The People's House
Parts 1-6

This multi-part series is used with the permission of the original author,
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"If once [the people] become inattentive to the public affairs, you and I, and Congress and Assemblies, Judges and Governors, shall all become wolves. It seems to be the law of our general nature, in spite of individual exceptions." — Thomas Jefferson to Edward Carrington, 1787.

After settling into my first term in the legislature last spring, I began this weekly column for the express purpose of keeping my constituents "attentive to the public affairs". I have tried to be informative and instructive while keeping the style light. I'm told that the column has been a moderate success.

In last week's column I said I would spend some time reviewing the issues surrounding the NH Supreme Court's Claremont decisions. I believe the decisions were wrong and I want to explain why I believe so. It may take a few weeks to cover it all.

For those who are new to the area, Claremont I, the initial Claremont decision, was delivered by the court on December 30, 1993. It said that the state had an obligation, in fact a "duty", to provide a "constitutionally adequate education" to every educable child and "guarantee adequate funding". It went on to say that a free public education is, at the very least, "an important, substantive right".

This guaranteed right to an adequate education was derived from the following clause taken from Article 83 of Part II of the state constitution which was written in 1784: **(Legislators and magistrates shall) "cherish the interest of literature and the sciences, and all seminaries and public schools".**

Does it not seem strange that the founders, according to the court, intended that public education was a right which was to be satisfied and funded by the state and yet such was never the case during the lifetime of those founders, nor for 200 years after? Did it take 200 years for someone to discover the intent of the founders?

The constitution of New Hampshire is divided into two sections — Part I is the Bill of Rights and Part II is the Structure of Government. If the founders had meant for public education to be a "substantive right" to be funded by the state, why was this right not included in Part I, the Bill of Rights? Does it not seem strange that the founders, according to the court, did not understand the structure of the constitution they wrote?

In an earlier column, I said that, "we need to be able to get past the impediments which are constantly thrust at us by the courts." The major impediment is the issue of adequacy. Because it is nowhere mentioned in Article 83, the only article cited by the court, constitutional adequacy is unobtainable except by legislation.

But the court said it was up to the legislature to determine adequacy only **"in the first instance".** Unfortunately, that means that after decisions regarding adequacy are made by the legislature, they will then be judged by the court, which sets itself as the final arbiter of this legislative prerogative.

We will delve further into the legitimacy of the Supreme Court's Claremont I decision and a historical view of state education funding in future columns.

"I know of no safe depository of the ultimate powers of the society but the people themselves. If we think them not enlightened enough to exercise that control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion." — Thomas Jefferson

This column is the second in a series of columns devoted to an explanation of the New Hampshire Supreme Court's Claremont decisions and their ramifications. The purpose is, as Jefferson says above, to "inform your discretion".

In last week's column, we looked at the salient clause of Article 83 of Part II of this state's constitution, on which the NH Supreme Court based its initial Claremont decision. That clause says, **(Legislators and magistrates shall) "cherish the interest of literature and the sciences, and all seminaries and public schools"**.

We questioned how the court could derive from this clause a duty for the state to usurp the local education prerogatives in order to provide and fund education at the state level and why no one had ever noticed that obligation previously.

How do we know no one ever noticed it? Well, obviously, funding of education was not a state obligation for our first 200 years of existence. In addition, attempts have been made in the past to change that situation. It had been claimed by some over the years that, although the state had no mandate to fund education, it should.

At the Constitutional Convention of 1850, a measure was passed to change Article 83 to order the legislature to make provisions for the establishment and maintenance of free common schools at the public expense. The convention delegates obviously thought there was no such obligation in the constitution at that time. **The Constitutional Amendment failed passage by the voters at the next regular election**.

Closer to our time, there was an effort at the 1974 Constitutional Convention to change Article 83 to provide the maintenance and support of a complete system of public elementary and secondary schools. They also wanted to add a new Article 83-A to say that all legislation relating to education would have to be funded by the state. Finally, a new Article 40 for Part I (the Bill of Rights) would be added to provide a right for free access to the essential elements of education which would be state provided. **All three of the proposals failed to pass the convention**.

While the failure to accomplish a state funding provision in our constitution is significant, the more important point is that apparently everyone recognized that there was no such provision existing in the constitution as written — until it was incredibly "found" by the NH Supreme Court in 1993.

It is therefore astounding to me how anyone, even if convinced that the outcome of the Supreme Court's decision was correct, could ignore the failure of previous historical attempts to change the constitution to make it say what the court "found" it said since 1784. The failure to take this history into account by both the court and its supporters is an omission which makes this decision by the NH Supreme Court fundamentally tainted and flawed.

"Your scheme yields no revenue. It yields nothing but discontent, disorder, and disobedience." — Edmund Burke, 1774, to the British Parliament

The last two columns in this space discussed the Claremont law suits and the resulting decisions by the New Hampshire Supreme Court. In this column we will discuss the predominant tax that resulted from those decisions, the statewide property tax (SWPT).

In previous columns I discussed why the legislature eschewed both a state sales tax and a state income tax. For

those who would have preferred those taxes, you should know that we will disagree. I have been adamantly opposed to both of those choices.

But that certainly doesn't make me a fan of the SWPT. It is a terrible tax for three reasons. (1) It is a sham tax which transformed the former local property tax into a state tax. (2) As a result of that transformation, it was required by the state constitution to be proportional throughout the state, which (3) created "donor" and "receiver" towns which has balkanized this state, pitting one town against another.

How much money is raised for distribution by the SWPT? Much less than one might think. In Fiscal Year 2002 which started July 1st, the gross state education package is $881M. Of that total, the SWPT raises $483M and the remaining $398M is raised by "other" taxes.

It looks like the SWPT raises more than half the total. On paper, yes. But there's more to it. Of the $483M SWPT, **$454M stays right in the town where it is raised. That's the SHAM part**. That's what we used to call "local property tax". Only $29M of that huge amount is distributed to other towns. That's the transfer from "donor" towns to "receiver" towns.

Why are there "donor" towns? The constitution requires that a state tax be "proportional". It must be the same throughout the state. The court does not allow the legislature to target the money, requiring instead that a set dollar amount be sent per pupil to each school district. Thus towns with high property values may raise more money than their number of students requires. They then become a "donor" town. The reverse results in becoming a "receiver" town.

$29M is the total amount sent from "donor" towns to "receiver" towns. When that is added to the $398M raised by "other" taxes, we see that a total of $427M is actually distributed. Is the conflict that has developed between towns in this state been worth the resulting $29M in "aid"?

I submit that it is not. Besides, if the court would allow the legislature to target aid where it is needed (like Sutton and Warner) rather than sending it per pupil to towns that do not need it (like wealthy towns such as Amherst and Bedford), we wouldn't even need the $29M from "donor" towns (like New London and Newbury).

What can be done? For the answer to that, you will have to see next week's column where I discuss a plan to get the New Hampshire Supreme Court out of the legislative process and repeal the SWPT.

"The 'balance of powers' is supposed to allow any of the three branches to block an unconstitutional order from another, otherwise we would only need one branch of government — the courts. You seem....to consider the judges as the ultimate arbiters of all Constitutional questions: a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy." — Thomas Jefferson

This is the fourth column in a series which discusses the New Hampshire Supreme Court's Claremont Education Funding decisions, the highly unpopular statewide property tax which emanated from them, and a plan currently afoot in the legislature to remove that yoke from around the legislature's neck.

"You must be talking about a Constitutional Amendment, right?" Wrong. There are many in the legislature (and I am one of them) who do not believe that a Constitutional Amendment (CA) is appropriate. Passing a CA would only legitimize the Claremont decisions by saying that the constitution is flawed and must be corrected. We don't believe that the constitution is wrong. We believe that the NH Supreme Court issued a wrong decision. As the old saying goes, "If it ain't broke, don't fix it."

"But how can you do that? Isn't the court's decision absolute?" I respond with a scenario proposed by my colleague, Rep. Paul Mirski, (Enfield) — If the court's right is absolute and the only way we can change a Supreme Court decision is by amending the constitution, what would the legislature do if the court ruled away our right to assemble, speak and vote? If the court so ruled, no CA would be possible. Should the legislature just turn off the lights and go home? I think not!

There is no reason why the legislature or the governor would have to blindly follow a decision of the court if the decision was clearly unconstitutional and wrong. Rep. Mirski asserts that in the case of Claremont I and II, the court denied the people the right of consent with respect to determining local educational policy and it denied them the right to vote on whether or not they would be taxed for what educational policy the state would make without their input. It left to the legislature the nature of that tax but indeed required that a tax be levied.

Finally he declares, "That's taxation without consent. That's the Stamp Act. That's the Townsend Duties. The Claremont decisions deny us our fundamental rights as surely as if the court had denied our right to assemble, speak and vote. The legislature can just say 'NO!' when the court acts so."

Each of us in the legislature took a vow to support the constitution of the state of New Hampshire. Following that oath, the legislature should challenge the court by telling it that the court did, in fact, get it wrong and we will not follow it.

House Concurrent Resolution 14 (HCR 14) is a joint resolution of the House and the Senate that does just that. It has been filed in the House of Representatives and should be decided very early in both the House and the Senate when the legislature comes back in January. HCR 14 does not warrant the signature of the governor and will not require a general ballot vote. **It is a statement of the legislature**.

Successful passage of HCR 14 will require no new taxes while paving the way for the repeal of the statewide property tax, total elimination of "donor" towns and no reduction in the amount of education aid being distributed. In my next column, I will discuss HCR 14 — what it says, what it will do and how it will do it.

"I hold it that a little rebellion now and then is a good thing and as necessary in the political world as storms in the physical." — Thomas Jefferson, Letter to James Madison, 1787

This column is the fifth in a series of columns which lead from the New Hampshire Supreme Court's Claremont decisions to a statement of the New Hampshire legislature to that it will not accept those Claremont rulings. That statement is called House Concurrent Resolution (HCR) 14 and it is expected to be voted on when the legislature returns to session in January.

Previous columns dissected the Claremont decisions, showing that they were a gross distortion of our constitution and that our state constitution, constitutional history, case law, and even the English language were ravished by the Supreme Court.

We then discussed the resulting taxation which emanated from those decisions and made the case that a Constitutional Amendment was not the appropriate first remedy to this problem. We don't need to change the constitution just because the court made an abysmal interpretation of it. We need to tell the court to stop usurping the authority of the legislature to determine the structure of education and the funding for it in the state

of New Hampshire.

Which brings us to HCR 14. It originates in the NH House and, being a concurrent resolution, it must also pass the NH Senate. It does NOT warrant the governor's signature and will not require a general ballot vote. **It is a statement from the legislature to the court.**

It boldly charges that the decisions of the court violate Part I, Article 37 and Part II, Article 2 of the NH Constitution and that, "accordingly, these aspect of the Claremont I and Claremont II decisions and any and all consequences that flow therefrom do not have the force and effect of law."

It goes on to say, "Whereas in furtherance of this position, the legislature finds that under Part I, Article 29...., the legislature possesses the sole authority to create law and that under (the same Article), the legislature possesses the sole authority to suspend laws."

Moreover, it says, the legislature finds additional constitutional support for its position in eight more constitutional Articles and, like Jefferson listing in the Declaration of Independence the abuses perpetrated by the king, the resolution lists the Articles in the NH Constitution violated by the Supreme Court of New Hampshire.

The resolution then cites the Constitutional Convention history and case law regarding education funding which has been previously discussed in this column. It goes on to affirm the logic of the structure and wording of our constitution. This structure and wording has not been changed in these areas since its original writing and such structure and wording support the position of the resolution. All of that information has been discussed in previous columns in this space.

Will this resolution cause a Constitutional Crisis? Will the court accept or reject it? How will it be enforced? Who will enforce it?

To understand what the ultimate result of the passage of HCR 14 would be, pick up a copy of the InterTown RECORD next week for my answer to those questions.

"The candid citizen must confess that, if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." — A. Lincoln, First Inaugural Address (Mar. 4, 1861).

This is the final column in a series concerning education funding in New Hampshire. Our previous column explained a response from the legislature to the NH Supreme Court's flawed Claremont rulings, called House Concurrent Resolution 14, which will be debated and voted on in January when the legislature returns to session.

After laying out the case against that ruling, including the violations occurring in other parts of our constitution as a result of the court's decisions, the legislature in passing this resolution will tell the court that its "Claremont I and Claremont II decisions and any and all consequences that flow therefrom do not have the force and effect of law."

Will passage of this HCR 14 create a constitutional crisis? There are many who say that we are already in such a crisis and have been since 1993 when the first Claremont decision was commanded upon us. Many feel that a real challenge to the people's power to determine their own government policy through their elected representatives exists and a crisis is needed to restrain and reverse a runaway Supreme Court.

Even those who agree with the ultimate Claremont result should look at the method of how it was obtained. The

court selectively chose its arguments from those snippets of law and history which supported its preconceived outcome while selectively ignoring anything and everything in both law and history which would prevent that outcome.

Would the public stand still for a court that used the same method to find an obscure section of the constitution which they interpret to outlaw ALL public education in the state? I would think not! The public would rise up and DEMAND that the legislature refuse to honor that decision and proceed with accepted public policy to continue public education.

An activist, aberrant court which has no check on its power is not in the interest of freedom for any citizen. Since all legislators have taken an oath to uphold the constitution, the legislature must act.

The first act anticipated after passage of HCR 14 is expected to be the repeal of the Statewide Property Tax (SWPT) which has caused the balkanization of this state by pitting one town against another. In our discussion of the SWPT, we showed how the elimination of that tax would create a mere $29M hole in the $427M distribution of education grants. A hole that size could be filled by the legislature.

If we took our newly gained independence further and targeted the money only to towns with demonstrated need (like Sutton and Warner in this district), the $29M would not be needed. But even without targeting, NO REDUCTION IN GRANT AID to current grant towns would result from the repeal of the SWPT.

As we explain this plan across the state, we pick up more and more supporters every day from both inside and outside the legislature. We are well on our way to having majority legislative support by January.