in the passage of laws; and the former was to depend upon the latter for his salary. A part of the judiciary, too, was united with a part of the legislature in the trial of some impeachments; and all of the judiciary were made dependent on the executive for appointments and on the legislature and executive for the erection of courts, the apportionment of jurisdiction, for compensation and for removal by address.

But these connexions and dependencies are not left to implication; they are all created by subsequent express provisions: and the above article was probably clothed in such cautious language that it might not conflict with those provisions.[13] It means no more than a similar article in the Illinois constitution, which, after dividing the powers of government, proceeds to say "that no person or collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others, except as hereinafter *expressly* directed or permitted."[14] For in our constitution if any one power, not afterwards expressly permitted or properly belonging to one department, could be exercised by it through implication, these consequences will follow; either that no powers need have been expressly permitted, or apportioned, as the whole could through implication be exercised by either branch: or that, though some are expressly apportioned, others may be implied and expressed contrary to the *spirit* of what are so apportioned.

As the 37th article, then, declares the general propriety of a separation between the different departments of government, and as it contains no qualifications of that principle, which are inconsistent with excluding the legislature from judicial powers, "properly belonging to another department, no inference from this article can be deduced, that the legislature were intended to be a branch of the judiciary. In fine, that they were not so intended by this or any other part of the constitution is manifest from many more circumstances, some of which it may be proper to enumerate.

At the formation of our present constitution, whatever might have been the prior connexion between the legislative and judicial departments, a great solicitude existed to keep them, thence forward, on the subject of private controversies, perfectly separate and independent. [1 Bl. C. Apx. A: Letter of judges sup. court of United States, April, 1792.]

It was well known and considered, that "in the distinct and separate existence of the judicial power consists one main preservative of the publick liberty;[15] that, indeed there is no liberty, if the power of judging be not separated from the legislative and executive powers."[16] In other words that "the union of these two powers is tyrrany;"[17] or, as Mr. Madison observes, may justly be "pronounced the very definition of tyrrany;"[18] or in the language of Mr. *Jefferson,* "is precisely the definition of despotick government."[19]

Not a single constitution therefore, exists in the whole union, which does not adopt this principle of separation as a part of its basis.[20] We are aware, that in *Connecticut,* till lately, and still in *New-York,* a part of their legislature exercise some judicial authority.[21] This is probably a relic of the rude and monarchical governments of the eastern world; in some of which no division of powers existed in theory, and very little in practice. Even in *England* the executive and judicial departments were once united;[22] and when our ancestors emigrated hither, they from imitation, smallness of numbers and attachment to popular forms, vested often in one department not only distinct, but sometimes universal powers.[23]

The practice of their assemblies to perform judicial acts[24] has contributed to produce an impression, that our legislatures can also perform them. But it should be remembered, that those assemblies were restrained by no constitutions, and that the evils of this practice,[25] united with the increase of political science have produced the very changes and prohibitions before mentioned. The exceptions in *Connecticut* and *New-York* do not affect the argument; because those exceptions are not implied, but detailed in specific terms in their charters: and this power, also, as in the house of lords in *England,* is in those states to be exercised in the form of judgments and not of laws; and by *one* branch, and not by all, of the legislature.[26] "The entire legislature can perform no judiciary act."[27] It is questionable; whether at this day such an act by all the branches of the British parliament, though in theory omnipotent, could be enforced.[28] "There is a statute, made in the 4th year of king Hen. IV. ch. 22, whereby it is enacted that judgment given by the king's courts shall not be examined in the chancery, parliament, nor elsewhere." [Doctor

and Student, dialogue 1, ch. 8.]

Be this, however, as it may, in that country, one great object of constitutions here (*Fed. No.* 81.) was to limit the powers of all the departments of government,[29] and our constitution contains many express provisions in relation to them, which are wholly irreconcilable with the exercise of judicial powers by the legislature, as a branch of the judiciary. That clause, which confers upon the "general court" the authority "to make laws," provides at the same time, that they must not be "repugnant or contrary to the constitution." One prominent reason for creating the judicial, distinct from the legislative department, was, that the former might determine when laws were thus "repugnant," and so operate as a check upon the latter, and as a safeguard to the people against its mistakes or encroachments. But the judiciary would in every respect cease to be a check on the legislature, if the legislature could at pleasure revise or alter any of the judgments of the judiciary. The legislature too would thus become the court of last resort, "the superior court," or "supreme judicial" tribunal of the state; and those expressions so often applied to this court in the constitution[30] would become gross misnomers. If our legislators too possess such high judicial powers, much consistency cannot exist in the provision, that "upon important questions of law and upon solemn occasions" they may be advised by the justices of this court, which, on the above principle is inferior and subordinate. Nor is this all. "Every reason, which recommends the tenure of good behaviour for judicial officers, militates against placing the judiciary power in the last resort in a body composed of men chosen for a limited period,[31] men too, not selected for their knowledge of the laws nor with a view to those other qualifications which fit men to be judges." Nor are our legislators commissioned and sworn in any manner as judicial officers are required to be. Nor can they like judges, for mal-conduct, be removed by address or impeachment. Because the house themselves are the tribunal to try impeachments: and both united are the bodies authorized to present addresses for removals.[32] Nor can it easily be conceived, that the judiciary are independent of the legislature to any extent, however small, if the legislature itself compose a part of that judiciary.

Certain reasons induce us to rest this opinion upon general principles, but under this point it may not be unimportant to notice one consideration of a particular nature. The constitution itself seems to declare what tribunals shall exercise jurisdiction over the subject matter of the dispute between the present plaintiff and defendants. For it says in express language, that till other provisions are made, the probate of wills "shall be exercised by the judges of probate" and "all appeals from the respective judges of probate shall be heard and tried by the superior court."[33] No provisions have since been made, which transferred any part of the above power to the legislature.

In deciding an abstract question like this, it cannot, we apprehend, be material, whether a review is provided in appeals from courts of probate; or whether, after judgment in such appeals, a new trial could be awarded by this court on petition by the party aggrieved. Because, if all our statutes on reviews and new trials were repealed tomorrow, the legislature would possess no more authority to exercise judicial powers than they now possess; as their authority was confined and limited, by the people at the formation of the constitution; and must continue as it was then, until the constitution itself is altered. A

different construction would enable the legislature, if the court of common pleas was abolished, to issue writs and try causes till other courts for that purpose were organized; and if no sheriffs happened to be in office, to proceed also, to serve the writs issued by themselves.

3. As our legislature, then, are not a branch of the judiciary, it only remains to enquire, whether without being made a branch of the judiciary, they are either by special clauses in the constitution, or, as a mere legislative body, authorized to pass the act under consideration.

The people, being supreme, might, without intending to make the legislature a branch of the judiciary, have invested them, by some special clause, with that judicial power which was exercised in this act. But no such clause has been found in the constitution, and without such a clause it would be most unwarrantable to presume that the people intended to confer this judicial power on the legislature, when all the reasons before mentioned, and the spirit of the people's language in the whole instrument forbid such a presumption. If our general court then were in any capacity authorized to pass this act, it must have been in that of mere legislators. The legislative power is surely one of the most honourable and useful in all governments. We should be among the last persons inclined to impair its rights. As it emanates more immediately from the people, it should also be ample, in order that the grievances of the people may be redressed; and we entertain no doubt that in this state, all its acts of a legislative character, not prohibited by our constitution, should be supported and construed favourably.[34] But those acts must in *substance* be of a legislative character. Their form is immaterial. They must be *laws*, must be confined to subsequent occurrences. For the very nature and effect of a new law is a rule for future cases.[35] They must too in general, be rules prescribed for civil conduct to the whole community, and not a "transient, sudden order from a superior to, or concerning a particular person."[36] For every subject of this state is entitled to a certain remedy, by having recourse to the laws;[37] but an act, which operates on the rights or property of only a few individuals, without their consent, is a violation of the equality of privileges guaranteed to every subject. It is, also, an interference with existing interests, and prescribes a new rule for the regulation of them, after they have become vested. This is forbidden by first principles. "*Vetant leges sacrae, vetant duodecem tabulae leges privatis hominibus irrogare, Id enim est privilegium.*"[38] Acts of the legislature, too, which look back upon interests already settled, or events which have already happened, are *retrospective;* and our constitution has in direct terms prohibited them, because "highly injurious, oppressive and unjust."[39] But perhaps their invalidity results no more from this express prohibition, than from the circumstance, that, in their nature and effect, they are not within the legitimate exercise of legislative power. For though under the name of *ex post facto* laws, when "made for the punishment of offences,"[40] they have long been severely reprobated, because more common in times of commotion, and because they endanger the character and person, as well as the property: yet laws for the decision of civil causes made after the facts on which they operate, *ex jure post facto*, are alike "retrospective," and rest on reasons alike fallacious. 7 *John.* 495.-- 1 *Bay.* 107.--*Bac. Stat.* 6.--3 *Ham. wks.* 254.--7 *Ma. R.* 385. We wish it to be distinctly understood, however, that acts of the legislature are not within the above prohibitions, unless they operate on the

interests of individuals or of *private* corporations. *Trus. Dart. Col.* vs. *Woodward.* Nor are they within them, when, in an implied or express manner, the parties affected have consented to their passage; as all publick officers impliedly consent to alterations of the institutions in which they officiate, provided the publick deem it expedient to introduce a change. So all citizens consent to the passage of acts, which the constitution in express terms has enabled the legislature to make, though those acts might otherwise be unjustifiable; because all either aided to form, or, by living under, are presumed to adopt the constitution.[41] Thus the constitution has ratified "acts respecting the persons or estates of absentees,"[42] and has empowered "the representative body of the people to take a man's property for publick uses."[43] Nor can acts of the legislature be opposed to those fundamental axioms of legislation before particularized, unless they impair rights which are *vested:* because most civil rights are derived from publick laws; and if, before the rights become vested in particular individuals, the convenience of the state produces amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee. Thus the right to prosecute actions in a particular time or manner may perhaps be modified or taken away, at any period before actions are commenced. 10 *Mass. R. p.* 439. So also may the right of *femmes covert* to dower at any period before the death of their husbands: and so the right of the next akin to a relations' estate, at any period before the relation's death. But it is questionable, whether even these rights, though inchoate, and in mere expectancy, can be taken from one portion of the community and be left unmolested with another portion.[44] Be that as it may however, it is clearly unwarrantable thus to take from any citizen, a vested right; a right "to do certain actions or possess certain things," which he has already begun to exercise, or to the exercise of which no obstacle exists in the present laws of the land.[45] But previous to the passage of the act, granting a new trial to this plaintiff, the defendants had become authorized by the laws of the land, to possess all the estate of which *Ward* died seized. Every obstacle to the exercise of their rights had been removed or annulled: and whether those rights became vested by *Ward's* death, or by the final judgment in November 1814, is immaterial; because both these events had happened before the passage of this act.[46] The defendants, being thus situated the legislature interfered; not to enact what is in its nature and effect a law, but to pass a decree; not to prescribe a rule for future cases, but to regulate a case which had already occurred: not to make a private statute by the consent of all concerned, but at the request of one party to reverse and alter existing judgments; not to promulgate an ordinance, for a whole class of rights in the community, but to make the action of a particular individual an exception to all standing laws on the subject in controversy.[47]

The expense and inconvenience of another trial were also imposed upon the defendants, and all their claims to the property in dispute which had become indefeasible by the laws then in being, were launched again upon the sea of litigation to be lost or saved as accident and opinion might afterward happen to injure or befriend them.

The misfortune of having vested rights thus disturbed is not small, when we consider, that on this principle, no judgment whatever in a court of law is final "If, says *Germaine J.* judgment given in the king's courts should be examined in the chancery, before the king's

counsel, or any other place, the plaintiffs or demandants should seldom come to the effect of their suit and the law should never have end."[48] The misfortune too is not small when we recollect with Mr. Madison[49] that usually "one legislative interference is but the link of a long chain of repetitions till the properties of parties are ruined in the contest." 14 *John.* 73. "The sober people of America, says he, have seen with regret and with indignation, that sudden changes and legislative interference in cases affecting personal rights become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community." "It is not, says *Spencer* J.[50] necessary to enquire whether a legislature can by the plenitude of its power annul an existing judgment. This power I should undoubtedly deny." "A legislature,[51] without exceeding its province, cannot reverse a determination once made in a particular case." "Neither the theory of the British nor the state constitutions authorizes the revisal of a judicial sentence by a legislative act"...[52] But it has sometimes been argued, that in case of extreme hardships, legislatures are always authorized to interfere. The defendants deny this hardship: and though the record shews, that before the application to the legislature, two trials had been enjoyed, which is a greater number than the common law generally allows, and that a motion for another one had also been fully heard and considered, yet all the hardship may be presumed which the plaintiff alleges, and still that could not confer upon one department of government a power, which the constitution had withheld. In a case of great state necessity the legislature might be warranted in adopting strong measures. But even in that case it would deserve consideration whether here they could advance beyond their delegated power. In this country it is not the legislature, who are supreme; but the people; and "there is no position, which depends on clearer principles, than that every act of a delegated authority contrary to the tenor of the commission, under which it is exercised is void."[53] The hardship in this case, however, is at the most only a pecuniary one of a mere individual, and like many other sufferings under the best system and the best administration of laws, may be remediless. Could perfect justice be always obtained, our institutions would cease to be human. Those evils, therefore, that have already been lost, and which the existing laws cannot reach, are irretrievable. In such cases it must be as unwarrantable for the legislature, as for the executive, or judicial power, to interfere in such a manner as to impair interests already vested in particular members of society.

The long usage of our legislatures to grant new trials has also been deemed an argument in favour of the act under consideration. But that usage commenced under colonial institutions, where legislative powers were neither understood nor limited as under our present constitution. Since the adoption of that, the usage has been resisted by sound civilians, and often declared void by courts of law. Though no opinions have been published, and though the decisions have been contradictory, yet the following ones appear by the records to have adjudged such acts void. *Gilman* vs. *M'Clary. Rock. Sept.* 1791.-- *Chickering* vs. *Clark. Hills. Butterfield* vs. *Morgan. Ches. May* 1797. *Jenness & al. Exrs.* vs. *Seavey, Rock. Feb.* 1799. Nor could it be pretended on any sound principles, that the usage to pass them, if uninterrupted for the last twenty-seven years, would amount to a justification, provided both the letter and spirit of the written charter of our liberties forbid them. That charter is the supreme law of the land to us all; and we know, that the sacred regard to the rights of the people, which our legislative department have

ever evinced, will induce them, as readily as ourselves, to conform to the provisions of that supreme law, whenever it is not misapprehended.

But in the passage of the act, granting a new trial to the plaintiff, we are constrained to think, that the constitution was misapprehended. The nature and effect of the act was judicial. It was also retrospective. The legislature cannot pass such an act, and our judgment, therefore, is, that the proceedings in this cause be quashed, and the *parties go without day*.

ENDNOTES

[1] *Millar on Banks* 287; *Fed.* No. 47, 78.

[2] *Fed.* No. 78--7 John.494--3 *Cook.* 7--6 *Bac. Stat.* H.

[3] *Fed.* No.78.

[4] *Bill of Rights, art* 8.

[5] *Bill of Rights, art.* 8.

[6] *Du.* 386.--1 *Cran.* 175.--4 *Mass. R* 1--5 *do.* 533.--6 *do.* 77.375--10 *do.* 391.--11 *do.* 402.--12 *do.*253--4. *John.* 75 80.8 *do.*388.--9 *do.* 464.--1 *Gal.*19.

[7] 6 *Bac. Stat. H*.--2 *Cran.* 272.--7 *John*. 498.

[8] 1 *Bl. Com.* 44.

[9] *Const.* 9th page.

[10] *Const.* 7th page.

[11] 2 *John*. 263.--8 *Co.*138. *a*.--1 *Inst.*176.--2 *Cran.*344. 345.--2 *Bl. G*. 344. 345.

[12] *Const.* 9.--3 *Cok. Pref.*7.

[13] *Fed. No*. 47. *Mr. Madison.*

[14] 15 *Niles' Reg.* 93.

[15] *Bl. Com.* 269.

[16] *Montesquieu,* B. 11. *Ch.* 6.

[17] 7 *Johnson* 508.

[18] *Fed.No.*47.

[19] *Notes on Vir.* 195.

[20] *Fed.No.*81. 1 *Bl. Apx.* 126. *Tuck. Ed.*--3 *Niles' Reg.*2. 4 *do.* 400.

[21] 4 *Niles' Reg.* 443.

[22] 1 *Bl.* 267.--2 *Hutch.His.* 107.

[23] 2 *Wil.Wks.* 50.--1 *Minot His.* 27.--1 *Hutch. His.* 30. 2 *do.* 250. 414.

[24] 3 *Dal.*386. *Calden & wife vs. Bull & al.*

[25] *Fed.No.*44.

[26] 4 *Niles Reg.* 444.

[27] *Fed.No.*47.

[28] 1 *Bl.C.*44.--2 *do.* 344.

[29] *Bill of Rights, Art.* 1, 7, 8. 38.

[30] *Const.* 7. 9. 22. 20.

[31] *Ham.Wks.* 255.

[32] *Const.* 13.

[33] *Const.* 20.

[34] 7 *John*. 492. *Dash* vs. *Vanclack.*

[35] 7 *John*. 503.--2Inst.95.

[36] 1 *Bl.C.*44.

[37] *Con.* 14.

[38] *Cicero de Leg.* 3. 19.

[39] *Bill of Rights*, 23*d art.*

[40] *Dall.* 386.--9 *Mas. R.* 363.--1 *Bl. C.* 46.

[41] 6 *Bac. Stat.*--4 *Inst.*1.

[42] *Const.* 22.

[43] *Const.* 3.

[44] 12.M.Rep. 258.

[45] 3 *Dall.*294.

[46] 7 *John*.494.--*Burr*. 2460.

[47] 11 *M. R.* 396.

[48] *Doct. & Stu. Dial.* 1. *ch.* 8.

[49] *Fed. No*. 44.

[50] 7 *John*.490.

[51] 3 *Ham. Wks*. 254. *Jeff. No.* 195.

[52] *Fed.No.*31.

[53] 3 *Ham. Wks*. 230--1 *Bl.* 315.

This excerpt from a larger article dealing with children's issues was published nine months before Claremont I by two of the plaintiffs' attorneys. It is a commendably straight-forward account of the genesis of the Claremont suit up to that time. It reminds us that the Claremont case was not about taxes, per se, but tax rates. In other words, the basic complaint was, not that the plaintiff school districts' individual property taxpayers were necessarily paying more in actual dollars than taxpayers in other districts, but more as a percentage of the value of their real estate. But many local services are paid for through local taxes assessed in a local tax district, resulting in different rates among those districts for the same service, and it has long been settled that as long as the tax rate is uniform within a given district, there is no basis for complaint on constitutional grounds. The objective of the Claremont plaintiffs, later adopted by the Supreme Court, was to overturn a settled and consistently followed state policy of over 200 years of locally controlled public schools, locally funded through local school tax districts. It did this by arbitrarily transforming local school taxes into one large state tax and the state into one large tax district for school tax purposes, thereby to require one uniform statewide rate. Good policy? Possibly. Constitutionally required under an intellectually honest reading of Article 83 of Part II in historical context? Hardly.

Edward Damon, Esq. and Apiar Saunders, Esq.:

Courts, Class Actions, and Children (Excerpt: *Claremont v. Gregg*)

(From The New Hampshire Bar Journal, March 1993, pages 67-69, 72-73)

"Education makes a greater difference between man and brute."[1] The relative simplicity of a judgment such as John Adams' and [Article 83 of Part II of the constitution] meet the "arcane, complex world of school financing formulas"[2] in *Claremont School District v. Gregg*,[3] now on appeal to the New Hampshire Supreme Court.

In their answer, the respondents admit that knowledge is important in maintaining a democratic form of government and that the founders of the New Hampshire Constitution believed in the importance of knowledge and learning to the New Hampshire form of government. Nevertheless, it is unclear whether respondents would go so far as to endorse Adams' assertion, expressed long ago by the man who would indirectly lay the groundwork for the provision in the New Hampshire Constitution which is at the heart of the case. They also deny that the New Hampshire Constitution has been violated.

The *Claremont* case tests the constitutionality of New Hampshire's method of funding public elementary and secondary school education which relies heavily on real property taxes imposed at the local level. Petitioners are certain “property poor” school districts and taxpayers and students in those districts. (The students and taxpayers bring the action as a class action.) They contend in part that educational opportunities are being unconstitutionally denied as a result of inequitable and inadequate funding, despite being burdened with property tax rates which are often much higher than those in “property rich” school districts. In the jargon of school funding policies, property poor districts are said to make a greater “tax effort” than that made in property rich districts.

The New Hampshire litigation comes at a time when numerous state courts across the country have been wrestling to resolve similar challenges. In 1992, school financing litigation was proceeding in 14 states. Since 1970 no fewer that 25 other states have experienced such litigation. The results in the latter cases have differed widely. The challengers have succeeded in 10 of those cases; the defenders of the status quo in 15 cases.

Indeed, New Hampshire has not been a stranger to school financing litigation in the recent past. *Jesseman v. State of New Hampshire*[4] was brought in 1982. The parties were consumed with discovery, and no definitive rulings of constitutional law were made. The case was settled in 1985 after the adoption by the legislature of the so-called “Augenblick” formula. The formula provides that state Foundation Aid Program dollars generated primarily by the Sweepstakes are to be distributed in part based on local need determined by the local tax base as well as by local income and tax effort. The state Foundation Aid Program is intended to assist the more needy school districts in providing an adequate educational program and to improve education throughout New Hampshire.[5]

The petitioners in the *Claremont* case clearly believe that the Augenblick formula and funding of the formula have not been sufficient to solve their problems. To the contrary, the petition alleges that things have gotten substantially worse despite the adoption of the Augenblick formula.

The *Claremont* petitioners seek declaratory judgment and injunctive relief to force reform of the school financing system. Two counts claim that the state has violated Part 2, Article 83 of the New Hampshire Constitution by failing to spread the opportunities and advantages of education equitably among all New Hampshire public school students and by failing to fund the public schools adequately and equitably.

Another count alleges that the Foundation Aid Program unconstitutionally restrains state participation in financing public schools because the statute effectively places a cap on the maximum total distribution of funds that the Program can make. Two counts claim that the school finance system as a whole, and the state Foundation Aid Program in part, violate the equal protection guarantees of the New Hampshire Constitution. A last count claims that the system unconstitutionally results in unreasonable, disproportionate and burdensome taxation of the petitioner taxpayers.

Petitioners assert that public education is a fundamental right. Wide differences in property wealth per pupil and property tax rates between property poor and property rich school districts increased dramatically to their advantage during the 1980's. They complain that there is a low statutory cap on the maximum amount of money that can be

appropriated for distribution by the state Foundation Aid Program across the state and they say that the Program is not fully funded in any event.[6]

Petitioners assert that the inability of property poor school districts to raise revenue has seriously harmed the educational opportunities available to students in such districts. As some specific examples they point to the loss of accreditation of the Claremont High School in 1991, as well as the paucity of course offerings, high pupil teacher ratio, high professional staff turnover and relative lack of experience of the teachers in Franklin.

In their answer, the respondents either denied most of petitioners' allegations outright or put them to their proof. They also raised thirteen affirmative defenses.

So that issues involving the legal sufficiency of the Petition and jurisdiction could be resolved before the parties undertook time-consuming discovery, the superior court[7] ordered the respondents to file their motion to dismiss at the outset of the litigation. They did so, raising all their affirmative defenses except those relating to whether the students and taxpayers can properly maintain a class action.

The court ruled in favor of the respondents on the motion to dismiss. In doing so, the court rejected a number of theories advanced by the respondents, namely, that the petition does not allege a case or controversy, that it is not appropriate for declaratory judgment, that it is barred by the political question doctrine, that the court cannot fashion an adequate remedy for the plaintiffs' equal protection claims and that the doctrine of official, legislative and sovereign immunity bars the claims made. Nevertheless, the court ruled that the petition should be dismissed in its entirety for failure to state a claim.

As to the two counts based on the New Hampshire Constitution, the court believed that in states where challenges to state systems of public school financing were successful, the constitutions explicitly state a more concrete duty and a more tangible standard than that set forth in Part 2, Article 83 and further noted that challenges have failed in a number of states. After only the briefest review of the express language of Part 2, Article 83, the court ruled that it imposes no qualitative standard of education which must be met nor any quantifiable financial duty. The court concluded that the language of Part 2, Article 83 is hortatory, not mandatory. In the petitioners' view, this is an unjustified leap of faith regarding the meaning of words written so long ago.

The same reasoning dismissed the count based on a claimed unconstitutional state cap on the distribution of funds that the state Foundation Aid Program can make. The court also ruled that the Program does not impose too low a cap on the aid available to a particular school district.

Regarding the two equal protection counts, the court applied the rational basis test and upheld the status quo. The court ruled that the Petitioners do not comprise a suspect classification and that Part 2, Article 83 imposes no fundamental right to "equal educational opportunity." Nor, the court ruled, is there any implicit fundamental right to "equal" education. Accordingly, there was no occasion to apply the strict scrutiny test. To further support its decision the court applied the middle tier scrutiny of the substantial relationship test and came out with the same result as under the rational basis test. Although the court analyzed the Foundation Aid Program under both tests, it did not do so with respect to the count claiming that the school financing system as a whole violates

equal protection. Finally, the court dismissed the last count, ruling that there is a requirement of uniformity of real property taxation only within a particular taxing district and not on a statewide basis.

The petitioners immediately responded with a motion for reconsideration and requested permission to submit additional interpretive materials regarding Part 2, Article 83. In petitioner's view, the court's ruling was primarily based on an interpretation of constitutional law which had not been briefed or argued by either party. To bolster their case, they offered the affidavit of Richard Lederer, a well known expert on the etymology, semantics and syntax of the English language and a detailed memorandum directed specifically at the meaning of the words used in Part 2, Article 83. The court denied the motion for reconsideration and it rejected the offered affidavit and memorandum on grounds that the petitioners had an adequate opportunity to present such materials at the hearing on the motion to dismiss.

The petitioners filed their notice of appeal with the New Hampshire Supreme Court late last year. They argue that the superior court erred in granting the motion to dismiss and in denying the motion for reconsideration. The Respondents have not filed a cross appeal.

In the quaint usage of the time two centuries ago, Jeremy Belknap, the noted student of New Hampshire history, wrote "[a]s far as public rulers conform to this article [Part 2, Article 83 then in effect], they promote in the most effectual manner, the true interest and prosperity of their country."[8] Much more recently Governor Merrill, a conservative, has said that the present school financing system is unfair to the students in property poor districts.[9] The *Claremont* case now sets the stage for a judicial determination as to whether the New Hampshire Constitution actually has anything to say about these matters.

ENDNOTES

[1] Letter from John Adams to his wife, Abigail Adams, dated October 29, 1775 (*The World Book Encyclopedia*, World Book, Inc. (Chicago 1988, vol. 1, p. 39)). "Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools..." N.H. Const., part 2, article 83.

[2] "The Search for Equity in School Funding," GOVERNING, Aug. 1991 at 20.

[3] *Claremont v. Gregg*, Merrimack Count Superior Court No. 91-E-00306-B (1991).

[4] *Jesseman v. State of New Hampshire*, Merrimack County Superior Court No. 82-E-038 (1982).

[5] RSA §198:27 (1989).

[6] Foundation Aid appropriation levels account for only about 4.5% of the total cost of education. Total state aid to school districts during 1989-1990 provided approximately 7% to the cost of education, compared to a national average of about 50%; New Hampshire is dead last by a large margin in this category. By contrast, in 1989 local property taxes accounted for over 90% of all revenue for education.

[7] Judge Manias presiding.

[8] Jeremy Belknap, *Belknap's New Hampshire: An Account of the State in 1792-A facsimile edition of volume III of The History of New Hampshire* (G.T. Lord ed., Randall 1973) at 221.

[9] "Steve Merrill discusses taxes, budget, abortion," *Concord Monitor*, Nov. 1, 1992 at D-6.

This is Claremont I, the case that began the constitutional confrontation. It is a textbook illustration of "result-oriented" jurisprudence, wherein a court, instead of compiling all the evidence and impartially following where it leads, decides in advance the decision it wants to make, and then carefully selects and cites only the evidence that supports that decision, and ignores the rest. In this case, the Supreme Court, after paying lip service to respecting contemporaneous intent, leaves begging the question fundamental to its determination: What did the first Legislatures under the 1784 Constitution actually do? What they did was enact the School Tax Law of 1789, which, through many re-enactments and amendments - whose constitutionality was never cast into doubt - served until 1919 as the model for public school funding: by taxes locally raised and locally applied. Incredibly, the Court does not even mention this law, or evince any knowledge of it.

SUPREME COURT OF NEW HAMPSHIRE

CLAREMONT SCHOOL DISTRICT & a. v. GOVERNOR

["Claremont I"]

138 N.H. 183; 635 A.2d 1375 (1993)

BROCK, C.J. The Superior Court (Manias, J.) dismissed the plaintiffs' petition for injunctive relief and declaratory judgment for failure to state a claim upon which relief could be granted. The plaintiffs appeal the court's conclusion that the New Hampshire Constitution imposes no duty on the State to support the public schools. We hold that part II, article 83 imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

The plaintiffs are five "property poor" school districts and five school children and five taxpayers, one from each of the school districts. They filed a petition for declaratory judgment alleging, in six counts, that the system by which the State finances education violates the New Hampshire Constitution: in counts (1) and (2) that the State fails to spread educational opportunities equitably among its students and adequately fund education, both in violation of part II, article 83; (3) that the foundation aid statutes, *RSA 198:27* through (1989), unconstitutionally restrain State aid to public education by capping State assistance at eight percent; (4) and (5) that both the State school finance system and the foundation aid statutes deny plaintiffs equal protection; and (6) that the heavy reliance on property taxes to finance New Hampshire public schools results in an

unreasonable, disproportionate, and burdensome tax in violation of part II, article 5 of the State Constitution.

Part II, article 83, adopted in 1784 as part of this State's Constitution, originally stated:

> "[Art.] 83. [Encouragement of Literature . . .] Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufacturers, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people."

The provision was amended in 1877 to prohibit money raised by taxation from being used by religious schools and again in 1903 to add language concerning control of corporations and monopolies.

The trial court granted the defendants' motion to dismiss each of the six counts. Its order states in part:

> "New Hampshire's Encouragement of Literature Clause contains no language regarding equity, uniformity, or even adequacy of education. Thus, the New Hampshire Constitution imposes no qualitative standard of education which must be met. Likewise, the New Hampshire Constitution imposes no quantifiable financial duty regarding education; there is no mention of funding or even of 'providing' or 'maintaining' education. The only 'duty' set forth is the amorphous duty 'to cherish . . . public schools' and 'to encourage private and public institutions.' N.H. Const., pt. 2, art. 83. The language of pt. 2, art. 83 is hortatory, not mandatory.
>
> “In view of the foregoing, the Court finds that the N.H. Const., pt. 2, art. 83 imposes no duty as set forth in count one to equitably spread educational opportunities and advantages or as set forth in count two to equitably and adequately fund education. Absent such a duty, counts one and two of the plaintiffs' petition fail to state a claim upon which relief can be granted, and therefore, both counts must be dismissed."

Because we conclude that the trial court's determination that the State had no constitutional duty to support public education so permeated its decision to dismiss counts one through five, we will, at this time, address only the question of whether part II, article 83 imposes such a duty. With respect to count six, because petitioners have not had an opportunity to develop a record in support of their claim, we remand that count to

the trial court for its further consideration. Our narrow task, therefore, is to determine whether the trial court committed legal error when it concluded that no duty exists.

"In interpreting an article in our constitution, we will give the words the same meaning that they must have had to the electorate on the date the vote was cast." *Grinnell v. State, 121 N.H. 823, 826, 435 A.2d 523, 525 (1981)* (quotation omitted). In doing so, we must "place [ourselves] as nearly as possible in the situation of the parties at the time the instrument was made, that [we] may gather their intention from the language used, viewed in the light of the surrounding circumstances." *Warburton v. Thomas, 136 N.H. 383, 387, 616 A.2d 495, 497 (1992)* (quotation omitted).

Numerous state courts have in recent years decided cases challenging, on constitutional grounds, systems of financing public education. Most of those cases are of limited value to this court because the constitutional provisions at issue contain language dissimilar to ours and were adopted under circumstances different from those existing in New Hampshire in the 1780s. Massachusetts, however, presents an exception. Given that New Hampshire shares its early history with Massachusetts, that we modeled much of our constitution on one adopted by Massachusetts four years earlier, and that the Massachusetts Constitution contains a nearly identical provision regarding education, we give weight to the interpretation given that provision by the Supreme Judicial Court in *McDuffy v. Secretary of the Executive Office of Education, 415 Mass. 545, 615 N.E.2d 516 (1993).*

An obvious starting point in interpreting part II, article 83 is to determine what the particular words used meant in 1784: "Encouragement: Incitement to any action or practice, incentive; favour, countenance, support," T. Sheridan, A General Dictionary of the English Language 1780 (Scolbar Press 1967); "Literature: Learning; skill in letters," Id., "Diffused: Spread abroad, widespread; dispersed over a large area; covering a wide range of subjects," Oxford English Dictionary (2d ed. 1989); "Generally: So as to include every particular, or every individual," id.; "Duty: That to which a man is by any natural or legal obligation bound," Sheridan supra; "Cherish: To support, to shelter, to nurse up," Sheridan supra.

The Encouragement of Literature clause, incorporating the sense of these definitions, thus declares that knowledge and learning spread through a community are "essential to the preservation of a free government," and that "spreading the opportunities and advantages of education" is a means to the end of preserving a free, democratic state. The duty of ensuring that the people are educated is placed upon "the legislators and magistrates, in all future periods of this government," and that duty encompasses supporting all public schools:

> "The breadth of the meaning of these terms ('duty . . . to cherish'), together with the articulated ends for which this duty to cherish is established, strongly support . . . that the 'duty . . . to cherish . . . the public schools' encompasses the duty to provide an education to the people of the [state]. . . . It is reasonable therefore to understand the duty to 'cherish' public schools as a duty to ensure that the public schools achieve their object and educate the people."

McDuffy, 415 Mass. at 564, 615 N.E.2d at 526.

We do not construe the terms "shall be the duty . . . to cherish" in our constitution as merely a statement of aspiration. The language commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools. Decisions of this court are consistent with this conclusion. See *In re Davis, 114 N.H. 242, 243, 318 A.2d 151, 152 (1974)* (State Constitution "imposes upon government the duty of providing for the education of its citizens"; *State v. Jackson, 71 N.H. 552, 553, 53 A. 1021, 1022 (1902)* ("the injunction 'to cherish the interest of literature'" intended as more than a mere sentimental interest"); *Farnum's Petition, 51 N.H. 376, 378-79 (1871)* (constitution "enjoins the duty" to educate in "comprehensive terms . . . as one of paramount public importance"); cf. *Fogg v. Board of Education, 76 N.H. 296, 299, 82 A. 173, 175 (1912)* (where student claimed right to state-provided transportation, court noted that providing for education of children, through support and maintenance of public schools, has always been governmental duty resting on the State). To suggest that the language is not mandatory because other states' constitutions, many drafted over 100 years after ours, contain more concrete, tangible standards of quality of education and quantity of support is an analysis we cannot endorse.

An examination of the "surrounding circumstances" at the time the constitution was adopted also supports our conclusion that the framers and the general populace understood the language contained in part II, article 83 to impose a duty on the State to educate its citizens and support the public schools. The Puritans who settled here were deeply committed to education. They emigrated "chiefly to enjoy and propagate their religion; but next to this . . . to educate their children." N. Bouton, The History of Education in New Hampshire: A Discourse Delivered Before the New Hampshire Historical Society (1833). The New England Puritans are credited with "contributing most that was valuable for our future educational development, and establishing in practice principles which have finally been generally adopted by our different States." E. Cubberley, Public Education in the United States 15 (1919).

Between 1641 and 1679, New Hampshire and Massachusetts were united as a single province. The first New England law on education was enacted in 1642, which ordered that all children should be taught to read. In 1647, an act was passed by which public schools were established in New Hampshire. The 1647 law expressed the principles that private property was subject to public taxation for support of public schools, that schooling was to be provided for all children, and that the State would control education. "It can safely be asserted that these two Massachusetts laws of 1642 and 1647 represent not only new educational ideas in the English-speaking world, but that they also represent the very foundation stones upon which our American public school systems have been constructed." Cubberley, supra at 18. In 1669, the towns of Portsmouth, Dover, and Exeter each contributed money to "aid in erecting a new edifice for Harvard College." Such was deemed by those towns as "needful for the perpetuating of knowledge both civil and religious, among us, and our posterity after us."

When New Hampshire became a separate province in 1680, it reenacted the education laws of Massachusetts then in existence. In 1693, the New Hampshire Legislature enacted a law requiring the towns' selectmen to raise money by "an equal rate and assessment" on the inhabitants for the construction and maintenance of the schools "and

allowing a Sallary to a School Master." G. Bush, History of Education in New Hampshire 10-11 (1898); see Laws of New Hampshire, Vol. 1 Province Period 560-61 (1679-1702). A penalty was provided for failure to comply with the statute. Similar laws were enacted in 1714, 1719, and 1721.

The law of 1719 required every town having fifty householders or more to provide a schoolmaster to teach children to read and write, and in every town of 100 householders, a grammar school to be kept. Laws of New Hampshire, Vol. 2 Province Period 336-37 (1702-1745). A penalty was to be assessed for failing to comply with the law, to be paid "towards the Support of Such School or Schools within this Province where there may be most need." Id. The law of 1721 stated:

> "Whereas the selectmen of Sundry Towns within this Province often Neglect to provide Grammar Schools for their Respective Towns whereby their youths Loose much of their Time, to the great Hindrance of their learning, For Remedy whereof Be it Enacted . . . That Not only Each Town but each parish within this Province Consisting of one Hundred Families shall be Constantly Provided with a Grammar School . . . And [if] any Such Town or Parish . . . is Destitute of a Grammar School for the space of one month, the Selectmen . . . shall forfeit . . . the Sum of Twenty pounds for Every Such Neglect to be paid out of their own Estates, & to be applyed towards the Defraying the Charges of the Province[.]"

Although these laws required the towns to fund public education, Governor Wentworth made clear in an address to the Council Chamber of the House of Assembly, on April 13, 1771, that the duty to educate remained with the State: "Religion - Learning, and Obedience to the Laws, are so obviously the Duty & Delight of Wise Legislators, that their mention, justifies my Reliance on your whole Influence being applied to inculcate, spread & Support their Effect, in every Station of Life." Governor Wentworth, Executive Papers & Correspondence (1771). It is also apparent from Governor Wentworth's subsequent message to the General Assembly on December 14, 1771, that the local town officials had failed to meet their duties under the prior laws and that corrective action was necessary by the State itself:

> "Among other important Considerations, The promoting of learning very obviously calls for Legislative Care. The Insufficiency of our present Laws for this purpose, must be too evident, seeing nine tenths of your Towns are wholly without Schools, or have such vagrant foreign Masters as are much worse than none: Being for the most part unknown in their principles & deplorably illiterate."

The General Assembly replied on December 30, 1771:

> "We beg leave to observe that we think it very a'propos that you have by order of your message plainly pointed out the necessary [connection] between good Education & the prosperous state of the People - for as they by the constitution have a share in the Governmt it is certainly of importance they should be able to sustain the part they are to bear with honor to themselves & with prosperity to the State which without such an Education is hardly feasably But without detaining

> your Excellency with a long detail of particulars, it is with pleasure we observe the extensive care your Excellency discovers for the welfare of the people under your Governmt by pointing out many different things as the proper objects of their attention of the house, all which they will consider as other necessary affairs will permit and do what they shall after deliberate consultation."

Against this background, the constitutional convention began its work drafting the State Constitution in 1781. The contention that, despite the extensive history of public education in this State, the framers and general populace did not understand the language contained in part II, article 83 to impose a duty on the State to support the public schools and ensure an educated citizenry is unconvincing. Indeed, in 1795 Governor Gilman addressed the Senate and House of Representatives, stating:

> "The encouragement of Literature being considered by the Constitution as one of the important Duties of Legislators and Magistrates, and as essential to the preservation of a free Government, will always require the care and attention of the Legislature."

To which the House and Senate replied:

> "The encouragement of Literature is a sacred and incumbent Duty upon the Legislature. Possessing a Constitution of Government which is founded upon the broad basis of the natural rights of mankind, we feel on our part, the strongest obligation to revere, to cherish, and to support it. Without a competent share of information diffused generally through the community, the natural as well as the acquired rights, and the duties to which the social compact necessarily subjects us, must be imperfectly understood, and consequently will be liable to be perverted and neglected. We shall therefore most cordially embrace all proper measures to diffuse Knowledge and Information, to promote Literature and to cherish seminaries of Learning as the most direct and certain means to perpetuate to posterity that Constitution, which forms our Glory, our Safety, and our Happiness."

This statement has significant probative value as an indication that the contemporary understanding was that part II, article 83 imposed a duty on the State to provide universal education and to support the schools.

We are unpersuaded by the State's argument that the fact that no State funding was provided at all for education in the first fifty years after ratification of the constitution demonstrates that the framers did not believe part II, article 83 to impose any obligation on the State to provide funding. But see W. Gifford, Colebrook "A Place Up Back of New Hampshire" 11 (1993) (resolution of Senate and House approved July 7, 1846, granting 10,000 acres of land to trustees of Colebrook Academy). "That local control and fiscal support has been placed in greater or lesser measure through our history on local governments does not dilute the validity" of the conclusion that the duty to support the public schools lies with the State. *McDuffy, 415 Mass. at 606, 615 N.E.2d at 548.* "While it is clearly within the power of the [State] to delegate some of the implementation of the

duty to local governments, such power does not include a right to abdicate the obligation imposed . . . by the Constitution."

Having identified that a duty exists and having suggested the nature of that duty, we emphasize the corresponding right of the citizens to its enforcement. For over two hundred years New Hampshire has recognized its duty to provide for the proper education of the children in this State. Since 1647, education has been compulsory in New Hampshire, and our constitution expressly recognizes education as a cornerstone of our democratic system. We must conclude, therefore, that in New Hampshire a free public education is at the very least an important, substantive right. The right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the public to enforce the State's duty. Any citizen has standing to enforce this right.

We do not define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor. There is a wealth of historical data upon which the legislature and the Governor may choose to draw in the pursuit of their duty, spanning more than three hundred years from the 1647 statutory mandate that youths be instructed "so far as they may be fitted for the University," to more recently recommended standards and practices such as the State Department of Education's 1958 report on Minimum Standards and Recommended Practices for New Hampshire Secondary Schools. The Encouragement of Literature clause expressly recognizes that a free government is dependent for its survival on citizens who are able to participate intelligently in the political, economic, and social functions of our system. The duty placed on the State encompasses cherishing the public schools. The constitution also provides that the legislature and the Governor have a duty to encourage "the promotion of agriculture, arts, sciences, commerce, trades, [and] manufacturers" and inculcate "the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people." N.H. CONST. pt. II, art. 83. The education necessary to meet the duty to cherish public schools must, of course, "be adapted to the various crises of human affairs." *McCulloch v. Maryland, 17 U.S. 316, 415, 4 L. Ed. 579 (1819)*

Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas. We are confident that the legislature and the Governor will fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government.

We remand the plaintiffs' petition for further proceedings consistent with this opinion.

Reversed and remanded.

This is Claremont II, in which the supposed constitutional mandates ("in no uncertain terms") of the Claremont decisions commence their journey as constantly moving targets. In Claremont II, no longer is the Legislature's "duty" merely to "guarantee adequate funding," as stated in Claremont I; now the Legislature's duty is to "provide a constitutionally adequate public education" by means of "proportionate and reasonable" state taxes. The legitimacy of the Court's decision in Claremont I, by which the school funding issue was found to be justiciable, is here taken for granted - it is, after all, now precedent – and so the watershed - but to the Court inconvenient - School Tax Law of 1789, so conspicuously unmentioned in Claremont I, is unmentioned here as well, enabling the Court to say, apparently with a straight face, that "the framers of the New Hampshire Constitution could not have intended the current funding system with its wide disparities." Uh, yes they did! Justice Horton's dissenting opinion provides a welcome – if still question begging - contrast to that of the social engineers, disguised as judges, of the majority.

SUPREME COURT OF NEW HAMPSHIRE

CLAREMONT SCHOOL DISTRICT & a. v. GOVERNOR

[Claremont II]

142 N.H. 462; 703 A.2d 1353 (1997)

BROCK, C.J. In this appeal we hold that the present system of financing elementary and secondary public education in New Hampshire is unconstitutional. To hold otherwise would be to effectively conclude that it is reasonable, in discharging a State obligation, to tax property owners in one town or city as much as four times the amount taxed to others similarly situated in other towns or cities. This is precisely the kind of taxation and fiscal mischief from which the framers of our State Constitution took strong steps to protect our citizens. The procedural history of the case and the reasons for our decision follow.

This is the second appeal of this case. In 1991, the plaintiffs filed a petition for declaratory and injunctive relief challenging the method by which the State of New Hampshire provides and funds education to New Hampshire children and the disproportionality of the property taxes levied to pay for education. The plaintiffs are five school districts, five students, and eight taxpayers and parents. The petition was dismissed by the Trial Court (Manias, J.) for failure to state a claim upon which relief could be granted. In *Claremont School District v. Governor, 138 N.H. 183, 635 A.2d*

1375 (1993) (Claremont I), this court reversed, holding that it was the State's duty to provide a constitutionally adequate public education and to guarantee adequate funding, and remanded for a trial on the merits.

On remand, following a trial, the Trial Court (Manias, J.) ruled in a detailed and thoughtful opinion that: (1) the education provided in the plaintiff school districts is constitutionally adequate; (2) the New Hampshire system of funding public elementary and secondary education guarantees constitutionally adequate funding to each of the plaintiff school districts; (3) the New Hampshire system of school funding does not violate the plaintiffs' right to equal protection under the State Constitution, part I, articles 1, 2 and 12; and (4) the system of school financing does not violate part II, article 5 of the State Constitution. We hold that the property tax levied to fund education is, by virtue of the State's duty to provide a constitutionally adequate public education, a State tax and as such is disproportionate and unreasonable in violation of part II, article 5 of the New Hampshire Constitution. Having so decided, we need not reach the plaintiffs' other claims. Accordingly, we reverse.

I

Funding for public education in New Hampshire comes from three sources. First, school districts are authorized to raise funds through real estate taxation. Locally raised real property taxes are the principal source of revenue for public schools, providing on average from seventy-four to eighty-nine percent of total school revenue. Second, funds are provided through direct legislative appropriations, primarily in the form of Foundation Aid, Building Aid, and Catastrophic Aid. Direct legislative appropriations account for an average of eight percent of the total dollars spent on public elementary and secondary education, ranking New Hampshire last in the United States in percentage of direct support to public education. Third, approximately three percent of support for the public schools is in the form of federal aid.

At the present time, the State places the responsibility for providing elementary and secondary public education on local school districts. State statutes, rules, and regulations delineate the requirements to be followed by school districts. See *RSA 186:5* (1989) (State Board of Education has same powers over public schools as directors of corporation have over business); *RSA 189:1-a* (1989) (duty of school board to provide at district expense elementary and secondary education); *RSA 194:1* et seq. (1989 & Supp. 1996) (general powers and duties of school districts); *N.H. Admin. Rules, Ed 200* et seq. (1996). For example, school districts are required to provide standard schools for 180 days per year, *RSA 189:1*, :24 (1989); provide transportation, *RSA 189:6* (Supp. 1996); provide meals to students, *RSA 189:11-a* (1989); purchase and provide textbooks, *RSA 189:16* (1989); meet minimum standards for school approval, *RSA 186:8* (1989); provide special education services, *RSA 186:6* (1989); and participate in the school improvement and assessment program, *RSA ch. 193-C* (Supp. 1996).

To comply with the State's requirements, school districts must raise money for their schools with revenue collected from real estate taxes. *RSA 194:34* (1989); *RSA 198:1-*:7 (1989 & Supp. 1996). Every year, the selectmen of each town are required to assess an annual tax of $3.50 on each $1,000 of assessed value for the support of that district's

schools. *RSA 198:1*. Each school district then details the sums of money needed to support its public schools and produces a budget that specifies the additional funds required to meet the State's minimum standards. A sum sufficient to meet the approved school budget must be assessed on the taxable real property in the district. *RSA 197:1* (1989); *RSA 198:5*. The commissioner of revenue administration computes a property tax rate for school purposes in each district. Using the determined rate, city and town officials levy property taxes to provide the further sum necessary to meet the obligations of the school budget.

As the trial court noted in its order, the total value of the property subject to taxation for local school revenue varies among the cities and towns of New Hampshire.

To some extent, the amount of revenue that a school district raises is dependent upon the value of the property in that district. This point can be illustrated by a comparison of petitioner district Franklin and its comparison district Gilford. In 1994, Franklin's "equalized property value" (property assessed at 100% of fair market value) per student was $183,626, while Gilford's equalized property value per student was $536,761. As a result, "property rich" Gilford had a significantly greater assessed value upon which taxes could be imposed for the support of its schools than did Franklin. Gilford raised more money per student than Franklin, even while taxing its residents at lower rates.

The plaintiffs argue that the school tax is a unique form of the property tax mandated by the State to pay for its duty to provide an adequate education and that the State controls the process and mechanism of taxation. Because of the purpose of the tax and the control exerted by the State, the plaintiffs contend that the school tax is a State tax that should be imposed at a uniform rate throughout the State. The State argues that "because the school tax is a local tax determined by budgeting decisions made by the district's legislative body and spent only in the district, it meets the constitutional requirement of proportionality." According to the State, "property taxation is a stable and expandable source of revenue which allows the citizens of New Hampshire to decide how to organize and operate their schools in a manner which best meets the needs of their children." The question of whether property taxes for schools are local or State taxes is an issue of first impression.

Part II, article 5 of the State Constitution provides that the legislature may "impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state." This article requires that "all taxes be proportionate and reasonable - that is, equal in valuation and uniform in rate." *Opinion of the Justices, 117 N.H. 749, 755, 379 A.2d 782, 786 (1977)* (citation omitted); see *Johnson & Porter Realty Co. v. Comm'r of Rev. Admin., 122 N.H. 696, 698, 448 A.2d 435, 436 (1982)* (tax must be in proportion to actual value of property and must operate in reasonable manner). "The test to determine whether a tax is equal and proportional is to inquire whether the taxpayers' property was valued at the same per cent of its true value as all the taxable property in the taxing district." *Bow v. Farrand, 77 N.H. 451, 451-52, 92 A. 926, 926 (1915).* "The property shall be valued within a reasonable time before the tax is assessed." *Id. at 452, 92 A. at 926.*

In defining the taxing district, the trial court reasoned that whether a tax is a State tax or a local tax depends on "the entity that controls the mechanics of assessment and collection"

and "the disposition of the tax revenues after their collection." The court found that each municipality controls the mechanics of assessment and collection of local property taxes, including the budgeting function and the determination of the local assessed value of property within each municipality. In addition, the court found that the property tax, once collected, is managed and expended by each municipality in accordance with its budget and thus does not become a part of the State treasury. The court concluded, therefore, that the school tax is a local tax and not a State tax. Because the trial court found there was no evidence that the school tax operated disproportionately within any local taxing district, it concluded that there was no violation of part II, article 5.

Determining the character of a tax as local or State requires an initial inquiry into its purpose.

> In order . . . that the tax should be proportional . . . it is required that the rate shall be the same throughout the taxing district; -- that is, if the tax is for the general purposes of the state, the rate should be the same throughout the state; if for the county, it should be uniform throughout the county; -- and the requisite of proportion, or equality and justice, can be answered in no other way.

State v. Express Co., 60 N.H. 219, 243 (1880) (Stanley, J.) (Emphasis added). We find the purpose of the school tax to be overwhelmingly a State purpose and dispositive of the issue of the character of the tax.

"The local school district, an entity created by the legislature almost two centuries ago, exists for the public's benefit, to carry out the mandates of the State's education laws." Opinion of the Attorney General, No. 82-100-I (Sept. 8, 1982) (citation omitted). "Indeed, school district monies, a public trust, can only be spent in furtherance of these educational mandates, and to promote the values set forth in the 'Encouragement of Literature' clause, N.H. CONST., pt. 2, Art. 83." Id. As we held in Claremont I, "part II, article 83 imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding." *Claremont I, 138 N.H. at 184, 635 A.2d at 1376.*

Providing an adequate education is thus a duty of State government expressly created by the State's highest governing document, the State Constitution. In addition, public education differs from all other services of the State. No other governmental service plays such a seminal role in developing and maintaining a citizenry capable of furthering the economic, political, and social viability of the State. Only in part II, article 83 is it declared a duty of the legislature to "cherish" a service mandated by the State Constitution. See *Claremont I, 138 N.H. at 187, 635 A.2d at 1378* (duty to cherish commands that State support all public schools). Furthermore, education is a State governmental service that is compulsory. See *RSA 193:1* (Supp. 1996). That the State, through a complex statutory framework, has shifted most of the responsibility for supporting public schools to local school districts does not diminish the State purpose of the school tax. Although the taxes levied by local school districts are local in the sense that they are levied upon property within the district, the taxes are in fact State taxes that have been authorized by the legislature to fulfill the requirements of the New Hampshire Constitution. See *Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 220 n.1 (Ky. 1989)* (Vance, J., dissenting); *Opinion of the Justices, 88 N.H. 500, 508, 190 A. 801, 807*

(1937) (distinguishing tax revenue to meet State needs from tax revenue for strictly local needs). "The taxes imposed by the legislature for the supports of schools . . . are, in their nature, state taxes . . ." *Opinion, 4 N.H. 565, 571 (1829).* Consequently, "there is abundant justification in fact for taking this property out of the class taxed locally, and taxing it at the average rate throughout the state." *Opinion of the Justices, 84 N.H. 559, 566, 149 A. 321, 325 (1930).* For purposes of analysis under part II, article 5, therefore, the taxing district is the State.

The question then is whether the school tax as presently structured is proportional and reasonable throughout the State in accordance with the requirements of part II, article 5. Evidence introduced at trial established that the equalized tax rate for the 1994-1995 school year in Pittsfield was $25.26 per thousand while the rate in Moultonborough was $5.56 per thousand. The tax rate in Pittsfield, therefore, was more than four times, or over 400 percent, higher than in Moultonborough. Likewise, the equalized tax rate for the 1994-1995 school year in Allenstown was $26.47 per thousand while the rate in Rye was $6.86 per thousand -- a difference in tax rates of almost 400 percent. We need look no further to hold that the school tax is disproportionate in violation of our State Constitution. Indeed, the trial court acknowledged that the plaintiffs "presented evidence that the school tax may be disproportionate if it is a state tax."

In addition, we conclude that the school tax as presently assessed is unreasonable. The word "reasonable" as used in part II, article 5 means "just." *Opinion, 4 N.H. at 569.* "The sense of the clause [is], that taxes shall be laid, not merely proportionally, but in due proportion, so that each individual's just share, and no more, shall fall upon him." Id.

Because the diffusion of knowledge and learning is regarded by the State Constitution as "essential to the preservation of a free government," N.H. CONST. pt. II, art. 83, it is only just that those who enjoy such government should equally assist in contributing to its preservation. The residents of one municipality should not be compelled to bear greater burdens than are borne by others. In mandating that knowledge and learning be "generally diffused" and that the "opportunities and advantages of education" be spread through the various parts of the State, N.H. CONST. pt. II, art. 83, the framers of the New Hampshire Constitution could not have intended the current funding system with its wide disparities. This is likely the very reason that the people assigned the duty to support the schools to the State and not to the towns.

There is nothing fair or just about taxing a home or other real estate in one town at four times the rate that similar property is taxed in another town to fulfill the same purpose of meeting the State's educational duty. Compelling taxpayers from property-poor districts to pay higher tax rates and thereby contribute disproportionate sums to fund education is unreasonable. Children who live in poor and rich districts have the same right to a constitutionally adequate public education. Regardless of whether existing State educational standards meet the test for constitutional adequacy, the record demonstrates that a number of plaintiff communities are unable to meet existing standards despite assessing disproportionate and unreasonable taxes. "If modern conditions make ancient divisions or plans for distributing the tax burden inequitable, it would seem to be a plain legislative duty to enact such constitutional laws as will remedy the defect." *Opinion of the Justices, 84 N.H. at 581, 149 A. at 332-33;* see *State v. Express Co., 60 N.H. at 247* (Doe, C.J.) ("Methods of dividing the public expense, equitable enough for practical

purposes in the last century, would now be good cause of complaint"). We hold, therefore, that the varying property tax rates across the State violate part II, article 5 of the State Constitution in that such taxes, which support the public purpose of education, are unreasonable and disproportionate. To the extent that the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State.

II

Following Claremont I, the trial court, in the absence of legislative action, accepted a definition of educational adequacy developed by the State Board of Education. This definition provides in part: "An adequate public elementary and secondary education in New Hampshire is one which provides each educable child with an opportunity to acquire the knowledge and learning necessary to participate intelligently in the American political, economic, and social systems of a free government." The definition then establishes at length a system of shared responsibility between State and local government. This definition, however, does not sufficiently reflect the letter or the spirit of the State Constitution's mandate. The constitution places the duty to support the public schools on "the legislators and magistrates." N.H. CONST. pt. II, art. 83. As we said in Claremont I, it is for the legislature and the Governor to "fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government." *Claremont I, 138 N.H. at 193, 635 A.2d at 1381*. Thus, in the first instance, it is the legislature's obligation, not that of individual members of the board of education, to establish educational standards that comply with constitutional requirements.

Our society places tremendous value on education. Education provides the key to individual opportunities for social and economic advancement and forms the foundation for our democratic institutions and our place in the global economy. The very existence of government was declared by the framers to depend upon the intelligence of its citizens. See N.H. CONST. pt. II, art. 83; *State v. Jackson, 71 N.H. 552, 553-54, 53 A. 1021, 1022 (1902).* As the New Hampshire Constitution exists today, education is deemed so essential to the viability of the State that part II, article 83 is one of only two places in the constitution where a duty is affirmatively placed on the legislature. Compare N.H. CONST. pt. II, art. 83 ("it shall be the duty of the legislators . . . to cherish . . . public schools") with N.H. CONST. pt. II, art. 5-A (legislature has "duty to provide for prompt and temporary succession to the powers and duties of public officers" in the event of enemy attack). "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Education, 347 U.S. 483, 493, 98 L. Ed. 873, 74 S. Ct. 686 (1954).*

In this appeal, the plaintiffs ask us to declare a State funded constitutionally adequate public education a fundamental right. In response to the same request, the trial court ruled that "classification of a right as fundamental under the New Hampshire Constitution is a task which properly rests with our Supreme Court." When governmental action impinges fundamental rights, such matters are entitled to review under the standard of strict judicial scrutiny. In *Belkner v. Preston, 115 N.H. 15, 18, 332 A.2d 168, 170-71 (1975),* this court

instructed that "where either a 'suspect' classification (i.e., race, alienage, nationality, and probably, sex) or a 'fundamental interest' (i.e., procreation, interstate travel, voting, first amendment rights) is involved, state statutes are subjected to strict judicial scrutiny with the result that there must be a compelling state interest to sustain the legislation." We learn also from the writing of Chief Justice Doe a little more than one hundred years ago that:

> [T]he settled constitutional right of equal privileges and equal protection under general law rests on incontestable grounds of wisdom and necessity. The equal protection of the laws recently inserted in the federal constitution has been a New Hampshire doctrine 110 years; and it has been maintained here in a breadth of meaning and a scope of practical operation unknown elsewhere.

State v. Griffin, 86 N.H. 609, 615, 186 A. 923, 926 (1894) (Doe, C.J.).

In determining whether, in New Hampshire, a State funded constitutionally adequate elementary and secondary education is a fundamental right, we are guided by two salient factors: one of constitutional interpretation and the other of practicality and common sense. First and foremost is the fact that our State Constitution specifically charges the legislature with the duty to provide public education. See N.H. CONST. pt. II, art. 83. This fact alone is sufficient in our view to accord fundamental right status to the beneficiaries of the duty. *Claremont I, 138 N.H. 183, 635 A.2d 1375.*

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. . . . Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-34, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973).

Second, and of persuasive force, is the simple fact that even a minimalist view of educational adequacy recognizes the role of education in preparing citizens to participate in the exercise of voting and first amendment rights. The latter being recognized as fundamental, it is illogical to place the means to exercise those rights on less substantial constitutional footing than the rights themselves. We hold that in this State a constitutionally adequate public education is a fundamental right. In so doing we note that "the right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the public to enforce the State's duty." *Claremont I, 138 N.H. at 192, 635 A.2d at 1381.*

We emphasize that the fundamental right at issue is the right to a State funded constitutionally adequate public education. It is not the right to horizontal resource replication from school to school and district to district. The substance of the right may be achieved in different schools possessing, for example, differing library resources, teacher-student ratios, computer software, as well as the myriad tools and techniques that may be employed by those in on-site control of the State's public elementary and secondary school systems. But when an individual school or school district offers

something less than educational adequacy, the governmental action or lack of action that is the root cause of the disparity will be examined by a standard of strict judicial scrutiny.

"Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing, and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas." *Claremont I, 138 N.H. at 192, 635 A.2d at 1381.* A constitutionally adequate public education is not a static concept removed from the demands of an evolving world. It is not the needs of the few but the critical requirements of the many that it must address. Mere competence in the basics --reading, writing, and arithmetic -- is insufficient in the waning days of the twentieth century to insure that this State's public school students are fully integrated into the world around them. A broad exposure to the social, economic, scientific, technological, and political realities of today's society is essential for our students to compete, contribute, and flourish in the twenty-first century.

We look to the seven criteria articulated by the Supreme Court of Kentucky as establishing general, aspirational guidelines for defining educational adequacy. A constitutionally adequate public education should reflect consideration of the following:

> (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 the student 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 levels 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.

Rose v. Council for Better Educ., Inc., 790 S.W.2d at 212; see *McDuffy v. Sec'y of Exec. Off. of Educ., 415 Mass. 545, 615 N.E.2d 516, 554 (Mass. 1993).* We view these guidelines as benchmarks of a constitutionally adequate public education. "These guidelines accord with our Constitution's emphasis on educating our children to become free citizens on whom the [State] may rely to meet its needs and to further its interests." *McDuffy, 615 N.E.2d at 555.* Without intending to intrude upon prerogatives of other branches of government, see N.H. CONST. pt. I, art. 37, we anticipate that they will promptly develop and adopt specific criteria implementing these guidelines and, in completing this task, will appeal to a broad constituency. "While the judiciary has the duty to construe and interpret the word 'education' by providing broad constitutional guidelines, the Legislature is obligated to give specific substantive content to the word and to the program it deems necessary to provide that 'education' within the broad guidelines." *Seattle Sch. Dist. No. 1 of King Cty. v. State, 90 Wash. 2d 476, 585 P.2d 71, 95 (Wash. 1978).*

We agree with Justice Horton that we were not appointed to establish educational policy, nor to determine the proper way to finance its implementation. That is why we leave such matters, consistent with the Constitution, to the two co-equal branches of government and why we did so in the unanimous opinion of this court in Claremont I. We disagree with him that the taxation of property to support education must reach the level of confiscation before a constitutional threshold is crossed. It is our duty to uphold and implement the New Hampshire Constitution, and we have done so today.

III

Our decision does not prevent the legislature from authorizing local school districts to dedicate additional resources to their schools or to develop educational programs beyond those required for a constitutionally adequate public education. We recognize that local control plays a valuable role in public education; however, the State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy. The responsibility for ensuring the provision of an adequate public education and an adequate level of resources for all students in New Hampshire lies with the State. "While local governments may be required, in part, to support public schools, it is the responsibility of the [State] to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate." *McDuffy, 615 N.E.2d at 556;* see *RSA 198:1-*:7. We agree with those who say that merely spending additional money on education will not necessarily insure its quality. It is basic, however, that in order to deliver a constitutionally adequate public education to all children, comparable funding must be assured in order that every school district will have the funds necessary to provide such education. Imposing dissimilar and unreasonable tax burdens on the school districts creates serious impediments to the State's constitutional charge to provide an adequate education for its public school students.

The State's duty to provide for an adequate education is constitutionally compelled. The present system selected and crafted by the State to fund public education is, however, unconstitutional. While the State may delegate its obligation to provide a constitutionally adequate public education to local school districts, it may not do so in a form underscored by unreasonable and inequitable tax burdens. As the State acknowledged at oral argument, several financing models could be fashioned to fund public education. It is for the legislature to select one that passes constitutional muster.

Decisions concerning the raising and disposition of public revenues are particularly a legislative function and the legislature has wide latitude in choosing the means by which public education is to be supported. *Opinion of the Justices, 97 N.H. 546, 547, 81 A.2d 853, 854 (1951);* see *Opinion of the Justices, 112 N.H. 32, 287 A.2d 756 (1972).* The legislature has numerous sources of expertise upon which it can draw in addressing educational financing and adequacy, including the experience of other States that have faced and resolved similar issues. Accordingly, we do not remand for consideration of remedies at this time, but instead stay all further proceedings until the end of the upcoming legislative session and further order of this court to permit the legislature to address the issues involved in this case. We are mindful of the fact that our decision

holding the present system of financing public education unconstitutional raises issues concerning the interim viability of the existing tax system. Because the legislature must be given a reasonable time to effect an orderly transition to a new system, the present funding mechanism may remain in effect through the 1998 tax year.

We are confident that the legislature and the Governor will act expeditiously to fulfill the State's duty to provide for a constitutionally adequate public education and to guarantee adequate funding in a manner that does not violate the State Constitution. See *Claremont I, 138 N.H. at 193, 635 A.2d at 1381.*

Reversed; proceedings stayed pending further order of the court.

THAYER, J., did not sit; BATCHELDER, J., retired, sat by special assignment under *RSA 490:3*; HORTON, J., dissented; the others concurred.

HORTON, J., dissenting: I agree with the majority that a proper education, beyond the basics, should include "[a] broad exposure to the social, economic, scientific, technological, and political realities of today's society." I also agree that the current financing matrix for education is far from desirable, for many of the reasons expressed in the majority opinion. My problem is that I was not appointed to establish educational policy, nor to determine the proper way to finance the implementation of this policy. Those duties, in my opinion, reside with the representatives of the people, the Governor, the legislature, and the respective magistrates and legislative authorities in the respective school and taxing districts. My job is to determine whether the structures for providing and financing education, as selected by these direct representatives of the people, meet the mandates of our State Constitution. I should not involve myself in social engineering, no matter how worthy the cause, when the constitution and the decisions of those charged with the obligation of forming social policy are compatible. This is not to say that I infer an absence of regard in the decision of the majority for the proper role of this court. My colleagues simply have a different view of the express constitutional mandate. I write separately to explain to the students and taxpayers of this State why I am unable to effect needed reform.

We have held that our constitution invests in the legislature and the magistrates of this State the duty to provide a constitutionally adequate education and to guarantee the funding thereof. *Claremont School Dist. v. Governor, 138 N.H. 183, 184, 635 A.2d 1375, 1376 (1993)* (Claremont I). We also held that the implementation of this duty could be delegated. *Id. at 191, 635 A.2d at 1381.* The majority holds today that the present system of taxation to provide funding to meet this constitutional duty violates part II, article 5 of the State Constitution, because it is not reasonable or proportional. The majority, quite properly, seeks to define the standard for the constitutional duty to provide an adequate education. I disagree with the majority's definition of the standard imposed by the constitution, see N.H. CONST. pt. II, art. 83, and further would hold that the delegation of the duty, and its incumbent financing obligation, is proper, and not violative of part II, article 5 of our constitution.

"Constitutional adequacy" is not "general adequacy." The former must be determined by a careful reading of our constitution. The latter may be important to the makers of policy, but it is clear that one man's adequacy is another's deficiency. Under our system of government, the elected representatives of the people must strike the balance. The constitutional provision material to this inquiry is part II, article 83, which states, in part:

> Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people . . . .

I read article 83 to have two parts, the "cherish" part and the "encourage" part. We have held that "cherish" is a mandate to support. *Claremont I, 138 N.H. at 187, 635 A.2d at 1378.* "Encourage" does not contain the same mandate. The same dictionary that drove our interpretation of "cherish," id., defines "encourage" as "to animate, to incite to any thing; to give courage to, to support the spirits, to embolden; to raise confidence, to make confident." T. Sheridan, A General Dictionary of the English Language (London 1780). This is not a duty on the encourager, but a charge to have positive effect on the encouragee. I would parse part II, article 83 and limit my constitutional mandate inquiry to these words:

> Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools . . . .

Taking this as the mandated duty and seeking the constitutional scope of this duty, I search for the constitutional purpose. I find this purpose in the language "the preservation of a free government." The article says that "education through the various parts of the country" is conducive to meet that end. Thus, my constitutional standard for adequacy would be satisfied if the education provided meets the minimum necessary to assure the preservation of a free government.

This standard would also be the subject of some debate, but the policy makers would have a standard mandated by the constitution. It would certainly contain the elements of reading, writing, and mathematics. It would also include exposure to history and the form of our government. Beyond this, arguments can be made for other elements. I would include in the constitutional standard the first three elements of the Kentucky standard adopted by the majority, but not necessarily the balance (mental and physical wellness,

arts, preparation for advanced education or vocations). *Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).* Although it is hard to fault the well-crafted Kentucky standard, it is taken from a constitution that vests in the "General Assembly" the duty to "provide for an efficient system of common schools throughout the state." KY. CONST. § 183. Such a constitutional provision invites an imperative to adequacy in the general sense. It is not appropriate as an answer to our constitutional mandate. In our analysis, we must look to education in the constitutional sense and define the level and type of education mandated by our constitution. It is the latter mandate that I designate the constitutional "nut." It is this nut that the legislature and magistrates of this State must provide and for which they must guarantee funding. It is conclusive from the factual findings below that this constitutional nut has been provided by the school districts, well within their respective resources.

Of course, the definitive holding of the majority on the unconstitutionality of the current educational finance matrix is that it violates part II, article 5 of our constitution. This article requires that all taxes levied in the State be proportional and reasonable. Although the scope of the duty may be material to the question of reasonability, the issue of proportionality, in this case, is driven by a determination of the appropriate taxing district. If the taxing district is appropriate, it is clear that proportionality is determined within that taxing district. *Keene v. Roxbury, 81 N.H. 332, 337, 126 A. 7, 10 (1924); State v. Express Co., 60 N.H. 219, 243 (1880)* (Stanley, J.); *Railroad v. The State, 60 N.H. 87, 97 (1880).* The majority, equating "duty" with "purpose," and ignoring the fact that governmental duty can be delegated to its subdivisions, holds that since the duty resides with the State, the State is the appropriate taxing district within which to measure proportionality. I would move from an analysis of duty to an analysis of purpose, and hold that the purpose in education taxation is a local purpose, the education of children of the school district. *Holt v. Antrim, 64 N.H. 284, 286, 9 A. 389, 389 (1886)* ("Local education is a local purpose for which legislative power may be delegated to towns.").

The State delegates many of its constitutional duties to its political subdivisions and provides for taxation to support satisfaction of the delegated duties at the local level. See generally *Wooster v. Plymouth, 62 N.H. 193 (1882).* It is important to understand that the State holds the residue of all political power and has been charged with all duties of government. N.H. CONST. pt. I, art. 7; U.S. CONST. amend. X. The State is the seminal unit for all aspects of government: the delivery of services, the protection of rights, and the determination of taxation for support. The State has the power to delegate these functions of government. It did so in binding delegation to the United States of America, in congress assembled, with its ratification of the Constitution of the United States. It does so, from time to time, by the formation of, and delegation of powers and duties to, its political subdivisions. The general duties of the State, imposed by our constitution, include provision of the general good (pt. I, art. 1), protection of the people (pt. I, arts. 3, 12), provision for the general benefit and welfare (pt. II, art. 5), and provision for government and ordering (pt. II, art. 5). Our constitution further imposes more specific duties, such as the provision of a constitutionally adequate education and a guarantee of adequate funding (pt. II, art. 83; *Claremont I, 138 N.H. at 184, 635 A.2d at 1376),* provision of courts and legal remedies (pt. I, art. 14; pt. II, art. 4), provision for elections (pt. II, art. 5), and provision for the raising of taxes (pt. II, art. 5).

Since the counties, towns, cities, and districts of this State do not hold the ultimate sovereign power and are not vested with the duties of government by the constitution agreed to by our people, these political subdivisions have no constitutional powers or duties in their own right. They have no independent constitutional duty to govern and order, to protect, or to provide for the benefit and welfare. Yet, their role is immense, and arises through delegation. Many State duties have been delegated to its political subdivisions, and with this delegation has gone the responsibility to fund. *Wooster, 62 N.H. at 216-17.* But cf. N.H. CONST. pt. I, art. 28-a (no new or expanded unfunded mandates after enactment). Political subdivisions, at their own expense, carry out State duties on elections, fire and police protection, land use control and other exercises of the police power, provisions of highways, sanitation, and the structure and staffing of local government. For much of our history, the counties, towns, and cities provided, at their expense, the facilities, and some level of staffing, for our court system. The local school district, for some time, has financed the education for the children of the district.

Under my determination of duty and delegation, I am driven to a holding that the constitutional education nut is properly delegated and the purpose, for taxation purposes, is demonstrably local. *Holt, 64 N.H. at 286, 9 A. at 389.* Funds raised by taxation are used for political purposes within the district, for the district's use, and expended by the district to achieve educational standards set by the State and the district, for the sole benefit of the district. See *School-District v. Prentiss, 66 N.H. 145, 146, 19 A. 1090, 1090 (1889);* cf. *Allen v. Bidwell, 68 N.H. 245, 246, 44 A. 295, 295 (1894); Railroad v. The State, 60 N.H. at 96.* Given the legislature's proper delegation, its clear designation of the taxing district, the discerned purpose of the tax, and its obvious proportionality within the taxing district, I would hold that the trial court was correct in deciding, in the context of this case, that the part II, article 5 tests of reasonability and proportionality have been met by the current tax system.

The majority gives a passing nod to reasonability, equating it with proportionality. Obviously, these are two different tests since they are separately stated in part II, article 5. Reasonability can involve a number of issues, but not proportionality. Reasonability should be measured against an absolute standard, whereas proportionality involves relative considerations. In this case, I would surmise that reasonability would involve measuring the tax collected against the property assessed, and where the taxing act becomes a taking act, the tax is unreasonable.

And that is the trigger of the State's guarantee which is mandated in the constitution, as interpreted in Claremont I. Failure of the school districts, the primary obligors, to provide funding for the educational nut by virtue of the unreasonability of their respective taxes, measured against the total local tax burden, would trigger the State's guarantee obligation. At that point, the State must step in and provide funding, or such part thereof as will reduce the tax burden to a reasonable level. The test of absolute reasonability is not developed in this case.

Although not the basis of the majority's opinion, the majority presents a learned analysis of the right of the student to education. It finds the right to be fundamental. I do not quarrel with this characterization, but note that its materiality is based on the plaintiffs' claim of a violation of equal protection. The majority does not find such a violation. Based on my definition of the constitutional duty owed to these students, I would hold

that the record below demonstrates that the constitutional nut is provided to all students and find the funding scheme is not constitutionally infirm. Thus, there is no equal protection violation.

Although I have some quarrels with aspects of the decision below, none are the subject of this appeal, and I agree for the most part with the result reached by the trial court in a mostly excellent opinion. Accordingly, I respectfully dissent and would affirm the decision below.

The excellence of the school funding law under review in the Londonderry case offered the Supreme Court a graceful exit from the school funding controversy, but it refused to take it,, not because the law was bad, but because it wasn't the law the Court had previously said the Constitution requires. There is an old expression that goes, if you find yourself deep in a hole, the first thing to do is stop digging. But courts are institutionally incapable of that. The basic reason is found in the Federalist No. 78, in which Hamilton observes: "The judiciary… has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." In other words, the judiciary's authority rests on the confidence others have in the force of its reasoning, and if ever it were to admit error, its prestige – and thus its authority – would be diminished. That is why the New Hampshire Supreme Court, whose members must by now realize how foolishly the Court blundered in ever interjecting itself into the "political thicket" of school funding policy, refuses to acknowledge its error and back off. Thus it continues to bluster, sermonize, deceive, and threaten, but in the end, "hav[ing] no influence over either the sword or the purse," it cannot prevail against a determined Legislature backed by a determined populace.

SUPREME COURT OF NEW HAMPSHIRE

LONDONDERRY SCHOOL DISTRICT SAU # 12 & a. v.
STATE OF NEW HAMPSHIRE

153 N.H. ___; 907 A.2d 988 (2006)

HICKS, J. Once again, we are called upon to address the basic educational needs of the children of New Hampshire and the State's obligation to ensure and to fund each educable child's opportunity to obtain a constitutionally adequate education as required by Part II, Article 83 of the New Hampshire Constitution.

The State appeals a decision of the Superior Court (Groff, J.) finding that the State has failed to fulfill its duty to define a constitutionally adequate education, failed to determine the cost of an adequate education, and failed to satisfy the requirement of accountability,

and that House Bill 616 (the current education funding law) creates a non-uniform tax rate in violation of Part II, Article 5 of the New Hampshire Constitution. We affirm the trial court's finding that the State has failed to define a constitutionally adequate education and stay consideration of its remaining findings.

I

The plaintiffs, Londonderry School District School Administrative Unit (SAU) # 12, Merrimack School District SAU # 26 and New Hampshire Communities for Adequate Funding of Education, a non-profit organization consisting of nineteen school administrative units and towns, filed a petition for declaratory relief in this court in 2005 seeking a determination that House Bill 616 is unconstitutional. After considering the parties' briefs regarding whether we should exercise our original jurisdiction, we concluded that "while substantial questions of constitutional law are presented by this case, we believe further factual development is necessary in the superior court before those questions are decided." Accordingly, the plaintiffs' action was dismissed without prejudice.

The plaintiffs then filed a petition for declaratory relief and a motion for summary judgment in the superior court challenging the constitutionality of House Bill 616 on grounds that the statute: (1) fails to define, determine the cost of, and ensure delivery of a constitutionally adequate education; (2) requires a number of municipalities to fund a constitutionally adequate education through local taxes; (3) all but eliminates so-called "donor communities" and imposes an unreasonable and disproportionate tax burden on property-poor municipalities with respect to the funding of education; and (4) creates a class of former donor communities that retain all the revenue they raise through the statewide enhanced education tax, resulting in a violation of equal protection. The trial court found House Bill 616 unconstitutional on its face and granted the motion for summary judgment.

II

In *Claremont School District v. Governor (Accountability), 147 N.H. 499, 505, 794 A.2d 744 (2002)*, we acknowledged the State's assertion that *Claremont School District v. Governor, 142 N.H. 462, 703 A.2d 1353 (1997)* (Claremont II) issued "four mandates: define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability," and that these four mandates comprise the State's duty to provide an adequate education. We focus here upon the first mandate: defining a constitutionally adequate education.

Since the inception of the education cases in 1993, we have consistently deferred to the legislature's prerogative to define a constitutionally adequate education. In *Claremont School District v. Governor, 138 N.H. 183, 635 A.2d 1375 (1993)* (Claremont I), we stated that "[w]e do not define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor." *Id. at 192*. We expressed our confidence that the legislature and the Governor would "fulfill their responsibility with respect to defining the specifics of, and the appropriate means to

provide through public education, the knowledge and learning essential to the preservation of a free government." *Id. at 193*.

In Claremont II, we looked to "the seven criteria articulated by the Supreme Court of Kentucky as establishing general, aspirational guidelines for defining educational adequacy." *Claremont II, 142 N.H. at 474* (emphasis added). We expressly viewed these guidelines as "benchmarks of a constitutionally adequate public education" and "anticipate[d] that [the other branches of government would] promptly develop and adopt specific criteria implementing these guidelines." *Id. at 475*. As we explained, "[w]hile the judiciary has the duty to construe and interpret the word 'education' by providing broad constitutional guidelines, the Legislature is obligated to give specific substantive content to the word and to the program it deems necessary to provide that 'education' within the broad guidelines," id. (quotation omitted; emphasis added), all consistent with the duties imposed by Part II, Article 83.

In *Claremont School District v. Governor (Motion for Extension of Deadlines), 143 N.H. 154, 725 A.2d 648 (1998)*, the State acknowledged that the legislature had yet to achieve "a system to ensure delivery of a constitutionally adequate education." *Id. at 160* (quotation omitted). We, therefore, "declined the . . . invitation to determine whether the definition adopted is facially unconstitutional." Id. In *Claremont School District v. Governor (Statewide Property Tax Phase-In), 144 N.H. 210, 744 A.2d 1107 (1999)*, we denied as premature the plaintiffs' request to assign a master for purposes of fact-finding to determine the definition of a constitutionally adequate education. *Id. at 212*; cf. *Pauley v. Bailey, 174 W. Va. 167, 324 S.E.2d 128 (W. Va. 1984)* (on remand, trial court appointed special master to oversee development of master plan for constitutional adequacy). In *Opinion of the Justices (Reformed Public School Financing System), 145 N.H. 474, 765 A.2d 673 (2000)*, we noted that constitutional adequacy had yet to be defined and that "[t]he content of a constitutionally adequate education must be defined, in the first instance, by the legislature." *Id. at 478*.

III

Today, the State argues that it has defined a constitutionally adequate education in *RSA 193-E:2* (Supp. 2005). That statute, titled "Criteria for an Equitable Education," provides:

An equitable education shall provide all students with the opportunity to acquire:

> I. Skill in reading, writing, and speaking English to enable them to communicate effectively and think creatively and critically.
>
> II. Skill in mathematics and familiarity with methods of science to enable them to analyze information, solve problems, and make rational decisions.
>
> III. Knowledge of the biological, physical, and earth sciences to enable them to understand and appreciate the world around them.

IV. Knowledge of civics and government, economics, geography, and history to enable them to participate in the democratic process and to make informed choices as responsible citizens.

V. Grounding in the arts, languages, and literature to enable them to appreciate our cultural heritage and develop lifelong interest and involvement in these areas.

VI. Sound wellness and environmental practices to enable them to enhance their own well-being, as well as that of others.

VII. Skills for lifelong learning, including interpersonal and technological skills, to enable them to learn, work, and participate effectively in a changing society.

The State argues that this definition of adequacy "accords with the definitions upheld by the judiciaries of other states around the nation," citing West Virginia, Kentucky, Montana and Washington. An examination of the cases and statutes in those states, however, reveals otherwise. In West Virginia, for example, an action was brought by parents of school children contending that the system for financing public schools violated that state's constitutional guarantee of a "thorough and efficient" education. *Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859, 861 (W. Va. 1979)* (quotation omitted). Although the state supreme court of appeals remanded the case "for further evidentiary development," because the case involved "significant and far-reaching public issues," *id. at 863*, the court proposed certain guidelines to the trial court, including identifying the parameters of a "[t]horough and [e]fficient" educational system, ultimately holding that the legislature has the constitutional duty "to develop a high quality statewide education system." *Id. at 861*. On remand the trial court found that the State had failed "to perform its constitutional and statutory duties with respect to formulating high quality standards for education" because the standards promulgated by the board of education were "far too general and minimal to define the elements of a thorough and efficient system of education." *Pauley v. Bailey, 324 S.E.2d at 132* (quotation omitted). The trial court appointed a special master to oversee the development of an educational master plan that contained "an extensive compilation of detailed concepts and standards that defines the educational role of the various state and local agencies, sets forth specific elements of educational programs, enunciates consideration for educational facilities and proposes changes in the educational financing system."

Similarly, in Kentucky, a group of school districts and public school students brought an action challenging whether the Kentucky General Assembly had complied with its constitutional mandate to "provide an efficient system of common schools throughout the state." *Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 189-90 (Ky. 1989)* (quotation omitted). The state supreme court declared the system of common schools to be constitutionally deficient and directed the legislature to "re-create . . . and re-establish a system of common schools within this state which will be in compliance with the Constitution." *Id. at 214*. In doing so, the court set out standards for a new system, including identifying seven "capacities" with which each and every child was to be provided through an efficient system of education. *Id. at 212*. The court indicated that the seven characteristics "should be considered as minimum goals in providing an adequate

education." *Id. at 214, n. 22*. The Kentucky legislature subsequently enacted the Kentucky Education Reform Act of 1990, "which radically changed the system of public education" in that state. *Chapman v. Gorman, 839 S.W.2d 232, 234 (Ky. 1992).*

In Montana and Washington, although the applicable statutes contain general definitions of an adequate education, in each state the legislation defines the substantive content of the educational program implementing the general definitions. In Montana, the legislature established five "goals" for public elementary and secondary schools. *Mont. Code. Ann. §20-1-102* (2005). The statutory scheme also identifies "the minimum standards upon which a basic system of free quality public elementary and secondary schools is built," and the "educationally relevant" factors the legislature must consider. *Mont. Code Ann. §§20-9-309(2)(a),* (3); see *Mont. Code Ann. §20-9-309(4)(b)(i)* (2005).

In Washington, the state supreme court interpreted the constitutional provision that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders," as creating a judicially enforceable, affirmative duty. *Seattle Sch. Dist. No. 1 of King Cty v. State, 90 Wn.2d 476, 585 P.2d 71, 83, 85 (Wa. 1978)* (quotation and emphasis omitted). The court held that pursuant to that duty, the legislature has the responsibility to define and give content to a basic education and a basic program of education. *Id. at 95*. The "Basic Education Act," codified in the Washington statutes, requires each school district "to provide opportunities for all students to develop" essential knowledge and skills in four broad categories. *Wash. Rev. Code §28A.150.210* (2004). The state board of education is required to establish a program that includes "the essential academic learning requirements . . . and such other subjects and such activities as the school district shall determine to be appropriate for the education of the school district's children," *Wash. Rev. Code §28A.150.220(1)(a), (b),* and to "adopt rules to implement and ensure compliance with the program requirements," *Wash. Rev. Code §28A.150.220(4).* See also *Mass. Gen. Laws Ann. ch. 69, §1* (West 1996) (intent of statute is to provide "public education system of sufficient quality to extend to all children the opportunity to reach their full potential and to lead lives as participants in the political and social life of the commonwealth and as contributors to its economy"), *§1B* (duties of the board of education), *§1D* (statewide educational goals and academic standards), *§1E* (curriculum frameworks), *§1I* (performance reports, evaluation system and assessments); *Hancock v. Commissioner of Educ., 443 Mass. 428, 822 N.E.2d 1134, 1137-38 (Mass. 2005)* (Massachusetts Education Reform Act of 1993 established uniform, objective performance and accountability measures for every public school student, teacher, administrator, school and district in the state). Therefore, although each state noted above provides, as part of a comprehensive statutory scheme, a general definition of an adequate education, each state also establishes a mechanism through which educational content is identified in fulfillment of constitutional duties.

In the case before us, the State asserts that the system of education in New Hampshire goes well beyond constitutional adequacy. In its brief, the State argues that "statutes and regulations . . . implement [the definition of adequacy] with a specificity that far exceeds constitutional requirements"; that by complying with the federal No Child Left Behind Act of 2001 and "establishing a comprehensive system for holding its schools accountable, the State has exceeded the constitutional requirements of accountability"; that "the annual testing and statewide performance targets. . . . far exceed the

constitutional standard of adequacy as defined by the legislature in *RSA 193-E:2*"; and that the "school approval standards go well beyond the constitutional floor of adequacy" and "far surpass the constitutional minimum of adequacy." For purposes of this appeal, we will accept these assertions. These assertions themselves, however, expose the core issue before us. If the statutory scheme that is in place provides for more than constitutional adequacy, then the State has yet to isolate what parts of the scheme comprise constitutional adequacy. More specifically, under the statutory scheme there is no way a citizen or a school district in this State can determine the distinct substantive content of a constitutionally adequate education. Consequently, its cost cannot be isolated. Such a system is also impervious to meaningful judicial review.

IV

The task of developing specific criteria of an adequate education is for the legislature. *Claremont II, 142 N.H. at 475*. By failing to do so, the legislature creates the potential for a situation in which a superior court judge, or a special master appointed by this court, will be required to decide what is to be taught in the public schools in order to provide the opportunity to acquire "[s]kill in reading, writing and speaking English," "[s]kill in mathematics and familiarity with methods of science," "[k]nowledge of the biological, physical, and earth sciences," "[k]nowledge of civics and government, economics, geography, and history," "[g]rounding in the arts, languages, and literature," "[s]ound wellness and environmental practices," and "[s]kills for lifelong learning." *RSA 193-E:2*. Similarly, to assess whether a constitutionally adequate education is being provided, a trial judge would likely have to determine the levels of "skill," "knowledge," "grounding" and "sound wellness" to which an educable child is entitled. Moreover, *RSA 193-E:2* mandates that students be provided the "opportunity to acquire" such skills and knowledge. Without more, a trial judge or a special master would have to determine the adequacy of the "opportunity" to be afforded. Determining the substantive educational program that delivers a constitutionally adequate education is a task replete with policy decisions, best suited for the legislative or executive branches, not the judicial branch.

RSA 193-E:2 largely mirrors the seven criteria that we cited with approval in *Claremont II, 142 N.H. at 474-75*. We characterized those criteria as establishing "general" and "aspirational" guidelines for defining educational adequacy and made clear that the legislature was expected to develop and adopt specific criteria for implementing the guidelines. In the years since *RSA 193-E:2* was adopted, this court and the State have acknowledged that constitutional adequacy has yet to be defined. Standing alone, *RSA 193-E:2* does not fulfill the State's duty to define the substantive content of a constitutionally adequate education in such a manner that the citizens of this state can know what the parameters of that educational program are. The right to a constitutionally adequate education is meaningless without standards that are enforceable and reviewable. See *Claremont School Dist. v. Governor (Accountability), 147 N.H. at 508* (definition of constitutionally adequate education must have standards subject to meaningful application). Furthermore, without a substantive definition of constitutional adequacy, it will remain impossible for school districts, parents, and courts, not to mention the legislative and executive branches themselves, to know where the State's obligations to fund the cost of a constitutionally adequate education begin and end.

The State further argues that, aside from the constitutionally sufficient definition of adequacy in *RSA 193-E:2*,

> [t]he Legislature has delegated to the State Board the authority and the duty to prescribe uniform standards for all public schools in New Hampshire. *RSA 194:23*; *RSA 186:8*; *RSA 21-N:9*. The State Board has responded by enacting comprehensive and detailed minimum standards for public school approval. See [N.H. Admin. Rules] Ed 306.01 et seq. Local school boards are required by statute to "comply with the rules and regulations of the state board." *RSA 186:5*; *RSA 186:8*. The school approval standards are very detailed and demanding; they govern nearly every facet of a school's operation. The standards prescribe how schools must be organized and staffed as well as the particular educational content of each subject taught. See e.g., [N.H. Admin. Rules] Ed 306.17 (setting forth maximum class sizes); [N.H. Admin. Rules] Ed 306.37 (detailing requirements for English program). These standards are monitored by DOE, which grades individual schools on their compliance with the standards. [N.H. Admin. Rules] Ed 306.40(b)(1)-(4). (Emphasis added.)

If it is the State's position that *RSA 193-E:2* together with the education rules and regulations, curriculum frameworks and other statutes define a constitutionally adequate education, we defer to the legislature's judgment. We note, however, that if the current system of delivery in combination with the statutory definition establishes a constitutionally adequate education, there would be no need for any local education taxes as the State would be required to pay for implementing the entire statutory scheme. Indeed, if that is the case, we question whether $837 million, the amount currently allotted for public education under House Bill 616, is facially sufficient to fund the school system as required by that statutory scheme. Alternatively, if, as the State asserts, the education rules and regulations, curriculum frameworks and other statutes provide some level of education beyond that of a constitutionally adequate education, the point of demarcation cannot currently be determined.

Any definition of constitutional adequacy crafted by the political branches must be sufficiently clear to permit common understanding and allow for an objective determination of costs. Whatever the State identifies as comprising constitutional adequacy it must pay for. None of that financial obligation can be shifted to local school districts, regardless of their relative wealth or need.

V

The trial court found House Bill 616 facially unconstitutional in part because it does not contain a definition of constitutional adequacy. House Bill 616 simply modifies the adequacy aid formula. Although the State must define constitutional adequacy in accord with this opinion, House Bill 616 standing alone need not necessarily contain such a definition for the bill itself to pass constitutional muster. Viewed together, however, the current education funding and "definitional" statutory framework falls well short of the constitutional requirements established in this court's Claremont decisions.

Because the definition of a constitutionally adequate education is essential to all other issues, including the cost of a constitutionally adequate education and the method by which to raise the necessary funds, we stay that portion of the case containing the trial court's findings that the legislature has failed to determine the cost, failed to satisfy the requirement of accountability and established a non-uniform tax rate. As to the core definitional issues, we will retain jurisdiction with the expectation that the political branches will define with specificity the components of a constitutionally adequate education before the end of fiscal year 2007. Should they fail to do so, we will then be required to take further action to enforce the mandates of Part II, Article 83 of the New Hampshire Constitution. Such appropriate remedies may include: (1) invalidating the funding mechanism established in House Bill 616 as set forth in the concurring opinion of Justice Galway; (2) appointing a special master to aid in the determination of the definition of a constitutionally adequate education, see *Below v. Gardner, 148 N.H. 1, 2-3 (2002)* ("the supreme court has been called upon to establish a new district plan for the New Hampshire Senate . . . because the New Hampshire Legislature failed to [do so] following the 2000 census"); or (3) implementing the remedy outlined in the concurring opinion of Justice Duggan and remanding the case to the trial court "for further factual development and a determination of whether the State is providing sufficient funding to pay for a constitutionally adequate education."

Respectful of the roles of the legislative and executive branches, each time this court has been requested to define the substantive content of a constitutionally adequate public education, we have properly demurred. Deference, however, has its limits. We agree with Justice Galway's concern that this court or any court not take over the legislature's role in shaping educational and fiscal policy. For almost thirteen years we have refrained from doing so and continue to refrain today. However, the judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential. *Petition of Below, 151 N.H. 135, 855 A.2d 459 (2004).*

We urge the legislature to act.

Affirmed in part; and stayed in part.

BRODERICK, C.J., and DALIANIS, J., concurred; DUGGAN, J., concurred specially in part and dissented in part; GALWAY, J., concurred specially in part and dissented in part.

DUGGAN, J., concurring specially in part and dissenting in part. Rather than focus on whether the State has defined a constitutionally adequate education with sufficient specificity, I believe we should focus on whether House Bill 616 provides municipalities with sufficient funding to pay for a constitutionally adequate education. A specific definition of adequacy is meaningless without a determination of its cost, and, unlike the task of defining a constitutionally adequate education, there exist concrete methodologies for determining the cost.

The sufficiency of funding in light of the cost of a constitutionally adequate education, however, is a factually-driven question appropriate for resolution through a trial. Accordingly, I would remand this case to the superior court now for a trial on that and the other related issues in this case.

I

A brief examination of the history of House Bill 616 and some of its current provisions suggests that there may be some validity to the plaintiffs' argument that the State has sidestepped its constitutional obligation to provide an adequate education.

House Bill 616 was based in large part on funding legislation that was debated during the 2003 and 2004 legislative sessions. See N.H.S. Jour. ___ (June 9, 2005). During those debates, one senator acknowledged that the legislature was "only going to spend so much money, regardless of what [an] adequate education costs." N.H.S. Jour. 1242 (2004). Another senator admitted that the legislature "arbitrarily set $ 428 million as the amount . . . [it was] willing to spend on an adequate education" and then "backed into figuring out how to pay for an adequate education based on the numbers [,] not based on the needs of the children of this state." Id. at 1262.

In a letter written to the Governor, the senate president and the speaker of the house in 2004, the attorney general raised significant and specific concerns regarding the constitutionality of that legislation. See Letter from Attorney General Peter Heed to Governor Benson, President Eaton, and Speaker Chandler (April 27, 2004) (reprint on file with court). Although House Bill 616 is not identical to that earlier legislation, it includes two of the features about which the attorney general was concerned: (1) House Bill 616 repeals the statutory provision calculating the cost of an adequate education, replacing it with provisions that distribute State educational aid based upon property value, see Laws 2005, 257:6, :22, II; and (2) the word "adequate" has been stricken throughout the statute, see, e.g., Laws 2005, 257:15. See also Letter from Attorney General Peter Heed, supra. Although criticism from legislators and the attorney general regarding previous legislation certainly does not render House Bill 616 unconstitutional, it provides important context for the issues now before us.

Furthermore, various provisions of House Bill 616 appear to support the plaintiffs' claim that it does not pass constitutional muster. First, it is unclear from the statutory scheme whether the distribution of education aid is linked to providing each community with the funds necessary to provide an adequate education. Second, the substitution of "equitable" for "adequate" in *RSA 193-E:2* and other statutory provisions, see, e.g., Laws 2005, 257:15, calls into question whether House Bill 616 is actually designed to fund a constitutionally adequate education. Third, given that the office of the legislative budget assistant projected the statewide cost of an adequate education to be over $ 909 million for fiscal year 2001, see *Opinion of the Justices (Reformed Public School Financing System), 145 N.H. 474, 476, 765 A.2d 673 (2000)*, and if, as the plaintiffs allege, the legislature appropriated only $ 837 million for fiscal year 2006, then there may be considerable strength to the plaintiffs' argument that the funding provided in House Bill 616 is insufficient to fund a constitutionally adequate education. That argument, however, is heavily fact-driven and requires further factual development.

II

As explained by the majority, the plaintiffs argue that House Bill 616 is unconstitutional on a variety of grounds. The majority chooses to focus at this juncture only on what it views as the legislature's failure to define the components of a constitutionally adequate education.

The State argues that it has defined a constitutionally adequate education in *RSA 193-E:2* (Supp. 2005). I acknowledge that the definition contained therein merely reflects the seven "general, aspirational guidelines for defining educational adequacy" that we articulated in *Claremont School District v. Governor, 142 N.H. 462, 474, 703 A.2d 1353 (1997)* (hereinafter Claremont II). Although I agree that a further statutory articulation of the specific components of a constitutionally adequate education would certainly be more conducive to judicial review in any challenge made under any of the Claremont II mandates, I do not think that the statutory schemes of Montana and Washington, for example, are illustrative of any ideal to which we should instruct the legislature to aspire. Although the majority cites these two statutory schemes, among others, as demonstrating how a State might "define[] the substantive content of [an] educational program implementing [a] general definition[]" of adequacy, each statutory scheme offers a different level of specificity and neither provides meaningful guidance to the legislature as to how it should define that "substantive content." It is thus unclear to me what level of statutory specificity as to the definition of a constitutionally adequate education is compelled by the Constitution. I do not think that further legislative action regarding the definition is a prerequisite for consideration of the other issues raised in this case. Rather, I believe that *RSA 193-E:2* provides a sufficient starting point.

Moreover, although Claremont II requires the State to define a constitutionally adequate education, determine the cost of that education, fund that education with constitutional taxes, and ensure provision of that education through accountability, see *Claremont School Dist. v. Governor (Accountability), 147 N.H. 499, 505, 794 A.2d 744 (2002),* it does not create a scheme under which any single piece of education funding legislation failing to satisfy any one of the Claremont II mandates will automatically be unconstitutional. I therefore respectfully disagree with Justice Galway's conclusion that House Bill 616 is rendered unconstitutional merely because it does not explicitly define the components of a constitutionally adequate education. While the obligation to articulate this definition remains, Claremont II does not require us to declare funding legislation unconstitutional for this reason alone.

III

Regardless of whether the components of an adequate education have been defined with specificity, I think it is important to identify the real issue presented in this case. The central issue is not whether the State has defined a constitutionally adequate education. Rather, the plaintiffs' fundamental complaint is that, by virtue of House Bill 616, the plaintiff school districts are receiving less education funding from the State than they have received in the past. They seek to invalidate House Bill 616 so as to restore the

funding that the State previously provided. The core of this appeal is the basic question of whether the State has, in House Bill 616, fulfilled its constitutional obligation to fund an adequate education. Accordingly, I disagree with the majority's decision to focus on the question of whether the State has satisfied its obligation to define a constitutionally adequate education.

Determining whether the State has fulfilled its constitutional obligation to fund a constitutionally adequate education cannot be done solely by examining the provisions of House Bill 616 and the limited factual record before us on appeal. Further factual development is necessary to determine whether there are municipalities that are not receiving sufficient funding from the State to pay for an adequate education. Thus, I would remand this case to the trial court for further factual development regarding whether the funding provided in House Bill 616 is sufficient to fund a constitutionally adequate education.

On remand, in order to determine whether any municipalities are receiving insufficient funding, the trial court would have to consider the cost of a constitutionally adequate education. Because neither House Bill 616 nor any other statute purports to calculate the cost of an adequate education, in the absence of any further action on the part of the legislature, it would be up to the trial court to consider that cost.

Determining the cost of a constitutionally adequate education may not be an easy task. With *RSA 193-E:2* already established as the starting point for what a constitutionally adequate education must provide, it would likely fall into the hands of educational experts to inform the trial court as to whether the funding provided by the State in House Bill 616 is sufficient to fund a constitutionally adequate education. Making this determination would be an arduous process - one far better suited for elected decision-makers rather than a single member of the judiciary.

However, courts are "well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government - not in order to make policy but in order to assure the protection of constitutional rights." *Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 801 N.E.2d 326, 349, 769 N.Y.S.2d 106 (N.Y. 2003)* (affirming trial court's determination that state funding system failed to provide the constitutionally-required level of education in New York City and ordering the State to determine the actual cost of providing that education). We should not shy away from the need to determine the cost of a constitutionally adequate education in order to ensure that it is being funded by the State. "It is our duty to uphold and implement the New Hampshire Constitution." *Claremont II, 142 N.H. at 475*. We must act to ensure that constitutional rights are protected, and we cannot ignore the possibility that the State may not be meeting its constitutional obligation to provide an adequate education to the children of this State.

If we were to remand this case, as I suggest, the trial court would not be the first ever to consider how to determine the cost of an adequate education. Although the facts necessary to make a determination would come from experts and other witnesses' testimony, general guidance regarding computational methods exists in opinions from courts in other jurisdictions, see, e.g., *Hancock v. Driscoll, 2004 Mass. Super. ____ (Mass. Super. Ct. Apr. 26, 2004)* (hereinafter Hancock I), report and recommendation

rejected by *Hancock v. Commissioner of Educ., 443 Mass. 428, 822 N.E.2d 1134, 1136-37 (Mass. 2005)*, and also in one legislatively-authorized study that is specific to New Hampshire, see J. Augenblick et al., Alternative Approaches for Determining a Base Figure and Pupil-Weighted Adjustments for Use in a School Financing System in New Hampshire (Nov. 30, 1998), in Final Report of the Adequate Education Costs and Municipal Grant Distribution Commission, SB 462 (Dec. 17, 1998) (attachment B).

In Hancock I, a Massachusetts Superior Court judge conducted a trial for the purpose of finding facts and making recommendations to the Supreme Judicial Court of Massachusetts on the issue of whether the Commonwealth of Massachusetts was failing to provide its students "with the level and quality of education required by the Massachusetts Constitution." *Hancock I, 2004 Mass. Super. __*.

One of the many issues addressed in the report was the adequacy of state funding for education. *Id. 2004 Mass. Super. ___*. At trial, the parties presented a number of expert witnesses who testified to the various methods for determining the cost of an adequate education. *Id. 2004 Mass. Super. ___*.

The report describes four basic analytical models for determining the cost of adequacy. *Id. 2004 Mass. Super. ___*. The "successful schools" model identifies school districts that perform at a predetermined level according to state performance standards and, by examining the amount that those school districts spend on their core educational programs, distills a base per pupil spending figure that represents the cost of adequacy. *Id. 2004 Mass. Super.* Another model also identifies school districts that perform at a predetermined level according to state performance standards, but rather than determine a base per pupil cost, it compares the net spending of those schools with their legislatively-defined budgets to determine whether they are spending, on average, above their legislatively-defined budgets, which would suggest that funding of only the foundation budget amount is insufficient. *Id. 2004 Mass. Super. ___*. The "professional judgment" model utilizes panels of educational experts who determine, based upon the state constitution's minimally-required skills or levels of achievement, what the necessary components are for providing such an education and, in turn, what the provision of those components will cost. *Id. 2004 Mass. Super. ___*. Finally, the "value added" analysis identifies the average statewide standardized test scores for certain demographic subgroups of students and then compares each district's expected student performance, based upon its demographic make-up, to its actual student performance to determine whether increased spending results in students performing above their expected levels. *Id. 2004 Mass. Super. ___*.

Our own legislature, in previous legislation, utilized one of the above methodologies - the "successful schools" model - in arriving at a formula to determine the cost of an adequate education in New Hampshire. See, e.g., *RSA 198:40* (1999) (amended 2003, 2004; repealed 2005). That statutory formulation was apparently derived from the 1998 study report prepared by John Augenblick and his colleagues. See Final Report of the Adequate Education Costs and Municipal Grant Distribution Commission, supra at 4-5.

The study report proposed four possible formulas for calculating the cost of an adequate education in New Hampshire. J. Augenblick et al., Alternative Approaches for Determining a Base Figure and Pupil-Weighted Adjustments for Use in a School

Financing System in New Hampshire, supra at 7-10. All four formulas were based upon the "successful schools" method described above. See id. at 1. Each of the four formulas differed in its method of identifying "successful schools." See id. at 1-2. Three of the formulas identified the "successful schools" by considering a variety of input measures (e.g., student-teacher ratios and starting teacher salaries) and output measures (e.g., drop-out rate and performance on standardized tests). Id. at 7-10 & tables 1-A, 1-B. The fourth formula identified "successful schools" based solely upon one output factor - performance on standardized tests at forty to sixty percent. Id. at 10.

The legislature appears to have adopted the final formula proposed in the study report. In 1999, the legislature enacted *RSA 198:40* (1999), entitled "Determination of Per Pupil Adequate Education Cost and Adequate Education Grant." See Laws 1999, 17:41. The statute provided, in pertinent part:

> I. [T]he cost per pupil shall be established using the following formula:
>
> (a) The department of education shall calculate the base expenditure per pupil for each school district that operates an elementary school . . . . For each school district, this amount shall be divided by the average daily membership in attendance at the elementary school level to attain the base expenditure per pupil.
>
> (b) The adequate education grant amount shall be calculated as follows:
>
> (1) The department of education shall identify those school districts where 40 to 60 percent of the elementary pupils enrolled in the grades tested on the day testing began, achieved a scaled score [on the statewide standardized educational test], in all areas tested, equivalent to performance at the basic level or above.
>
> (2) From the school districts identified in subparagraph I(b)(1) of this section, the department of education shall then identify those school districts that have the lowest base expenditure per pupil . . . .
>
> (3) The department of education shall calculate the average base cost per pupil of an adequate education at the elementary school level by multiplying the base expenditure per pupil of each school district identified in subparagraph I(b)(2) of this section by the average daily membership in attendance at each of the selected school districts, and add the results across all districts selected. This sum shall then be divided by the total average daily membership in attendance at the elementary school level in all of the selected school districts and the result shall be multiplied by .9025.
>
> II. [Defining the "weighted average daily membership in residence" for a municipality as taking into consideration various factors.]
>
> III. For each fiscal year, the statewide cost of an adequate education for all pupils shall be calculated by multiplying the average base per pupil cost of an adequate education by the statewide weighted average daily membership in residence of pupils and then adding 70 percent of total statewide transportation costs.

House Bill 616 repealed this calculation of the cost of an adequate education in its entirety. See Laws 2005, 257:22, II.

While I do not necessarily endorse this particular formula for determining the cost of an adequate education, cf. *Hancock I, 2004 Mass. Super.* ___ (criticizing a similar formulation as yielding illogical results, and noting that the test scores relied upon to identify "successful schools" under that formulation may not have reflected the students' level of competence as required by the constitution), I note its prior existence in order to illustrate that a legislative calculation of the cost of an adequate education is far from impossible.

In light of the foregoing, I would remand this case to the trial court for further factual development and a determination of whether the State is providing sufficient funding to pay for a constitutionally adequate education. I note that I would not expect the trial court to craft its own definition of an adequate education, or to determine with any precision the cost of providing that education to every child in the State. Rather, I would expect the trial court to begin with the seven factors articulated in Claremont II, and codified in *RSA 193-E:2*, as guidelines for the provision of an adequate education, and from there consider whether the funding provided under the current statutory scheme is sufficient to pay the cost of that education.

IV

The majority concludes that the legislature must define a constitutionally adequate education before this case is given any further consideration. In my view, however, because a number of methodologies already exist to determine the cost of a constitutionally adequate education, it would be less problematic for the legislature to determine the cost of that education than it would be for it to look to the Washington and Montana statutes for guidance to further define the components of that education. More fundamentally, even if the legislature provides a more specific definition of an adequate education, that definition is meaningless unless the legislature also determines what that specifically-defined education will cost. A legislative determination of the cost of a constitutionally adequate education would more quickly advance the process of establishing a constitutionally sound statutory scheme for the future education of New Hampshire's children. Indeed, in my view, a legislative determination of the cost of a constitutionally adequate education using an acceptable method for determining that cost could also satisfy the need to define a constitutionally adequate education.

Hopefully, a trial will not be necessary in this case. Hopefully, in the interim, the Governor and legislature will, using an acceptable method, determine the cost of a constitutionally adequate education at a level that satisfies constitutional concerns and addresses the issues raised by the plaintiffs.

GALWAY, J., concurring specially in part and dissenting in part.

I agree with the majority that the New Hampshire Legislature has not defined a constitutionally adequate education. The majority and I part ways over the remedy for

this failure. The majority would retain jurisdiction of this appeal and would consider remand to the trial court, or appointment of a special master, if the legislature, by the end of fiscal year 2007, continues not to define a constitutionally adequate education. I fear that by so doing we risk taking over the legislature's role in shaping educational and fiscal policy. The judiciary should be unwilling to assume that risk. Rather than retain jurisdiction and later remand to the superior court, I believe that the court should today declare House Bill 616 unconstitutional on its face. Consistent with the plaintiffs' request, we should stay this ruling until the end of fiscal year 2007 so that school districts will receive the state funding they anticipated.

Part II, Article 83 of the New Hampshire Constitution provides: "[I]t shall be the duty of the legislators . . . to cherish the interest of literature and the sciences, and . . . public schools, to encourage . . . public institutions . . . for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country . . . ." Under Part II, Article 83, it is the legislature's duty to provide every educable child with a constitutionally adequate public education. *Claremont School Dist. v. Governor, 138 N.H. 183, 184, 635 A.2d 1375 (1993).* A constitutionally adequate public education gives our children a safety net - a guarantee that, at a minimum, they will receive a state-funded constitutionally adequate education, regardless of where they live and how much money their parents earn.

Providing a constitutionally adequate education to the children of this State entails: "defin[ing] a[] [constitutionally] adequate education, determin[ing] the cost, fund[ing] it with constitutional taxes, and ensur[ing] its delivery through accountability." *Claremont School Dist. v. Governor (Accountability), 147 N.H. 499, 505, 794 A.2d 744 (2002)* (quotation omitted). This court did not impose these duties upon the legislature; they derive from our State Constitution.

As the majority finds, the legislature has yet to define a constitutionally adequate education. In 1998, it enacted *RSA 193-E:2* (Supp. 2005). That year, the State admitted that it had not "completed its efforts to define and implement a constitutionally adequate education." *Claremont School Dist. v. Governor (Motion for Extension of Deadlines), 143 N.H. 154, 160, 725 A.2d 648 (1998).* In this case, the State contends that *RSA 193-E:2* is the definition of a constitutionally adequate education. As the majority aptly observes, the seven criteria set forth in that statute are no more than a restatement of the "general, aspirational guidelines" we quoted with approval in *Claremont School District v. Governor, 142 N.H. 462, 474-75, 703 A.2d 1353 (1997)* (Claremont II). Aspirational guidelines do not provide a safety net for our children. Aspirational guidelines do not "give specific substantive content" to a constitutionally adequate education and "to the program [the legislature] deems necessary to provide that education." *Claremont II, 142 N.H. at 475* (quotations omitted).

Without such a definition, the legislature cannot fulfill its mandate to determine the cost of providing a constitutionally adequate education to our children. As we stated in *Opinion of the Justices (Reformed School Financing Systems), 145 N.H. 474, 478, 765 A.2d 673 (2000)*: "It is not possible to determine the level of funding required to provide the children of this State with a constitutionally adequate education until its essential elements have been identified and defined." Thus, as the trial court observed, "While great latitude must be granted to the Legislature to develop a formula or methodology to

compute [the cost of a constitutionally adequate education], it must fulfill its duty by, in fact, determining the cost in accordance with its definition of an adequate education."

As the trial court aptly found, the current education funding law, House Bill 616, is constitutionally infirm for just this reason -- it is not tethered to a definition of a constitutionally adequate education. In the trial court's words, House Bill 616 does not "provide[] for a calculation of the cost of a[] [constitutionally] adequate education, per pupil or otherwise." Rather, it "arbitrarily establishes an amount to be dedicated to providing [such] an . . . education." Because House Bill 616 is not linked to a definition of a constitutionally adequate education, I believe that the court should declare it facially unconstitutional.

It is the legislature's job, not ours, to define a constitutionally adequate education, and to determine the mechanism by which to fund it. *Claremont II, 142 N.H. at 476-77*. It is our job to determine whether the legislature has complied with its constitutional obligation. "[W]e were not appointed to establish educational policy . . . . That is why we leave such matters, consistent with the Constitution, to the two co-equal branches of government." *Id. at 475*. Our sole duty is to "uphold and implement the New Hampshire Constitution." Id.

"While it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation." *Baines v. N.H. Senate President, 152 N.H. 124, 129, 876 A.2d 768 (2005)* (quotation omitted). I believe that, by remanding to the superior court, or by appointing a special master, we risk usurping the legislature's prerogative to set educational and fiscal policy. Accordingly, I believe that we should declare House Bill 616 unconstitutional for the reasons the superior court sets forth in its decision. Once the legislature provides the children of this State with what it determines to be a constitutionally adequate education, the mandate of the constitution will be satisfied, and our role will be concluded.

I believe strongly that it is not our role to "sit in continuous judgment over educational policy decisions made by the legislature and the Governor." *Claremont School Dist., 147 N.H. at 524* (Nadeau and Dalianis, JJ., dissenting). Nor is it our role to judge the legislature's fiscal policy. See id. By retaining jurisdiction of this appeal, I believe that the majority moves us dangerously close to taking these policy-making roles for ourselves and deciding questions that are not ours to answer. See *Hughes v. Speaker, N.H. House of Representatives, 152 N.H. 276, 283-88, 876 A.2d 736 (2005)* (discussing political question doctrine).

For these reasons, respectfully, I concur in the majority's determination that the legislature has not defined a constitutionally adequate education and dissent from its decision to retain jurisdiction of this appeal indefinitely.

It seems that the more authority the judiciary arrogates from, and the more powerful it becomes relative to the elected branches, the more it claims that it is under assault and threatened by them. In this article, the late Justice Batchelder cherry-picks a few cases which to him place the judiciary in a heroic light in order to suggest that virtually all criticism of the judiciary is "ill-founded or unjustified." Not addressing the utter lack of principle underlying certain other cases that he studiously avoids discussing enables him to characterize any such criticism as an attack on "society as a whole, not the judges;" that is, on the constitution. Thus can he, immediately after claiming that the courts should welcome criticism that "is fair, principled, and reasonably enlightened," proudly tell us that "I do not think for one minute that any of this criticism affects or in any way directs the way judges in New Hampshire decide cases or write the law."("Write the law"?? – Freudian slip, that!) Such are the judicial arrogance, isolation from reality, and state of denial that are at the root of the Claremont debacle.

William F. Batchelder:

The Independence of the Judiciary in New Hampshire Revisited

(From The New Hampshire Bar Journal, June 1998, pages 62-70)

I. INTRODUCTION

In the first issue *of the New Hampshire Bar Journal* in 1959, an article appeared entitled, "The Independence of the Judiciary in New Hampshire."[1] It was written by New Hampshire's highly respected constitutional lawyer and legal historian, the late Richard E Upton.[2] Mr. Upton took the reader on a fascinating journey through the first two centuries of our state's judicial development.[3] Undoubtedly he surprised many readers when he pointed out the fragile foundation upon which our courts were positioned.[4] His article is replete with accounts of the exercise of the so-called "people's right to reconstruct" the judiciary by legislative action in reorganizing the courts.[5]

The trial court and the law court were summarily removed and reconstituted by legislative action seven times between 1813 and 1901.[6] In some instances the changes have been motivated by conflicting and opposing political views of the judiciary's role in government, a patent "throw the rascals out and to the victor belongs the spoils" view of democracy and perhaps occasionally a combination of the two.[7]

Mr. Upton set the stage for what has become an era of substantial and far reaching fundamental change in the status of the New Hampshire judiciary when he wrote,

> The two major courts have not been tampered with since 1901. The bitter feelings of the post-civil war years, which accounted for so much of the "political retaliation," have largely subsided...subsequent to the defeat of the proposed constitutional amendment in the Convention of 1901**,** a "gentlemen's agreement" was reached between the leaders of the two major political parties, to the effect that, in future appointments to the two major courts, members of both political parties would be represented, with the party in power retaining only a bare majority of the seats. No doubt this agreement was an effort to avoid a repetition of the unhappy record of the last century. Since 1901, this agreement has been substantially complied with, down to the present day.[8]

Against this political and constitutional landscape I have been asked to comment upon concepts of judicial independence as they exist today in New Hampshire. As an abstract term judicial independence implies freedom from constraints which inhibit the free exercise of the judicial function as its myriad tasks are met in interpreting the constitution and putting the law into play in the resolution of disputes arising within society. In order to focus our attention regarding judicial independence in the context of the present we must know what has transpired since the Upton article and in the process occasionally reach into the past for historical background.

First Circuit Court of Appeals Chief Judge Juan R. Torruella recently addressed the subject of judicial independence in the *New Hampshire Bar News.* He divided the subject matter into two components: institutional independence and decisional independence. He stated that the "heart of the matter" concerning judicial independence is "not the personal benefit of judges, but rather the protection of those who appear before the courts and those affected by their decisions."[10] In other words, it is the general public and all who come in contact with the courts who are the direct beneficiaries of a truly independent judiciary. The Chief Judge's language is directly on the mark when he writes,

> The bedrock principle to which I am referring is legitimacy. It is legitimacy that is the foundation of our judicial process. If the independence of the judiciary is eroded by extraneous influences, be they ideological or political, and even if such influences affect only a small percentage of the cases, the validity of all cases will become suspect and the faith of the people in the justice system will be compromised.[11]

A third important component of judicial independence in New Hampshire is its independence within our American scheme of federalism. The civil rights and liberties of those within our boundaries are extensively set forth in Part I of our 1784 Constitution.[12] To the extent that our Supreme Court interprets such rights and liberties more expansively than their counterparts in the Federal Bill of Rights may be interpreted by the United States Supreme Court, we may enjoy a modicum of independence and freedom slightly greater than that enjoyed throughout the remainder of the country. New Hampshire is far from alone in defining liberty according to the interpretation of its own constitution. An increasing number of states follow a similar course as ours. In some limited instances we may be one of the laboratories in the federation of states which was contemplated by Jefferson.[13]

I will touch first upon that aspect of judicial independence which is institutional, secondly I will offer some views of decisional independence and lastly I will discuss the recent origins of federal independence. Justice Oliver Wendell Holmes, Jr. has written that "a page of history is worth a volume of logic"[14] and in keeping with that sentiment we look to history, to our roots to find rationality in what we proclaim and what we do.

II. HISTORICAL ANALYSIS AND INSTITUTIONAL INDEPENDENCE

As in any venture, a good place to start is at the beginning. A firm and strong historical argument for judicial independence is found in the Declaration of Independence. In signing that great document our New Hampshire representatives Josiah Bartlett, William Whipple and Matthew Thornton joined the other signers in setting forth the lengthy bill of particular grievances against the King of England which included language which has significance for us today.

> ... He has obstructed the Administration of Justice by refusing to assent to Laws for establishing Judiciary powers... He has made judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries... For depriving us, in many Cases of the Benefits of Trial by Jury...

This language speaks for itself and is reflected in the equally powerful language of our own 1784 Constitution. Part I Article 35 provides,

> It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme judicial court should hold their offices so long as they behave well; subject, however to such limitations, on account of age, as may be provided by the constitution of the state, and that they should have honorable salaries, ascertained and established by standing laws.[15]

Judicial independence both conceptually and in fact has a strong foundation in the history of both our nation and state. The words of the two documents express in clear phraseology what was in the minds of those who were "present at the creation." These were the predicates of what was to follow.

After the publication of the Upton article in 1959, the first step toward firming up the underpinnings of institutional judicial independence in New Hampshire's was the establishment of the comprehensive system of District Courts much in the same form as we know it today.[16] This change in the law was unrelated to the Upton commentary and was the product of Judicial Council activity.[17] In 1955 the Legislature passed a statute, Ch. 335, sees. 1-3, which directed the Judicial Council to "institute a study of the jurisdictional limits of municipal courts in this state to determine whether said jurisdiction should be enlarged, or whether district courts should be established in order to improve the local courts of the state."[18]

The Council went about its task and reported its findings in its 1956 biennial report and recommended the creation of a comprehensive District Court System.[19] This system was created by the Laws of 1963, Ch. 331.[20] Although the suggested statutory language contained in the report looked to an effective date of 1957,[21] the change took seven years to become law. The delay gives stark witness to the observation many years ago of the late Chief Justice of New Jersey, Arthur Vanderbilt, when he said in effect that those who undertake judicial reform should not be short of wind.

The precise language of section 3 of the enabling law becomes a focal point of New Hampshire's institutional judicial independence when analyzed against its history. The statute, in part, provides that,

> Whenever possible, justices and special justices shall be chosen from qualified persons who are also members of the bar of New Hampshire. The tenure of office of the persons serving as justices and special justices of the municipal courts hereby constituted and

> established as district courts shall not be affected hereby, but such justices and special justices shall continue in office as justices or special justices of their respective districts.[22]

Thus for the first time in history a major overhaul and reconstitution of a jurisdictional level of New Hampshire's courts took place without the ousting of the judges in office at the time by bills of address. This fact stands out as a signal that the drafters of the bill recognized the tenure of the judges' constitutional appointments and perhaps gave life and credibility to the early comment by Justice Story that what had happened in the past as reported by Mr. Upton was probably unconstitutional.[23]

Another important step in the long road to the independence of the judiciary occurred on November 8, 1966, almost 182 years after the adoption of the State Constitution, when an amendment was adopted giving constitutional status to New Hampshire's Supreme and Superior Courts:

> The judicial power of the state shall be vested in the supreme court, a trial court of general jurisdiction known as the superior court, and such lower courts as the legislature may establish under Article 4th of Part 2.[24]

This was the most important step taken in two centuries to ensure institutional independence for New Hampshire's courts and their placement as equals among equals with the executive and legislative branches of our government. The fact that the courts survived until then, having been tossed about by the winds and currents of varying degrees of political passion, is a strong statement attesting to the integrity, steadfastness and vision of the majority of New Hampshire's political leaders and members of the bar.

Constitutional Conventions held in 1948 and 1956 recommended that commissions be established to prepare for future conventions. The legislature responded by establishing such a commission consisting of nine members.[25] Subsequently the 1963 commission, in addition to seeking constitutional status for the Supreme and Superior Courts also recommended a further amendment which would have greatly limited the broad and almost unchecked power of the governor and council to remove judges upon the address of both houses of the legislature. The purely political motives of removing judges in the past by address had been, for lack of more substantive grounds, claimed to be in the "public good."[26] The commission report suggested an amendment which would limit the opportunities for address to situations short of grounds for impeachment and offered to limit address to instances of "incompetence, misconduct, or mental or physical inability to perform the duties of their office."[27] The commission language did not survive the convention.

The language which found its way to the ballot asked the voters,

> Are you in favor of an amendment limiting the power of the Governor and Council to remove any commissioned officer upon the address of both houses of the legislature to instances where reasonable cause exists, stated fully and substantially in the address, which cause shall not be sufficient grounds for impeachment, and provided that no officer shall be so removed unless he shall have had an opportunity to be heard in his joint committee of both houses…?[28]

The amendment passed 119,640 to 35,304. Thus a little due process was introduced in the removal mechanism.

These two amendments were instrumental in the ascension of New Hampshire's judiciary to a state of equality with the other two branches of our government. In following the path of their adoption we learn that the constitution was vague on such matters as judicial independence. Vague, not due to fear of a strong judiciary but because its importance in the preservation of

freedom was taken for granted by more than a hundred years of history and experience with a powerful judiciary deeply rooted in English law. Specificity with the structure of the legislative and executive branches was apparently the order of the day at the framers' convention because a new government unlike any other was in the process of formation. There was no historical precedent for a democratic government of free citizens. There was precedent for the judicial function. It was understood and relied upon to support the important role it has played throughout the last two centuries of English law. At the outset it was taken for granted.

After the blockbuster changes ensuring institutional judicial independence brought about as a result of the 1964 constitutional convention, the results of the 1974 and 1984 constitutional conventions seem tame and modest. The '74 convention may be remembered for what it accomplished in the area of Supreme Court rule making, and the '84 convention is best remembered for what it failed or refused to do.

The 1974 Commission did not recommend any amendments relating to judicial independence. There was however, a resolution introduced by one of the delegates, Maurice Geiger of District 2 in Carroll County, which designated the Chief Justice of the Supreme Court as administrative head of the courts.[29] Such a move was in keeping with a national trend toward the establishment of unified court systems throughout the country.[30] A report issued four years later by the National Center for State Courts on March 9, 1978 indicated that twenty-six states recognized the chief justice of the court of last resort as the administrative head of the court system.[31] In twenty of those states the designation was by constitutional provision.[32] In seven other states the high court itself was constitutionally vested with administrative authority although in practice the authority was exercised by the chief justice.[33]

The 1974 Constitutional Convention voted that the constitution be amended by the insertion of Article 73-A:

> [Supreme Court, Administration.] The chief justice of the supreme court shall be the administrative head of all the courts. He shall, with the concurrence of a majority of the supreme court justices, make rules governing the administration of all courts in the state and the practice and procedure to be followed in all the courts. The rules so promulgated shall have the force and effect of law."[34]

The convention also voted to submit the following question to the qualified voters:

> Are you in favor of amending the constitution to provide that the chief justice of the supreme court shall be the administrative head of the state courts and that he shall, with t the concurrence of a majority of the supreme court justices make rules governing procedure in the courts?[35]

The amendment was adopted at the election of November 7, 1978 by a vote of 155,920 to 67,244.[36]

On May 31, 1974 a rather unheralded two page *per curiam* opinion worked its way into the New Hampshire Reports. *State v. Morton Whippie,*[37] was an appeal from a guilty verdict in the Keene District Court by Judge Lichman on a charge of driving while under the influence of intoxicating liquor. The theory of Mr. Whippie's appeal was more imaginative than most. He claimed a denial of a fair trial, equal protection and due process by reason of the fact that he was prosecuted by a state trooper in full uniform wearing a sidearm in the courtroom.[38] The Supreme Court did not agree that Whippie's rights had been compromised and overruled his exception.[39] However, in a strange turn of events the court stated,

> [W]e agree, however with both the defendant's counsel and the assistant attorney general in their position expressed at oral argument, that apart from arming court officers for

> security, side-arms have no place in a New Hampshire courtroom... not as a constitutional right of the defendant, but as a matter of deference to the court… In his courtroom, the judge, as the representative of the law and of the judicial branch of our government, is the controlling authority. ... Absent special authority from the presiding justice in extraordinary circumstances, no-one other than duly authorized bailiffs, should be armed while appearing in court. (N.H.RSA 490:4(Supp. 1973).[40]

The legislative response was quick. It passed a statute to take effect June 7, 1975,

> [N]otwithstanding any other rule, regulation or order to the contrary, law enforcement officers shall be permitted to wear firearms in any courtroom in the state. RSA 490:4-a.[41]

Over seven years passed before the issue was joined. The case arose in Belknap County when Arnold LaFrance, a burglary defendant represented by Philip T. McLaughlin, now the Attorney General of New Hampshire, moved that officers testifying in his case not be permitted to wear sidearms in the courtroom during his jury trial.[42] The chief of police of the City of Laconia, Bruce Cheney, apparently relying on the statute refused to appear in court without his sidearm.[43] The presiding judge, William F. Cann, transferred the question in an interlocutory appeal to the Supreme Court.

Judge Cann was not new to the issues in the case. A number of years earlier a particularly dangerous and potentially volatile defendant was being tried for murder, and the then presiding justice, after conferring with the Chief Justice of the Superior Court, William W. Keller, determined that public safety would best be served if only the court bailiffs were armed. Any threats posed by a defendant running amok and attempting to seize weapons from witnesses would not exist. So it was thought. The favorable experience of that particular trial resulted in a local judicial practice, not followed in all cases, that non bailiff guns would be kept out of the courtroom. Judge Cann followed the practice in the *La France* case. The appeal was a classic instance of an honest disagreement with respect to the practical application of the doctrine of separation of powers in the real world involving real people. As the appeal proceeded an event without precedent took place. Because of the importance of such a line drawing dispute among the three branches of government, fourteen past presidents of the New Hampshire Bar Association joined in the filing of an amicus brief.[44]

The Supreme Court ruling was handed down on November 23, 1983.[45] Based on a separation of powers analysis against an historical background the Court held that the statute was unconstitutional.[46] The reference in the case to Part II 73-a of the constitution was at best a passing comment that the language merely stated what had been an inherent power of the judiciary all along; namely, that the Supreme Court had the power to make rules concerning practice and procedure in the courtroom.[47] There was, at least in the minds of some politicians, political capital to be garnered from speaking out against the court's decision.[48] As matters later turned out, this view was without much merit but it generated enough steam to lay the groundwork for the Constitutional Convention of 1984.

If there was any doubt that the *LaFrance* decision sparked a public discussion of the role of the judiciary in our scheme of government one need only take a look at the resolutions offered at the convention.[49]

The '84 convention, presided over by Richard F. Upton, began with no judicial matters proposed by the planning group. This did not last long. At least thirteen separate resolutions were offered affecting the judiciary, many of them apparently in response to *LaFrance*.[50] They ran the gamut of a suggested constitutional provision requiring policeman to wear guns in court, retention election of judges, dissolution of the integrated bar, election of judges, diminution of the court's

rule making function, sentencing guidelines, and others in some ways duplicitous of the ones mentioned.[51] None were adopted by the convention.[52]

This article has touched upon the bedrock changes in the *constitutional* authority of the New Hampshire judiciary. There have also been statutory measures and administrative realignments which have lent support to institutional judicial independence. The creation of the unified court system at the 1983 legislative session for the first time placed responsibility for the maintenance of the judicial branch in the hands of the state and relieved the towns, cities, and counties of the burdens they had borne since 1784.[53] The movement toward a full time judiciary at the probate and district court levels is important. In the final analysis however, the important changes took place at the 1964 constitutional convention.

A good place to end this aspect of this discussion is where it began; with some thoughts from Richard F. Upton. The September 1990 issue of the N.H. Bar Journal[54] includes the record of an interview of Mr. Upton conducted by his son Matthew. Matthew is an attorney who clerked one year for me at the Supreme Court. In commenting on the jurisprudence of former Chief Justice, Frank Rowe Kenison Mr. Upton stated, "It was his long tenure and the experience which went with it which gave him the status to accomplish what he did. Life tenure to age 70 and independence under the Constitution made this possible. Personally, I have always opposed the election of judges."[55]

III. DECISIONAL INDEPENDENCE

Turning our attention to the matter of decisional independence we start with the premise that the New Hampshire judiciary benefits greatly from the fact that judicial appointments are for "good behavior until age 70."[56] This fact alone insulates the decision making process from political pressure and the demands of a particular constituency. The judge is free to decide the issues in each case according to his or her best judgment according to the facts and the law without fear of retaliation at the polls or in matters of fund raising at election time.

It is as likely as not when one picks up a publication of any kind today dealing with the judiciary or organized bar, he or she will find an article addressing such concerns as diminishing judicial independence, judge-bashing or lawyer-bashing so called. The writers of such articles are usually members of the bar, office holders or committee members of local, state and national bar associations, members of the judiciary and occasionally members of the print media, law school faculty and writers who have a special interest in the third branch of government The increasing incidence of such commentary is usually the result of attacks on the judiciary which are ill-founded or unjustified.[57]

It is this type of criticism that causes concern. There is plenty of room for principled criticism of the courts, judges and the products of their efforts. The courts benefit from such political discussion and debate. Judges are human beings capable of mistakes. Brisk free-wheeling comment on matters of public affairs is at the very essence of our democratic institutions and was recognized as such by the framers. The public, in the final analysis, may be greatly enriched by the exercise of the freedoms of expression protected by constitutional doctrine. But the obverse is true as well. Society as a whole, not the judges, becomes the victim of attacks against the judiciary which are without foundation or so unprincipled as to foment retaliatory measures in the absence of any factual basis. After all, it is the judiciary which is the protector of individual rights and the interpreter of the constitution. This is so even when such action by the courts runs counter to prevailing public sentiment and the political winds of the moment. Only where there is a strong and independent judiciary are the people protected from the tyranny of the majority. This is precisely what our framers visualized.

New Hampshire's citizens possessed the great rights of free expression from the inception of our constitution; Part I, Art. 22 provides "Free speech and liberty of the press are essential to the security of freedom in a state. They ought, therefore, to be inviolably preserved."[58] Our framers did not end it there. They went on in Article 30 and provided that "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatever."[59]

If criticism in the media is fair, principled, and reasonably enlightened, the courts should welcome it. Judge Torruella's prescription "for a thick skin and a heightened awareness that we are not infallible" is well taken. It is the unfounded criticism that is more nettlesome and which has undoubtedly given rise to all the recent activity concerning judicial independence. An incident in New Hampshire which took place almost a quarter century ago comes to mind.

Senior Associate Justice William R. Johnson of our Supreme Court as a trial judge presided over a trial in Grafton County involving a prosecution under New Hampshire's obscenity laws. The case involved films shown at a Bethlehem theater. The prosecution was based on a statute which provided in part that, "Material is 'obscene' if, considered as a whole, *to the average person* "(emphasis added).....[60] In his instructions to the jury Judge Johnson stated, "We are not concerned with the effect that these films have on isolated individuals." In light of the statute's reference to *the average person* standard the judge's comment was a correct statement of what the legislature had passed into law.

The remark drew a heavy and critical response. In a front page editorial in the Manchester Union Leader of March 19,1975, entitled A VICTORY FOR SMUT the editorial writer commented, "[The governor] has very ably commented on the outrageous charge by that professional 'liberal' and leftist Superior Court Justice William Johnson, who said, 'We are not concerned with the effect that these films have on isolated individuals.'[61] The editorialist went on and wrote “Judge Johnson’s outrageous charge to the jury in this trial calls for the legislature to pass laws which limit the terms that judges can serve. Life terms give judges, not independence, but arrogance. They also allow them to be free from restraint and correction by the voters who have to suffer their judicial behavior, as in this case."[62] That seems pretty strong medicine for judicial conduct that consisted of making a correct statement of the law as defined by the legislature, and nothing more. It would appear that the criticism in this case was unfounded.

It is this kind of criticism which has given rise to the ABA November 1997 formation of a Committee on Judicial Independence presently chaired by former FBI and CIA director and federal judge William Sessions. The task of the committee is to formulate a response to criticism which is unfounded and lacking merit. All of us are witnesses to an apparent shift in the manner and content of political discourse in recent years. Today there often seems to be more of an "us versus them" approach in public statements, less regard for common courtesy and respect, and a resort to language that unfortunately is careless, mean spirited, and mendacious. It all the more troublesome when such comment is attributed to members of the bar and political leaders who seek or hold high public office. It was this kind of comment that Chief Justice Brock spoke out against with compelling language at the 1998 Mid Winter Meeting of the N. H. Bar.[63]

The same indictment may be made against that small segment of the press which is not responsible or pursues an agenda where objectivity and even handedness take second place. Nevertheless it is a fact of life which must be dealt with. I do not think for one minute that any of this criticism affects or in any way directs the way judges in New Hampshire decide cases or write the law. There is yet another side to this and that is if the comment is unfair and is repeated many times, or it is blatantly outrageous in the first place the credibility of the source is greatly diminished and the public probably doesn't pay much attention to it anyway. The fair question

then becomes, if irresponsible comment doesn't affect the work of the courts why are we concerned with it. The answer is simple. To the extent such comment is left unanswered it encourages more of the same. The indirect effect is that it casts doubts in the public mind about the integrity of the system and this in turn finds expression at elections and in legislative forums which may have a direct effect upon the judiciary's ability to properly function and serve the public as it has these past two centuries.

IV. JUDICIAL INDEPENDENCE V. FEDERALISM

The last aspect of judicial independence for consideration in this article is its role in New Hampshire's federalism.

The departure from our earlier jurisprudence in this aspect of constitutional analysis is of relatively recent origin. It stems from the arrival in our Supreme Court of a case of first impression involving a misadventure by Forrest Ball.[64]

On June 14, (Flag Day) 1981 Mr. Ball operated his 1973 topless Toyota Land Cruiser on route 120 in Claremont. The inspection sticker on the vehicle had expired and this fact resulted in his being stopped by a state trooper accompanied by a trooper trainee.[65] While Mr. Ball was retrieving his registration, one of the officers noticed a partially used hand rolled cigarette in an ashtray.[66] The officer seized the cigarette, smelled it, and determined that it contained marijuana.[67] The question simply stated was at what point did the officer have sufficient cause to seize the cigarette.[68] Under prevailing United States Supreme Court 4th amendment law suspicion was enough to carry the day.[69] The defendant sought protection under the New Hampshire Constitution as well as the national constitution and claimed that suspicion should have ripened into probable cause in order to justify the seizure.[70] The evidence was properly admitted at trial on the basis of the 4th amendment.[71] The case was thus presented on appeal. Attorney Mark A. Larsen, counsel for the defendant, urged a separate state constitutional analysis and relied in part on the content of an article which had appeared in the *Harvard Law Review*, written by one of the great jurists of this century, U.S. Supreme Court Justice William J. Brennan, Jr.[72] The article was appropriately entitled *State Constitutions and the Protection of Individual Rights.*[11] The persuasive language of Justice Brennan carried the day for Mr. Ball:

> But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed.[74]

The language of the New Hampshire Supreme Court in *State v. Ball* is reflective of Justice Brennan's views:

> This court has historically viewed the rights of people in light of both the United States Constitution and the Constitution of the State of New Hampshire... While the role of the Federal Constitution is to provide the *minimum* level of national protection of fundamental rights, our court has stated that it has the power to interpret the New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution, citations omitted.[75]

Independent state constitutional analysis is looked upon favorably by the United States Supreme Court. In, *Michigan v. Long*[16], Justice O'Connor wrote,

> The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on "the limitations of our own jurisdiction." The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than advisory Opinion."[77]

State v. Ball thus brought about a substantial turn in the road on the course toward judicial independence and placed New Hampshire near the vanguard of many states which now pursue the same state constitutional primacy.

V. CONCLUSION

In bringing these comments to a close, some thoughts remain as the distillate of the process of marshalling material and examining it both in the abstract and in context. With respect to the 1964 Constitutional Convention which laid the groundwork for constitutional status for the Supreme and Superior Courts one is led to the following observation. At the time Richard Upton wrote his article in the 1959 NH Bar Journal,[78] its editor in chief and founder was attorney John W. King, later to become governor and Chief Justice of the State. Attorney Joseph Millimet was legal counsel to Governor King during part of his administration and chair of the planning commission for the 1964 convention. Richard Upton was the president of the convention. As one reads the various documents and articles leading up to the adoption of the amendment giving New Hampshire's judiciary true independence it does not require a lyrical leap to say that the fact that the paths of these three giants of the New Hampshire Bar converged in the early 196os was magnificently catalytic. They were lawyers of vision, outstanding intellect, a sense of history, courage, political skill and common sense. New Hampshire is deeply in their debt.

Our own constitution in Part I Art. 37 advises that the branches of government "ought to be kept as separate from and independent of each other as the nature of a free government will admit.....consistent with union and amity."[79]

Alexander Hamilton in *The Federalist No. 78* urges tenure of judicial appointments as a requisite to the success of the judiciary in a government of divided powers. Respect for tenure was buttressed in the constitution as a result of the 1964 convention and recognized in the phasing in of the District Court system. It was later shown in the defeat of the efforts to elect judges at the 1984 convention. New Hampshire has shown it fears a judiciary dependent upon political popularity for its existence.

There will always be tension between and among the three branches. This is both welcome and healthy for democratic government as each branch secures its role in the life of the state. So long as the tension is enlightened and *respectful* our government will succeed and prosper. For many years on the trial bench I told juries that the standards of care which govern our activities in society were the sum of the experience of human conduct articulated by legislatures and common law judges into understandable rules of behavior. They involve self restraint, common sense, good manners and plain decency. There is no reason why the dialogue among the branches should take place on a lesser plateau. This does not mean that spirited discussion and debate is out of bounds.

Unwarranted attacks on the judiciary should be met with measured responses pointing to the fallacies in the underlying report or comment. Much of this task will fall on the bar or on those whose knowledge and skills empower them to know that what is reported is false. Guidelines for the occasion and manner of responsive measures *are* being formulated by various bar groups. Bear in mind, it is not the judge who stands to be diminished. It is the legitimacy of the process.

There is another, and in my view, a more important task which the bar is undertaking with great distinction at the present time. That is the task of education which is presently being conducted in an array of levels and venues. There is unfortunately a vast lack of understanding concerning the separation of powers and the role of the judiciary in our government. If the New Hampshire Bar is to strengthen democracy it must educate our citizens.

With respect to state constitutional primacy it is my hope that it will be nurtured. New Hampshire citizens Morton Whippie, Arnold LaFrance and Forrest Ball are not names that are likely to pop up around the dinner tables of New Hampshire households. Their modest involvements with the courts have made a mark on the constitutional definition of New Hampshire's judicial turf. Constitutional interpretation and development is dynamic, never static. Our revolutionary forbears warned that the price of liberty is eternal vigilance. We might add that we must be equally vigilant to keep the concept of judicial independence a reality and keep our courts out of the political arena. We should guard against those politicians who would "bring democracy" to the judiciary and call for the popular election of judges. Samuel Johnson was on the mark many years ago when he wrote that "patriotism is the last refuge of a scoundrel."[80] New Hampshire has benefited greatly from the judicial selection process set forth in the constitution. Gubernatorial nomination and Executive Council confirmation keep the process close to the people. At the same time, the process protects those who would sit in judgment among us from the high burden of political obligation.

ENDNOTES

1. Richard F. Upton, *The Independence of the Judiciary in New Hampshire,* 1 N.H.B.J. 28 (July 1959).
2. *Id.*
3. *Id.*
4. *Id.* at 28-29.
5. *Id.* at 29-35.
6. *Id.* at 30-35.
7. *Id.*
8. *Id.* at 35.
9. Juan R Torruella, Editorial, *On the Subject of Judicial Independence,* N.H. Bar News, Jan. 7,1998 at 4.
10. *Id.*
11. *Id.*
12. N.H. Const, part I, Bill of Rights.
13. See *also, New State Ice Co. v. Liebmann,* 285 U.S. 262,311 (1932) (Brandeis, J. dissenting).
14. *New York Trust Co. v. Eisner,* 256 U.S. 345,349 (1921).
15. N.H. Const, part I, art. 35.
16. 1955 N.H. Laws 335:1-3.
17. *Id.*
18. 1955 N.H. Laws 335:1-3.
19. New Hampshire Judicial Council, 1956 Biennial Report (1956). At this point a small anecdotal offering is germane to the Judicial Council's findings. During the week after the Supreme Court issued its opinion in *State v. Reinstiema,* 101 N.H. 286, in April,1958, I represented a client in the Plymouth Municipal Court who was charged with the offense of operating a motor vehicle while under the influence of intoxicating liquor. Chief Justice Kenison's opinion in the case dealt with the integrity of evidence and required the state as part of its case in chief to trace the blood sample to the accused before the results of the test for alcohol content could be admitted. *Id.* at 288. I found myself in the rare but fortunate position of having a shift in the law after arrest but before trial announced in my favor by the State's highest court.

The dividend thus obtained seemed all the more valuable because it resulted from absolutely no effort on my part. My client entered a plea of not guilty and proceeded to trial. The State offered no proof other than a letter from either the motor vehicle department or the state laboratory that the blood sample belonged to my client. At the dose of the State's case I moved to have the matter dismissed and in support offered the judge a copy of the advance sheet of the opinion. He found my client guilty. I had the temerity to ask the court how he reconciled his finding in light of the Supreme Court opinion. He looked at me, my client and the chief of police and in words I remember well to this day he said, "They're wrong."

20. 1963 N.H.Laws, 331:1-10.

21. New Hampshire Judicial Council, 1956 Biennial Report (1956).

22. 1963 N.H.Laws331:1 (§502-A:3).

23. Upton, *supra* at 37-38.

24. N.H. Const, part II, art. 72-a.

25. Commission to Study the State Constitution, *Report to the Fifteenth Constitutional Convention,* 18 (1964). Also Chapter 186, Laws 1963.

26. *Id.*

27. *Id.*

28. 1964 N.H. Jour, of Const. Conv. 309.

29. 1974 N.H. Jour, of Const. Conv. 535-6.

30. See *generally,* Standards Relating to Court Organization, Standard 1.33 Administrative Authority, 1974 A.B.A. Comm. On Standards of Jud. Admin. 81-5.

31. Memorandum from the National Center for State Courts, Research and Information Service 78.042,1 -2 (March 9, 1978) (on file with the New Hampshire Archives).

32. *Id.*

33. *Id.*

34. 1974 N.H. Jour, of Const. Conv. 435.

35. *Id.* Upon the introduction of the resolution the following dialogue took place between and among three delegates:

Del. WILLIAMSON of Goshen: *Does this in any way increase the powers of the courts to levy expenses on the counties?*

Del. NIGHSWANDER of Gilford: *It has no effect on this whatsoever. This is purely an administrative measure in order to have a unified system with the Supreme Court at the top. There is a statute on the books now and this amplifies it and makes it constitutional; a unified court.*

Del. GROSS of Concord: *The last sentence of the proposed amendment reads: 'The rules so promulgated shall have the force and effect of law." Could you tell us what effect that sentence would have on the Legislature's ability to provide by statute for court procedures in the future?*

Del. NIGHSWANDER: *It is my understanding that the courts now have rule-making power. The rules which they make for the orderly procedure within the courts are within the jurisdiction of the judiciary. All this does is to unify the place where the rules are promulgated; that is, in the Supreme Court. At the present time, for example, the Superior Court makes rules for themselves and then they submit them to the Supreme Court for approval. But I don't think it changes the general principle that the rules of court, as far as procedure is concerned, have the effect of law.*

Del. GROSS: Is *my understanding correct that this amendment, it adopted, would nor deprive the Legislature of its right that it presently has, to regulate court procedure by statute?*

Del. NIGHSWANDER: *I would think any power that they now have, they would still have.* 1974 N.H. Jour. Of Const. Conv. 261 -2.

36. On file with New Hampshire Archives.

37. 114 N.H. 369 (1974).

38. *Id.* at 370.

39. *Id.*

40. *Id.*

41. N.H. Rev. Stat. Ann. §490:4(a) (1975).

42. 124 N.H. 171,175(1983).

43. *Id.*

44. Those who joined were Ernest L. Bell, Stanley M. Brown, Donald R. Bryant, Robert L. Chiesa, Richard E. Galway, Fred W. Hall, Jr. Arnold P. Hanson, Joseph M. Kerrigan, Paul McEachern, Jack B. Middleton, Joseph A. Millimet, Arthur H. Nighswander, David L Nixon, and N. Michael Plaut. Mr. Bell argued for the group and Richard F. Upton, also a past president of the bar, filed a separate amicus brief and also argued. Mr. McLaughlin argued. Attorney General Gregory H. Smith argued for the State, joined by Peter Heed who represented the N.H. Association of Chiefs of Police, the International Association of Chiefs of Police, Americans for Effective Law Enforcement, Inc. and the N.H. Police Association. The sponsor of the legislation, George E. Gordon, III filed a brief. 124 N.H. at 174.

45. *Id.* at 171.

46. *Id.* at 175-83.

47. *Id.*

48. See, e.g., John DiStaso, *NH Supreme Court Rules: Judges Can Ban Guns,* Manchester Union Leader, Nov. 24, 1983, at A1.

49. The reading of all the briefs in the LaFrance case is recommended to anyone whose scholarly pursuits delve into the study of our political institutions, separation of powers doctrine, our rich legal history and New Hampshire's constitutional roots. 1984 N.H. Jour, of Const. Conv. 398-413.

50. *Id.*

51. *Id.*

52. *Id.*

53. 1983 N.H. Laws 383:1-80.

54. 31 N.H. B.J. 143(1990).

55. *Id.* at 146.

56. Tenure of Office to Be Expressed in Commissions; Judges to Hold Office During Good Behavior, etc.; Removal. The tenure that all commissioned officers shall have by law in their offices shall be expressed in their respective commissions, and all judicial officers duly appointed, commissioned and sworn, shall hold their offices during good behavior except those for whom a different provision is made in this constitution. The governor with consent of the council may remove any commissioned officer for reasonable cause upon the address of both houses of the legislature, *provided nevertheless that the cause for removal shall be stated fully and substantially in the address and shall not be a cause which is a sufficient ground for impeachment, and provided further that no officer shall be so removed unless she shall* have *had an opportunity to be heard in his defense by a joint committee of both houses of the legislature.* June 2, 1784 Amended 1792 changing president to governor. Amended 1966 spelling out procedures for removal from office. N.H. Const, part II, art. 73. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour..." U.S. Const, art. Ill, §1.

57. See: *Judicature,* V. 79, No. 6, May-June 1996, *Perspectives on Court-Congress Relations,* Robert A. Katzmann, pp. 303 - 309; *Id.,* Louis H. Pollak, 299 - 302; *Judicature,* V. 80, No. 2, Sept-Oct 1996, *What is Judicial Independence?,* pp. 73-83; *Judge's Journal,* V. 37, No. 1, Winter 1998, *Judicial Independence Revisited,* Norma L. Shapiro, pp. 28-46.

58. N.H. Const, part I, art. 22.

59. N.H. Const, part I, art. 30.

60. N.H. Rev. Stat. Ann. §650:1, IV (1995).

61. Editorial, *A Victory for Smut,* Manchester Union Leader, Mar. 19, 1975, at A1.

62. *Id.*

63. Chief Justice David Brock, Address at the 1998 Mid-Winter Meeting of the N.H. Bar (Jan. 22, 1998) (transcript currently available at the N.H. Supreme Court Web Page, http://www.state.nh.us/courts/supreme.htm).

64. State *v. Ball,* 124 N.H. 226 (1983).

65. *Id.* at 230.

66. *Id.*

67. *Id.* at 230.

68. *Id.* at 230-1.

69. *Id.* at 235.

70. *Id* at 230.

71. *Id.* at 235.

72. William J. Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv.L Rev. 489 (1977).

73. *Id.*

74. *Id.* at 491.

75. *Ball*, 124 N.H. at 231.

76. 463 U.S. 1032 (1983).

77. *Id.* at 1041-2.

78. Upton, *supra.*

79. N.H. Const, part I, art. 37.

80. Letter from Samuel Johnson to Lord Chesterfield (April 7, 1775).

This is a well-written but superficial and conventional apologia for judicial activism. It focuses on implicit constitutional limitations on the Legislature, but ignores the express limitations on the judiciary's authority to enforce its views of them found in Articles 8, 12, 28 and 29 of Part I. It ignores, also, the lack of any historical or constitutional basis to assume that the judiciary's opinion of the constitutionality of a legislative act is entitled to precedence over that of the Legislature. It raises the spectre of legislative mischief while ignoring the very possibility of any from the judiciary. It fails to acknowledge that the dangers from a bad precedent are certain to be worse - by reason of being more difficult to correct - when it comes from an unaccountable judiciary instead of a Legislature that is subject to biennial elections. Finally, it is blind to the fact that the panoply of "rights" determined by the Court to emanate from the word "cherish" found in Article 83 of Part II is judicial policymaking, pure and simple. This article is testament that, when the Constitution is entrusted to judges and law professors, representative government is not safe.

Professor Richard Hesse:

The Legislature, the Court and the Constitution

(From The New Hampshire Bar Journal, March 2000, pages 38- 45)

INTRODUCTION

Among other consequences of the New Hampshire Supreme Court decisions in *Claremont School District v. Governor*,[1] the relationship between the legislature and the judiciary has been subjected to strain and reexamination. While comity (or the lack thereof) among the institutions of government is an important feature in a representative system of government, the basis for the relationship of the judiciary to the legislature is the constitutional limitations imposed on the legislative and judicial powers. When one considers that the legislature is proactive and the judiciary is reactive, the potential for tension between the branches is magnified. It is not surprising that sharp differences of opinion arise between the legislature and the judiciary even on basic issues including the proper role of the court in determining and imposing constitutional limitations.

Discourse following the *Claremont II* decision[2] has sometimes reached extravagant lengths. The legislature has been urged by some of its members to simply disregard the *Claremont II* decision on grounds that it exceeds the proper authority of the Court. Others asserting the same claim have been more modest in their reaction by acknowledging that the legislature cannot ignore the order of the court without creating a constitutional crisis.

What is most interesting is the extent to which persons asserting academic and scholarly credentials have expressed unprecedented views regarding constitutional limitations without challenge from the legal community except from the court itself and those lawyers most immediately associated with the prevailing side in the *Claremont* litigation.

This article reviews the New Hampshire Constitution's limits on legislative power and the New Hampshire legal traditions in applying those limits. In the last analysis, critics of judicial power may discover that their objections are not that the Supreme Court overstepped proper bounds in the *Claremont* decisions but rather that the Court possesses the power to interpret and apply constitutional limits on the exercise of legislative power.

THE TRADITIONS

Seven months before the Declaration of Independence was approved in 1776, New Hampshire framed its first constitution based on the dual propositions that government should be subject to popular control and that the power of government should be limited. That first constitution was brought under heavy criticism for a variety of reasons including especially the failure to provide adequate guarantees of the rights of the people in the face of a powerful government. A constitutional convention labored through several drafts and "final" products before it produced a version acceptable to the electorate in 1783. The most prominent feature of that constitution, the same one which has governed New Hampshire since 1784, is a detailed Bill of Rights guaranteeing *each* citizen an array of rights.

An integral element of the system of guaranteed rights for individuals in the New Hampshire Constitution is a system of checks and balances designed to prevent any single branch from exceeding the limits of its powers.[3] And an important feature of the separation of governmental powers was the creation of an independent judiciary.[4] That basic arrangement of power spelled out in the 1784 Constitution remains unchanged over 216 years notwithstanding that the people of New Hampshire have produced approximately 250 changes through nearly 150 amendments in that period of time. It can be noted that a large number of the changes and amendments occurred in 1792 when the Constitution and some of its institutions were revised. Left untouched by that major effort and all efforts since was the basic arrangement of government with limited powers, of guarantees for personal freedoms and independent branches of government with the responsibility to check the power of co-equal branches.

These generalities regarding the arrangement of power in the state government do not answer the hard questions. Precise limits on legislative power can be found and are discussed below. Precise limits on the judicial power are harder to come by since the constitution is not explicit. The power and procedure for the removal of judges can be found in the constitution,[5] but the exercise of judicial power is addressed only is the most general and negative terms where the grounds for impeachment are laid out: bribery, corruption, malpractice or maladministration. Thus there remains plenty of room for debate about the enforcement of limits on legislative and judicial power. That debate is most meaningful when it arises out of the actual function of the system and not out of

academic questions or abstract propositions. Thus more is to be learned by observation of the operation of the system over the more than 200 years of history than can be gained from the self-serving positions that might be asserted in a contemporary debate over a single decision.

DISCUSSION

Judicial Review

The concept of judicial review in the ordinary sense of judicial consideration of the acts of the legislature was a routine matter in the common law by the time New Hampshire declared its independence and framed its early constitutions in the last quarter of the 18th Century. Judicial review was an accepted proposition when it amounted to interpretation and application of the law. The evolving principles of statutory construction guiding the court in its "review" showed great deference to the intention of the legislature with an eye toward developing an interpretation that would carry out the legislative purpose.

The advent of a written constitution with expressed limits on the power of government raised a "new" dimension of judicial review. The prospect of challenges to an act of the legislature on grounds that the constitutional limits had been exceeded cast the court in a novel position - one unlike routine judicial review. Instead of seeking an interpretation that would carry out the legislative purpose (routine judicial review), the court's task could well put it in the position of declaring the legislative purpose to be invalid or declaring that the means chosen by the legislature to achieve its purpose did not satisfy constitutional standards.[6]

Tension is an unavoidable by-product of the scheme. Legislators regard themselves as reasonable and intelligent persons able to read and understand the constitution. Further, legislators act under a commission from the electorate and stand accountable in the court of public opinion. It is not surprising that offense would be taken at the prospect of a small group of executive branch appointees holding their positions for life without any accountability to the electorate declaring invalid the considered judgment of hundreds of elected officials.[7] But that is exactly the constitutional arrangement which is the hallmark of American constitutions at both the federal and state levels.

Further offense may be taken by the few options open to the legislature when it believes the court has over-stepped the bounds of judicial authority. The straightforward political solution is an amendment to the constitution explicitly addressing the decision of the court. But the New Hampshire Constitution makes amendment a difficult and laborious task and requires the support of a super majority at every level of the process.[8] On the other hand, amendments to the New Hampshire constitution are relatively frequent and numerous; thus response to an unpopular judicial decision by way of constitutional amendment is not out of the question.

Beyond amendment, legislators are left only with the power to remove the judges who made the unpopular decision. Removal can be accomplished by either impeachment or "address." The means of "address" is provided by Part II, Article 73:

> The Governor with consent of the council may remove any commissioned officer for reasonable cause upon the address of both houses of the legislature, provided nevertheless that the cause for removal shall be stated fully and substantially in the address and shall not be a cause which is sufficient ground for impeachment, and provided further than no officer shall be so removed unless he shall have had an opportunity to be heard in his defense by a joint committee of both houses of the legislature.

The latter part of Article 73 regarding the procedure for removal was added to the constitution in 1966. That procedure was recently employed in a wide-ranging effort to remove the Chief Justice. A part of that effort included an assertion that the Chief Justice had exceeded proper judicial authority in decisions involving the school funding litigation. The Joint Committee of the House and Senate declined to recommend removal.

Impeachment is left to common law for the most part but the power to investigate the need for impeachment is vested in the House which is designated as "the grand inquest of the state."[9] Article 17 and Article 38 of Part II constitute the Senate as a court "with full power and authority to hear, try, and determine, all impeachments made by the House of Representatives." The Senate's constitutional power to try impeachments is encumbered with important due process protections for officers subjected to the impeachment process.

Looking back over the two centuries of experience with this arrangement, it should first be noted that constitutional judicial review may have first appeared in New Hampshire as early as the last decade of the 17th Century. The great national confrontation on judicial review in 1803, *Marbury v. Madison*,[10] began as a power struggle between the executive and judiciary but as the case evolved, the court's decision declared an act of the Congress unconstitutional after an elaborate examination of the reasons why judicial power to do so was necessary.[11] A similar event marks New Hampshire legal history. It seems beyond serious question that the judicial power to set aside legislative acts was an accepted proposition by 1817 when the court was asked to strike down an act reconstituting Dartmouth College as unconstitutional.[12] The Court in that case reached the merits of the claim without challenge to its jurisdiction. The Court's decision favorable to the State was later reversed by the United States Supreme Court.[13]

It appears that New Hampshire accepted the proposition that an independent judiciary possesses the power to act as guardian of the constitutional limits and of individual freedoms. The State's own publication of the Constitution begins with a section entitled "Introduction and Overview of Our Constitution History" prepared by Lorenca Consuelo Rosal for the 1984 Bicentennial of the New Hampshire Constitution. Speaking to the issue of an independent judiciary, Ms. Rosal declares:

> If the constitutional rules are to continue to be called by an impartial umpire we can be proud of our current system of independent judges beholden to no group or branch for their tenure in office. Judges, unlike our elected officials in the other two branches, are not meant to do what is popular, but what will protect an individual citizen's constitutional rights in the face of majority clamor.

Choice of words aside, the role of the court described is one which is supported by history and practice and is a natural consequence of the arrangement of powers in the constitution.[14]

Expressed Limits On Legislative Power

Because American thinking about government since the late 1700's is firmly entrenched in the concept of limited government, all of the constitutional provisions which expressly empower the legislature to act can be seen as limitations on government. The language of the New Hampshire Constitution does not clearly support that proposition. The major source of legislative power in the New Hampshire Constitution is found in Part II, Article 5:

> And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, instructtions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing thereof....

Two critical propositions emerge from that organic arrangement. First, the legislature is given a broad scope of judgment upon which to base its decisions regarding the welfare and governance of the state. Second, the grant of power is limited by the values and provisions expressed elsewhere in the constitution. While some might be inclined to argue that a "balance" of these propositions is appropriate to assure some notion of co-equal powers in the branches of government (given the fact that the judicial branch imposes the constitutional limits), the language of the mandate for legislative power does not provide for balancing away the constitutional values. Rather, the language expressly limits the broad judgment of the legislature to those which are "not repugnant or contrary" to the constitution.

Of course, the difficulty arises in determining when a legislative judgment becomes "repugnant" or "contrary" to the constitution. For some, there may still be a lingering question of who should make the determination that the legislative judgment is contrary to the constitution; asked another way, that question asks who should interpret the constitution. As noted above, at least since 1817, New Hampshire's Supreme Judicial Court has asserted that power without serious erosion over the intervening years.

The crux of recent controversy surrounding legislative authority has been the determination of the state's obligation to provide educational services and the judgment of the legislature regarding the means by which taxes would be imposed. Those central issues in the *Claremont* cases highlight the unavoidable consequences of imposing constitutional limits on legislative action; the policy determinations made by the legislative majority, presumably representing the majority of the electorate, are overridden by the interpretation of the constitution by a small unelected group of judges. On the one hand the legislators have expressed a judgment on policy which they view as

"wholesome and reasonable" within the authority granted by Part II, Article 5 of the constitution. On the other hand, the justices are confronted with a legal dispute in which they are asked to interpret a specific provision of the constitution to determine whether the legislative judgment is "contrary" to the requirements of that provision.

The Court's process for addressing the issues in the *Claremont* cases was not invented for the occasion. A starting point in judicial precedent could well be the *Dartmouth College Case*.[15] In that situation the legislature enacted a law empowering the Governor to expand the Board of Trustees of Dartmouth College by appointment of additional members. The sitting Trustees challenged the law essentially on grounds that the College was a private institution and not subject to state control. In laying the foundation for its consideration of the specific issues, the Court spelled out some broad principles:

> A complaint that private rights protected by the constitution have been invaded, will at all times deserve and receive the most deliberate consideration of this court. The cause of an individual whose rights have been infringed by the legislature in violation of the constitution becomes at once the cause of all. For if a private right be thus infringed today, and the infringement be sanctioned by a judicial decision tomorrow, there will be next day a precedent for violation of the rights of every man in the community; and so long as that precedent is followed, the constitution will be in fact to a certain extent repealed.[16]

Thus began the long line of cases in which the New Hampshire Supreme Court has regarded its function to definitively include the task of measuring the constitutional bona fides of legislative enactments.

The court in the *Dartmouth College Case* had high expectations of the legislature and the respect which might be afforded its decisions:

> An unconstitutional act must always be presumed to have been passed inadvertently or through misapprehension; and it is equally to be presumed that every honest legislature will rejoice when such an act is declared void, and supremacy of the constitution maintained.[17]

While the logic of the court's assessment may be impeccable, human nature pushes in a different direction. Legislators have traditionally resented the reversal of the will of the legislators even when the constitutional imperatives are not seriously questioned. There remains the question of proper limits on the judicial power.

The *Dartmouth College* court was not unmindful of the call for limits on the judicial power but its view may not be reassuring:

> But we must not forget for a moment that the question submitted to our decision in such cases is always one of mere constitutional right; sitting here as judges, we have nothing to do with the policy or the expediency of the acts of the legislature.

> Legislative power is limited only by our constitutions and by fundamental principles of all governments and the inalienable rights of mankind.[18]

But in construing a "doubtful" clause in the constitution the court might properly weigh the "conveniences and inconveniences" which are produced in an effort to understand the framers' intent.[19]

As a further restraint on judicial interference with legislative policy, the court suggested a standard of review that was deferential to the legislature. The law comes to the court with a presumption of validity and can be overturned only when the court develops a "clear and strong conviction" of incompatibility with the constitution. The justification offered mirrors the justification for judicial intervention (inadvertent or misapprehension leading to repeal): blocking the legitimate exercise of legislative power imposes a limitation not intended by the people.[20]

The *Claremont II*[21] decision on taxation models this system in operation. The legislative judgment on raising public money to support education (apart from recognition of any legislative duty to do so) allowed taxes to be imposed on a local basis which in turn permitted widely differing tax rates and burdens. Putting aside an important factual determination that public school taxes were state taxes not local taxes, the court was asked to determine whether the legislative tax scheme was "repugnant" to the provisions of Part II, Article 5 which provides power to "impose and levy proportional and reasonable assessments, rates, and taxes...." Once the Court determined that the school taxes were statewide taxes, it resorted to its case precedents interpreting the requirements of the constitution:

> This article requires that "all taxes be proportionate and reasonable - that is, equal in valuation and uniform in rate." *Opinion of the Justices*, 117 N.H. 749, 755 (1977)[citation omitted]; *see Johnson & Porter Realty Co. v. Comm'r of Rev. Admin.*, 122 N.H. 696, 698 (1982) [citation omitted} (tax must be in proportion to actual value of property and must operate in a reasonable manner.)....[22]

The Court's first effort in reference to the language of the constitution and to the legal tradition in interpreting that language was to determine the constitutional policy. That done, the task then became to determine whether the legislative policy was "repugnant" to that constitutional policy. As uncomfortable as many may find the result, the court's processes in declaring a limit on legislative power were the time-honored processes by which constitutional values and limits are imposed.

Without attempting an exhaustive treatment of the time-honored traditions in this area, a few examples are helpful in showing both the general rhetoric and the application of that rhetoric. In 1902 the parents of a sickly child kept the child at home rather than sending her to public school as required by the compulsory attendance law. Unfortunately, the parents did not communicate with the school officials and were prosecuted for violation of the law. In defense of the charges the parents argued that the law was an unconstitutional violation of their parental rights. The trial court dismissed the defense as

did the Supreme Court.[23] The court reasoned that not all claims of infringement of individual rights were sufficient to limit the legislative power to enact "wholesome and reasonable" regulations. Part I, Article 3 of the New Hampshire Constitution spells out the concept:

> When men enter into a state of society, they surrender up some of their natural rights to the society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void.

Thus even though the parents could validly assert a common law right to act for the child, such a claim did not necessarily establish that the state law was repugnant to the constitution. The court went on to acknowledge both the general legislative power to enact reasonable laws and the state's duty to educate the children of the state. Under the circumstances, the legislature has the exclusive power to determine the reasonableness of the law. The court's role is limited to placing that law beside the constitution and determining whether the two can stand together.[24]

The court offered a more complete explanation of the process in *Carter v. Craig*[25] where a state tax on property passed by will was challenged. The court stated the issue before it in somewhat absolute terms: does the Bill of Rights forbid making laws that in any way limit rights secured by it or only those laws that are unreasonable.[26] Justice Young for the court began by explaining that law is made for a purpose and that the constitution as a species of law was made by the people for the purpose of promoting the general welfare of the community as a whole and not the welfare of any particular individual. The general power conferred in Part II, Article 5 would be rendered meaningless if the Bill of Rights precluded any law infringing individual liberty.[27] The limits on legislative power might go to either the purpose of the law or to its means; if either offends constitutional values, the law is repugnant to the constitution and is invalid.[28]

In *Carter v. Craig*, the question of the "reasonableness" of the means of raising taxes was in the first instance for the legislature to judge. But if the law is so unreasonable that no fair-minded person could think it reasonable, the court would have to declare it void.[29] We should first observe that the court in *Carter* imposed an even more rigorous and deferential standard than the "clear and convincing" standard in the *Dartmouth College Case*. Second, the question of reasonableness of a law might change under the circumstances and might be influenced by the understanding of the law by the framers of the constitution. The court in *Carter v. Craig* addressed that concern by noting that the validity of the law is determined by its reasonableness at the time it is enacted and not by reference to circumstances when the constitution was framed; indeed the framers must have understood that circumstances would change when it imposed the "reasonableness" standard.[30]

A more recent case is illustrative of the fact that the basics in this process have not changed dramatically although the attitudes toward individual rights have undergone a major overhaul. In 1986 the legislature considered legislation to prevent harassment of hunters, fishermen and trappers. The House asked for an advisory opinion on the

provisions of the bill including one that made verbal harassment unlawful.[31] The Court readily recognized that the regulation of hunting, fishing and trapping is a proper subject of the state's police power inasmuch as the police power extends to the protection of lives and the health, comfort and quiet of all persons as well as to the protection of property.[32] However, persons and property are subject to reasonable restraints to secure the general comfort, health and prosperity.[33] That said, the Court found that the exercise of the police power (pursuant to the "wholesome and reasonable" provision of Part II, Article 5 of the New Hampshire Constitution) may not unreasonably interfere with the individual rights to free speech provided in Part I, Article 22 of the New Hampshire Constitution.[34] Based on the breadth of the restrictions on speech and the vagueness of terms in the proposed regulation, the court found the bill contrary to the constitution and hence invalid.

Separation of Powers

A "separate" limitation on legislative powers is found in the constitutional requirement for the separation of powers. Of course, the separation of powers concept is equally applicable to the exertion of power by any of the branches of government. But the realities are that the issues before the courts almost invariably involve the assertion that the legislature or the executive is overstepping its bounds. For purposes of this article, a few illustrations involving the clash between legislative and judicial powers serve to illustrate the force of the doctrine as a limitation on legislative powers. Two modern cases surround judicial concerns over the control of the courtroom.

In 1983 the court was asked to review a conflict between a Superior Court policy barring firearms in the courtroom and a state statute specifically authorizing police officers to wear firearms in the courtroom notwithstanding "any other rule, regulation or order."[35] The court's per curiam opinion offers a discussion of the history and rationale for the separation of powers doctrine in our constitutional system. In particular, the court identifies the purpose of the doctrine in terms of the protection of the integrity of the democratic system and the assurance of political accountability.[36] The need for the doctrine is founded in the pre-constitutional experience in New Hampshire and sister states during which the exercise of judicial and executive power by the legislature led to abuses.[37] Turning to the structure of the New Hampshire Constitution, the court declares the obvious by noting that the legislative power to enact reasonable regulations found in Part II, Article 5 is conditioned by conformity with the constitution including those parts of the Bill of Rights assuring an independent judiciary[38] and requiring separation on powers.[39]

From that foundation the court employed standard rhetoric of limitation on legislative powers. An individual, LaFrance, claimed his rights were infringed by the law authorizing a police witness to wear firearms while giving testimony in court. The judicial function is to resolve the dispute by matching the act with the values in the constitution and testing for compatibility.[40] In explaining the impact of the process, the court said:

> The courts have the duty to interpret constitutional provisions. This duty may result in decisions that run counter to the present desires of the voters or their elected representatives. This is so because the constitutions of our states and of the nation are intended to be restraining documents so that the exercise of power by the majority does not go unchecked. We do not have unqualified majority rule, we have majority rule with protection for minority and individual rights. Without this limitation we would have a tyranny of the majority and lose our liberty. [emphasis in original].[41]

The basis for the court's approach to separation of powers has ancient roots.

An early clash between the legislature and the court occurred in 1817 when the legislature was persuaded to order a new trial for a disappointed litigant in a probate contest. The case had been decided by the probate court and reviewed by the appellate court (then called the Superior Court); subsequently a new trial was sought but denied by the courts. Mrs. Merrill, the disappointed litigant, turned the legislature which enacted a law ordering a new trial. When Sherburne was served with the summons for a new trial he moved to quash on ground that the law was unconstitutional.[42] Finding the effect of the law to be the reversal of a judicial judgment, the court ruled that the legislature had overstepped the bounds of legislative function and in so doing, acted contrary to separation of powers limitations.[43] A reading of the *Merrill* opinion reveals that the treatment of the issues in *LaFrance* and the instruction it offers are in near perfect harmony.

A more recent clash between the judicial branch and the legislature surrounded the determination of who should provide courtroom security.[44] No novel doctrinal developments mark the court's treatment of the issue. In summarizing past applications of the doctrine, the court looked to the function involved and the effect of the actions taken. Citing *LaFrance*, the court held that the power of one branch may not be seized by another branch in a way that threatens the freedom and sovereignty of the people.[45] Citing an opinion of the Justices, the court added that the doctrine of separation of powers is violated when one branch usurps an essential power of another branch. [46] Ultimately, the court concluded as a matter of fact that the control of the courtroom including control over security personnel was an essential judicial function which the legislature could not invade without violating separation of powers limitations.[47]

CONCLUSION

The cases involving limitations on legislative power illustrate that tensions in this area most likely do not involve conflicting understandings of the constitution. It seems beyond argument that the court can and should function to enforce constitutional provisions and that the legislature's power to enact "wholesome and reasonable" laws must be limited by the constitution. The tensions that result from judicial action to limit the legislature are noted in the earliest cases and seem inescapable given the fact that each branch serves as a check on the other and that human nature does not take kindly to being overruled. The real nub of the matter is the treatment of the specific issues that are involved in cases

rather than the treatment of the broad constitutional scheme of limitations. The *Claremont* cases involve basic disputes about the line between constitutional law and policy. No bright line exists and differing points of view produce different conclusions. Most legislators and the court agree that there is a duty to provide education but when the court quantifies that duty, as it must to answer the legal question raised by the litigation, legislators may see that as establishing educational policy, a matter within the legislative prerogative. Similarly, the court's conclusion in *Claremont II*[48] that the taxes imposed to support education were actually state rather than local taxes was based on the court's application of judicial standards while the legislators focused on the mechanics of the tax collection system to conclude that the court was wrong. Once again, the tension arises not from the system of limitations but from the specifics of the subject matter.

While separation of powers can be seen as an independent doctrine of limitations, it is more properly understood as yet another constitutional provision which limits the legislative power to enact "wholesome and reasonable" laws. If separation of powers as a limiting proposition is distinct it is because it is a structural concern going directly to the relationship between the branches of government. But in considering limitations on legislative power, separation of powers is not different from free speech, equal protection or any other constitutional provision which provides a standard against which legislation can be measured. All of those limiting values have a developed body of law not captured in the specific language of the constitution. The invocation of the developed law surrounding the constitutional value may appear to the legislator and the layperson as judicial interference with legislative authority. What we have here is the classical failure to communicate. Would that it were that simple.

ENDNOTES

1. The principal decisions in the *Claremont* series are the opinion affirming a positive *obligation* to provide an adequate education at 138 NH 183 (1993) and the opinion holding that the state breached its duty and that the state funding of public education is unconstitutional at 142 NH 462 (1997).

2. "Claremont II" refers to the invalidation of the school funding scheme found at 142 NH 462 (1997).

3. New Hampshire Constitution, Part I, Article 37.

4. New Hampshire Constitution, Part I, Article 35.

5. New Hampshire Constitution, Part II, Articles 17, 38, 39 and 73

6. See e.g. *Carter v. Craig*, 77 NH 200, 204 (1914).

7. *Merrill v. Shelburne*, 1 NH 199, 200 (1818).

8. New Hampshire Constitution, Part II, Article 100.

9. New Hampshire Constitution, Part II, Article 17.

10. 5 U.S. (1 Cranch) 137 (1803).

11. 5 U.S. at 180.

12. *Dartmouth College v. Woodward*, 1 NH 111 (1817) and see also *Merrill v. Sherburne*, 1 NH 199, 201-202 (1818).

13. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

14. *Dartmouth College v. Woodward*, 1 NH 111, 114 (1817); Opinion of Justices, 128 NH 46, 49 (1986).

15. *Dartmouth College v. Woodward*, 1 NH 111 (1817).

16. *Id.* At 114 .

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* At 114-115 .

21. *Claremont v. Governor*, 142 NH 462 (1997) .

22. *Id.* At 468.

23. *State v. Jackson*, 71 NH 552, 53 A. 1021, 1023 (1902).

24. *Id.* at 53 A. 1023.

25. 77 NH 200 (1914).

26. *Id.* at 202.

27. *Id.* at 203.

28. *Id.* at 204.

29. *Id.* at 206.

30. *Id.* at 207.

31. *Opinion of the Justices*, 128 NH 46, 48 (1986).

32. *Id.* at 49 citing to *State v. Company*, 49 NH 240, 250 (1870).

33. *Id.* citing to *State v. White*, 64 NH 48, 50 (1886).

34. *Id.* at 49.

35. *State v. LaFrance*, 124 NH 171, 175 (1983).

36. *Id.* at 176.

37. *Id.*

38. New Hampshire Constitution, Part I, Article 35.

39. New Hampshire Constitution, Part I, Article 37.

40. 124 NH at 177.

41. *Id.*

42. *Merrill v. Sherburne*, 1 NH 199, 200 (1818).

43. *Id.* at 206-211; New Hampshire Constitution, Part I, Article 37.

44. *Petition of Mone* 143 NH ____; 719 A.2d 626 (1998).

45. *Id.* at 719 A.2d 631.

46. *Id.* citing *Opinion of Justices*, 121 NH 551, 556 (1981).

47. *Id.*

48. *Claremont School District v. Governor*, 142 NH 462 (1997).

Thanks in large measure to the power of professional life and death over the legal profession that the Legislature has conceded to the Supreme Court, those in the best position to know and to alert the elected branches to the false pretenses by which the judicial branch is systematically arrogating to itself authority vested by the Constitution in the elected branches – the lawyers – prefer to remain silent. Many lawyers actually like the trend, some because they realize that the more powerful the judges, the more powerful and better employed and paid are the attorneys who litigate before them, and others because they regard the legal fraternity as an elite who should not have to endure the slow and untidy political process in order to bring about social progress as they define it. Still others are simply work-a-day practitioners who have little interest in politics and little knowledge of constitutional law or history.

Among the few Brethren of the Bar who have dared to confront the pretensions of the Supreme Court in the Claremont series of cases was – and is – Eugene Van Loan III of the Manchester firm of Wadleigh, Starr & Peters, PLLC. In his "Letters to the Educators," a series of fifteen essays written under the pseudonym "Rasputin" between January and August, 1998 following issuance of Claremont II, Attorney Van Loan provided a comprehensive critique of the Claremont case from the standpoint of the systemic abuse of judicial authority necessary to their making. These essays have an importance transcending the education funding issue, constituting a virtual seminar in political science and New Hampshire constitutional history worthy of the celebrated "Federalist Papers" after which they are modeled.

"Rasputin:"

Letters to the Educators,
The Case for a Constitutional Amendment

"Rasputin:"

Letters to the Educators, No. 1

To Debate or Not to Debate

This letter and its impending successors are being written in the tradition of the Federalist Papers and the other polemical tracts which formed the basis of the great public debate of 1787-89 about whether or not to ratify the Constitution of the United States. Like the document produced by the Philadelphia Convention over 200 years ago, the so-called *Claremont II* decision recently issued by the New Hampshire Supreme Court poses issues of transcending political significance. The big difference between the two events, however, is that if James Madison, Alexander Hamilton and John Jay were alive today, they would be writing in opposition to, not in support of, the decision.

The issues at stake go far beyond the bottom line question of whether one agrees or disagrees with the proposition that public school education is best funded in New Hampshire through a tax system that is proportional on a statewide basis. *Claremont II* implicates the very structure of our tripartite system of government which is composed of a partnership between the executive, legislative and judicial branches, each of which has its own area of responsibility and competence and each of which is subject to checks and balances when it improperly interferes with its co-equal branch. Every judicial decision which purports to interpret the Constitution inevitably insinuates the Court into law-making, but there are some decisions which cross over that indefinable line that separates the judicial function from the legislative and executive functions and which raise legitimate questions about whether we truly have a government of laws, not men. *Claremont II* is such a decision.

The Court can hardly complain if a public debate over its decision brings it into disrepute. We reap what we sow. The Court violated every canon of judicial restraint when it reached out to lecture our duly elected officials on social policy and undertook to elevate its own views to constitutional stature. Since the Court has no army to enforce its decrees, it must rely upon its ability to persuade. The reason that court issue opinions explaining their decisions is presumably to convince their readers that their decisions carry sufficient moral weight to warrant the readers' voluntary obedience. Thus, the Court must demonstrate its faithfulness to the written word which it purports to interpret, its adherence to precedent, its attention to the political and social traditions of this State, its clarity of thought, and - perhaps most of all - its commitment to institutional integrity. The Court cannot rely upon the fact that it is a sacred cow. This is not India where they don't eat cows. We eat cows in America and, as Abbie Hoffman is reported to have said, "sacred cows make the tastiest hamburger."

There are many, however, who claim there should be no debate over the *Claremont* decision. After all, the Supreme Court has spoken and that is that. Moreover, they assert, the niceties of constitutional law cannot be comprehended by ordinary mortals, especially those in the Legislature. This sentiment was echoed not long ago on the floor of Congress

by one of its own members, Representative David Obey of Wisconsin, who sanctimoniously chirped to his colleagues, "I dislike getting into constitutional arguments in Congress because we prove there are more Casey Stengels here than James Madisons." To begin with, we like to think that we are a little smarter here in New Hampshire than they are down in Washington. But even if we are not, Congressman Obey misses the point. The point is that although James Madison may have written part of the Constitution, and most of the Bill of Rights, he still had only one vote. The people who decided whether or not to make the Constitution the law of the land, the delegates to the state ratifying conventions and legislatures, may well have included a lot of Casey Stengels, but their votes were just as good as Mr. Madison's.

This is not to say that the debate should be left to politicians. The public ought to be involved as well. Article 8, Part I, of the New Hampshire Constitution states that "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them." Ultimately, therefore, these issues must not be left to the institutions which are the subject of the debate. They need to have the attention of those to whom the temporary occupants of those institutions are finally accountable: the *citizens* of this State.

This issues presented by the *Claremont* decisions should also not be consigned to resolution by the lawyers. In a speech to the Bretton Woods Conference held right here in New Hampshire in 1944, the famous economist, John Maynard Keynes stated: "I have been known to complain that, to judge from results in this lawyer-ridden land, the Mayflower, when she sailed from Plymouth, must have been filled with lawyers .... Too often lawyers busy themselves to make common sense illegal. Too often lawyers are men who turn poetry and prose into jargon." Interestingly enough, this concern over the propensity of lawyers to enshroud important concepts of political, economic and social philosophy in language unfit for ordinary consumption was a frequently registered complaint during the ratification debates of the Federal Constitution. For example, Mr. Singletary, a delegate to the Massachusetts Convention of 1787, when responding to those who advocated a swift and perfunctory review of that most-important document, charged that:

> These lawyers, and men of learning, and moneyed men, that talk so finely, and gloss over matters so smoothly, to make us poor illiterate people swallow down the pill, expect to get into the Congress themselves; they expect to be managers of this Constitution, and get all the power and all the money into their own hands, and then they will swallow up all us little folks, like the great Leviathan, Mr. President; yes, just as the whale swallowed up Jonah.

These observations are not meant to serve as judge-bashing, politician-bashing or lawyer-bashing. The point is that the debate is not only about whether or not *Claremont II* will raise our taxes (although it surely will) or whether of not it will give us better education (although it surely won't). The point is that *Claremont II* challenges first principles and we *all* must, therefore, get involved. The Supreme Court itself states in its decision that, "Because the diffusion of knowledge and learning is regarded by the State Constitution as

‘essential to the preservation of a free government’. ... it is only just that those who enjoy such government should equally assist in contributing to its preservation." Thus has the gauntlet been thrown down.

The debate has already begun. Those newspapers which published the verbatim text of *Claremont II* are to be commended for their contribution to this process. Much misinformation about the case can be dispelled by simply reading it. Indeed, it would not be waste of newsprint if that were repeated - and if *Claremont I*, from which *Claremont II* sprang, were printed alongside. I also entreat you to print these Letters to the Educators and the responses they will surely provoke. The letters will not be sound-bite length, but like all tasks worth doing, they are worth doing well.

If it is education that the Court wants, what better education than a debate over the Constitution? Let us produce our own Federalist Papers for future generations to ponder over. Although our forefathers were most concerned about the concentration of power in the legislative branch - as they called it, the "tyranny of the majority" - their basic theme was that *all* government power must be subject to checks and balances. Although the Framers had expected the judiciary to be the "least dangerous branch", they would not be surprised to find that absolute power has again corrupted absolutely. As Madison and Hamilton put it in The Federalist No. 51, "If men were angels, no government would be necessary." But men (and women) are not angels and government is necessary. So, in the spirit of the Great Debate, let us do it again.

The author has chosen to write under the pen name of the reputedly mad Russian monk Rasputin. This was not designed to emulate his political intrigue, but to gain strength from his capacity to withstand the repeated assaults of his enemies. Let there be no mistake about it: the stakes are high and the interested parties are powerful. Much money is at risk; the seats of those in high places are at risk; and serious principles are at risk. Hence, for those who may be so inclined, there is a great incentive to divert attention from the message by attacking the messenger.

These letters, therefore, are being published anonymously. Like Publius, Cato, the Federal Farmer and the others who sparked the Great Debate two centuries ago, I hope that my letters will focus the controversy on the issues and elevate the level of discourse. I note only that their author is - for better or for worse - a product of New Hampshire's "inadequate" system of education.

Rasputin

"Rasputin:"

Letters to the Educators, No. 2

What the Constitution Actually Says

Does the constitution of the State of New Hampshire guarantee the citizens of this state an "adequate" education supported by "adequate" funding? Of course it does. Why? Because the Supreme Court in its two *Claremont* decisions said so. And as we all know, unless the Constitution is hereafter amended, the word of the Supreme Court is final. On the other hand, except in the sense that might makes right, the Supreme Court is not necessarily right. As Justice Robert Jackson of the United State Supreme Court once said about that institution, "we are not final because we are infallible, but we are infallible only because we are final."

Let us therefore reason together and decide for ourselves whether the Supreme Court was correct. Our obvious starting point ought to be the New Hampshire Constitution itself. The operative provision is Article 83, Part II, as follows:

> Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.

Suffice it to say that Article 83 nowhere states what the Supreme Court says it states. There is no mention in this text of any *right* to an education (adequate or otherwise) and, as far as funding is concerned, no mention whatsoever. What the text does say is that the "legislators and magistrates" shall have the "duty" to "cherish" the interests of literature and sciences, to "encourage" public and private institutions to promote agriculture, arts, sciences, etc., and to "countenance and inculcate" the principles of charity, industry, honesty etc. among the people. Yet it out of this aspirational language, typical of Eighteenth Century declarations of its kind, that the Court has divined a judicially enforceable "right to a State funded constitutionally adequate public education."

How did the Court get from point A to point B? This is how: (1) duties are mandatory; (2) Article 83, Part I, speaks of a "duty"; (3) therefore, the duty described in Article 83 is mandatory; (4) the duty described is a duty to "cherish" education; (5) cherish means "support"; (6) therefore, the duty to cherish education is the duty to educate; (7) all duties

create corresponding rights; (8) therefore the duty to educate gives rise to a right to education; (9) all rights imply remedies; (10) courts give remedies for violations of rights; and (11) therefore, the judiciary may enforce the right to education. Sounds pretty simple doesn't it, almost as if it were a mathematical equation? The thing about mathematical equations, however, is that each step builds on the other and if there is an error in one step, it throws everything which comes later out of kilter.

If you read closely, you probably noticed that there was a little leap in logic in step (6). Let us examine what happened. In *Claremont I*, the Court commenced its analysis with the threshold issue of whether Article 83, Part I, is "hortatory, not mandatory". This is steps (1), (2) and (3). The question was whether the language of Article 83 was only intended to *exhort* the legislators and magistrates to do something or whether it was intended to *require* them to do something. To answer this question, the Court simply looked to the phrase in Article 83, "it shall be the duty". The presumably common sense meaning of those words was enough for the Court to conclude that Article 83 was 'not ... merely a statement of aspiration" and that it "commands" the State to do something.

Having settled steps (1), (2) and (3), the Court next tackled the thornier issue of what that something is which the Constitution supposedly requires the legislators and magistrates to do. But here is where the Court ran into a problem. All that Article 83 requires is for the legislators and magistrates to "cherish" education. That doesn't sound like much of a duty.

The Court resolved its dilemma by turning to the dictionary. Referring to a 1780 dictionary in circulation at the time that the New Hampshire Constitution was written, the Court noted that the definition of "cherish" was "to support, to shelter, to nurse up". But how does this advance the inquiry? How does one get a duty to educate from a duty to "support, shelter, or nurse up" education? How does the Court accomplish step (6)?

Let the Court's words speak for themselves:

> The breadth of the meaning of these terms (`duty ... to cherish'), together with the articulated ends for which this duty to cherish is established, strongly support ... that the `*duty ... to cherish* ... the public schools'; encompasses the *duty to provide* an education to the people of the [State] ... [I]t is reasonable therefore to understand the duty "cherish" public schools as a duty to ensure that the public schools achieve their object and educate the people.[1] (Emphasis supplied)

Rather than proving the Court's point, I suggest to you that this paragraph constitutes a classic example of a non-sequitur. The only way it has meaning is if the reader suspends his intellect and accepts the Court's decision as the act of a superior will. In fact, it reminds me of the comment of Humpty Dumpty in *Alice in Wonderland*: "When *I* use a word, it means just what I choose it to mean - neither more nor less." Just like Humpty Dumpty, the Court *choses* to make the duty to "cherish" education mean the duty to "provide" education.

Assuming that the Court had really been searching for the truth - which is supposedly what courts are all about - its foray into the dictionary could not fairly have led it to find any constitutional prescription to the legislative and executive branches to *provide* an education to anyone. Indeed, this exercise should have given the court some second thoughts about its resolution of steps (1), (2) and (3). In other words, is Article 83, Part I really hortatory or mandatory? What does "hortatory" itself mean? Since it comes from the same root verb "exhort", it means something which "incites" or "urges" a person to do something. Thus, the question is whether Article 83 merely *encourages* the legislators and magistrates to do something. The reason that the definition of "cherish" raises doubts as to whether Article 83 was meant to do anything more than encourage the legislators and magistrates is because the admonition that they "cherish" education is essentially telling them to do the same thing: encourage it. In fact, if you read further on in Article 83, you will see that the legislators and magistrates are expressly told to "encourage" private and public institutions, etc. Finally, the last clause of this section of Article 83 advises the legislators and magistrates to "countenance and inculcate" certain values among the people. Again, the language is that of encouragement.

What does all this dictionary jurisprudence amount to? Only that if one is inclined to decide constitutional questions by playing on words, the *most* that anyone can get out of Article 83, Part I, without rewriting the dictionary is that it directs the Legislature and the Executive to encourage education. In my book, that is just another way of saying that the provision is "hortatory, not mandatory."

The real problem with the *Claremont* decisions, however, is not that they were issued by people who played fast and loose with the dictionary, but that they start and end with the dictionary. As the man who invented the concept of judicial review, U.S. Supreme Court Justice John Marshall, said in the famous case of *McCulloch v. Maryland*, "We must never forget that is a *constitution* we are expounding." If the question is whether or not Article 83 in hortatory, someone should be asking what it means to be hortatory and why some constitutional provisions are hortatory and why some are not. One can, in turn, only deal with these questions when one acknowledges that the underlying issue is the proper role of the judiciary in a system of government that divides power between three supposedly co-equal branches of government.

In that regard, I direct your attention to a provision in the Constitution which is cited only once and not quoted anywhere in either *Claremont I* or *Claremont II*: Article 37, Part I, entitled "Separation of Powers":

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

How this separation of powers should have applied to the *Claremont* decisions shall be the subject of the next Letter to the Educators. For present purposes, however, let us see

how the Court might apply it, rather than dictionary jurisprudence, in an area near and dear to the Court's heart: its own power.

One of the criticisms that have been leveled at *Claremont II* is the fact that retired Justice Batchelder sat in place of Justice Thayer, who had recused himself on account of his wife's prior involvement in the case as a member of the State Board of Education. The claim is that Justice Batchelder should have been disqualified because he was 70 years old at the time and because Article 78, Part II of the Constitution states that, "No person shall hold the office of judge of any court ... after he has attained the age of seventy years." [2]

Despite the fact that the *Claremont II* decision carried by a 4-1 majority and that dropping Judge Batchelder off the case would therefore not have changed the result,[3] some critics are nevertheless contending that the alleged constitutional violation completely vitiates the decision. Others clamor that it provides grounds for the impeachment of Chief Justice Brock, who appointed Justice Batchelder to sit. Let us assume that the General Court chose the latter tack and preferred articles of impeachment against the Chief Justice charging him with "maladministration in office", as provided for in the Constitution. Let us further assume that the Senate convicted the Chief Justice.

According to Article 39, Part II of the Constitution, conviction by impeachment results in removal from office. Let us finally assume, however, that the Chief Justice refused to step down and that the rest of the Court had to opine on at least the following questions: (1) was Judge Batchelder "holding the office" of a judge when he sat on the *Claremont II* case and therefore disqualified because he was 70 years old? (2) Even if he was so disqualified, was Chief Justice Brock's appointment of him an impeachable act of "maladministration in office?"

I would venture to say that the dictionary would hardly find its way into the Court's opinion. The case would be decided - as it should be - on the basis of the Court's views as to the competency of the judicial versus the legislative branch to resolve the issues, whether the issues are ones which peculiarly affect one branch and therefore can reasonably be assumed to have been assigned to its exclusive jurisdiction, and, finally, whether or not a branch which has the competency and jurisdiction to decide an issue has the power to enforce its decision.

This is exactly the kind of decision the Court did write several years ago in the case of *State v. LaFrance*. There the Court was determining the constitutionality of a statute which provided that "law enforcement officers *shall* be permitted to wear firearms in any courtroom in the state." (Emphasis supplied.) The case arose when a judge of the Superior Court enforced a local court rule to the contrary, and the Laconia Chief of Police, who was the subject of the judge's attention, refused to testify. Although the issue in the case would appear to be somewhat of a tempest in a teapot, the opening line of the Supreme Court's opinion set the stage for something much bigger: "This case presents the question which branch of government controls the actual conduct of trials in our courts." The Court then launched into a dissertation on the history and purposes of the doctrine of

separation of powers, with a particular emphasis upon the right and power of the judiciary to control its own domain. Not unexpectedly, the Court struck the statute down as an unconstitutional encroachment upon *its* powers.

One would have expected the Court to devote similar attention to the separation of powers issue in the *Claremont* cases which, after all, deal with the adequacy of our system of public school education, an issue of infinitely greater consequence than whether or not police officers can pack their pistols when they testify in court. There is, however, almost no flavor of the important issues of institutional competence and jurisdiction in *Claremont I* and very little of it in *Claremont II*. There certainly is no opening line in either decision to the effect that, "This case presents the question of which branch of government controls the actual conduct of the schools in our cities and towns." Instead, the Court just skirts around the issue and *takes* control. When the Court in *Claremont II* finally makes its disingenuous offer of the olive branch to the Legislative and Executive ("we leave ... matters [of educational policy] ... to the two co-equal branches of government"), it comes *after* the Court has already decided on the basis of dictionary jurisprudence that the Constitution guarantees every citizen with a judicially enforceable right to an adequately funded adequate education. To put it mildly, this is closing the barn door after the horse is long gone.

If all of this is reminiscent of the concept of "doublethink" and its ilk in *1984* and *Brave New World*, be aware that judges have been doing this for centuries. In a 1717 sermon he was preaching before King George I, Bishop Hoadly of England observed that, "Whoever hath an absolute authority to interpret written or spoken laws, it is he who is truly the lawgiver to all intents and purposes and not the person who wrote or spoke them." Consequently, all that the Supreme Court was doing in the *Claremont* cases was acting within this ancient (although nor particularly venerable) tradition of rule by judicial fiat. Once that is understood, it becomes clear why the Court feels so confident of our blind obedience. Perhaps it is time for us to challenge the conventional wisdom.

Rasputin

ENDNOTES

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[1] Actually, the Court didn't even use its own words. It simply quoted the Massachusetts Supreme Court decision in the case of *McDuffy v. Secretary of Executive Office of Education* which interpreted the nearly identical language in the Massachusetts Constitution. This just goes to show that when a New Hampshire court quotes a Massachusetts court on an issue which affects taxes, you should hold on to your wallet.

[2] For those who think this is a real issue, which I, Rasputin, do not, you might be interested in this factoid: retired Justice Grimes, who sat for Justice Thayer in *Claremont I*, was 82 years old at the time.

[3] *Id.*

"Rasputin:"

Letters to the Educators, No. 3

How Does a Court Decide What is Adequate?

We left off our last discussion with the observation that the doctrine of separation of powers prescribed by Article 37, Part I of the Constitution had essentially been ignored by the Supreme Court in its two *Claremont* decisions. The provision bears repeating:

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with the chain of connection that binds the whole fabric of constitution in one indissoluble bond of union and amity.

Considering the fact that the *Claremont* decisions reverses two centuries of judicial non-interference with the administration of the public school system in this state, it is fairly incredible that the Court so completely sloughed this issue off.

Indeed, the Court was apparently activated more by its concern with being on what they considered to be the politically correct side of the education funding debate than by the niceties of the doctrine of separation of powers. The fact is that the propriety of the exercise of judicial review over matters of educational policy got totally lost in all the sound and fury about the importance of education. In this regard, our court failed to heed the admonition of the U.S. Supreme Court in the 1979 case of *Bell v. Wolfish*:

> Judges...have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan.

Let us, therefore, try to do the job that the Court didn't do; let us examine the separation of powers issue. To do this, we must return to the question with which the Court started: is Article 83, Part II "hortatory, not mandatory"? Unlike the Court, however, we shall analyze that issue in terms of whether or not the subject matter of the provision, public education, is suitable for the exercise of judicial oversight.

On the other hand, before we do that, let us briefly attempt to catalog the types of constitutional prescriptions which do not contemplate judicial enforcement. A review of the Constitution reveals that it contains a number of provisions which fall into this category. For example, Article I, part I states that, "All men are born equally free and independent: Therefore, all government, of right, originates from the people, is founded

in consent and instituted for the general good." This is one of those "whereas" clauses we often find at the beginning of a legal instrument. These provisions are not directive of anything and are merely meant as an affirmation of accepted values or as a statement of an assumed factual predicate for something that comes afterward.

The Supreme Court does not deny that constitutional provisions such as these are not judicially enforceable. For example, in the 1985 case of *State v. Evans*, the Court examined Article 18, Part I of the Constitution which provided in part that, "[T]he true design of all punishments [is] to reform." A prisoner in the New Hampshire State Prison had brought suit against the State under the theory that this provision guaranteed him a judicially enforceable right to rehabilitation. The Court, however, stated that "we believe that the language of Article 18 is best read as a general statement of principle rather than as a mandatory standard which creates imprimatur" upon the goal of rehabilitation. The Court ruled that the inmate plaintiff was not entitled to any judicial relief.

Another type of provision which is not judicially enforceable is a directive which is aimed specifically and exclusively at another branch of government. An example of this is Article 31, Part I which provides that, "The legislature shall assemble for the redress of public grievances and for making such laws as the public good may require." Not only is this provision specifically directed to the Legislature alone, but the directive is also so open-ended that the Court could not possibly enforce it without substituting itself for the Legislature. For example, if the Legislature failed to meet for six months, would that violate the directive? What about a failure to meet for a year? What about two years? And so on. Moreover, even if the Court could set a schedule for the Legislature, what if it didn't meet the schedule? What could the Court do about it? Redress the people's grievances itself? Pass its own laws for the public good?

Finally, there is a component of the doctrine of judicial review which holds that some issues are, by their very nature, so standardless as to be substantively inappropriate for resolution by the judiciary. These are known as "political question". By that, it is meant that their disposition can effectively be accomplished only through the political process, and not by the courts. Professor Lon Fuller of the Harvard Law School described these as "polycentric" issues because they inherently involve so many competing considerations that they are not suited for determination by the traditional methods of dispute resolution employed by the courts. The judicial process is characterized by the adjudication, which contemplates the resolution of a focused dispute, known as a "case or controversy", between a plaintiff and a defendant or between the state and a person accused of a crime. Accordingly, the judicial process typically results in a winner and a loser.

Polycentric issues, however, have a myriad of winners and losers, as well as lots of in-betweens. Legislation is the classic example of the resolution of a polycentric dispute. The word "polycentric" means having many centers, a concept which fairly well describes the process by which laws are made. All legislation is the product of competing interests which are balanced off against and traded for each other. In colloquial terms, we have come to call this phenomenon "horse trading" or "log rolling". It is what we mean when we say that politics is the art of compromise.

The value judgments made by the participants in this process and the cost-benefit calculations by which they individually and collectively make their determinations are inherently subjective. In the same sense that every legislator's vote is equal to everyone else's, so are his value judgments. Thus, nobody's opinion on a legislative matter is intrinsically any better or worse than anyone else's. What holds true for the value judgments of individual legislators also applies to the values expressed by the legislation which results from their collective judgments. In the constitutional sense of the terms, there is no way to distinguish a "good" law from a "bad" law. Nor is there any constitutional standard for an "adequate" law or an "inadequate" law.

On occasion, the Supreme Court has evidenced its understanding of this issue. For example, in the case of *Caspersen v. Town of Lyme*, decided in 1995, the owners of certain real property in the Town of Lyme challenged the town's fifty acre minimum lot size requirement in its zoning ordinance. The plaintiffs claimed that requiring fifty acres was a violation of due process of law. In rejecting their claim, the Court held that, "There is no arbitrary maximum lot size controlling a substantive due process analysis." In other words, the Court was not capable of determining how big was too big.

Similarly, in an *Opinion of the Justices*, rendered in 1931, the court advised the Legislature that a bill proposing to establish a system of pauper relief to be administered by the probate courts, which would require those courts to establish a comprehensive system of rules, procedures and enforcement devices in order to put the system into effect, would unconstitutionally impose upon the judiciary functions of the executive branch which the judiciary was unqualified to perform. As the Court noted, "[T]he judicial department is confined to courts of justice established to interpret laws and decide disputes."

Perhaps the most instructive case in this area is the aforementioned case of *State v. Evans*. As reported above, the Court held that Article 18, Part I of the Constitution was simply "a general statement of principle" and did not create a judicially enforceable right to rehabilitation for prison inmates. The Court, however, went on to discuss whether or not prison inmates had such a right under New Hampshire's statutes governing the Department of Corrections, including the section requiring the department to adopt rules relative to "standards for the management and operation of rehabilitation related programs, including but not limited to . . . [e]ducation."

In rejecting the plaintiff's claim that this statute authorized the Court to order the warden of the State Prison to provide him with college-level educational courses, the Court demonstrated that it could be sensitive to the separation of powers issue:

> Removed from the actual operation of the prison and lacking expertise in correctional and rehabilitative methodologies, the judiciary is ill-suited to assume the responsibilities of prison administration. Moreover, an *ad hoc* approach to the assignment of rehabilitative or educational opportunities would require disproportionate allocation of limited resources among inmates: At best, this

> arrangement would simply substitute the judgment of a court for that of the legislature and prison officials, with no guarantee of net benefit.

This, however, is precisely the point which the Court did *not* make in its *Claremont* decisions. Don't education and rehabilitation present the very same impediments to judicial review? In fact, isn't rehabilitation just a form of education directed at a special population?

The point is that there simply is no objective standard by which to measure the "adequacy" of any social welfare or public works program. Saying that there is a judicially enforceable right to adequate education or to adequate rehabilitation begs the question: what is adequate? By what standard can the Court determine adequacy? This is inherently a political question to which there is no objective answer.

In fact, the "adequacy" of an educational program - or any other social program - is the *quintessential* example of a political question: It is like asking how much is enough. The question simply cannot be answered in the abstract. To begin with, it depends upon how one defines education: is it the three-R's or does it include the social sciences, vocational training, home economics, etc., etc.? Then there is the problem of how long it must last: is it only grammar school or does it include nursery school, kindergarten, college, etc., etc.? How about the means to accomplish it: are teachers and textbooks sufficient, or do we need audio-visual aids, computers, field trips, etc., etc.? Then we need to decide whether education is limited to the mind or does it include training for the body and the spirit: are academics enough, or must there be an athletic program, and what about courses in "values?"

It should be obvious that even the foregoing does not exhaust the list of issue-centers that comprise this polycentric subject we call education. Moreover, unless education is to trump all other government spending programs (a subject with which we will deal later), adequacy of education must be measured against the needs of the other social welfare and public works programs that compete with it for the available pot of public dollars. In other words, any reasonable evaluation of the adequacy of an educational program must take into account the worthiness of opposing demands for police protection, fire protection, public health, highways, environmental regulation - and even a court system.

Finally, when adequacy of education is defined - as it is defined in the *Claremont* decisions - to include adequacy of funding, we introduce the question of how big the pot of dollars available for public expenditure needs to be. In other words, what proportion of people's wealth should be dedicated to funding public projects and what proportion may be reserved by them to satisfy their private needs? How much should we pay in taxes and how much should we keep for food, shelter, clothing, entertainment and the like?

There is no objective standard by which any court can judge these issues. For the judiciary can no more determine educational adequacy than it can judge the constitutional adequacy of the minimum wage. Again, how much is enough? Is five dollars per hour adequate? How about ten dollars per hour? How about fifteen? The same is true for an

adequate rate of return on capital. Can the judiciary create a usury law to place a constitutional limit on interest rates? Here the question is, how much is too much? Is five percent per year too much? How about ten percent? How about fifteen?

When it comes to our Great Rights like freedom of speech and freedom of religion, there are no issues of "adequacy," and we expect the Court to close its eyes to public opinion and strike down even the most minor abridgements of our rights. That is why Supreme Court Justices have life tenure. What constitutes an "adequate" education, however, is very much in the eye of the beholder. And here the vision of the Supreme Court is no better than that of the Legislature. On the contrary, it is worse. Since there is no objective measure of the adequacy of social welfare programs, our republican (with a small "r") system of government delegates the task of making the decisions on such matters to the branches most responsive to the electorate. Accordingly, when it comes to splitting up the social and economic pie, we expect to have some say in the matter and we expect the political branches of government to do our bidding. And if they don't give us what *we* think is an adequate system of education, we don't need the Supreme Court to tell us what to do about it.

Rasputin

"Rasputin:"

Letters to the Educators, No. 4

Not All Duties Create Rights

It is of more than passing interest that the Supreme Court in its *Claremont* decisions ultimately described the constitutional interest in education in terms of a "right", rather than merely a "duty". Article 83, Part II of the Constitution, after all, uses the latter term, not the former. Most of you presumably saw no significance in this because you probably took it as a given that one person's duty surely corresponds to another's right and vice versa. In fact, one might have thought that once having discerned that Article 83 imposed a "duty" with respect to education, the Court had all it needed to assert its power over the subject.

Yet the Court clearly felt uncomfortable dealing with duties rather than rights. One must presume, therefore, that the distinction has some significance to the Court. I suggest that the distinction lies in the fact that "rights" in constitutional parlance are assumed to be particularly within the bailiwick of the judiciary. Indeed, it is customary to think of the courts as the place to which we go to enforce our rights. (Does it surprise you that no one goes to court to find out what his duties are; that one goes to court only to secure his rights?) It is therefore no accident of verbiage that the Court decreed that Article 83 establishes a "right" to an adequate education.

The way in which the Court got from duty to right, however, was accomplished with a peculiar lack of explanation. In fact, the transition consisted of little more than an *ipse dixit*:

> For over two hundred years New Hampshire has recognized its *duty* to provide for the proper education of the children in this State. Since 1647, education has been compulsory in New Hampshire, and our constitution expressly recognizes education as a cornerstone of our democratic system. We must conclude, *therefore*, that in New Hampshire a free public education is at the very least an important, substantive *right*."

(Emphasis supplied)

On the other hand, the Court's "if-there-is-a-duty-there-must-be-a-right" type of analysis should be familiar to any student of the Anglo-American tradition of the common law. In its primary fields of operation, torts and contracts, the common law does indeed equate a plaintiff's right to damages with a defendant's breach of a legal duty. Accordingly, the focus of common law jurisprudence is upon whether or not a legal duty exists between the parties. Once a duty has been found, the plaintiff's right to recover for injuries caused by the defendant's breach of that duty generally follows as a matter of course.

In deciding whether or not to recognize a duty at common law, judges admittedly do engage in a law-*making*, rather than a law-*finding*, enterprise. In fact, the common law is often called “judge-made” law. To the extent that courts of general jurisdiction in the several states possess such common law powers, they differ from federal courts, including the U.S. Supreme Court, which have no such powers. Federal courts are generally limited to interpreting positive law as found in statutes and the U.S. Constitution. The jurisdiction of state courts, on the other hand, is plenary and state judges are thus quite used to declaring not only what the law is, but what it should be.

The problem often faced by state court judges, however, is to distinguish their common law powers from their powers of judicial review. Oliver Wendell Holmes, the preeminent common law scholar and also a Justice of the U.S. Supreme Court, had plenty of experience in performing both tasks. With respect to the former, he admitted that, "[J]udges do and must legislate." However, when it came to performing his role as an interpreter of the Constitution, his view was quite different. In response to the entreaty of one of his colleagues that he should "do justice, sir," Justice Holmes is reported to have said "That is not my job. It is my job to apply the law."

The *Claremont* decisions constitute a perfect example of a court's confusion of its two roles. In its characteristically unsophisticated way, our Court looked at the case as if it were just another tort case in which the issue confronting it was whether or not the State had a legal "duty" to educate its populace. Once the Court concluded that the State had such a duty, it was axiomatic to the Court that students had a "right" to a State-provided education. Ironically, even if *Claremont* had indeed been just a simple tort case, Justice Holmes probably would have had some difficulty with the Court's simplistic reasoning: "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as it if contained only axioms and corollaries of a book of mathematics."

But that is not the fatal flaw of *Claremont*. The real problem is that the Court failed to heed the advice of Chief Justice John Marshall that courts, when exercising their power of judicial review, "must never forget that it is a *constitution* we are interpreting." The differences between a garden variety judicial decision on a matter of tort or contract law and a decision interpreting the Constitution are legion. The most basic difference, of course, is that the Legislature can change a tort or a contract decision. All it has to do is pass a statute. Indeed, common law rulings by the courts are fairly regularly reversed by legislatures which disagree with the courts as to what the law should be. Constitutional decisions, however, are a different matter. Changing one of those requires a constitutional amendment, which not only cannot be accomplished by the Legislature, but also cannot be accomplished at all without a great deal of difficulty.

This, then, is one reason why a court's exercise of its power of judicial review is limited by the doctrine of separation of powers. Outside the arena of the common law, the Constitution assigns the responsibility for law-making to the Legislature, not the Court. As a result, putting issues of the constitutional allocation of power in the context of he Court's simplistic notion that all duties create corresponding rights simply doesn't work.

Indeed, so long as the enforcement of rights is seen to be the job of the judiciary, if the Constitution assigns a duty to another branch, the presumption should be that the duty does *not* create a right.

In truth, the question of whether the duty to cherish education articulated in Article 83, Part II of the Constitution creates a right to an education is just another form of the question which the Court posed at the outset of *Claremont I* about whether Article 83 is "hortatory, not mandatory". The Court asserted that it had found a negative answer to this question in the mere fact that Article 83 used the word "duty" to describe what the legislators and magistrates were supposed to do. Whether a duty of one creates a right in another, however, is not simply a matter of *text*. It is also a matter of *context*.

The Court makes much of the fact that "article 83 is only one of two places in the constitution where a duty is affirmatively placed on the legislature." The other place, so reports the Court, is in Article 5-A, Part II, where it is provided that, "the general court, ... in periods of emergency resulting from disasters caused by enemy attack, shall have the power and the immediate duty to provide for prompt and temporary succession to the powers and duties of public offices". Although the Court may well be correct that the word "duty" is found in only Articles 5-A and 83, Part II of the Constitution, the point is interesting, but hardly constitutionally significant. If anything, the fact that the word "duty" is used in Article 5-A in connection with the Legislature's responsibility to provide means to fill positions in the executive departments on account of vacancies created by enemy attack reflects that the word cannot be used to imply a right which is judicially enforceable. For only the most rabid advocate of government by the judiciary would suggest that if the Legislature failed to pass a law providing for executive succession that the judiciary could do so itself.

More importantly, it is eminently clear that the Constitution imposes what are obviously duties upon the Legislature in *many* places, albeit without using that word. For example, Article 31, Part I provides that, "the legislature *shall* assemble for the redress of public grievances and for making such laws as the public may require." (Emphasis supplied) Likewise, Article 11, Part I provides that, "the general court *shall* provide by law for voting by qualified voters who . . . are absent from the city or town of which they are inhabitants." (Emphasis supplied.) To the extent, therefore, that the Court finds magic in isolated words snatched out of their context, it is difficult to see how the Constitution's "shalls" are any less obligatory upon the Legislature than its prescription of "duties."

In order to provide anything but a mechanistic answer to the question whether a constitutionally prescribed duty is meant to create a constitutional right, one must acquire some understanding of the nature of the duty under consideration. General Robert E. Lee described "duty" as "the sublimest word in the language." For example, is the duty a standard of conduct or is it merely an aspirational goal whose achievement is desired, but not necessarily expected? What about the Court's own duties? Chief Justice Marshall said that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Is this a standard of conduct and, if so, by whom is it to be enforced? General Lee's personal definition was that "[Y]ou can never do more than your duty; you shall

never wish to do less." Suffice it to say that this could hardly be a standard of conduct or we would all be in jail.

Applying this test, I suggest to you that Article 83, Part II of the Constitution is patently nothing more than what it purports to be: an ideal; a goal; an aspiration. Although it is admittedly more than merely a grant of power to pass and enforce laws relating to education, one would be hard-pressed to see anything in its prescription of a "duty" to "cherish" education but a counsel of excellence. In this regard, the message of Article 83 is rather like the recent pronouncements of the Governor that the Legislature should not be satisfied with providing the "adequate" education required by the Supreme Court; on the contrary, its goal should be to provide every New Hampshire student with a "world-class" education. Like the Constitution, the Governor presumably does not intend the Court to construe her words as creating a "duty" that creates judicially enforceable "rights."

The Court, of course, makes no note in its *Claremont* decisions of the simple fact that Article 83 nowhere mentions anyone's "rights." Moreover, it does not discuss the fact that Article 83 appears in Part II of the Constitution, which describes the "Form of Government," rather than in Part I, which is labeled as the "Bill of Rights." Indeed, the Court fails to mention that in 1850 a resolution at a constitutional convention proposed to move the clause from the “Form of Government” section to the “Bill of Rights” section, but was defeated. It is dangerous to draw too many conclusions from a negative, but one can only assume that some people thought that the reference in the existing Constitution to a duty to cherish education did not create a right to education and that a change was required to make it do so.

When all is said and done, therefore, the *Claremont* decisions are nothing more glorious than the decisions of a common law court which thought it was deciding another tort case. Although dressed up in constitutional clothing, the right to an adequate education is merely an expression of the personal views of a majority of the justices of the Supreme Court on a matter of public policy. As such, the decisions should command no greater respect than a decision in any other common law case. Consequently, although a constitutional amendment will be required to restore matters to the *status quo ante*, the Legislature and the Governor should have no compunction about recommending this course of action to the voters.

Rasputin

"Rasputin:"

Letters to the Educators, No. 5

A Constitution Is Not a Menu of Entitlements

We have previously noted that an essential step in what the Supreme Court passed off in its *Claremont* decisions as a string of logical propositions was its assertion that the imposition in Article 83, Part II of the Constitution of a "duty" upon the legislators and magistrates to cherish education necessarily implied the existence of corresponding "right" in every citizen to be educated. We have also discussed how this brand of logic was rather like that of Tweedledee in *Alice in Wonderland*: "Contrariwise, if it was so, it might be; and, if it were so, it would be; but as it isn't, it ain't. That's logic."

Even more important to the Court than its conversion of a duty into a right, however, was its characterization of the legal interests at stake as an *affirmative* duty and an *affirmative* right. The question of whether rights and duties are affirmative or negative may appear to involve nothing more than semantics, but I can assure you that it definitely has something to do with how constitutions are interpreted - and that it has *everything* to do with the *Claremont* decisions. In this regard, the Court speaks of the right "to an adequate education" rather than something like the right "to choose one's own education." In other words, the interests which the Court recognizes in its *Claremont* decisions do not consist of a right of parents to educate their children as they please and a duty of Government not to interfere with their educational choices, but a right of children to receive an education and a duty of Government to provide it.

Those who see affirmative rights in a constitution view the state as a dispenser of benefits, as a redistributor of wealth and as an agency of social engineering. On the other hand, those who see constitutional rights as negatives on the exercise of official power view the state as an arbiter of disputes, as a policeman, and as a social agency of last resort. The advocates of affirmative constitutional rights conceive of the state as an instrumentality, a pro-active organism which reaches out to do good, whereas those who focus upon the negative rights conceive of government as something which performs only those tasks which civil society cannot perform for itself, and, therefore, as a necessary evil which must always be kept at bay.

Even the language used by the two camps is different. The proponents of an activist state speak of rights "to" something such as the "right *to* fair housing", the "right *to* equal employment", and the "right *to* a decent wage". Those of the libertarian persuasion, however, tend to use the term "freedoms" rather than "rights" and more often talk of freedom "of" something, such as "freedom *of* speech", "freedom *of* religion", and "freedom *of* contract". Thus, the jargon of the advocates of the welfare state connotes a beneficent government ministering to our needs, whereas the terminology of the believers in the minimalist state conjures up visions of an officious government meddling in our private affairs.

Each of these two opposing schools of jurisprudence claims to find support for its world-view in our written constitutions. The statists envisage constitutions as "teleological" instruments (a phrase coined by scholar Michael Oakeshott), which means that they were supposedly crafted to achieve a certain telos or end. Members of this school of thought are people like Robert Bork, Alexander Bickel, and Justice William O. Douglas. Although these strange bedfellows definitely disagree on what sort of society was contemplated by our constitution-makers, they share the notion of our American constitutions as "nomocratic" (Oakeshott's term again) instruments. By this it is meant that our constitutions were designed to bring government under the rule of law, rather than to achieve any grand social end. The adherents of this branch of constitutional historiography such as Forrest McDonald, Philip Kurland and Justice Oliver Wendell Holmes construe our early constitutions, especially the Federal Constitution, as essentially procedural documents which first define institutional domains of power and no-power, and then establish the rules for how those granted powers may be exercised. Suffice it to say that it is the teleological view of constitutions which leads to the creation of affirmative rights such as the Court created in its *Claremont* decisions.

But let us stop using the phrase "affirmative rights." They have a name which is much more familiar to us; we call them "entitlements." As the name indicates, the recipient of a social welfare program which is categorized as an entitlement is "entitled" to the benefits of that program. And once the beneficiary becomes entitled to his benefit, you had better believe that he isn't about to give it up. Moreover, if you try to take it away, he will sue you. In fact, he will probably sue you anyhow because most entitlements, like the right to an "adequate" education, are defined only in the eye of the beholder, so a beneficiary can always make a colorable claim that whatever you provided was not enough.

It is beyond cavil that the Framers of the Federal Constitution - and, I would claim, the Framers of our New Hampshire Constitution - came from the libertarian side of this debate. For example, John Adams - who was supposedly the draftsman of the Massachusetts predecessor of Article 83, Part I of our Constitution - believed that, "So long as the Legislature is in session, no man's life, liberty or property is safe." Likewise, Thomas Jefferson - the author (along with John Adams) of those glorious phrases in the Declaration of Independence about "unalienable rights" made it eminently clear that it was not the *state* to which citizens should look for their "life, liberty [or] pursuit of happiness:"

> Still on thing more, fellow citizens - a wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government..

The Supreme Court obviously did not have its copies of the writings of Adams or Jefferson open when it wrote the *Claremont* decisions. Neither did the Court heed the lessons of history. Our experience with entitlements, whether created by judges out of whole cloth or whether created by well-intentioned legislatures, has been a disaster. The most notorious failure of affirmative rights has been affirmative action. To begin with,

the benefits have been few. Affirmative action programs have not only created perverse incentives disruptive of the marketplace, but they have also generally failed in their primary goal of eradicating racial and sexual prejudices. And the transactional costs have been enormous. Besides generating a prodigious amount of litigation over what is "equal" (which simply transfers wealth from the productive classes to the lawyers), affirmative action has spawned a huge array of agencies whose job it is to determine eligibility for benefits, dole out those benefits, and advocate for more benefits (which simply transfers wealth from the productive classes to the bureaucrats). As most (but certainly not all) of our society has learned, it is one thing to prohibit the government from discriminating against people on the grounds of their race, creed, or sex, but it is another thing entirely to say that government has an affirmative obligation to make people equal.

Many of the same problems exist with respect to the various schemes which have been cooked up to grant supposedly disenfranchised individuals or groups a right to "equal access" to resources which are controlled by the government or by government franchisees. These include such things as the Federal Communication Commission rules which provide private persons with free access to the airways in order to respond to the editorial comments of those who own or control such media, the Federal Election Commission rules which give certain candidates for President and U.S. Senate access to public funds to finance their campaigns, and even the rules promulgated by various federal agencies which ration access to publicly owned land for purposes of livestock grazing, mineral extraction, timber harvesting and the like.

To the extent that we constitutionalize the interests recognized by these access laws, as the Court did with respect to access to education in the *Claremont* cases, we are in for a great deal of trouble. For one thing, inclusionary rules always create matching exclusionary rules and, whatever rules are devised, they are always touted as "fair" by those who are on the inside and challenged as "unfair" by those who are on the outside. For another thing, the recognition of something as an entitlement inevitably means the creation of vested interests in the status quo. At best, therefore, today's social welfare programs are cast in concrete; at worst, they constantly expand. No better example of these phenomena may be found in our society than the granddaddy of all entitlements, Social Security: Just try to change the benefit structure of the social security system and I guarantee that you will hear more "rights talk" from the AARP than you will ever hear from a punk street criminal.

At the risk of introducing a subject which tends to generate more heat than light, I suggest that the abortion debate provides a good illustration of the differences between viewing rights as freedoms versus characterizing them as entitlements. So long as the interests of women are cast in terms of "rights of choice," the issue usually centers upon whether or not a government regulation unconstitutionally interferes with a woman's decision to have or not to have an abortion. If, however, the interests are framed as a woman's "right to an abortion," the debate shifts to such things as whether or not government must require health insurance companies to provide coverage for abortions which is equivalent to coverage for other illnesses, or whether or not government itself

has an obligation to fund abortions for those who cannot afford to purchase health insurance.

The constitutionalization of affirmative rights also introduces trump cards into the political process. The fact is that "rights" do trump other social policies. Take the right to a "constitutionally adequate education." Assume that the Court finds that the Legislature has failed to provide it. Because our resources are not infinitely elastic, a constitutional requirement that more of these resources *must* be dedicated to education necessarily means that some other worthy social goal cannot be pursued or cannot be pursued with equal vigor. Likewise, assume that an environmental disaster makes an extraordinary call upon our financial resources or that an economic collapse destroys some element of our revenue base. Despite the fact the every other social program will have to be cut, the Legislature will *not* be allowed to reduce spending on education below the level of constitutional "adequacy."

This is the difference between an entitlement and a freedom. Although freedoms are rights, too, and although they also trump other social policies, freedoms are essentially defensive. They merely block government from proceeding down a certain path; entitlements, however, call upon government to build a new highway. For example, when the Federal Constitution states in the First Amendment that "Congress shall make no law . . . abridging the freedom of speech," a law which tends to restrict free speech is unconstitutional. If someone challenges the law and a court strikes it down, it usually doesn't cost anybody anything. No wealth is redistributed by the judiciary; no bureaucracy is ordered into existence; and, except for not being able to pass the same law again, the legislature is not restricted from pursuing its otherwise valid goals.

Do not pass this discussion of trump cards off as some parade of horrors which simply cannot happen in the real world. It is happening already, and it is in the field of education. Just take a look at what the federal handicapped education law is doing to the budgets of every New Hampshire school district. Since the Individuals with Disabilities Education Act, or IDEA, was passed in 1975, the proportion of school budgets consumed by the financing needs of the handicapped has increased exponentially. And, as we all know, there is nothing we can do about it short of changing the law. Indeed, what the *Claremont* decisions have done is expand the class of students which the IDEA states must receive a "free appropriate education" from students who are handicapped to *all* students. More importantly, the *Claremont* decisions have converted the requirement that the State provide an appropriate (read "adequate") education from a *statutory* obligation into a *constitutional* one. And, since *Claremont II* has decreed that it is the State which has the responsibility of providing and funding this purported right to an adequate education, it will be the State budget which will now have an irreducible core that must be met, come hell or high water.

Rasputin

"Rasputin:"

Letters to the Educators, No. 6

Entitlements Created by the "Least Dangerous Branch" are the Most Dangerous Ones

We have previously discussed how the Supreme Court in its *Claremont* decisions tortured the word "cherish" in order to find a duty to educate in Article 83, Part II of the Constitution and how the Court then mechanically transformed its newly-discovered duty to educate into a right to an education. We also noted how the Court's characterization of this right as the right to an "adequate" education plunged the Court into the never-never land of deciding so-called political questions, which are called that because they are most appropriately dealt with in the political arena, not in the courtroom. Lastly, we discussed how the recognition of a right to an adequate education is tantamount to the creation of an entitlement program and how such programs are generally antithetical to our traditions of limited government.

On this final point about entitlements, we approached the issue from the perspective of Ralph Waldo Emerson, who believed that, "the less government we have, the better." Nevertheless, we did not mean to suggest that our Constitution actually prohibits the government from creating entitlements. Despite the Lockean notions of a minimalist state which informed the drafting of the New Hampshire Constitution, it contains no express prohibition of entitlements. On the contrary, at least as far as the Legislature is concerned, its granted powers are essentially:

> full power and authority. . . to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions. . . as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, . . .

As the Supreme Court observed in the 1936 case of *Coleman v. School District of Rochester*, "The rule of law upon this subject appears to be, that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute." Therefore, although traditions of limited government may well caution the Legislature against an indiscriminate exercise of its power, it definitely does have the power to create entitlements.

But the *Claremont* opinions don't deal with the *powers* of the Legislature; they deal with the *duties* of the Legislature and the *rights* of the people. To the extent that such alleged duties and rights are enforced by the Court, the issue, then, is whether the Court has the power to create entitlements. The Constitution is unfortunately much less explicit in defining the powers of the Judiciary than it is in delineating the powers of the Legislature. For example, the Constitution did not originally specify even the structure of the court system in New Hampshire. In fact, in the early years, it almost seemed as if the first item on the agenda for each new administration was to reorganize the courts. This was done by

legislating the offices of all incumbent judges out of existence, creating a whole new set of judicial positions, and, of course, appointing new judges to fill the new offices. Although this type of overt politicization of the judiciary pretty much came to a halt at the end of the nineteenth century, it was not until 1966 when Article 72-a, Part II was added to the Constitution that New Hampshire was assured of a "supreme court, a trial court of general jurisdiction known as the superior court, and such lower courts as the legislature may establish."

But even Article 72-a did little to define the extent of the judiciary's power. All it did was prescribe that those courts whose existence was thereafter guaranteed would be vested with "the judicial power of the state." But what is that? One can search the Constitution in vain for a definition of "the judicial power."

This is not to say that the Constitution is completely silent on the subject of judicial duties. For example, Article 4, Part II, provides that the Legislature is authorized to establish courts

> for the hearing, trying and determining, all manner of crimes, offenses, pleas, processes, plaints, actions, causes, matters and things whatsoever arising or happening within this state, or between or concerning persons inhabiting or residing, or brought, within the same, whether the same be criminal or civil, or whether the crimes be capital, or not capital, and whether the said pleas be real, personal, or mixed, and for the awarding and issuing execution thereon.

This provision clearly describes that aspect of the "judicial power" which involves the traditional stock-in-trade of the court system: the litigation of disputes. Similar references to this element of the judicial role may be found by implication in Article 14, Part I (the right of every citizen to a civil remedy for his injuries); Article 15, Part I (the rights of one accused of a crime to notice of the charge, counsel, cross-examination and immunity from self-incrimination); Article 16, Part I (the right to trial by jury in capital cases); and Article 20, Part I (the right to trial by jury in civil cases involving more than $1,500).

The significance of the foregoing is that the judicial power is generally exercised in the context of what are known as "cases and controversies;" it does not extend to the issuance of legal opinions on abstract or theoretical propositions. The only exception to this is the power granted to the Supreme Court by Article 74, Part II, to issue advisory opinions upon the request of either house of the Legislature or the Governor and Council. The Court itself, however, has made it clear that no other parties, public or private, are entitled to apply for advisory opinions, and that the Court’s general authority to opine on matters of law is limited to discrete conflicts between parties whose personal legal interests have been or may be jeopardized. In summary, courts are tribunals for the adjudication of disputes, not places for the discussion of philosophy.

What, then, about "judicial review," which is the power of the Judiciary to declare an act of the Executive or the Legislature unconstitutional? It is interesting to note that nowhere in the Constitution is this authority expressly granted to the Court. Nevertheless, the

Court itself staked out this territory very early in the history of our State. Most notably, in the 1818 case of *Merrill v. Sherburne*, the Court asserted that judicial review is inherent in the concept of a written constitution. Justice Levi Woodbury (who later sat on the Supreme Court of the United States) wrote for the Court that "it is the province of judges to determine what is the law, for they are to apply it while the [Legislature] makes it." Since Article 4, Part II of the Constitution, in turn, prescribed that the Legislature could make only such laws as were not "repugnant or contrary to the constitution," Judge Woodbury concluded that the Court had the power to determine whether a legislative act submitted to it for interpretation conflicted with the "higher law" of the Constitution and, if the Court concluded that the statue did so conflict, the Court had the power to refuse to apply it.

The other justification for the power of judicial review stems from a notion that the Court is special guardian of the rights of the people against infringement by an oppressive state. This concept, of course, assumes that in any case or controversy in which there is a collision between a citizen's rights guaranteed by the Constitution and an exercise of governmental power over that citizen, the source of the claimed oppression will most likely be the Legislature or the Executive. Although this view of the Court's role did not really come into vogue until the twentieth century, it does have an ancient and honorable lineage. For example, in the great speech he made to the U.S. House of Representatives on June 8, 1789 in which he proposed the amendments to the U.S. Constitution which we now call the Bill of Rights, James Madison had this to say about judicial review:

> It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention… If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for the constitution by the declaration of rights.

This same sentiment was echoed by our own Chief Justice Frank Kenison in a 1976 address commemorating the bicentennial of New Hampshire's first constitution:

> The institution of judicial review provides a link between the American Revolution and our present situation. The American people revolted in the 1770s against governmental action which they felt violated their fundamental rights. Judicial review provides a means of redress against such action today.

The difficulty, however, with all of these explanations of judicial review is that they include no parameters by which to measure its limits. And the fact of the matter is that the agency which possesses the power of judicial review - the Court- is the same body which claims to have the power to define its limits. The real problem with judicial review, therefore, is that the Constitution has assigned the fox to guard the henhouse.

It is true that at the time our early constitutions were formed, the branch of government most feared by men such as Madison was the legislative branch; thus he and others often warned of the dangers implicit in the "tyranny of the majority." Thomas Jefferson agreed. For example, he stated in a letter he wrote to Madison on March 15, 1789, that "This [the Judiciary] is a body, which if rendered independent and kept strictly to their own department merits great confidence for their learning and integrity." For the Framers, then, the Judiciary was considered to be "the least dangerous branch."

Little did Jefferson know at the time, however, how important was his proviso that the judges "be kept strictly to their own department." For when he became President of the United States, Jefferson himself was subjected to an egregious instance of judicial overreaching in the case whose name has become synonymous with the doctrine of judicial review, *Marbury v. Madison*. In that famous case, Chief Justice John Marshall declared that the newly elected President (Jefferson) and his Secretary of State (none other than James Madison) could not constitutionally refuse to honor the appointment of a Mr. Marbury to the office of justice of the peace. Marbury's commission had been signed by Jefferson's predecessor, John Adams, in the waning hours of his administration, but the commission had not been delivered by the time Adam's term in office had expired. Although Marshall ultimately decided that the Supreme Court had not been granted jurisdiction by the Constitution to decide such cases and, therefore, that Mr. Marbury was not entitled to any relief, Marshall had gone out of his way to make the gratuitous point that if the Court had been granted such jurisdiction, it could have told the President what to do. Jefferson never forgave him for the insult.

In part on account of his own experience, but more likely because of his general observations of the behavior of judges, Jefferson eventually came to appreciate the tendency of judges to constantly expand their powers. As he wrote in his *Autobiography* in 1821:

> It is not enough that honest men are appointed Judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence. To this bias, add that of the esprit de corps, of their peculiar maxim and creed, that “it is the office of a good Judge to enlarge his jurisdiction,” and the absence of responsibility.

Moreover, in a contemporaneous letter to his friend William Jarvis, Jefferson noted how this habit of judicial self-aggrandizement was particularly troublesome when it occurred in the context of judicial review.

> Betrayed by English example, and unaware, as it should seem, of the control of our constitution in this particular, they [American judges] have at times overstepped their limit by undertaking to command executive officers in the discharge of their executive duties; but the constitution, in keeping three departments distinct and independent, restrains the authority of the judges to judiciary organs, as it does the executive and legislative to executive and legislative organs. The judges certainly have more frequent occasion to act on

> constitutional questions, because the laws of meum and teum and of criminal action, forming the great mass of the system of law, constitute their particular department. When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power... [I]f the three powers maintain their mutual independence on each other, [our government] may last long, but not so if either can assume the authorities of the other.

To the extent that we must rely upon the judiciary's self restraint in not "assuming the authorities" of the other branches, the Court's decisions in the *Claremont* cases demonstrate just how precarious our situation is. As we have noted before, the Court never even quotes or discusses the Constitution's one textual restriction upon its power of judicial review, the separation of powers provision. On the other hand, no one should have been too surprised about that because the Court had already taken the position in earlier cases that "the interpretation of our constitution is a traditional function of the judiciary and is not within the competence of the other two branches." The lack of respect evidenced in these comments for the institutional competence of the executive and the legislative branches - who certainly are capable of forming responsible opinions on issues of constitutionality and who in fact frequently do express such opinions in the course of executing their respective duties - goes a long way towards explaining the mindset of the Court which issued the decisions in the *Claremont* cases.

However, if there ever was any question about whether the attitude exemplified in the *Claremont* decisions really does represent the thinking of the Court, the recent extrajudicial remarks of the Chief Justice should have resolved all doubts on that score. In his "State of the Judiciary" speech delivered on January 22, 1998 to the mid-winter convention of the New Hampshire Bar Association, Chief Justice Brock took the opportunity to chastise those who disagreed with the Court's decisions. Justice Brock's position on this subject was essentially the same as that of St. Augustine in another context, "Rome has spoken; the case is closed." But the Chief Justice's real ire was reserved for those who dared to criticize the Court itself. To this group, Justice Brock delivered the following scolding: "Such criticism is dangerous to a free society, for it will erode public respect for, and confidence in, the judicial system and the rule of law, which are the foundations of our society."

Justice Brock was, of course, wrong on almost every account. First, public criticism of public institutions is almost never wrong in a democratic society. Secondly, public criticism of a judicial abuse of power is particularly appropriate since judges have life tenure and are therefore immune from almost all forms of political suasion except for the people's rights of free speech. Thirdly, it is especially inappropriate for the supposed guardians of the rights of free speech to be criticizing the exercise of those rights. Finally, what is truly "dangerous' about the *Claremont* decisions is not that they have provoked a

public outcry, but that they reflect such a cavalier attitude on the part of the Court itself with respect to the need for self-discipline in its exercise of its otherwise unrestrained power of judicial review.

We have already commented upon the internal dynamic of entitlements which favors their perpetual expansion. This centripetal force finds its origin in the perfectly natural human qualities known as greed and envy; i.e., if there is more to get, I want it - especially if you already have it. The point now being made is that there is similar internal dynamic in the doctrine of judicial review. Thus, when the compulsive expandability characteristic of all entitlements is coupled with the equally compulsive tendency of an unrestrained judiciary to enlarge upon its own powers, entitlements can completely spin out of control.

One might suggest that the tendency of the judiciary to expand entitlements is no greater than that of the administrative bureaucracy which accompanies any legislative entitlement system. While this may or may not be true, the problem with judicially created entitlements is that we get the worst of both worlds. This is because every entitlement system, whether created by the Legislature or by the judiciary, generates the bureaucratic superstructure required to administer the code of implementing regulations which inevitably follows the creation. Consequently, if we should generally beware the establishment of entitlements, we should be especially cautious about countenancing their establishment by the Court. This, of course, is even more so the case because the Court is insulated from the political process and once it creates, it is extremely difficult for us to uncreate.

The other feature of judicial entitlements which make them so much more problematical for a democratic society than legislatively created entitlements is that they separate the law-maker from the tax-payer. The basic principle of responsible schemes of wealth redistribution is that those who do the redistributing ought to include their own wealth in the redistribution. That principle is violated, however, when the judiciary decides that citizens have an affirmative right (i.e., entitlement) to some social welfare benefit - and then hands the problem over to the legislative and executive branches to fund it. In fact, a judicial entitlement is a perfect example of what we have come to know and hate as an "unfunded mandate".

And this is exactly what the *Claremont* decisions constitute: and unfunded mandate. Having made its pronouncement from on high that every citizen has a constitutional right to an "adequate" education, the Court simply passed the buck to the Legislature and the Governor to figure out how to raise the money. If this transfer had been made with no strings attached, the *Claremont* decisions might have been tolerable (even if they can never be intellectually defensible). However, the Court made it eminently clear in *Claremont II* that this was not to be the case. By its repeated assertions that the Constitution not only provides for a right to an "adequate" education, but that it also guarantees a right to an "adequately funded education, the Court let it be known that whatever level of educational funding is established by the Legislature, it will be subject to judicial review.

The watchwords of the American Revolution - "no taxation without representation" - are equally applicable to the *Claremont* decisions. When a legislative body - whether it be the General Court or a local school district - sets a level of "adequacy" for educational funding, the proper link between the pocketbook and the vote is maintained. It is amazing how this simple requirement of making those who pass the laws pay for the laws can have such a salutary effect upon government profligacy. When the Court, however, takes it upon itself to direct and supervise the process, that connection is severed. Herein lies the paramount evil of judicial entitlements: the tax rate for one million citizens can be set by five black robes in Concord who are responsible to no one but themselves.

Rasputin

"Rasputin:"

Letters to the Educators, No. 7

Who Is To Guard The Guardians?

The genius of the American political system lies in its resolution of the problem posed by James Madison in *The Federalist*, No. 51: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." The American solution, of course, is its system of checks and balances. As Madison put it, "Ambition must be made to counteract ambition."

Our Constitution has two types of checks and balances built into it, vertical ones and horizontal ones. The vertical lines of control are those which run between the institutions which do the governing and the people who are governed. The horizontal controls are those which the three supposedly co-equal branches of government exercise over each other. Checks and balances are also direct and indirect. Direct checks are those wherein one person, group, or branch of government can reverse or alter the specific act or decision of another, such as the Governor's power to veto a bill passed by the Legislature. Indirect checks consist of those grosser devices by which pressure can be brought to bear upon an institution in a more general way, such as the voters' power to elect the Legislature.

We have learned that the Supreme Court's power of judicial review - its power to declare the acts of the other two branches unconstitutional - while quite plausibly implied in the Constitution, is nowhere expressly mentioned therein, and therefore is effectively an invention of the judiciary. Even to the extent that judicial review is deemed to be constrained by the Constitution's express recognition of the doctrine of separation of powers, the "final arbiter" (as the Court is so fond of calling itself) of the interpretation of the separation of powers clause is the same institution which decides how far its own powers of judicial review extend.

The problem with the Supreme Court's power of judicial review, therefore, is that there is no effective counter to the Court's ambition. To begin with, there is no horizontal check which directly counteracts the Court's power of judicial review; neither the Governor nor the Legislature has any power under the Constitution to alter a decision of the Court which purports to interpret the Constitution. Accordingly, the limits of judicial review are essentially only those which the Court chooses to impose upon itself.

On the vertical plane, the only potentially meaningful direct control upon the Court's power of judicial review is the people's reserved power to amend the Constitution. Article 100, Part II of the Constitution, however, makes the process of amendment extraordinarily (but quite appropriately) arduous. First, a proposed amendment must be approved by three-fifths of the entire membership - that is, not of just those present and voting - of each house of the Legislature. Alternatively, the Legislature may by majority

vote convene a constitutional convention, which such body may propose amendments by a three-fifths vote of its entire membership. If the proposal successfully runs either of these gauntlets, it must then be approved by two-thirds of the State's voters at a general election. Despite the fact that our Constitution has reputedly been amended some 140 times since 1784, suffice it to say that the amendment process provides a rather cumbersome method of exercising popular control over a judicial power-grab.[1]

Since there is no effective direct check or balance on the Court's power of judicial review, we are left with the question of whether or not the indirect checks upon the Court are sufficient to restrain it from straying out of its proper territory. The first thing to note with respect to indirect checks upon the Court is that the checks (legislative or executive vetoes) are nonexistent and direct vertical checks (constitutional amendments) are ineffectual at best; in the realm of indirect checks and balances, it is the vertical ones which are essentially nonexistent and the horizontal ones which are ineffectual.

The most extreme vertical check upon the government's abuse of its power is a citizen's right of revolution, which is specifically preserved in the New Hampshire Constitution by Article 10, Part I. At the opposite end of the spectrum are a citizen's right of free thought, free speech, and free press. In theory, both revolution and free expression are devices which are available to restrain the power of any one of or all three of the branches of government. On the other hand, when it comes to the judiciary, we can substantially discount the efficacy of free speech as a control device because - for better or for worse - the Court considers itself immune from public criticism. As far a the right of revolution is concerned, we can presumably exclude that as well, simply on the grounds that it is not productive to spend our time considering remedies designed only for doomsday scenarios. (Although the *Claremont* decisions are horrific, no one has yet suggested that they rise to the level of a breach of the social contract.)

Between these two extremes lies the most important and most effective vertical device to control the general behavior of government: a citizen's right to vote. The problem, however, is that this is a control mechanism from which the judiciary is expressly *exempt*. In fact, the framers of our constitutions deemed independence from the political process, secured by life tenure, to be one of the necessary attributes of the judicial branch of government. For example, in his discussion in *The Federalist*, No. 51 of the principle that government should be subject to the consent of the governed, James Madison took the following position:

> Some deviations ... from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select the mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

In light of the virtual immunity which life tenure gives the judiciary from any vertical control upon its general behavior, one might have assumed the Constitution would make up the difference with horizontal controls. Although this is perhaps theoretically the case, the devices provided by the Constitution for the legislative and/or executive branches to exercise control over the judicial branch (i.e., the horizontal checks and balances) are more likely in the current era to be reserved for cases of personal, as opposed to institutional, misconduct.

To begin with, some of the horizontal control devices which were historically available in 1784 have been eliminated by subsequent constitutional amendments or judicial decisions. For example, the power to reorganize the court system and to thereby legislate Supreme Court justices out of a job - a tactic that was used quite frequently by opponents of the Court in the nineteenth century - was canceled when Article 72-a, Part II was added to the Constitution in 1966. Likewise, the Legislature's power to tinker with the judicial salaries was curtailed by the Court itself in a 1995 *Opinion of the Justices* which held that a judge's salary may not be legislatively suspended or reduced during his or her tenure in office.

The most awesome power which the legislative and executive branches have over the judicial branch is the power of impeachment. Article 35, Part I provides that the Supreme Court judges shall hold their offices "so long as they behave well." To the same effect is Article 73, Part II, which provides that all judicial officers "shall hold their offices during good behavior." While these provisions establish the judiciary's life tenure, the reference to "good behavior" establishes the grounds for their removal by impeachment. Article 38, Part II provides that impeachment commences through the presentation of articles of impeachment in the House of Representatives and is concluded by a trial in the Senate. The grounds stated by the Constitution for impeachment are "bribery, corruption, malpractice, or maladministration in office." Finally, an accused judge is granted full procedural rights to notice of the charges, the assistance of counsel, and the production of witnesses in his behalf.

Not surprisingly, no justice of the New Hampshire Supreme Court has ever been successfully impeached. On the other hand, that may well be due more to the availability of an alternative removal process known as "address" than to the difficulty of prosecuting an impeachment. In that regard, Article 73, Part II of the Constitution provides that, "the governor with the consent of the council may remove [judicial officers] upon the address of both houses of the legislature." According to a 1959 article by lawyer-historian Richard F. Upton in the *New Hampshire Bar Journal*, "removal of members of the judiciary ... by address requires no investigation or trial. Based on past precedents, it does not appear that charges need to be stated or approved. And only such hearing will be given as is naturally incident to the legislative process."

Mr. Upton reports that four separate attempts to amend the Constitution to limit the power of address to cases of incapacity or misconduct or to prohibit the exercise of the power "for political reasons" have all failed. Nevertheless, although new administrations in the nineteenth century frequently availed themselves of the political use of address to

sweep the old guard from office in order to replace them with members of the new ruling party, address has been used to remove a judge only once in the twentieth century, and that concerned a municipal court judge who was the subject of numerous complaints of personal misconduct.

It should be noted that the appropriateness of address as a vehicle to control the judiciary's exercise of its power of judicial review does have some historical authority. For example, in 1813, a petition was presented to the Legislature requesting the repeal of the act by which it had completely reorganized the court system and legislated all of the incumbent justices out of office. The Legislature rejected the petition and adopted a report of a committee of the House which, among other things, noted that the power to abolish courts was a necessary check on the judiciary's authority to declare laws unconstitutional.

On the other hand, removal of judges, either through a wholesale reorganization of the court system (which is now constrained by Article 72-a, Part II) or by deposing individual judges through impeachment or address, does nothing to reverse the ill effects of an unacceptable judicial decision. The same thing can probably be said for the mirror image of judicial removal: court packing. Since the Constitution does not prescribe the number of Supreme Court justices, the Legislature could indeed increase the current membership from five to seven, or to nine, or to any other number. Packing the Court, however, does not itself change any of its previous rulings. Furthermore, the practical difficulties in actually accomplishing an impeachment, an address, or a court-pack, together with the lack of recent precedent for any of these schemes, means that the threat of their use probably exerts very little control over the Court's exercise of its powers of judicial review.

In summary, then, the Court's powers are subject to very few indirect controls, either on the vertical scale or on the horizontal scale. When combined with the lack of direct controls upon the Court's power of judicial review, it should be apparent that there is precious little that anyone can do when the Court makes a bad constitutional decision. Consequently, although the New Hampshire Constitution proclaims that "the legislative, executive and judicial [powers], ought to be kept separate as the nature of a free government will admit" (Article 37, Part I) and that "all the magistrates and officers of government are [the people's] substitutes and agents, and at all times accountable to them" (Article 8, Part I), our Supreme Court has effectively become exempt from both of these requirements.

Thomas Jefferson believed that "the natural progress of things is for liberty to yield and government to gain ground." As reflected in a letter he wrote in 1816 to Joseph Cabell, he also believed that government would gain its ascendancy over liberty all the more easily if power were not dispersed among competing agencies: "What has destroyed the liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating of all cares and powers into one body, no matter whether of the autocrats of Russia or France, or of the aristocrats of a Venetian Senate." This is exactly the same point that Madison had made in the Great Debate over the ratification of

the Constitution in 1787-9: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." (*The Federalist*, No. 47)

As we have previously noted, Jefferson was one of the few Framers who had the foresight to anticipate a concentration of power in the hands of the judiciary. On the other hand, it is doubtful that any one of them would have predicted the activist courts of the twentieth century. One need only turn to the opinion of our own Court in the early case of *Merrill v. Sherburne* (1816) to get a flavor of the type of judicial review that was contemplated by those who wrote America's eighteenth century constitutions, including New Hampshire's. Although the Court did declare a statute unconstitutional, look at how it addressed its co-equal branch of government:

> [W]e have in the present cause, experienced considerable embarrassment: but duty has compelled us to act, and it hardly need be repeated, that we have attempted to divest ourselves of every feeling, except an earnest desire to perform what duty dictated ... If then there should happen to be an irreconcilable variance between the constitution and a statute, that which has the superior obligation and validity ought of course to be preferred: in other words, the intention of the people ought to be preferred to the intention of their agents. Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes, that the power of the people is superior to both; ... Our confidence, also, in the liberality of the legislature is such, that when through inadvertence or mistake, they have passed an unauthorized act, we believe that should the unpleasant task of adjudging it void, devolve upon us, they would think the task is performed only from a conviction that the act is in the *clearest* manner, unconstitutional, and that our right and duty so to pronounce it are both unquestionable.

(emphasis in original)

The almost apologetic quality of the Court's *Merrill* opinion is a far cry from the decisions written by today's philosopher-king judges. The Court's decision in *Claremont II* simply could not have been written in 1784. Whereas the *Merrill* decision was a model of institutional deference, *Claremont II* virtually oozes with condescension. For example, after making the obligatory ritual promise that it does not "intend to intrude upon the prerogatives of other branches of government", the *Claremont* Court proceeds to do just that:

> We anticipate that they [the Executive and the Legislature] will promptly develop and adopt specific criteria implementing these guidelines [for an 'adequate' education] and, in completing this task, will appeal to a broad constituency.

It is hardly nitpicking to observe that the Court's assignment of a "task" to the Legislature and the Executive which they must complete "promptly" sound somewhat like a

schoolmarm addressing her students. In addition, the Court's own specification of "guidelines" for educational adequacy leaves the other two branches of government with no job to do except to rubber-stamp what the Court has already done. Finally, by its direction to the Governor and the Legislature that they "appeal to a broad constituency," the Court takes it upon itself to lecture its equals as to how *they* should do *their* job.

If the *Claremont* decisions are a harbinger of the future, perhaps it is time for a change. No less a figure than George Washington accepted the possibility that experience might reveal that one branch of government was insufficiently restrained by the Constitution's original system of checks and balances, and that the system might have to be altered in order to restore the balance. In fact, this was one of the thoughts that he left with his fellow Americans when he took leave of his political career in his famous Farewell Address:

> It is important, likewise, that the habits of thinking in a free Country should inspire caution in those entrusted with its administration, to confine themselves within their respective Constitutional spheres; avoiding in the exercise of the Powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under own eyes. To preserve them must be as necessary as to institute them. If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates.

To the extent that the *Claremont* decisions have provoked consideration of a constitutional amendment designed to reverse the specific holdings of those cases, perhaps the Legislature ought to give some serious thought to offering the voters of this State a constitutional amendment which deals with the broader problem of judicial abuse which created the *Claremont* crisis. One of the proposals which has been bandied about on the federal level in the backlash against the excesses of the Warren and Burger Courts is an amendment to the Federal Constitution which would make any decision by the Supreme Court reversible by (1) a supermajority vote (2/3, 3/5 or 3/4) of both houses of Congress, and (2) the concurrence of the President. If the Court is hell-bent upon participating in the legislative process, perhaps the Constitution should be amended to have the Executive and the Legislature participate in the judicial process.

Such a proposal is not as far-fetched as you might think. On several different occasions, none other than James Madison advocated that the Philadelphia Convention incorporate a provision into the Federal Constitution which would accomplish the reverse of this

proposal. In particular, on August 15, 1787, Madison introduced an amendment to the draft constitution which would give the Court the same veto power over legislation as the President had, subject to being overridden by a two-thirds vote of both houses of Congress in the case of only a judicial or an executive veto, and a three-fourths vote in case of a veto by both the Court and the President. In supporting Mr. Madison's motion on the Convention floor, Mr. Mercer of Maryland commented as follows:

> It is an axiom that the judiciary ought to be separate from the legislative; but equally so, that it ought to be independent of that department. The true policy of the axiom is, that legislative usurpation and oppression may be obviated. He disapproved of the doctrine, that the judges, as expositors of the Constitutions, should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable.

Although Madison's proposal was not adopted, his approach to the problem is quite instructive to our current situation. What is most relevant is the notion that judicial review need not be the absolute power that it has become in order to function effectively. Adjustments to the Court's power of judicial review can indeed be made without throwing the baby out with the bath.

Rasputin

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[1] Interestingly enough, there has been a great hue and cry in the aftermath of *Claremont II* about how it is supposedly inappropriate to pass a constitutional amendment for the purpose of reversing a judicial decision. One can understand such drivel being issued by those who support the result reached by the Court in its *Claremont* decisions and who justify the means by the ends achieved, but it is frankly most peculiar to see this position being espoused by so many newspaper editors who ought to know better. The fact of the matter is that the judiciary's abuse of its powers to determine what is constitutional and what is not presents the paradigmatic occasion for a constitutional amendment.

"Rasputin:"

Letters to the Educators, No. 8

Making The Case For Candor

As Thomas Jefferson observed in his letter of 1816 to John Taylor, "The further departure from direct and constant control by the citizens, the less has the government of the ingredient of republicanism." Applying this formula to the judiciary and taking into account its life tenure, Jefferson concluded: "The Judiciary [is] seriously anti-republican."

Life tenure obviously does provide the judiciary with an extraordinary potential for the exercise of political power. On the other hand, although life tenure provides the judiciary with the ultimate in employment security, it is still only a defensive weapon. When it comes to offensive weapons, the judiciary's arsenal is not so nearly so well stocked. In particular, the judiciary has neither the power of the purse nor the power of the sword. As Joseph Stalin once remarked about another institution which suffered from similar disabilities: "The Pope! How many divisions has *he* got?" To secure compliance with its decrees, therefore, the Court must rely upon the public's willing obedience (or at least its grudging acquiescence) and failing that, upon enforcement by the other two branches of government. In either case, the Court's effectiveness is dependent upon the voluntary cooperation of parties who may seriously disagree with it.

Since the Court cannot compel such cooperation, the Court must earn it. At least in the long run, this means that the Court's decisions and society's fundamental beliefs must generally coincide. As the constitutional scholar Alexander Bickel once commented, "The Supreme Court's law...could not in our system prevail - not merely in the long run, but within the decade - if it ran counter to deeply felt popular needs and convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country." To the extent, therefore, that the Court's legitimacy is dependent upon the eventual consonance of its decisions with public opinion, one could argue that Jefferson was wrong and that the judiciary really is a democratic institution. Professor Bickel, for example, espoused just such a view: "This, in the end, is how and why judicial review is consistent with the theory and practice of political democracy. This is why the Supreme Court is a court of last resort presumptively only."

Such an argument, however, not only attenuates the definition of democracy to such an extent that the word is robbed of all meaning, but also sends the Court the wrong message. Judicial review is by its nature counter-majoritarian and judges, therefore, must be prepared to buck the tide of public opinion. As Alexander Hamilton noted in *The Federalist, No. 78*, "[I]t would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community." Consequently, the reason that

the Court was granted life tenure was just so it would not have to keep one eye on the courtroom and the other on the polls.[1]

On the other hand, immunizing the Court from the political process was not intended to release it from *all* external constraints. Although freed from any meaningful control by the electorate, the judiciary was still supposed to be subject to our carefully crafted system of institutional checks and balances, including the doctrine of separation of powers. The problem, however, is that the judiciary was also granted (or, in the opinion of some scholars, it simply assumed unto itself) the power of judicial review, which gives the judges the last word in matters of constitutional interpretation. To the extent that this often involves an interpretation of the doctrine of separation of powers itself, the judiciary has become the final arbiter of the limits of its own power.

As we have previously discussed, the doctrine of separation of powers was intended to be the American antidote for the classic truism that, "Power tends to corrupt and absolute power corrupts absolutely."[2] Jefferson, for example, was very familiar with this principle; as he commented in his *Autobiography*, "[I]t is not by the consolidation of powers, but by their distribution, that good government is effected." However, we will have accomplished nothing if the judiciary, which we set up to restrain the legislative or executive branches from violating the Constitution, can itself violate the Constitution. As Alexander Hamilton stated, "If [the courts] should be disposed to exercise WILL instead of JUDGEMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." How then, is this dilemma to be resolved?

One way is to simply admit that there are no effective *external* controls over the Court and to turn instead to *internal* controls. One of the reasons that the Framers entrusted judicial review to the judiciary was precisely because the regime of the law is characterized by certain rules of procedure which are designed to limit what judges can do. In particular, these rules attempt to promote the judicial impartiality and consistency which are the hallmarks of a system of laws, not men. This is presumably what is meant by the inscription over the front entrance of the U.S. Supreme Court building: "Equal Justice under Law."

One example of these precepts is the tradition of the written opinion. By having to write and publish a formal opinion, a judge is required to explain his reasons for reaching a particular decision. If the judge's reasons are based upon irrelevant or unacceptable criteria, faulty logic or incorrect facts, the judge should expect to be criticized and, if his decision is appealed, to be overruled. On the other hand, a well-written opinion will hopefully persuade the reader that the judge was correct in deciding as he did - or at least that the judge's decision is within the realm of reason. Thus, the requirement of a written opinion not only imposes an internal discipline upon the judge who writes the opinion, but also increases the likelihood that the result will be accepted by others - even if they disagree with it.

Another internal limitation upon the exercise of judicial review is the notion of principled decision-making. By that I mean what Professor Herbert Wechsler meant when he wrote

in 1959 that a principled decision was "one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Accordingly, a judicial decision should not be ad hoc; it should be based upon articulatable principles which are equally applicable to any other case presenting the same or similar facts. Like the requirement that an opinion be written, the necessity that it be principled not only serves as a check upon the arbitrariness of the judge, but it also cultivates the respect for the judiciary which allows people to accept its decrees - even the adverse ones.

Finally, one of the most familiar features of the judicial process which imposes some form of internal restraint upon the Court's exercise of its power of judicial review is the doctrine of *stare decisis*. This is the legal tradition which requires judges to follow precedent. By honoring the justifiable expectations of people who have ordered their affairs in reliance upon prior judicial decisions, adherence to precedent promotes certainty and predictability. More importantly, like the requirement of a written opinion and the concept that judicial decisions should be based upon neutral principles, the doctrine of *stare decisis* protects us against judicial caprice.

These characteristics of the judicial process were indeed touted by the early supporters of judicial review as sufficient safeguards against an otherwise unrestrained judiciary. Alexander Hamilton, in particular, argued that an independent judiciary could be trusted with the power of judicial review precisely because it was bound to conduct its affairs according to established modes of decision making which, although self-imposed, would act as an effective check upon the Court's activities. In this regard, Hamilton especially commented upon the efficacy of the doctrine of *stare decisis*; "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."

This, of course, does not mean that the Court can never reverse course. Before ascending to the U.S. Supreme Court, Oliver Wendell Holmes wrote a famous article in 1897 entitled *The Path of the Law*, in which he argued that change is necessary lest rules "simply persist from blind imitation of the past." In appropriate cases, therefore, prior decisions can and indeed should be overruled. As Supreme Court Justice Louis Brandeis wrote in a 1932 case, this is especially true with respect to constitutional decisions:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right....But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

However, even if we acknowledge the possibility of change in judicial interpretations of the Constitution, that does not dictate a total abandonment of *stare decisis*. Principled

decision-making commands that there be rules for change, as well for other things. Just recently, the U.S. Supreme Court had an occasion in the case of *Planned Parenthood v. Casey* (where the Court just barely decided not to overrule the controversial case of *Roe v. Wade*) to articulate the conditions for departing from previous decisions:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective cost of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Our Court has fashioned similar rules for deviating from precedent. Although these rules - like the doctrine of *stare decisis* itself - are self-imposed, they nevertheless constitute a meaningful constraint upon the Judiciary's potential abuse of its power of judicial review. For if the Court must either follow its own precedents or give logical, consistent and traditional reasons for abandoning them, we have some guarantee that the Court's decision will be, as Hamilton said, an act of judgment, not will.

If there is one thing, however, that I can say without equivocation about the *Claremont* decisions, it is that they *do not* follow the Court's own precedents. Let us begin with the basic fact that the system that the Court declared unconstitutional and the provisions of the Constitution upon which the Court relied to strike that system down have existed for more than two centuries. Although one might argue that the fact that we have been doing something for 200 years doesn't necessarily mean we have been doing it right, it would seem that some smart lawyer in our litigious society would long ago have made the same claims that the *Claremont* plaintiffs did. Yet it was not until we had almost concluded the twentieth century that we got *Claremont I* and *Claremont II*. At a minimum, therefore, these decisions represent a departure from some pretty substantial conventional wisdom.

Moreover, to state - as the Court did in *Claremont I* - that the "decisions of this court are consistent with [our] conclusion" is pure bunk. Contrary to the Court's representations, the New Hampshire precedents interpreting Article 83, Part II of the Constitution are essentially *in*consistent with the *Claremont* decisions. As reflected in the summaries of the relevant cases in the Appendix which is attached to this essay, the following was the state of the law on educational rights and duties before *Claremont*.

1. Article 83, Part II's imposition upon the Legislature of a "duty" to cherish education is a *grant of power* which *authorizes*, but does not *require*, the Legislature to pass laws in furtherance of education.

2. Article 83, Part II does *not* confer "rights" upon parents, students, teachers, or voters, either to an education or to direct the educational process.
3. Article 83, Part II, of the Constitution does *not* grant the Court any general power to interfere with or supervise the Legislature's educational policies.

When one reads reports of the *Claremont* case which claim that the Court's decision concluded that New Hampshire's current educational system is "at odds with two centuries of case law" (a statement which appeared in a recent New Hampshire newspaper editorial), one can only admire how the Court has managed to make black appear to be white. As the foregoing review of prior case law demonstrates, the Court's discovery of a constitutional right to an adequate education constitutes a complete break with the past. Yet you would never know that from reading the *Claremont* opinions.

Another thing that you would not know from reading the Court's opinions in *Claremont* is that the Court had at least once before passed up an opportunity to declare the local property tax system of funding New Hampshire's educational system unconstitutional. In 1971, in the case of *Laconia Board of Education v. City of Laconia*, the Laconia school board brought a petition to compel the Laconia city council to either approve the school board's submitted budget or to approve a budget in an amount sufficient for the board to meet its statutory obligations to educate Laconia's school children. The Court held that (a) under the New Hampshire statutes and the City of Laconia charter, the city council, not the school board, had final say in appropriations for education; (b) although the City did have to appropriate at least enough money to satisfy statutory and Board of Education mandates, (c) there was insufficient evidence that the budget which the city council had approved would fail to satisfy those mandates. As a result, the Court denied the school board's petition. Moreover, the Court specifically declined to rule upon the school board's contention the "the present system of financing the Laconia school system by a property tax is a violation of the equal protection clause of the fourteenth amendment of the United States Constitution." The Court's refusal to deal with the issue was purportedly because the claim had only been raised in oral argument before the Supreme Court and had not been considered by the trial court or briefed by the parties. Nevertheless, the Court did discuss it and there is no mention in the Court's discussion of any possible relevance to this claim of Article 83, Part II of the New Hampshire Constitution - nor does it appear that such a connection ever occurred to the school board. Suffice it to say that the Laconia case is not cited or discussed by the Court in either of its *Claremont* decisions.[3]

Finally, you would not learn from reading the *Claremont* decisions that the Court had, at least once and perhaps twice, decided that the Constitution does *not* guarantee an affirmative right to a State-supported education. First, there was the *Opinion of the Justices* issued by the Court in 1978 concerning the constitutionality of a bill pending before the House of Representatives which proposed to excuse local school districts from any duty to provide a public school education to the residents of military installations located within the boundaries of such districts unless the districts were reimbursed by the Federal Government. The Court held that the bill denied the military residents of the affected school districts the "equal protection of the laws" guaranteed by Part I, Article I

of the Constitution because no one could offer the Court any reasonable basis for their discriminatory treatment. Despite having been asked whether the bill violated *"any* provision of the Constitution of New Hampshire", the Court made no mention of Article 83, Part II of our Constitution. More importantly, by even hinting that the State could have *completely* denied a free public education to some segment of the population if there had only been a rational basis for the law, the Court was certainly not acting as if it recognized any constitutional right to an education, much less an "adequate" one.

Then in 1985, in the case of *State v. Evans*, a prison inmate claimed that he had a right under Article 18, Part I of the Constitution (which stated that, "[T]he true design of all punishments [is] to reform") to be provided with a free *college* education. In addition to holding that this provision of the Constitution was merely hortatory and, therefore, did not convey any rights upon anyone, the Court also held that it had no business involving itself in the operations of the prison system, even under a statute requiring the Department of Corrections to set up an educational system for inmates. Moreover, even though the question specifically presented to the Court was, "Does an inmate at the New Hampshire State Prison have a [i.e. any] constitutional or statutory right to a State-funded college education," the Court nowhere cited or discussed Article 83, Part II of the Constitution. Finally, the Court did not equivocate in answering the question presented to it in the negative: "A talented law-abiding citizen of the State of New Hampshire has no right to a State-funded college education. A talented inmate of the New Hampshire State Prison has no greater right." Again, it goes without saying that there was no mention of the *Evans* case in either *Claremont I* or *Claremont II*.[4]

What is at issue here is not the court's miraculous transformation of the Legislature's duty to cherish education into a citizen's right to obtain an education; it is the Court's failure to acknowledge that its conclusions constitute a major deconstruction of 200 years of case law and conventional wisdom. At a minimum, it was shoddy craftsmanship for the Court to have omitted any reference to the *Laconia* case, the 1978 *Opinion of the Justices* and/or the *Evans* case in its *Claremont* opinions. Even worse, it was downright disingenuous for the Court to affirmatively state that its prior decisions were "consistent" with the conclusions it reached in *Claremont*. In this regard, the Court's sin lies not so much in its disregard of history, but in is lack of candor.

If the test, therefore, of whether or not the *Claremont* decisions represent a threat to democracy is based upon what those decisions can tell us about where the Court may go in the future, we may well have reason for concern. To the extent that the Court created a constitutional right to an adequate education out of whole cloth, one would not feel as uncomfortable about the future if the Court had at least admitted it. By purporting to rely upon a provision of the Constitution which neither textually nor historically supports the Court's decision, the Court raises the specter of a shift to result-oriented jurisprudence. If the words of the Constitution don't mean what they say and if contrary precedents are made to vanish into thin air, upon what principled basis does the Court intend to decide constitutional questions?

The irony of the *Claremont* decisions is that they are as bad as they are because the Court was not as bold as it could have been. Since the Court apparently felt compelled to break new ground and fashion a right to education, it would have been on firmer ground if it had simply acknowledged that it was recognizing a new substantive right not specifically enumerated in the Constitution. The New Hampshire Constitution does not purport to identify each and every substantive right which is retained by the people. For example, Article 2, Part I states that, "All men have certain natural, essential, and inherent rights - *among which are*, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and in a word, of seeking and obtaining happiness." Relying upon this express provision of the Constitution, upon general references in the Constitution to due process of law and upon theories of natural law, the Court has on several occasions recognized the existence of unenumerated substantive rights, such as the right of self-defense, the right to live where one chooses, and the right to travel. Consequently, if the right to an education is a "fundamental" right of every citizen - which the *Claremont* decisions claim is so - the Court would have been better off if it had discovered it among the unenumerated "natural, essential, and inherent" rights protected by Article 2, Part I of the Constitution rather than by inventing the contrived explanations which were required to place it under Article 83, Part II.[5]

By saying this, I don't mean to retract any of my disagreements with the Court's establishment of a constitutional right to an adequate education. Adequacy is still a political question and the creation of constitutional entitlements is still a mistake. Nevertheless, a principled decision is infinitely more acceptable than an unprincipled one. And it is because the *Claremont* decisions are not only wrong, but because they are also unprincipled, that they are so dangerous.

A decade ago, Professor David Shapiro addressed these issues in an article entitled *In Defense of Judicial Candor*. Although he was writing more generally, his remarks almost seem to have been prepared with foreknowledge of our Court's *Claremont* decisions:

> A requirement that judges give reasons for their decisions - grounds of decision that can be debated, attacked, and defended - serves a vital function in constraining the judiciary's exercise of power....In the absence of an obligation of candor, this constraint would be greatly diluted, since judges who regard themselves as free to distort or misstate the reasons for their actions can avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail. In a sense, candor is the *sine qua non* of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another. Moreover, lack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges.

Whether the *Claremont* decisions signify such a change in the Court's own perception of its role as to warrant a modification of its power is a matter which at least deserves some discussion. Even though the judicial excesses which provoked Jefferson's concerns were

far less than those which have become familiar to us in the 20th century, Jefferson was of the opinion that the judges of his era were abusing their power and that something needed to be done about it:

> I do not charge the Judges with wilful and ill-intentioned error; but honest error must be arrested, where its toleration leads to public ruin. As, for the safety of society, we commit honest maniacs to Bedlam, so judges should be withdrawn from their bench, whose erroneous biases are leading us to dissolution. It may, indeed, injure them in fame or in fortune; but it saves the Republic, which is the first and supreme law.

The remedies proposed by Jefferson to curb the power of an out-of-control judiciary included a relaxation of the constraints upon judicial impeachment and a substitution of fixed terms for life tenure. Such measures would indeed materially curtail the power of the Court and they may well be more draconian than necessary. In our last discussion, I raised the possibility of subjecting the Court's power of judicial review to a veto by a combined, supermajority vote of the legislative and executive branches of government. Like Jefferson's suggestions, this proposal may also be too extraordinary to be worthy of serious consideration. However, what type of remedy is appropriate for the damage wrought by the *Claremont* decisions depends upon what they bode for the future. If they constitute only an aberration in our jurisprudence, their specific holdings may be simply reversed by a narrow constitutional amendment directed to them alone and life can go on as before. If, however, they signal a change in the Court's philosophy which is likely to lead New Hampshire down the path of a more generalized judicial control over our political institutions, more drastic remedies may indeed be required.

Rasputin

APPENDIX

1. *Trustees of Dartmouth College v. Woodward* (1817) - In order to induce a change in the educational policies of the trustees of Dartmouth College, the Legislature passed an act which increased the size of the College's board of trustees to a size sufficient to allow the new appointees to outvote the old trustees. The old trustees' sued, claiming that the Legislature's packing of the board was unconstitutional. The old trustees' counsel, Daniel Webster, argued that the College, as a trust, was subject to supervision only by the courts. Noting that educational institutions "should be fondly cherished by the best affections of the people" and that, in Article 83, Part II, of the Constitution, "the people have most emphatically enjoined [the Legislature] 'to cherish the interests of the literature and the sciences and all seminaries and public schools", the Court rejected Webster's argument and held that the Legislature was authorized to direct the governance of the College. In response to Webster's contention that the Court should nevertheless be able to second guess the wisdom of the actions of the Legislature, Chief Justice

Richardson wrote as follows: "In forming my opinion in this case..., I have given no weight to any considerations of expediency. I think the legislature had a clear constitutional right to pass the laws in question." (Note - Mr. Webster was more successful in this case in the Supreme Court of the United States, which reversed the decision of our Court. However, the reversal was based on a provision of the Federal Constitution and, therefore, does nothing to detract from the precedential effect of our Court's interpretation of Article 83, Part II, of the New Hampshire Constitution.)

2. *Farnum's Petition* (1871) - Citizens of the Concord School District challenged the constitutionality of a statute passed by the Legislature which authorized any 10 or more voters of a school district to petition the county commissioners to determine the location of schoolhouses in the district. A group of voters in Concord had availed themselves of this procedure and convinced the Merrimack County Commissioners to site a school house in a location different from that determined by the local school committee. After specifically acknowledging that Article 83, Part II of the Constitution "enjoins the duty, in very general and comprehensive terms, on magistrates and legislators as one of paramount public importance," the Court held that the State had the unlimited power to discharge its said duty and that "the inhabitants of a school district have no rights in the existence or in any of the corporate functions of the district which can be regarded as vested rights, or which can be set up as beyond legislative control." As far as the Court's power to review the appropriateness of the statutory scheme set up by the Legislature was concerned, the Court observed that "[w]e are not...to inquire into the motives of the legislature, or to judge the wisdom of their acts." In response to the specific claim that the Legislature could not create a local school district committee and then deprive it of the power to determine the location of its own school houses, the Court stated that "however convenient and beneficial to the people of the State, we are unable to see wherein the legislature transcended their constitutional power in repealing it anymore than they did in bringing it to existence."

3. *In Re School-Law Manual* (1885) - The Legislature passed a joint resolution authorizing the Governor and Council to appoint a commissioner to compile the public statutes of the State relating to schools and to "frame rules and forms of proceeding in towns under said statutes, which rules and forms, when approved by the supreme court or a majority of the judges thereof, shall be deemed valid and sufficient." Such a commissioner was appointed and he submitted a set of rules and forms to the Court for its approval. The Court, however, declined to pass upon the manual on the grounds that to do so would be exercising a legislative function not within the scope of the Court's jurisdiction. Specifically quoting the Constitution's separation of powers provision, the Court noted that "a prospective determination of the validity of these rules and forms, without notice and opportunity of hearing given to persons whose interests may be involved in the facts and the law of a particular case, would not be an exercise of judicial power."

4. *State v. Jackson* (1902) - This case involved the appeal of a person from a criminal conviction for having violated the State's compulsory education laws by keeping his sickly daughter out of school on account of perceived threat to her health. Although the Court ultimately reversed the conviction on the ground of self defense (the father's right to protect his daughter's health), the Court rejected the father's claim that compulsory education laws were unconstitutional. Noting that Article 83, Part II of the Constitution imposed a duty upon the Legislature to diffuse knowledge and education through the community, the Court held that "it must be within the constitutional power of the legislature to enforce school attendance to that end." In response to the father's contention that the Court should determine whether or not the statute in question was reasonable, the Court stated that this "is a question over which the court has no control."

5. *Fogg v. Board of Education of Littleton* (1912) - A resident of Littleton who lived over four miles from the nearest school brought an action to compel the Littleton School District to transport his nine-year-old son to school at the District's expense. The District responded that an expenditure of funds to transport one isolated student would be "wholly out of proportion to the amount which could properly be extended per scholar in the district, thereby depriving many other scholars of the advantages they now have." In the course of discussing the responsibilities of the State and local school districts, the Court stated that the maintenance of a free public school system prescribed by Article 83, Part I of the Constitution "is not so much a right granted to pupils as a duty imposed upon them for the public good." Although the Court ultimately held that the District was required to provide transportation to the plaintiff's son, it did so on the basis of an existing statute which required local school districts to "give to all scholars of the District as nearly equal advantage as may be practicable."

6. *Coleman v. School District of Rochester* (1936) - Several married female teachers brought an action in the Strafford Superior Court challenging a regulation of the Rochester School District which "directs that no married woman shall be nominated or elected to any teaching position in the city." The Court ruled that "Contrary to the plaintiffs' assertion, no constitutional issue of personal rights is involved...the legislature, if it saw fit, might enact that teachers should be elected by popular vote or subject to dismissal at pleasure. The scope of legislative authority in the premises is virtually untrammeled and unhampered. The constitution recognizing the subject of education as ‘one of paramount public importance,' merely enjoins that it be ‘cherished, regulated and controlled by the state.' (Citing Farnum's Petition)... [T]he courts may not declare acts of the legislature void on the sole issue whether they are ‘wholesome and reasonable.' The legislature is to judge whether they are for ‘the benefit and welfare' of the state."

7. *In re Davis* (1974) - This is a case like *State v. Jackson*, in which parents were charged with failing to secure the attendance of their minor children in the public schools. Although the court ultimately found that the parents had been charged under the wrong statute and therefore could not be convicted, the Court noted that

the State could legitimately require compulsory school attendance pursuant to its "duty of providing for the education of its citizens" imposed upon it by Article 83, Part II of the Constitution.

8. *Opinion of the Justices* (1978) - The House of Representatives applied to the Court for an advisory opinion concerning the constitutionality of a proposed act of the Legislature, which had been vetoed by the Governor and which purported to subject certain executive agencies to a so-called "sunset" provision by which the existence of all State agencies would automatically terminate in accordance with a prescribed time-schedule set forth in the act. Although the issue before the Court involved the distribution of powers between the legislative and executive branches, the Court embarked upon a general discussion of separation of powers doctrine. Noting that "The three branches of government cannot be completely separated and in the nature of things there must be some overlapping," the Court undertook to enumerate the various provision of Part II of the Constitution in which some blending of the legislative, executive, and judicial powers was provided for: "Articles 5, 17, 33, 38, 40, 43, 44, 45, 49, 50, 52, 63, 67, 93, 94, 95." The Court did *not* include Article 83, Part II in this list.

ENDNOTES

[1] Unfortunately, our own Court has begun to evidence a disconcerting preoccupation with public opinion. The Chief Justice's widely publicized diatribe against the critics of the *Claremont* decisions at the N.H. Bar Association's mid-winter meeting has already been mentioned. Soon thereafter, the Court created a new internal staff position for a Public Relations Director. In announcing the appointment of a person to fill the position, the Chief Justice stated that the appointee had "a keen awareness of the need for better communications with the public and the media concerning the work and role of the judicial branch." This is presumably code-speak for "We know we have a PR problem; the problem is that people are questioning our decisions." One can only wonder if the Court's next gambit will be to have the Justices themselves appearing as guests on radio and television talk shows or hosting press conferences to advocate for their decisions.

[2] The quoted form of this famous aphorism was not known to the Framers of our 18th century constitutions because it was not uttered until 1887, by Britain's Lord Acton. His words, however, were a paraphrase of an earlier speech which was indeed well-known to the Framers. This was the speech delivered by William Pitt to the House of Lords in 1770 in the notorious seditious libel trial of John Wilkes: "Unlimited power is apt to corrupt the minds of those who possess it; and this I know, my lord, that where laws end, tyranny begins."

[3] The Court also made no mention of the case of *Jesseman v. State of New Hampshire*, which some of the same plaintiffs in the *Claremont* case had brought in 1982. Although this case was settled before it even reached the Supreme Court, it also challenged the constitutionality of funding public education. Like the claim belatedly raised by the school board in the *Laconia* case, the constitutional basis for the claim in the *Jesseman* case was equal protection of the laws.

[4] Note that the *Evans* case cannot be explained on the grounds that Article 83, Part II only applies to grammar and secondary schools and, therefore, was irrelevant to a claim to a free college education. In cases involving Dartmouth College and the now defunct Mount Saint Mary College, the Court had specifically held that the reference in Article 83 to the Legislature's duty to cherish all "seminaries" referred to colleges. Indeed, in light of those cases, it will be fascinating to watch the Court bob and weave when it is faced with the inevitable claim by some University of New Hampshire student that the *Evans* case should be overruled and that the free and adequate education to which he is entitled under Article 83, Part II of the Constitution and the *Claremont* decisions includes his college tuition.

[5] Note that Chief Justice Brock had already gone on record as recognizing an unenumerated right of parents to educate their children. In a concurring opinion which he and then Justice Charles Douglas wrote in the 1982 case of *Appeal of Peirce*, a home-schooling case, the Chief Justice stated that the "fundamental rights of parents to the custody, care and nurture of their children" protected by the due process provisions of the State and Federal Constitutions meant that the State "does not have the unlimited power to require they be educated in a certain way at a certain place." The problem with this type of reasoning, however, is that it treats education as a traditional, *negative* right, i.e. something which sets limits upon the power of government. To justify the *Claremont* decisions, the Court needed to fashion an *affirmative* right to education. Consistent, therefore, with the Court's general treatment of precedent in its *Claremont* opinions, there is no mention therein of the *Peirce* case. The Chief Justice's concurrence in *Peirce*, however, will ultimately

come back to haunt the Court when the inevitable suit is brought by some parent that his child is entitled to an adequate, publicly-funded education *at home*.

"Rasputin:"
Letters to the Educators, No. 9

Is Education Too Important To Be Entrusted To The Politicians?

Let us return to first principles: judicial review is the power of the Court to declare an act of the executive or the legislative branch unconstitutional. It is, therefore, characteristic of judicial review that it is a *negative* act. It is the power to say "no". This may be contrasted with the power to make laws confided in the legislative branch or the power to enforce laws confided in the executive branch, both of which are characterized by "affirmative" acts. In a sense, these constitute the power to say "yes".

In our previous discussions, we have noted the relationship between the recognition of affirmative rights and duties and the creation of entitlements. More specifically, we have observed that recognition of a right to an "adequate" education is tantamount to the establishment of an educational entitlement. We also know that the *Legislature* can grant rights to an education, that it can define educational adequacy, and that it can thereby create an entitlement. The question, then, is whether the *Court's* traditionally negative power of judicial review may be legitimately converted into an affirmative power in order to accomplish the same thing. In other words, does the fact that the Court has the power to veto an act of the Legislature on the grounds that it infringes some constitutionally protected right give the Court the authority to put forth its own scheme for developing and protecting that right? Or, to put the question in the context of the *Claremont* cases, if the Court doesn't think that the Legislature sufficiently "cherishes" education, may the Court do the cherishing itself?

Ironically, the notion that a negative implies a positive played a very important role in our constitutional history. During the ratification debates over the federal Constitutional in 1787-9, one of the main arguments *against* including a bill of rights in the Constitution was that an enumeration of the people's rights would imply that government had been delegated some authority to regulate those rights. Alexander Hamilton made just this point in *The Federalist*, No. 84:

> Bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers not granted, and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done, which there is not power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power, but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power... This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by in the indulgences of an injudicious zeal for bills of rights.

Suffice it to say that such contentions did not carry the day and that a bill of rights was added to the federal Constitution in 1791. This was presumably because most people were more persuaded by the arguments of those who, like Thomas Jefferson, believed that "A bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse; or rest on inference." On the other hand, the fears about how an enumeration of rights could be misinterpreted, which were expressed by Hamilton and others, were referred to by our own Chief Justice Doe in the 1882 case of *Wooster v. Plymouth.* In rejecting the claim that the reservation in Article 15, Part I of the New Hampshire Constitution of a citizen's right to trial by jury implied that the State itself could claim a jury trial, the Chief Justice stated the federal debates proved that "a bill of rights, including a right of jury trial, is a reservation and not a grant."

It is true that the Constitution does not contain any express prohibition upon the judiciary's creation of entitlements. In fact, as we have previously observed, the Constitution does not define the "judicial power." Article 72-a, Part II, simply lodges it in the "supreme court, a trial court of general jurisdiction known as the superior court and such lower courts as the legislature may establish." Consequently, even the Court's negative power, it power of judicial review, rests upon implication. To suggest, however, that we can further infer a judicial power to affirmatively seek out and protect the objects of the Court's attention would be to pile implication upon implication in a way that would render the arguments against the federal Bill of Rights pale by comparison.

It also is true that many of the rights guaranteed in our Constitution are in fact stated in the affirmative, rather than in the negative. In other words, rather than always saying to government "Thou shalt not," the Constitution sometimes says "Thou shall." For example, Article 22, Part I states that "free speech and liberty of the press...ought...to be inviolably preserved;" Article 12, Part I provides that "every member of the community has a right to be protected by it;" and Article 14, Part I proclaims that "every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property or character." The problem with this observation is that it proves too much. For if each of these provisions, and others like them, were construed as a warrant for the judicial establishment of entitlements, the Constitution would be a menu of entitlements and the Legislature would be superfluous. The creation of an entitlement is a uniquely legislative act. As has been noted previously, entitlement rules determine who is in and who is out. These are policy decisions and they inevitably involve the weighing and trading of various societal interests which characterize law-making, as opposed to law-interpreting.

Prior to *Claremont,* all of this would be taken as a given. Indeed, one would not even have to respond to such metaphysical disputations; all one would have to do is point to the Constitution's separation of powers provisions and the argument would be over. If the task was judicial, it was reserved to the judiciary; if it was legislative, it was reserved to the Legislature. As the President of the Constitutional Convention of 1781, George Atkinson, stated in his address forwarding to the people the first draft of what eventually became the Constitution of 1784, "The three powers of government...we have thought

proper to keep as separate and distinct as possible, for...if they should all be united, the maker of the law would be the interpreter thereof, and might make it speak what language best pleased him to the total abolition of justice."

Prior to *Claremont*, even the Court had never overtly claimed that its assigned task of safeguarding the rights of citizens from infringement by the political branches gave it the power to proactively enhance and expand those rights through some type of legislative-like activity. On the contrary, the Court had generally acknowledged that matters of policy were within the exclusive domain of the politicians. For example, in the oft-cited 1896 case of *State v. Griffin*, the Court expressed the traditional view of the limits upon its own institutional competence:

> It is not for the court to inquire into the wisdom of legislation. Whether the act "be wise, reasonable, or expedient, is a legislative and not a judicial question. The legislature is as capable of determining the question of the wisdom, reasonableness, and expediency of the statute, and of the necessity for its enactment, as the courts. The only inquiry is whether the statute conflicts with the constitution."...The question is one of constitutional power.

Indeed, it had become such an accepted part of the Court's jurisprudence in constitutional cases that it was at one time almost ritualistic for the Court to recite somewhere in its opinion in such cases that it was not the Court's job to second-guess the Legislature on matters of policy and that a statue was constitutional so long as it had some "rational basis".

On the other hand, the Court has of late displayed a disturbing tendency to expand judicial review into areas once thought to be reserved to the discretion of the Legislature. Beginning in 1980 with the case of *Carson v. Maurer*, the Court has developed a more stringent standard of judicial review over the legislative and executive acts which affect certain interests which the Court has seen fit to designate as "important." Under the aegis of the people's rights to equal protection of the laws (Article 12, Part I), to "a certain remedy...for all injuries" (Article 14, Part I), and to due process of law (Article 15, Part I), the Court has imposed upon the political branches the requirement that laws negatively impacting such important rights be "reasonable, not arbitrary" [i.e., have a rational basis] *and* "rest upon some ground of difference having a fair and substantial relation to the object of the legislation."

Applying this test to various legislative classifications, the Court has struck down numerous State laws since 1980, including a comprehensive revision of the medical malpractice liability statutes, various statutes of limitations, workmen's compensation laws, damage caps, and sovereign immunity laws. In so doing, the Court has not only failed to articulate any principled basis upon which to determine which societal interests are "important" enough to warrant this added degree of juridical oversight, but it has also become much more aggressive in its willingness to exercise it power of constitutional veto. A good example of the Court's new attitude appears in the 1981 case of *Park v. Rockwell International Corp.*, where the Court struck down a workmen's compensation

law which granted one type of remedy to the estates of deceased employees who left no surviving dependants, but a greater remedy to the estates of those employees who did have dependents: "[The statute] is not only contrary to sound public policy but also violates the equal protection provisions of our State constitution." Besides the fact that the Court's discernment of a public policy argument against this statute has always been somewhat obscure, the point is that the Court's own policy preferences were placed upon an equal footing with its views on the Constitution.

Nevertheless, prior to *Claremont*, the Court at least felt it necessary to pay regular homage to the traditional view that the proper role of a judge in constitutional matters was to find the law, not make the law. For example, Justice Batchelder (the retired Justice who sat by special designation in *Claremont II*) presumably spoke for the Court in the 1990 case of *In re Certain Scholarship Funds* when he stated that, "we believe that the appropriate source of values for our judgment is the constitution." And, on at least one occasion, the Court had even sought to distinguish itself from its more activist colleagues in other jurisdictions, "Despite other views elsewhere, we do not sit as a continuing constitutional convention". (*Grinnell v. State*, 1981).

Accordingly, to the extent that the Court had in the past been presented with the necessity of ruling upon the constitutionality of an act of the executive or legislative branches, the Court had in fact generally restrained itself from doing anything more than just that. For the most part, the Court had refrained from taking the extra step of suggesting to its sister branches alternative ways in which they might refashion an unconstitutional law to make it constitutional. More importantly for present purposes, the Court had generally refrained from venturing into the types of cases which involve what we have called "political questions;" that is, those cases which inevitably insinuate the Court into an affirmative, policy-making role.

This is not to say that the issue is as simple as whether or not the Court has ever engaged in an activity which could be characterized as legislative. As the Court has observed in numerous cases, "the separation of powers provided for in the State Constitution is not absolute, but rather permits an overlapping of powers among the branches in certain areas." In this regard, certain provisions of the Constitution do expressly authorize or even require one branch of government to exercise powers which could fairly be characterized as being more traditionally within the jurisdiction of another branch. For example, except for those whose appointment is otherwise specifically provided for in the Constitution, the Legislature is empowered to appoint "all civil officers within this state" (Article 5, Part II) - an executive function; the Senate is authorized to conduct impeachment trials (Articles 17 & 38, Part II) - a judicial function; the Governor and Council have the right to adjourn or prorogue the Legislature (Articles 43 & 50, Part II) - a legislative function; the Chief Justice of the Supreme Court, with the concurrence of the majority of the other justices, has the power to "make rules governing the administration of all courts in the state" (Article 73-a, Part II) - a legislative function.

Another example of such overlapping of powers applicable specifically to the Judiciary concerns what the court calls its "inherent powers." These, in turn, consist of two kinds of

powers. The first of these involves the power of every court to do those things which may be considered to be the essence of the judicial function and which distinguish a court from other institutions. The earliest example of this is the famous case of *Merrill v. Sherburne*, in which the Court held that the power to grant a new trial in a specific case was exclusively within the purview of the judiciary and could not be superseded by the Legislature. Similarly, in *Cloutier v. State Milk Control Board*, the Court held that all courts in New Hampshire have the inherent power to determine issues of law properly presented by cases pending before them, a power which cannot be interfered with by the executive branch. Because these types of inherent powers, however, have to do with the essence of a court's adjudicatory function, they do not present questions of whether or not the judiciary is engaging in legislative or executive functions.

On the other hand, there is a second category of inherent powers which clearly does implicate the Court in non-judicial activities. First and foremost, this category includes the power of the Supreme Court to exercise a general power of superintendence over the entire judicial system. Although the Court's authority in this area is now clearly authorized by Article 73-a, Part II of the Constitution, that amendment was only passed in 1978. On a number of occasions prior to that time, the Court had already held that it had the inherent power to superintend the judicial system, which included not only the power to discipline the system participants on a case-by-case basis (*In Re Mack M. Mussman*, 1972 - judges; *Bryant's Case*, 1851 - lawyers), but also the power to issue comprehensive rules for such purposes (*In Re Unification of the New Hampshire Bar,* 1968). Over the years, the Court has exercised its power in this regard by issuing codes of evidence, rules of trial procedure, rules for judicial conduct, and rules governing the practice of law, including the recent adoption of rules establishing a fund to reimburse clients for losses caused by the dishonest conduct of attorneys. Finally, the Court has stated that *all* New Hampshire judges have inherent powers to control their courtrooms, which includes power to issue orders regulating witness behavior (*State v. LaFrance*, 1983), and the power to punish violators of such orders with the sanction of contempt (*Opinion of the Justices*, 1933).

The fact that the concept of inherent powers allows the Court to claim a legislative-type authority for matters within its own special domain does not negate the doctrine of separation of powers or render it superfluous. Although artful explanations have been constructed by legal theorists to make the Judiciary's involvement in these types of activities consistent with the doctrine of separation of powers, it makes much more sense to simply accept the Court's domestic rule-making authority as an exception to the rule.[1] But it is the exception that proves the rule. The fact remains that the Constitution does have a specific separation of powers provision and, despite some indications by the Court that the provision is less applicable to it than to the other two branches of government, the doctrine does apply to the judiciary as well. As the Court itself has said, "Separation of powers is an integral part of our governmental system of checks and balances: *each* branch of government acts as a check on the other, protecting the sovereignty and freedom of those governed by preventing the tyranny of *any* one branch of the government being supreme."

As we have previously discussed, the Court has occasionally applied the separation of powers doctrine to itself and, in most cases before its *Claremont* decisions, the Court has exercised an appropriate level of restraint. For example, in 1931, the Court issued an advisory opinion to the Senate that a proposed law granting the probate courts of the State the power to develop rules for and to administer a comprehensive system for the relief of paupers would be unconstitutional. Likewise, in 1885, the court declined to exercise the authority which a joint resolution of the Legislature purported to give it to review and pass upon the propriety of a manual of rules and forms for the operation of the State's public school system. In each of these cases, the Court held that the power which the Legislature purported to convey upon it would have inappropriately involved the judiciary in functions reserved by the Constitution to another branch of government.

In many jurisdictions around the country, zoning cases have afforded courts the opportunity to engage in legislative-type functions. But not so in New Hampshire. We have already remarked upon the 1995 case of *Caspersen v. Town of Lyme* in which the Court declined to substitute its judgment for that of a municipality with respect to the appropriateness of building lot size requirements. More to the point is the 1991 case of *Britton v. Town of Chester,* where the Court sustained a trial court's finding that the Town of Chester had violated the State's enabling legislation by adopting regulations which excluded persons of low and moderate income. The Court, however, refused to remedy the situation by substituting a regulation of its own. Speaking again through Justice Batchelder, the Court observed that, "It is not...within the power of this court to act as a super zoning board. Zoning is properly a legislative function, and courts are prevented by the doctrine of separation of powers from invasion of this field."

Indeed, New Hampshire has been fortunate that its courts have generally stayed out of the business of running its political and administrative institutions. Unlike the courts of many other states and unlike some federal courts, our Supreme Court has not involved itself in running our prisons, our public hospitals, our mental institutions or - until *Claremont* - our schools. The closest that the Court has come to crossing over this line has been its expressed willingness to become involved in the reapportionment of voting districts. In 1964, in the case of *Levitt v. Maynard*, a resident of the Town of Hancock attempted to invoke the Court's jurisdiction to declare unconstitutional New Hampshire's statutes establishing the geographical division between the State's two Congressional districts. Noting that the Legislature was about to convene and was expected to address the reapportionment issue, the Court declined to intervene at that time. Similarly, in the 1982 case of *Monier v. Gallen*, the Court was requested to get involved in the redistricting of the New Hampshire Senate. Again, the Court deferred to the legislative and executive branches in the hopes that they would resolve the issue (which they did). Although the Court claimed on both occasions that "we have jurisdiction to resolve reapportionment cases," it has never had the occasion to exercise its asserted power and to directly involve itself in the essentially political act of reapportionment.[2]

The *Claremont* cases, therefore, stand alone. Is there *any* principled basis upon which to justify its unique status? Suffice it to say that nothing is forthcoming from the Court to justify it because the Court does not even acknowledge that the case constitutes a

deviation from its previous jurisprudence. What, then, is so special about the *Claremont* cases? Is it because education is singled out in the Constitution for special mention among the subjects consigned to the Legislature? Is it because it involves education and education is so important?

The answer to these rhetorical questions is clearly "no." As important as it is, education is certainly no more important than food, shelter or personal safety. And what about a clean environment, an efficient highway system, good public health, etc., etc.? Although one could argue that education is the *sine qua non* for a citizen's opportunity to obtain his or her fair share of these other social benefits, a full stomach, a roof over one's head and a safe environment would appear to be just as essential to one's opportunity to obtain a decent education.

Education, moreover, is not the only one of these social benefits which is expressly mentioned in the Constitution. For example, Article 2, Part I states that, "All men have ... rights... [of] acquiring, possessing and protecting, property." Better yet, what about Article 12, Part I, which provides that "Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty and property?" Do these rights of protecting one's property and being protected by the community imply a grant to every citizen of the State of a right to an "adequate" police force? Even Article 83, Part II, from whence supposedly comes the right to an adequate education, also admonishes the legislators and magistrates "to countenance and inculcate the principles of...public and private charities." Does Article 83, Part II, give every citizen a constitutional right to a tax exemption for charitable gifts?

Suffice it to say that if one has the requisite motivation and a sufficient facility with the English language, one can enlist the aid of the New Hampshire Constitution in support of virtually any social welfare agenda that one desires to advance. This is proved in spades by the recent publication by Yale and Columbia Law School scholar Charles L. Black, Jr. of a book entitled *A New Birth of Freedom: Human Rights, Named and Unnamed.* Relying upon the "inalienable right" in the Declaration of Independence to "the pursuit of happiness," Professor Black embarks upon a jurisprudence excursion into fantasyland. After he somehow gets the words of the Declaration of Independence into the U.S. Constitution, he constructs a theory of rights and duties not unlike that of our Court in its *Claremont* decisions. By the time he finishes his exposition, he has divined in the Federal Constitution a duty upon the part of Government to provide every American with a "decent livelihood," and, correspondingly, an affirmative, judicially-enforceable "right to welfare."[3]

I suggest that the only feature about education which distinguishes it from other equally worthy social benefits is that the members of our Court are particularly interested in educational "reform" and are apparently enamored with their own views about how to accomplish it. And, of course, the advantage that the Court has over the rest of us who may have our own concerns about educational policy is that the Court is capable of bypassing the normal channels for social change: electing people who agree with us or

amending the Constitution so that they *must* agree with us. Unfortunately, the Court has failed to heed the caution which George Washington left with us in his Farewell Address:

> If in the opinion of the People the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

If we should have learned any lesson from our own history, it is that the ends do *not* justify the means. Although the pet of today's Court may be education, the favorite of tomorrow's Court may be something else. As Oliver Wendell Holmes once said in response to the suggestion that the Federal Constitution had memorialized a theory of economics popular in his era: "The [Constitution] does not enact Mr. Herbert Spencer's *Social Statics*." Neither does the New Hampshire Constitution enact anyone's particular definition of an "adequate" education - including the one supplied by our Supreme Court.

The Constitution also does not grant the Court a monopoly on political wisdom or social conscience. Judges have no special competence in discerning good social policy, whether it be in the field of education or otherwise. As the Supreme Court of the United States put it in the case of *San Antonio School District v. Rodriguez*, which held that education is *not* an affirmative right under the Federal Constitution:

> In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect.

In other words, judges don't know any more about education than anyone else does. And, contrary to suggestions of some historians such as Eugene Rostow that judges should be "teachers in a vital national seminar," judges are also not educators. The Constitution does not establish the Court as a panel of philosopher-kings. Accordingly, the Court would do well to leave philosophy to the philosophers, education to the educators and legislation to the legislators. In the immortal words of Judge Learned Hand, "For myself, it would most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."

Rasputin

ENDNOTES

[1] Another exception to the rule is the Court's quasi-legislative power to make new substantive law through its common law ruling sin contract and tort cases.

[2] The Court did have occasion in two other cases to address issues of reappointment, a 1963 *Opinion of the Justices* and the 1993 case of *McGovern v. Secretary of State*. Both of these cases, however, simply involved the proper interpretation of Article 9, Part II, of the Constitution, which requires reappointment of the House of Representative "according to the last general census of the inhabitants of the state". The Court did not actually engage in reapportioning the Legislature in either of these cases. [Editor's Note: Since 1998, when this essay was written, the Court - unrestrained and unabashed - has crossed this line, too, taking upon itself authority to redistrict the State of New Hampshire's House of Representative (*Below v. Gardner,* 148 N.H. 1, 2-3 (2002).]

[3] Little does Professor Black know that if he were sitting on the New Hampshire Supreme Court, he would not even have to resort to the Declaration of Independence in order to make the case for our supposed right to welfare benefits. Article 2, Part I of the New Hampshire Constitution specifically provides that "All men have certain natural, essential, and inherent rights - among which are ... *seeking and obtaining happiness."*

"Rasputin:"

Letters to the Educators, No. 10

Is There An Adequate Definition of An Adequate Education?

One of the most bizarre features of the *Claremont* episode has been the Supreme Court's direction to the Legislature and the Governor to come up with a definition of an "adequate" education and the responses of those two branches to the Court's directive. To begin with, the entire exercise is a sham. In *Claremont II*, the Court provided its own definition of an adequate education, as follows:

> (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 the student 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 lifework intelligently; and (vii) sufficient levels 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.

Despite the fact that the Court labels its definition as merely a "guideline" of as only a "benchmark", it is obvious that the legislative and executive branches may not adopt something which conflicts with the Court's definitions. *What, then, is left for the Legislature and the Governor to do?*

As we have observed before, the power of judicial review is the power to declare something unconstitutional. Traditionally, that means that the Court simply informs the legislative branch or the executive branch that it cannot do something that it is doing. It is not generally acceptable for the Court to go farther and tell the other branch what its alternatives are or which alternative ought to be selected. At first blush, the Court's opinion in *Claremont II* appears to favor neither of these two extremes. On the one hand, it attempts to honor tradition by claiming to "leave educational policy to the two co-equal branches of government," but on the other hand, it offers some input into those policies through the announcement of its own "aspirational guidelines."

The Court's fence-straddling, however, is more apparent than real. First, as the Court's decision in *Claremont I* demonstrates, it has no genuine appreciation for aspirational guidelines. In that case, the Court took the aspirational language of Article 83, Part II of the Constitution and concocted a judicially-enforceable right to an adequate education.

There is no reason to suppose that the Court will do otherwise with respect to its own formulation. Secondly one can presume that the Court did not go out of its way to announce its own preference for a definition of an adequate education merely because it likes the sound of its own voice. If *Claremont II* were no more than gratuitous pedantry, the Court would not have made such a point of telling the Governor and the Legislature that "we anticipate that they will promptly develop and adopt specific criteria *implementing* these guidelines." In some fashion, therefore, the Court's "guidelines" do indeed establish educational policy for the State.

That the Court's "guidelines" have real teeth is best illustrated by the fact that the Court in *Claremont II* specifically rejects a definition of educational adequacy which had been fashioned by the State Board of Education in response to the Court's directive in *Claremont I* that just such a definition be created. The Court stated that the Board of Education's definition was insufficient because "it is the legislature's obligation, not that of individual members of the board of education, to establish educational standards that comply with constitutional requirements." This statement is complete nonsense. Even assuming that the Legislature has a constitutional duty to establish standards, why is the Legislature not able to delegate that function to the Board of Education?

In a long line of cases, the Court has consistently held that, "the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws." Although these cases condition the Legislature's authority to delegate its rule-making power upon the requirement that it must "declare a general policy and prescribe standards for administrative action," the Legislature had long ago satisfied this requirement in the field of education through its comprehensive statutory scheme establishing our system of public schools. Among other things, this included implementation of a statewide quality assessment program geared to "what New Hampshire students should know and be able to do" (RSA Chapter 193-C); adoption of the federal requirement that each disabled child receive a "free and appropriate public education" (RSA Chapter 186-C); and a statement of policy that "the more needy school districts... be assisted in providing an adequate education program" (RSA 198:27). Under the established precedents of the Court, these and many other statutory directives were clearly sufficient to authorize the Board of Education to do what numerous other executive agencies in this State do, including the development of statements of public policy.

The other reason that the Court gives for rejecting the Board of Education's definition is that it "does not sufficiently reflect the letter or spirit of the State Constitution's mandate." The definition which the Court rejected is as follows:

> An adequate public elementary and secondary education in New Hampshire is one which provides each educable child with an opportunity to acquire the knowledge and learning necessary to participate intelligently in the American political, economic, and social systems of a free government.

Besides materially misrepresenting the Board of Education's definition by quoting only its preamble, the Court also fails to identify exactly what is deficient about it. Similarly, the Court gives no reason for rejecting the trial court's findings, which had specifically approved the Board's definition. The normal rule in New Hampshire is that findings of fact by a trial court are accepted by an appellate court unless they are unsupported by the evidence or otherwise contrary to law. Consequently, although we are never informed in what manner the Board's definition of educational adequacy conflicts with the Court's guidelines, it is clear that the guidelines are much more than merely "aspirational".

What then, is so endearing about the Court's definition? Indeed, many people would characterize it as nothing more than modern-day sociological jargon. The only authority which the Court gives for its definition is the fact that it had previously been adopted by the State of Kentucky. In *Claremont I*, the Court had already decreed - as a matter of constitutional law - that, "Mere competence in the basics - reading, writing, and arithmetic - is insufficient in the waning days of the 20th century to insure that the State's public school students are fully integrated into the world around them." Although the Kentucky definition responds to such a notion, the Court offers absolutely no explanation as to why it is so superior to any other definition of educational adequacy that it warrants being permanently enshrined in New Hampshire's constitutional lexicon.

More specifically, why is Kentucky's definition of educational adequacy any better than that authored by our Board of Education? Although the Court purported to quote the Board's definition in *Claremont II*, it did so only in part. Here is the whole thing:

> An adequate public elementary and secondary education in New Hampshire is one which provides each educable child with an opportunity to acquire the knowledge and learning necessary to participate intelligently in the American political, economic and social systems of a free government. The components of an adequate public elementary and secondary education are as follows:
>
> - Broad and well-balanced curricula to equip students with basic knowledge and skills in language arts and reading, mathematics, science, social studies, arts, health, physical education, computers and consumer and workplace technology and to allow students the opportunity to learn a foreign language;
> - Programs and activities to promote the development of character and citizenship;
> - Legally qualified administrative and teaching professionals who focus on student achievement and on implementing the schools' educational program;
> - Safe and orderly facilities for educating students;
> - Evaluation and assessment of the effectiveness of the educational program, teachers, instructional methods and organizational structure; and
> - Evaluation of student academic performance to determine what students have learned and what skills they have acquired.

When the Board of Education's complete definition is available to the reader, it is difficult to figure out how it is materially different from the Kentucky definition. Suffice it to say that all one can glean from the Court's *Claremont* decisions is the bottom line:

the Kentucky definition is acceptable to the Court and the State Board's definition is not.

Even if we accept the Court's assertion that there is a constitutionally material distinction between the Kentucky definition and that of the Board of Education, and even if we assume that the Legislature and the Governor have some genuine room to maneuver in the middle, how is anyone to measure whether they have done the job well or poorly? We have previously discussed how issues of adequacy constitute quintessentially political questions unsuitable for determination by the judiciary. Nothing illustrates this point better than the futile exercise in which the Legislature and the Governor are now engaged in response to the directives of the Court in the *Claremont* decisions. Is there some standard of educational adequacy which hangs over us like the proverbial brooding omnipresence to be discovered by some committee or group of experts? Of course there isn't! As the various groups to whom the task has been assigned are learning, educational adequacy is a matter of opinion, not fact. And, as all of these groups are coming to realize, *everyone* has an opinion on the subject.

For example, if the Board of Education's definition is not adequate, how does one judge the just-released report of the Governor's "blue ribbon" Task Force On Educational Adequacy? The Task Force's definition, which is apparently based upon a North Carolina model, states as follows:

> It is the policy of the State of New Hampshire that public K-12 education shall provide all students with the opportunity to acquire the education necessary to prepare them for successful participation in the social, economic, scientific, technological and civic realities of society, now and in the years to come; an education that is consistent with the curriculum and student proficiency standards specified in state school approval rules and New Hampshire curriculum frameworks. An "adequate education" should provide all students with an opportunity to acquire:
>
> - Skill in reading, writing, and speaking English to enable them to communicate effectively;
> - Knowledge of mathematics, science and technology to enable them to function in a complex and rapidly changing society;
> - Knowledge of civics and government, economics, geography and history to enable them to participate in democratic processes and to make informed choices as responsible citizens;
> - Grounding in the arts and literature to enable them to appreciate the cultural heritage of our State, nation and world;
> - Understanding of sound wellness practices to enable them to make decisions that enhance their own health and safety as well as the well- being of others and the community at large;
> - Problem-solving, reasoning and critical thinking skills to enable them to address issues that affect them personally or affect the community, state, nation, and the world;
> - Career development skills to enable them to deliberately choose and pursue their life's work effectively;

- Knowledge and skills, including the importance of teamwork and lifelong learning, to enable them to participate successfully in post secondary education and gainful employment in an expanding international economy.

Which of these definitions is the best? Is any one of them adequate? Are all of them adequate? What about the fact that the Kentucky definition doesn't even mention science or mathematics? Does it make any difference that the State Board's statement doesn't reference critical thinking skills? What about the Task Force's failure to address resources and facilities?

None of the foregoing definitions, of course, would satisfy the definition preferred by the plaintiffs in the *Claremont* cases. They took the position in the litigation that "adequacy" of education demands the adoption of an individual education plan for each student tailored to his/her special needs and the dedication of sufficient resources to meet each child's special needs. The plaintiff's definition, which was drafted by Professor Robert Fried of the University of Hartford, is as follows:

> Cornerstone One. An "Adequate Education" is one that provides physical, personal, curricular and material resources necessary for children to acquire the skills, knowledge, and values necessary to develop as responsible and productive citizens and to continue formal and informal learning as adults.
>
> Cornerstone Two. An "Adequate Education" recognizes and responds appropriately to conditions that children possess when they enter school that affect their ability to acquire skills, knowledge and values necessary to develop as responsible and productive citizens and continue formal and informal learning as adults.
>
> Cornerstone Three. An "Adequate Education" is managed at the district and building level to provide efficient and effective organization and utilization of resources for the benefit of student educational achievement.
>
> Cornerstone Four. An "Adequate Education" is one that results in a level of student educational achievement that meets the standards necessary for the acquisition of skills, knowledge, and values required for responsible and productive citizens and to continue formal and informal learning as adults.

If all of this doesn't give you a headache, consider these competing concepts, each of which is advocated by somebody in the debate over educational adequacy:

1. Is educational "adequacy" best measured by inputs or outputs? In other words, do we need to focus upon facilities and resources such as class sizes, teacher qualifications, computer labs, etc. or is it sufficient to let each school district choose it own path so long as its students demonstrate through standardized test that they have learned what we want them to learn?

2. Is educational "adequacy" a matter of one size fits all or is it a variable standard which takes into consideration the individual needs of individual students? In other words, is adequacy defined by the mean or are there separate standards for the under-achievers and the over-achievers?

3. Is educational "adequacy" a minimum level of achievement or is it a standard of excellence? In other words, is it a baseline of competence that all students must meet or is it a target of quality such as the one which philosopher John Dewey once suggested: "what the best and the wisest parent wants for his own child?"

4. Is an "adequate" education best accomplished in an institutional environment or can it be equally or better achieved in some other setting? In other words, are home schooling, religious schools, charter schools and other non-traditional educational venues acceptable ways to provide an education or is the only way the public school way?

As we have discussed, "adequacy" is an abstraction which has no objective meaning. It is like asking how high is up? In other words, before adequacy can be defined, one must first define the objective that one is trying to reach. It is important to note that the Court specifically eschewed the opportunity presented to it by the text of the Constitution to put some parameters around the issue of educational adequacy. In this regard, Article 83 states a goal for education which could have been used by the Court as the *constitutional* standard by which to measure educational adequacy. This point was made by Justice Horton, the lone dissenter in *Claremont II*. Here is what the Constitution says:

> Knowledge and learning, generally diffused through a community, *being essential to the preservation of a free government* and spreading the opportunities and advantages of education through the various parts of the country, *being conducive to promote this end;* it shall be government, to cherish the interest of literature and the sciences, and all seminaries and public schools...

As Justice Horton stated, the "constitutional standard for adequacy would be satisfied if the education provided meets the minimum necessary to assure the preservation of a free government."

On the other hand, even limiting the notion of educational adequacy to that which is necessary to "preserve a free government" is insufficient to eliminate the subjectivity inherent in the task. For example, although Justice Horton states that such a standard "would certainly contain the elements of reading, writing, and mathematics," he goes on to say that "arguments can be made for other elements." Moreover, even under his own preservation-of-free-government test, it is difficult to see what mathematics has to do with it. In the end, therefore, although Justice Horton attempts to confine the definition of educational adequacy to what he calls the "constitutional nut," it is apparent that this standard is ultimately no more objective than the wide-ranging Kentucky definition adopted by the Court's majority. Educational adequacy is still a matter of public choice, not judicially determinable constitutional law.

The policy choices enumerated above and a thousand other variations on the theme are the kinds of things which the various *Claremont*-inspired panels have been wrestling with in their efforts to respond to the Court's requirement that the State come up with a definition of an adequate education. And each of the participants in the process, whether he be legislator, citizen, educator, newspaper editor, or all manner of other "experts," has his or her own opinion on the subject. Depending upon the personal views of the individuals making up each one of these panels, therefore, no one should be surprised if they come up with as many different definitions of an "adequate" education as there are panels.

The more amazing thing about this entire exercise is that no one has paused long enough to ask *why* the job needs to be done at all. The Legislature's job is to pass laws and the Governor's job is to execute those laws. Prior to the *Claremont* decisions, neither of these branches of government had any obligation to state why they were doing whatever they did. There clearly is no general constitutional requirement that they create mission statements, preambles or the like. Although the Legislature often finds it useful to do such things, it certainly is not required to do them.

Instead of challenging the Court's edict, however, the other two branches of government have fallen all over themselves to be the first on the block to come up with an acceptable definition of a constitutionally adequate education. Like a bunch of Keystone Cops, the Governor and the Legislature have formed committees, convened forums, consulted with experts and generally run around like chickens with their heads cut off attempting to comply with the Supreme Court's directive.

Nothing in the Constitution requires any branch of government to devise a definition of education, adequate or otherwise. At most, all the Constitution requires is that the Legislature and the Executive "cherish" education. The Court, however, has convinced everyone that the Constitution requires some kind of a legislative essay contest. As a result, we all have been compelled to witness the sorry spectacle of the Legislature and the Governor bowing and scraping to the Court in an effort to write the best essay. This in not only inane, but also demeaning, and the Governor and the Legislature should refuse to participate in it.

Rasputin

"Rasputin:"

Letters to the Educators, No. 11

What Was The Original Understanding?

Chief Justice Charles Evans Hughes of the U.S. Supreme Court once observed that, "We are under a Constitution, but the Constitution is what the judges say it is." As you obviously know by now, the judges of our Supreme Court have ruled that Article 83, Part II of our Constitution guarantees every New Hampshire citizen the right to a State-funded adequate education. With all due deference to Chief Justice Hughes, Article 83 says nothing of the kind.

However, before we examine what the Constitution really says, it would be useful to make one structural observation. That is the simple fact that Article 83 appears in Part II of the Constitution entitled "Form of Government," rather than in Part I which is called a "Bill of Rights." In prior cases, the Court had deemed the location of a constitutional provision to be quite relevant to its meaning. For example, in the 1882 case of *Wooster v. Plymouth*, the Court described the rule as follows:

> The division of the constitution into two parts was not made without a purpose, and the name of each part is not without significance. The first is a "bill of rights," the second is a "form of government." The second is, in general, a grant of powers, made by the people to "magistrates and officers of government," who are declared (in Part I, art. 8) to be the grantors' "agents." The first contains a list of rights not surrendered by the people when they formed themselves into a state. Part I, arts. 1, 2, 3; Part II, art. 1. By the reservations of these, they limited the powers they granted in the second part, and exempted themselves, to the stipulated extent, from the authority of the government they created.

Since the jury trial provision appeared in the Bill of Rights section of the Constitution, the Court in the *Wooster* case held that all that it did was establish a right; it did not give the State any power to regulate. By the same token, since the Encouragement of Literature Clause was not placed in the Bill of Rights section of the Constitution, one would have expected the *Claremont* Court to have found this fact to be an impediment to its conclusion that it established a right to education. However, the Court never even mentioned the issue.[1]

Also not mentioned by the Court is the fact that the Constitutional Convention of 1850 proposed a constitutional amendment to the voters which would have moved Article 83 from the Form of Government section to the Bill of Rights section. Although the proposed amendment was soundly defeated by the voters, the fact that it was offered indicates that some people of that era felt that Article 83 needed to be changed if it was to guarantee a right to education. Again, one would have expected the Court to have at least discussed the circumstance - especially since it was called to the Court's attention in the briefs.

This situation illustrates the *Claremont* Court's general disdain for history. Although the Court claimed that in discovering a right to an adequate education in Article 83, Part II, of the Constitution, it "placed [itself] as nearly as possible in the situation of the parties at the time the instrument was made," this statement appears to be little more than window-dressing for the Court's pre-formed conclusions. For example, in its decision in *Claremont I*, the Court purported to find support for its conclusion that the Constitution guarantees every citizen a State-funded adequate education in several exchanges of communications between New Hampshire's early chief executives and their legislative counterparts. But all that the authors of these exchanges do is affirm that education is a "proper object of their attention" and something which deserves their "care and attention." The Court, nevertheless, asserts that such "statement[s] [have] significant probative value as an indication that the contemporary understanding was that part II, article 83 imposed a duty on the State to provide universal education and to [financially] support the schools." This is not logic; this is alchemy.

An even more serious instance of the Court's deconstruction of the historical record involves its response to the data submitted by the defendants in the *Claremont* suit concerning how our schools were actually operated and funded in the period surrounding the Constitution's framing. As even the Court acknowledged, this information clearly established that "no State funding was provided at all for education in the first fifty years after ratification of the constitution." One would have thought that this would have provided some fairly persuasive evidence that the contemporaneous understanding of Article 83 was that the maintenance and funding of schools were matters of local, not State, responsibility. Nevertheless, the Court dismissed the information as completely inconsequential. According to the Court, the fact that "local control and fiscal support has been placed in greater or lesser measure though our history on local governments does not dilute the validity of the conclusion that the duty to support the public schools lies with the State." In other words, the Court had itself covered either way; if the evidence had showed that the State historically funded education, that would have proved the State had a duty; but since the evidence showed that local governments had always funded education, that just proved that the State had delegated its duty.

The most egregious instance of the Court's misuse (or nonuse) of history[2] however, concerns its total silence about the Constitutional Convention of 1850. We have already mentioned the Court's failure to mention the proposal to move Article 83 from the Form of Government section of the Constitution to the Bill of Rights section. But the real smoking gun was the Convention's Proposal #XI, which read as follows:

> <u>Art. 83. Strike out this article and insert in lieu thereof the following:</u>
>
> > Art. 89 The Legislature shall make provisions for the establishment and maintenance of free common schools at the public expense, and for the assessment and collection, annually, in the several towns and places in this State, of a sum not less than one hundred and twenty-five dollars for every dollar of state taxes apportioned to them respectively, to be applied exclusively to the support of such schools.

> Art. 90. The supervision of public instruction shall be vested in a state superintendent, and such other officers as the Legislature shall direct.
>
> Art. 91. The State Superintendent shall be chosen biennially by the qualified electors of the state in such manner as the Legislature shall provide; his powers, duties, and compensation shall be prescribed by law.

We can assume from the mere fact that Proposal #XI was made that the delegates to the 1850 Convention who recommended it felt that the existing language of Article 83 was not accomplishing something which they desired to accomplish. When combined with the proposal to move Article 83 to the Bill of Rights section, Proposal #XI would have accomplished the following: (1) established education as a constitutional right; (2) established the Legislature's duty as one to "make provision for" the public schools; (3) established the right/duty as relating to "free" public schools; (4) established the duty of the State to fund the schools through a uniform tax; (5) set a constitutionally adequate level of State funding; and (6) transferred operational control for public schools from the municipalities to the State.

Confirmation of the delegates' understanding can be gleaned from the Convention's records. On November 21, 1850, its Committee on Education presented two reports which explained the reasons for proposing amendments to Article 83. With regard to the mandatory State education tax, the Committee stated the following:

> Such a sum, we think is needed at this time, especially by the small towns, and those of middling population; for while these remain nearly stationary others increase in both respects. The proportional valuation of the farming towns, heretofore, becomes less, even while they do not diminish in numbers or amount of property. Of course, unless by special vote they add to the sums required to be raised by law their means of education are unduly abridged. Many towns do add largely to the sums required by law. But others as appears by the reports of the State Commissions, raise no more than the law exacts. There is need, therefore, of increasing from time to time the percentage of appropriation that the children and youth in every part of the State may enjoy as nearly as may be practicable, equal advantages of education.

This, of course, is the same justification which the *Claremont* Court used to divine in the Constitution a mandate for the State to provide every citizen with an adequate education, adequately funded. The only difference is that the delegates to the Convention of 1850 were acknowledging that such a system was not mandated by the Constitution in its then current form, and that it would take a constitutional amendment to make it so. In fact, in the Committee on Education's separate report on the provision which would have established a permanent office of State Superintendent of Schools, the Committee expressly observed that "The resolution does not confer new power upon the Legislature, but it professes to make that permanent which is now changeable; to make that imperative which is now optional." Accordingly, it seems obvious that at least the

delegates to the Convention believed that, in its existing form, Article 83 did not require a State-funded, State-operated public school system.

As we know, the proposed amendment was defeated. Because no one has to state why he votes against something, we do not know why it was defeated. Consequently, we can never know exactly what the voters' understanding of Proposal #XI was or, even less, what their understanding of Article 83 was. Perhaps some of them thought that the new State education tax was too high. Others probably thought it was a mistake to cast any tax figure in constitutional stone. Still others undoubtedly objected to a State takeover of education and/or the creation of a new office of State Superintendent to run such a system. Nevertheless, one can feel reasonably secure that the citizens who went to the polls to vote on Proposal #XI would be shocked to find that the Supreme Court in 1993 had accomplished by judicial fiat what they in 1850 had declined to do with their ballots.

In any case, let us leave history to the historians and go now to the language of Article 83, Part II, itself. This, of course, brings us to the Court's interpretation of the word "cherish". We have already noted that the definitions of "cherish" which were contemporaneous with the formation of the Constitution pointed in the exact opposite direction from that claimed by the Court. Just as now, the core meaning of cherish at the time our Constitution was written was to "honor;" to "revere;" or to "hold dear." Thus the verb was not one of action, of doing or of accomplishing; rather, it conveyed a sense of affect, of emotion, or of sentiment. In this regard, it is reflective of the sense in which George Washington used the word in his relatively contemporaneous Farewell Address when he urged all Americans to "cherish pubic credit," "cherish religion and morality," and "cherish a cordial, habitual and immovable attachment to the Unity of Government."[3]

The *Claremont* Court makes two other assertions about the language of Article 83 which are not supported by the text: (1) that Article 83 explicitly speaks to its addressees in their institutional capacities, and (2) that the addressees of Article 83 are only the political officers of government, the members of the legislature and the Governor. As far as the first of these propositions is concerned, note that Article 83 is not directed to "the State" in its corporate capacity - as it asserted by the Court in *Claremont I* - but to individual "legislators and magistrates." Interestingly enough, this language is different from the version of the Encouragement of Literature Clause in the Massachusetts Constitution of 1780 from whence it came; in the Massachusetts version, the admonition is aimed at "legislatures and magistrates." Although this may be no more than a drafting preference, it may also be evidence of an intent to identify the duties being prescribed in Article 83 as personal, not institutional, obligations.

In this regard, it might be well to compare Article 83, Part II, with Article 38, Part I, which also directs the officers of government to observe and foster a laundry list of social virtues. Note the similarity of their texts, the consistency of their purposes, the identity of their aspirational qualities, and the fact that they both appear to be directed at individuals, not institutions:

Article 38, Part I	**Article 83, Part II**
A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to justice, moderation, temperance, industry, frugality, and all the social virtues, are indispensably necessary to preserve the blessings of liberty and good government; the people ought, therefore, to have a particular regard to all those principles in the choice of their officers and representatives, and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of their laws necessary for the good administration of government.	Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality sincerity, sobriety, and all social affections, and generous sentiments among the people.

It may not occur to you that the fact that Article 83 is in some ways duplicative of Article 38, and that Article 38 appears in Part I - the Bill of Rights section of the Constitution - could actually be used as arguments in favor of the *Claremont* Court's discovery in Article 83 of a "right to education." The problem with such an argument, however, is the Court had ruled long before *Claremont* that the provisions of Article 38, Part I are non-justiciable. For example, in the 1940 case of *Trustees & c. Academy v. Exeter*, Exeter Academy had argued that Article 38 supported its claim that a revocation of the school's historical exemption from real estate taxes would be unconstitutional. The Court, however, flatly rejected the expansive interpretation of Article 38 advocated by the Academy:

> The constitutional direction that laws shall be just and conformable to social virtues does not contemplate the laws thought by the courts to be otherwise shall be held repugnant to the instrument. The direction is a precept and not a condition

> of validity. The exercise of legislative good faith is not a subject of judicial review. If the precept for all agents of the State to act in justice and reason is an obligatory mandate on which the validity of legislation depends, then it is applicable to all legislation, and the cardinal rule that the legislation alone passes on all moral virtue of its enactments is disregarded. The issues of the qualities of legislation prescribe by article 38 of the Bill of Rights are not justiciable.

As we shall see, the pre-*Claremont* Court had said the same thing about the provisions of Article 83, Part II; like the terms of Article 38, Part I, they are not justiciable. We have previously suggested a number of different reasons why the provisions of Article 83 are properly viewed in this way. We have said that they are "hortatory, not mandatory." Alternately, we have argued they involve "political questions." What we are saying now is that another reason for the non-justiciability of Article 83, Part II is that - like Article 38, Part I - its language appears to be meant to inspire *persons*, not to direct *governments*. We are also suggesting here that there are some strong indications that those people to whom that inspirational language of Article 83 was addressed include judicial officers as well as legislative and executive officers. In this regard, it should be noted that when the Constitution uses the term "magistrates," it does not refer exclusively to "the Governor," as is also asserted by the Court in *Claremont I.* The Constitution uses the words "magistrate" or "magistrates" variously to mean executive officers (Article 41, Part II); judicial officers (Article 33, Part I); or both (Article 8, Part I). As far as Article 83, Part II is concerned, it is most likely that the use of the term there was intended to refer to both executive and judicial officers.

Again, we should note the similarity of Article 83, Part II, to Article 38, Part I. The former addresses "legislators and magistrates" and the latter speaks to "lawgivers and magistrates." Who are the "magistrates" mentioned in these provisions? In a 1933 *Opinion of the Justices*, the justices said that they were. Referring to the "duty of the legislators and magistrates to inculcate and constantly adhere to honesty and justice," and citing both Article 38 and Article 83 as the source of such a duty, the justices spoke of themselves "as magistrates, sharing that duty with the legislature." Likewise, in the 1886 case of *Dow v. Railroad*, the Court had also noted that these two constitutional provisions spoke to them personally:

> Legislators are agents (N.H. Bill of Rights, art. 8), employed not in the rescission, but in the performance, of the social contract...But the integrity of their principals is not to be unnecessarily impugned by other agents employed in the judicial department. The social contract requires an exact and constant adherence to justice and honesty as virtues indispensably necessary to preserve the blessings of liberty and good government. N.H. Bill of Rights, art. 38; Const. of N.H., art. 83.

These cases and others seem to contradict the notion put forth by the Court in its *Claremont* decisions that Article 83, Part II specifically imposed its duty to cherish education upon only the Legislature and the Governor. The judiciary was apparently included too.

On the other hand, if Article 83 was addressed to the Court, wasn't the Court just discharging its proper duty under the Encouragement of Education Clause when it undertook to define an "adequate" education? The best answer to this question is that if something in a constitution appears to be everyone's duty, it was probably not intended to be anyone's duty - at least not in the sense of it being a legal duty. The point is that a constitution - especially one like ours which is founded upon the principles of representative government and separation of powers - is designed to allocate functions between the people and their representatives, on the one hand, and among the three branches of government, on the other hand. If the same duty purports to be shared by all three branches of government, there is by definition no separation of powers. The duty, therefore, is most likely one which is owed by all of government and/or its officers to the people. Such a duty is a political obligation, enforceable only through the political process, not the courts.[4]

As is typical of such eighteenth century tracts, the New Hampshire Constitution abounds in these types of duties. They are directed to government officials as agents of the public, not as representatives of a particular institutional entity. As we have already observed, Article 38, Part I states that the people's "lawgivers and magistrates" should adhere to principles of "justice, moderation, temperance, industry, frugality, and all the social virtues." Article 8, Part I, states that "all the magistrates and officers of government," as the "substitutes and agents "of the people, shall operate a government which is "open, accessible, accountable and responsible." And, of course, Article 83, Part II directs our "legislators and magistrates" to "cherish the interests of literature and the sciences" and to "countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections and generous sentiments, among the people."

Such provisions must be read in the context of the times. This was the era of Rousseau and the notion of government as the embodiment of the social contract. As Article 3, Part I of our Constitution states: "When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void." Constitutional provisions such as Article 83, therefore, constitute a statement of government's part of the bargain. And the judiciary is just as much an obligor on the social contract as is the Legislature and the Executive. If, therefore, the contract is breached, the people's remedies lie in the political arena, not in the courts.

On the other hand, if the proper construction of Article 83, Part II, is that its duties are imposed upon the members of all three branches of government, you might ask one final question about the Encouragement of Literature Clause: how did the Framers intend judges to discharge their duties? Quite frankly, I doubt that the Framers ever really stopped to think about such an issue any more than they thought specifically about how a judge would discharge his duty to promote "frugality" or to inculcate "sobriety." On the other hand, I feel confident that the Framers did not contemplate that the Court would discharge these duties through the exercise of its power of judicial review. As we shall soon see when we examine the precedents, if there is one thing which comes through

loud and clear, it is that virtually no one before *Claremont* - including the Court - assumed that it was the duty of the judiciary to judge the "expediency" of the acts of the Legislature or the Executive.

What we tend to forget is that judicial review was only a fraction of the Court's work in the eighteenth century. The regulatory state with its explosion of statutory and administrative law is a creature of the twentieth century. The bread and butter of the judicial system at the time of our Constitution was framed was not statutory interpretation. It consisted mostly of the resolution of common law civil claims and the disposition of criminal cases. In these areas, the constitutional admonitions to the officers of government that they foster the social virtues were just as meaningfully applied to judges as they were to legislators and executive officers.

A perfect example of this is the recent case of *Marguay v. Eno*, which was decided in 1995. The Court was faced in that case with the question of whether or not it should recognize a new common law tort in favor of sexually abused school children against school officials who either knew or should have known that the children were being abused by other school employees. Relying in part upon "the importance to society of the learning activity which is to take place in public schools," the Court held that such officials did have a duty to protect the children entrusted to their care and they could be sued for damages for breach of that duty. By recognizing this new cause of action, therefore, the Court was arguably discharging its own duty to cherish education.

Cases such as *Marguary*, however, do not deprive the Legislature of its superior role in law-making in general, or within the field of education in particular. Judge-make law is still subordinate to statutory law. The fact remains that the Legislature could reverse the rule of the *Marguary* case by simply passing a statute which eliminates the tort liability of the school officials.[5] In other words, the mere recognition of the possibility that the precepts of Article 83, Part II were intended to guide not only the legislative and executive branches within their domains, but also the judiciary within its domain, in no way contradicts the proposition that the wisdom and efficacy of the acts of the Legislature are non-justiciable. And - until *Claremont* - that is exactly the way the Court itself had interpreted Article 83. So let us now review those precedents. The least relevant of the cases are those in which the Court has interpreted the so-called Monopoly Clause of Article 83, which was not added to the Constitution until 1903:

> Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof. Therefore, all just power possessed by the state is hereby granted to the general court to enact laws to prevent the operations within the state of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or destroy free and fair competition in the trades and industries through combination,

> conspiracy, monopoly, or any other unfair means; to control and regulate the acts of all such persons, associations, corporations, trusts, and officials doing business within the state; to prevent fictitious capitalizations; and to authorize civil and criminal proceedings in respect to all the wrongs herein declared against.

Although the Monopoly Clause is not directed to the "legislators and magistrates," the provision is a part of Article 83, Part II and the Court has had a lot to say about its role in enforcing the provision. For example, in the 1948 case of *McIntire v. Borofsky*, certain merchants argued that the Unfair Sales Act was unconstitutional because it supposedly conflicted with the prohibition upon monopolies in Article 83. The Court, however, made it clear that this was not a matter for judicial determination:

> The expediency and wisdom of such legislation is by the constitution “hereby granted to the general court” (Art. 83) and it is not for the judiciary to compete with the Legislature in matters of opinion upon points of… expediency. Since the enactment of [the] Unfair Sales Act is within the power of the Legislature granted to it by the Constitution, its wisdom, effectiveness and economic desirability is not a judicial question.

Likewise, in the 1960 case of *Corning Glass Works v. Max Dichter Co.,* New Hampshire's Fair Trade Law was challenged on the grounds that it violated the Monopoly Clause. The Court again refused to get involved: "We believe that a government of laws is best served when, in such situations as the present, a court exercises sufficient judicial restraint so that it does not substitute its economic or sociological predilections for the judgment of the Legislature."

Another clause in Article 83 directs the legislators and magistrates "to countenance and inculcate the principles of...sobriety ...among the people." This clause was not added by amendment, but was a part of the original 1784 version of Article 83. In the 1908 case of *State v. Roberts*, two defendants who had been convicted of violating the State's liquor licensing laws claimed that such laws were unconstitutional under this provision. The Court, however, declined to enter the fray: "Whether the public good requires the sale of liquor as a beverage should be entirely or partially prohibited is for the legislature to determine, in the exercise of its discretion. The court does not inquire into the expediency or wisdom of such legislation."

Finally, we come to the Encouragement of Literature Clause itself. This provision of Article 83, Part II was very much at issue in the famous case of *Dartmouth College v. Woodward* decided by the Court in 1817. The issue presented by the case was the constitutionality of a statue which increased the number of members on the board of trustees of Dartmouth College. The Court held that the law was constitutional because Dartmouth was a public trust and because the Legislature had the power to regulate the affairs of such entities. Rejecting the argument that the college should be deemed a private trust, which would have made it subject to the superintendence of only the court system, the Court concluded that judicial control would yield insufficient protection for education. In that regard, the Court observed that "Courts of law cannot legislate. There

may be many abuses which can be corrected by the sovereign power [i.e. the voters] alone." As to whether or not the Court, in turn, could safely leave the "cherishing" of education to the Legislature, Chief Justice Richardson said as follows:

> I am aware that this power in the hands of the legislature may, like every other power, at times be unwisely exercised; but where can it be more securely lodged? If those whom the people annually elect to manage their public affairs, can not be trusted, who can? The people have most emphatically enjoined it in the constitution, as a duty upon "the legislators and magistrates, in all future periods of the government, to cherish the interests of literature and the sciences and all seminaries and public schools." And those interests will be cherished, both by the legislature and the people, so long as there is virtue enough left to maintain the rest of our institutions. Whenever the people and their rulers shall become corrupt enough to wage war with the sciences and liberal arts, we may be assured that the time will have arrived, when all our institutions, our laws, our liberties must pass away, when all that can be dear to them, must be lost, and when a government and institutions must be established, of a very different character from those under which it is our pride and our happiness to live.

In one of our other Letters, we posed the question as to whether education was too important to be left to the politicians. The point made by the Court in the *Dartmouth College* case is precisely the point that has got lost in most of the discussions about the *Claremont* case: education is important; in fact, it is so important that its nurture has been placed in the hands of the institution which is most responsive to the body politic, the Legislature. On the other hand, if We The People don't care enough about education to see to it that the Legislature properly cherishes it, we will have a problem far too great to be fixed by the judiciary.

The fact is that the judiciary was not given the mission of curing all of society's ills. Judge Learned Hand gave a famous speech in 1942 called "The Contribution of An Independent Judiciary to Civilization." Although Judge Hand was not talking specifically about educational policy, he made the same point about judicial review and democracy that Justice Richardson had made in the *Dartmouth College* case:

> [Judges] should not have the last word in those basic conflicts of "right and wrong, between whose endless jar justice resides." You may ask what then will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know - that a society so riven that the spirit of moderation is gone, no court can save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

In a democracy, judicial review has its limits. If we believe in democracy, we must trust it. It may not work as quickly as we like or in just the way we would like, but it will work if we just give it a chance. It is unfortunate that our current crop of Supreme Court justices appear to be non-believers. In a letter that he wrote in 1824 to Henry Lee, Thomas Jefferson said that "Men by their constitutions are naturally divided into two parties: 1. Those who fear and distrust the people and wish to draw all powers from them into the hands of the higher classes. 2. Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise, depositories of the public interest." If only the justices of our Court had fallen into Jefferson's second category of men; they might not have felt compelled to substitute their own social policy predilections for those of the Legislature - and the *Claremont* case would have been decided the other way.

Rasputin

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[1] This is not to suggest that the location of a provision in Part I versus Part II of the Constitution is determinative of its status as the reservation of a right versus the grant of a power. There are in fact several instances of mismatching of rights and powers in the Constitution. Compare, e.g., Article 6, Part I (granting power to the Legislature to authorize the towns to hire teachers of religion) with Article 91, Part II (guaranteeing the right to habeas corpus and prohibiting its suspension by the Legislature).

[2] This not to suggest that the authors of the *Claremont* decisions are unique in their use of history for forensic purposes. Lord Acton - who also coined the phrase about absolute power corrupting absolutely - wrote that, "Writers the most learned, the most accurate in details, and the soundest in tendency, frequently fall into a habit which can neither be cured nor pardoned - the habit of making history into the proof of their theories."

[3] On the other hand, we don't want to get trapped into agreeing with the Court that the proper way of interpreting the Constitution is by resorting to the dictionary. As Judge Learned Hand once cautioned, "[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary."

[4] And it may also be a moral obligation, which is not enforceable in any sense other than through one's own conscience or a concern for one's reputation in the community.

[5]

"Rasputin:"

Letters to the Educators, No. 12

If There Are Education Rights, Whose Rights Are They?

In one of our previous Letters, we discussed the proposition that not all duties create rights. The context for that discussion was the Court's comment in *Claremont I* that, "Having identified that a duty exists and having suggested the nature of that duty, we emphasize the corresponding right of the citizens to its enforcement." Assuming, however, that duties generally do create rights - or, more particularly, that the specific duty to cherish education creates a corresponding right to its enforcement - that merely begs the question. If there is a duty, to whom is the duty owed; if there is a right, whose right is it?

As a general proposition, only those parties who are within the class of persons who were intended to be benefited by a law are entitled to assert a claim for judicial enforcement of that law. This concept frequently comes into play in civil and criminal cases where one party is attempting to base a claim or a defense upon a statute. For the party to be entitled to proceed with his claim, "the right/duty that the statute mandates must be intended to protect the [party] or class of which he is a member." For example, in a recent case of *Fish v. Homestead Woolen Mills, Inc.*, a swimmer who got hurt when he dove into shallow water created by a faulty dam sued the dam owner for failure to comply with a statute which set standards for dam maintenance. The Court said that whether or not the plaintiff had a cause of action under the statute depended upon the purpose of the dam statute; i.e., was it intended to create swimming holes in order to protect swimmers, or was it intended to prevent floods in order to protect the owners of riparian land?

This same principle applies in constitutional cases. For example, in the 1882 case of *Wooster v. Plymouth*, the Town of Plymouth claimed that it was entitled to demand a jury trial in a suit by a person who claimed to have been injured on one of its highways. The town's claim was based upon the seemingly clear words of Article 20, Part I of the Constitution which provides that, in all civil cases, "the parties have a right to a trial by jury." The Court, however, phrased the issue as follows: "Historically and constitutionally, jury trial is a remedial protection of substantive rights. But of whose and what rights, and against whom, is it a protection?" After examining the history of trial by jury and the background of the jury trial provision in our Constitution, the Court concluded that, "It was universally understood by the founders of our institutions that jury trial, and other usual provisions of bills of rights, were not grants of rights to the public body politic, but reservations of private rights of the subject." Accordingly, the Court remanded the case back to the lower court for a trial - without a jury.

The *Wooster* case is an example of a situation where the Court determined that the only intended beneficiaries of a constitutional provision were the State's citizens, as opposed to the State itself. One of the reasons for the Court's conclusion was its observation that

the right of trial by jury has historically been viewed as a device by which the citizens could protect themselves *against* their governments. It is a mistake, however, to think that all constitutional provisions are the same as the one guaranteeing the right to a jury trial. Written constitutions do many things besides guaranteeing the right of the people against governmental infringement. Constitutions also grant (and withhold) powers from the people to government; they allocate powers among the institutions of government; they prescribe the rules of procedure for each branch; they specify the qualifications for the officials of government; and they provide mechanisms for the people to make changes in the identity of their governors or the form of their government.

Accordingly, not all "duties" prescribed by a constitution are duties owed by government to its people. Likewise, not all "rights" given recognition in a constitution are rights which necessarily belong to the State's citizens. For example, the Constitution may well impose a "duty" upon a government institution, the function of which is to preserve, protect and facilitate the operation of that institution. It is not the function of such duties to create rights in others which are then enforceable *against* that institution itself. Consequently, if such a duty creates a corresponding right, the right belongs to the institution, not to you and me.

An example of this type of duty appears in Article 35, Part II of the Constitution which provides that, "The senate shall be the final judges of the elections, returns and qualifications, of their own members." In the case of *Brown v. Lamprey*, several persons claimed to have been elected to the State Senate. The Senate, however, refused to seat them on the grounds that they had not been residents of their senatorial districts for the requisite period prescribed by the constitution; instead, the Senate seated the candidates from those districts who had received the second highest number of votes. The Court refused to get involved in the dispute because "[W]e have no authority to approve or disapprove the action thus taken by the Senate. For this court to interfere would be a usurpation of the authority of the Senate granted to it by the Constitution." In other words, even though the Constitution imposed a duty upon the Senate to judge its own elections (the Senate "shall" be the judges), this created no right in the voters or in the candidates running for office to seek enforcement of that duty in the courts. Or, to put it another way, the intended beneficiary of the duty was the Senate itself, not the people.

The Legislature is not the only branch of government to which the Constitution has assigned areas of exclusive responsibility for the purpose of giving it the means of self-preservation. The executive branch is the recipient of several similar grants of authority. For example, Articles 46 and 47, Part II of the Constitution prescribe the specific manner by which the Governor and Council nominate and appoint, respectively, certain executive officers. In a number of *Opinions of the Justices*, the Court has affirmed that these "duties" do not grant "rights" to putative officeholders or to the general citizenry which may be enforced *against* the Governor and Council in a court of law.

Finally, the Court itself possesses exclusive spheres of influence which may not, in turn, be invaded by its co-equal branches. Indeed, it would not be unfair to say that the Court's most ardent defenses of the notion that the institutions of government have a legitimate

interest in protecting their own integrity have come in those cases in which the Court has safeguarded its own turf.[1] For example, in an *Opinion of the Justices* issued in 1933, the Court ruled that it would be unconstitutional for the Legislature to place a monetary cap on judicially-imposed fines for contempt of court. According to the Court, the power to punish violators of its own orders is an inherent power of any court which is necessary for its "essential operations" and, therefore, cannot be taken away without destroying the very institution itself:

The constitution confers upon the legislature "full power and authority to erect and constitute judicatories and courts." Const. Pt. II, *art.* 4. The question now presented is whether this grant of power is broad enough to authorize the legislature to take from the judicial department of the government a power which has always, both here and elsewhere, been recognized as an essential attribute of judicial tribunals. We are of the opinion that it does not confer such power. The existence of the judiciary as one of the three essential parts of government is declared in terms. It is "to be kept as separate from, and independent of" the legislature "as the nature of a free government will admit." Const. Pt. I, *art.* 37. If one of the essential attributes might be taken away from the judiciary, so might many or all of them; and our courts might be directed to proceed in accordance with regulations at variance with all known ideas of the functions of a court. The constitution creates no such supremacy of the legislative department over the judicial. In other words, if there is a "right" here, it is not a right of the people to have a judicial system which has the power to punish for contempt; it is a right exercisable by the Judiciary itself for its own preservation.[2]

Although we have previously suggested that the Encouragement of Literature Clause, like a number of similar provisions in our Constitution, was not directed to any institution, but was instead addressed to the individual officers of Government - including judges - the Court in *Claremont* says that this is not so. Let us assume for purposes of argument that the Court is correct and that Article 83 imposed the duty to cherish education upon the Legislature and the Governor in their corporate, institutional capacities. As we all know, the Court went on to hold that the duty prescribed by Article 83, in turn, creates a right to a so-called constitutionally adequate public education. The question then becomes: For whose benefit were the Governor and the Legislature charged with this duty to cherish education? Alternatively, if this duty creates education rights, whose rights are they?

The Court's answer in *Claremont I* was as follows: "The right to an adequate education mandated by the constitution is not based on the needs of a particular individual, but rather is a right held *by the public* to enforce the State's duty." The historical evidence and the Court's own precedents, however, do not support the Court's contention. What they do demonstrate is that the purpose of Article 83 was to affirm the significance of education as a prerequisite for an effective democracy. As the Constitution states in several places, legitimate government is founded upon the "consent of the people." See Articles 1, 8, 12 and 28, Part I. The Framers, however, did not believe that democracy alone led to good government. They believed that an *educated* people were - as Article 83 itself states - "essential to the preservation of a free government." The purpose of Article 83, therefore, was to encourage the creation of an educated citizenry who would make wise choices in

their selection of representatives, who, in turn, would make wise choices in their selection of public policies. In this way, the institutions of government themselves could most effectively satisfy the obligation imposed upon them by Article 31, Part I of "making such laws as the public good may require."

The Court *expressly* acknowledged that this was the purpose of Article 83 in the 1912 case of *Fogg v. Board of Education of Littleton*. That case involved the claim by parents of a nine year old boy who had to walk four miles to get to the nearest school that he had a right to be transported to school at public expense. Although the Court found that he did have such a right under a State statute, its discussion of the constitutional issue is diametrically opposed to the rationale of the *Claremont* decisions:

> The primary purpose of the maintenance of the common-school system is the promotion of the general intelligence of the people constituting the body politic and thereby to increase the usefulness and efficiency of the citizens, upon which the government of society depends. *Free schooling furnished by the state is not so much a right granted to pupils as a duty imposed upon them for the public good.* If they do not voluntarily attend the schools provided for them, they may be compelled to do so. P.S., c.93. s.6 *State v. Hall,* 74 N.H. 61; *State v. Jackson,* 71 N.H. 552. While most people regard *the public schools* as the means of great personal advantage to the pupils, the fact is too often overlooked that *they are governmental means of protecting the state* from the consequences of an ignorant and incompetent citizenship. "Knowledge and learning generally diffused through a community being essential to the preservation of a free government, and spreading the opportunities and advantages of education through the various parts of the country being highly conducive to promote this end, it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools." Const., art. 82 [*sic*]. In accordance with this injunction, the state has always maintained for its protection and at great expense a common-school system which long ago became one of the most important governmental agencies.

At no point in either of its *Claremont* decisions does the Court seek to overrule or, distinguish this language in the *Fogg* case.[3] The Court's recitation in *Claremont I* of the *importance* of public education in colonial and post-Revolutionary times does nothing to contradict *Fogg*. No one disputes the importance of education - then or now. *Fogg* itself acknowledges that education "long ago became one of the most important governmental agencies." The question is not *whether* education is important. It is *why* it is important. And this, in turn, leads us to the *real* question about education which the *Claremont* case posed, the separation of powers question. In short, if providing education was a duty entrusted by the Constitution to the legislative and/or executive branches, did the Framers (or anyone else in that last 200 years) contemplate that the *courts* would be telling the other two branches how to do their jobs?

In its much more extensive review of the contemporaneous literature on the importance of education to the Framers, the decision of the Supreme Judicial Court of Massachusetts

in the *McDuffy* case had quoted from the writing of John Adams in which he extolled the value of education. It is interesting to note that even though our Court in *Claremont I* relied upon and quoted liberally from the *McDuffy* opinion because it interpreted the Encouragement of Literature provision of the Massachusetts constitution from which our Article 83 was drawn, our Court did not focus upon the fact that the reputed author of the provision was John Adams.

It is fortunate for the deceased Mr. Adams - who probably is still rolling over in his grave after the Massachusetts court gave him credit for its *McDuffy* decision - that our Court did not ascribe its *Claremont* decisions to him. For in addition to being such an advocate of education, John Adams also had a few pertinent things to say about the doctrine of separation of powers. Besides the fact that he was apparently the one who coined the phrase "a government of laws, not men" (which also appears in the Massachusetts constitution), he had this to say about the unchecked concentrations of political power:

> The fundamental article of my political creed is that despotism, or unlimited sovereignty, or absolute power, is the same in the majority of a popular assembly, an aristocratical council, an oligarchical junto, and a single emperor.

Had Mr. Adams ever assumed that the powers of judicial review could be asserted over legislative determinations of educational policy, he would have added the judiciary to his list of despotic institutions.

But perhaps we are jumping ahead of ourselves. Let us return to our discussions within the same framework of analysis that the Court used in *Claremont*: first we have duties; then we have rights; and, finally, we have parties to whom those rights belong. *Fogg* said they belong to the State. *Claremont* says they belong to the public.

On the other hand, even if we assume that Article 83's duty to cherish education was intended to benefit the *public*, that doesn't necessarily get educational issues into the courtroom. It is the Court's next proposition which accomplishes this task. After stating that the rights supposedly created by Article 83 belong to the public, the Court went on to assert that "*any citizen* has standing to enforce this right." Yet this proposition is quite contrary to the Court's jurisprudence in other areas. For example, the Court has held in a number of cases that "to sustain the liability against a municipality or its servants, the duty breached must be more than a duty owing to the general public."

This principle is known as the public duty rule, which holds that a State official may not be sued for a violation of a duty which is owed to the public in general. For example, in the 1984 case of *Hartman v. Town of Hooksett*, the court refused to allow a party who had been injured on account of a frost heave in a State highway to sue the Town of Hooksett for the failure of its police officers to warn travelers of defective conditions in the pubic ways, of which the officers had or should have had knowledge. The plaintiff's theory of liability was that the police officers had breached a statutory duty "to act as conservators of the peace." The Court, however, declined to allow recovery under such a theory, ruling that more than just a public duty must be involved and that "there must

exist a special relationship between the municipality and the plaintiff, resulting in the creation of a duty to use due care for the benefit of particular persons or classes of persons."

I acknowledge that the public duty rule is a creation of tort law, not constitutional law, and that its function is to set limits upon the occasions when an injured party may collect damages form a public official. Nevertheless, the notion that the breach of a duty owed to the public in general is not actionable in a court is instructive on the constitutional issues presented by the *Claremont* cases. The point is that if - as the Court says - this creates a right "held by the public," there was good reason for the Court to have held that the right was only enforceable at the ballot box and not in a courtroom.

One of the current problems created by *Claremont's* notion that any private citizen can enforce the public's supposed right to an adequate education is that we are all now at the mercy of any self-appointed protector of this public right who purports to speak in our behalf. In fact, some of the lawyers for the *Claremont* plaintiffs have been proclaiming that they are so-called "private attorneys-general" who are authorized to enforce the public's rights against government without your and my permission - and apparently even without the permission of their own clients. This should remind one of laws which purport to give rights to snail darters and spotted owls. In any case, the point is that in a democracy, no one is entitled to speak for the citizens without their consent, and none of us has consented to have the *Claremont* plaintiffs or their lawyers speak for us about whether or not the Legislature is performing its public duties. We are perfectly capable - thank you very much - of speaking for ourselves.[4]

Rasputin

ENDNOTES

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[1] In fact, there is even a school of thought that the Court's power of judicial review was intended for no other purpose than to protect the Court's own jurisdiction, i.e., that it was a *de*fensive weapon only. Adherents of this position include prominent historians Louis B. Boudin and William W. Crosskey. There is clear support for this on the Federal level. For example, James Madison, one of the advocates among the Framers of the Court's power to declare laws unconstitutional, apparently contemplate that it would especially be exercised in cases "of a Judiciary Nature." In New Hampshire, the concept obtains some credibility from the fact that the seminal case establishing our Court's power of judicial review, the 1818 *Merrill v. Sherburne*, involved a legislative encroachment upon the prerogatives of the judiciary (i.e., passage of a statute which purported to grant a litigant who had lost in court a new trial).

[2] By the same token, the Court acknowledged in this *Opinion* that "the authority to punish contempt is [also] a necessary incident, inherent in the very organization of all Legislative bodies." Presumably, therefore, this was an acknowledgment that if the shoe had been on the other foot, the Court would have ruled that the Legislature's power of contempt is immune from judicial interference.

[3] On the contrary, in what can only be described as a display of judicial chutzpah, the Court in *Claremont I* actually cited *Fogg* in *support* of its holding that the Constitution establishes a right to education by every citizen in the courts.

[4] Moreover, you should know that the claim of the plaintiffs and/or their lawyers in the *Claremont* cases that they are entitled to act as "private attorneys-general" is simply a misapplication of the concept to the current controversy. This is a doctrine which was created to justify the claims of *private* parties against other *private* parties in furtherance of a governmental policy. For example, the federal antitrust laws prohibit unreasonable restraints of trade and authorize private parties to sue other private parties to enforce this public policy. However, the doctrine does not contemplate that the so-called private attorney general could bring a claim against the government itself. This is eminently clear in New Hampshire where, by virtue of the Constitution itself (Article 41, Part II), the Governor - and, therefore, even the *real* Attorney General - "shall not... [bring] any action or proceeding against the legislative or

judicial branches ... to restrain violation of any constitutional or legislative power, duty, or right, by any officer, department or agency of the state."

"Rasputin:"

Letters to the Educators, No. 13

A Court Out Of Control

Part I - Judicial Restraint

In one of our earlier Letters, we concluded that there really were no effective checks and balances upon the manner in which the Justices of our Supreme Court exercise their power of judicial review (i.e., their power to declare laws unconstitutional). Although theoretical constraints, such as removal from office by impeachment or reversal of their decisions through constitutional amendments, do exist on paper, they are either too draconian to seriously contemplate or too difficult to effectuate in practice. Consequently, the only real checks upon the Court's abuse of its powers are those which the Court is willing to impose upon itself.

This necessity for judicial self-control was addressed by Mr. Justice Stone of the US Supreme Court in his oft-quoted dissent to the 1936 case of *United States v. Butler*:

> The power of Courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books, appeal lies not to the courts but to the ballot and to the processes of democratic government.

Note that Justice Stone speaks of two separate principles. The first point that he makes - that judges should not confuse issues of constitutionality with their own policy preferences - is an aspect of a principle with which we are by now very familiar; this is the doctrine of separation of powers. His second point - that even where there may be unconstitutionality, the Court should not reach out to find it - is somewhat new to our discussions; it is called the doctrine of judicial restraint. In our earlier Letters, we discussed in great detail the degree to which our Court's *Claremont* decisions violated Justice Stone's first principle. Now we shall see just how badly the *Claremont* decisions have also violated his second principle.

There is nothing new about the concept of judicial restraint. It has to do with the proper role in our system of justice of the judge as a neutral umpire. Our judges are trained to decide only those cases which need deciding. Unlike the courts of continental Europe, Anglo-American courts have no magisterial power to affirmatively go forth like Knights of the Round Table, seeking to right the world's wrongs. For example, as part of our common law tradition, we accept the proposition that our courts have no power to

commence a case *sua sponte*; that is, on their own. Accordingly, even if a blatant illegality is staring a judge in the face, he must hold his tongue unless and until someone commences an action in his court. And even if a claim is brought in his court, his job is not to raise issues not raised by the parties; it is not to decide issues which are unnecessary to the disposition of the case; and it is not to decide the case at all if the parties elect to withdraw their claims and settle their dispute.[1]

On a personal level, this paradigm reflects itself in that cast of mind which we call the "judicial temperament." This consists of that aggregation of personality traits which are characterized by the passive virtues, such as humility, patience, deliberation, circumspection, reflection, caution, equanimity, modesty and moderation. Accordingly, its exemplars are not Judge Roy Bean dispensing his personal brand of Law West of the Pecos, Judge Julius Hoffman suffering an apoplectic fit over the antics of the Chicago Seven, or even Judge Lance Itoh preening before the television cameras. The role model for our perfect judge is a nameless, faceless, blindfolded statue of a woman holding the scales of justice in perfect balance.

The perfect judge in such a system is *re*active, not *pro*active. His function is to resolve cases, not to prosecute them and not to defend them. He must remain aloof, above the fray, emotionally uninvolved. He is even-handed and impartial, favoring neither side. A judge is an arbiter; he is not a party; and he is not an advocate for any party. He seeks to avoid disputes, not to create them. And when he does resolve a dispute, he does so by making a decision, not by scoring a debating point.

This image of the reluctant judge is particularly apropos when the Court decides constitutional cases. For, in this arena, there is a definite intersection between Justice Stone's two principles, judicial restraint and separation of powers. Whenever the Court exercises its power of judicial review over the acts of the other two branches of government, it is implicitly compelled to determine the limits of its own authority as well. For example, when the Court assesses the constitutionality of a law passed by the Legislature, the Court must also analyze its own thinking on the issue to ensure that it is truly acting in a judicial capacity and that it is not - as Justice Felix Frankfurter often characterized it - acting as a "super-legislature." In this sense, every instance of judicial review presents an issue of separation of powers.

To the extent that the doctrine of judicial restraint cautions the Court to confine itself to its own domain (or, as Justice Stone stated it, to be "concerned only with the power to enact statutes, not with their wisdom"), judicial restraint serves to reinforce the doctrine of separation of powers. As Justice Frankfurter put it in his dissent in the 1943 case of *West Virginia State Bd. of Education v. Barnette,* "the attitude of judicial humility which these considerations enjoin is not an abdication of the judicial function. It is a due observance of its limits." Or as our own Court phrased it in the 1960 case of *Corning Glass Works v. Max Dichter Company,* "We believe that a government of laws is best served when ... a court exercises sufficient judicial restraint so that it does not substitute its economic or sociological predilections for the judgment of the Legislature."

In this regard, judicial restraint is simply a counterweight to the Judiciary's natural propensity to expand its own power. We have already noted the tendency of all power to corrupt. As James Madison said in a letter to Thomas Jefferson in 1788, "[W]herever the real power in a Government lies, there is the danger of oppression." And, as Jefferson knew only too well, that includes the judiciary. For example, this is what he said on the subject in his *Autobiography*: "[C]ontrary to all correct example, [judges] are in the habit of going out of the question before them, to throw an anchor ahead, and grapple further hold for future advances of power." Judicial restraint, therefore, simply acts as a brake - or a governor - upon judicial ambition, which is itself just a reflection of the fallibility of *all* human beings.

Another human trait at work here is self-interest. The ancient maxim states that "no man should be a judge in his own case."[2] A judge who must determine the limits of his own power of judicial review is indeed a judge in his own case. This does not mean that the Supreme Court is disqualified from engaging in judicial review. For not only is it accepted that the exercise of the power of judicial review is the Court's constitutional right and duty, but it is also compelled by the ancient rule of necessity which states that, "when all judges would be disqualified, none are disqualified." On the other hand, the doctrine of judicial restraint at least openly acknowledges the conflict of interest which is inherent in judicial review, and cautions the Court to avoid its potentialities.

If the doctrine of judicial restraint can be said to reinforce the doctrine of separation of powers in some cases, it can also be viewed as tempering it in others. Like the mythical figure of Janus, separation of powers faces in two different directions at the same time. We have just discussed its introspective side, that which counsels each branch of government to look inwards, to know the borders of its own territory and to remain within them. But the doctrine of separation of powers has an extroversive side as well. This is the face which tells the three branches to look outwards, to know the borders of their neighbors' territories, and to keep them within their borders. As Justice Brandeis once pointed out, "[T]he doctrine of separation of powers was adopted ... not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy."

By its very nature, judicial review creates friction. Because judicial review necessarily pits the judiciary against its sister branches of government, it is *bound* to do this. The problem with friction, however, is that things which are subjected to it have a tendency to become worn and to break. For this reason, confrontation is not usually assumed to be in the judiciary's best interest. Judicial restraint, therefore, cautions the Court to exercise its power sparingly. It suggests that at least as much can be achieved through cooperation as it can through confrontation.

This feature of judicial restraint which seeks to minimize institutional confrontation manifests itself in a number of subsidiary legal doctrines. The first of these directs the Court to avoid opining on issues of constitutionality if there are any alternative grounds upon which a case can be decided. For example, in the 1991 case of *Britton v. Town of*

Chester, the Court decided that a local zoning ordinance was invalid because it conflicted with a State enabling statute. The Court observed that its refusal to deal with the question of the ordinance's constitutionality was "in keeping with our longstanding policy against reaching a constitutional issue in a case than can be decided on other grounds." Such a policy is not only ancient, but it is also typical. For example, at the Federal level, it was declared to be the rule of decision by the very architect of judicial review, Chief Justice Marshall himself:

> No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.

Another tack often taken by the Court when presented with an attack upon the constitutionality of a legislative act is to purposefully construe the law in question in a manner consistent with the Constitution. As the Court said in its decision in the 1908 case of *Canaan v. District*, "A construction that makes a statute unconstitutional in its operation is not to be adopted when it is reasonably susceptible of another and constitutional construction." Again, the same rule applies in the Federal system where - according to our own Justice David Souter - the U S Supreme Court's "longstanding practice is to read ambiguous statutes to avoid constitutional infirmity."

On the other hand, if the issue of constitutionality cannot be dodged by the Court, the doctrine of judicial restraint directs the Court to commence its task of judicial review by making an assumption that the challenged act is valid. This is an application of the so-called presumption of constitutionality. This notion holds that when the acts of the Legislature or the Executive are challenged on constitutional grounds, the Court is to give the actor the benefit of the constitutional doubt. Although this tradition is indeed a function of judicial restraint, it is also an acknowledgment of the wisdom of Justice Oliver Wendell Holmes' comment that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[3]

The presumption of constitutionality is very much a part of the jurisprudence of New Hampshire. For example, in the l8l8 case of *Merrill v. Sherburne*, the Court said that it would only declare a law unconstitutional if its invalidity were shown "in the *clearest* manner." Likewise, in the 1859 case of *Rich v. Flanders*, the Court held that "a legislative enactment is not to be declared invalid for lack of a constitutional power unless the conclusion is established *beyond a reasonable doubt*." And, finally, in the case of *Musgrove v. Parker*, the Court stated that, "It has always been the practice in this jurisdiction to follow the universally accepted doctrine that the constitutionality of an act passed by the coordinate branch of the government is to be presumed. It will not be declared to be invalid except upon *inescapable* grounds."

On the other hand, even if the presumption of constitutionality is overcome, judicial restraint signals the Court to do no more than declare the challenged act unconstitutional. In other words, it is not the function of the Court to put anything in its place. As Justice Frankfurter said in the *Barnette* case, "A court can only strike down. It can only say, `This or that law is void.' It cannot modify or qualify; it cannot make exceptions to a general requirement." Thus, the power of judicial review is only a negative power; having cast its veto, the Court's job is done. It is then the province of the Legislature or the Executive, as the case may be, to either find a new way to accomplish its intended end or to abandon the task and move on to something else.

The principle of judicial restraint, therefore, is completely compatible with the principle of separation of powers. On the one hand, it keeps the judiciary focused upon matters of genuine constitutional dimension, as opposed to mere expediency. As reflected in the comments of the Court in the l936 case of *Coleman v. School District of Rochester*, judicial restraint teaches that:

> The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power.

On the other hand, by keeping the Court out of the Legislature's business, judicial restraint encourages the Legislature to tend to business. In this regard, many commentators have remarked upon the fact that one of the consequences of hyperactive judiciary is a slothful legislature. Famed historian Henry Steele Commager, for example, charged that "judicial review has been a drag upon democracy and - what we may conceive to be the same thing - upon good government." Commager, in turn, took his cue from an earlier giant, Professor James Bradley Thayer, who wrote at the turn of the nineteenth century:

> Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence, - the power of the judiciary to disregard unconstitutional legislation - it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors.

If, therefore, a vigorous lead from the Court dampens the fires of democracy, judicial restraint has the effect of keeping those fires well lit. By not being able to pass the buck to the Supreme Court, the Legislature is compelled to accept responsibility for its actions

and, if it is careless of evil, to suffer the consequences. As the Constitution says in Article 8, Part I, the officers of government are "at all times accountable to [the people]." Judicial restraint fixes accountability for the wisdom and efficacy of our laws upon the body which makes the laws, the Legislature. Consequently, by avoiding the confrontation between institutions which inevitably results from a cavalier exercise of the Court's power of judicial review, the doctrine of judicial restraint not only promotes comity among the institutions of government, but it also makes each one do its job better.

Judicial restraint also warns the Court to conserve its moral capital. But now we are talking about more than just institutional harmony; we are talking about credibility. And a due regard for credibility is particularly important to an institution such as the Court whose effectiveness depends upon the force of persuasion rather than the persuasion of force. It goes to the very heart of the Court's ability to function.

The question of credibility also implicates a different audience than simply the Court's companion branches of government; it involves that constituency to whom all institutions of government are ultimately responsible - the people. Despite the fact that judicial decisions are not supposed to be determined by plebiscites or public opinion polls, the Court cannot maintain its legitimacy, at least in the long run, if its decisions are not compatible with the essential, shared values of the general populace. US Justice John Harlan recognized this requirement when he wrote the following in his dissent to the Court's 1961 decision in *Poe v. Ullman*:

> If the supplying of content to [a] Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive.

The threat to the Court's legitimacy is especially immanent when it ventures into areas which affect our deepest sensibilities. As Justice Frankfurter said in his dissent in the *Barnette* case, "As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantedly enter social and political domains wholly outside our concern." The most obvious example of the high political price to be paid for a disregard of judicial restraint in an area of intense personal concern is the intrusion of the federal courts into matters of sexual practice and abortion. Regardless of how one may come down on the moral, social, and religious aspects of these issues, it is acknowledged by all but the most ardent of partisans (on either side) that the literal text of the Federal Constitution says nothing whatsoever about them. This is not to say that the Court was right or wrong in divining constitutional rights in these areas; my point is simply that when the Court ventures into areas which cause it to take sides in matters of basic moral precepts, it jeopardizes its own legitimacy if it has nothing more to base its decisions upon than the mere fact that it has the power to decide. As Justice Antonin Scalia recently

said about such a decision, "When the Court takes sides in the culture wars . . . it is an act, not of judicial judgment, but of political will."[4]

Part II - Education

It appears that our Court was oblivious to these considerations in its *Claremont* decisions. Indeed, the Court exhibited a certain naïveté in the boldness of its pronouncements upon educational policy. It apparently assumed that a decision which purported to state for all time what constitutes an "adequate" education would have no greater impact upon the citizens of New Hampshire than one of its typical decisions about the search and seizure rights of a criminal. The Court obviously did not understand that, as controversial as its anti-majoritarian decisions on such issues may be, they are not taken personally by most people.

Education, however, *is* different. Decisions about education don't affect only the minority, or even only the majority. They affect everyone. And everyone has an opinion about education. Why? Because most people have children and the education of *their* children is a subject which is intimately related to their own moral and social beliefs. For most of us, our children are extensions of ourselves; they are our window to the future; they are our immortality. As Jane Addams once wrote, "America's future will be determined by the home and the school. The child becomes largely what it is taught." Consequently, when the Court tells you or me that *it* knows best how our children should be taught, the Court takes a huge risk in terms of its own institutional credibility.

This point was not lost upon the Supreme Court of the United States when twenty-five years ago it declined to take the path chosen by our Court in *Claremont*. In the case of *San Antonio School District v. Rodriguez*, the U S Supreme Court decided that it would *not* intervene in matters of educational policy. In reaching its conclusion that education was not a fit subject for judicial intercession, the Court specifically took account of the depth of disagreement on the issue among persons of goodwill and rationality:

> [T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of intractable economic, social, and even philosophical problems… On even the most basic questions in this area the scholars and educational experts are divided... The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues.

The other reason that education is such a sensitive issue is because of its intimate relationship with freedom of speech and our other political freedoms. As Sir Francis Bacon said, "Knowledge is power." He who controls our education controls what we know, and what we know, in turn, has a great deal to do with what we think, what we say and, ultimately, what we do. Thus, the power over knowledge is one of the most

awesome of powers, especially in a democracy. Certainly the connection between education and the exercise of our political rights is nowhere made more explicit than in the very provision of our Constitution which spawned *Claremont*, Article 83, Part II, where it is proclaimed that "knowledge and learning [are] . . . essential to the preservation of a free government."

Yet the irony is that the Court apparently does not perceive the inconsistency between its insistence in *Claremont* upon governmental control over education and the judiciary's traditional condemnation of even the most minor interference by government with our political rights. Again, the U. S. Supreme Court in the *Rodriguez* case had no difficulty in recognizing this as a serious problem under the Federal Constitution:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

The New Hampshire Constitution, like the Federal Constitution, guarantees freedom of speech, freedom of religion, freedom of association, and the right to vote. Pursuant to these provisions, the Court has held on numerous occasions that although the State may regulate the time, manner and occasion for speech, it may not dictate the content thereof. Under *Claremont*, however, the State *must* regulate education. According to the Court in *Claremont I*, the Legislature and the Governor must "fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government." Likewise, in *Claremont II*, the Court proclaimed that "the legislature's obligation [is] ... to establish educational standards that comply with constitutional requirements."

Part III - <u>Local Control</u>

This certainly doesn't look like judicial restraint to me. Even if the Court had conscientiously concluded that Article 83, Part II of the Constitution imposed a judicially-enforceable duty upon the State to provide its citizens with a system of education, there was no reason that the Court should not have held that the State could delegate that function to the cities and towns. Educational policy and funding have always been determined in New Hampshire at the local level, by elected school boards and through direct citizen participation in the democratic process at school district meetings. In one grand gesture, however, *Claremont* swept these 200 years of tradition aside and decreed that educational policy must be set in Concord at the Statehouse.[5]

This is not to say that there is any *requirement* that educational policy or funding be determined at the local level. Our Court has repeatedly held that cities, towns and school districts are but subdivisions of the State, and that their powers, their territories and their very existence may be altered or even eliminated by the Legislature. For example, in the l937 case of *Amyot v. Caron*, the Court specifically held that there was no such thing as a "constitutional right of local self-government."[6] Even the addition to the Constitution in l966 of Article 39, Part I, which denies to the Legislature the power to change "the charter or form of government of any particular city or town" without the consent of its voters, has had little or no limiting effect upon the Legislature's historically plenary power over the State's municipalities. Although intended to be an affirmation of home rule, the Court has construed the amendment so narrowly as to almost render it nugatory.

Another home rule amendment, Article 28-a, Part I, which was added to the Constitution in l984, was intended to put an end to the State's not infrequent efforts to impose new burdens upon the cities and towns without providing them with the resources to satisfy their obligations. In the 1990 case of *N.H. Municipal Trust v. Flynn*, the Court described the amendment, which is known as the unfunded mandate provision, as being "designed to provide a safety net to save cities and towns from the burden of coping with new financial responsibilities not of their own creation, and to permit them a stronger grasp of their fiscal affairs." On the other hand, it appears that one of the unintended consequences of the amendment is actually to *weaken* local control in that it induces the State not to delegate responsibility. If the State has to pay for something, it wants to run the show.

Notwithstanding local control's lack of constitutional stature, its prominence among New Hampshire's most revered traditions is beyond cavil. Indeed, its place in our political culture was well established before we even declared our independence from England in l776 or adopted our first constitution as an autonomous political entity in that same year. According to Chief Justice Doe in the case of *State v. Hayes*, our tradition of local control extended back at least as far as l640 - and was still very much alive when he wrote about it in l88l:

> Local self-government (including much administration of law, and an extensive use of the law-making powers of taxation and police), introduced not only before the organization of both the state and province of New Hampshire, but also before the extension of Massachusetts jurisdiction to the Piscataqua, and continuing in uninterrupted operation more than two hundred and forty years, has been constitutionally established by recognition and usage. Preceding all other New Hampshire legislation, and firmly fixed in the foundation of our institutions as an executed intention of the people, the local exercise of the power of making local law is an application of the principle of self-government that retains the control of local affairs in the community most interested in them.

New Hampshire's experience with participatory democracy, moreover, was typical of that of the American colonies and the early states, especially those in New England. Indeed, when Alexis de Tocqueville penned his famous survey of our new nation in the mid-nineteenth century, *Democracy in America*, he spoke of our system of local government

as "the American system," which he contrasted to the system of centralization then extant in most of the countries of continental Europe. Thomas Jefferson made the same comparison in a letter he wrote in l816 to John Taylor of Virginia in which he extolled the virtues of political decentralization: "The further the departure from the direct and constant control by the citizens, the less has the government of the ingredient of republicanism."

On the other hand, one would have to be deaf, dumb and blind not to recognize the tendency toward the concentration of power which has characterized the two centuries that have passed since the formation of the union. Even by l8l6, in the same letter quoted from above, Jefferson was bemoaning the trend: "If, then, the control of the people over the organs of their government be the measure of its republicanism, . . . it must be agreed that our governments have much less of republicanism than ought to have been expected; in other words, that the people have less regular control over their agents than their rights and interests require. . . [However,] the golden moment is past for reforming these heresies."

Notwithstanding Jefferson's lament, in at least one area local control has managed to mount a stiff resistance to the "heresies" of centralized government, social engineering and statism: in the area of *education*. For if there is one subject upon which there has continued to be general agreement that big is bad, it is the subject of education.[7] And again, one need only refer to the U S Supreme Court's decision in the *Rodriguez* case for a clear statement of the obvious:

> In a era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means… the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence… No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.[8]

Suffice it to say that one can search our Court's *Claremont* decisions in vain for any similar expressions of opinion. Although the issue of local autonomy in matters of education was not completely ignored, it might just as well have been. For example, in *Claremont I*, the Court dismissed the subject with the following *ipse dixit*: "That local control and fiscal support has been placed in greater or lesser measure through our history on local governments does not dilute the validity of the conclusion that the duty to support the public schools lies with the State." Similarly, in *Claremont II*, the Court served up this bit of sophistry: "We recognize that local control plays a valuable role in public education; however, the State cannot use local control as a justification for

allowing the existence of educational services below the level of constitutional adequacy." Finally, in *Claremont IV,* [9] the Court delivered the following lecture in statist civics:

> It should not be forgotten that New Hampshire is not a random collection of isolated cities and towns. Indeed, all of us live in a single State. The benefits of adequately educated children are shared statewide and are not limited to a particular town or district. We live in a highly mobile society such that a child may be educated in Pittsfield and, as an adult, reside in Moultonborough. That adult may serve or influence the town or State as an elected or appointed official, a business or civic leader, or in various other endeavors. The benefits of that citizen's public education and contributions to community may be felt far beyond the boundaries of the educating town or district. Therefore, it is basic to our collective well-being that all citizens of the State share in the common burden of educating our children.

The Court's decision to make education a non-delegable State responsibility was certainly not dictated by our Constitution. Article 83, Part II says nothing whatsoever about whether or not the State can delegate its duty to "cherish" education to its political subdivisions. Indeed, in the absence of such a prohibition, judicial restraint should have caused the Court to at least look before it leaped. In this regard, it is not just the outcome of the *Claremont* decisions which is so disconcerting; it is the impetuosity of the Justices in getting there which ought to make us really nervous.

Part IV - Educational Adequacy

Moreover, as if enough new ground were not broken by the Court in *Claremont II* by withdrawing educational policy from our local school districts and placing it in the hands of the State, the Court leaped over an even bigger precipice without looking by volunteering its own views on what the content of this new State policy should be:

> (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 the student to make informed choices; (iii) sufficient understanding of governmental processes to enable to 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 advance training in either academic or vocational fields so as to enable each child to choose and pursue life work intellectually; and (vii) sufficient levels 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.

Again, if this is judicial restraint, one shudders to think what judicial license would look like. The fact is that judicial restraint would never have countenanced such a flight of sociological fancy; on the contrary, appropriate judicial inhibition would have dictated that the Court not involve itself at all in the imbroglio over educational policy.

In fact, the real problem started back in *Claremont I* with the reference to an "adequate" education. This was a complete gratuity. As we have noted before, there is no mention in Article 83, Part II of the concept of adequacy. Nor was it necessary in *Claremont I* for the Court to have created such a concept. The case came to the Court as an appeal from the trial court's dismissal of the plaintiffs' novel claim that they had been deprived of a supposed constitutional right to a State-provided education. Even if the Court had conscientiously concluded that Article 83 did create such a right, it could just as well have found that the State had satisfied its obligation by the mere maintenance of *some* system of public schools. As far as the "adequacy" of such a system was concerned, there was no need to assume that the Constitution had anything at all to say on the matter.[10]

Alternatively, even if the Court felt compelled in *Claremont I* to find that some concept of adequacy was implicit in the supposed constitutional directive that there be a system of public education, judicial restraint offered the Court any number of alternative ways to deal with the issue which would have been far less intrusive than the route which it chose in *Claremont II*. The most obvious of these was to hold that "adequacy" was essentially a matter of fact to be determined by the trial court on the basis of evidence adduced at a trial. This, of course, is precisely what the parties to the litigation had assumed was the import of the Court's ruling in *Claremont I* when it remanded the case for a trial on the merits. The problem, however, was that - after 2-1/2 more years of litigation and the expenditure of untold sums of money - Judge Manias, the trial judge, found that the plaintiffs had in fact received an "adequate" education. So what did the Court do about it in *Claremont II*? It simply *ignored* Judge Manias' findings and pretended that the trial had never taken place.

But even assuming that the Court had some valid reason to disregard Judge Manias' findings, nothing really explains why the Court reached out in *Claremont II* to pontificate upon the nature of an "adequate" education. In fact, there was no justification in *Claremont II* for the Court to say much at all about education. The reason for this is that *Claremont II* was really a *tax* case and the issue which the Court decided in that case did not depend upon any definition of educational adequacy. Consequently, the Court's foray into considerations of educational policy was completely superfluous to its decision.

Some digression is perhaps warranted at this point in our discussions to elaborate upon this issue. As discussed above, what the Court decided in *Claremont I* was that Judge Manias had been wrong in dismissing the plaintiffs' education claims because, according to the Court, "Article 83 imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding." If the Court had decided *Claremont I* the other way (as it should have), these education claims would have been out of the case. Nevertheless, the plaintiffs could still have proceeded on their completely separate tax claims, which

challenged New Hampshire's system of funding its schools under Article 5, Part II, of the Constitution. This requires that all taxes within the same taxing district be uniform. In other words, regardless of how *Claremont I* had been decided, the issues in *Claremont II* would have been the same - is the property tax system of funding schools a State tax or a local tax and, if the former, is it assessed "proportionally and reasonably?"

In fact, it is even possible that the result of *Claremont II* would have been the same. Where there is a will, there is a way, and, considering the innovating spirit of the present Court, it is not unthinkable that the Court could have found a way to declare our system of funding schools through local property taxes unconstitutional even without the help of *Claremont I* . On the other hand, if things had happened that way, the only thing that we would be left with would be a ruling that schools can't be financed with local property taxes which vary from municipality to municipality. That would definitely have caused a major brouhaha in the Legislature, but at least the path would be clear: Either fund education through some type of uniform, statewide tax, or change the Constitution. Moreover, having done no more than it traditionally did in tax cases of simply declaring the tax unconstitutional and then stepping out of the picture, the Court would not have become embroiled in an ongoing debate with its coordinate branches of government about whether or not our system of education is "adequate."

But, as we all know, things didn't happen that way; the plaintiffs' educational claims were sustained in *Claremont I* and, for better or for worse, we were all told that we had a right to a State-provided "adequate" education. This made the tax case in *Claremont II* easy. Having concluded in *Claremont I* that there was a right to a *State*-funded education, the Court had no difficulty in completing the tautology in *Claremont II* that even though property taxes are collected locally, if they are used to fund the schools, they "are in fact *State* taxes." And once the Court had decided that the taxes were State taxes, the conclusion was inescapable that "varying property taxes across the State violate part II, article 5 of the State Constitution in that such taxes, which support the purpose of public education, are unreasonable and disproportionate."

Nevertheless, if the Court had only stopped at this point in *Claremont II*, we would *still* not be in the fix that we are in now. We might have been able to treat *Claremont II* as nothing more than a tax decision and hope that at some later time, the Court might distinguish away all of its talk in *Claremont I* about educational rights. But the Court didn’t stop there. Instead, in virtual defiance of any sense of judicial restraint, the Court launched into a completely unnecessary exposition into the nature of an adequate education, concluding with its curious adoption of the jargon-laden definition of adequacy from some Kentucky case.

This behavior of the Court in *Claremont II* was totally at odds with our tradition of a temperate, unpretentious and reserved judiciary; if anything, it was the *opposite* of judicial restraint. Despite the fact that the Court attempted to sugarcoat its intrusion into the legislative process by characterizing its educational definition as a series of "guidelines" and "benchmarks," there can be no mistake about what the Court was doing. In its direction to the Legislature to "implement these guidelines" and in its retention of

jurisdiction over the case "until the end of the upcoming legislative session and further order of this Court to permit the legislature to address the issues involved in this case," the Court made clear its intention to supervise the legislative process. Consequently, although the Justices claimed to understand "that we were not appointed to establish educational policy," when they promised that they would "leave such matters, consistent with the Constitution to the two co-equal branches of government," they obviously had their fingers crossed.

Part V - Tax Equity

Indeed, even the Court's protestations of deference to the Legislature in *Claremont II* seem more sardonic than sincere. The respect which the Court purported to grant its supposedly co-equal branches of government was, at best, the respect that a superior shows to a subordinate. And if that was not sufficiently apparent in *Claremont II,* all one has to do is read the Court's sanctimonious conclusion to its decision in *Claremont IV:*

> [W]e note the commendable steps taken by the Governor and legislature in reaching their definition of a constitutionally adequate education. The legislature's involvement of a broad cross-section of the community in the process can only lead to a definition that will serve this State's school-age citizens well as they journey toward achievement in the world around them. We applaud the Governor and legislature for the work accomplished to date and in advance for that yet to be undertaken.

These remarks of the Court remind one of the comment made by Patrick Henry after listening to the claims of the Federalists about why no one should fear adopting a constitution without a bill of rights: "When we see men of such talents and learning compelled to use their utmost abilities to convince themselves that there is no danger, is it not sufficient to make us tremble?"

And tremble is precisely what one should do after reading the Court's opinion in *Claremont IV*. Just as in *Claremont I* and *Claremont II*, the Court could not content itself with simply deciding the case before it; it just *had* to add some gratuitous philosophizing. The issue presented to the Court in *Claremont IV* was the constitutionality of the Governor's ABC Plan. In particular, opponents challenged its system of abatements which would be awarded to municipalities that were able, because of a small school population or a large tax base, to raise more revenue from property taxes than they needed to provide their own children with an "adequate" education. Because the Court concluded that the abatement provision was not justified by any sufficiently articulated "good cause or just reasons," it declared that the ABC Plan conflicted with the requirement in Article 5, Part II of the Constitution that all taxes must be "proportional and reasonable."

This was all that the Court needed to say in order to answer the questions posed to it by the Senate. But the Court apparently couldn't control itself. It insisted upon sending the Governor and the Legislature a little message about what *else* it might declare

unconstitutional. The critical sentence comes at the end of the Court's mini-lecture on the importance of education and on how the whole of New Hampshire is greater than the sum of its parts: "Therefore, it is basic to our collective well-being that all citizens of the State share in the common burden of educating our children." What this presumably means is that no tax designed to fund education is constitutional unless it requires *all* citizens to contribute to the pot. In other words, *when it comes to education, only a broad-based tax is constitutionally permissible*.[11]

Those of us who live in New Hampshire know what an absolutely incredible statement this is. Regardless of how we personally feel about the merits of a broad-based tax, it is deeply ingrained in our collective psyche that New Hampshire does not have one. So here comes the Supreme Court - after having only recently broken the news to us that we have been operating our educational system in an illegal manner for the last 200 years - and now it tells us that another of our revealed truths is a hoax. And, to top it off, no one even *asked* the Court to tell us about it!

It is possible, of course, that the Court really didn't mean what it said. If one takes all of its chatter about sharing the common burden seriously, *no* exemptions from a tax to fund education would be permissible. In other words, even a statewide, single-rate property tax would be unconstitutional if it retained the existing scheme of charitable and current use exemptions, elderly and veterans' credits, and/or poverty abatements. Or perhaps the Court didn't say what it meant. Maybe its collectivist imagery was just poetic license and it was really just trying to buttress its condemnation of the specific abatement scheme proposed by the ABC Plan. After all, not even a traditional broad-based tax falls upon *everyone*. For example, an income tax doesn't affect the unemployed; a sales tax doesn't affect those who only buy necessaries; and a statewide property tax doesn’t affect those who live in public housing.

The point, of course, is that the reason we have to speculate about the Court's intentions is that its philosophizing went way beyond the case before it. One of the reasons that judicial restraint cautions against doing this is that when a court answers a question that no one has asked it, it is obviously trying to make some kind of a point, and that usually means that it is trespassing on someone else's turf. This is why the *Claremont* decisions are so much more than simply tax cases or education cases; although they are indeed tax cases and education cases, they are first and foremost separation of powers cases. We have already discussed how the Court's discovery in *Claremont I* and *II* of a right to an adequate education in Article 83, Part II of the Constitution is tantamount to a *sub silentio* reversal of two centuries of precedent involving that particular provision of the Constitution. Now, in *Claremont IV* (assuming that the Court said what it meant and meant what it said), we have a reversal of an equally longstanding precedent concerning Article 5, Part II of the Constitution. Nevertheless, as erroneous and as harmful as these decisions are, either or both of them can be changed through a constitutional amendment if the people become sufficiently aroused to do something about the situation. The Court's arrogation of powers reserved in the Constitution to the other branches of government, however, is much more of a problem; and this, therefore, is what constitutes the really long-term evil of *Claremont.*

Part VI - Accepting Responsibility

What makes the Court's power grab even more ominous is the fact that its fist is wrapped in a velvet glove. As we have observed, the *Claremont* decisions are replete with the language of decorum and judicial self-deprecation. For example, the Court says all the right things when it proclaims, as it did in *Claremont IV*, that, "It is neither our task nor intent to manage the public school systems of the State, or to suggest that the State education system cannot incorporate local elements." However, since this denial comes right after the Court has just declared one legislative tax proposal unconstitutional and suggested that it will do likewise to any other one that doesn't conform to its new-found theory of everyone sharing the common burden, don't you get just a little concerned that "the lady doth protest too much?"

The real cue that all is not as it seems comes from the following statement of the Court in *Claremont IV*: "On December 17, 1997, when *Claremont II* was issued, the court was conscious of the magnitude of the tasks and challenges it had passed to its co-equal branches of government .... It is in [the] spirit of union and amity that we retained jurisdiction in *Claremont II*." What the Court is referring to here is the fact that in *Claremont II*, after it had found our system of funding schools through local property taxes unconstitutional, it did not thereupon remand the case to the trial court for purposes of fashioning a remedy for the plaintiffs; instead, it decided to "stay all further proceedings until the end of the upcoming legislative session and further order of this court to permit the legislature to address the issues involved in this case." In essence, the Court was saying that, "Rather than us doing something bad to you right now, we will give you some breathing room to fix your problem; but, in the meantime, we will keep your file open."

This last caveat, of course, is wherein the problem lies. The fact is that the Court's retention of jurisdiction in the *Claremont* cases is no boon; on the contrary, it is *Claremont's* Trojan Horse.

However, before we get to the issue of the Court's retention of jurisdiction, we should note that its initial decision to delay the effective date of its decision is a device virtually without precedent in New Hampshire. It is true that the Court has on occasion warned the Legislature that if certain measures were not taken to alter a statutory scheme, the Court probably would, in the future, declare the scheme unconstitutional. For example, in the 1983 case of *State v. Brosseau*, the Court - acting pursuant to customary notions of judicial restraint - found a way to resolve the case before it without reaching the issue of the constitutionality of the ancient doctrine of sovereign immunity, the doctrine which prohibited a citizen from suing his own government for money damages. On the other hand, the Court served notice that "if and when we do reach [the issue], we would be disposed to reconsider the doctrine as it exists today…However," the Court went on to say, "we should be reluctant to do so until the legislature has been given an opportunity to correct the present procedural and financial inadequacies of the statutes relating to sovereign immunity." Duly forewarned, the Legislature did in fact propose certain changes to the laws on sovereign immunity, which it then presented to the Court in 1985

for an advisory opinion. As it turned out, the Court concluded that some of the Legislature' s changes would be constitutional and some would not.

On the other hand, the Court had never before *Claremont* actually held that something which it decided was unconstitutional could nevertheless continue to be enforced as "the law" until some specified date in the future when its unconstitutionality would all of a sudden become effective and render it invalid. Prior to *Claremont,* it was the rule of decision in New Hampshire - as stated by the Court itself on many occasions - that "an unconstitutional act is not a law; it binds no one and protects no one."[12] Under *Claremont II,* however, our supposedly unconstitutional system of funding education is still the law; it still binds us to pay our taxes and it still dictates how we educate our children - at least until "the end of the upcoming legislative session."

This notion of delayed unconstitutionality is indeed a fascinating concept if one accepts the proposition of Sir Francis Bacon that it is the office of a judge "to interpret the law, and not to make law, or to give law." It is one thing to understand that the Court's interpretation of the Constitution may change over time, but it is a very different kettle of fish to accept that the Court can interpret the Constitution two different ways at the same time and elect, at its whim, when to retire the old and when to effectuate the new. I don't mean to get into the epistemological debate about whether judges truly do "find" the law or whether there are some senses in which they "make" the law.[13] On the other hand, one would have expected to hear *something* about that issue from a court which not only makes a radical departure from its prior jurisprudence, but also does so in a manner which has such profound implications for the way in which we view the Constitution and the role of judges in interpreting it. Suffice it to say that if the Constitution is to be acknowledged as nothing more than what the Court says it is - and *when* the Court says it is - there should be a frank and open discussion of how the Court came to such a conclusion and what may be its effects upon our constitutional democracy. But - as is characteristic of the *Claremont* decisions - all we hear from the Court on this issue is a deafening silence.

Should we assume that the Court's failure to raise this issue has some Machiavellian origin? Thomas Jefferson would not be surprised if it did: "This member of government [the Court] was at first considered as the most harmless and helpless of all its organs. But it has proved that the power of declaring what the law is, *ad libitum*, by sapping and mining, slyly, and without alarm, the foundations of the Constitution, can do what open force would not dare to attempt." Was the Court intentionally "sapping and mining" at the foundations of our Constitution in *Claremont II* when it delayed the effective date of its decision? It is certainly possible, but frankly, I doubt it.

It is more likely that the Court, in this instance, was actually motivated by some sense of judicial restraint, albeit a misguided one. The Court's several references in *Claremont II* and *Claremont IV* to deference to the Legislature - even if condescending, and even if ultimately disingenuous - do appear to reflect a belief on the Court's part that it was doing the Legislature a favor by not then and there voiding our local property tax system of

funding education. As far as the larger jurisprudential implications of such a decision were concerned, my guess is that the Court never even saw the issue.

On the other hand, even if one adopts this benign explanation of the Court's decision to delay the effect of its ruling in *Claremont II*, one need not assume that the Court was completely naive. There was something in this for the Court as well. One thing that delaying the effective date of the decision did for the Court was to allow it to put off until tomorrow some issues which it ought to have dealt with today. Although we will discuss this topic in greater depth in another Letter, I only wish to draw your attention at this point to the fact that there is a connection between rights and remedies which the Court has severed in *Claremont*. By dispensing with the issue of remedies, the Court was able to evade a whole host of questions about the extent of its powers of judicial review. Since the Court had just declared our entire system of locally-determined and locally-funded education unconstitutional, issues of the Court's power to tax, its power to spend and its power to administer were obviously implicated. However, because the Court simply finessed the issue of remedies, the possibility that it had no power to enforce its decree never had to be addressed.

The other benefit which the Court reaped for itself by not immediately striking down what it found to be unconstitutional was that it was able to substantially lessen the social impact of its decision. The Court in *Claremont IV claimed* not to be concerned with this issue: "That all three branches of government must struggle in difficult decisions which may cause social unrest cannot be a factor in a court's constitutional review." However, the reason that the Court didn't need to be concerned about social unrest was because it had postponed the effective date of its decision. The advantage of this was to shift the public's focus of attention to the *other* branches of government, who then will be the ones who get blamed for the resulting social unrest if *they* don't fix the problem by the date set by the Court. In other words, by not taking its declaration of unconstitutionality to its logical conclusion, the Court avoided taking responsibility for its own decision.

Part VII - <u>Supervising the Legislature</u>

Even if one discounts all of the foregoing as speculation, the real proof of the fact that the Court's purported gift of a delayed decision in *Claremont* did not come without cost is found in the Court's retention of jurisdiction over the case. Recall that I said this is the Trojan Horse of *Claremont* - and it is. If delaying the effect of its decision had truly been an exercise of judicial restraint, the Court would have done only that and, in all other respects, it would have terminated the case. But by retaining jurisdiction, the Court gets to play orchestra conductor over the legislative process. While eschewing any desire to *personally* control the schools, the Court gets to peer over the Legislature's shoulder to make sure that educational policy is set according to its liking. In the meantime, the Court waits in the wings, threatening to swoop in whenever it is dissatisfied with the Legislature's progress.

The notion of a court retaining jurisdiction in a case such as this is foreign to New Hampshire. But is not unknown elsewhere in the Nation. If you want to know about it,

just ask those who experienced Judge Arthur Garrity's use of it in the Boston desegregation case or those who have lived under its regime in the many *Claremont*-like school cases around the country. Suffice it to say that it is the very antithesis of judicial restraint.

Perhaps the worst example of the harmful effects of a court retaining jurisdiction in order to supervise a legislature's remediation of an alleged unconstitutionality is the twenty-plus-years of "occupation" of the Kansas City, Missouri, school system by a single federal judge in the Kalmia Jenkins desegregation case. Finally, in 1995 - after the case had come to it three times - the US Supreme Court put the clamps on the judge's interferences with the State of Missouri's educational and tax structures, all of which had been accomplished under the questionable guise of attempting to achieve racial balance in the Kansas City schools. In his concurring opinion, Justice Clarence Thomas made special note of the role which the trial court's retention of continuing jurisdiction had played in this incredible saga:

> The District Court's remedial orders are in tension with two common-sense principles. First, the District Court retained jurisdiction over the implementation and modification of the remedial decree, instead of terminating its involvement after issuing its remedy .... This concept of continuing judicial involvement has permitted the District Courts to revise their remedies constantly in order to reach some broad, abstract, and often elusive goal. Not only does this approach deprive the parties of finality and a clear understanding of their responsibilities, but it also tends to inject the judiciary into the day-to-day management of institutions and local policies - a function that lies outside of our [constitutional] competence.

The *Claremont* case has not gotten to the stage that the *Jenkins* case did - at least not yet. However, all the warning signs are there. The Governor and the Legislature are already floating trial balloons about extensions of the Court's deadline for compliance with *Claremont II*; counsel for the plaintiffs regularly issue threats to return to the Court for relief if they are not satisfied with the Legislature's remedial measures; newspapers are writing editorials which call upon the Court to allow a phase-in of any new education funding plan; and the Court in *Claremont IV* has already sent a message to the Governor and the Legislature that Big Brother is watching what they do. All of these things are reflections of what the Court's retention of jurisdiction in the *Claremont* case will inevitably bring: interference by the Court in the business of the Legislature and interference by the Legislature in the business of the Court.

The Court's retention of jurisdiction over the *Claremont* case does indeed create an atmosphere of impending judicial interference with the political branches. For example, by congratulating the Governor and the House of Representatives in *Claremont IV* upon their efforts to date in defining an "adequate" education - by proposing the ABC Plan, which was merely a piece of legislation-in-process not yet enacted into law - the Court gave aid and comfort to one side of the public debate on educational policy, at the expense of all others. Volunteering such an opinion clearly insinuated the Court into the affairs of the Legislature. This is not healthy for the politicians. It encourages legislators

to feel that they are accountable to the Court, not to their constituents. Although some might argue that this is a good thing because the politicians can "vote their consciences," the Constitution suggests otherwise; it provides that our representatives in government shall be "accountable to the people."

Retention of jurisdiction in constitutional cases is, in my opinion, violative of the doctrine of separation of powers and, therefore, itself unconstitutional. However, even if that view overstates the situation, retention of jurisdiction in such cases is simply a bad idea. If the Court can't heed the advice of Professor Thayer that "the judiciary ... in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it," it ought to at least have the courage of its convictions and act like a Court, not a mediator. This means that if the Court concludes that a law is unconstitutional, it should strike it down, grant the plaintiffs whatever relief they are entitled to - and leave it to the Legislature and the Governor to decide what the future will bring.

In the long run, the Court's retention of jurisdiction over the *Claremont* case may not be healthy for the Justices either. The Court's retention of jurisdiction seemingly invites a dialogue between the Court and the Legislature. To the extent that this encourages people to view the Court as an institution which is amenable to negotiation and compromise, it will only serve to further politicize the Court. While this will not have any adverse effect upon those cynics who already hold that law is nothing more than politics, it will eventually damage the Court's credibility with the vast majority of us who still cling to belief that we are governed by law, not men.[14]

Part VII - Opening Pandora's Box

As we discussed above, it is the job of the courts to resolve disputes, not to create them or to invite them. For our last example of the Court's complete lack of self-discipline in this area in *Claremont*, we turn to a little-noticed portion of the decision in *Claremont II* which may end up being the most consequential of all of the Court's reckless remarks in this case. You may recall that the Court held in *Claremont I* that even though the educational rights which it divined in Article 83 were "rights held by the public," they are enforceable by "any citizen." Referring in *Claremont II* now to these private citizens as the "beneficiaries" of Article 83, the Court then embarked upon one of its typically gratuitous discussions, on this occasion involving what these private enforcers of the public's rights could expect when they brought their claims. In this regard, the Court ruled in *Claremont II* that it would "accord *fundamental right* status" to any claim based upon a denial of one's right to an adequate education.

Although the significance of this holding may not be readily apparent to all readers, it is potentially the most dangerous precedent coming out of the *Claremont* cases. In the jargon of the Judiciary, designating a right as "fundamental" means that it is entitled to review under a standard of "strict judicial scrutiny." Strict scrutiny, in turn, is a term of art which refers to the highest level of judicial oversight which the Court exercises in its review of a governmental action which is challenged on constitutional grounds. In the

metaphysical world of judicial review, the Court has developed three levels of oversight: (1) the rational basis test; (2) the so-called "middle-tier" test; and (3) the strict scrutiny test. The rational basis standard, as its name implies, simply requires that a law must be "rationally related to a legitimate state interest." The middle-tier test - which applies to "important" rights - requires that a law must be rational *and* "have a fair and substantial relation to the object of the legislation." Finally, the strict scrutiny test - which applies to "fundamental" rights - requires that a law be rational, that it be reasonably related to its objective, *and* that it be "necessary to achieve a compelling State interest."

In *Claremont I*, the Court had specifically noted that "in New Hampshire a free public education is at the very least an *important* substantive right." This, as is noted above, is Court-speak for imposing the so-called middle tier level of judicial review. In *Claremont II*, however, we are informed - completely out of the blue - that since Article 83, Part II of the Constitution supposedly charges the Legislature with the duty to provide everyone with a public education, "this fact alone" grants "fundamental status" to the so-called right to an adequate education. We are, of course, not informed of what it is that has caused this elevation in the jurisprudential stature of educational rights between *Claremont I* and *Claremont II*. Unless there is something that the Court is not telling us, it would appear that the only thing which has changed in the interim is the Court's view of its own power.

Another fascinating aspect of the Court's designation in *Claremont II* of the right to an adequate education as "fundamental" is the total absence of any discussion of the basis upon which the Court decides which rights are to be favored for inclusion in this select category and which are not. Examples of rights which have warranted the Court's denomination as fundamental prior to *Claremont* include such things as the right to live where one chooses, the right to just compensation for a taking of one's private property, and the right not to have one's children taken away without just cause. What the right to an adequate education has in common with these other "fundamental" rights is not revealed to us in *Claremont II*. Accordingly, because there does not appear to be *any* principled basis for distinguishing one right from another, one can only assume that the Court’s decision to upgrade the status of educational rights was based upon pure judicial whim.

This conclusion is substantiated by the fact there was nothing in *Claremont II* which required the Court to even raise this issue. As we noted above, *Claremont II* decided that property taxes which were used to fund education are State taxes and, as such, they must be levied uniformly throughout the State. There was no issue in *Claremont II* concerning the proper scope of the Court's review in cases in which citizens claim a deprivation of their so-called right to an adequate education. As in so many other instances in *Claremont*, therefore, the Court's decision to re-categorize educational rights from “important right” status to “fundamental right” status, and to announce that it would henceforth determine all such cases under the standard of strict scrutiny was entirely gratuitous.

If you want proof of the incalculable harm that adoption of the strict scrutiny standard can wreak upon the balance of power between the Court and the Legislature over matters involving educational policy and funding, just read the U.S. Supreme court's 1973 decision in the case of *San Antonio School District v. Rodriguez*. In the course of rejecting the proposition that there is a right to education under the Federal Constitution and that such a right is "fundamental," the Court noted that if it were to espouse and apply a strict scrutiny standard of review, "the Texas financing system and its counterpart in virtually every other State will not pass muster." The Court in *Rodriguez* described the application of the strict scrutiny test to an educational law as follows: "[A] State must demonstrate that its educational system has been constructed with 'precision,' and is 'tailored' narrowly to serve legitimate objectives, and that it has selected the 'least drastic means' for effecting its objectives ..." Since this is the standard which our Court has announced it will apply to the State's response to its *Claremont* decisions (and to the implementation of that response in every local school district), it doesn't take a seer with a crystal ball to predict the torrent of litigation that this will unleash.

It is as if the Court had announced: "the floodgates are now open; let the litigation begin." The Court has in fact issued an invitation to every disgruntled parent to sue not only the State, but also the local school district, the school board, the superintendent of schools and the principal of his child's school. Do you think that I am exaggerating? If so, witness the Court's own words in *Claremont II*: "[W]hen *an individual school or school district* offers something less than educational adequacy, the governmental action or lack of action that is the root cause of the disparity will be examined by a standard of *strict judicial scrutiny*." This unprincipled and gratuitous expansion of the scope of judicial review for the benefit of those who wish to second-guess our public officials with respect to educational policy is truly shocking.

The result of *Claremont II* is that we have the worst of all worlds. First, we are saddled with the fact that any private citizen - without your or my consent - can sue the State to enforce what he construes to be the Legislature's public duties with respect to education. Secondly, we can expect that this will include suits not only against the State, but also against every local school district and official. Finally, the decisions of these duly elected local school officials will be reviewed by unelected judges who have been instructed by the Supreme Court to apply a standard of strict scrutiny. I suggest that we get ready to change the State's motto. How about: "Live Free or Litigate!"

Part IX - <u>Conclusion</u>

In his concurring opinion in the most recent US Supreme Court decision in the *Jenkins* case, Justice Thomas commented upon the institutional consequences of the wanton judicial intrusion into matters of educational policy which occurred in that case:

> In this case, not only did the district court exercise the legislative power to tax, it also engaged in budgeting, staffing, and educational decisions, in judgments about the location and aesthetic quality of the schools, and in administrative oversight and monitoring. These functions involve a legislative or executive, rather than a

> judicial, power.... [J]udges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught. When ... judges undertake such local, day-to-day tasks, they detract from the independence and dignity of the federal courts and intrude into areas in which they have little expertise.

The primary reason that *Claremont* represents such a palpable likelihood that we are headed in the same direction as Missouri and the other states which have been subject to school desegregation orders and educational orders is that our Court, like so many others, *chooses* to get involved in issues that it shouldn't. Rousseau wrote in *The Social Contract* that "Liberty is obedience to the law which one has laid down for oneself." Judicial restraint requires just such a conscious imposition of self-discipline. Our Court, however, has elected not to place any limits upon its appetite for power.

The Justices of our Supreme Court apparently believe that they are endowed with a wisdom denied to Legislators and other ordinary mortals. They have concluded that New Hampshire's system of education is in need of "reform," and that it is their destiny to blaze a trail to the new millennium which, as they put it in *Claremont IV*, "will serve this State's school-age citizens well as they journey toward achievement in the world around them." Unfortunately, such inflated egos are not likely pay heed to the admonitions of Justice Ingersol, who said in a speech he gave in 1883, "We must remember that we have to make judges out of men, and that by being made judges, their prejudices are not diminished and their intelligence is not increased."

As Judge Robert Bork wrote in his recent polemic on law and culture, *Slouching Towards Gomorrah*, "It is now clear that it is the courts that threaten our liberty - the liberty to govern ourselves - more profoundly than does any legislature." According to Judge Bork, our courts are out of control - either by themselves or by us:

> We are no longer free to make our own fundamental moral and cultural decisions because the Court oversees all such matters, when and as it chooses. The crisis of legitimacy occurs because the political nation has no way of responding. The Founders built into our government a system of checks and balances, carefully giving to the national legislature and the executive powers to check each other so as to avoid either executive or legislative tyranny. The Founders had no idea that a Court armed with a written Constitution and the power of judicial review could become not only the supreme legislature of the land but a legislature beyond the reach of the ballot box.

Judge Bork, of course, was referring in this passage to the Supreme Court of the United States. However, his comments are just as applicable to our Court and, in particular, to its *Claremont* decisions. Our challenge, therefore, is the same one which he posed in his book: Will it be enough to do something about the Court's decisions, or must we also do something about the Court?

Rasputin

ENDNOTES

[1] Companion principles also exist which instruct lawyers to take only those cases which need taking. These are the doctrines of champerty and maintenance, which make it professionally unethical for attorneys to solicit lawsuits or to otherwise foment litigation. Likewise, there are even devices in the law which are designed to ensure that citizens bring only those claims which need bringing. In this category are such things as the civil actions for malicious prosecution and abuse of process. Although the viability of these principles may seem to be in jeopardy in our increasingly litigious society, they are all reflective of a tradition which still purports to value the resolution of disputes over their perpetuation.

[2] This principle was well-known to the Framers of the Federal Constitution (being cited, for example, on several occasions in *The Federalist*) and to the Framers of our New Hampshire Constitution. In fact, it is even incorporated into our Constitution, although not in those very words. See Article 35, Part I and Arts. 79 and 81, Part II, N.H. Constitution. Moreover, as reflected in the comments of the Court in the 1908 case of *Rollins v. Connor*, it is indubitably a part of our common law: "It is equally plain that a man cannot sit in judgment to decide upon the validity of a claim against himself, or in a proceeding in which he is the defendant."

[3] In this regard, note that the members of our Legislature and the Governor are required to take an oath of office to support both the Constitution of the United States and the Constitution of the State of New Hampshire. Article 8, Part II, N.H. Constitution.

[4] Justice Scalia's comment comes from his dissent in the l996 case of *Romer v. Evans*. In that case, the Court struck down an amendment to the State of Colorado's constitution which purported to prevent homosexual persons from obtaining a preferential legal status. In Justice Scalia's opinion, "[T]his Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality is evil." The Court's increasing willingness to take positions in the great moral debates of the day has, in turn, made it ever more vulnerable to this type of criticism leveled by Justice Scalia. As a result, the Court has found it necessary to take the unusual step of publicly defending itself against its critics. For example, in one of the Court's most articulate and candid discussions of its own role, Justices O'Connor, Kennedy and Souter confronted the credibility issue head-on in their masterful defense of the Court's abortion decisions in the l992 case of *Planned Parenthood v. Casey*. However, despite their eloquent plea for an end to the national debate on abortion, their decision only served to set off a firestorm of controversy over the Court's legitimacy. In particular, it provoked that celebrated symposium on judicial review entitled *The End of Democracy* sponsored by the editors of the highly respected journal of religion and public policy, *First Things*. In the symposium's lead article, the editors even concluded their remarks with a thinly-veiled call for civil disobedience:

> What is happening now is the displacement of a constitutional order by a regime that does not have, will not obtain, and cannot command the respect of the people. If enough people do not care or do not know, that can be construed as a kind of negative consent, but it is not what the American people were taught to call government by the consent of the governed. We hope that more people know and more people care than is commonly supposed, and that it is not too late for effective recourse to whatever remedies may be available.

[5] Those who, in the wake of *Claremont*, have suggested that local control of schools in New Hampshire is more myth than reality probably haven't attended a contentious school board meeting where the topic of discussion is either sex education, what books should be in the school library, or even pupil-teacher ratios. Likewise, they apparently have not witnessed voters at an annual school district meeting debate, amend, and sometimes defeat a resolution to raise teacher salaries or to build a new school. Indeed, if there is a myth afoot here, it is that the disparities in educational expenditures which exist among New Hampshire's local school districts are solely the function of differences in property values and, thus, the municipalities' varying abilities to raise taxes. This is obviously false because if all educational policies were already dictated at the State level, the per-pupil expenditures of all school districts would have to be approximately equal. But they are not equal and one of the reasons that they are not is because school and other municipal priorities are in fact set at the local level, not in Concord. In other words, it is local control which allows the residents of one town to build a new school, the voters of another town to build a new fire station and the voters of a third town to build neither in order to keep their tax rates down. On the other hand, even if Federal and State mandates such as handicapped education laws and minimum education standards, respectively, have in fact substantially diminished the reality of local control, the myth is still worth retaining. As Thurmond Arnold, a central figure in the legal realist movement, wrote in 1960, "Unattainable ideals have far more influence in molding human institutions toward what we want them to be than any practical plan for the distribution of goods and services by executive fiat."

[6] Interestingly enough, the Court in that case specifically used the example of hiring teachers as something which the Legislature, pursuant to its authority under Article 83, Part II of the Constitution, could take away from local school districts if it so chose. On the other hand, there was not even the hint of a suggestion - ala *Claremont* - that the State should assume such a responsibility.

[7] One can see reflections of this in the push for smaller schools, smaller class sizes, seminar courses versus lectures, and even home-schooling.

[8] If anything, the public's tolerance of experimentation in education is considerably more robust today than it was in 1974 when the *Rodriguez* case was decided. Open enrollment, charter schools, voucher systems, and numerous other novel ideas are being tried out all over our country. Whether one considers any or all of these schemes meritorious or deleterious is not the point. The point is that the US Supreme Court's willingness to keep its hands off education and to leave it to the individual states is precisely what has permitted the current spirit of innovation to flourish.

[9] When I started writing these *Letters to the Educators*, there was only a *Claremont I* and a *Claremont II*. On May 8, 1998, the Court issued *Claremont III*, which held that Justice Batchelder's participation in *Claremont II* in place of the recused Justice Thayer did not

vitiate that decision despite the fact that Justice Batchelder was over 70 years of age. Then, on June 23, 1998, the Court issued *Claremont IV*, an advisory opinion to the Senate, which declared that the Governor's proposal for a legislative solution to the problems created by *Claremont I* and *II*, her so-called ABC Plan, is unconstitutional. Before this saga comes to an end, there will undoubtedly be more *Claremont* decisions. But if *Claremont IV* is a harbinger of what is to come, I just want to warn you that, as in other forms of theater, the sequel is never as good as the original.

[10] Even if it were assumed that there must be at least a minimalist test of constitutional adequacy, the Court should have had no difficulty whatsoever in determining whether or not the obligation had been satisfied. If the measure of the State's obligation under Article 83 were simply whether or not we have a system of public schools in this State which is capable of providing some education to every child who wanted one, the Court's task would probably parallel the comment which US Justice Potter Stewart once made about obscenity: "I may not know how to define it, but I know it when I see it."

[11] Any tax other than a broad-based tax, by definition, fails to access all citizens with some "share in the common burden." For example, a cigarette tax only falls upon those who buy cigarettes; a hunting license fee only falls upon those who hunt; a room and meals tax only falls upon those who eat out or stay in a motel.

[12] Because there has never been a case like *Claremont*, the Court has had no occasion to discuss whether an unconstitutional law can have any continued prospective validity. On the other hand, the retrospective validity of a law which has been declared unconstitutional is an issue upon which the Court has opined in the past. Although there have been exceptions - most notably in the area of sovereign immunity - the Court has generally ruled that a decision on constitutionality applies not only to future situations, but also to situations which arose prior to its effective date. In other words, prior to *Claremont*, if a law was found to be unconstitutional, it was completely null and void - yesterday, today and tomorrow.

[13] Personally, I prefer to side with those, like Professor Henry Hart, who believed that "reason is the life of the law;" not those, like Oliver Wendell Holmes, who claimed that, "the life of the law is not reason, but experience." I happen to believe that there are neutral principles of law which can be discerned by and agreed upon by judges of differing persuasions, backgrounds and temperaments, and that law is not all politics or simply what the judge had for breakfast that day. On the other hand, even if my belief in a government of laws, not men, is only a myth, I go along with Thurmond Arnold who said that, without a continuing pursuit "of the shining ideal of law above men, evolved solely from Reason, we would not have a civilized government. If that ideal be an illusion, to dispel it would cause men to lose themselves in an even greater illusion, the illusion that personal power can be benevolently exercised."

[14] Unfortunately, it is cases like *Claremont* which give credence to the increasingly skeptical body of scholarship called critical legal theory. Typical of the school are the comments of author David Kairys in the introduction to his book *The Politics Of Law:*

> A realistic, understandable approach to the law that explains its operation and social role must acknowledge the fundamental conflicts in society; the class, race, and sex basis of these conflicts; and the dominance of an ideology that is not natural, scientifically determined, or objective. The discretionary nature of court decisions, the importance of social and political judgments, and the dominance of the ideology of advanced capitalism characterize our judicial process far better than any notions of justice, objectivity, expertise, or science.
>
> Ours is a government by people, not law. Those robed people sitting behind orate oversized desks are not controlled or bound by law; regardless of their honest self-appraisals or their pretensions, they are in the business of politics.

"Rasputin:"
Letters to the Educators, No. 14

If There Is No Remedy, Is There Any Right?

Part I - Introduction

The essential question that we have tried to answer in our previous Letters can be summarized as follows: in our tripartite system of government, what issues are properly resolvable by the courts and what issues are best left to determination by our political institutions - and into which category does the issue of education fit? Up to this point, our answers have mostly been consumed with discussions of rights and duties. What is a duty? When is a duty mandatory? Whose duty is it to cherish education? Do all duties create rights? Do all rights create entitle-ments? Is there a right to an adequate education? How can one know adequacy when one sees it? If there are educational rights, whose rights are they?

Perhaps, however, there is another way of looking at this problem. In one of our early Letters, we noted that one of the links in the Supreme Court's chain of reasoning in its *Claremont* decisions was the notion that where there is a right, there must also be a remedy. Assuming this is true, is the inverse of the proposition also true? In other words, where there is no remedy, is there also no right?

In American constitutional jurisprudence, the all-rights-imply-remedies principle dates back to the famous decision of U.S. Supreme Court Chief Justice John Marshall in the 1803 case of *Marbury v. Madison*, which we discussed in one of our earlier Letters. The case is best known for Justice Marshall's assertion of the Court's power of judicial review; that is, the judiciary's power to review the constitutionality of the acts of the political branches. As applied to the facts of the case, the Court ruled that incoming President Jefferson had acted without constitutional authority in withholding from the plaintiff, Mr. Marbury, his appointment as a justice of the peace, the commission which had been signed, but not delivered, by lame duck President John Adams.

Having concluded that Mr. Marbury had been deprived of his right to his commission, Justice Marshall phrased the next issue confronting the Court as follows: "If he has a right, and that right has been violated, do the laws of this country afford him a remedy?" Although less well-known than his declaration of the doctrine of judicial review, Marshall's answer to his rhetorical question about remedies was equally as powerful an affirmation of the Judiciary's authority:

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

Take note that when Justice Marshall spoke of rights, he referred to "legal rights". Similarly, when he said that there must be a remedy for legal rights, he referred to a remedy furnished by "the *laws*." The true statement of Justice Marshall's principle, therefore, is that where there is a legal right, there must be a *legal* remedy.

This refinement of the principle is especially significant for the issues of institutional power and competence with which we have been dealing, because the agency whose function it is to deal with legal rights and remedies is obviously the *Court*. One way, therefore, to further clarify Justice Marshall's principle is to say that where there is a judicially-determined right, there must be a judicially-enforceable remedy.[98] This, in turn, brings us to the final statement of our inverse principle: where there is no judicial remedy, there is no justiciable right.

Our first question, then, is whether either version of this rights-remedies principle, the positive version or the negative version, has any currency in our New Hampshire jurisprudence. At least as far as the positive version is concerned, the answer to the question is clearly in the affirmative. For example, in the interpretation of statutes, the Court has frequently said such things as "the existence of a statutory right implies the existence of all necessary and appropriate remedies." Likewise, the Court has on occasion recited as a general proposition of law the maxim of the English courts of equity that "equity will not suffer a wrong without a remedy." And, finally, as Chief Justice Doe put it most expansively in the 1890 case of *Attorney-General v. Taggart*, "as our common law furnishes all writs necessary for the furtherance of justice and the due administration of the laws, there can be no legal right without a remedy."

In fact, the concept that the existence of legal rights implies the existence of legal remedies is expressly memorialized in our Constitution. In this regard, Article 14, Part I, reads as if it came right out of *Marbury v. Madison:*

> Every subject in this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.[99]

Although not similarly incorporated into its own provision of the Constitution, the negative version of the rights-remedies proposition is just as much a part of our jurisprudence as is the positive version. As is exemplified by the doctrine of sovereign immunity (which we shall discuss shortly), because there is no available judicial remedy in a case brought against the State where the State has not consented to be sued, the parties to such a suit are generally not permitted to litigate whether or not anyone's rights are at issue or whether or not they were violated. Indeed, it is frequently the case in the law that the appropriateness of, and/or the availability of, a remedy dictates whether or not the Court will recognize a right.

Perhaps this is because the law does not favor exercises in futility which, if nothing else, waste precious judicial resources. However, a more basic reason that remediless cases are

usually dismissed by courts without any decision on the merits is that they don't *need* to be decided. If a judge cannot grant a claimant any relief, his involvement in the dispute is voluntary and inconsistent with his role as an impartial umpire. Accordingly, as we discussed in our last Letter, if the case is remediless, the doctrine of judicial restraint counsels the court to preserve its neutrality and abstain from deciding the case.

A judge who fails to heed such advice not only becomes a partisan, but he also becomes a toothless partisan. If a judge cannot grant a remedy, his decision is nothing *more* than an expression of his opinion. Moreover, if a judge's decision were nothing more than an expression of his opinion, it is presumably no better than anyone else's opinion. And, finally, if a judge's opinion is like everyone else's opinion, it can be followed - but it can also be ignored. In the long run, therefore, allowing judges to declare which party to a dispute is right and which one is wrong, without affording any remedy to the party in the right, raises doubts about the very legitimacy of the judiciary and, ultimately, jeopardizes its ability to enforce its decrees. Again, therefore, judicial restraint suggests that where there is no available remedy, a court should not concern itself with whether or not there is a right.

Part II - Advisory Opinions

On the other hand, the question of whether or not a court should express its opinion in a case in which it cannot grant a remedy is not simply a matter of judicial restraint; it is also a matter of constitutional authority. Because they liberate courts from the consequences of their decisions, remediless cases are abstract cases. Accordingly, they tend to produce academic dissertations on social theory, which often result in utopian solutions to intractable real-world problems. But a court is not a forum for philosophical disputations. It is not a court's function to decide how many angels can stand on the head of a pin. A court's job is to decide real cases; involving real people; with real problems; who want real solutions.

When a court ventures its opinion outside the context of a concrete case or controversy, it is no longer exercising the "judicial power.". Instead, it is engaging in the practice of issuing an "advisory opinion," something which is generally forbidden to courts in New Hampshire (and elsewhere). For example, a court may not render an opinion in a hypothetical case. The hypothetical case is a "what if" case. The "what if" could take the form of make-believe parties positing real facts,[100] or real parties positing make-believe facts.[101] In either instance, the issues raised in a hypothetical case lack the urgency and definition of a genuine case or controversy.

The reason that the hypothetical case is not justiciable is that the parties to such a case are not asking for a *decision*; they are simply seeking *advice*. The 1965 case of *State v. Harvey* is a perfect example of just such a case. The defendant, an anti-war activist, had been charged with violation of an ordinance prohibiting the distribution of handbills. The charges, however, were *nol prossed* by the county attorney who decided that the ordinance would be unconstitutional if applied to the defendant, whose handbills

contained anti-war messages. Not satisfied with this result, the defendant appealed to the Supreme Court for a *judicial* declaration of the ordinance's unconstitutionality, which would be binding upon all other prosecutors who might try to enforce it in identical or similar situations. The Court held that since "the State now makes no claim of any rights adverse to those asserted by the defendant," there was nothing for the Court to decide and it dismissed the case without ruling upon the defendant's claims. In short, the issues posed by the defendant were purely hypothetical and, therefore, if the Court were to decide the case, it would be issuing an advisory opinion.

Remediless cases are very much like hypothetical cases. Since, by definition, the court in a remediless case cannot *order* anyone to do anything, its decision is the functional equivalent of a suggestion that the parties do something. This, of course, is just another way of saying that an opinion in a remediless case is indeed an advisory opinion.

Our Supreme Court has on numerous occasions held that it has no constitutional authority to decide remediless cases. To begin with, such cases often raise due process concerns because the level of abstraction that is inherent in a remediless case often implicates the interests of persons who are not parties to the litigation. This problem is reflected in the Court's refusal to rule upon a request by one party for an adjudication of his legal rights vis-a-vis some other party who has not been notified of the case and who has not been given an opportunity to respond to the claims. For example, in the 1952 case of *Petition of Turner*, the Court declined to answer questions submitted to it by the State Tax Commission regarding its power to grant a taxpayer's request that the Commission make a certain redistribution of tax revenues from the City of Keene to the Town of Sullivan. The reason for the Court's refusal to act was that the City of Keene had not been joined as a party and, therefore, regardless of the Court's answer to the Commission's questions, the Commission could grant no remedy to the taxpayer which could bind the City. As the Court said, "Since it appears to us that any determination of the question transferred ... would be advisory only, we must respectfully decline to make it."

Remediless cases also tend to involve disputes which may never materialize. Even where all of the potentially interested parties have been notified of a claim, the Court has generally insisted that the case be "ripe" for determination. In this regard, the Court usually requires that some type of injury has been suffered before it will assume jurisdiction over the case. For example, in the 1904 case of *Harvey v. Harvey*, the Court ruled that it had no power to determine the rights of litigants absent a claim by one party against the other that a wrong had been committed; it was insufficient that a wrong had been threatened, but not accomplished.

It is true that the Court has since backed off from this hard line on the ripeness issue. This was due to the Legislature's passage in 1929 of the so-called declaratory judgment act - which allows parties to sue for a declaration of their rights or title when some other party is merely "claiming adversely to such right or title." In the 1931 case of *Faulkner v. Keene*, the Court upheld the statute's constitutionality and agreed to accept jurisdiction over actions in which injuries had not yet occurred, but in which they were threatened or were otherwise likely to occur. Nevertheless, implicit in the Court's acceptance of the

jurisdiction to issue declaratory judgments was the notion that the only thing affected by the statute was timing. As the Court stated in the *Faulkner* decision, "What [the Constitution] does forbid is a failure to give all interested parties notice and an opportunity to be heard before any decree affecting their rights is made. Beyond this there is no constitutional limitation upon the stage of the controversy at which the courts may be appealed to by the contending parties." In other words, although the statute allowed one party to bring suit against another before the other had caused the plaintiff any injury, the case would still have to be one in which the Court *could have* awarded a remedy to the plaintiff if he had waited until he actually was injured.[102]

Thus, the declaratory judgment has become a regular part of our legal landscape. Indeed, the law of New Hampshire provides numerous examples of cases in which legal rights can be fixed by the courts in advance of a wrong being committed. For example, a party who claims an interest in land may bring a petition to quiet his title to the premises. A trustee of a trust may bring an action wherein the trustee requests instructions from the court as to how the terms of the trust should be construed. A liability insurer may bring an action for purposes of having a court decide whether or not the terms of the insurance policy require the insurer to defend the insured in some pending legal action. In each of these situations, the reason for allowing the court to grant a declaratory judgment is to prevent the violation of some party's legal rights which might otherwise occur, thereby obviating the necessity for the Court ever having to issue a remedy for the violation. *In none of the cases, however, is there any question as to the court's power to grant a remedy to the injured party if the parties were to wait until a violation of rights actually occurred*.[103]

On the other hand, when the Court has been presented with a case in which it possessed no power to provide a successful litigant with a remedy, it has generally held that issuing a declaratory judgment would constitute the rendering of a prohibited advisory opinion. For example, in the 1969 case of *Piper v. Meredith*, a resident of the Town of Meredith attempted to have the Court enjoin the town from conducting a special town meeting to pass an ordinance setting limits on the height of buildings. The plaintiff claimed that such an ordinance would be invalid under State law. Although the trial court had denied the injunction, it had also volunteered its opinion that, if the contemplated ordinance were passed, it would be invalid. On appeal, the Supreme Court held that the trial court "properly denied the injunction as it had no power to interfere with proposed legislative action." More importantly, the Court went on to hold that since "the Superior Court has no jurisdiction to give advisory opinions... the additional statement of opinion on the proposed action of the town meeting was beyond its jurisdiction." In other words, where it could not have provided a remedy, the trial court should not have gotten involved with determining whether there was a right.[104]

Although the above quotes from the *Piper* case are illustrative of our “no remedy, no-rights” principle, they also alert us to a wrinkle in the prohibition upon advisory opinions. Note that the Supreme Court stated that the Superior Court had "no" jurisdiction to issue advisory opinions. When it comes to the Supreme Court itself, however, you will generally find that the Court expresses itself a little differently. For example, it is typical

for the Supreme Court to say that "advisory opinions cannot be given by this court on the petition of *private individuals*." The reason for the difference is that the Supreme Court does in fact have authority under the Constitution to issue advisory opinions in one very distinct and limited category of cases. In this regard, Article 74, Part II of the Constitution provides as follows:

> Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.

In other words, in contrast to the general constitutional *prohibition* upon advisory opinions, Article 74 specifically *requires* the Court to render advisory opinions when so requested by a select group of public officials: the House of Representatives, the Senate, the Governor and the Council.[105]

Fully aware of the inconsistency between the prescriptions of Article 74 and the general prohibition upon courts issuing advisory opinions, the Supreme Court has generally exercised a fair degree of judicial restraint in interpreting its own powers and responsibilities under Article 74. As the Court observed in the 1984 case of *Petition of Public Service Co. of N.H.*, "Because such advisory opinions do not arise out of an adversary relationship between contending parties, we have strictly construed even the power to issue them and from time to time have denied advice to our coordinate branches of government." To begin with, the Court has limited its advisory role to responding to only those requests which involve a proposed action by a party entitled to request its opinion. The reasons for this are twofold. First, the rationale for Article 74 is that, prior to taking any contemplated action, the executive and/or the legislative branches of government ought to have access to authoritative legal counsel so that missteps may be avoided. On the other hand, if they have already taken action, the water is over the dam and any advice which the Court might offer concerning their past actions would serve no useful purpose. Secondly, accomplished acts by the political branches - such as the passage of a statute by the Legislature - create vested rights in private parties. Accordingly, if the Court were to respond to a request by the executive or the legislative branch for its opinion as to some past act which has already acquired the force of law, the rights and liabilities of unrepresented third parties would inevitably be affected. As the Court stated in a 1976 *Opinion of the Justices*, "It has been the long-established law of this State that the constitutional provision for advisory opinions ... does not permit the Supreme Court to advise the Legislature as to the meaning of existing statutes. Similar considerations prevent the Supreme Court from rendering advisory opinions on the constitutionality of existing laws as distinct from the constitutionality of proposed legislation."[106]

As reflected in the foregoing quotation, even as to proposed legislation, the Court has limited itself to offering advice only as to the constitutionality of the proposal. In deference to the principle of separation of powers, the Court does not opine upon matters of policy or expediency. As the Court has so often said, "the wisdom of particular ... measures is for the legislature and not the courts to determine." Moreover, even if the

question to the Court concerns a matter of constitutionality and even if it relates to an act which has yet to occur, similar separation of powers considerations have caused the Court to refrain from answering a question posed by a branch of government which is not the one contemplating the action. For example, in an 1875 *Opinion of the Justices*, the Court did not answer a question presented to it by the House of Representatives involving an action of the Governor and Council. As the Court put it, "[T]o offer the opinion of the court unasked, would obviously be an interference with the duties of the executive entirely unwarranted by the constitution." The Court's reluctance to issue advisory opinions except in situations where Article 74, Part II of the Constitution clearly requires it is the common theme running through all of these cases. Indeed, the Court is well aware of the fact that its Article 74 responsibility to issue advisory opinions does not constitute an exercise of the "judicial power." In this regard, the Court has frequently stated that "In giving such opinions, the justices do not act as a court, but as the constitutional advisers of the body requiring their opinion." Indeed, as a consequence of this characteristic of an Article 74 advisory opinion, it is not binding upon either the government agencies which requested it or upon the Court itself. As the Court has noted, because an advisory opinion is "in no sense an adjudication of the question," the Court is free to change its mind when and if it confronts the issue in a genuine case or controversy.[107]

The Court's squeamishness with respect to accepting the role of a constitutional advisor, as opposed to an adjudicator of cases, is well-founded. Although New Hampshire is not alone among the states in granting its Supreme Court a limited power to issue advisory opinions in response to requests therefor from the executive and/or legislative branches, this is clearly not the scheme at the federal level. Proposals to grant the US Supreme Court just such a power were made in the Philadelphia Convention, but they were rejected by the delegates and thus never made it into the Federal Constitution.[108] There was good reason for the architects of the new national union, on the one hand, to have rejected advisory opinions completely and for our own Court, on the other hand, to have construed its granted powers quite narrowly. For one thing, rendering an advisory opinion with respect to a piece of legislation which may or may not ever get passed is a classic case of answering a hypothetical question. As Felix Frankfurter wrote several years before he assumed his position on the US Supreme Court:

> Legislation is largely empirical, based on probabilities, on hopes and fears and not on demonstration.... To submit legislative proposals rather than the deliberate enactments of the legislature to judicial judgment is to submit legislative doubts instead of legislative convictions. The whole focus of the judicial vision thereby becomes altered.... Experience has shown that ... advisory opinions are bound to move in an unreal atmosphere. In the attitude of court and counsel, in the availability of facts which underlie litigation, there is a wide gulf between opinions in advance of legislation or executive action, and decisions in litigation after such proposals are embodied into law or carried into execution.

It is this same "unreal atmosphere" which militates against a court deciding a remediless case. Although a remediless case does not necessarily involve proposed legislation and,

therefore, it does exist within a specific factual milieu, it is nevertheless like an advisory opinion in its quality of abstraction. Accordingly, like the request for an advisory opinion, it is likely to generate a decision which reads more like a tract in philosophy than a judicial opinion. As Justice Frankfurter stated in the same article quoted from above, "Every tendency to deal with constitutional questions abstractly, to formulate them in terms of barren legal questions, leads to dialectics, to sterile conclusions unrelated to actualities." This is why *Claremont II*, a remediless case, reads so much like *Claremont IV*, a true Article 74 advisory opinion.

The other thing that a remediless case like *Claremont* has in common with an Article 74 advisory opinion is its lack of finality. In the case of the remediless case, there is no finality because the Court issues no order to the parties and, thus, they can decide for themselves whether or not to change their behavior. Similarly, when the Court issues an advisory opinion concerning the constitutionality of proposed legislation, the Legislature can still elect whether to pass the bill as is or to modify it. More importantly, even if the Court assumes that the parties in both cases are more likely than not to comply with its edicts, the Court knows that its pronouncements will not have any material adverse consequences. In the remediless case, this is because the defendant is not charged with any penalty for his violation of the plaintiff's rights and in the advisory opinion case, it is because it involves something which is not yet a law and, therefore, no one has even *acquired* any rights which can be taken away.

Because the Court's decisions in these types of cases do not result in the same kinds of consequences which attend their decisions in genuine cases and controversies, the Court is tempted to cross over the line between determining the legality or illegality of the matters under consideration and expressing its opinion upon their wisdom and expediency. Accordingly, both the remediless case and the advisory opinion compound the problems of abstraction with considerations of separation of powers. Again, the admonitions of Justice Frankfurter are instructive:

> [On the one hand,] advisory opinions involve the judges too intimately in the process of policy and thereby weaken confidence in the disinterestedness of their judicatory functions. On the other hand, advisory opinions weaken legislative and popular responsibility. It is not merely the right of the legislature to legislate and of the executive to act; it is their duty. Legislatures and executives may inform themselves as best they can; but the burden of decision ought not to be shifted to the tribunal whose task is the most delicate in our whole scheme of government, involving as it does the power to set limits to legislative and executive action within those vague bounds which are undefined and *a priori* indefinable.

The point is that the existence of our Court's limited authority to issue advisory opinions in the situations called for by Article 74 is *not* an argument for ceding the Court authority to decide a remediless case. On the contrary, the fact that Article 74 is so distinctly an exception to the normal rule is ample reason for the court to hold its ambitions in check whenever it is presented with an invitation to become involved in a case in which it can do nothing but give the parties the benefit of its advice. This, of course, is precisely the

essence of the remediless case and, therefore, if one is brought before the Court, it should be rejected as being beyond its jurisdiction to decide.[109]

In fact, an examination of several cases in which the Court has declined to issue an advisory opinion even when brought by a party entitled to submit a request under Article 74 reveals that the remediless case is always beyond its jurisdiction. Just as was the case with respect to our earlier discussion of the Court's power to issue declaratory judgments, it has been an implicit but unstated assumption of our discussion of the Court's responsibility to issue advisory opinions in Article 74 cases that if the same issue arose in the context of a genuine case or controversy, the Court *could* grant a remedy. In other words, so long as the matter under consideration by the Court was one over which the Court could exercise the full extent of its jurisdiction, as problematical as the hypothetical nature of an Article 74 case was, the Court's eventual power to issue a remedy was not at issue.

But what if a request for an advisory opinion involved an issue over which the Court had no remedial power even if the issue were presented to it in a genuine case or controversy? That was exactly the type of case which the Court faced in an 1875 *Opinion of the Justices*. In that case, the Senate submitted a request for an advisory opinion in which the Court was asked to determine whether or not two persons whom the Senate had already seated had in fact received the requisite number of votes to be elected. Noting that Article 35, Part II of the Constitution made the Senate the "final judge" of the election of its members, the Court stated that, "We are of the opinion that from the action of the senate in this respect there can be no appeal." Moreover, said the Court, "If the framers of our organic law had intended that some court or other tribunal should have the power, by writ of *quo warranto* or *mandamus*, or other process, to reverse the action of the senate, they would have so expressed themselves, in language which could not be misunderstood." Since, therefore, the Court had no power to grant a remedy, it declined to answer the Senate's inquiry. In other words, even where the Court had the constitutional obligation to issue an advisory opinion, where there was no remedy, the Court would not decide whether or not there was a right.[110]

Part III - <u>The Confluence of Rights and Remedies</u>

We have now encountered the Court's refusal to get involved in an election contest in both the context of a case and controversy and the context of a request for an advisory opinion. In an earlier Letter, we discussed the 1965 case of *Brown v. Lamprey* where the Court refused on account of Article 35, Part II to intervene in behalf of an aggrieved voter; in the 1875 case discussed above, it refused to answer a question from the Senate itself. I have argued in both instances that one reason that the Court declined to act was because it would have been entering an area in which it had no remedial powers. On the other hand, it could be argued that the reason for the Court's reluctance to act was not because it had no power to grant a judicial remedy in an election contest; it was because the reference in Article 35, Part II to the Senate being the "final judge" of the elections of its members meant that no one had a judicial right in an election contest.

These alternative approaches demonstrate the interrelationship between legal rights and legal remedies. The supposed distinction between them has bedeviled New Hampshire jurisprudence for years. It most frequently comes up in cases involving the prohibition in Article 23, Part I of the Constitution upon retrospective laws where the Court, for better or for worse, has held that the provision is violated where a law adversely affects a party's vested rights, but it is not violated where the law only affects his remedies. Without going into any detail on this issue, I can assure you that the Court's efforts to parse a law into the right that it creates and the remedies it affords has been nothing short of metaphysical. As Justice Bellows wrote in his dissent to the 1859 case of *Rich v. Flanders*:

> The cause of this conflict is to be found in the difficulty of defining the boundaries between rights and remedies. In fact, they run into each other with such irregular lines of approach, that the most eminent ability must despair of defining them.

In fact, we have already encountered several other instances where the impropriety of judicial review could be analyzed in terms of the absence of a legal right or the lack of a legal remedy. For example, we noted that one of the reasons that the requirement in Article 31, Part I that the Legislature shall "assemble for the redress of public grievances and for making such laws as the public good may require" is non-justiciable is because the Court can provide no remedy for the Legislature's non-compliance with the Constitution's directive. On the other hand, we could just as easily say that Article 31 does not create any legal rights. In other words, if Article 31 is construed to recognize the people's "right" to have the Legislature redress their grievances and pass good laws, the right which it recognizes is a political one, not a legal one.

Another example of a constitutional right which is not justiciable because it is not enforceable by the Judiciary is the right of revolution. This is addressed in Article 10, Part I of the Constitution as follows:

> Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, the public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

On the other hand, as Chief Justice Doe wrote in his dissent to the 1874 case of *Orr v. Quimby*, "For exceptional reasons, applicable to the construction of article 10, the right of insurrection there declared is evidently a moral right, not reserved as a legal one." The point is that whether the "right" of revolution suffers from the unavailability of a remedy or the non-legality of its designation as a right, no court (at least no court north of the Mason-Dixon Line) would be open to a citizen who tried to exercise such a right.

In the same sense that some things such as the right of revolution are not justiciable both because they are not conceptualized as legal rights and because they do not contemplate judicial enforcement, there are other interests which clearly are justiciable both because they are recognized by the Constitution as legal rights and because they quite clearly do envisage a judicial remedy. These consist of the many trial rights which are specifically enumerated in the Constitution such as the right to trial by jury, the privilege against self-incrimination, the right to counsel, the right to confront one's accusers, etc. Since these rights involve what happens in the courtroom, they are unquestionably enforceable by the courts and no one would think of challenging the Court's jurisdiction to determine their nature and extent.

Once we get away from the judiciary's obvious control over the enforcement of trial rights, however, it is technically true that the Court has no power to enforce any of its decrees. As Alexander Hamilton said in *The Federalist*, *No. 79*, the judiciary "may truly be said to have neither FORCE nor WILL, but merely judgment." Accordingly, it "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." But this fact alone can surely not mean that all rights other than those which involve what happens in the courtroom are non-justiciable. Although that would be carrying “where there is no remedy, there is no right” principle to its logical conclusion, the logic of the argument would confront the equally valid logic that dictates that if courts are to have a role in establishing the rule of law, we must accept it as an article of faith that their remedial orders issued in cases within their jurisdiction will be complied with. As the Court put it in the 1934 case of *Tirrell v. Johnston*, in a government of laws and not men, we must assume that "when the law is settled, it will be obeyed."

In order, therefore, for an issue to be judicially non-remediable and thus non-justiciable, there must be some larger impediment to the Court's authority than the sole fact that the Judiciary has to depend upon the Executive for enforcement of its orders. There must either be something about the nature of the issue which makes it inherently incapable of judicial remediation or there must be some express or implied prohibition upon the Court's remedial authority in the Constitution itself.

This brings us to the issue at hand - education. The obvious starting point for determining whether the "right to a constitutionally adequate education, adequately funded" is judicially remediable is Article 83, Part II of the Constitution, from whence the right to an adequate education supposedly sprang. The problem is that Article 83 is totally silent about the issue of remedies. As we have already observed, it doesn't even make mention of rights, never mind remedies. What remedy, then, does the Court award if the legislators and magistrates fail in their duty to "cherish" education?

But before we review those provisions of the Constitution which potentially bear upon the Court's remedial powers over education, let us first examine the *Claremont* decisions to see what the Court itself had to say about this subject. As we noted in our last Letter, the Court essentially ducked the issue: "[W]e do not remand for consideration of remedies at this time, but instead stay all further proceedings until the end of the

upcoming legislative session and further order of this court to permit the legislature to address the issues involved in this case." Why does the Court hesitate? Is it because it wishes to display its respect for the Legislature? Hardly! Despite the Court's lip-service to institutional deference, its *Claremont* decisions are much more reflective of hubris than they are of humility. Consequently, I suspect that the real reason that the Court says nothing about remedies is that there is nothing for it to say!

The fact, however, that the Court skirted the question of remedies in *Claremont* makes it very difficult for us to discuss this issue. It is always easier to discuss whether some *specific* remedy is verboten than it is to attempt to determine whether *all* remedies are off limits. As in any case where one is attempting to prove a negative, one is compelled to conjure up the full range of possibilities and then pick them off, one by one. Nevertheless, that it what we shall try to do here. And if we are successful, the exercise will reveal the final reason for us to conclude that the Court has overstepped the bounds of its proper jurisdiction in *Claremont.* That reason, of course, is that the Court-created "right to an adequate education" is a right for which there is *no* legal remedy. And, as we have discussed above, if there is no legal remedy, there is no legal right.

Part IV - Sovereign Immunity.

However, before we get into the specifics of the Court's remedial powers over education policy and education funding, there is one other aspect of the “no remedy, no right” principle which needs to be considered. Up to this point, we have analyzed the issue of justiciability primarily from the point of view of the plaintiff or of the Court itself. In this regard, we have asked either "does the plaintiff have a right?" or "can the Court grant a remedy?" There is, however, another party whose perspective must be considered: the defendant.

We have noted previously that the Court is reluctant to issue an order directed to a representative of one of its co-equal branches, especially the Governor. This is not simply a matter of institutional deference. It also has to do with the fact that such persons are representative of the State itself. "So what?" you ask. "Don't people sue the Government all the time?" The answer to your question is, "Yes, they do - but only because the Government says they can." This is known as the doctrine of sovereign immunity. According to this doctrine, the State is immune from lawsuits unless it agrees to them. Therefore, the only reason that people can sue the State is because the State has agreed to it.

Historically, sovereign immunity originated in the proposition that "the King can do no wrong." Admittedly, we in America have no kings, and we also believe that no one is above the law. In fact, as Chief Justice Doe noted in his opinion in 1874 in *Orr v. Quimby*, one of the reasons that we have a written Constitution is "that government not only can do wrong, but is exceedingly apt to do wrong." On the other hand, we still have the doctrine of sovereign immunity - but for different reasons. As the Court observed in the 1860 case of *State v. Kinne*:

> [I]t is a principle of the common law as old as the law itself, that “the king is not bound by any statute, if he be not expressly named to be so bound.”.... With us, the State stands in the place of the crown; it is the crown. The people are sovereign; the State is the embodiment of the people, hence the very embodiment of sovereignty; and the rule has generally, we think, been applied in the same way in the United States as in England.[111]

Despite having been subjected to great criticism over the years from lawyers, judges and academics, the doctrine of sovereign immunity is still alive and well in New Hampshire. As the Court itself has observed on numerous occasions, "The doctrine of sovereign immunity is deeply entrenched in this jurisdiction." Among other things, the Legislature has declared it to be the official policy of the State to retain sovereign immunity to the fullest extent compatible with the Constitution. Accordingly, RSA 99-D:1 states in the clearest of terms:

> The doctrine of sovereign immunity of the state, and by extension of that doctrine, the official immunity of officers, trustees, officials, or employees of the state or any agency thereof acting within the scope of official duty and not in a wanton or reckless manner, except as otherwise expressly provided by statute, is hereby adopted as the law of this state.

It is important that one understand that, when it applies, sovereign immunity really means what it says. For example, in the 1951 case of *Rothrock v. Loon Island*, parties who disputed the State's claim to an island in Silver Lake attempted to get the Carroll County Superior Court to quiet the title to the property. When the case was transferred to the Supreme Court, it ruled that "Since the State cannot be sued in our courts without its consent and there is no statute, general or special, authorizing the present proceeding, it must be dismissed as against the State." In other words, in its broadest form, sovereign immunity does more than just deny an aggrieved party his traditional legal remedies; it keeps him out of court altogether. As the Court put it in Rothrock, unless the State consents, it "cannot be sued." Note, however, that RSA 99-D provides that the State asserts its sovereign immunity "except as otherwise expressly provided by statute." In fact, the Legislature has, in RSA 491-8, waived the State's sovereign immunity for all suits on express and implied contracts, and in RSA 541-B, the State's immunity for tort claims - subject, however, to certain substantial exceptions. What are these exceptions? As the law currently stands, the State may not be sued for the tortious acts of its agents which they arise out of the exercise of their "discretionary functions". Discretionary functions - for which the State still retains its immunity from suit - are defined by the statute as those which involve:

> (a) the exercise of a legislative or judicial function, and (b) the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.

If we apply this definition of sovereign immunity to a suit for a violation of the so-called right to an adequate education, it is obvious that such a claim could not survive the test. Under any conceivable conception of what a discretionary function is, the determination of what makes up an adequate education simply must be such an animal. Whether the claim of the "injured party" is that there should have been less arts and more music, or there should have been smaller classes, or there should have been a larger library - or there should have been more or less of anything else - these are quintessentially issues of judgment which would warrant the invocation of a sovereign immunity defense. In other words, unless the Court were to rule that sovereign immunity is somehow inapplicable to the *Claremont* case, the right to an adequate education is clearly a right for which there is no remedy.

Moreover, if this sounds rather like our previous discussion of the political question doctrine, which holds that issues of social policy are not justiciable because of their multi-dimensional nature, it should. The fact is that the doctrine of sovereign immunity - in its current form - has much in common with the political question doctrine. Each of them accepts the fact that there is a domain in which the judiciary lacks the competence to make decisions. The political question doctrine addresses the situation from the front end; it says that such questions are non-remedial because they are non-justiciable. The doctrine of sovereign immunity addresses the problem from the back end; it says that claims are non-justiciable because they are non-remediable. In either case, whenever the Court approaches this domain of institutional incompetence, the message that both of these doctrines send to the Court is the same: Thou shalt not enter.

Does this mean that the *Claremont* case should have been dismissed at the very outset because it was a suit against the State? Unless there is something special about the so-called right to an adequate education, it would appear that the answer to this question should be "yes." After all, if you can't even get into court, you certainly can't obtain a judicial remedy, and if there is no remedy, there is no right.

On the other hand, there is something special about a claim of a deprivation of the right to an adequate education. This is the fact that the claim arises under the *Constitution*. That is significant for several reasons. First of all, only the government can violate the Constitution. Contrary to popular opinion, private citizens (for the most part) cannot violate the constitutional rights of other private citizens; only government can. That is because the Constitution speaks to the relationship of citizens to their government and not to their relationship to each other. Consequently, it would be most peculiar if sovereign immunity would immunize the *only* party which can violate the Constitution from any liability for doing so. Secondly, the usual way in which we determine whether or not the government has violated the Constitution is through a *judicial* determination of liability. Again, if sovereign immunity were a bar to all such suits against the State, judicial review would be an empty promise because the Court would never be permitted to determine whether or not a violation had occurred.

In fact, if sovereign immunity had no limits, it would completely swallow up, as to the State, the notion that where there is a right, there is a remedy. Consequently, the Court

has indicated that *absolute* sovereign immunity would itself be unconstitutional. For example, in the 1983 case of *State v. Brosseau*, the Court suggested that the then existing statutory damage cap of $50,000 on common law tort claims against the State was probably unconstitutionally low.[112] Obviously, if a $50,000 threshold was already too low, an across-the-board ban on all torts suits against the State would never be permitted. Moreover, if sovereign immunity has constitutional limits when the State commits a garden-variety tort, it surely cannot impose an absolute bar against suits versus the State when the State violates someone's rights under the Constitution.

What, then, are the permissible limits of the sovereign immunity defense? In other words, how much sovereign immunity can the State retain without running afoul of the Constitution? The Court answered this question in a 1985 *Opinion of the Justices* as follows:

> When the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should remain immune from liability.

In other words, at least as to those "discretionary acts," which RSA 541-B had immunized from liability, the State was permitted to close the doors to its courts.

But, you ask, does the State's power to close its courts to claims involving its discretionary acts also include claims for its violations of the Constitution? Shouldn't *all* violations of the Constitution by the State, even ones that involve policy-making functions and other discretionary acts, be actionable in a court of law? In other words, is it possible that sovereign immunity may properly only be raised as a defense to claims against the State for violations of *statutory and common law* rights, but it may never be properly interposed as a defense to a *constitutional* claim?

There are a number of different arguments which could be used to support such a proposition. For example, one can view the Constitution as a contract between the people and their government which assumes a certain mutuality of obligation. There is some basis for this concept in Article 3, Part I of the Constitution which provides that:

> When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void.

On the other hand, this provision has never been interpreted by our Court as something which grants citizens remedial interests in the Constitution; on the contrary, to the extent that it has received any judicial construction (which has been very little), it has generally been viewed as one of those provisions of the Constitution which was intended to be merely a statement of underlying principles and, therefore, is non-justiciable.[113]

Another tack that could be taken is to treat the Constitution itself as a grand waiver of sovereign immunity for anything that the document requires the State to do or not to do. As you may recall, the doctrine of sovereign immunity provides that the State cannot be sued "unless it consents." One could argue that the original ratification of the Constitution by the voters of 1784 (and its continued "ratification" by each succeeding generation's failure to amend it) constitutes the implicit consent of the people to allow themselves (i.e., the State) to be sued when they (i.e., the State) violate its provisions. Besides the fact that such a symbolic identification of the State as the alter ego of the people is antithetical to our anti-statist traditions, the argument is one which has never been accepted by the Court. In fact, in only one instance has the Court held that a provision of the Constitution itself constituted a waiver of sovereign immunity: the clause in Article 12, Part I, which requires the State to compensate a citizen for a taking of his private property for public purposes.[114]

The fact of the matter is that the Court has never ruled that the Constitution requires any blanket exception to the doctrine of sovereign immunity for claims arising out of the instrument itself. In fact, the Court has specifically relied upon sovereign immunity doctrine in the exercise of its own powers to fashion remedies to deny relief to a party for an alleged constitutional violation. For example, in the 1986 case of *Rockhouse Mt. Property Owners Assoc. v. Town of Conway*, a group of persons who owned property in the Town of Conway, but who did not live there, charged that the municipality had unconstitutionally discriminated against them on account of their non-residence, allegedly in violation of their right to equal protection of the laws guaranteed by Article 12, Part I of the Constitution. Their complaint arose out of the Town's refusal to lay out a public road within their residential development. The Court, however, ruled that even if the plaintiffs could prove their case, it would be inappropriate for the Court to allow them to sue the Town for damages. Among other things, the Court held that the policies behind the doctrine of sovereign immunity should defeat a claim for damages because matters of highway layout "require the exercise of a high enough order of discretion to justify legal immunity."

Note the Court's reference again to the concept of discretionary acts. As we learned above, the Court had already determined that although the Constitution did place limits upon the doctrine of sovereign immunity, the Legislature could constitutionally refuse to waive the State's sovereign immunity for its discretionary acts. Now, in *Rockhouse* we have the Court itself carving out an area of official non-liability for exactly the same type of conduct. And equally as significant, we have it occurring in a case where the claim involved an alleged violation of constitutional rights.

It is important to understand, however, that the *Rockhouse* case was not a suit against the State; it was a suit against the Town of Conway, a political subdivision of the State. As a result, the question of whether or not the Town was entitled to immunity from suit was technically not dictated by sovereign immunity. Nevertheless, sovereign immunity concepts informed the Court's decision as to whether or not, as a matter of policy, it ought to create a judge-made cause of action for the Town's allegedly unconstitutional conduct. So what do you think would be the result in such a case if the defendant had

been the State itself? Assume that the Legislature had neither asserted the State's sovereign immunity (i.e., there was no RSA 99-D), nor partially waived it (i.e., there was no RSA 541-B) and that the Court was free - as it was in *Rockhouse* - to decide for itself whether or not to allow a suit against the State. Would the Court immunize the State's discretionary acts, like it had done for those of the Town of Conway?[115]

It is quite clear that the Court would do just that. In fact, there are indications in its decisions that the Court would exempt the State from liability for its discretionary acts, including for constitutional claims, because the Constitution *requires* it. This suggestion that the doctrine of sovereign immunity has a constitutional basis - at least insofar as it is limited to immunity from suits for discretionary acts - finds support in the well-known concurring opinion of Justices Douglas and Batchelder in the *Brosseau* case: "The distinction between routine activities that are not uniquely governmental in nature and activities that are discretionary and inherently governmental has been accurately described as an extension of the separation-of-powers doctrine." Ironically, the very same sentiments were echoed in an opinion written just eight months before *Claremont* by Chief Justice Brock in *Mahan v. New Hampshire Department of Administrative Services*:

> The retention of sovereign and municipal immunity for discretionary functions stems from the separation of powers doctrine. This exception reflects judicial reluctance to evaluate the wisdom of an executive or legislative choice of public policy goals or the means to accomplish those goals....

But in order to really test the theory that there is a constitutional imperative to sovereign immunity, let us take things to the final extreme. Assume that the Legislature passed a statute which purported to *completely* waive the State's sovereign immunity, even for its discretionary acts. Indeed, assume that the Legislature specifically *authorized* suits against itself for failing to pass "wholesome and reasonable" laws, suits against the Governor for failing to "faithfully" execute the laws and against the judiciary for failing to "impartially" interpret the laws. It is my suspicion that the Court would hold all of these laws unconstitutional, including the one by which the Legislature tried to waive the State's sovereign immunity for its own discretionary acts.[116]

Among other things, my belief in the probable unconstitutionality of such laws is based upon the Court's 1985 *Opinion of the Justices*, wherein the Court reviewed the policies underlying the doctrine of sovereign immunity in some detail. Indeed, its statement in that case of the considerations supporting the doctrine has generally been accepted as the standard against which all efforts to expand or contract sovereign immunity must be measured. The constitutional flavor of the Courts' reasoning is apparent and pervasive:

> Four considerations support continuation of the immunity doctrine. First, exposure to liability would force the State to obtain funds to satisfy, process, and insure against claims against the State by either increasing revenues or diverting funds from other uses. If the State incurred significant liability, the payment of these costs could impair the financial ability of the State to render governmental services. Second, exposure to liability for the State's tortious performance of

> functions that it alone can perform, such as law enforcement, in a sense, would penalize the State for undertaking these obligations. Unlike an individual or private entity, which can select its activities to minimize its liability exposure, the State may not eschew certain functions, even if the attendant liability exposure is onerous. Third, exposure to liability could inhibit the ability of the legislature and the executive to exercise effectively their discretion. To allow persons to challenge a governmental policy on the ground that it was negligently developed would force courts to re-evaluate the policy's wisdom and thus to invade the prerogatives of the legislature and the executive. See N.H. Const. pt. I, art. 37 (separation of powers). Finally, exposure to liability for the judiciary's negligent disposition of suits would greatly impair the ability of the courts to render final judgments and could undermine the confidence in the court system that is essential to its effective operation.

Where, then, does this discussion of sovereign immunity leave us? On the one hand, sovereign immunity appears to be constitutionally *limited* by the notion that a written constitution demands that the State not be permitted to violate the Constitution with impunity and by the notion that judicial review demands that the Court be entitled to provide a remedy for such violations. On the other hand, sovereign immunity appears to be a constitutional requirement derived from the principle of separation of powers which, in turn, restricts that same Court from interfering with certain acts of the State which are accomplished by the Executive and the Legislature. At another level, it appears to be merely a defense to legal actions which can be waived at will by the Legislature; yet the Legislature's power to waive it with respect to claims against the judiciary and the Executive appears to be limited. And finally, it appears at times to be applied or withdrawn by the judiciary itself, at its own election, as a part of its inherent powers to fashion remedies for violations of constitutional rights.

With the law in such a state of disarray, it is no wonder that the Court itself is confused about how sovereign immunity affects its powers to grant remedies in constitutional cases. The best that I can conclude about all of this is that, however one gets there, the bottom line of sovereign immunity is that it instructs the Court that claims against the State for alleged violations of the Constitution are not justiciable when the challenged act or omission is one which is within the jurisdiction of the actor and is characterized by a high degree of discretionary choice. In fact, in the very opinion which is most often cited for the clearest exegesis of sovereign immunity, the concurring opinion of Justices Douglas and Batchelder in the *Brosseau* case, the authors state flatly that "The remedy in those instances where a State official or his appointee is protected by sovereign immunity lies at the ballot-box, not in the courts."

On the other hand, the Court should not bear *all* the blame for not having considered the effect of sovereign immunity upon the *Claremont* case. One of the reasons that the Court did not have to deal with the issue is that the State did not raise it!

Nevertheless, all is not lost. Remember what the Court said about the doctrine in the *Rothrock* case: where sovereign immunity applies, "the State cannot be sued in our courts without its consent." Consent implies an *affirmative* act and, therefore, the fact that no

one raised the issue in the lawsuit does not mean that consent has been given. More importantly, the Court has ruled many times that only the Legislature can give such consent. In fact, in the 1991 case of *LaRoche, Administrator v. Doe,* the Court expressly ruled that the failure of the Attorney General - who was defending the State in that case - to raise the defense of sovereign immunity at the time that defenses must normally be raised in a litigated matter did not preclude him from raising the defense at a later time. This was because the defense belonged to the Legislature and since the Legislature had not, by statute or otherwise, waived its sovereign immunity for the type of claim being brought in that case, the defense could be raised by the Attorney General (or even by the Court) at *any* time. As the Court put it, "sovereign immunity is a jurisdictional question."

What, then, is the message for the Legislature? One possibility is that the Legislature could request the Attorney General by resolution to petition the Court to reopen the *Claremont* case in order for him to assert the State's sovereign immunity. Alternatively, perhaps the Legislature could even move to intervene in its own capacity and assert the defense.[117] On the other hand, if the Legislature were not inclined to get itself directly involved in the *Claremont* litigation, it could pass a statute to provide- in no uncertain terms - that, at least for future cases, the State does not waive its sovereign immunity with respect to claims arising under Article 83, Part II, of the Constitution.

The real message, therefore, is that the Legislature is not impotent in these matters. On the contrary, it can and should assert its independence and its primacy with respect to educational policy and funding - and, if it does so, there is even a chance (however minimal it may be) that the Court would go along!

Part IV - Damages

Let us assume, however, that we are where we are, and that neither the Attorney General, the Legislature, nor the Court is going to raise the issue of sovereign immunity as a complete defense to *Claremont* and, therefore, that the case does not get dismissed on this ground. Let us further assume that the "legislators and the magistrates" fail to comply with the Court's deadline to alter the educational system of New Hampshire in a manner which complies with the dictates of *Claremont I, II and IV*. The Court would then be faced with the issue that it has so-far avoided: what to do about remedies?

One would presumably begin this task by referring to the constitutional provision at issue in this case: Article 83, Part II. But, as we have already observed, Article 83 does not say anything at all about remedies. What about Article 14, Part I? It certainly speaks to remedies. However, all it says is that "every subject in this state is entitled to a certain remedy ... for any injuries he may receive;" it doesn't tell us anything about what remedy an injured party should receive - much less one whose injury consists of being deprived of an adequate education.

We must take it as a given that the Court is not free to create remedies for constitutional violations *ex nihilo* (out of nothing). Even the Court would not subscribe to such a view. Moreover, this is not a new dilemma for the Court. In fact, the Court had occasion to deal

with such a problem quite recently in the case of *Marguay v. Eno*. In that case, a group of former students who claimed to have been sexually abused by their teachers when they were in school argued that their rights to "life and liberty" guaranteed by Article 2, Part I of the Constitution had been violated and that they were entitled to a remedy. Noting that "our constitution does not specify remedies for its violation," the Court stated that the Court itself "ultimately has the authority to fashion a *common law* remedy for the violation of a particular constitutional right." As it turned out, the Court declined to exercise its claimed authority in *Marguay* because it concluded that other adequate remedies were available to the plaintiffs. Nevertheless, the point is that the Court will look to the common law for guidance in determining what remedies are appropriate for the vindication of constitutional rights.

This is generally how the Court has also interpreted Article 14, Part I. Despite the seemingly unequivocal language of Article 14, the Court has consistently ruled that this provision is not absolute. For example, in the 1979 case of *Estate of Cargill v. City of Rochester*, the Court noted that "the rights guaranteed by part I, article 14 are necessarily relative." More particularly, as the Court observed in a 1973 *Opinion of the Justices*, "the remedies provided in article 14 are to be ‘conformably to the laws.’ This means the rules of statutory and common law applicable at the time the injury is sustained." In other words, the Court rejected the notion that Article 14 had constitutionalized some abstract, all-pervasive notion that the violation of a provision in the instrument entitled a party who claimed injury to any remedy which the Court might conjure up. On the contrary, what Article 14, Part I, did was to import into the Constitution a sense of historical time and place. It gave recognition to the fact that legal rights do not hang in space like some "brooding omnipresence;" rather, they exist in a milieu of historically accepted forms, procedures and remedies.[118]

At common law, the customary remedy was a *damages* remedy. Indeed, examinations of the old English cases make this connection quite clear. For example, in the 1703 case of *Ashby v. White*, from which the axiom about “every right having a remedy” was derived, the plaintiff sought damages against an election official who had disallowed his vote in a parliamentary election, contrary to a statute governing the matter. Despite the fact that the statute prescribed no remedy for its violation and in the face of a claim that the plaintiff should seek his relief, if any, from the parliamentary committee on elections, the House of Lords decided that he was entitled to pursue his action in the courts for money damages.

All of this is quite consistent with what we generally mean by the term "remedy." In the law, the typical definition of the word is "compensate;" it usually refers to making someone whole for the injury he received. Accordingly, remediation has a retrospective connotation to it in the sense of its focus upon things which happened in the past. Thus it is often said that the purpose of a legal remedy is to restore the victim of an injury to the *status quo ante*; that is, his condition before the injury. And since money is the common medium of exchange, it is generally accepted that the appropriate way to make all sorts of different people whole for all sorts of different injuries is to award them damages.

Claremont would not be the first case in which the Court has been confronted with a claim for money damages for a violation of the Constitution and where - as in the case of Article 83, Part II - the Constitution itself does not specify a remedy. These are said to involve claims for "constitutional torts." The interesting thing about such cases is that although the Court has frequently asserted its power to recognize such claims, it does not appear to have ever done so. Beginning with the 1819 case of *Evans v. Foster* and ending just three years ago with *Marquay v. Eno*, the Court has always found a reason to avoid the judicial creation of a civil cause of action for damages directly under the Constitution. In most cases, the Court has deferred because it concluded that already existing common law or statutory causes of action afforded the injured party an adequate remedy and, therefore, there was no need for the Court to fashion a remedy of its own

The sixty-four dollar question, then, is whether or not the Court would or could grant a damages remedy to the *Claremont* plaintiffs. I believe that the answer to this question is probably "no." To begin with, if the Court went down this road, it would soon be dealing with a sixty-four *million* dollar question. If it were to grant a damages remedy to each and every child in New Hampshire who claims not to have received a constitutionally adequate education (whatever that may be), the potential verdicts could soon dwarf the current State budget. Moreover, the transaction costs of the litigation in terms of lawyers' fees, consumption of judicial resources, and deferred justice in other cases would be equally horrific.

The second reason is that damages are really not an appropriate remedy for the right at issue. As we have discussed before, the right to an adequate education is an *affirmative* right. Unlike the conventional rights which have traditionally been recognized under our Constitution (and, for that matter, under constitutions in general), the right to an adequate education is an *entitlement*. It is not something that is protected against governmental *infringement*; it is something which government must affirmatively *give* to everyone. Accordingly, if the State has violated the Constitution, it is not because it *took something away* from a citizen which the citizen previously had and for which the citizen can be made whole by a damages award.

That is not to say that damages can never be awarded to compensate someone for something which he was promised and didn't receive. On the contrary, that is exactly what damages are used for in a breach of contract suit; they are the measure of what the aggrieved party would have received if the contract had been honored. But providing a citizen with the fair market value of the adequate education to which he was supposedly entitled, but didn't get, in no way vindicates the purpose of Article 83, Part II of the Constitution, which is to "spread the opportunities and advantages of education throughout the various parts of the country" in order to "promote ... the preservation of a free government."

This is presumably why the plaintiffs in the *Claremont* suit did not even ask for a damages remedy. The goal of the *Claremont* plaintiffs was not to obtain some personal damage award for the State's alleged failure in the past to have provided the children of Claremont, Allenstown, Franklin, etc. with an adequate education; their goal was to have the Court order the State to mend its ways and do things differently in the future. Indeed,

this is implicit in the Court's comment in *Claremont I* that "the right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the public to enforce the State's duty." Accordingly, awarding money damages to individual plaintiffs would not be responsive to the public's rights.

Another reason that the common law remedy of damages should not be available to compensate one for the State's failure to provide him with an adequate education is that the so-called right to an adequate education never existed at common law. That does not mean that a damages remedy for such a right could not be created by the Legislature. The Legislature could pass a statute providing for a damages remedy, but that has not happened, and that is not what the *Claremont* suit is all about.[119] The *Claremont* suit is all about the *Court* creating a remedy for a supposed constitutional right where the Constitution itself is silent on the matter and, as we discussed above, one of the things which the Court looks to when it engages in such an exercise is whether or not a particular remedy for a particular right existed at common law. Since there was no common law analog to the right to an adequate education, the Court would simply not feel compelled to grant the common law remedy of money damages.

When all is said and done, however, the real reason that the Court should not, and I believe would not, grant a damages remedy for the deprivation of someone's right to an adequate education is our old friend sovereign immunity. For if sovereign immunity has any force at all - whether as a constitutional imperative, as a statutory reservation or as a judicially self-imposed limit upon the Court's power to fashion remedies - it exerts its greatest weight when money damages are at issue.[120] And if the State's immunity from suits for money damages extends at least to its discretionary, policy-making functions, it is almost impossible to see how the State's failure to define, implement, or fund a citizen's right to an "adequate" education could ever subject it to liability for damages.

Accordingly, damages are out!

Part V - Mandamus

As we pointed out above, one of the characteristics of the so-called right to an adequate education is that it is an *affirmative* right; that is, it is a right *to* something. Consequently, the most effective remedy for a deprivation of such a right would be a judicial order addressed to an appropriate governmental body or official directing such party to provide the plaintiff with what he was supposed to get. This is known in the law as a "writ of *mandamus*" (or, sometimes, a "mandatory injunction").

If the Court were to remand the *Claremont* suit to the trial court for a consideration of remedies, a *mandamus* order would clearly be something which would be requested by the plaintiffs. But to whom would such an order run? The Governor? The Legislature? The State Board of Education? The Claremont School District? The Claremont School Board? And what would such an order require? Would it direct the addressee to "provide the plaintiffs with an *adequate* education?" What if the addressee said that it didn't know

what an adequate education was? Would the order require the party to "define an adequate education?" What if the addressee said it didn't have the money to provide an adequate education? Would the order tell the party to "raise the money?"

To begin with, it is clear that the Court simply has no power to order "the State" in its corporate, sovereign capacity to do anything. Likewise, the Court may not issue affirmative orders to one of its coordinate branches of government. For example, in the *Piper v. Meredith* case discussed above, the Court held that a court may not prevent a legislative body (there, the Meredith town meeting) from conducting its proper business - passing laws - even if the laws might not be constitutional. Although there is some question as to whether this prohibition applies equally to the Governor, this is due to the conceptual problem created by the fact that the Governor is not only the embodiment of the executive branch, but is also a specific person holding an office within the executive branch. In any case, whether or not the Court has the power to issue an order to the Executive, *qua* Executive, the fact is that it has historically not attempted to do so.

One of the reasons that the Court does not issue orders to its coordinate branches is simple comity. As we mentioned in our discussion of judicial restraint in an earlier Letter, it is essential for the Court to maintain amicable relations with the political branches, both because it enhances the likelihood that they will accede to its rulings and because it reduces the Court's vulnerability to their potential retaliation.

On the other hand, the overriding reason that the Court does not issue orders directing the Governor or the Legislature to do something is the doctrine of separation of powers. The executive power resides with the Governor and the legislative power resides with the Legislature, and the Court has no power to *compel* either of them to exercise their powers.[121]

Although one may seek to get around the Court's lack of power to issue directives to the other institutions of government by suing a particular government official, one will only be successful in obtaining a remedy if the official's duty which one wants the Court to enforce can be characterized as "ministerial." If the duty is "discretionary," the Court will not order the official to act. Therefore, just as in the case of the sovereign immunity defense to a claim for damages, if the act complained of involves a high degree of official *judgment*, the plaintiff will obtain no remedy for the violation of his rights.

This distinction between ministerial and discretionary acts is, in the first instance, a technical one which is associated with the historical uses of the writ of *mandamus*. As Chief Justice Doe observed in *Attorney-General v. Taggart:*

> *Mandamus* ... extends to all cases of neglect to perform a legal duty.... If it be ministerial, then the *mandamus* will direct the specific duty to be performed.... [But] the Court will not interfere by *mandamus* with the executive officers of the government in the exercise of their ordinary official duties... [i.e., duties which require] an exercise of judgment on a question of fact [which] is frequently called discretion.

On the other hand, the relationship between the amount of discretion involved in an official's discharge of his public duty and the Court's power to direct him in its exercise has constitutional implications, as well. Indeed, the propriety of the Court issuing a *mandamus* order to a public official was at issue in *Marbury v. Madison*. After Chief Justice Marshall had determined that Mr. Marbury had a legal right to his commission as justice of the peace and that the existence of his legal right implied the existence of a legal remedy, he still had to decide whether or not a writ of *mandamus* was the property remedy. Upon concluding that the mere delivery of Mr. Marbury's commission to him by Secretary of State Madison would be nothing more than a ministerial act, he ruled that the writ would be proper. Nevertheless, he noted that if the act required of Madison had involved the exercise of judgment, the Court would have had no jurisdiction to interfere:

> It is scarcely necessary for the court to disclaim all pretensions to such jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Note Justice Marshall's mention of the so-called political question doctrine in the context of the Court's power to fashion a remedy. What he is suggesting is that any remedy which places the Court in the position of directing the discretionary actions of a member of the executive or the legislative branch implicates it in the exercise of a non-judicial power. In fact, this part of his decision mirrors our prior discussion about the distinction between what happens when the Court exercises its traditional, negative power of judicial review to declare a law unconstitutional and when it attempts to create affirmative rights in the nature of entitlements. When the Court declares a law unconstitutional, it need not decide what, if anything, should be put in its place. Likewise if it orders a public official to either do or not do a ministerial act, the Court's task is easy. However, when the Court defines an entitlement, or when it issues a *mandamus* order to a public official that instructs him how to exercise his discretion, the Court's task is polycentric, non-linear, and non-judicial.

A perfect case to illustrate this point is the *Brouillard* case mentioned in several footnotes above. According to a statute then in effect, the Governor and Council were required to appoint a Commissioner of Health and Welfare from the "two or more nominees" presented to them by an advisory commission. The advisory commission nominated four persons; the Council approved two and rejected two; the Governor, however, rejected both of the two approved by the Council. The advisory commission then sued the Governor and Council and requested the Court to order them to appoint one of the commission's nominees. Despite having concluded that Governor had failed to comply with his obligation under the statute to appoint one of the nominees, the Court declined to issue any order. Indeed, what order *could* it have issued? Who should it have ordered the Governor to appoint? How could the *Court* decide?

Some might suggest that it would be a sufficient remedy in this case for the Court to simply order the Legislature and/or the Executive to *do* their duty without telling them *how* to do it. Such a contention would be based upon language in cases like the *Rockhouse* case where the Court stated that "When an official is given discretion to decide how to resolve an issue before him, a *mandamus* order may require him to address the issue, but it cannot require a particular result." What this apparently means is that a Court has the power to issue an order to a public official to exercise his discretion.

Besides the fact that issuing such an order would just be a sham designed to get around the proscriptions against deciding remediless cases, it would not be even colorably appropriate in the *Claremont* case. It is one thing to issue this type of order to an official who is capable of exercising his discretion but refuses to do so, but it is a very different thing to issue it to a deliberative body like the Legislature. The Legislature can only act when a sufficient number of its members (usually a majority) agree on something. How does the Court issue an order to such a body? Assume that there are several proposals on the table to define and/or to fund an adequate education. Which faction is allowed to become the majority and which ones have to give in and agree? The point is that an order directing a deliberative body to "exercise its discretion" in such a situation is not only a futile act; it is a silly act.

Note that the situation would not be any different in this case if the Legislature were to act, but the Court were to conclude that its efforts were insufficient to comply with its constitutional duty. Suppose, for example, that the Legislature were to enact the Governor's so-called ABC Plan, the one which the Court has already advised in *Claremont IV* would be unconstitutional if adopted. And now the *Claremont* case is remanded for a consideration of remedies. The trial court certainly could - and presumably would - be prepared to declare the new law unconstitutional. But that does not give the plaintiffs any *remedy*. Suppose the Court issues a mandamus order to the agents of the State not to collect the local property tax by which the ABC Plan would have funded education. I agree that the Court could do this because collection of the tax is a ministerial duty.[122] But how does that remedy the plaintiffs' deficiently funded education? In fact, doesn't this do the plaintiffs much more harm than good? For by ordering that local property taxes cannot be assessed and collected to fund education, the Court *guarantees* that the plaintiffs will not receive an adequate education. In fact, they may get no education at all.

The explanation for this anomaly relates back to the distinction between positive rights and negative rights. In the typical case where the government is violating the Constitution, it is doing something it isn't supposed to be doing. It is taking something away from the citizens which they already have; it is depriving them of their "rights." In this situation, an order to the agents of the State to cease and desist from their unconstitutional behavior is responsive to the harm being suffered by the plaintiff. It is truly a "remedy." But where the right at issue is an *affirmative* right like the right to an adequate education, issuing an order to an official to stop enforcing an unconstitutional law doesn't do the plaintiff any good. Indeed, by preventing the State from giving the plaintiff the something which it offers to him on the grounds that the something is not enough, the plaintiff ends up worse off than if he had not sued.

Accordingly, *mandamus* is out!

Part VI - Exculpatory Relief

For the same reasons that issuing an order to State officials not to collect an illegal tax or not to enforce an illegal education law would provide the plaintiffs with no remedy for their rights, granting the plaintiffs permission not to comply with such illegal laws is equally unavailing. In either case, the plaintiffs get *less*, not *more* education.

For example, let us again assume that the Legislature enacts the ABC Plan, but instead ofordering the State not to *collect* the unconstitutional tax, the Court orders that the plaintiffs (and others) need not *pay* the tax. Hasn't the Court accomplished the same thing? If people don't pay the school portion of their tax bills, there will be no money to support the schools, and the Court itself will have insured that their students will not receive their "constitutionally adequate education."

On the other hand, I will admit that to the extent that the tax *equity* aspect of the *Claremont* case is viewed in isolation, the picture does look different. As you recall, *Claremont I* was an *education* case, but *Claremont II* (excluding, of course, all the surplusage about the proper definition of an adequate education and the gratuitous reference to the "strict scrutiny" test) was a *tax* case. Although *Claremont II* was tied to *Claremont I* because of the Court's conclusion that the State's supposed duty to fund an adequate education made the school tax a State tax, the Court's declaration that local property taxes which varied from school district to school district created a group of potential plaintiffs who may well care not a hoot about education - but who would be delighted not to have to pay their school taxes.

So which constitutional right does the Court prefer over the other? Does it relieve the taxpayer group from paying an unconstitutional tax, but let the education group go without, or does it let the education group continue to receive an education but let taxpayers suffer the burden of paying a disproportionate tax? Note that the effect of the Court's decision in *Claremont II* to delay the effective date of its ruling until the commencement of the 1999-2000 tax year was to choose the second option and to prefer the education interests over the taxpayer interests. But if nothing happens prior to April 1, 1999 to change the *Claremont* decisions, change the tax laws, or change the Constitution, how will the Court resolve its Hobson's Choice the next time?

Some might argue that educational interests would in fact be benefited by the Court responding primarily to the interests of taxpayers. They suggest that the Court should exonerate taxpayers from paying the school tax for the very *purpose* of bringing our educational system to a halt. Alternatively, they advocate that the Court exonerate all school children from the truancy laws so that only those who wanted to go to school would have to go. Again, they contend that the way for the Court to respond to the fact that the plaintiffs are not being provided an adequate education is to shut the schools down. The *remedy* for the violation of their right, therefore, is to punish the State.

This type of thinking comes from those who hold that an appropriate element of the judiciary's remedial power is the creation of *deterrents*. According to this theory, a judge may properly look beyond the case at hand and fashion a remedial order which is designed to promote desirable conduct or deter undesirable conduct in the future. In other words, in the name of the "greater good," the interests of the parties to the current lawsuit may properly be subordinated to the interests of all citizens, present and future.

The primary example of this philosophy of judging is the so-called “exclusionary rule,” the problematical notion that if the police treat a criminal suspect improperly, the courts should refuse to admit the "tainted" evidence at the suspect's trial, in order to deter the police from committing a similar misdeed in the future. In the famous words of Supreme Court Justice Cardozo, "if the constable blunders, the guilty goes free." The net result of this “two wrongs make a right” jurisprudence, of course, is that both the criminal *and* the bad cop go unpunished.

This is neither the time nor the place to debate the merits of the exclusionary rule. Suffice it to say that, despite its continued vitality, most responsible commentators (including a number of former and present Justices of the US Supreme Court) recognize that it has no principled basis. Consequently, it provides no precedent for the importation of its methodology into other areas of the law. Moreover, even though our own Court has retained the exclusionary rule in cases of illegal searches and seizures and illegally obtained confessions, it has eschewed the theoretical basis of the rule in other contexts. Indeed, in a recent *Opinion of the Justices*, the Court expressly stated that "under the State Constitution, as elsewhere in life, two wrongs do not make a right."

Accordingly, exculpatory relief is out!

Part VII - Krytocracy.

If the Court can't order the State or its officials to provide and/or fund an adequate education; if it can't relieve the plaintiffs from their obligations to go to school or to pay taxes; and if it can't award the plaintiffs money damages for the State's inaction, what is left? The only thing that is left is the one thing that the Court said it didn't want to do: "We were not appointed to establish educational policy, nor to determine the proper way to finance its implementation," (*Claremont II*), "It is neither our task nor intent to manage the public school systems of this State...." (*Claremont IV*).

If one were to accept the Court's words as a promise, that would be the end of the matter. The plaintiffs would have no remedy and where there is no remedy, there is no right. But please don't fault me if I remain skeptical. I suggest we discuss the matter anyway.

The question is whether the judiciary has the constitutional authority to *itself* establish educational policy, raise taxes to fund the schools, and spend those funds to provide students with an "adequate" education. In my opinion, the answer to each one of these questions is a resounding "no." In the words of Alexander Hamilton in The Federalist, No. 78:

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse.

We have already discussed the judiciary's lack of power to actually run the schools in our prior Letters dealing with the nature of the "judicial power." Notwithstanding the Court's bizarre offering of its own "benchmark" definition of an adequate education in *Claremont II*, the Court has not previously deigned to overtly exercise the legislative power and to actually pass a law.[123] Likewise, it has rejected offers from the Legislature to be delegated executive powers, such as when it held that a law purporting to give the probate courts the responsibility of establishing and administering a system of pauper relief would be a violation of the doctrine of separation of powers.

But suppose that our Court attempted - as others have - to take over the operation of the schools. This would mean establishing curriculum, hiring and firing teachers, setting standards for graduation, disciplining students and undertaking all of the other tasks necessary to insure that students received an adequate education. What tools does the Court have to do this job?

To begin with, the Court has a limited capacity to accumulate and digest the necessary facts which must be gathered in order to set good policy (assuming, of course, that we could even agree upon what "good" policy is). As noted by ex-New Hampshire Supreme Court Justice and now US Supreme Court Justice David Souter in the case of *Washington v. Glucksberg*, decided just last year:

> [F]acts necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative fact finding and experimentation. Legislatures, on the other hand, have superior opportunities to obtain the facts necessary for a judgment about the present controversy. No only do they have more flexible mechanisms for fact finding than the judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions.

Although Justice Souter was talking about setting policy with respect to euthanasia, his comments hold just as true when it comes to education. Even more to the point, however, are the remarks of Justice Clarence Thomas in his concurring opinion in the 1995 case of *Missouri v. Jenkins* - in which the US Supreme Court set aside the wide-ranging remedial orders which a single District Court judge had issued in the course of his 20-year effort to personally desegregate the Kansas City school system:

> [C]ourts simply cannot gather sufficient information to render an effective decree, have limited resources to induce compliance and cannot seek political and public support for their remedies.

Moreover, even if the judiciary had the wherewithal to undertake the legislative component of providing an adequate education, it certainly does not have the resources to actually *operate* a school system. It has no staff of administrators. How would it enforce its policies? Send out the court bailiffs to drive the buses, to teach in the classrooms, or even to supervise others in doing these things? Just posing the hypotheticals illustrates how ludicrous this proposition is.

Equally as ludicrous is the notion of the Court setting tax policy and running a tax system to fund the schools. Again, the Court would be faced with the same problems of information gathering, policy-setting, administration and enforcement. It goes without saying that the Court has no staff of accountants, actuaries or other personnel capable of evaluating economic data to predict the revenues from or to evaluate the impact of one tax versus another. And even assuming that it could devise a fair tax (assuming, again, that we could agree upon what a "fair" tax is), the Court has no means to assess or collect such a tax.

In an earlier decision in the notorious *Missouri v. Jenkins* case, Justice Kennedy addressed the special issues that are raised when a court becomes embroiled in setting tax policy or gets entangled in tax administration:

> The operation of tax systems is among the most difficult aspects of public administration. It is not a function the judiciary as an institution is designed to exercise. Unlike legislative bodies, which may hold hearings on how best to raise revenues, all subject to the views of constituents to whom the legislature is accountable, the judiciary must grope ahead with only the assistance of the parties, or perhaps random *amici curiae*. Those hearings would be without principled directions, for there exists no body of juridical axioms by which to guide or review them.... Day-to-day administration of the tax must be accomplished by judicial trial and error, requisitioning the staff of the existing tax authority, or the hiring of a staff under the direction of the judge.... Forcing citizens to make financial decisions in fear of the fledgling judicial tax collector's next misstep must detract from the dignity and independence of the federal courts.

In any case, when it comes to taxes, we don't need to rely upon the Court's concern for its own institutional "dignity and independence." We have the express words of of our Constitution:

> "No subsidy, charge, tax, impost, or duty, shall be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the legislature, or authority derived from that body"(Article 28, Part I). "But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people" (Article 12, Part I). "Full power and authority are hereby given and granted to the said general court to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same" (Article 5, Part II). "All money

> bills shall originate in the house of representatives; but the senate may propose, or concur with amendments, as on other bills" (Article 18, Part II).

These constitutional provisions are very familiar to the Court, having been the subject of interpretation in numerous cases. For example, the Court stated in the 1978 case of *Crown Paper Co. v. City of Berlin* in the clearest of terms that "absent legislative authority, taxes cannot be assessed in New Hampshire." Even more apropos to *Claremont*, in the 1908 case of *Canaan v. District*, the Court expressly dealt with the suggestion that where it declares a tax unlawful because it does not comply with the "proportional and reasonable" requirements of Article 5, Part II, the Court has the power to revise the law to *make* it comply:

> The constitution is not self-executing in this respect. It does not authorize any officials or department to assess taxes, except by authority from the legislature. If the true construction of the constitution requires the legislature to impose taxation upon all classes of property in the state, the failure of the legislature to comply with the constitutional command would be a violation of duty imposed on it by the fundamental law. If we assume the action of the legislature to have been unconstitutional because of a failure to tax all classes of property, the unconstitutional action of the legislature in refusing or neglecting to provide for the taxation of certain classes of property would not authorize the court to invade the domain of the legislature and order the taxation of such property; for the power of taxation is included within the supreme legislative power vested by part 2 of the constitution in the senate and house of representatives.

In other words, the Court has neither the power to create a tax of its own, nor the power to modify an existing tax, nor the power to direct the Legislature to do what it is powerless to do itself. All that the Court can do in the realm of taxation is declare an existing tax unconstitutional - as it purported to do in *Claremont II* - and either order the tax collector not to collect it or exonerate the taxpayer from paying it - as the plaintiffs may or may not argue it should do when and if we ever get to *Claremont V*.

But even assuming that the Court were to invent its own tax and find a way to collect it, does the Court have the power to spend the money? Again, the Constitution speaks directly to this issue and, again, the answer is "no:"

> "No moneys shall be issued out of the treasury of this state, and disposed of (except as may be appropriated for the redemption of bills of credit, or treasurer's notes, or for the payment of interest arising thereon), but by warrant under the hand of the governor for the time being, by and with the advice and consent of the council, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court" (Article 56, Part II). "[Taxes are] to be issued and disposed of by warrant, under the hand of the governor of this state for the time being, with the advice and consent of the council, for the public service, in the necessary defense and support of the government of this state, and the protection

> and preservation of the subjects thereof, according to such acts as are, or shall be, in force within the same" (Article 5, Part II).

These provisions have also been interpreted by the Court to mean what they say. For example, in a 1910 *Opinion of the Justices*, the Court stated that "From these provisions of the constitution, it is clear that the governor has no authority to draw his warrant upon the treasury in a particular case, unless there is some existing act or resolve authorizing such payment." Moreover, in the 1950 case of *State v. Kimball*, the Court made it clear that no one except the Governor and Council may direct that funds be withdrawn from the State treasury, even upon proper legislative authorization. In other words, a *judicial* authorization for an expenditure would be unavailing and the State Treasurer would be acting wrongfully to comply with it.

The mere fact that some judges in some other states have purported to wield the power of the purse and of the sword in their efforts to remediate perceived constitutional violations involving the schools in their jurisdictions is surely no good reason for our Court to do likewise. Besides potential differences between our Constitution and those of the states which have been victimized by such judicial orders, most of these orders were simply exercises in judicial hubris. A political scientist writing about the Depression-era Court coined a word for this brand of tyranny; he called it "krytocracy." It means government by judges. The Constitution of New Hampshire, however, contemplates a different form of government; it is one based upon the consent of the governed. We call it "democracy."

Accordingly, orders from the Krytocracy are out!

Part VIII – Conclusion

Although it is virtually impossible to canvas all remedies that the Court might contemplate for the *Claremont* plaintiffs when and if the case ever gets to the remedy stage, I think we have fairly well covered the range of realistic possibilities, and the landscape looks pretty barren. I just don't see any appropriate legal remedy for the supposed legal "right to an adequate education, adequately funded." Maybe the Court has a different crystal ball, but I doubt it. My guess is that the Court thought that by delaying the effective date of its decisions, it would simply be able to sidestep the issue because the Governor and the Legislature would just roll over and change the laws.

But whether the laws get changed or whether they don't, and whether the *Claremont* case ever gets to a remedy stage or whether it doesn't, is not the be-all and end-all of the matter. As Justice Kennedy stated in *Missouri v. Jenkins*, "This case is a stark illustration of the ever-present question whether ends justify the means." According to our own Court in *Petition of Public Service Company of New Hampshire*, however, "Desirable ends will not validate unlawful means."

As Chief Justice Doe said in his opinion for the Court in *Edes v. Boardman*, decided in 1879:

> [I]t is a vain thing to imagine a right without a remedy. Want of right and want of remedy are reciprocal.... When the law... declines to interfere between the claimant and his disturber, and stands, as it were, neutral between them, it is manifest that, in respect to the matter involved, no claim to the legal rights can be advanced.

The point is that the *Claremont* case is a judicial decision in a remediless case. As such, it is no more than an advisory opinion. It should have been dismissed by the Court at the outset. In fact, there is even a long-shot chance that it could *still* get dismissed if the Governor and/or Legislature take appropriate action to press the point.

If the Court's overreaching in the *Claremont* case is ultimately the cause of its undoing, it will have no one to blame but itself. The Justices of our Supreme Court apparently think that our system of education is in need of reform. Contrary to what they may believe, however, if the Court had declined to decide *Claremont*, that would not be the equivalent of the Court *approving* of the existing educational scheme in New Hampshire. As the US Supreme Court stated when it refused 25 years ago in the *Rodriguez* case to find an affirmative right to education in the Federal Constitution, "We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo."

If only the Court had heeded its own words, penned by the majority in the *Public Service Company* case quoted from above in response to an argument of the dissenters (led by then Associate Justice Brock) that the Court should issue an advisory opinion because the issue was "important:":

> All across our State and nation, lawyers daily are faced with important legal questions which they would prefer to have definitively answered by an appellate court. Our constitutional republic, however, confines the judiciary to deciding cases and not to serving as a "super law firm," no matter how high the stakes or how important the question. Were we to accept this transfer, the power of the judiciary would be expanded beyond anything heretofore known in America. The hydraulic pressure of a hard case cannot compel us to expand our limited authority under the constitution. The judiciary's ship is not to meant to be all sail and no anchor.

Rasputin

ENDNOTES

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[98] Indeed, when the principle is phrased in this manner, one can more fully understand the connection between the otherwise separate parts of Justice Marshall's opinion in Marbury v. Madison. In his mind, the doctrine of judicial review and the notion that judicially-determined rights imply judicially-enforceable remedies were inextricably linked together. To put it simply, if the Court's power to declare things unconstitutional were to have any real meaning, the Court had to have the power to do something about it. Or, as others have since expressed the matter, unless the Court can be deemed to have the power to grant a remedy for the violation of a constitutional right, the Constitution is but a "mere form of words".

[99] Note, however, that Article 14 can also be read in another, more limited, way. In its guarantee of a remedy for "injuries" to one's "person, property or character", the provision has a certain tort-law flavor to it. On this level, Article 14 appears to be simply a guarantee that common law remedies for personal injury claims, especially the remedy of money damages, will not be impaired. This is certainly the way in which the provision was interpreted in the 1979 case of Estate of Cargill v. City of Rochester, where the Court stated that, "the purpose of part I, article 14 was to make civil remedies readily available, and to guard against arbitrary and discriminatory infringements on access to the courts." On the other hand, Article 14 can also be read as intending to guarantee a judicial remedy for the violation of all justiciable rights, including, but not limited to, those guaranteed by the Constitution. This is the way the Court read the provision in the recent case of Marguay v. Eno, where it cited Article 14 for the proposition that "a denial of a constitutional right demands some vindication in the law."

[100] The concern over suits by hypothetical parties manifests itself in the doctrine of "standing." Among other things, this generally means that the parties to litigation must have a personal interest in the dispute and that, unless so authorized by a specific statute, they do not appear exclusively in a representative capacity as a proxy for someone else. For example, the Court held in the 1982 case of Sununu v. Clamshell Alliance that "neither the constitution nor the laws of this State authorize a taxpayer to bring a suit on behalf of the State." In addition, the claims that a party may assert must be "definite and concrete touching the legal relations of adverse parties." This requirement of adversity, in turn, means that the interests at issue must be something more than just amorphous political, social or moral interests such as the interest which all citizens presumably have in seeing the law is obeyed. Accordingly, prior to Claremont, the Court generally required that either (1) the plaintiff have some type of personal economic interest which was affected by the dispute at hand (such as a taxpayer contesting the validity of a tax), (2) the plaintiff claim that some protected legal interest of his had been or probably will be injured (as in the case of the victim of a tort or of the non-breaching party in a contract dispute), or that the plaintiff be a member of a class expressly granted standing by a statute (such as an abutter to a proposed real estate development who is defined as "an aggrieved party" under our zoning and planning laws)

As we learned in an earlier Letter, Claremont eviscerated much of the lore of standing when the Court held that any citizen may bring an action to enforce what the Court said was the public's right to an adequate education. [It must be acknowledged, however, that Claremont is not the only case in which our Court failed to honor the established rules of standing. For example, in the 1974 case of O'Neil v. Thomson, the Court allowed the officers of the House and Senate to bring an action challenging certain executive orders of the Governor which imposed a State hiring freeze, but which did not affect any of the plaintiffs personally. The Court held that the plaintiffs "have sufficient right and interest in the performance by public officers of their public duties and in the preservation of an orderly and lawful government to entitle them to maintain these proceedings." On the other hand, the plaintiffs in O'Neil were not just ordinary citizens and, therefore, there was at least an arguable basis for giving them standing to enforce public rights.]

[101] Although the court has said on many occasions that a justiciable controversy "cannot be based on a set of hypothetical facts" and that the facts must be "complete, mature, proximate and ripe", this is not to say that courts may not give any consideration to hypotheticals in their decisions. On the contrary, the use of hypotheticals to test the logic of one's argument is a typical form of legal reasoning. Indeed, the jurisprudential quest for "neutral principles" virtually demands that any legal proposition be subjected to such a test to see how it holds up when applied beyond the case at hand to variant factual situations that may come up in the future. This use of hypotheticals as an intellectual device to establish legal principles of sufficient breadth that we can keep our promise to be a government of laws, not men, however, is a far cry from a court deciding a case in which the facts that are supposedly at issue or the parties who are supposedly at odds with each other are, on the contrary, made up.

[102] If the potential problem with a declaratory judgment is its arguable prematurity, at the other end of the timing spectrum is the case which has become moot. This is the case where, for example, some change occurs in a party's status while his case is on appeal which renders irrelevant or unobtainable the relief which he was seeking. For instance, an athlete who sues to be granted a position on an Olympic team has a moot case when the Olympics come and go before his case is heard. Likewise, a convicted criminal who seeks to overturn his conviction and be released from jail loses the remedy he seeks when he serves his entire sentence while his case is pending on appeal. As the Court said in its 1990 decision in Appeal of Hinsdale Federation of Teachers, it will generally refuse to review a question that "no longer presents a justiciable controversy because the issues involved have become academic or dead." Nevertheless, just as with respect to the notion of ripeness, the Court has come to relax its position on whether or not it may decide a moot case. As the Court said recently in the 1996 case of Petition of Brooks, if the issue "involves a significant constitutional question or an issue of significant public concern," a party who desires to pursue a case which has become moot may be permitted to do so. On the other hand, just as in the declaratory judgment situation, the assumption in the moot case is that the only issue is timing and that the Court could have provided a remedy if it had only acted sooner.

[103] This is why the mere fact that the Court issues a declaratory judgment, but does not grant the successful plaintiff any remedy does not necessarily mean that the Court has decided a remediless case. There is a genre of cases, especially those involving the Governor or some other high ranking member of the executive branch as a defendant, in which the Court has undertaken to declare that the plaintiff was right, but where the Court has also stated that it was unnecessary to issue any remedial order against the defendant(s). The most notable case in this category is the case of O'Neil v. Thomson, mentioned in a prior footnote. Although the Court held that certain executive orders were "beyond the powers of the Governor and invalid", the Court noted that it did "not recommend or issue an injunction" against the Governor. However, the Court clearly could have issued an injunction to the Governor directing him to perform the ministerial act of simply rescinding his executive orders. Consequently, the reason that the Court gave the Plaintiff no remedy was presumably out of deference to the office of the Chief Executive. [Interestingly enough, the only private party which has been accorded the same type of deference is the N.H. Bar Association. For example, in the 1986 case of Petition of Chapman, the Court held that the Bar Association had been engaging in lobbying activities which were contrary to its charter, but it declined to issue

a cease and desist order on the grounds that it was unnecessary. Again, however, there is no doubt that the Court *could have* issued such an order.] On the other hand, where parties of lesser status than the Governor are the defendants, the Court has dismissed the case for lack of jurisdiction if the only thing the plaintiff is seeking is a declaratory judgment as to the legality of the defendants' proposed actions. For example, in the 1938 case of Conway v. Water Resources Board, a taxpayer requested the Court to rule that the expenditure of public funds by the State Water Resources Board was unconstitutional, but the plaintiff specifically withdrew its request for an injunction against such expenditure. Noting that "there is no right to an adjudication of matters not in contention", the Court refused to allow the case to be heard.

104 In fairness, I should point out that there are several New Hampshire declaratory judgment cases which point in the opposite direction. The first of these is the 1890 case of Attorney-General v. Taggart. In that case, Attorney General Barnard petitioned the Supreme Court for an order of mandamus directing the President of the Senate, David Taggart, to assume the duties of then Governor Goodell on account of the latter's extreme sickness. Senator Taggart was reluctant to do so because Article 49, Part II, of the Constitution, which made the Senate President the next in line for succession to the duties of the Governor in the event of a "vacancy", did not specifically mention illness as a cause therefor. The Court, however, had no trouble concluding that a disabling illness was a proper occasion upon which to declare a vacancy in the office. The hard question was whether the court could do anything about the situation. The Court specifically noted that there was a question as to whether or not it had the power to compel Senator Taggart "to exercise the governor's powers in a particular manner (approve and sign a bill passed by the senate and house, concur with the council in the appointment of a justice of the peace or the pardon for a convict ...)". Nevertheless, the Court purported to avoid this issue by limiting its order to simply directing Senator Taggart to serve in the office. As to the possibility that he might not comply with even that order, the Court stated that, "an amendment of the petition could raise the question of whether the best procedure would enable the state to obtain a judgment establishing the fact of an executive vacancy, and the public right to [Mr. Taggart's] service as a substitute. A decision of this question might be as important as an adjudicated reformation of a deed, or as any other establishment of a private right by the declarative judgment."

Almost 100 years later, the Taggart case was cited favorably by the Court in its 1974 decision in Brouillard v. Governor and Council, another declaratory judgment case involving the office of Governor. By statute, the Governor and Council were supposed to appoint the Commissioner of Health and Welfare from a list of two or more nominees submitted by an advisory commission. Governor Meldrin Thomson, however, refused to choose either of the persons whose names were submitted to him by the commission. The Court specifically discussed the question of whether or not, if it found that the Governor had not complied with the law, it had the power to grant the petitioners any remedy. Noting that the act of appointment of a government official was a discretionary one, the Court declined to issue an order against the Governor. Notwithstanding its conclusion that it *could* not (or at least it *would* not) issue such an order, the Court nevertheless elected to decide the question of whether or not Governor Thomson was acting in violation of the statute. Accordingly, the Court concluded its opinion with the by-then gratuitous statement that "the responsibility for leaving the office vacant lies with the Governor."

105 This list of parties who may properly ask for advisory opinions may offer some explanation for the Taggart and Brouillard cases. Although they are still anomalies in that they appear to be advisory opinions issued outside the context of Article 74, they do have a kinship to Article 74 cases. In the Taggart case, the petitioner was the Attorney General, but he was apparently acting at the behest of the Governor in bringing the petition. Additionally, the defendant, the President of the Senate, apparently indicated to the Justices that he was desirous of having their advice (and stamp of approval) upon the question of whether or not he should assume the role of the Governor. Similarly, in the Brouillard case, the petitioners were the members of the advisory commission who had submitted the nominees for Commissioner of Health and Welfare to the Governor and the Council. Although their petition was nominally brought against both the Governor and the Council, it appears from the case that the Council supported the petitioners' case. In addition, the impasse concerning the appointment of a Commissioner had already been the subject of two prior advisory opinions, one requested by the Governor and Council and the other requested by the Senate. Thus, although the Court does not rely upon this fact in either of these cases, it appears that they both came about as close as one can get to actually being Article 74 cases.

The similarity of the parties to Article 74 parties and the fact that the case involved the powers of the Governor may also explain the relaxation of the standing rule and some of the other justiciability doctrines which characterize the O'Neil case, also discussed above. On the other hand, the real explanation for the Court's extraordinary extension of its jurisdiction in the O'Neil, case (and in the Brouillard case and a number of other cases decided in the 1970's, as well) is that the Governor who bore the brunt of the Court's judicial wrath was the feisty and iconoclastic Meldrim Thomson, Jr. Suffice it to say that Governor Thomson had a habit of pushing his own authority to its constitutional limits. As the old saying goes, "bad cases make bad law."

106 Even in cases where the Legislature's requests for an advisory opinion concerning the interpretation of existing law may have some bearing upon a pending proposal for new legislation, the Court has generally refused to answer the question. An interesting pre-Claremont example of this is the 1959 Opinion of the Justices involving the question posed to the Court by the Senate concerning a bill pending in that body to allow three specific school districts to enter into a long-term contract for the joint construction, maintenance and funding of a high school. The question which the Senate asked and which the Court declined to answer was, "Do school boards presently have authority or the power to enter into a contract beyond one year?" What makes this case interesting is not the fact that the Court declined to answer the question that the Senate asked. It is the fact that the only question that was asked related to the power of school districts to enter into long-term contracts; nobody apparently even thought to question whether or not local districts should be funding their own schools.

107 In this sense, advisory opinions are just like rulings made by a court in a litigated case which go beyond the facts of the case or which are unnecessary to the court's resolution of the dispute. Such rulings are known as obiter dictum and are not considered to be

binding upon courts in future cases. On the other hand, it is probably true that many of the most quoted portions of famous judicial opinions are technically not a part of the holding of the case. For example, as we pointed out in a prior Letter, despite its monumental significance in American jurisprudence, Justice Marshall's grand assertion of the power of judicial review in Marbury v. Madison was actually mere dictum. Nevertheless, when a court egregiously goes out of its way to volunteer its opinion on a matter which is not at issue in the case, the event is likely to provoke dissension within the bench itself. For example, in the 1984-5 case of Appeal of Seacoast Anti-Pollution League, the majority proceeded - "in the interests of conserving judicial resources and judicial economy" - to address an issue raised by the parties, but admittedly made irrelevant by the Court's holding on another point in the case. The consequence of this adventure into the land of dictum was that several Justices felt compelled to write dissents castigating the majority for issuing "a sweeping declaration of the rights of future litigants, utilities and investors." [In fact, the criticism of the dissenters could just as easily have been leveled at Claremont: (1) "the breadth ... of the majority's holding ... abdicates the responsibility of this court as factual situations present themselves in the future"; (2) "the majority's resolution of this case without an adjudicated factual basis violates notions of substantive due process"; and (3) "the majority's acceptance of (its own definition of an adequate education) denies opposition parties procedural due process by impairing their appellate rights without an opportunity to be heard on the factual basis for the decision."]

108 It is interesting to note that the proposal to grant the US Supreme Court advisory opinion authority was phrased in terms which are quite similar to Article 74, Part II, of our Constitution: Each branch of the legislature, as well as the supreme executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions.

109 In addition to issuing decisions and orders in contested cases and advisory opinions in Article 74 cases, the Court also publishes administrative orders pursuant to its constitutional and inherent powers to supervise the court system and the bar. Although the Court's rule-making is often submitted to public and professional comment, this is not an adversary process and the Court's orders are more in the nature of reports than judicial opinions. In any case, the Court's practice of issuing such orders provides no basis for arguing that it should be able to decide a remediless case.

110 Again, I note that there is some contrary jurisprudence in this area. In an Opinion of the Justices issued in 1881, the Court did answer a request from the Senate concerning its powers under the Federal Constitution to elect a United States Senator. (Prior to the passage of the 17th Amendment to the Constitution, US Senators were not popularly elected.) Apparently, in response to some reservations as to whether or not it had the authority to act, the Court observed that "it has never been considered essential that the question proposed should be such as might come before [us] in [our] judicial capacity." On the other hand, one Justice refused to participate in the opinion because he was "in doubt whether [the question] is one upon which the opinion of the court may properly be required under the constitution."

111 One way to think about sovereign immunity in a democracy is that it is a way of saying that we don't sue ourselves. For both historical and practical reasons, the doctrine was universally accepted into the jurisprudence of our new nation and of each of its constituent states in the post-Revolutionary period. This was attested to by Alexander Hamilton in The Federalist, No. 81: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union."

112 The Court, however, declined to declare the law invalid. Instead, it declared that, "the legislature should be given the opportunity to take corrective action, increasing the limits on recovery to a level which can satisfy, to a reasonable degree, the valid claims of injured parties, before the judiciary acts." The Legislature responded by increasing the damage cap to $250,000 per claim and, in a 1985 Opinion of the Justices, the Court upheld the amended law as constitutional.

113 On the other hand, it is true that the social compact theory was adverted to by Justices Douglas and Batchelder in their dissent to the Brousseau case, cited above:

In joining a just society, we surrender the control over certain of our rights to its government for the greater good of the whole. That surrender is valid only so long as there is a quid pro quo, with the society providing an equivalent larger good for its exaction from the people .... Whatever theoretical basis may have existed in the past for the people's surrender of their right to redress from the State no longer can justify the unequal tradeoff that favors the State's coffers. In other words, the bargain is out of balance.

Justice Douglas and Batchelder, however, were clearly not making this argument to support a total denial of the validity of sovereign immunity, either in general or only as to constitutional claims. On the contrary, they favored retention of sovereign immunity for discretionary acts; their beef was with the sovereign having immunity for *all* claims.

114 As the Court stated in its 1967 decision in N.H. Water Resources Board v. Pera, "[T]he doctrine of sovereign immunity does not apply to eminent domain proceedings because the constitutional requirement of just compensation is self-executing and not dependent upon waiver of immunity."

115 If you find it confusing to be told that a town can violate the Constitution when the Constitution supposedly only addresses the relationship between citizens and the State, and yet the town does not have the benefit of the State's sovereign immunity, don't feel alone. The fact of the matter is that this entire area of the law is beset with metaphysical distinctions. It is as if the jurisprudence of governmental liability and the jurisprudence of governmental immunity developed on two independent tracks with the right hand never knowing what the left hand was doing. Indeed, the court itself commented in its l993 decision in Schoff v. City of Somersworth that "the law of municipal liability and immunity historically has been composed of a patchwork of judicial decisions and statutory

enactments." On the other hand, a certain consistency has eventuated. As reflected in the Rockhouse case and others like it, the defense which the Court has extended to the State's political subdivisions through its judge-made doctrine of municipal immunity has essentially mirrored the defense which the Legislature has made available to the State through its statutory affirmation of the doctrine of sovereign immunity. In both cases, governmental entities are immune from liability for their policy-making functions and other discretionary acts. (Note also that the Legislature has, in turn, confirmed the judge-made rules for municipalities by enacting RSA 507-B, which provides for the same discretionary act exemption.)

116 It is true that in the recent case of Schoff v. City of Somersworth. the Court approved a legislative waiver of municipal immunity for certain discretionary functions with respect to the design of town roads, stating as follows: "One of our primary concerns underlying the discretionary function exception is to limit judicial interference with legislative and executive decision-making. There is no such interference when the Legislature broadens municipal liability to include certain discretionary functions." However, the functions that were involved in the Schoff case were statutory and common law duties of due care, not the Legislature's *constitutional* duty to pass good laws. Moreover, for whatever this may be worth, the issue was whether or not the Legislature could waive a *municipality's* immunity for discretionary acts, not the State's.

117 We can assume that the plaintiffs would argue that the Court should reject the defense on the grounds that the Legislature has waived the State's immunity by having in place our general declaratory judgment statute, RSA 491:22. In the l981 case of State v. Grinnell, the judge of the Town of Derry District Court brought a declaratory judgment action directly against the State challenging the constitutionality, under the Federal Constitution, of the provision of the New Hampshire Constitution setting a mandatory retirement age of 70. The State's motion to dismiss on the grounds of sovereign immunity was given short shrift by Court: "We need not pause long to consider this asserted jurisdictional hurdle. RSA 491:22 has long been construed to permit challenges to the constitutionality of actions by our government or its branches." However, the Grinnell case is no longer good law. RSA 99-D, in which the Legislature reasserted the State's general sovereign immunity except where specifically waived, and RSA 541-B, in which the Legislature provided for a waiver of sovereign immunity for tort claims except those involving discretionary acts, were both passed in l985, four years after Grinnell was decided. Moreover, when these express affirmations of the State's sovereign immunity are combined with the Court's general rule (as stated in a number of cases) that "statutory waivers of sovereign immunity are to be strictly construed," it would be very interesting to see what argument could be made to support the notion that the declaratory judgment statute can still be deemed as a waiver of the State's sovereign immunity.

118 The Court also ruled that the Article 14 does not memorialize some idealized *level* of remediation as a constitutional minimum. In this regard, the Court specifically held in the Cargill case that, "Part I, article 14 does not guarantee that all injured persons will receive full compensation for their injuries." Likewise, Article 14 does not create vested *rights* to any particular remedy. Accordingly, even if the violation of some legal interest protected at common law carried with it a given form of remedy, the Legislature is perfectly free to eliminate the traditional remedy, so long as the new system of recovery "provides a reasonable alternative for existing rights". For example, in the cases of workmen's compensation and automobile liability insurance, the Court has held that an administratively administered system of no-fault compensation provides an adequate quid pro quo for our historical, judicially-administered tort system of recovery.

119 The irony is that the Legislature's future response to the Claremont decisions could permit the Court to bootstrap itself into a position where it obtains the power which I suggest it may not presently have to award a damages remedy in the Claremont case. If the Legislature enacts an education law in compliance with the dictates of Claremont and if such a law expressly acknowledges the State's duty "to provide every educable child with a constitutionally adequate education", the Court could seize upon such language as a purported expression of legislative intent to provide a damages remedy for the State's failure to fulfill its duty. To begin with, the Legislature will have converted its Claremont-inspired *constitutional* duty into a *statutory* duty. Secondly, such a law would be construed against a backdrop of case law in which the Court has interpreted other statutes providing for an "adequate" this or a "humane" that as (1) authorizing a private right of action for money damages in favor of any party who was intended to be benefited by the statute and (2) constituting a waiver by the State of its sovereign immunity so that such a claim could be brought against the State itself. Two cases in which the Court did just such a thing are the 1979 case of Chasse v. Banas (RSA 135-B:43, guaranteeing every mentally ill patient at New Hampshire Hospital with the "right to adequate and humane treatment") and the 1983 case of State v. Brosseau (RSA 171-A:13, guaranteeing the same things to every developmentally disabled person treated by the Division of Mental Health). In light of these cases, I offer a word to the wise: whether Claremont remains the law of New Hampshire or not, the Legislature should take great care in crafting any laws dealing with education in order to foreclose the possibility of its own statutes becoming the cause of endless litigation and monumental damage awards (unless, of course, that its what the Legislature wants).

120 In fact, in one of its more arcane pronouncements upon the subject of rights and remedies, the Court held in its 1975 case of Sousa v. State that the State actually has *two* kinds of sovereign immunity: (1) immunity from *suit* in its courts and (2) immunity from claims for *money damages* for its torts. The problem is that after the Court made reference to this supposed distinction, it never really developed it in later cases. Consequently, it has become customary to refer to sovereign immunity as a unitary concept which simply operates as a complete defense to a claim against the State. Nevertheless, whether there continues to be a separate, additional sovereign immunity defense which only deprives a plaintiff of his damages remedy or whether the doctrine just finds more judicial favor in cases where the plaintiff seeks money damages, the fact is that sovereign immunity gets much more play in a damages case than it does in any other case.

[121] Another reason (which may indeed be the same reason) for the Court's inability to issue a remedial order directly to the State or to one of the other branches of State Government is sovereign immunity. As the Court held, for example, in the 1953 case of Wiseman v. State, unless the State has consented to being sued for this type of relief, "as against the State [such an order may not be maintained."

[122]The Court has held that it is also not a violation of the State's sovereign immunity for it to issue an order to a State official simply directing him not to enforce an unconstitutional law. The theory was articulated most prominently in the 1938 case of Conway v. Water Resources Board:

While the State cannot be sued without its consent, and while a suit against those representing the State is one against the State when a judgment or decree against them would have the same effect as though it were directly against the State, yet when the alleged or threatened wrong, though colorably the State's and in its name, is only that of its officials or agents, equity is deemed to have power to grant relief. When a law is challenged as unconstitutional, the claim is that the law is void and hence that no law has been enacted. It follows that if the legislature has not acted under authority, no action has been taken by the State, and hence when suit is brought to restrain those representing the State from carrying the void legislation into operation and enforcing it, it is not a proceeding to which the State is a party. What is forbidden by the Constitution is outside the field of state activity; restraint of forbidden action is not imposed by the courts upon the State but upon those asserting the right to take the action as though it were the State's and as though binding upon it.

Note, however, that this concept that State agents are acting in their own behalf, and not for the State, when they seek to execute an unconstitutional law does not carry over to the State's failure to satisfy an affirmative duty, such as to provide an adequate education. In that case, the agents of the State are not acting for the State or themselves; they are not acting at all. Consequently, if the Court orders them to do something and that something is designed to satisfy the State's duty, the officials would clearly be acting for the State and entitled to claim the benefit of its sovereign immunity.

[123] Note, however, the provision at the end of Article 73-a which states that the rules which the Supreme Court issues to government the administration of the courts "shall have the force and effect of law." In an interesting sidelight to this discussion, there is apparently some question as to whether or not that provision was a part of the resolution which was submitted by the voters in 1978 when Article 73-a was added to the Constitution and, therefore, whether or not *it* now has the "force and effect of law."

"Rasputin:"
Letters to the Educators, No. 15

Res Ipsa Loquitur

Well, we have finally come to the end of our journey. This is the last of the Letters to the Educators about the *Claremont* lawsuit. But *Claremont* itself also marks the end of a journey. Or, if it does not represent the journey's end, it at least symbolizes a major fork in the road. The journey to which I am referring is the Court's evolution from The Least Dangerous Branch into something much less benign.

The Court's journey began with a promise. That promise was made in 1784 when our forefathers ratified a new Constitution. One of the dramatic changes made by this Constitution was the formation of an independent judiciary. During the revolutionary period, New Hampshire's government was structured for the exigencies of the times; it was designed to conduct a war. The Government consisted only of a bicameral legislature which, according to Chief Justice Doe (writing 100 years later in the case of *Gould v. Raymond*), possessed "all power, civil and military, including the power of delegating all power." With respect to the judiciary, this included the power to appoint and remove judges at will, the power to reject or revise their judicial decisions, and the power to bypass them completely by conducting trials in the Legislature itself.

After the War For Independence was won, those who had fought so hard to protect their liberties with the sword agitated for some protections by the pen. Besides wanting their constitution to include a bill of rights (which the Constitution of 1776 did not), the citizens of the new State of New Hampshire decided that the powers of government should be dispersed, not concentrated in one body. As a result, one of the primary changes to our form of government which was made by the Constitution of 1784 was the establishment of an executive and a judiciary separate and apart from the Legislature.

In the case of the judiciary, independence was accomplished by giving judges life tenure "during good behavior," and by guaranteeing them "permanent and honorable salaries." Moreover, since the three functions of government - legislative, executive, and judicial - were separated from each other, the decisions of the judiciary were no longer reviewable by the Legislature. As the Court later commented in *Merrill v. Sherburne*, this particular feature of our new Constitution reflected the thinking of all the great men of the day when it came to defining the essence of a limited government:

> It was well known and considered, that "in the distinct and separate existence of the judicial power consists one main preservative of the publick liberty;" that, indeed "there is no liberty, if the power of judging be not separated from the legislative and executive powers." In other words that "the union of these two powers is tyranny:" or, as Mr. Madison observes, may justly be "pronounced the very definition of tyranny;" or, in the language of Mr. Jefferson, "is precisely the definition of despotick government."

At the same time that the judiciary was granted its independence from the executive and legislative branches, it was also given a new power, the power of judicial review. Thus, the branch of government which Alexander Hamilton labeled "the least dangerous branch" was now invested with a most awesome - and a most dangerous - power. In exchange for its new autonomy and its new power, the judiciary made a promise. The promise was that its power of judicial review would be exercised *prudently* and *sparingly*.

Claremont, however, broke that promise. But why should we be surprised? The Framers warned us not to be naive when it came to human beings and power. For example, in his first inaugural address as President of the United States in 1801, Thomas Jefferson said the following:

> Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the form of kings to govern him? Let history answer this question.

Jefferson's co-author of the Declaration of Independence, John Adams, had already answered this question. In a speech which he gave in 1772, Adams proclaimed darkly: "There is danger from *all* men. The only maxim of a free government ought to be to trust no man living with power to endanger the public liberty."

The Framers also warned us how our liberties would be lost. As James Madison put it in a speech he gave to the Virginia Ratification Convention in 1788: "I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations." Jefferson was even more explicit in identifying the *judiciary* as the most likely agent for these silent encroachments:

> It has long, however, been my opinion, and I have never shrunk from its expression, that the germ of dissolution of our government is in the Constitution of the Judiciary; working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction, until all shall be usurped.

So, were we all asleep at the switch? Should we have seen *Claremont* coming? Has our Court been "silently encroaching" and "working like gravity by night and by day" for the last 200 years? The fact of the matter is that there *have* been some warning signs. There are indications in the Court's own opinions that it considers the judiciary somehow exempt from the laws which apply to everyone else. For example, here are some statements made by the Court over the years, which perhaps should have alerted us to the danger ahead:

> "All judicial officers, when acting on subjects within their jurisdiction, are exempted from civil prosecutions for their acts." *Evans v. Foster* (1819).

"With reference to the purpose of Article 37 of the Bill of Rights, it should be remembered that during the Revolution all sorts of executive and many judicial powers had been exercised by the Legislature and this practice had resulted in great dissatisfaction .... No evidence has been discovered of any contemporary dissatisfaction over the wide range of duties performed by the courts. The convention was engaged in setting up new executive and judicial branches of the State Government and it may well have been that the prime purpose of Article 37 in the minds of its framers was to protect these new departments from legislative encroachment rather than to circumscribe within strict limits the functions of the Court." *Attorney-General v. Morin* (1943).

"It has never been the tradition of the jurisprudence of this court to refuse to exercise judicial power when there was an established need for it and there was no constitutional barrier to its exercise." *In re Mussman* (1972).

"Nor does suspending the pay of a judge as a matter of internal discipline by this court violate the State constitutional provision providing for ‘permanent and honorable salaries... for the justices of the superior court.’ N.H. CONST. pt. II, art. 59. This provision ‘protects judges from being influenced by the legislature's power of the purse.’ It does not limit this court's inherent judicial disciplinary power." *Opinion of the Justices (Judicial Salary Suspension)* (1995).

"The Constitution of 1784 embodied the principle of separation of powers. Three reforms were enacted with the purpose of fostering an independent judiciary. Judges were given the constitutional right to permanent and honorable salaries, were prohibited from holding plural offices, and were granted tenure during good behavior.” *Grinnell v. State* (1981).

"It is long settled that this court is the final arbiter of State constitutional disputes. The interpretation of our constitution is a traditional function of the judiciary and is not within the competence of the other two branches." *Smith v. State* (1978).

"Accordingly, we hold that RSA 281-A:17, II (Supp. 1989) imposes upon local government a new responsibility within the meaning of article 28-a of the New Hampshire Constitution [the unfunded mandate provision] and in those instances where the State has failed to either obtain the consent of local governments or provide them with the requisite funding, it is also unconstitutional. In holding as we do today, we do not imply that actions of the State judiciary, that by their nature may impose a new, expanded or modified responsibility upon local government, are also unconstitutional. On the contrary, it is the duty of the judiciary to interpret the law, not make it. In the context of article 28-a, it is the law that mandates or assigns any new, expanded or modified responsibilities; the judiciary merely declares under what circumstances it does or does not. Furthermore, article 28-a contemplates a set of circumstances whereby local government can reject a particular State mandate by failing to approve local funding. Thus, if we were to interpret article 28-a as applying to acts of the judiciary, we would necessarily clothe local government with the authority to

> reject the decisions of the judiciary at their own election, thereby reducing the doctrine of separation of powers to a nullity. This we shall not do." *New Hampshire Municipal Trust v. Flynn* (1990).

One can certainly see the germs of *Claremont* in these excerpts from the prior opinions of the Court. On the other hand, the *Claremont* decisions were not just another hashmark along a continuum; they truly were a quantum leap beyond anything that the Court had decided previously. As I said in the very first *Letter to the Educators*, "the Court [in *Claremont*] violated every canon of judicial restraint when it reached out to lecture our duly elected officials on social policy and undertook to elevate its own views to constitutional stature." After six months and over a dozen more Letters to the Educators, I think you get my point.

However, you don't have to take my word for this; all you have to do is to read the words of the Court. Attached hereto is a series of excerpts from *Claremont I, II, III,* and *IV* which thematically track the *Letters to the Educators*. Each theme is exemplified by one or more quotations from general sources. Then, the position taken by the Court in *Claremont* is juxtaposed against the position which it took on the same issue in other cases (and, sometimes, even in *Claremont* itself). In all cases, the contrasts are significant; in some cases, they are dramatic. Indeed, nothing condemns the Court for its *Claremont* opinions more than its own words. That is why I have titled this last Letter "Res Ipsa Loquitur." It is a Latin phrase which means, "The thing speaks for itself."

If nothing else, this little word game demonstrates how deep is the hole that the Court has put itself in. It has simply gone so far out of its way to reach the result that it desired that there is no turning back. In other words, don't expect the Court to change its mind about *Claremont*.

But what if you don't want the Court to change its mind? What if you think that the State has been delinquent in funding the schools and it is high time that we add some money to the pot? What if you think that local property taxes are an archaic way to pay for education? Shouldn't you just sit back and let the Court pursue its (and your) personal vision of "justice?" Not if you hope to preserve your right to have a say in the matter the next time around - when you may not agree with the Court. For as James Madison said in *The Federalist, No. 51:*

> Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit."

The point is that, as Ralph Waldo Emerson said, "One man's justice is another man's injustice," and if you allow the Court to set the agenda for what is "good" and "fair" and "just" without regard to whether or not this is the Court's job, you may be happy today, but you will ultimately be very sad tomorrow.

So what can you, John Q. Public, do about the situation? It should be obvious: if you can't change the Court's mind about the Constitution, you must change the Constitution.

George Washington said in his *Farewell Address* that "the basis of our political systems is the right of the people to make and to alter their constitutions of government." Chief Justice Marshall said much the same thing in his 1821 decision in *Cohens v. Virginia*, "The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will."

Note that you don't have to conclude that the Court was wrong in *Claremont* to think that it is right to change the Constitution. Even if you believe that the Framers actually meant to create a judicially enforceable "right to an adequate education, adequately funded," you might have been persuaded by these Letters that this is not a good way to run a railroad. If so, you are just as entitled to change the Constitution as someone who thinks that the *Claremont* decisions were dead wrong. As Thomas Jefferson said in a letter he wrote in l816 to Samuel Kercheval:

> Each generation is independent of the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness.

In any case, however one comes to the conclusion that something must be done about *Claremont*, the Constitution itself acknowledges our right to change it. It also provides us with directions as to how to do it. What the Constitution doesn't do, however, is tell us what changes to make.

Some of you may be satisfied with a narrow, targeted amendment which seeks only to undo the specifics of the *Claremont* holdings on educational adequacy and\or tax equity. Others may feel that limits need to be placed upon the Court's power of judicial review. Still others may feel that the answer lies with elected judges or judicial term limits. Where one comes down on these issues not only depends upon one's views about the proper form of government in a constitutional democracy, but it also depends upon one's view of *Claremont*, I, for one, see no need for radical surgery, at least not yet. Our form of government has served us well for the last two hundred years and I see no reason that it won't do just as well for the next two hundred. I am inclined to believe that *Claremont* was an aberration. On the other hand, it was and is a *gross* aberration. Consequently, it cannot be permitted to go unchallenged. Like a cancer tumor, it must be excised before it spreads. They say that the price of liberty is eternal vigilance. So we must reverse *Claremont.*

But let us not throw out the good with the bad. Let us have faith that a reversal of *Claremont* will sufficiently chastise the Court for its abuse of power. I am willing to assume that the Court will henceforth exercise that judicial restraint which, for the most part, has characterized its opinions in the past. And if I am wrong, we can always change things again. For we must never forget that we are the ones who have the ultimate authority. As James Madison said:

> We have staked the whole future of American civilization, not upon the power of government, far from it. We have staked the future of all political institutions

> upon the capacity of mankind for self-government: upon the capacity of each and all of us to govern ourselves.

We need only consider one final aspect of the notion that not all provisions of the Constitution which impose duties upon the legislative or executive branches are subject to judicial review. This does not mean that the Constitution is a "mere form of words." Just because the Legislature or the Governor may not always be accountable to the Supreme Court does not mean that they are not accountable at all. As Article 8, Part I. of the Constitution states: "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them." As Justice Clarence Thomas said in his opinion in *Missouri v. Jenkins*, "At some point, we must recognize that the judiciary is not omniscient, and that all problems do not require a remedy of constitutional proportions." The people still retain the most effective remedy that exists in democracy: if they are displeased with the performance of their officers and magistrates, they can vote them out of office. Isn't that the way it is supposed to be?

Rasputin

ENDNOTES

[1] Probably the best example of the Court's combative response to criticism concerns the circumstances surrounding the *LaFrance* case discussed in Letter #2. In l974, the Court ruled in the case of *State v. Morton Whippie* that witnesses who testified in Court, including police officers, should not be permitted to wear a firearm. The Legislature responded in l975 by passing a statute expressly providing that "law enforcement officers shall be permitted to wear firearms in any courtroom in the state." In l983, the issue was joined when Superior Court Judge William Cann refused to permit the Laconia Chief of Police from testifying in his court while wearing a sidearm. Instead of treating this as the tempest in a teapot that it was, the Supreme Court issued a grandiloquent defense of the judiciary's inherent powers to rule over the courtroom - free from all legislative interference. The immediate consequence of the Court's petulance was the introduction of more than a dozen separate resolutions in the Constitutional Convention of l984 designed specifically to reverse the *LaFrance* case or to otherwise diminish the powers of the judiciary. Although none of these was adopted by the Convention, that was probably due to the fact that the Convention had been packed with sympathetic lawyers. The Court, however, apparently does not recognize that it dodged a bullet; instead, in a recent *Claremont*-inspired article on the independence of the Judiciary in the *New Hampshire Bar Journal*, Justice Batchelder reveled in this case as a supposed affirmation by the public of the judiciary's own expansive view of its power of judicial review.

FINIS

In Claremont I and II, the Supreme Court based its authority to intervene into the education funding issue and to read into Article 83 of Part II of the Constitution mandates for (1) a statewide definition of an adequate education, (2) a formulaic determination of its cost, and (3)"command-and-control" accountability, upon its expressed understanding of "the situation of the parties at the time the instrument was made, that [we] may gather their intention from the language used, viewed in the light of the surrounding circumstances." No evidence could possibly express their intentions more clearly than what they actually did, evidence conspicuously absent from both decisions. This article details what they did, and, as the author makes clear, "the prevailing view of state-mandated 'adequacy' for all could not have been less relevant to the original intent of 1784." Published eight years after Claremont I and four years after Claremont II, this article should have sparked a reappraisal by the Court of the soundness of those decisions. Instead, the Court has ignored it.

Walter A. Backofen:[1]

Claremont's Achilles' Heel: The Unrecognized Mandatory School-Tax Law of 1789

(From The New Hampshire Bar Journal, March 2002, pages 26-29)

As the Legislature must propose in the wake of the *Claremont* decisions,[1] the Supreme Court continues to dispose, to leave New Hampshire with the company of more than a few states having a similar experience today.[2] Yet there was a time when New Hampshire's General Court, on its own initiative, set the pace for enlightened change in public education.

The exact moment came on June 18, 1789, five years and sixteen days after New Hampshire received the minimalist charge from its newly adopted Constitution, "to cherish the interest of literature and the sciences."[3] As part of an opening wave of federal-era legislation, every education statute out of New Hampshire's past was repealed; primary control of public education was vested in the state; and a state-mandated school-tax policy was enacted, effective in 1790, that served until 1919. In the process, New Hampshire's taxpayers became the first in the nation to be denied the freedom of raising only as much money for their schools as they felt inclined to spend. From 1790 to 1919,

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[1] *The late Walter A. Backofen, a resident of Plainfield, New Hampshire, was a professor of Metallurgy and Material Science at the Massachusetts Institute of Technology. He had a long-standing interest in the social history of this state.*

each New Hampshire town would be told precisely the least amount that would have to be, year by year.

New Hampshire's first public/common-school laws were written by Massachusetts in 1647 when the two colonies were temporarily conjoined, and they lasted in both places essentially unchanged until 1789.[4] The State of Massachusetts passed its own school-reform legislation on June 25, 1789, one week after New Hampshire acted, but without giving up the essence of 1647: Massachusetts taxpayers were still permitted to do no more than "vote and raise such sums of money upon the polls and rateable estates . . . as they shall judge expedient."[5] While towns of fewer than fifty families were still not required to school their children. It was New Hampshire that broke with the past, by disavowing the exclusive local control over school budgets which had proven so disastrous for the last 142 years,[6] and by finally guaranteeing access to public education for every child. This was also a past that had long been under attack in New Hampshire, arguably with never more vehemence than in 1783 by Jeremy Belknap, New Hampshire's premier historian.[7]

Against such a background, the Law of 1789 cannot avoid being a window on how the State Constitution was interpreted by those closest to its framing, even by the framers themselves. Lasting for so long through its effect on school-tax revenue can only be a sign that that early interpretation was slow to change. Now abandoned for over 80 years, the legacy of 1789 seems also to have fallen into a black hole in the state's memory. Until little more than a year ago there was no evidence that any contemporary New Hampshire educator, historian, jurist, legislator, lawyer, or journalist knew of the law's existence, and today there is only scant evidence that any are aware of how it worked.[8] Which means, ultimately, that the Supreme Court decision of 1993 - the more important of the two at the heart of the case - is unconnected to the history of these 130 defining years, and has gone unquestioned in relation to that history.

Implicit in all of this is the standing problem in constitutional interpretation, of updating original intent.[9] The situation in New Hampshire is a textbook example of the challenge to that process. For here, traditional definitional openness - as in the State Constitution of 1784 - may never have been translated more quickly by those on the scene into a formula so numerically precise, that left no doubt about how the two principals in the original school-support equation - the taxpayers and the schoolchildren - were intended to fare. And as if to emphasize that control would now begin with the state, the Legislature of 1789 took its formula from the very statute that had been in force for paying the bills of the province since no later than 1693, and would continue in use for those of the new state until 1933.[10] Coupled with 130 years of regularly published operational data and updates, original intent, as captured in the Law of 1789, can hardly be better defined or more readily discovered. Nor is it more elusive without the guidance of that law.

Perhaps the Court might have argued in 1993 that the ideas of 1789 didn't truly capture original intent, given the five-year delay that separated them from the Constitution's adoption. Or it might have taken the tack favored in a recent newspaper profile of Andru Volinsky, the lead attorney for the Claremont plaintiffs, that the "state had been wrong

for centuries,"[11] which, presumably, would deny constitutional shelter to anything that happened after 1784 (and excuse both profile-writer and Andru Volinsky for showing not the least awareness of 1789). But instead, the Court in *Claremont I* simply stood mute about all that evolved from the unrecognized Law of 1789. And in so doing, it made judicial motives even more suspect because the legislation from 1789 would have immediately handed the Court what it tried through *Claremont I* to tease out of an otherwise unyielding record: the state-mandated support for public education that it needed as the basis for *Claremont II*. There would be a critical difference, however. The Law of 1789 would have allowed no more than a formulaic taxpayer-friendly proportionality to each town's assessed valuation; it would never have given the Court the open-ended amount for the adequate education identified in *Claremont I* as the state's original funding goal in 1784, just five years before 1789. That the Court nevertheless undertook an examination of the "surrounding circumstances" at the time of the Constitution's adoption - and in that was not above using other parts of the post-1789 record for help in the argument it chose to follow - only stresses how decisively this pivotal law was avoided. How close the Court might have come to *Claremont I* had it honored the record is the imponderable.

As all played out after 1789, the Legislature, in its wisdom, decided on the sum of money that would serve the schools of the state, as a whole, for the year ahead. Set at about $16,500 (its pound equivalent) for 1790, this support-threshold was then increased in seventeen steps over intervals of from one to twenty-two years until it reached $750,000 in 1905 and grew no further. The underlying statewide tax base kept on growing, however, and accelerated suddenly after 1900,[12] to end up at around 600 million dollars in 1919 for approximately a twentyfold increase from 1800.

In practice, each town's annual school-tax obligation was made the same share of the statewide threshold as its share of the state's tax base, with that proportion normally allowed to stand for four years. The local mandate was therefore fixed until reapportionment or the next higher step was taken in the aggregate obligation, whichever came first. Although local rates commonly and unavoidably varied a bit between times, the net result was virtually equivalent to a uniform state-controlled school-tax rate that was in decline - often very sharply - for perhaps 80% of its life. Along the "tread" in every threshold step, a rising, underlying valuation necessarily pulled the rate downward; between 1905 and 1919, in years of rampant inflation and no change in state-mandated revenue, it was more than halved as the collective tax-wealth more than doubled. Meanwhile, the school system in any town not expanding its tax base as rapidly as the state's, overall, was put at risk from loss of revenue whenever the rate fell; by the end of the nineteenth century many schools in that predicament were being devastated. In fewer places, where growth outdid the state's, spending became the challenge. Yet the handwriting had been on the wall for years, and as early as 1850 a remedy was attempted with a constitutional convention having something of a *Claremont* agenda but a completely different fate: none of the amendments passed.[13]

By 1850, the rising wealth of the state and the erratically growing annual education-support mandate had interacted to produce an effective school-tax rate of only a few

pennies over $1.00 per $1000 of valuation, for about the lowest in New Hampshire history. This was also nearly where it came to rest when the era of 1789 closed in 1919 after a fleeting, roughly $3.50/$1000 all-time high in 1905. Adding to the tax pool was therefore on the convention's mind. Beyond that, as *The Concord Daily Patriot* saw the dilemma in 1850, essentially 10% of all towns were home to 20% of the state's schoolchildren while raising 30% of the mandatory school-tax revenue. Still, this was only the tip of the inequity iceberg; lost to sight in the averaging was the disparity in per capita support at both ends of the distribution by town, and another in how children compared among the school districts that fragmented every town between 1805 and 1885. In 1833 when the discovery is relatively easy to make, the end-to-end support-ratio from towns at the very extremes was around thirty to one. And that might have been compounded by at least another factor of ten at the district level. By the time of *Claremont I*, 160 years later in 1993, the intertown ratio was only about four to one, after a growth in the average per capita outlay from roughly $1.00 to more like $5000.00.[14] Back in 1851, however, when the dust finally settled, the status quo was simply too taxpayer-friendly, and "the economic men who held that public education is one of the necessary functions of the state but not an all important one" won the day;[15] seventy more years lay ahead for a practice that favored equity for the taxpayer over schoolchildren, and sweetened that equity with the equivalent of a perennially declining mandatory school-tax rate.

Important to emphasize is that myopia is not exclusively a failing of the *Claremont* advocates. Two recent arguments for nullifying the *Claremont* decisions build on the failure of the Constitutional Convention of 1850. Yet in both cases there is no awareness of the law that the convention's amendments were responding to, and each misses the support-disparity that so motivated the convention.[16] To argue that the defeat of the proposed amendments preserved local control over school taxes, as it resisted pressure from the state to surrender that control, is plainly wrong; all the defeat really accomplished was to prevent further state regulation, beyond that already imposed since 1789. In effect, the Constitutional Convention of 1850 was the opening skirmish in a battle over school-tax reform that did not climax until the Court declared a winner in 1993.

The bottom line is that neither side in the *Claremont* controversy is served by the framers' intentions as spelled out so unequivocally in the Law of 1789. Thus, even if both were to drive themselves to understand exactly what this law says, neither would be rewarded for its efforts. The Law of 1789 makes clear that the state, in an act of early enlightenment, did accept responsibility for a threshold of funding for public education, using what amounted to a more or less uniform but free-floating mandatory school-tax rate for the purpose.[17] It also makes equally clear that the prevailing view of state-mandated "adequacy" for all could not have been less relevant to the original intent of 1784. Today, the pronouncements of an activist, ahistorical Court are being challenged by convictions about local control that were abandoned by the legislature over 200 years ago. With myths before facts on both sides, the conflict hardly differs from a religious war, and is as likely to find lasting resolution. That it is being fought in the name of public education is the ultimate irony.

ENDNOTES

1. 138 N.H. 183, 635 A.2d 1375 (1993); 142 N.H. 462, 703 A.2d 1353 (1997).

2. *Equity and Adequacy in Education Finance*: *Issues and Perspectives*, Helen F. Ladd, Rosemary Chalk, and Janet S. Hansen, Editors, National Academy Press, 1999: See Chapter 6, "Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm", by Paul A. Minorini and Stephen D. Sugarman, p. 175. See also, *Equity and Excellence in Education*, Vol. 32, No. 3, Dec. 1999, especially Michael A. Rebell, "Fiscal Equity Litigation and the Democratic Imperative", p. 5, and Sue Brooks, "School Funding: Justice v. Equity", p. 53.

3. Law of 1789: "An Act for the better regulation of schools within this State; and for repealing the laws now in force respecting them," *Laws of New Hampshire: Including Public and Private Acts and Resolves and the Royal Commissions and Instructions, with Historical and Descriptive Notes, and an Appendix*, ed. Albert Stillman Batchellor, 10 vols., (Manchester, N. H.: J. B. Clarke, 1904-1922), Vol. 5, First Constitutional Period 1784-1792), 449-450. See also "The Constitution of the State of New Hampshire", Art. 83, Part 2. A more extended discussion of the Law of 1789 and its effect on public school funding in the taxpayer-oriented years of 1789-1919 can be found in a series of four essays in the *Dartmouth College Library Bulletin:* Nov 1993, 17-24; Nov 1998, 26-43; Nov 1999, 21-29; Apr 2000, 75-84; all by Walter A. Backofen. The formal end of the school-tax policy set in motion in 1789 came with "An act in amendment of the laws relating to the public schools and establishing a state board of education", effective 28 March 1919. (New Hampshire, Laws, Statutes, etc., *Laws of the State of New Hampshire*, 1919, Chap. 106, pp. 155-166).

4. Massachusetts, *Records of the Governor and Company of the Massachusetts Bay in New England*. Printed by order of the legislature, 5 vols, ed. Nathaniel B. Shurtleff, Boston: W. White, 1853-1854, 2:203.

5. *General Laws of Massachusetts, from the Adoption of the Constitution to February, 1822, with the Constitution of the United States and of this Commonwealth, together with Their Respective Amendments, Prefixed*, 2 vols. (Boston, Wells & Libby and Cummings & Hilliard, 1823-1832), 1:367.

6. Nothing better summarizes the problems of public education in New Hampshire when it shared the Massachusetts management practice than the commentary by Governor John Wentworth in 1771. [New Hampshire Provincial Papers, Vol. VII, p. 287). That matters only got worse is clear from Jeremy Belknap in 1783 (*The Belknap Papers*, Massachusetts Historical Society Collections, 5th series, Vol. 2, p. 287.)] Walter Herbert Small, "Early New England Schools", Arno Press & *The New York Times*, 1969, offers much anecdotal evidence.

7. Belknap, *ibid.*

8. An admittedly sweeping claim based on a close monitoring of the public literature- chiefly newspapers and other outlets for public debate-for the decade of the '90s over which the debate has been raging. Proof from the published, scholarly literature is simply its silence about the Law of 1789, which is rarely broken but then only by error in its interpretation. An intermediate source testifying to general unawareness is the 291-page, *A New Hampshire History Curriculum for Grades K-12*, commissioned by the New Hampshire Historical Society and recently released to critical acclaim under a copyright date of 1999; it is also mute about every other definitive statutory action on behalf of public education in New Hampshire before 1919. Significant, as well, is the fact that the New Hampshire Humanities Council which maintains a speakers bureau on an enormous range of subjects of potential interest to citizens of the state had no one on its roster as recently as a year ago prepared to address the history of New Hampshire's public school system.

   Douglas E. Hall, writing as the Executive Director of the New Hampshire Center for Public Policy Studies, has been the only one in the post-Claremont era to cite the Law of 1789, doing that in an op-edit piece for the *Concord Monitor* of Nov. 23, 1999. But again, although understanding its peculiar structure, he did not identify the adverse tax-rate effect it had on most public school systems as a result of the distribution of municipal wealth then evolving in New Hampshire.

   Even in the roughly eight-inch pile of briefs produced for the opening lawsuit against the State of New Hampshire, charging unconstitutional practice in support of public schools (No. 92-711 on the Supreme Court docket of September 1993), less than an aggregate of one-half page from all briefs is given to the funding law of 1789. And that bit comes only from Eugene A. Bishop ("The Development of a State School System: New Hampshire", Teachers College, Columbia University, New York City, 1930) who missed the origin of the law's tax formula in the seventeenth century, and did not address the connection between that formula, which he may have understood, and the underlying effective tax rate which was ultimately so debilitating to public schools.

   The conventional wisdom was well summarized in 1968 by William H. Mandry, former president of New England College and once Executive Secretary of the New Hampshire School Boards Association. See *A Summary of the Development of the New Hampshire State Department of Education*, Concord, New Hampshire, June 3, 1968. There we are told that no tax in support of public education was ever levied directly against the people for that "would have been violently opposed by the local control forces". The whole era of 1789 is glossed over with the claim that "there was no state program or system of education until 1919".

9. *Contemporary Perspectives on Constitutional Interpretation*, Eds., Susan J. Brison and Walter Sinnott-Armstrong, Westview Press, 1993.

10. Walter A. Backofen, "New Hampshire's Proportion of Public Taxes: Its Role in Public School Funding, 1789-1919", *Dartmouth College Library Bulletin*, Nov. 1993, p. 17.

11. *The Valley News*, White River Jct., VT, Feb. 14, 1999.

12. Walter A. Backofen, "New Hampshire's Public School System: 1789-1919, The Taxpayer-Oriented Years," Lord Timothy Dexter Press, East Plainfield, New Hampshire, 1994. Here the actual steps in both timing and amount are first summarized and translated into the effective statewide school-tax rate. A copy of this work is on file at the New Hampshire State Library, Concord, NH. A more schematic account is found in the *Dartmouth College Library Bulletin* of November 1999.

13. See especially *The Concord Daily Patriot* of November 22, 1850. The proceedings of the convention of 1850 were never published. Selected accounts of sessions in progress were printed by *The Concord Daily Patriot* and the *New Hampshire Patriot and State Gazette* of Portsmouth, which the former organized separately in a bound collection of pertinent issues. The original manuscript account of the convention was discovered in recent months in the holdings of the State Archives in Concord, where it has since been transcribed into a roughly 750-page typescript document.

14. The intertown disparities became much compounded as the mandatory school-tax revenue was distributed across the town, by school district. Over time, the average number of such districts came to vary from ten to fifteen per town. The possibilities and outcomes depended upon the intratown distribution formula chosen by the local taxpayers. When there was too little money for a poor district in a poor town, the extreme response was occasionally to suspend school altogether. In this domain, local control retained its hold on money-management practice with little evidence of ever having made a bad situation better. The crisis came in 1885 with legislative repeal of the school-district system that had been launched, reluctantly, in 1805. Support inequities inherent to the Law of 1789 were not relieved, however. A review of the practical consequences is found in the *Dartmouth College Library Bulletin* of April, 2000, 75-84: "The Distribution of Tax-Generated Support for New Hampshire's Schoolchildren, 1789-1993", by Walter A. Backofen.

    New Hampshire's superintendent of Public Instruction for 1880-1892 was James W. Patterson from the faculty of Dartmouth College. His analysis of problems as presented in the Report of the Board of Education for 1887 belies the Court's claim in Claremont I that, "For more than 200 years New Hampshire has recognized its duty to provide for the proper education of the children in this state", which was made only after also ignoring the 85-year interval of intratown school districts.

15. Technically, this quotation came from the Report of the State Board of Education for 1921-22, page 9 et seq, when the opposition to reform in 1919 was being identified. From the record, there is no reason to believe that it was ever different. Among the Court's 1993 citations of evidence of an early belief in adequate support for all was one to Nathaniel Bouton; see his "The History of Education in New Hampshire, A Discourse Delivered Before the New Hampshire Historical Society" (Concord, N.H.: March, Capen and Lyon, 1833). Yet in the year of Bouton's discourse, the intertown per capita support disparity across the state was about 30 to 1 (before compounding at the district level), which he viewed as quite fair. Meanwhile, Bouton put public education second in importance to religious training.

16. "Letters to the Educators, The Case For A Constitutional Amendment", authored by Rasputin, January-August 1998, Granite State Taxpayers. Letter No. 11 on "What Was The Original Understanding", p. 53, uses the Constitutional Convention of 1850 without awareness of the Law of 1789 which triggered it. More recently, an op-edit piece in the *Valley News* of Aug. 10, 2001, by Robert Boyce, "Claremont Rulings Ignore The Clear Historical Record", written in support of pending House Bill HCR 14, shows the same misunderstanding of that record.

    One of the goals of the Convention of 1850 was to raise the prevailing state-mandated support-threshold of $120,000 to $125,000, and thus make the change irreversible. In principle, the mandated sum from 1789 could rise or fall, although it had always gone up before. If the intent were also to cap that amount at $125,000 after what would have been the proportionately smallest one-step increase ever, it hardly looks like an action in support of schoolchildren. For three years later, in 1853, after the amendment's defeat, the legislature on its own lifted the threshold to $135,000, and over the next three years in a row kept lifting it until it reached $200,000 in 1856. Such rapid escalation, producing a 67% increase in seven years, was unprecedented and never seen again. It was as if the legislature was announcing that there was more than money behind the resistance to change.

    What Rasputin did not see, evidently, is that by 1850 the state-mandated support-threshold had already been raised from about $16,000 to $120,000. Therefore, rejecting the proposed amendment from 1850 cannot be read as a denial that the practice existed. Perhaps the irreversibility idea is what could not be accepted at the time.

    The confusion in the Boyce position is tied to how the threshold mandate was traditionally represented. The amount was always reported as a multiple of 1000, for pounds before 1800 and dollars afterwards. This made the number 125 in 1850, in particular, equivalent to $125 for every dollar of what was called the "proportion of public taxes", with that quantity

summing to $1000 for the state as a whole. Thus the statewide mandate in question was $125 x 1000 = $125,000. In practice, each town's proportionate share of the statewide tax base was multiplied by 1000 to define its own proportion of public taxes. That dollar amount, in turn, would have been multiplied by 125 to establish the town's local school-tax obligation for the year in which the aggregate threshold was $125,000.

17. The "rate" was never a part of New Hampshire school-tax vocabulary until 1899 when the local tax rate became a factor in eligibility for the state's first-ever equalized aid to deserving towns (Laws of the State of New Hampshire, 1899, p. 318). Given reapportionment every four years, a rate could not pretend to be uniform more frequently than that. But even then, a comparison of actual, local school-tax rates when no more than mandated support was being made, shows intertown variations of 10-20%. The whole question was once avoided by the practice of making a town's school-tax obligation the same share of the statewide support threshold as its share of the statewide tax base. This area of fuzziness is explored in Walter A. Backofen, "A Quintessential New Hampshire Policy: The Seemingly Forgotten Mandatory School Tax of 1789 to 1919", *Dartmouth College Library Bulletin*, November 1999, Volume XL (NS) Number 1, p. 26.

In May 1998, Senate Resolution 4 sought an advisory opinion on the constitutionality of SB1280, the so-called "ABC" education funding plan. The following memorandum filed by Attorney Eugene Van Loan III describes in devastating fashion how far from constitutional legitimacy the Court had strayed in Claremont I and II, how abysmally ignorant the Legislature was of its own plenary constitutional authority over education policy, and how subservient and debased the Legislature had become in its uncritical acceptance of the Court's falsified history, fanciful interpretation of Article 83 of Part II, and abuse of the adjudicatory function. The Court's response to SR 4 in its resulting "Opinion of the Justices," 142 N.H. 892 (1998) inaugurated its invariable custom of simply ignoring challenges to the intellectual underpinnings of its Claremont rulings.

Eugene M. Van Loan, Jr. (1998)

Memorandum in Response to Requests from the Senate for an Opinion of the Justices (School Financing)

The Senate has posed seven questions to this Honorable Court concerning bills presently pending before that body. Four of those questions ask this Court whether or not certain proposed legislation conflicts with the Court's decisions in the so-called *Claremont* cases.[124] While such questions may be well-meaning, they do, of course, miss the point. The issue which should be of importance to the Senate is not whether the bills conflict with the *Claremont* case, but whether they conflict with the Constitution.

The fact is that that Court can change its decisions, but it isn't supposed to change the Constitution. Nevertheless, the Senate's questions are revealing. To the extent that they focus upon the *Claremont* decisions, rather than upon the Constitution itself, they reflect the conventional wisdom that the Court has indeed changed the Constitution.

On the other hand, whether one wants to call what the Court did in the *Claremont* cases "changing" or "interpreting" the Constitution, the one thing that we know is that the Court can change is its mind. And it ought to do so in this instance. The simple reason for this is that the Court was wrong in *Claremont* - very wrong!

With all due respect to the Court, *Claremont I* and *Claremont II* were ill-conceived from start to finish. From the Court's strained reading of the precatory language of the Constitution's Article 83, Part II; to its conversion of non-justiciable private duties into judicially-enforceable institutional duties; to its creation of a right to an "adequate" education out of whole cloth; to its granting of standing in educational rights cases to virtually everyone; to its unprecedented assertion of a judicial power to regulate the fisc;

to its gratuitous adoption of a strict scrutiny standard in educational cases; to its total disregard of the trial court's findings of fact; to its suggestion that the formation of educational policy cannot be delegated by the Legislature to the State Board of Education; to its exercise of judicial review to declare constitutional rights without any serious consideration of the availability of judicial remedies; to its obliteration of 200 years of local control over education; to its transformation of the quintessential local tax, the school tax, into a State tax - in so very many ways, the Court's decisions in *Claremont* constitute a massive departure from its own well-settled traditions and doctrines. Indeed, taken altogether, the *Claremont* decisions are nothing short of a jurisprudential catastrophe.

It would be well to heed the words of one of the Court's most famous members, Justice Doe - written before he became Chief Justice, and in dissent - in the case of *Orr v. Quimby,* 54 N.H. 590, 610-611 (1874):

> The duty of obeying the divine law when human law is in conflict with it, on a point of morals or religious faith, is everywhere taken for granted. But this duty does not legally require or empower a judge or other officer of the government to officially nullify a law which he is under an express official oath or implied official obligation to officially maintain. By resignation he may throw off an official duty which he cannot conscientiously perform. He may refuse to obey. If he is not a non-resistant, he may exercise the moral right of revolution declared in article 10 of the bill of rights. But however pressing his moral duties, he cannot legally justify an official violation of an official duty. The constitution authorizes the legislature to make constitutional laws: and it requires the court to be sworn to officially support the constitution, and to perform the duties of their office agreeably to the constitution and the human laws of the state; not agreeably to that constitution and those laws supplemented or modified by the divine, natural or moral law, or the principles of reason and justice. While it recognizes the divine government and the unalienable rights of conscience, it does not establish anarchy by legalizing every principle and practice that may be approved by anybody's interpretation of the higher law, nor authorize the court to destroy the constitution and laws which they are commissioned to administer.

We need to return to these First Principles. No one disagrees with the Court's statement in *Claremont II* that, "Our society places tremendous value on education." Article 83, Part II, of the Constitution, however, places the duty to "cherish" those values in the hands of the "legislators and magistrates", not the Court.[125]

Senate Resolution 3, in particular, demonstrates just how much damage the *Claremont* decisions have done to the proper separation between the roles our law-makers, the Legislature, and our law-sayers, this Court. The Court stated in *Claremont II* that "we were not appointed to establish educational policy, nor to determine the proper way to finance its implementation." If, however, the Court answers the question posed by Senate Resolution 3 - which asks whether or not Senator Rubens' so-called A Plan "fulfills the

mandates of *Claremont II*" - establishing educational policy is exactly what the Court will be doing.

Just recently, the U.S. Supreme Court had occasion to deal with the question of whether or not there were limits to the remedial powers of federal courts in cases dealing with the public schools. This was the case of *Missouri v. Jenkins*, 515 U.S. ____, 132 L. Ed. 2d 63, 115 S. Ct. 2038 (1995), in which a district court had ordered the State of Missouri to raise and appropriate millions of dollars to fund a grandiose educational scheme which the trial judge had devised as a desegregation remedy. The Supreme Court ruled that the lower court had exceeded its powers. In his concurring opinion, Justice Clarence Thomas had some things to say which are equally as apropos to the *Claremont* case. "There simply are certain things that courts, in order to remain courts, cannot and should not do. There is no difference between courts running school systems or prisons and courts running executive branch agencies." Id. at 132 L. Ed. 2d 63, 108.

Is this where we too are headed? Can't we learn from the experiences of others? Do we have to personally experience the riots caused by Judge Garrity's busing scheme in Boston, or Kansas City's two decades of fiscal profligacy and social engineering, or New Jersey's litigation feeding frenzy or Vermont's current taxpayer revolts in order to appreciate the direction in which *Claremont* will inevitably take us? Isn't there some route open to the Court to correct its mischief before it is too late?

Some persons are suggesting that if the Court can just avoid answering the Senate's questions, the entire controversy will blow over and, in the fullness of time, resolve itself. One approach which is apparently being offered is that the Court simply decline to answer the Senate's questions, ostensibly on the grounds that the Senate has yet to actually pass either of the bills which have generated the questions which the Senate presented to the Court. To begin with, this is a nonsensical argument. As the name indicates, the purpose of the Court's role in issuing advisory opinions is to act as an advisor to certain governmental bodies. The time that the Legislature needs advice as to the constitutionality of a bill is before it passes, not after it is already enacted into law. [126]

Secondly, there is no precedent to support a stonewalling of the Senate's requests. The Court does not have discretion as to whether or not to accept a bona fide request for an advisory opinion.[127] Article 74, Part II of the Constitution prescribes that the Legislature, the Governor and/or the Council may, upon solemn occasions, "require" the opinions of the justices. If, as the Court said in *Claremont I*, the mere fact that Article 83, Part II used the word "duty" makes that provision "mandatory, not hortatory", the language of Article 74 is at least as obligatory.

Another way to duck the Senate's questions being suggested to the Court is based upon the theory that since the ruling in *Claremont II* that our current system of funding education is unconstitutional does not take effect until April 1, 1999, *Claremont* doesn't really exist at this time. Consequently, questions about whether or not pending legislation conflicts with or conforms to *Claremont* are premature. However, as noted above, the measure of constitutionality is not some decision of this Court; it is the Constitution itself. Thus, as

ingenious as this argument is, it belongs more in a discussion of metaphysics than it does in the courtroom.

This brings us, then, to the most bizarre of the reasons being proffered to the Court as a basis upon which to return the Senate's questions unanswered. This is the notion that the Court can refrain from issuing an advisory opinion because the *Claremont* case itself is still pending. As incredible as it sounds, certain members of the Legislature are actually taking the position that the lawsuit has divested them of their power under Article 74 to ask for an advisory opinion. In this regard, they suggest that, "The *Claremont* litigation should be the arena in which questions about the ABC Plan are answered; it is, after all, the litigation which has necessitated the kind of solution which the ABC Plan offers." See Memorandum of Peter Burling, et al, p. 3.

Although this may pass for logic in the topsy turvy world of *Claremont,* it sounds like someone needs a lesson in the doctrine of separation of powers. See Article 37, Part I of the Constitution. The arena in which questions about education and education funding are answered - until *Claremont* - was the Legislature, not the Court. As provided in Article 2, Part II of the Constitution, "The supreme legislative power, within this state, shall be vested in the senate and house of representatives."

Those legislators who are so cowed by the *Claremont* decision that they are willing to abdicate their own responsibility to legislate are apparently also willing to cede the rights of the public to private litigants. When they tell this Court that "the Plaintiffs in the *Claremont* case are [the] real parties in interest," they take the supposed right to an adequate education way beyond *Claremont.* For even this Court held that the right which it divined in Article 83, Part II of the Constitution was "not based on the exclusive needs of a particular individual, but rather a right held by the public to enforce the State's duty." *Claremont I*, 138 N.H. at 192 (emphasis supplied).

The fact of the matter is that the *Claremont* plaintiffs have no standing in the case at bar.[128] The only "party" is the Senate. Everyone else - including a member of the House - is merely an *amicus curiae*, whose participation is at the pleasure of the Court. Neither the *Claremont* plaintiffs nor anyone else can reframe the Senate's questions, move to dismiss them or withdraw them. Since the Senate has requested the advice of its constitutional advisors "upon important questions of law and upon [a] solemn occasion", the Senate is constitutionally entitled to an answer.

The only ground upon which the Court can refuse to answer a request for an advisory opinion is if the question posed is beyond the Court's constitutional authority to answer. For example, the Court need not answer a request for it to determine the results of a Senate election contest because under Article 35, Part II, the Senators are the "final judges of the elections ... of their own members." *Opinion of the Justices*, 56 N.H. 570 (1875). Unless the Court is to use the Senate's requests for an advisory opinion as an opportunity to reverse *Claremont,* it is stuck with its decisions in that case and those decisions clearly hold that Article 83, Part II and Article 5, Part II of the Constitution are justiciable. This, in turn, means that the questions presented by the Senate regarding the proper

interpretation of these provisions are indeed within the Court's jurisdiction.

That is, of course, unless the Court is prepared to confront the real dilemma and do something about *Claremont* itself. One route for the Court to take is to simply admit that it was wrong, reverse its *Claremont* decisions,[129] get out of the education business and tell the Senate that both the Governor's ABC Plan and Senator Rubens' A plan - and any other alphabet plan that the Legislature comes up with - are all constitutional. Although such a move would undoubtedly subject the Court to as much criticism as the *Claremont* decisions themselves, that is a small price to pay for doing the right thing. Let us turn back while we still can.

Alternatively, the Court could take this opportunity to step back and reconsider. One way to do this would be for the Court to vacate its decisions in *Claremont I and Claremont II,* and schedule the case for reargument. The Court could then consolidate its reconsideration of *Claremont* with its consideration of the Senate's questions. If the Senate is not inclined to wait and the Legislature passes a law which alters the State's system of education and/or education funding, so much the better. The Court can then dismiss the *Claremont* suit as moot and, if some group wants to challenge the new law, they can bring a new lawsuit. On the other hand, if the Legislature demurs with respect to new legislation, we can all await the court's reconsideration of these weighty issues in *Claremont IV*.[130]

Let us assume, however, that this Court is not of a mind to back away from *Claremont,* but is nevertheless inclined to avoid a confrontation with the Legislature on educational policy - at least for now. Let us further assume that the Court can figure out an intellectually honest way to duck the adequacy-of-education and/or adequacy-of-funding issues which surely would provoke such a confrontation and, by so doing, that the Court can limit the Senate's questions to tax issues. That would narrow this case down to whether the ABC Plan satisfies the requirements of Article 5, Part II of the Constitution that all taxes be "proportional and reasonable". [131]

If that is the only question that the Court needs to answer, the answer is "yes" - even under *Claremont.* All that *Claremont* requires is that if a property tax system is used to fund education, it must be "equal in valuation and uniform in rate throughout the State". The ABC Plan satisfies this requirement and, therefore, it is constitutional. [132]

As others will undoubtedly describe to the Court in much more detail than I, this is the way that ABC works: (1) the cost per child for an "adequate" education is calculated according to some yet-to-be-determined method; (2) this is multiplied by the number of "educable" children to get a statewide cost of education; (3) the total equalized value of all taxable real property in the state is determined; (4) the total statewide education cost is then divided by the total statewide property valuation; (5) the resulting tax rate per $1,000 of valuation is then applied by each municipality to all taxable property within its jurisdiction. Thus, all real property in the State is subject to the same method of valuation and assessed at the same rate of tax.[133]

So far, so good. The challenge to ABC, however, comes in the fact that it also includes an

abatement provision which abates the taxes of a municipality to the extent that collection of the state education tax in that municipality would raise more money than is necessary to fund the cost of an "adequate" education for the number of children resident in that community. A few examples will suffice. Suppose that the cost-per-child of an "adequate" education is $5,000 and that the uniform state education tax rate is $15.00 per $1,000 of property valuation. Suppose further that Community A has a total of $100 million in assessed property valuation and a population of 300 "educable" children and that Community B also has $100 million in property valuation but only 250 children. Under the ABC Plan, application of the state tax rate would raise $1.5 million to educate each community's children. However, since Community B would only need to raise $1.25 million to provide an "adequate" education for its children, HB 1280 would give its taxpayers an abatement of $250,000.

Now let us look at Community C and Community D. Community C's total property valuation is $200 million. Applying the uniform state rate of $15.00 per $1,000 would generate $3 million. However, since Community C has only 300 "educable" children, it only needs to raise $1.5 million. Thus, it is entitled to an abatement of $1.5 million. Community D also has $200 million in property valuation, but it has 550 children in town. It, therefore, receives an abatement of $250,000.

The argument made by some is that this abatement device destroys the proportionality of ABC's tax scheme. The claim is that the "effective" tax rates in Communities A, B, C and D would each be different. If one calculates the net tax paid in each community, after factoring in the abatements, the effective rates are as follows: (1) Community A pays $15.00; (2) Community B pays $12.50; (3) Community C pays $7.50; and (4) Community D pays $13.75. Accordingly, only Community A's effective rate is equal to the initial State rate. Thus, it is suggested that the tax would not be constitutionally "uniform".

If, however, this were the sole test of constitutionality under Article 5, Part II, we could have no tax exemptions whatsoever. As a pure function of mathematics, every tax exemption, credit, deduction or abatement which is granted to some, but not all, taxpayers creates a disparity in their effective rates of tax. See generally, Ardinger, *An Analysis of the New Hampshire Supreme Court's Recent Application of the "Proportional and Reasonable" Standard to Restrict the Legislature's Taxing Power*, 33 N.H. B.J. 331 (March 1992). Therefore, unless the Court were to adopt a theory of "uniformity" which would jeopardize virtually every tax presently laid in New Hampshire, the mere existence of an abatement feature in the ABC Plan cannot make it unconstitutional.

This is clearly not the law. As this Court has stated on numerous occasions, "The power of the Legislature to grant a reasonable exemption ... is not doubtful." E.g., *Opinion of the Justices*, 105 N.H. 22, 24 (1963). Indeed, creating an exemption can be just another form of the process of classification which is involved in selecting what property is to be taxed. As the Court has frequently observed, "There is no doubt that the legislature may provide, by general laws, for the exemption of certain classes of property from taxation, as well as exempt it, in fact, by omitting it in the description of property required to be taxed." *Brewster v. Hough*, 10 N.H. 138, 142 (1839). Moreover, the form of the exemption does

not appear to determine its constitutionality. In this regard, the Court has stated that "we recognize that the legislature has broad power to create exemptions, such as deductions, adjustments and credits". *Opinion of Justices*, 131 N.H. 640, 642 (1989).

Tax exemptions, therefore, may constitutionally withdraw a category of property from the classification of property which is otherwise taxable [e.g., *Trustees of Phillips Exeter Academy v. Exeter*, 90 N.H. 472, 482-3 (1940) (exemption from real property tax for schools)] or they may withdraw something which would otherwise be taxable from the tax base [e.g., *Opinion of the Justices*, 117 N.H. 512, 517-18 (1977) (exemption of $100 from taxable capital gains for persons over 65 or blind)]. Exemptions can also come in the form of expense deductions [e.g., *Opinion of the Justices*, 123 N.H. 296 (1983) (deduction from gross income for compensation paid to employees in order to calculate taxable net income)], or as credits against the tax [e.g., *Opinion of the Justices*, 117 N.H. 512, 520 (1977) (tax credit against capital gains tax for taxes paid in another jurisdiction)] or as abatements [e.g., *Opinion of the Justices*, 117 N.H. 512, 520-1 (1977) (abatement for inability to pay)].

On the other hand, it is true that not every tax exemption, deduction, credit or abatement is constitutional. As the Court stated in *Opinion of the Justices*, 117 N.H. 512, 517 (1919), "Although exemptions may, theoretically, produce inequalities in the tax burden, the legislature clearly has the power to grant a reasonable exemption, on a uniform basis." (Emphasis supplied.) Accordingly, an exception from a tax - like the tax itself - must be by classification so that all those who are similarly situated receive like treatment.

Uniformity of application certainly presents no problem with respect to the ABC Plan. Any municipality whose state education tax is "in excess of the product of the statewide per pupil cost of an adequate education at the elementary school level times the average daily membership [of students] in residence for the town" is entitled to an abatement equal to such excess. Section 15, HB 1280. Abatements, therefore, are awarded according to neutral factors which are defined in the law and applied across the board. No specific taxpayer or municipality is singled out for special treatment. Compare, *Eyers Woolen Co. v. Gilsum*, 84 N.H. 1 (1829) (special exemption for "the Eyer Woolen Mill").

The other constitutional requirement for a tax exemption, deduction, credit or abatement is that it be "reasonable". As the Court commented in *Opinion of the Justices*, 95 N.H. 548, 550 (1949), "In the selective process of classifying certain property for taxation and exempting other property the Legislature has a wide discretion which will be sustained `provided just reasons exist for the selection made.'"

What constitutes a "just reason", of course, can be defined quite narrowly or quite broadly. I respectfully suggest that great breadth is the order of the day when the issue involves taxes. To begin with, the power of taxation is an element of sovereignty which is uniquely consigned by the Constitution to the Legislature. In this regard, Article 28, Part I provides that, "No subsidy, charge, tax, impost, or duty, shall be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the legislature, or authority derived from that body." See also, Articles 5 & 6, Part II.

After all, our ancestors fought a war over the principle that there should be no taxation without representation.

The decisions of this Court confirm the virtually plenary power of the Legislature to determine the objects of taxation, the identity of property to be taxed, rates of taxation and the nature of exemptions. "The power of the legislature to classify property as taxable or non-taxable is a broad one, and the validity of its exercise has rarely been called in question." *Opinion of the Justices*, 84 N.H. 559, 569 (1930). Thus, it is black-letter law in New Hampshire that the Court does "not pass on the wisdom or advisability" of a tax law. *Opinion of the Justices*, 95 N.H. 548, 550 (1949). As a result, "A [tax law] is not to be declared invalid for lack of constitutional power unless the conclusion is established beyond a reasonable doubt." *Opinion of the Justices*, 84 N.H. 559, 572 (1930).

The reasonableness of a tax exemption generally turns upon whether or not the exemption "reasonably promotes a matter of the general welfare." *Id.* at 551. In this regard, "It is a recognized principle of constitutional law that taxes may not be imposed for the benefit of private persons or for private uses." *Opinion of the Justices*, 88 N.H. 484, 486 (1937). On the other hand, the concept of the "general welfare" is exceeding comprehensive. For example, a general tax exemption granted in order to "stimulate economic recovery by encouraging new building projects" is "properly within the legislature's discretion in acting for the welfare of the state." *Opinion of the Justices*, 87 N.H. 490 (1935). See also, *Opinion of the Justices*, 88 N.H. 500, 511 (1937) (exempting livestock and stock in trade of retailers, mechanics and manufactures in order to aid farming and industry "tends to further the state's general welfare").

As long as this Court is willing to grant the Legislature the deference that the foregoing principles require, the abatement provision of the ABC Plan should pass the test of constitutional reasonableness. This is, after all, what the Court in *Claremont II* said it would do: "Decisions concerning the raising and disposition of public revenues are a particularly legislative function and the legislature has wide latitude in choosing the means by which public education is to be supported .... [S]everal financing models could be fashioned to fund public education. It is for the legislature to select one that passes constitutional muster." *Claremont II* (slip opinion, p. 7.

One of the best reasons for the Court to defer to the Legislature on issues of tax policy is that such matters inevitably involve certain economic assumptions and strategies that the Court is ill-equipped to critique. For example, one of the assumptions of the abatement provision in the ABC Plan is that it will incentivize communities to increase their tax bases faster than the State average. Take our Community B, for example. If it can increase the assessed valuation of its property from $100 million to $200 million, like Communities C and D, it can increase its abatement from $250,000 to $1.75 million. Since Community B gets to keep all that money under the ABC Plan, it is presumed that it will still appropriate some or all of it for local purposes, including the provision of education in excess of that required to meet the test of constitutional "adequacy."[134] Even though the Court may be skeptical about whether the voters of Community B would still raise that money, as opposed to just leaving it in their pockets, and even though there is

no guarantee that if they did raise it, they would spend it on education, those are matters of public policy which are peculiarly within the purview of the Legislature.[135]

Note that another potential consequence of the ABC abatement scheme is to induce municipalities to discourage people with children from moving into town - or even to discourage people from having children. However, no one has suggested that either of these things is a goal of the ABC Plan. Moreover, it is difficult to see how the abatement scheme creates any more of an incentive for these things to occur than is inherent in the mere fact that so long as schools are financed with public money, there is an incentive to minimize the number of children in the school system.

Such speculative considerations as the foregoing aside, what is there for anyone to complain about the ABC abatement scheme? The only thing that anyone can complain about is that someone in another community may be paying less than he is. But that is not what the Constitution's requirement of a "proportional and reasonable" tax is all about. Article 5, Part II is meant to make sure that no one pays more than his fair share.

Take the citizens of Community A. They pay the State rate of $15.00 per $1,000 of valuation, which is, by definition, their fair share of the statewide burden of providing an "adequate" education to all of the State's children. Why do they have any complaint about the people in Communities B, C or D? So long as the abatements that residents of B, C and D receive do not increase the amount that the citizens of Community A have to pay, the Community A folk should have no gripe. Likewise, the people who live in Community B should not be complaining about the fact that the residents of Communities C and D pay less than those in B and, finally, the residents of Community D should not be complaining just because their neighbors in C pay less than those in D.

The only basis for such complaints would be envy. This would be begrudging another for his good fortune - even though his good fortune did you no harm. As Judge Robert Bork pointed out in his book *Slouching Towards Gomorrah*, this is equality for its own sake. As such, it is not equality in the constitutional sense. It is, instead, a form of egalitarianism which not only levels just to level, but also inevitably ends up leveling to the lowest common denominator.

This Court, however, has made it clear that, in New Hampshire, "This question of equality is a practical one." *Keene v. Roxbury*, 81 N.H. 332, 338 (1924). And particularly when it comes to taxes, "Substance rather than form is the test." *Eyers Woolen Co. v. Gilsum*, 84 N.H. 1, 9 (1929).

What then is the form and what is the substance under ABC? Note that I said that no one should complain about the abatement scheme so long as the fact that some people paid less on account of their abatements did not cause others to pay more. But how can that not be the case? Is it not always true that an exemption for one is an increase for all others? "And as anyone's payment of less than his share leaves more than their shares to be paid by his neighbors, his non-payment of his full share is a violation of their constitutional right." *Eyers Woolen Co. v. Gilsum*, 84 N.H. 1, 9 (1929).

In a closed system, where the revenues to be raised by a tax must equal the expenditures to be made, the foregoing is true. This would indeed be the situation described by the Court in *Morrison v. Manchester*, 58 N.H. 538, 550 (1879), as follows:

> Non-payment is, in effect, a compulsory payment of money, by those who bear their shares of the common burden, to the privileged person who does not bear his share. It is, in law and in fact, as much a subsidy, paid by the former to the latter, as if it were a subsidy in form and in name. The result is the same whether (1) a man pays his just tax of $10, and receives it back again, and his neighbors pay $10 more than their shares, or (2) they pay $10 and receiving it back again is omitted, or (3) he and they pay their several shares, and they pay him $10. The first may be called a donation of a subsidy or bounty; the second may be called an exemption; the third may be called something else. They are three methods of doing one thing.

The ABC Plan, however, does not create a closed system. One the contrary, through its subsidy provision, it is an open system. To understand this, we must add to our examples; now we must look at the communities who raise less than what they need to provide an "adequate" education. Suppose that Community E, like Communities A and B, has $100 million in property valuation, but it has 350 children. Application of the State rate of $15.00 per $1,000 will leave Community E $250,000 short. However, under the subsidy provision of the ABC Plan, Community E will receive a grant from the State in the amount of the shortfall. On the other hand, the subsidy will not be financed through the property tax system; the money will come from other, as yet unidentified, State revenues. The critical feature of the ABC Plan, then, is that the money will not be financed by taxes raised from Communities A, B, C or D.

Thus, in the open system created by ABC, everyone is assessed the same state education tax, on the same class of property, valued in the same manner. Money then flows out of the system to those communities who are eligible for an abatement and money flows into the system to those communities which are in need of a subsidy - but the abatements do not finance the subsidies. Although those who receive abatements and those who receive subsidies arguably pay less than their fair shares, no one pays more than his fair share.

This is not the first New Hampshire tax scheme which collected taxes on one basis and then distributed the revenue to the same parties who paid the taxes, but according to a different formula. For example, in *Opinion of the Justices*, 84 N.H. 550, 577-582 (1930) the revenues collected from separate State taxes which were assessed at uniform rates upon timber and utilities were placed into an equalization fund and then redistributed to the towns in which such property lay, as if the property had been taxed by the towns at their municipal rates. In essence, the Court separated the tax from the expenditures. From this perspective, the two taxes were clearly constitutional because they were uniform across the State. As for the lack of statewide uniformity with respect to the distribution of the revenues, the Court said this: "[S]tate aid to relieve the burden put on some towns and not on others, or put upon towns in differing degree or amount, may be granted by the

legislature. If the burden put upon the town is one the legislature might rightly impose, relief therefrom by an appropriation of state funds is permissible." *Id.* at 580.[136] See also, *Opinion of the Justices*, 94 N.H. 506, 510 (1947) (one-half of State tax on bottled soft drinks distributed to towns "in the same proportion which the total valuation of that town for [real property] bears to the total such valuation of all towns"); *Opinion of the Justices*, 88 N.H. 500, 507 (1937) (payments to towns out of State revenues "to replace the loss of revenue by reason of a repeal of the law taxing live stock and stock in trade").

The only distinction between the ABC Plan and the utility and timber taxes upheld in the 1930 *Opinion* is that under ABC, the State does not actually collect the money and then redistribute it to the towns. Looking at the substance of the transaction, however, they are the same. If one then views ABC's abatement just like its subsidy - as a separate appropriation from State revenues in to order to finance municipal activities, including education - the abatement is clearly justified by a public purpose and, therefore, it is just as constitutional.[137]

The bottom line, then, is that this Court can leave *Claremont* in place and still uphold the ABC Plan. This would be terribly unfortunate because it would keep the notion of a "constitutionally adequate education" alive, well and ready to wreak havoc on another day. Nevertheless, half a loaf is better than no bread at all.

ENDNOTES:

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[124] *Claremont*, 138 N.H. 183 (1993); *Claremont II*, 142 N.H. ____ (1997); and *Claremont III*, ____ N.H. ____ (May 8, 1998).

[125] This assumes, of course, that the reference in Article 83 to "magistrates" does not include the members of the Court itself. If, however, Article 83 was addressed to judicial officers as well as legislative and executive officers, that would be just one more reason to believe that the provision was not intended to be justiciable.

[126] Indeed, it is settled law in New Hampshire that the Court will not issue an advisory opinion on existing, in contrast to proposed, legislation. E.g., *Opinion of the Justices*, 123 N.H. 510 (1983); *Opinion of the Justices*, 119 N.H. 266 (1979); *Opinion of the Justices*, 116 N.H. 358 (1976).

[127] Whenever the Court has failed to answer a question, it has asked to be relieved from its obligation to provide an answer. See, e.g., *Opinion of the Justices*, 121 N.H. 280 (1981).

[128] By the same token, the Court's advice to the Senate in this case will not be binding upon the *Claremont* plaintiffs in their suit. As this Court has said on many occasions, its Article 74 advisory opinions are subject to revision in a true case or controversy between adverse parties. More importantly, because the Senate's questions to the Court concern the constitutionality of laws which do not yet exist, neither the questions nor the Court's answers will have any effect upon the vested rights of the *Claremont* plaintiffs, or anyone else. The fact that someone's future rights might be affected by an advisory opinion creates no more impediment to the Court's rendering its opinion than it does to the Legislature's passage of the bills now pending before it. Compare, Article 23, Part I, N.H. Const. (retrospective laws prohibited). In this regard, those cases which hold that this Court should refrain from rendering an advisory opinion where doing so would determine the private rights of private parties are completely inapposite. See generally, e.g., *Opinion of the Justices*, 95 N.H. 557 (1949); *Opinion of the Justices*, 62 N.H. 704 (1816); *Petition of Turner*, 97 N.H. 449 (1952). Note that these principles are in no way altered by the Court's retention of jurisdiction in the *Claremont* case. To begin with, the mere fact that the case remains pending does not itself bestow some type of inchoate future rights upon the plaintiffs. Nor does it grant them a preferential interest vis-a-vis other New Hampshire citizens in determining the form and substance of future legislation. And, finally, it presumably does not convert this Court's role in the *Claremont* case from an adjudicator of rights and responsibilities accrued under existing law into a floor manager for the legislative process. In this regard, the Court should consider carefully another comment of Mr. Justice Thomas in the ill-fated Jenkins case: "[T]his concept of continuing judicial involvement has permitted the District Court to revise their remedies constantly in order to reach some broad, abstract, and often elusive goal. Not only does this approach deprive the parties of finality and a clear understanding of their responsibilities, but it also tends to inject the judiciary into the day-to-day management of institutions and local policies - a function that lies outside of our Article III competence." *Missouri v. Jenkins*, 132 L. Ed.2d at 109.

[129] As *Claremont III* demonstrates, it is presumably open to the Court to reopen the case any time it so chooses.

[130] Note that the other advantage of this procedure is that the full, permanent Court gets to rule on *Claremont*. There is presumably no reason for Justice Thayer to recuse himself from participating in the advisory opinion requested by the Senate. Moreover, since his wife is no longer a member of the State Board of Education and, therefore, the reasons for his recusal in *Claremont I* no longer exist, Justice Thayer could sit on a reconsideration of *Claremont*. Although this Court was correct in its ruling in *Claremont III* that it was constitutionally permissible for Justices Batchelder and Grimes to sit on the *Claremont* case in place of Justice Thayer, the opportunity now presents itself to have the case considered by the whole Court. In a case of this consequence, the people of New Hampshire deserve nothing less.

[131] I admit I really don't know how the Court can accomplish this task. Senator Rubens' bill, Senate Bill 508-FN, is not a tax bill; it is a funding bill. Consequently, the only way that the question posed to the Court by Senate Resolution 3, (which asks whether the bill "fulfills the mandates of *Claremont*") makes any sense is to construe it as asking whether or not it "adequately" funds the requirement of a so-called "constitutionally adequate education." Likewise, Questions #3 and 4 in Senate Resolution 4 inquire about the constitutionality of the interim funding compromise under the Governor's ABC Plan. Again, these questions relate to a funding provision of HB 1280-Local which does not purport to change the State's tax structure and, therefore, the questions appear to ask whether or not the State will be fulfilling its duty to "cherish" education during the next two years if it simply increases the amounts it pays to local school districts under the existing Augenblick Formula and gives the amounts so calculated a priority call upon the State's available funds equivalent to the call for bond payments and the like. It would seem, therefore, that unless the Court decides to take one of the we-don't-have-to-answer-these-questions routes discussed above, it cannot avoid jumping into the morass of second-guessing the Legislature's determinations of educational and funding adequacy.

[132] If *Claremont* were reconsidered, the ABC Plan could be found constitutional for the additional reason that it is not a State tax and, therefore, it does not have to be applied uniformly throughout the State. Such a conclusion, in turn, could be arrived at by either of two routes. First, there is the question of the purpose of the tax. In *Claremont II* the Court stated that, "We find the purpose of the school tax to be overwhelmingly a State purpose." *Claremont II* (slip opinion, p. 3). This finding was based upon the holding of *Claremont* I that, "part II, article 83 [of the Constitution] imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding." *Claremont I*, 138 N.H. at 184. If, therefore, this Court were to reverse *Claremont I* and interpret Article 83 in the way in which it was intended - merely as a non-justiciable admonition to all government officials to hold certain values dear - the supposed State purpose of school taxes would evaporate. See, e.g., *Holt v. Antrim*, 63 N.H. 284, 286 (1886) ("Local education is a local purpose for which legislative power may be delegated to the towns. The amount of money to be raised for school-houses and other educational purposes is determined, under some restrictions, by municipal corporations".)

Secondly, there is the question of what makes a tax a State tax. *Claremont II* held that the purpose of a tax is "dispositive of the issue of the character of the tax." *Claremont II* (slip opinion, p. 3). This is despite the fact that "each municipality controls the mechanics of assessment and collection of local property taxes" and that "the property tax, once collected, is managed and expended by each municipality in accordance with its budget and thus does not become a part of the State treasury." *Claremont II* (slip opinion, p. 3). If, therefore, the Court were to reverse *Claremont II* and follow those precedents which seem to hold that the character of a tax is determined primarily by the disposition of the funds, school taxes would again be viewed as they always have been, as local taxes. Compare, e.g., *Opinion of the Justices*, 88 N.H. 500, 508 (1937) (income tax collected by the State, but distributed "in such a manner that a town or city receives all the tax which its residents pay, less its share of the collection expense" is a local tax); *Boston, Concord & c. R.R. v. State*, 60 N.H. 87, 96 (1880) (The disposition made of the tax [on railroads] when collected [by the State] is evidence bearing on ... the question whether the tax is state or municipal."); with *Opinion of the Justices*, 84 N.H. 559, 564-6 (1930) (tax on gas and electric utilities collected by the State, but distributed in part "to the several towns where the physical property is situated" is a State tax).

[133] Unfortunately, the terminology used by the Legislature in HB 1280 gives this Court a special, but perverse, incentive to hold the ABC Plan constitutional without reconsidering *Claremont. Claremont* says that all school taxes are state taxes. Even assuming that this conclusion is wrong, the Legislature will have mooted the issue if the ABC Plan is held constitutional and HB 1280 is passed into law. This is because the conclusions of *Claremont* will have been incorporated into an act of the Legislature. In other words, the property tax system used to fund education will be a State tax, not because the Constitution supposedly makes it so, but because the Legislature has decreed it to be a "state education tax." Similarly, the preamble to HB 1280 expressly affirms the State's responsibility to "ensure each child a constitutionally adequate education." The likely result of this verbiage is that, if the bill becomes law, the Court will no longer need to rely upon questionable constructions of the Constitution to support the supposed "right to an adequate education"; it will merely turn to the Legislature's own handiwork. Thus, the Legislature itself will have made *Claremont* a self-fulfilling prophesy.

[134] Note also that the abatement device doesn't benefit only the so-called "property- rich" municipalities. To the extent that it creates a successful incentive for any municipality to increase its property values, that increase is also reflected in the total State property valuation, which, in turn, lowers the State education tax rate - for everyone.

[135] Note, however, that the fact that the revenues to be raised by the state education tax are "dedicated" to a specific use - education - does at least clearly identify the overall purpose of the tax. This distinguishes the ABC Plan from most tax schemes, where the funds collected are simply deposited into the State treasury and made available for general public purposes. Where the tax revenues are dedicated, a match between the purposes of the tax and the purposes and/or effects of the exemption sufficiently establishes the constitutionality of the latter and there need not be any independent policy justification for the exemption itself. See *Opinion of the*

Justices, 132 N.H. 777, 786 (1990) (Brock opinion) (tax credit unconstitutional where "the resulting tax would depend on attributes unrelated to the object of the tax").

[136] Note also the example the Court gave of a constitutional distribution of revenues despite the fact that it varied from town to town: "In this respect, the relief granted is very like that as to school money. Certain public duties are imposed upon all towns, but the state aids the poorer ones in the discharge of some of these obligations. So long as such aid is distributed upon a fair and equitable basis, it is merely an exercise of the legislative function of determining where, in the aggregate, the burden incident to the performance of public duties shall rest." Id. at 580.

[137] Note that the public purpose of ABC's abatement provision need not be the same as the public purpose of its subsidy provision in order for both to be constitutional. As I pointed out above, the incentive feature of the abatement scheme is designed in part to increase the available pot of funds for education, which is the same purpose of the subsidy provision. However, the abatement provision may also be looked at from another public policy perspective. One of the things that the ABC Plan does is to remove a substantial chunk of real property from the tax base of each municipality. In the terms of our hypothetical, $15.00 per $1,000 of real property valuation in each and every New Hampshire community is no longer available to be taxed to support local functions. To the extent that the municipalities differ among themselves in the total value of their properties, they are differently impacted by the ABC Plan's withdrawal of property from their respective tax bases. In this case, the "property-rich" communities get hit worse than the "property-poor" communities. (Note, however, that what makes a community rich or poor in terms of total property valuation is not just a function of the worth of its properties; it is also a function of geography. For example, a town having 10 square miles of property valued at $1 million per square mile has the same total property valuation as a town containing 20 square miles valued at $500,000 per square mile.) One of the things that the abatement device accomplishes is to compensate those communities who will be disproportionately burdened by ABC's impact upon their tax base. This notion of using the revenues generated by a statewide tax on property withdrawn from the local tax rolls in order to restore the status quo ante in the affected municipalities was expressly acknowledged as a permissible public policy in the 1930 *Opinion of the Justices* which sustained the constitutionality of the timber and utility tax/rebate plans discussed above. See 84 N.H. at 578-9. [For another example of a form of quid pro quo justification for a tax exemption, see *Opinion of the Justices*, 95 N.H. 548 (1949).

This article surveys the results around the nation as of the summer of 2006 of the experiment of judicial takeover of state education policy and funding in the name of such conveniently (to the judges and education monopolists) amorphous standards as "fairness" and "equity," in pursuit of that other will o' the wisp, "adequacy." The result: "[A]dequacy suits may actually retard school reform - by distracting attention from real productivity, and focusing on dollars instead of badly needed procedural and structural reforms." Is there thus hope that our Supreme Court, like that for example of Texas, will one day come to its senses and "acknowledge that public education is a responsibility of the people's elected representatives and the political process, not of judges?"

Frederick M. Hess:[1]

When Unaccountable Courts Meet Dysfunctional Schools

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Last year, Columbia University formally abandoned intellectual neutrality and embraced political activism in a remarkable fashion. The university announced a Campaign for Educational Equity that aims, in its first year, to raise $12 million to engage in "action research" and advocacy on behalf of "educational equity." This development should alarm anyone who believes that "no taxation without representation" is a bedrock American principle.

For the uninitiated, "educational equity" entails filing lawsuits in an attempt to get courts to order elected officials to raise taxes and pump additional spending into particular public schools. Columbia Teachers College president Arthur Levine boasts his university's newest unit "is not an academic undertaking.... The goal, very simply put, is to make things happen."

Columbia's campaign is being led by Michael Rebell, a crusading attorney of a decidedly activist bent. Rebell's claim to fame is that he masterminded the litigation in New York that eventually forced the state's taxpayers to cough up $5.6 billion a year more for the New York City schools, and to finance a $9.2 billion school facilities fund--even though the Big Apple already spent over $14.1 billion on public schooling in fiscal 2006, more than $12,800 per student.

The New York verdict is no isolated instance. Similar lawsuits to force up school spending outside of the political process have been filed in more than 40 states, including

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New Jersey, Kentucky, Wyoming, Ohio, and Texas. So-called "adequacy" litigation emerged in the 1980s as successor to an earlier series of suits intended to boost education spending and raise taxes. Those earlier efforts, launched in the 1960s and '70s and known as "equity" cases, focused on reducing differences in spending between school districts in a given state. This dragged litigants into a "Robin Hood" scenario, seeking to take funds from high-spending suburban districts and give them to poorer districts. This strategy had limited political appeal and modest success, with plaintiffs triumphing only about a third of the time in court.

Seeking a more viable tack, litigants shifted from "equity" to "adequacy," which skirted divisive politics by promising to raise spending *everywhere* to some vague standard. In the adequacy camp's breakthrough victory, the Kentucky Supreme Court concluded in 1989 that an "adequate" education required, among other things, skills for functioning "in a complex and rapidly changing civilization," "sufficient knowledge of economic, social, and political systems to enable the student to make informed choices," and a "sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage."

The court provided no definition of "sufficient." There were no metrics for determining when obligations were fulfilled. Yet within a year, this ambiguous, aspirational standard resulted in $1.3 billion in new annual taxes for Kentuckians. And that verdict became a model for many other states.

Readers removed from the education wars may be scratching their heads. How can a supposedly non-political Ivy League institution press an "action campaign" for attacking elected school officials with a series of lawsuits, supporting efforts to end-run the democratic process and replace legislative appropriation with verdicts from a handful of judges? This represents a bold attack on political due process, with trial lawyers, activist justices, the public school lobby, liberal public officials, and academics joining together in a quiet effort to commandeer the public purse and take control of public education. These suits constitute the most brazen effort yet to use "creative" jurisprudence to enhance the role of the courts, raise taxes, and expand the public sector by non-democratic means. Can they get away with it?

Creative Jurisprudence

All 50 state constitutions require free public schools. Adequacy promoters say they are simply extending this by stipulating that states provide "adequately funded" public schools. There are at least two problems with their logic. First, 46 of the 50 state constitutions say nothing about "adequate" funding for K-12 education; they are much likelier to call for an "efficient" system. The second problem is that there is no sensible way of determining what amount of spending is "adequate."

Joe Viteritti of Hunter College, a leading expert on education law, states the simple facts: "Adequacy clauses do not exist in state constitutions. Lawyers have construed adequacy as a loose legal standard from language that had a different meaning.... That is what

lawyers do." Suits brought by these litigators insist that rather than relying on the political process, "experts" should determine exactly how much money is needed to run a good school. That's a bit like bringing your favored team of engineers to Detroit to study a Ford plant and decide how much it should spend to build cars. The methodologies used "are generally quite unscientific," reports school spending authority Eric Hanushek of Stanford's Hoover Institution, and encourage loose spending on programs of uncertain effectiveness.

When billions in local revenues are distributed via dubious secret formulas and the whims of unaccountable judges, a tremendous arbitrariness enters the law. Vanderbilt professor Jim Guthrie, who has assisted more than two dozen adequacy suits and helped produce the cost estimates in New York's case, has termed the report that provided the basis for the judge's decision to up New York City's spending by $5.6 billion an egregious "mistake." He explains that the report "improperly added the three intervention models together, instead of averaging them. If we had properly averaged the three panel results, the amount of additional money flowing to New York City would have been halved."

"It's as if someone asked you to figure the price of a new car and you did it by adding the price of a BMW to a Jaguar to a Ferrari, instead of just averaging out the price of a new Pontiac," explains Guthrie. At the time, the judge in the case ignored warnings against this elemental economic mistake and threw the full force of the law behind the flawed estimates. Given that these judgments are inherently political and imperfect, it's not even possible to characterize the judge's choice of one figure rather than another as an "error." That's the problem: When school spending is pulled away from elected officials and voters, it becomes a capricious experiment in judicial fiat. One participant in the New York suit explained simply that "that judge was looking to hand down a landmark decision."

The presiding justice, Leland DeGrasse, started with the language in the New York state constitution stipulating that "the legislature shall provide for the maintenance and support of a system of free common schools," and from there established a series of vague demands for particular kinds of instruction. He decreed "skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment," as well as the "intellectual tools to evaluate complex issues" such as "campaign finance reform" and "global warming," not to mention the ability to "determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud." The result took imperial invention by judges to a new level of artistry.

An Emphatically Political Effort

Adequacy cases are part of a broader strategy to use courts to win victories on spending and government expansion that proponents have been unable to win at the ballot box. Many of the players are high-level partisans. In the Kentucky case described above, for

example, the lead attorney for the plaintiffs was a former governor. In a major North Carolina case, the lead lawyer is a past state chairman of the Democratic Party.

At a 2005 Washington, D.C. conference for adequacy advocates, litigators discussed not only courtroom tactics like picking plaintiffs and witnesses, but also how to spin the media, commission public relations firms, and hire lobbyists. Congressman George Miller, a leading Democratic firebrand, implored, "You have to continue to litigate.... You can help us realize the goals and live up to the promise of No Child Left Behind." Adequacy suits are an integral part of a guerilla struggle to resist the efforts of "small-government" conservatives to shrink government or lower taxes.

Champions of small government have done a poor job of fighting back. In Idaho, the state Supreme Court overturned legislation intended to prevent adequacy suits. In places like Kansas and New Jersey, elected officials have been unable to marshal the votes needed to challenge court rulings. Supporters of judicial restraint, tax-trimmers, and tough-minded education analysts who might be expected to resist these efforts have been conspicuously absent.

University of Virginia professor Martha Derthick has studied adequacy suits and concludes that "state officials who are in charge of the defense do not necessarily have strong incentives to conduct it vigorously. No attorney general has yet won a large following as a champion of opposing more spending...and state superintendents of instruction, who often have a great deal of influence in shaping the defense, have even less incentive to oppose increased spending."

Are We Really Starving Schools?

This battle raises the larger question of whether America is failing to sufficiently fund its schools. "Adequacy" is of course in the eye of the beholder. As a comparative factual matter, however, the United States appears exceptionally generous when it comes to school spending. America will devote more than $550 billion to public schools during the 2006-07 school year, more than $10,000 for every K-12 student. Despite ceaseless claims of tight budgets, after-inflation school spending has more than tripled since 1960.

International comparisons show that U.S. per-pupil spending for elementary and secondary schooling is significantly higher than in other industrial democracies, including those famous for their generous social programs. U.S. spending outstrips Germany, France, and the U.K. by more than 50 percent, and Japan by more than 20 percent, on a per-pupil basis.

America's massive increases in K-12 spending during recent decades have not been matched by improved student achievement. Math and reading scores for today's 17-year-olds are about where they were during the Nixon administration. Even the most prominent funding surges have not helped outcomes. In Kansas City, Missouri, for instance, an infamous court order that mandated more than $2 billion in extra spending did nothing to raise the quality of the schools over two decades.

In the state of New York, an analysis by Standard & Poor found that the half of the state's school districts that spend more than the average produce almost no identifiable difference in student performance or high school graduation, compared to the half that spend less than the average. None of this should surprise us. Economist Hanushek, perhaps the nation's leading authority on the efficacy of education spending, has found in a decades-long series of meta-analyses that there is no clear link between additional spending and improved outcomes in schools.

How "Help" Can Hurt

Beyond their undemocratic nature and their tendency to aggrandize the role of the courts in social policy, adequacy suits not only waste resources but also create new problems. Adequacy "victories" in states like Maryland and New Jersey appear to have underwritten corruption, waste, and incompetence in public schools. A massive court-mandated program for school construction in New Jersey has been plagued with "pervasive waste and mismanagement" plus bribery, according to the state inspector general. The Newark *Star-Ledger* reports that schools built through this litigation-required program cost 45 percent more than other schools.

In Maryland, a settlement forced by adequacy litigation caused the Baltimore City school district to pad its payroll with bureaucrats at twice the rate of neighboring districts, add school staff, and expand preschool programs. Even with hundreds of millions in extra funding, the district thus found itself in a $52 million deficit in 2003, had to beg the state for additional relief, and continued to post abysmal student achievement numbers.

Experiences like these point to the sad reality that adequacy suits may actually retard school reform--by distracting attention from real productivity, and focusing on dollars instead of badly needed procedural and structural reforms**.** Infusions of new money can actually make it easier to shrug off tough decisions on how schools are run, and how educators are paid, evaluated, and hired. California's Democratic Secretary of Education and former Superintendent of San Diego city schools, prominent attorney Alan Bersin, has warned that "adequacy litigation is a distraction that will turn out to be another dagger in the heart of public education...one more costly placebo in a sector that's seen too many."

The stakes in this fight have been raised by the Bush administration's centerpiece No Child Left Behind act. Hailed by its proponents as a way to discipline public schools and focus attention on outcomes, NCLB has been welcomed by savvy adequacy plaintiffs as a tool for boosting educational spending. NCLB promises to simplify litigants' work by enshrining in federal statute the grand declaration that 100% of students will be "proficient" on state standards in math and reading by 2013-14.

In adopting this standard, NCLB abandoned the tough but realistic goals of leading state accountability systems in favor of pleasing but unserious absolutes. In practical terms, this aspirational language could ultimately mean that states are violating Constitutional

protections in any locale where 100% of students are not deemed proficient in math and reading.

The National Conference of State Legislatures has estimated the NCLB price tag at $139 billion annually. Others suggest the figure may be higher and note that NCLB's language basically constitutes an open-ended promise--divorced from considerations of school efficacy or efficiency. You can bet that Michael Rebell, the Campaign for Fiscal Equality, and their allies are hard at work pursuing these opportunities.

In November, the Texas Supreme Court sparked the first hope that today's educational "adequacy" bandwagon might be slowed. The court unanimously rejected the idea that the Texas school system, which spends nearly $10,000 per student, was "inadequately" funded. Particularly noteworthy was the court's declaration that "more money does not guarantee better schools or more educated students." This is believed to be the first time that a state court flatly rejected the conventional presumption that more education spending necessarily leads to better classroom performance. While it's too early to predict the fallout, this defeat might mark a turning point in the fortunes of the adequacy crusade.

The Texas court did more than simply reject the easy allure of new dollars. It acknowledged that public education is a responsibility of the people's elected representatives and the political process, not of judges. "The Constitution does not require a particular solution. We leave such matters to the discretion of the Legislature." Instead of imposing judicial uniformity, the court noted that "public education could benefit from more competition."

Now, if only education reformers could make those sentiments more than just a Lone Star thing.

Among the few members of the New Hampshire Bar who have been willing to risk the ire of the Supreme Court in the cause of saving representative government from the corrosive effects of judicial arrogance, stubbornness and ambition that have been so visible for all to see throughout the Claremont litigation, Eugene Van Loan III and the author of this article, Attorney Edward C. Mosca, have been by far the most vocal, consistent and articulate. Over the past thirteen years, they have been nothing short of Churchillian both in the persistence and accuracy of their descriptions of what has been happening, and in their unheeded warnings of the evil it portends to the survival of democratic self-government. But like Churchill, when the crisis finally resolves itself into actions no longer possible to ignore, it is they to whom those who have been willfully blind and ignorant will have to turn for the guidance and leadership that has been so utterly lacking among the political class throughout this court-created constitutional crisis.

***Edward C. Mosca*:**

New Hampshire's Claremont Case and the Separation of Powers

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New Hampshire's serial education funding litigation, the Claremont case,[1] raises some obvious separation of powers problems, such as the institutional competency of courts to determine what level of education is an adequate education and how much funding is necessary to reach that level, as well as the authority of courts to enforce such judgments. While Claremont I, which announced that the State has a duty to provide an adequate education and to guarantee adequate funding, was unanimously decided,[2] the New Hampshire Supreme Court's extension of that holding to require a particular definition of an adequate education (Claremont II) and later to require "standards of accountability" (Claremont XI), provoked dissenting opinions that charged the majority had violated the separation of powers.[3]

In each case, the majority's response was to summarily deny any violation. In Claremont II, the majority said "[w]e agree with [dissenting] Justice Horton that we were not appointed to establish educational policy... That is why we leave such matters... to the two co-equal branches of government."[4] While in Claremont XI, in which two of the five justices dissented, the majority said "[w]e recognize that we are not appointed to establish educational policy and have not done so today."[5] Unfortunately, summarily denying that it had violated the separation of powers was the extent to which the

majority examined the issue, while the dissent's treatment was only slightly less superficial. This article will attempt to help fill this void.[6]

I will start by briefly reviewing the history of education funding litigation because this context is essential to understanding the Claremont case.[7] I will then undertake a limited review of the Claremont case. Finally, I will consider Claremont from the standpoint of the separation of powers.

I. CLAREMONT IN CONTEXT

Education funding litigation is not unique to New Hampshire. According to the "Campaign for Educational Equity,"[8] as of November, 2005, "lawsuits challenging state methods of funding public schools have been brought in 45 of the 50 states."[9]

The Claremont case is part of what has been called the "third wave" of school funding litigation.[10] The first wave began in the late 1960s[11] and involved challenges under the federal equal protection clause.[12] The first successful case was in 1971, when the California Supreme Court in Serrano v. Priest held that education was a fundamental right and was violated by "substantial disparities among school districts in the amount of revenue available for education."[13]

The first wave was short-lived. In 1973, the United States Supreme Court's decision in San Antonio Independent School District v. Rodriguez held that education was not a fundamental right under the federal constitution,[14] and applied rational basis review to uphold the challenged education funding system.[15] In dissent, Justice Marshall encouraged prospective litigants turn to state constitutions to achieve their objectives - "nothing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions."[16]

The second wave broke almost immediately after San Antonio Independent School District v. Rodriguez, when the New Jersey Supreme Court issued Robinson v. Cahill, which held that spending disparities between school districts violated the New Jersey Constitution's education clause, which required "a thorough and efficient system of free public schools."[17] Second wave litigation sought equalized per pupil spending based on state education clauses, particularly equal protection clauses.[18] For example, in 1976, the California Supreme Court reaffirmed the result in Serrano under the state constitution's equal protection clause.[19]

The third wave began in 1989 with cases such as the Supreme Court of Kentucky's Rose v. Council for Better Education,[20] and involved a shift from "equity" to "adequacy." Rather than seeking to equalize spending among school districts based on equal protection arguments, third wave litigation maintained that the education clauses of state constitutions required a minimum level of education and that the state is required to provide a level of funding that is adequate to provide that education.[21]

The shift was politically motivated. Equity litigation created winners and losers because it caused wealth to be transferred from richer to poorer school districts. Naturally, the school districts whose pieces of the education funding pie got thinner were not happy.[22] Adequacy litigation, in contrast, by seeking to enlarge the size of the pie created the impression that everyone was a winner.[23]

Adequacy litigation is considerably more policy laden than equity litigation. Once a court has determined that education is a fundamental right, the court's subsequent review is limited to whether there is equal per pupil spending. Adequacy litigation, on the other hand, requires a court to determine what level of education is an adequate education and how much funding is necessary to reach that level. Thus, adequacy litigation raises concerns about the institutional competence of courts to make such judgments and the authority of courts to enforce such judgments.[24]

Nevertheless, the results of third wave litigation have heavily favored plaintiffs. According to the "Campaign for Educational Equity," the plaintiffs have triumphed in twenty-one states and lost in only seven states.[25] Where the plaintiffs have lost, courts have held that questions regarding educational adequacy are not justiciable because they are political questions. For example, the Florida Supreme Court in Coalition for Adequacy & Fairness, Inc. v. Chiles held that "appellants have failed to demonstrate ... an appropriate standard for determining 'adequacy' that would not present a substantial risk of judicial intrusion into the powers" of the representative branches.[26] In contrast, the high courts of other states, such as New Hampshire, have treated it as self evident that questions regarding educational adequacy are justiciable.[27]

II. AN ABRIDGED CLAREMONT CHRONOLOGY

At the center of the Claremont case is part II, article 83 of the state constitution, which in part provides:

> Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools…

Despite the enigmatic nature of a “duty” that involves “cherish[ing] the interest of” a number of things including public schools, [28] the supreme court in 1993 held that this language “commands in no uncertain terms, that the State provide an education to all its citizens and that it support The court further held – despite the lack of any dire all public schools.” [29]

The court further held - despite the lack of any direct or indirect mention of any qualitative or quantitative measures - that “article 83 imposes a duty on the State to

provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding;" [30] that there is a "corresponding right of the citizens to its enforcement;" [31] and that "[a]ny citizen has standing to enforce this right." [32] The Court, however, did not "define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor." [33]

In *Claremont II*, which was issued in 1997, the supreme court decided that defining the parameters of educational adequacy was not a task for the representative branches after all. The court struck down a definition of educational adequacy developed by the State Board of Education, [34] and said instead it would "look to the seven criteria articulated by the Supreme Court of Kentucky [in the v. Council for Better Education decision] as establishing general, aspirational guidelines for defining educational adequacy." [35] These so-called "general, aspirational guidelines" are:

1. sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
2. sufficient knowledge of economic, social, and political systems to enable the student to make informed choices.
3. sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation.
4. sufficient self-knowledge and knowledge of his or her mental and physical wellness.
5. sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage.
6. 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
7. sufficient levels 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.

The court added that it "anticipated" that the representative branches would "promptly develop and adopt specific criteria implementing these guidelines."[36]

In Claremont II, the court also changed the nature of the funding duty from guarantor to provider as it held that "[t]o the extent that the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State."[37] It also gave the representative branches a grace period to replace the extant funding system, which relied heavily on the local property tax.[38]

The court also held that a "constitutionally adequate public education is a fundamental right."[39] But because "the fundamental right at issue is the right to a State funded

constitutionally adequate public education,"[40] the legislature could allow school districts "to dedicate additional resources to their schools."[41] The court saw it as "basic," however, that the State must assure "comparable funding."[42]

In 2000 in Claremont IX, the Supreme Court issued an advisory opinion that reiterated the change in the nature of the State's funding duty. It opined that proposed legislation that relied on local property taxes to fund some of the legislatively defined cost of educational adequacy would "directly contradict the mandate of Part II, Article 83, which imposes upon the State the exclusive obligation to fund a constitutionally adequate education."[43]

The court also gratuitously opined that educational adequacy had "yet to be defined,"[44] despite the enactment of RSA 193-E.-2 in 1998, which essentially codified the "general, aspirational guidelines" handed down in Claremont II.[45] For good measure, the court added that "[ijt is not possible to determine the *level* of funding required to provide the children of this State with a constitutionally adequate education until its essential elements have been identified and defined."[46]

In 2002 in Claremont XI, the court held that "accountability is an essential component of the State's duty."[47] It explained that "[accountability means that the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible *to* determine whether, in delegating its obligation to provide a constitutionally adequate education, the State has fulfilled its duty."[48]

The Attorney General, who since 1999 had taken the position that the Claremont case "mandated" accountability, argued that extant statutes and regulations satisfied this "mandate."[49] The court, however, held that the "existing statutory scheme has deficiencies that are inconsistent with the State's duty to provide a constitutionally adequate education."[50]

The court held that certain education regulations known as the "minimum standards" for school approval[51] were "in clear conflict with the State's duty to provide a constitutionally adequate education" to the extent they "excuse noncompliance solely based on financial conditions."[52] Accordingly, to this extent, the minimum standards were deemed "facially insufficient."[53] The court also was critical of the New Hampshire Education Improvement and Assessment Program ["NHEIAP"] because the Department of Education "is limited to using the results [of assessment tests] to encourage school districts to develop a local education improvement and assessment plan," which the court felt was not a "meaningful" application of assessment tests.[54] Borrowing language that had been suggested by the Attorney General, the court "concluded that the State 'needs to do more work'."[55]

In sum, the supreme court's interpretation of article 83 has made the provision of a homogeneous public education through a centralized command-and-control system, which has the supreme court at its helm, the constitutional law of New Hampshire.

III. CLAREMONT AND THE SEPARATION OF POWERS

Part I, article 37 of the New Hampshire Constitution requires that governmental powers be separated between the three branches of government:

> In the government of this state, the three essential powers, to wit, the legislative, executive and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.[56]

As the supreme court has explained, this "[separation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people."[57][56]

The court has utilized the "political question" doctrine developed by the federal courts to prevent judicial violation of the separation of powers.[58] Among other circumstances, a case involves a nonjusticiable political question "where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it."[59]

A. Text and Structure

If the separation of powers means anything, it means that one branch of government cannot exercise powers that are textually committed by the constitution to another branch. Yet that is exactly what a judicially enforceable duty to provide an adequate education and provide adequate funding entails, because the constitution commits these matters to the representative branches.

The "power of the purse" is textually committed to the legislature as the constitution gives only the legislature the power to raise taxes,[60] and only money that the legislature has appropriated can be spent. [61] In general, it has long been understood that, under the separation of powers, when and how to exercise the "power of the purse" is exclusively a legislative call. [62] Indeed, that is one of the reasons why some have seen fit to refer to the judiciary as the “least dangerous branch.” [63]

The supreme court has recognized that the separation of powers would be violated if the judiciary were to attempt to require the legislature to make a particular type of appropriation. Indeed, only eight years prior to Claremont I, the court had held that part I, article 18, which in relevant part provides that the “true design of all punishments being to reform, not to exterminate mankind,” did not authorize the superior court to order the State to provide a college education to a State prison inmate.[64] Rather, the “superior court exceeded its jurisdiction” because, in part, the judiciary “cannot violate

the separation of powers by invading the right of the legislature to appropriate money for prison programs." [65]

Any remedy for an alleged deprivation of "adequate funding" would require a court to order the State to spend money that the legislature has not appropriated, which would violate part II, article 56.[66] Thus, there cannot be a judicially enforceable duty to provide adequate funding.

The power to make education policy is just as obviously textually committed to the legislative branch. The constitution vests the "supreme legislative power" in the legislature,[67] and gives the legislature "full power and authority" to make laws.[68] Consequently, to use the supreme court's own words, "[a]ny educational policy or rule declared by the Legislature or promulgated under authority delegated by it may not be reversed or vacated judicially on the ground that it must be regarded as impolitic." [69]

Yet that is precisely what the supreme court did in Claremont II, when it struck down a definition of educational adequacy developed by the State Board of Education. The court contended that it struck down the State Board's definition because the definition did not "sufficiently reflect the letter or spirit of the State Constitution's mandate."[70] However, the court did not explain what it was about the definition that was not sufficiently reflective of the constitutional mandate except that "in the first instance, it is the legislature's obligation, not that of individual members of the board of education, to establish educational standards that comply with constitutional requirements."[71] This explanation is unconvincing.

For one thing, the court's precedents established that it was constitutional for the legislature to delegate authority to administrative agencies, such as the Board of Education, as long as it provided "some standards or general policy to guide the administrative agency."[72] The court suggested that the authority to define educational adequacy could not similarly be delegated because the "constitution places the duty to support the public schools 'on the legislators and magistrates'."[73] But that simply begs the question why the legislature did not have the discretion to carry out its duty by delegating to the State Board the authority to define adequacy. Additionally, under this reasoning, the legislature should be prohibited from delegating any aspect of the duty to provide an adequate education, which as later Claremont decisions make clear is not the case.[74]

For another thing, if the problem was that the legislature could not delegate the task of defining educational adequacy, then the court did not need to "look to" the Kentucky parameters, as all that the representative branches would need to do to meet their "obligation" "to establish educational standards that complied with constitutional requirements,"[75] would be to directly enact the Board of Education's definition or another definition. The conclusion that the supreme court simply wanted to define adequacy itself is inescapable.

This conclusion is further supported by the language of part II, article 83. As noted earlier, there is no mention of any qualitative standard of education. Rather, the duty is simply to "cherish the interest of literature and the sciences, and all seminaries and public schools."[76] A very strong case can be made that this language is hortatory.[77] At best, this language is what commentators call "Category I" constitutional language,[78] and "merely mandate[s] some system of free public schools with no requirement as to support or quality."[79] But whether the language is hortatory or mandatory, it is impossible to read as requiring the multifarious "guidelines" enumerated in Claremont II. Instead, such a reading can fairly be described as "a display of stunning judicial imagination."[80]

Claremont II's holding that it was unconstitutional to use the local property tax to fund an adequate education was also politically based. Whether the tax was constitutional depended upon how the taxing district was delineated.[81] If it was delineated as the school district, as the trial court had defined it, then the rate and assessment would be uniform, and the tax would be constitutional. On the other hand, if the taxing district was delineated as the entire State, as the supreme court delineated it, then the tax would be unconstitutional because rates and assessments varied between school districts.

The supreme court reasoned that, because the purpose of the local property tax was to meet the State's duty to provide an adequate education, it was a State tax.[82] Again, the problem with this reasoning is that it is purely results oriented as it offers no satisfactory explanation why the State can delegate other aspects of its educational duties, but not the funding aspect. It also fails to explain why various other duties that the State delegates to municipalities can be funded with local property taxes when, in theory, they are also State duties.[83]

Another problem with this reasoning is that it is inconsistent with how the court had described the State's funding duty in Claremont I. There, the court said that the duty was to "guarantee adequate funding,"[84] which connotes a role where the State, acting as a guarantor, would assure that less affluent school districts have sufficient funding, as opposed to paying for the entire cost of an adequate education in all school districts. Thus, the supreme court, in order to strike down the extant education funding system, changed the nature of the State's duty from the guarantor of adequate funding to its exclusive provider.[85]

It is not just the constitution's delineation of governmental powers that compels the conclusion that education policymaking is textually committed to the representative branches. Article 83 does so as well as it makes the duty one for "the legislators and magistrates."[86] If the language "shall be the duty ... to cherish" is no mere statement of aspiration, but "commands, in no uncertain terms,"[87] then it necessarily follows that the language "shall be the duty of the legislators and magistrates" commands every bit as unequivocally "that the duty be fulfilled by the legislative and executive branches, without oversight and intrusion by the judiciary."[88]

Despite the clear textual commitment of education policymaking to the legislature, the supreme court has, under the guise of interpreting the constitution, played the role of a

"super Legislature" from the outset. While Claremont I's declination to "define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and Governor,"[89] may sound like deference to the representative branches, it is not.

Assuming for the sake of argument that article 83 "imposes on the State a duty to provide a constitutionally adequate education to every child in the public schools in New Hampshire and to guarantee adequate funding,"[90] it nonetheless is quite an interpretive leap to conclude that this duty requires that State government define an adequate education, and that it define adequacy in a one-size-fits-all manner. For example, it is certainly arguable that a more efficacious way to develop the parameters of a quality of public education is by letting school districts function as laboratories of education policy and develop their own separate definitions[91] or by letting market forces do so through school choice.[92]

Telling the representative branches that they have the "task" of defining an adequate education, in a decision purporting to interpret the constitution, is simply an insidious way of ordering the legislature to pass a certain type of legislation. If the text of the constitution mean anything, however, it is the legislature's call what level of government should be responsible for defining an adequate education and indeed whether there should be a governmental definition of an adequate education at all. Thus, rather than deferring to the legislature in Claremont I, the Supreme Court encroached upon its powers.

The representative branches' compliance with Claremont I emboldened the court. In Claremont II, the court struck down the State Board of Education's definition, announced its own "general, aspirational guidelines for defining educational adequacy," and indicated that it "anticipated" the representative branches "will promptly develop and adopt specific criteria implementing these guidelines."[93] Thus, the legislature's role had been reduced to implementing a program of public education that reflected the court's policy views.

Subsequent cases involved increased judicial micro-managing of education policy. In Claremont IX, even though the definition of an adequate education was not before it, the court opined that the legislative definition -which essentially codified the Claremont II guidelines- was insufficient, and indicated that the definition should be written at a *level* of detail from which its cost could be determined.[94] In Claremont XI, the court held *ST*- that the duty to provide an adequate education required "standards of accountability."[95] Because the extant statutes and regulations were not sufficiently "meaningful,"[96] the State "needed] to do more work,"[97] which is a fetching euphemism for rewriting the minimum standards and the NHEIAP to the court's liking.

Critiquing the legislature in this manner is clearly beyond the scope of how the supreme court had previously characterized judicial review, which simply "authorizes courts to determine whether a law is constitutional, not whether it is necessary oruseful."[98] Thus, the court "simply compares the legislative act with the constitution; [and] since the

constitution clearly cannot be adjudged void, the courts have no choice but to declare any act which is inconsistent with it to be of no effect."[99]

While one would never know it from reading the Claremont case, there are differences of opinion regarding how best to improve public education. The divide is political not legal. Those on the conservative side of the political spectrum typically favor the principle of subsidiarity, which pushes decision making down to the lowest possible level.[100] Accordingly, school districts, rather than the State, should run public schools, while parents should be able to choose their children's schools.[101] Those on the liberal side of the political spectrum typically favor centralization of education policy and oppose school choice.[102] Interpreting article 83 to require a single definition of educational adequacy for the entire State and uniform standards of accountability is simply a political judgment -that centralized bureaucratic control of public education is better policy than local control and school choice- camouflaged as constitutional law.

The structure of the constitution also belies the assertion that article 83 imposes any judicially enforceable duty on state government to provide an adequate education. Part I, the Bill of Rights, specifically enumerates limitations on governmental power. To name a few examples, government cannot take away our firearms,[103] prevent us from exercising the religion of our choice,[104] take our property without just compensation,[105] or prevent us from ventilating our opinions.[106] Part II, the Form of Government, in contrast, divides governmental powers between the three branches without specifically enumerating how to exercise those powers.[107]

Moreover, it expressly provides that the legislature has "full power and authority" to make "all manner of wholesome and reasonable" laws "as they may judge for the benefit and welfare of this state,"[108] The supreme court has construed this language to mean that "courts may not declare acts of the Legislature void on the sole issue whether they are 'wholesome and reasonable.' The Legislature is to judge whether they are for 'the benefit and welfare' of the state."[109] It would be incongruous with this structure, which precludes some governmental actions but does not require any actions, and leaves it to the branch most responsive to the people to determine what is for "the benefit and welfare of this state," to interpret article 83 to impose a judicially enforceable duty on the legislature to design and implement a curriculum based on qualitative guidelines provided by the supreme court and to enact and utilize "standards of accountability" that the court deems "meaningful."

B. Judicially Discoverable and Manageable Standards

Another characteristic exhibited by cases that involve nonjusticiable political questions is "a lack of judicially discoverable and manageable standards" for resolving the question.[110] The need for such standards for adequacy litigation is obvious as courts must determine what level of education is an adequate education and how much funding is necessary to reach that level. Perhaps the biggest problem a court attempting to develop such standards faces is that the relationship between school performance and funding is hardly the self-evident proposition that the Claremont case, and adequacy doctrine in

general, assumes. Rather, "there are significant theoretical and empirical disputes as to the importance of finance in the delivery of a quality education."[111]

Perhaps the paradigmatic example that it is not just love, but adequacy as well, that money cannot buy is the Missouri v. Jenkins desegregation case.[112] The United States District Court, since 1985, had issued remedial orders designed to desegregate the Kansas City Missouri School District by creating "magnet schools" to attract white students.[113] The "massive expenditures" ordered by the District Court financed, among other things, air-conditioned classrooms, a 2,000-square-foot planetarium, green houses and vivariums, a 25-acre farm with an air-conditioned meeting room for 104 people, a Model United Nations wired for language translation, broadcast capable radio and television studios with an editing and animation lab, a temperature controlled art gallery, movie editing and screening rooms, a 3,500-square-foot dust-free diesel mechanics room, 1,875-square-foot elementary school animal rooms for use in a zoo project and swimming pools.[114] The per pupil cost far exceeded the costs in any other school district in Missouri.[115] Yet "student achievement levels were still at or below national norms at many grade levels."[116] Mercifully for the taxpayers of Missouri, in 1995 the United States Supreme Court put an end *to* the District Court's spending spree.

Nevertheless, various "cost studies" have been developed to determine the cost of an adequate education.[117] A majority of states, including New Hampshire, have undertaken such studies voluntarily in response to education funding litigation,[118] In a few states, the studies were ordered by the courts.[119] The most popular types of cost studies are "professional judgment" and "successful schools."[120]

Professional judgment is just that as it defines the cost of an adequate education as what "experts" believe it costs to provide either their own vision of an adequate education, State standards or some other measure.[121] Successful schools studies define the cost of an adequate education as average spending among schools or school districts meeting selected benchmarks.[122] Despite the multiplicity of approaches, what all cost studies have in common is that they are completely arbitrary.

Consider the initial education funding law passed in response to Claremont II.[123] It was based upon a cost study prepared by Augenblick & Myers, Inc. using the successful schools approach.[124] The study identified school districts in which 40 to 60 percent of the third and sixth grade students had proficiency ratings of "Basic" or better on the State's standardized "NHEIAP" tests.[125] The sample was then reduced to the school districts that accounted for the 50 percent of the students with the lowest base costs,[126] which was defined as per pupil expenditure less costs for special education, summer school, all costs reimbursed by federal funds, and various other costs.[127] The per pupil cost of an adequate education was calculated based on the average base cost among these school districts.[128] In 1999 this number was $3,669.00.[129] This figure was then reduced by a 9.75 percent discount factor to produce a $3,311.00 per pupil cost of an adequate education, which was used to determine the amount of State funding.[130]

In Claremont VII, the plaintiffs urged the supreme court to write the 9.75 percent discount factor out of the formula because it lacked a "sufficient legal basis."[131] The plaintiffs were correct about the pedigree of the discount factor as it was a plug by the legislature to keep the total cost of an adequate education at $825 million,[132] But under that standard of review every other component of the formula could be found wanting as well. The definition of base cost, the choice of the NHEIAP tests, the choice of the "Basic" proficiency rating, and the selection of school districts where 40 to 60 percent of students score at "Basic" or better are also not legally based.

For example, the only answer to why the sample should be school districts where 40 to 60 percent of students score at "Basic" or better on the NHEIAP tests is that an "expert" says so. What is a court to do then when such a cost study is challenged as unconstitutional and a different expert testifies that in order to determine the cost of an adequate education the sample should be school districts where 50 to 70 percent of students score at or above "Proficient," or that base cost should be defined differently, or that a professional judgment study showed that per pupil expenditures should be $8,000.00 higher?[133] There certainly is no legal standard to guide the court.

Another shared attribute of cost studies is that they are unreliable because they ignore the numerous other variables affecting education performance besides funding, such as the competence of administrators, the quality of teachers, the talents and motivations of students, and the involvement of parents.[134] Because of these variables, the cost of an adequate education necessarily varies not just by school district or by school but by student. Accordingly, in order to reliably calculate the cost of an adequate education, the calculation must be done on a student-by-student basis and the calculation must account for the particular effect of non-financial variables on each student's performance. Until somebody comes up with a cost study that does so, the best that can be said about cost studies is that they provide equal per student State funding.

But even if the cost of an adequate education could be determined, education funding is not something that can be considered in isolation because education is just one of many services that State and local government provide. There are no judicially discoverable and manageable standards for determining how much of the State's budget can be devoted to public education without compromising the ability of State and local government to enforce environmental regulations, maintain public health programs or provide for the public safety, to name just a few examples.[135] Thus, education funding is an issue that belongs in the Statehouse, not the courtroom.

There also are no judicially discoverable and manageable standards for determining what level of education is an adequate education. Ironically, the Claremont case illustrates that the question is thoroughly political.

Claremont I seemed to hold out some hope that the New Hampshire Supreme Court would leave the making of education policy to the legislature to a greater degree than other state supreme courts which had also held that their States' constitutions imposed duties to provide and fund an adequate education. Unlike these courts, which

immediately proceeded to define educational adequacy,[136] the Claremont I court declined to "define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor."[137] Of course, which branch would control education policy would hinge upon what the supreme court intended to do "in the second instance." On the one hand, if the court's review were restricted to determining whether the definition is "inadequate" -for example, a thirty percent literacy rate[138]- then the legislature would retain the primary role in setting education policy.[139] If, on the other hand, the review were to involve determining whether the legislative definition of adequacy is, well, adequate then the court would be at large in the field of education policy and the branches' roles would be reversed.

Claremont II's "aspirational guidelines" made it clear that henceforth the supreme court intended to take the primary role in setting education policy. Justice Horton, who had been part of the unanimous Claremont I decision, dissented because, "[m]y problem is that I was not appointed to establish educational policy, nor to determine the proper way to finance the implementation of this policy. Those duties, in my opinion, reside with the representatives of the people ....”[14o]

Horton argued that the majority had defined "general adequacy" when all that part II, article 83 required was "constitutional adequacy."[141] The former was a question to be left to the political branches because "it is clear that one man's adequacy is another man's deficiency."[142] Reasoning that the scope of the duty was coterminous with the purpose of part II, article 83, and that the purpose was found in the language, "the preservation of a free government," Horton concluded that there is constitutional adequacy "if the education provided meets the minimum necessary to assure the preservation of a free government."[143] He then proceeded to define "constitutional adequacy" as "reading, writing and mathematics," "exposure to history and the form of our government," and "the first three elements of the Kentucky standard adopted by the majority, but not necessarily the balance."[144]

The majority, of course, had a different take on things. "We agree with Justice Horton that we were not appointed to establish educational policy ... That is why we leave such matters, consistent with the Constitution, to the two co-equal branches of government...,"[145] The majority's rebuttal, at best, simply assumes what needs to be proven.[146] Moreover, it is belied by their "aspirational guidelines," which leave the legislature no room to establish education policy. Rather, all that is left is for the legislature to "promptly develop and adopt specific criteria implementing these guidelines."[147]

While Horton's dissent criticizes the majority for setting education policy his approach represents a difference in degree, not in kind, from the majority's. Limiting the scope of the duty to the education "necessary to assure the preservation of a free government" may theoretically reduce the number of potential answers to the question what is an adequate education, but it does not convert that question from a political question into a legal question.

For example, Horton "would include in the constitutional standard the first three elements of the Kentucky standard adopted by the majority, but not necessarily the balance."[148] But whether knowledge of economics (standard two) is more important to the preservation of a free government than knowledge of the arts (standard five) is a matter of opinion.

Additionally, the Kentucky criteria contain other elements that might be deemed necessary to the preservation of a free government. For example, one might reasonably believe that "vocational training" is as necessary to preserving a free government as "written communication skills." And one might reasonably believe that skills that do not appear in the Kentucky criteria - such as sufficient physical fitness to serve in the armed forces - are essential to preserving a free government.[14]* Just as "one man's adequacy is another's deficiency," what type of education is "the minimum necessary to preserve a free government" is also a matter of opinion. Both are political questions.

Ironically, the majority's description of the nature of an adequate public education shows how political the question is:

> A constitutionally adequate public education is not a static concept removed from the demands of an evolving world. It is not the needs of the few but the critical requirements of the many that it must address. Mere competence in the basics-reading, writing, and arithmetic-is insufficient in the waning days of the twentieth century to insure that this State's public school students are fully integrated into the world around them. A broad exposure to the social, economic, scientific, technological, and political realities of today's society is essential for our students to compete, contribute, and flourish in the twenty-first century.[150]

If an "adequate public education is not a static concept removed from the demands of an evolving world," which I agree it is not, then whether the public schools are providing an adequate education is not something that judges can discover by recourse to the text of the constitution, the supreme court's precedents[151] or history.[152] Rather, it is a question of policy to be answered by the elected branches.[153]

Of the three branches of government, the judiciary is the least institutionally suited to adjusting education policy to "the demands of an evolving world." The judiciary must wait for the appropriate lawsuit to set education policy. The legislature, in contrast, is able to change education policy as often as necessary. And while a judge only gets to hear the views of the litigants' "experts," the legislature can listen to anyone it thinks might be helpful. If it "is not the needs of the few but the critical requirements of the many that [an adequate education] must address,"[154] then the body elected by and regularly accountable to the many, the legislature, is its logical expositor.[155]

Ironically, the crown jewel of the Claremont case, its "standards of accountability," illustrates why judges should leave education policymaking to the representative branches. The legislature will not be able to use standards to generate improvement by purposefully making standards hard, or even impossible, to achieve without running the

risk that schools will be deemed inadequate for not attaining such standards. Consequently, Claremont may well result in lower standards and a lower level of education performance than would otherwise be the case. Public school students may get an adequate education, but that is all that they will get.

IV. CONCLUSION

The supreme court has said that the separation of powers requires that it "be as zealous in protecting the rights of the other co-equal branches,"[156] as it is protecting its rights. Claremont, therefore, should be overruled. For their part, the representative branches should take to heart James Madison's words in *The Federalist* No. 49: "[T]he several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers,"[157] and start acting like co-equals.

ENDNOTES

1 I use the phrase "Claremont case" to refer to the line of cases that commenced with Claremont School District v. Governor, 138 N.H. 183, 635 A.2d 1375 (1993) and Claremont School District v. Governor, 142 N.H. 462, 703 A.2d 1353 (1997). These initial decisions are generally known as Claremont I and Claremont II, which is how I will refer to them. I count, and will refer to, the challenge to Justice Batchelder's participation in Claremont II as Claremont III (Claremont School District v. Governor, 142 N.H. 737, 712 A.2d 612 (1998)); the advisory opinion on former Governor Shaheen's "ABC" education funding plan as Claremont IV (Opinion of the Justices (School Financing)), 142 N.H. 892,712 A.2d 1080 (1998)); the State's request for an extension to implement a new education funding system as Claremont V (Claremont School District v. Governor, 143 N.H. 154, 725 A.2d 648 (1998)); the advisory opinion on the constitutionality of a proposed tax plan referendum as Claremont VI (Opinion of the Justices (School Financing), 143 N.H. 429, 725 A.2d 1082 (1999)); the Claremont plaintiffs' challenge to a "phase-in" in certain communities of the state property tax as Claremont VII (Claremont School District v. Governor, 144 N.H. 210, 744 A.2d 1107 (1999)); the Claremont plaintiffs' successful request for attorney's fees as Claremont VIII (Claremont School District v. Governor, 144 N.H. 590, 761 A.2d 389 (1999)); the advisory opinion on a targeted aid plan proposed by former State Senator Fred King as Claremont DC (Opinion of the Justices (Reformed Public School Financing System), 145 N.H. 474, 765 A.2d 673 (2000)); the decision upholding the constitutionality of the state property tax as Claremont X (Sirrell v. State, 146 N.H. 364, 780 A.2d 494 (2001)); and the "accountability decision" as Claremont XI (Claremont School District v. Governor, 147 N.H. 499, 794 A.2d 744 (2002)). Commentators have truncated matters by referring to the accountability decision, which I refer to as Claremont XI, as Claremont III, *see, e.g.,* John Dayton, Anne Dupre, *School Funding Litigation: Who's Winning the War?,* 57 Vand. L. Rev. 2351, 2359 (2004). This, however, does not give a true sense of the serial nature of the litigation. Indeed, while not discussed in this article, there arguably also have been a Claremont XJJ, Baines v. New Hampshire Senate President, 152 N.H. 124, 876 A.2d 768 (2005) (rejecting challenge to process used to pass education funding law), and a Claremont XHI, Hughes v. Speaker of New Hampshire House of Representatives, 152 N.H. 276, 876 A.2d 736 (2005) (rejecting challenge to process used to pass education funding law).

2 *See Claremont I,* 138 N.H. 183, 635 A.2d 1375 .

3 *See Claremont II,* 142 N.H. 462, 703 A.2d 1353; *Claremont XI,* 147 N.H. 499, 794 A.2d 744.

4 *Claremont II,* 142 N.H. at 475, 703 A.2d at 1360.

5 *Claremont XI,* 147 N.H. at 520, 794 A.2d at 760. Note that one of the dissenters, Justice Nadeau, retired in December, 2005.

6 This article is not the first examination of the Claremont case from the standpoint of the separation of powers. In LETTERS TO THE EDUCATORS, Attorney Eugene Van Loan III, writing under the pseudonym Rasputin, examined the topic as part of a comprehensive critique of the Claremont case. LETTERS TO THE EDUCATORS, which was written from January, 1998 to August, 1998, can be found at www.mainstream.net/nhpolitics (last accessed February 15, 2005).

[7] *See* Andru H. Volinsky, *New Hampshire's Education-Funding Litigation: Claremont School District* v. *Governor*, 83 Neb. L. Rev. 836, 844 005) ("Our experience in New Hampshire with the Claremont case is representative of the state-constitution-based school-funding litigation hat has developed across the nation in response to the United States Supreme Court's decision in San Antonio Independent School District v. Rodriguez.")

[8] Information regarding "The Campaign for Educational Equity" can be found at its website "Access," at www.schoolfunding.info. It was formed in June, 2005 by Teachers College, Columbia University. Teachers College's President Michael Levine in launching the organization "explained that the new campaign is designed to overcome the gap in educational access and achievement between America's most and least advantaged students. 'We consider 'the gap' to be the educational equivalent of AIDS or cancer in medicine,' he said." http://www.schoolfunding.info/news/policy/6-16-05rebelltotc.php3(last accessed February 15, 2005). The website of the Claremont plaintiffs also refers to "the gap." http://www.nhcvp.org/fundgap.php (last accessed February 15, 2005).

[9] The Access website reports that the only states not to have undergone education funding litigation are Delaware, Hawaii, Mississippi, Nevada and Utah. http://www.school fundmg.info/litigation/hi-Process%20Litigations-09-2004.pdf (last accessed February 15, 2005).

[10] Commentators have described "three waves" of school funding litigation. *See* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: the Massachusetts Decision as a Model*, 35 B.C. L. Rev. 597, 598 (1994) ("challenges to the school finance systems of the various states can be divided into three distinct 'waves' of cases.") *See also* William S. Koski, *Of Fuzzy Standards and Institutional Constraints: a Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 Santa Clara L. Rev. 1185, 1188 (2003); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave ": From Equity to Adequacy*, 68 Temple L. Rev.1151, 1152 (1995).

[11] Mclnnis v. Shapiro, 293 F. Supp. 327 (N.D. 111. 1968) aff d sub. Nom. Mclnnis v. Oglive, 394 U.S. 322 (1969); Burrus v. Wilkerson, 310 F.Supp. 572 (W.D. Va. 1969) aff d. 397 U.S. 44 (1970). *See Koski, supra* note 10, at 1213-14.

[12] Koski, *supra* note 10, at 1188 ("school finance litigation initially focused on the federal Constitution's Equal Protection Clause and was fueled by the argument that per-student funding should be substantially equal or at least not dependent upon the wealth of the school district in which the student resided.").

[13] 487 P.2d 1241, 1265 (Cal. 1971).

[14] 411 U.S. 1, 33 (1973) ("[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws").

[15] *Id.* at 49-55 (concluding that "local control" was a sufficient state interest to satisfy rational basis review).

[16] *Id.* at 138 n. 100 (Marshall dissenting). Allegedly, Marshall described his judicial philosophy as "you do what you think is right and let the law catch up." MARK R. LEVIN, MEN IN BLACK 17 (2005).

[17] *Robinson v, Cahill*, 303 A.2d 273, 294 (N.J. 1973).

[18] *See* Thro, *supra* note 10, at 603; Koski, *supra* note 10, at 1191; Heise, *supra* note 10, at 1152.

[19] Serrano v. Priest, 557 P.2d 929 (Ca. 1976).

[20] 790 S.W.2d 186 (Ky. 1989).

[21] See Thro, *supra* note 10, at 603; Koski, *supra* note 10, at 1192; Heise, *supra* note 10, at 1153.

[22] A well known example in New Hampshire of the political unpopularity of equity litigation is the effort by Killington to secede from Vermont and join New Hampshire. *See, e.g., Vermonters Persist in Desire to Move*, Concord Monitor, February 2, 2005, at B1.

[23] See Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform*, 55 Hastings L.J. 1077, n. 554 (2004) ("Adequacy was seen as a more politically appealing theory of reform that would permit the big spenders to continue spending big, while at the same time ensuring an adequate education for all school children.")

[24] But see Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 Har. J.L. & Pub. Pol'y, 569, 583 (2004) ("The adequacy standard is perhaps also more palatable to legal commentators and the public because it intrudes less upon the principle of separation of powers. It is one thing to find that a system does not meet the constitutionally required minimum standard and is therefore unconstitutional until it is improved to meet that standard. This is the fundamental function of courts: to say what the law is.")

[25] Note 8, *supra*. Massachusetts and Texas are listed as both winners and losers.

[26] 680 So.2d 400,408 (Fla. 1996). *See* Committee for Educational Rights v. Edgar, 672 N.E. 2d 1178,1191 (HI. 1996) ("It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution;") *See also* Ex parte James, 836 So.2d 813, 819 (Al. 2002) ("Continuing the descent from the abstract to the concrete, we now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature. Accordingly, compelled by the authorities discussed above-primarily by our duty under § 43 of the Alabama Constitution of 1901-we complete our judicially prudent retreat from this province of the legislative branch in order that we may remain obedient to the command of the people of the State of Alabama that we 'never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men;') Marrero v. Commonwealth of Pennsylvania, 739 A.2d 110,113-14 (Pa. 1999) ("what constitutes an 'adequate' education or what funds are adequate' to support such a program.... are matters which are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government;") City of Pawtucket v. Sundlun, 662 A.2d 40,59 (R.I. 1995) (noting that, in attempting to define what constitutes a "thorough and efficient" education under the New Jersey Constitution, "the New Jersey Supreme Court has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort, and court attention. The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature.").

[27] *See Claremont II*, 142 N.H. at 475, 703 A.2d at 1360. *See also* Rose v. Council for Better Education, 790 S.W. at 211 ("In spite of any protestations to the contrary, we do not engage in judicial legislating. We do not make policy. We do not substitute our judgment for that of the General Assembly. We simply take the plain directive of the Constitution, and, armed with its purpose, we decide what our General Assembly must achieve in complying with its solemn constitutional duty."); Lake View School Dist. No. 25 of Phillips County v. Huckabee, ___ S.W. ___, (Ark. 2005) ("This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education.")

[28] *See* Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 Cap. U. L. Rev. 37 (1996) (describing mandate to cherish as "inherently nebulous.")

[29] *Claremont I*, 138 N.H. at 187, 635 A.2d at 1378.

[30] *Id*. at 184, 1376.

[31] *Id*. at 191-92, 1381.

[32] *Id*. at 192, 1381.

[33] *Id*.

[34] *Claremont II*, 142 N.H. at 471 -72, 703 A.2d at 1357-58

[35] *Id. at* 474, 1359.

[36] *Id.* at 475, 1359.

[37] *Id. at* 471, 1357.

[38] *Id.* at 476-77, 1360 ("the present funding system may remain in effect throughout the 1998 tax year.") At the time, "[l]ocally raised real property taxes [were] the principal source of revenues for public schools, providing on average from seventy-four to eighty-nine percent of total school revenue." *Id.* at 466, 1354.

[39] *Id.* at 473, 1359. It is noteworthy that, in *Claremont* /the court had said that "a free public education is at the very least an important, substantive right," which is a lower level right under equal protection analysis than a fundamental right. 138 N.H. at 192, 635 A.2d at 1381. *Claremont II* does not attempt to explain how, in the intervening four years, the right to an education grew from a substantive right to a fundamental right.

[40] *Claremont II*, 142 N.H. at 473, 703 A.2d at 1359.

[41] *Id. at* 475, 1360.

[42] *Id.* at 476, 1360. This makes the Claremont case a hybrid of equity and adequacy theory. Every school district must receive comparable state funding, which is equity theory, but school districts may use local taxes to increase the level of funding, which avoids the political problems experienced in Vermont with equity litigation. *See* Note 22, *supra*.

43 *Claremont IX*, 145 N.H. at 476, 765 A.2d at 676.

44 *Id. at* 478, 677.

45 *See* N.H. Laws 1998, Chapter 389,193-E:2. In 2005, RSA 193-E.-2 was re-titled, "Criteria for an Equitable Education." However, the criteria remain unchanged.

46 *Claremont IX*, 145 N.H. at 478, 765 A.2d at 677.

47 *Claremont XI*, 147 N.H. at 500, 794 A.2d at 745.

48 *Id.* at 508, 751.

49 *Id.* at 510,752. The Attorney General previously had "characterized Claremont II as issuing four mandates: 'define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability,'" *Id.* at 505, 749. Claremont II, however, says nothing about either delivery or accountability. Moreover, as long as adequate funding is being provided, the duty is being met. Therefore, it should not matter constitutionally whether the legislature "determined" the cost of an adequate education or picked a number from a hat. Similarly, as long as an adequate education is being provided, it should not matter constitutionally whether it is being delivered through accountability or through UPS. The court properly chose not to base its holding in Claremont XI on this "concession," *id.* at 507-08,750-51, as the Attorney General cannot bind the legislature. Instead, it reasoned that "meaningful" "standards of accountability" were required because "[i]f the State cannot be held accountable for fulfilling its duty, the duty creates no obligation and is no longer a duty." *Id.* at 509, 751. The manifest problem with this reasoning is that the constitution does hold the representative branches accountable for its education policy choices, albeit to the voters not the court, as the legislature and governor must stand for reelection every two years.

50 *Id. at 500, 745.*

51 Ed. 306 *available at* www.ed.state.nh.us. The "minimum standards" are minimum only in the sense that they are required for State approval for student attendance and state funding. They are quite extensive and detailed.

52 *Claremont XI*, 147 N.H. at 514, 794 A.2d at 755.

53 *Id.* The court had never before used the phrase "facially insufficient" to describe a law or regulation's constitutional status. While it sounds like "facially unconstitutional," it is a completely different animal. A facially unconstitutional challenge to a legislative act is "the most difficult challenge to mount successfully" and to succeed "the challenger must establish that no set of circumstances exists under which the Act would be valid." U.S. v. Salerno, 481 U.S. 739, 745 (1987); *see* State v. Brobst, 151 N.H. 420,422-25, 857 A.2d 1253, 1254-57 (discussing overbreadth doctrine.) "Facial insufficiency" appears to mean that the challenger simply must show that the law was not written the way the court would have written it.

54 *Claremont XI*, 147 N.H. at 517, 794 A.2d at 758.

55 *Id.* at 519, 759. The Attorney General's view of the respective roles of the branches was that the representative branches "are responsible for crafting and implementing a long-term solution to the problems with the education funding system found by this Court. The Court is responsible for deciding whether the Legislature has adopted a satisfactory definition and for determining that the Legislature has finished its initial tasks under *Claremont II*, or that it needs to do more work." *Id.* Thus, in the view of the Attorney General, the judiciary's role is to tell the legislature how high to jump, while the legislature's role is to jump that high.

56 In Claremont V, the court, apparently frustrated that nearly a year had passed since the issuance of Claremont II, during which time "the legislature has primarily put its efforts into the consideration of legislation (the ABC plan) that was determined to contain an unconstitutional funding mechanism and proposed constitutional amendments designed to nullify in whole or in part this court's decisions in *Claremont I* and *Claremont II,"* 143 N.H. at 157, 725 A.2d at 650, intimated that the "chain of connection" language meant it could act to fund public education in the absence of legislative action, *id.* at 160-61, 652. Such a construction of part I, article 37 would be the proverbial exception that swallows the rule because by the same reasoning the legislature could exercise judicial powers if it felt the court was not meeting its constitutional duties. What this language refers to is one branch exercising a power that is of a nature that belongs to another branch, where expressly provided by the constitution. One example is part II, article 38, which provides that the senate "shall be a court" for impeachments. *See* THE FEDERALIST, NO. 47 (James Madison).

57 Petition of the Governor and Executive Council, 151 N.H. 1, 9, 846 A.2d 1148,1154 (2004).

[58] Baines v. New Hampshire Senate President, 152 N.H. 124, 128-29, 876 A.2d 768, 774- 75 (2005) (citing Baker v. Carr, 369 U.S. 186, 209 (1962)).

[59] Hughes v. Speaker of the New Hampshire House of Representatives, 152 N.H. 276, 283, 876 A.2d 736, 743(2005).

[60] N.H. CONST, part I, article 28 and part II, article 5.

[61] N.H. CONST, part II, article 56.

[62] Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 Harv. J. On Legis. 297, 300 (1988) ("The Framers[1] decision to invest the Legislative Branch with the control over the purse was neither arbitrary nor novel. Rather, in assigning the Legislature the power of the purse, the Framers were relying on their familiarity with the lessons of Roman, English, and colonial history; with the history of the American states prior to the adoption of the Constitution; and with English and continental political theory.")

[63] *See* THE FEDERALIST, NO. 78 (Alexander Hamilton) ("Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes
the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.")

[64] State v. Evans, 127 N.H. 501, 506 A.2d 695 (1985).

[65] *Id.* at 507, 699. The court also ruled that judiciary could not violate the separation of powers by invading "the right of the executive to devise and implement rehabilitative and educational programs at the State prison." *Id.*

[66] "No moneys shall be issued out of the treasury of this state, and disposed of, (except such sums as may be appropriated for the redemption of bills of credit, or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, by and with the advice and consent of the council, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court."

[67] N.H. CONST. part II, article 2.

[68] N.H. CONST. part II, article 5.

[69] Coleman v. School District of Washington, 87 N.H. 465, 472; 183 A. 586, 589 (1936).

[70] *Claremont II*, 142 N.H. at 471, 703 A.2d at 1357.

[71] *Id.* at 472, 1358.

[72] Petition of Strandell, 132 N.H. 110,118,562 A.2d 173,178 (1989).

[73] *Claremont II*, 142 N.H. at 471, 703 A.2d at 1357.

[74] *See Claremont XI*, 147 N.H. at 508, 794 A.2d at 751 (standards of accountability must allow court "to determine whether, in delegating its obligation to provide a constitutionally adequate education, the State has fulfilled its duty.")

[75] *Claremont II*, 142 N.H. at 472, 703 A.2d at 1358.

[76] N.H. CONST, part II, article 83.

[77] *See* LETTERS TO THE EDUCATORS, *supra* note 5.

[78] *See* Thro, *supra* note 10, at 605-06 ("In some states, 'Category F clauses impose a legislative duty which is met by simply establishing a public school system. In other states, 'Category II' clauses require that the system be of a specific quality or have some characteristic such as 'uniformity.' The 'Category HI' education clauses go beyond the specific quality level of Category II and set up

the school system for a specific purpose. Finally, in the few states with 'Category IV' clauses, education is the 'primary,' 'fundamental' or 'paramount' duty of the state legislature.") Note that Thro incorrectly classifies New Hampshire as a Category IV state as there is no language in part II, article 83 describing public education as a "primary," "fundamental" or "paramount" duty. *Id.* at n. 59. Thro, however, correctly describes the Massachusetts education clause (which is a "nearly identical provision regarding education," *Claremont I,* 138 N.H. at 186, 635 A.2d 1378) as a Category I clause, "which cannot be regarded as imposing a quality standard." *Id.* at 611.

79 Jon Mills and Timothy McLendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make "Adequate Provision "for Florida Schools,* 52 Fla. L. Rev. 329, 344 (2000).

80 Hancock v. Commissioner of Education, 822 N.E.2d 1134,1160 (2005) (Cowin, I, concurring).

81 *See* SUSAN E. MARSHALL, THE NEW HAMPSHIRE STATE CONSTITUTION, 121 (2004) ("The legislative authority to impose taxes is limited by the constitutional requirement that they be 'reasonable and proportional.' Reasonable and proportional taxes are equal in valuation and uniform in rate.... To have a uniform valuation and uniform rate, a tax must be uniform throughout the taxing district, so that a state tax must be uniform throughout the state, a county tax throughout the county, and a town tax throughout the own." (Citations omitted))

82 *Claremont II,* 142 N.H. at 469, 703 A.2d at 1356. *Compare* Holt v. Antrim, 64 N.H. 284, 286, 9 A. 389, 389 (1887) ("Local education is a local purpose for which legislative power may be delegated to towns.")

83 *See Claremont H,* 142 N.H. at 481, 703 A.2d at 1363 (Horton, J., dissenting).

84 *Claremont I,* 138 N.H. at 184, 635 A.2d at 1376.

85 *See also Claremont IX,* 145 N.H. at 478, 765 A.2d at 677 (It is "the State's obligation to underwrite the cost of an adequate education for each educable child.") The hostility of the supreme court to property taxes in general can be seen in Claremont X, where the court came within one vote of declaring the statewide property tax unconstitutional. *See* 146 N.H. 364, 780 A.2d 494.

86 *See* N.H. CONST, part II, article 41 (referring to Governor as "supreme executive magistrate.")

87 *Claremont I,* 138 N.H. at 187, 635 A.2d at 1378.

88 *Hancock,* 822 N.E.2d at 1160 (Cowin, J. concurring). There are other examples that demonstrate that the court's treatment of the language of part II, article 83 has been inconsistent. For example, it is not just public schools that the legislators and magistrates have a duty to "cherish" but "seminaries" and "the interest of literature and the sciences." Yet the court has given no effect to this language. The reason cannot be that the language is too ambiguous because the court previously had said that to the framers seminaries meant colleges. *See* Sisters of Mercy v. Town of Hooksett, 93 N.H. 301,305; 42 A.2d 222,225 (1945).

89 *Claremont I,* 138 N.H. at 192, 635 A.2d at 1381.

90 *Id.* at 184, 1376.

91 *See* San Antonio v. Rodriguez, 411 U.S. at 50 ("An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.' No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.")

92 *See* Jennifer L. Smith, *Educational Vouchers in Indiana - Considering the Federal and State Constitutional Issues,* 34 Val. U. L. Rev. 275 (1999).

93 *Claremont II,* 142 N.H. at 474-55, 703 A.2d at 1359.

94 *Claremont IX,* 145 N.H. at 478, 765 A.2d at 677.

95 *Claremont XT,* 147 N.H. at 500, 794 A.2d at 745.

96 *Id.* at 517, 758.

97 *Id. at* 519, 759.

98 State v. LaFrance, 124 N.H. 171, 177, 471 A.2d 340, 343 (1983).

99 *Id. See* Marbury v. Madison 5 U.S. (1 Cranch) 137,178 (1803) ("So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide the case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.")

100 *See* 2005-2006 REPUBLICAN PARTY PLATFORM *available at:* http://www.nhgop.org/ resourees/platfonn.html#edu ("Local control of education policy and education funding creates the best-managed school systems.")

101 *See id.* ("Laws should be implemented to encourage school choice and competition and allow all parents to choose the best public, private, charter or home school program for their children.")

102 *See* THE NEW HAMPSHIRE DEMOCRAT PARTY PLATFORM 2004 *available at* http://www.nhdp.org/platform.asp#EDUCATION ("We believe in the primacy of public education and oppose attempts to reduce the public commitment to all schools." "We require that the State Board of Education develop policies for the benefit of local boards that outline our collective concept of adequacy in public education.")

103 N.H. CONST, part I, article 2-a.

104 N.H. CONST, part I, article 5.

105 N.H. CONST, part I, article 12.

106 N.H. CONST, part I, article 22.

107 N.H. CONST, part II, article 2 (legislative power); N.H. CONST, part II, article 41 (executive power), N.H. CONST, part H, article 72-a (judicial power).

108 N.H. CONST. part II, article 5.

109 *Coleman, supra* note 68, 87 N.H. at 466, 183 A. at 586.

110 *Hughes, supra* note 58, 152 N.H. at 283, 876 A. 2d at 743.

111 Obhof, *supra* note 24, at 595. *See also* W. Lance Conn., *Funding Fundamentals: the Cost/quality Debate in School Finance Reform,* 94 Ed. Law Rep. 9, 10 (1994) ("Despite over two hundred studies in nearly thirty years, educational researchers have not yet shown convincingly that school expenditures are related to educational achievement in any systematic way.") *See generally* Michael Heise 11 Cornell J.L. & Pub. Pol'y 633, 656 n. 148 (2002) (collecting articles).

112 515 U.S. 70 (1995).

113 *Id.* at 76-77.

114 *Id*. at 19.

115 *Id.*

116 *Id.* at 100 (internal quotation omitted).

117 *See, e.g.,* Steve Smith, *Education Adequacy Litigation: History, Trends, and Research,* 27 U. Ark. Little Rock L. Rev. 107,114 (2004) ("with courts across the country finding education systems unconstitutional, the next logical step was to create some type of rationale or methodology to determine adequate funding levels"); James E. Ryan and Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?,* 22 Yale L. & Poly Rev. 463,475 (2004) ("reliance on costing-out studies promises to be one of the most important trends in school finance litigation over the next decade.")

118 *See Costing Out,* Campaign for Educational Equity, *available at:* tp://www.schoolfunding. info/policy/CostingOut/overview.php3 (last visited February 15, 2005.)

119 *Id.* These states were Arizona, Arkansas, New York, Ohio and Wyoming.

120 Janet D. McDonald, Mary F. Hughes and Gary W. Ritter, *School Finance Studies and Adequacy Litigation,* 27 U. Ark. Little Rock L. Rev. 69, 93 (2004). *See also* Ryan and Saunders, *supra* note 117 at 477.

121 Deborah A. Verstegen, *Towards a Theory of Adequacy: the Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems,* 23 St. Louis U. Pub. L. Rev. 499, 500 (2004).

122 R. Craig Wood and Bruce D. Baker, *An Examination and Analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas,* 27 U. Ark. Little Rock L. Rev. 125,145 (2004)

123 N.H. RSA 198:40 (1999) (repealed 2005).

124 N.H. Laws 1998, Chapter 267, 267:1. *See* Campaign for Educational Equity, *New Hampshire Fact Sheet, available at:* http://www.schoolfunding.info/states/nh/ costingout-nh.php3 (last accessed February 15, 2005).

125 N.H. Laws 1999, RSA 198:40, I(b)(l). The NHEIAP ranks students in one of four categories: Novice, Basic, Proficient, or Advanced. *See* New Hampshire Department of Education, *NHEIAP FAQ, available at:* http://www.ed.state.nh.us/education/doe/organization/curricu -lum/Assessment/nheiapFAQ s.htm (last accessed February 15, 2005). Districts where more than 60 percent of the students scored at the Basic or better levels were excluded on the ground that they were providing more than an adequate education, while districts where fewer than 40 percent of the students scored Basic or better were excluded on the ground that they were not providing an adequate education. *See* Douglas E. Hall and Richard A. Minard Jr., *Plumbing the Numbers #7 School Finance Reform: Trends & Unintended Consequences* 5-7 (New Hampshire Center for Public Policy Studies 2003) *available at* http://www.unh.edu/nhcpps/plumbing/plumbing7.pdf (last accessed February 15,2005).

126 N.H. Laws 1999, Chapter 17,198:40, 1(b)(2).

127 N.H. Laws 1999, Chapter 17,198:40, 1(a).

128 N.H. Laws 1999, Chapter 17,198:40, 1(b)(3).

129 Hall and Minard, *supra* note 125, at 5.

130 *Id.* at 7.

131 *Claremont VII,* 144 N.H. at 212, 744 A.2d 1107.

132 Hall and Minard, *supra* note 125, at 7, n. 3.

133 A study relied on by the plaintiffs at the trial court level in the Massachusetts Hancock case argued that the per pupil cost of an adequate education was $13,000.00, which was nearly $8,000.00 higher than spending in one of the target school districts. The trial court did not find the study "helpful" because it represented "to some extent a wish list of resources that teachers and administrators would like to have if they were creating an ideal school with no need to think about cost at all" and because "the context in which this study was conducted—a lawsuit involving funding issues for the very districts in which the panel members teach and work-gives one pause about its otal objectivity." Hancock ex rel. Hancock v. Driscoll, 2004 WL 877984 at 121 (Mass.Super.)

134 *See* Michael Heise, *Litigated Learning and the Limits of Law,* 57 Vand. L. Rev. 2417, 2446 (2004) "(what is reasonably clear is that something as complex as student academic achievement almost assuredly does not pivot on any single variable, such as funding, teacher quality, racial composition, or class size"); *see also* Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy,* 28 Harv. J. on Legis. 423, 438 (1991) ("the aggregate data provided by the 187 separate estimates lead relentlessly to the conclusion that, after family backgrounds and other educational inputs are considered, differences in educational expenditures are not systematically related to student performance.")

135 Education funding litigation seeks to override the political process by imposing a higher value on education spending than on other government spending. The Supreme Judicial Court of Massachusetts recently refused to hold that the Commonwealth was underfunding education "[b]ecause decisions where scarce public money will do the most good are laden with value judgments, those decisions are best left to our elected representatives." *Hancock,* 822 N.E.2d at 1156.

136 *Rose,* 790 S.W.2d at 212; *McDuffy,* 615 N.E.2d at 618. Note that in Hancock, the Supreme Judicial Court of Massachusetts backed away from using the Kentucky "capabilities" as the lodestar for whether the Commonwealth was providing an adequate education. Rather, McDuffy "did not mandate any particular program of public education," while the "seven 'capabilities' listed in *Rose* do not in themselves prescribe a specific curriculum." *Hancock,* 822 N.E.2d at 1153.

137 *Claremont I,* 138 N.H. at 192, 635 A.2d at 1381.

138 *Cf. Coalition for Adequacy & Fairness, Inc.* v. *Chiles,* 680 So.2d at 411 ("While 'adequate' may be difficult to quantify, certainly a minimum threshold exists below which the funding provided by the legislature would be considered 'inadequate.' For example, were a complaint to assert that a county in this state has a thirty percent illiteracy rate, I would suggest that such a complaint has at least stated a cause of action under our education provision.") (Overton, J., concurring)

139 While this approach makes the court's role critic, as opposed to chef, it still does not provide a manageable standard of review because inadequacy, like pornography, would depend on the eye of the beholder. *See* Jacobellis v. State of Ohio, 378 U.S. 184,197 (1964) (under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that") (Stewart, J. concurring).)

140 *Claremont II,* 142 N.H. at 477, 703 A.2d at 1361.

141 *Id.* at 478, 1361.

142 *Id.*

143 *Id.* at 479, 1362

144 *Id.*

145 *Id.* at 475, 1360.

146 Note that the majority's profession of deference to the representative branches is qualified by the phrase "consistent with the Constitution," which the majority had just interpreted to require the representative branches to "develop and adopt specific criteria implementing" the Kentucky guidelines.

147 *Id.* at 475, 1359.

148 *Id.* at 479, 1362.

149 *See, e.g.,* Paul Cartledge, THE SPARTANS p. 32 (2003) (discussing the Agoge, the system of compulsory education in Sparta).

150 *Claremont II,* 142 N.H. at 474, 703 A.2d at 1359.

151 If anything, precedent indicates that the constitution does not impose a judicially enforceable duty upon the State to provide and fund an adequate education. *See* Holt v. Antrim, *supra* note 82, 64 N.H. at 286, 9 A. at 389 ("Local education is a local purpose for which legislative power may be delegated to towns"); Fogg v. Board of Education, 76 N.H. 296, 299, 82 A. 173,174-75 (1912) ("primary purpose of the maintenance of the common school system is the promotion of the general intelligence of the people constituting the body politic and hereby to increase the usefulness and efficiency of the citizens, upon which the government of society depends. Free schooling furnished by the state is not so much a right granted to the pupils as a duty imposed upon them for the public good.")

152 History also indicates that the constitution does not impose a judicially enforceable duty upon the State to provide and fund an adequate education. As the supreme court noted in Claremont I, "no State funding was provided at all for education in the first fifty years after ratification of the constitution." 138 N.H. at 191, 635 A.2d at 1381; *see also* Walter A. Backofen, *Claremont Achilles' Heel: The Unrecognized Mandatory School-Tax Law of 1789,* New Hampshire Bar Journal, Vol. 43, No. 1, p. 26 March 2002 (Law of 1789, which was in effect until 1919, provided neither equal nor adequate funding for public schools.)

153 *See* Marrero v. Commonwealth of Pennsylvania, *supra* note 26, 739 A.2d at 112 ("The Constitution 'makes it impossible for a legislature to set up an educational policy which future legislatures cannot change' because 'the very essence of this section is to enable successive legislatures to adopt a changing program to keep abreast of educational advances.' It would be no less contrary to the 'essence' of the Constitutional provision for this Court to bind future Legislatures and school boards to a present judicial view of a constitutionally required 'normal' program of educational services. It is only through free experimentation that the best possible educational services can be achieved.")

154 I cannot help pointing out that the "[i]t is not the needs of the few but the critical requirements of the many" language sounds a lot like Mr. Spock's last words to Admiral Kirk in Star Trek II: "Don't grieve, admiral... It's logical... The needs... of the many... outweigh... the needs of the few."

[155] It should come as no surprise, then, that if "taken literally, there is not a public school system in America that meets" Claremont II's aspirational guidelines. Thro, *A New Approach to Slate Constitutional Analysis in School Finance Litigation*, 14 J.L. & Pol. 525, 548 (1998), *See also* Obhof, *supra* note 24, at 595 (describing guidelines as "essentially useless.")

[156] *State v. Evans, supra* note 63, 127 N.H. at 507, 506 A.2d at 699.

[157] THE FEDERALIST, NO. 47 (James Madison).

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Demystifying the Judiciary

Late in the Nineteenth Century, the American humorist Josh Billings quipped that "The trouble with most folks ain't so much their ignorance, as their knowing so many things that ain't so." In public affairs, nothing so aptly illustrates the truth and the dangers of this observation than what we "know" about the power and authority of the judicial branch of our tri-part form of government. Policy change emanates ever-increasingly from decisions of the supreme courts of the nation, so much so that the judiciary has in many cases superceded the elected branches of their respective governments as primary policymaker. This phenomenon has been enabled and facilitated by general public acceptance of the view – originated and promoted by the judiciary itself through endless repetition - that judicial pronouncements, no matter how counterintuitive and no matter how at odds with constitutional language they may be, are final and binding on the legislative and executive branches, and that any public or legislative response that ventures beyond mere resigned, apathetic and unquestioning acceptance, is dangerous to liberty. After all, we all "know" that this is the system that the authors of our constitutions - federal and state – established for the protection of our liberties, don't we?

It has been one of the purposes of this collection of essays to demonstrate that "it ain't so;" that present-day conventional wisdom concerning the balance of authority between the judicial branch and the elected branches that has enabled the New Hampshire Supreme Court to create the ongoing impasse in education policy and funding is seriously flawed; that it is a fiction invented and carefully nurtured over a period of many years by the Supreme Court itself and its acolytes among the Brethren of the Bar, under the all-purpose rubric "judicial independence," to enhance its influence at the expense of the majoritarian principles - the democratic process – upon which our system of government is based. This concluding article will examine each of the ten most universally accepted but nevertheless completely false assumptions that have contributed to the resulting displacement of the representative branches by the appointive one.

False Assumption No. 1: The Judiciary has no choice but to rule on the merits of any dispute that comes before it.

Whenever a supreme court takes a word, phrase or article in the constitution that is impossible of precise definition or literal application, and uses it as the basis of an affirmative duty of the legislature enforceable against it, the court to all intents and purposes places itself at the head of the legislative branch with respect to the area of law

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concerned. This is because every statute enacted under such imprecise word, phrase or article necessarily creates a disaffected group consisting of those on the losing side, who immediately have a cause of action in the courts based on that word, phrase or article's undetermined and undeterminable nuances, and it will ask the court to adopt the particular nuance that serves the policy objective it prefers. The judiciary will thus be in perpetuity the ultimate policymaker of statutes enacted under authority of that word, phrase or article.

It was in recognition of the danger this poses to the constitutional separation of powers that in the early years of our national experience - when judges had a more modest understanding of the role of the judiciary in the constitutional framework - the judiciary developed the doctrine of "political questions," whereby the judiciary would voluntarily refrain from ruling in such matters, but would instead conclude that they had been entrusted to the elected branches of the government, to be worked out by the give and take of the political process.

The most famous early articulation of this doctrine came in the U.S. Supreme Court's 1849 decision in the case of *Luther v. Borden*, in which the Court refused to be drawn into resolving a controversy over the substantive content of the "republican form of government" guaranteed by the United States to every state under Article 4, Section 4 of the Federal Constitution. In the 1962 case of *Baker v. Carr*, the U.S. Supreme Court included among the defining features of a political question:

> "[A] lack of judicially discoverable and manageable standards for resolving it, or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government."

The constitutional provisions underlying the statutes at issue in the *Claremont* series of public school funding decisions reveal them to present classic, textbook examples of political questions. Recent jurisprudence, however, indicates that the only type of case our Supreme Court regards as involving "political questions" are those concerning purely internal legislative procedures (*Hughes v. Speaker***,** 152 NH 276 (2005); *Starr v. Governor,* 153 NH ____ (2006)); for every other kind of case, the Court seems never at a loss for a constitutional basis to involve itself in the Legislature's decision.

<u>False Assumption No. 2:</u> The Supreme Court has inherent authority to determine the meaning of the Constitution with *binding future effect* upon the legislative and executive branches.

Nowhere in the Constitution are the opinions of the Supreme Court on the meaning of the Constitution accorded precedence over those of the legislative or executive branches, thereby making them final and binding upon them. Such a concept was unknown and would have been considered preposterous in the eighteenth century. It was then – and

remains today - axiomatic in English law both that Parliament was the sole judge of the constitutionality of its own enactments, and that any decision of any English court, even on constitutional grounds, could be reversed for purposes of future cases by a simple act of ordinary legislation. The authors of New Hampshire's Constitution would hardly have altered so fundamental a change in the allocation of power among the branches of government without directly saying so.

Most of those who take for granted a more active constitutional role for the judicial branch of this state - a role amounting to little less than comprehensive supervisory authority over the legislative and executive branches - are analogizing from the federal model; they are taking their lead from the very visible activism of the United States Supreme Court, and are attributing the same authority on the state level to the New Hampshire Supreme Court. Whether the activism of the United States Supreme Court is a legitimate consequence of the structure of the United States Constitution and the federal system, or whether it is instead an illegitimate consequence of neglect, ignorance or demoralization on the part of the United States Congress, is an ongoing subject of controversy not relevant here, because the United States Constitution, adopted in 1788, and the New Hampshire Constitution, adopted four years earlier, are not alike. The champions of judicial activism on the state level are either not reading or not comprehending the New Hampshire Constitution.

False Assumption No. 3: The Supreme Court has inherent authority to nullify and refuse to enforce enactments of the Legislature that a majority of the Court believes to be unconstitutional.

Article 29 of Part I reposes the power of suspending the laws, or the execution of them, exclusively in the Legislature, or by authority derived from the Legislature. This express provision of the Constitution entirely refutes the assumption held by many that the judiciary has authority to refuse to enforce on constitutional grounds laws duly enacted by the Legislature and signed by the Governor.

False Assumption No. 4: In the absence of action on the part of the Legislature to carry out the Court's constitutional determinations, the Supreme Court has inherent authority to order corrective remedies.

Article 12 of Part 1 of the Constitution expressly states that the inhabitants of this state are not controllable by any other laws than those to which they or their representative body have given their consent. This means that no policy choice articulated by the Supreme Court, no matter how artfully clothed in the raiment of the Constitution, can be enforced against the people unless the people, either directly or acting through the Legislature, have consented to it.

Article 28 of Part I is even more explicit, stating that no tax "shall be established, fixed, laid, or levied, *under any pretext whatsoever*, without the consent of the people, or their representatives in the legislature, or authority derived from that body." It is impossible to be clearer than that**:** If the Legislature refuses to enact a scheme of taxation essential to the implementation of a policy preference of the judiciary, the judiciary's preference must yield to the Legislature's.

False Assumption No. 5: The justices of the Supreme Court are the persons best qualified to determine the meaning of the Constitution.

Judicial officers are appointed under Article 46 of Part II by the Governor with the consent of a majority of the Executive Council. This Article does not require a judicial appointee to have or demonstrate any knowledge of the Constitution or of the history surrounding its creation. No test is administered, and rarely - if ever - are appointees even questioned as to their background on these subjects. A lawyer taking office as a Supreme Court justice does not necessarily possess any more knowledge of the Constitution than the average citizen or member of the Legislature, much less the average lawyer or professor of history.

False Assumption No. 6: The justices of the Supreme Court are the persons best qualified to apply the relevant history to constitutional interpretation.

Law students are not required to have any undergraduate background in American or British history as a prerequisite to admission, and are not required to take more than a single one semester course on constitutional law. By reason of the diversity of domicile of each law school's student body, that one course will likely focus almost wholly on the federal Constitution, and - amazingly - cover neither its text nor history, but instead only what the United States Supreme Court has *said* about it, almost always in the context of striking down a law as unconstitutional. In this way, young lawyers, even those taking more than the one required course in the subject, not only learn nothing of constitutional history – state, federal or British – but they become inured to the twin notions that legislatures are composed overwhelmingly of ignoramuses and bigots, and that it is a normal and proper function for supreme court judges to "push the envelope" of constitutional interpretation in order to protect the public from the evils of the democratic process and to promote progressive societal reform.

False Assumption No. 7: The Supreme Court is a neutral, disinterested arbiter of constitutional meaning.

A supreme court is the head of a state's judicial branch. As such, it has an inherent institutional bias to decide in its own favor disputes with the legislative branch over the boundaries of the constitutional separation of powers between them. Invested with so important an office, each judge is naturally tenacious of its power, and feels a

responsibility to hand it to his successor with all its rights and privileges unimpaired, and the same principle influences him to extend its power and increase its prerogatives. These considerations operate strongly upon the judge to give such meaning to the constitution, in all cases where it can possibly be done, as will enlarge the sphere of his authority.

In light of this, it is no coincidence and is not surprising that the Supreme Court of New Hampshire almost always resolves separation of powers disputes with the legislative branch so as to enhance its own sphere of authority at the expense of the Legislature. Accordingly, for the Legislature to accede docilely to the Supreme Court's unfounded pretensions to exclusive authority to resolve separation of powers disputes is to commit slow institutional suicide.

False Assumption No. 8: Interpretation by the Supreme Court ensures rationality and continuity by providing fixed meanings to the Constitution.

This was an argument made by Alexander Hamilton in *The Federalist, No. 78* in defense of a lifetime appointed judiciary of men learned in the "strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them, [and which] must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them." This, according to Hamilton, would "avoid an arbitrary discretion in the courts." The weakness of this argument lies in the fact that the accumulation of and resort to "a very considerable bulk" of precedents is the very antithesis of being "bound down by strict rules," because the systemic and ingrained practice of courts being to make *present* decisions on the basis of their *most recent* precedents causes the "strict rules" originally imposed – in this case the text of the Constitution - to recede more and more into the background and become increasingly irrelevant to the judges, making the judiciary a uniquely *un*fit guarantor that the Constitution will be faithfully adhered to. In other words, the *common law* approach to adjudication - that is, the ancient system of practice of the courts to view the law as constantly evolving and to apply it accordingly - which is practiced by the judiciary even in cases applying the Constitution, is totally at odds with the *historiographical* approach to adjudication - that is, the constant reference back to original sources - that is required in order to prevent distortion of the Constitution.

False Assumption No. 9: The justices of the Supreme Court reach their conclusions of constitutional meaning on the basis of where the evidence and precedents inevitably and unavoidably lead them.

In fact, after over 200 years as an independent and very litigious nation, there are so many sources of statutes, and so many sources of published judicial decisions applying and interpreting them, that in any given case before them the justices of a supreme court can – and often do - decide in advance the result they want to reach, knowing that they

will have no difficulty finding precedent, somewhere, to support it. And if precedent for a desired ruling cannot be found in that supreme court's own published reports, resort may be had to those of the other 49 state supreme courts, or to those of the United States Supreme Court, the 13 United States Courts of Appeal, the 70 or more United States District Courts, and, in a pinch, to those of the intermediate appellate courts of states such as New York or California that publish their decisions. And if all those are unavailing, there remain the reports of the courts of the United Kingdom, Canada, Australia and New Zealand, and – incredible but true – those of the European Union and the World Court.

No outcome desired by a supreme court bent on social experimentation is so strange or outrageous that it hasn't been reached somewhere, at least by implication, and our learned judges and their intrepid clerks can and will find them, and they will incorporate them into their published opinions so adroitly as to suggest that no other outcome was possible. In the absence of a vigilant legislative branch jealous of and willing to defend its own authority, there is no limitation on the judicial branch except the extent of its members' imaginations and sense of self-restraint, if any.

False Assumption No. 10: The ability of the Supreme Court to rule on the constitutionality of legislative acts with binding effect on the Legislature is inherent in the very concept of "judicial independence."

This false assumption emanates from the common error – which the judiciary itself promotes - of equating judicial *independence* with judicial *review*.

Judicial *independence*, as understood by the authors of our federal and state constitutions, consisted of exactly two elements: respect for adjudications, and tenure in office. An adjudication is a decision reached by applying to a set of facts that have already occurred, the laws and rules in effect at the time. This is the essence of the "judicial power" enshrined - in those very words - in Article 72-a of Part II of the New Hampshire Constitution. The tradition of respecting – that is to say, abiding by – adjudications, was already an ancient one when, in the Act of Settlement of 1689, the British Parliament added the second element of judicial independence by providing that judges should henceforth hold their offices "during good behavior," thereby ensuring that their adjudications would no longer be influenced by fear of removal from office at the will of the King. This feature of judicial independence is also enshrined - in identical language - in Article 73 of Part II of the New Hampshire Constitution.

Judicial *review*, however, is something entirely different. "Judicial review" is the term applied to the doctrine that asserts that the courts of the United States, or of any state, have the authority to interpret the constitution, or to rule on the constitutionality of any legislative enactment, with *binding future effect* not only upon the judicial branch, but upon the legislative and executive branches as well. The practical effect of the application of this doctrine by the judicial branch, and of the acceptance of or acquiescence in it by the legislative and executive branches, is that no rule established by a supreme court on constitutional grounds – no matter how dubious - can be changed for future cases except

by amending the constitution. Judicial review thus extends the power of the courts beyond mere adjudication, and into the legislative realm of policy-making; that is, the creation of rules of general applicability to govern conduct in the future.

The courts have been successful in their exercise of this pretended authority, first, because they plausibly claim that every decision of constitutional magnitude they make is mandated by the constitution; second, because every such ruling by a supreme court is self-justifying by virtue of what has become a tenet of a kind of secular religion - reminiscent of the doctrine of papal infallibility - whereby it must be uncritically accepted as correct simply because the court has made it; and, third, because every such decision, no matter how suspect its asserted constitutional basis, immediately creates constituencies more interested in the success of the policy promoted by the decision than in constitutional separation of powers issues, which are regarded by them as mere esoteric legalistic quibblings.

Is it not an extraordinary notion that constitutions establishing three branches of government intended to be coordinate and independent, in order that they might check and balance one another, should nevertheless – and without saying so - give to one of them - the judicial - the authority to prescribe rules for the functioning of the others? This notion is especially troubling given that the branch claiming this unstated authority is the only one that is unelected and therefore least accountable to the sovereign people.

Conclusion

The special talent that all too many supreme court judges - state and federal - have in common is to make history seem so inconclusive and statutes and constitutional provisions so lacking in historical context, as to justify them in treating the written words and phrases that laws and constitutions use as mere empty vessels to be filled with such life and meaning as the judges choose to give them. By this means they have set themselves up as modern-day Readers of the Delphic Oracle, shrouding what they do in their secret deliberations in an aura of erudition, morality, and insight that is beyond the capability and understanding of ordinary mortals, thereby insulating themselves not only from accountability for the consequences of what they do, but even from criticism.

The evidence is all around us that the widespread uncritical acceptance of this secular religious dogma among elected representatives is reducing representative institutions to increasing irrelevance. But dare to call attention to this alarming situation and one is branded as a heretic and a crank; and if a lawyer, as one with an overpowering instinct for professional suicide.

A large part of the difficulty of undertaking a process of public re-education on the proper role of the judiciary under a majoritarian form of government is that, overwhelmingly, the class of citizens in the best position to understand and explain it - the lawyers - are either so pleased with the power over society that a powerful judiciary gives to them that they will not speak out; or are so conscious of the power of

professional life-or-death the judiciary exercises over the lives and fortunes of themselves and their clients that they are afraid to speak out; or are themselves such constitutional illiterates that they cannot speak out. If the Brethren of the Bar are so intimidated and so obsequious that they will not speak out on the illegitimacy of the judiciary's increasingly numerous and increasingly bold forays into the constitutional realm of the elected branches of the government; if they of all people cannot be counted upon to rally to the defense of the political process, where can the overwhelmingly lay membership of those branches acquire the intellectual armament needed to arrest the erosion of representative government?