

HCR 14 - AS INTRODUCED

2001 SESSION

01-0636

04/09

HOUSE CONCURRENT RESOLUTION **14**

A RESOLUTION declaring the New Hampshire supreme court's Claremont decisions to be an unconstitutional violation of the separation of powers mandate under part I, article 37 of the New Hampshire constitution.

SPONSORS: Rep. Pepino, Hills 40; Rep. Mirski, Graf 12; Rep. L. Christiansen, Hills 23; Rep. Boyce, Belk 5; Rep. Salts, Hills 41; Sen. Boyce, Dist 4; Sen. Roberge, Dist 9

COMMITTEE: Ways and Means

ANALYSIS

This house concurrent resolution sets forth a legislative declaration, supported by constitutional findings, that the New Hampshire supreme court's Claremont I and Claremont II decisions are an unconstitutional violation of the separation of powers mandate under part I, article 37 of the New Hampshire constitution

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand One

A RESOLUTION declaring the New Hampshire supreme court's Claremont decisions to be an unconstitutional violation of the separation of powers mandate under part I, article 37 of the New Hampshire constitution.

Whereas, the members of the executive and legislative branches of the state of New Hampshire, having made and subscribed an oath to God and

to the state and its constitution, or alternatively, by affirming under the pains and penalties of perjury, their allegiance to the state of New Hampshire and its constitution pursuant to part II, article 84 of said constitution, hereby find that the New Hampshire supreme court has exceeded its constitutionally enumerated powers in the Claremont decisions and violated part I, article 37 and part II, article 2 by asserting that it has the power to tell the legislature whether and how to set educational policy and whether and how much to spend on education and that, accordingly, these aspects of the Claremont I and Claremont II decisions and any and all consequences that flow therefrom do not have the force and effect of the law.

Whereas, in furtherance of this position, the legislature finds that under part I, article 29 of the New Hampshire constitution, the legislature possesses the sole authority to create laws, and that under part I, article 29 of said constitution, the legislature possesses the sole authority to suspend laws. Moreover, the legislature finds additional constitutional support for its position as follows:

- (a) Part I, article 1, relative to the origin and object of government.
- (b) Part I, article 2 relative to individual property rights.
- (c) Part I, article 6 relative to local control of education, both religious and secular.
- (d) Part I, article 12, relative to the consent of the governed on taxation.
- (e) Part I, article 28, relative to the consent of the people, or their representatives in the legislature, prior to the establishment or imposition of a tax.
- (f) Part I, article 28-a, relative to the prohibition on unfunded mandates.
- (g) Part I, article 31 and part II, article 2, relative to the authority of the legislature to make laws.
- (h) Part II, article 83, relative to the New Hampshire supreme court's inconsistent and unsupported interpretation of "cherish" to mean "to require payment for" within the context of this article.

Whereas, the legislature hereby finds and declares that the tax structure in effect prior to the Claremont II ruling to be legally binding until such time as the legislature may vote to change it. Whereas, the basis for this legislative finding includes the following:

- (a) Under part I, article 37, the people of New Hampshire have a right to a government based upon the separation of powers. The legislature finds that it would be a violation of this right for the legislature to delegate to the judiciary or to allow the judiciary to assert, directly or indirectly, any of the legislative powers vested exclusively in the general court by part II, article 2.
- (b) The legislative power vested exclusively in the general court by part II, article 2 includes the power and discretion to determine whether and how to set educational policy and whether and how much to spend on education. Therefore, the legislature finds that it is unconstitutional for the judiciary, either directly or indirectly, to define educational adequacy or the cost of educational adequacy.

(See, e.g., Coleman v. School District of Rochester, "The 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.")

(c) Part II, article 83 nowhere states what the supreme court claims it states; there is no mention anywhere in said article that the state has a duty to "fund" education; rather, it says only "cherish," which does not mean "fund" because when our framers wanted the state to fund something they used the term "support."

(See, part I, article 6, of the New Hampshire constitution.)

(d) No state funding was provided for public education for the first 50 years of the state, which conclusively demonstrates that nobody understood the constitution as imposing a duty upon the state to fund public education.

(e) Every single supreme court, with the exception of the current supreme court, understood that the power to determine whether, how and to what extent to fund public education was exclusively a legislative power.

(See, Fogg v. Board of Education, "It is a duty not imposed by constitutional provision, but has always been assumed by the state.")

(f) Had the framers intended to make an adequate education a constitutional right, they could have and would have said so in the same way that they enumerated various rights in part I of our constitution, the Bill of Rights, by expressly calling it a right in that portion of our constitution; they would not have hidden a constitutional right to an adequate education in part II of our constitution, the Form of Government, using language so obscure that nobody would discover said "right" for 200 years.

(See, Wooster v. Plymouth, "The division of the constitution into 2 parts was not made without a purpose, and the name of each part is not without significance.")

(g) The framers of our constitution understood "rights" as freedom from government interference, the right to free speech has never been understood to mean that the government must provide one with a typewriter or fax machine, only that the government cannot prevent one from ventilating his or her viewpoint; in contrast, the "right" to an "adequate education" declared by our supreme court is a claim upon government, which is totally inconsistent with the nature of the types of rights recognized by the framers and, not surprisingly, the nature of the actual rights contained in our constitution.

(h) The educational system that the supreme court declared unconstitutional and the provisions of the constitution that the supreme court relied upon to strike it down peacefully co-existed for more than 200 years; the assertion by the New Hampshire supreme court so late in our history that educational policy is a matter not for democratic decision making, but for constitutional law.

(i) The Claremont decisions are irreconcilable with the structure, text and history of our constitution; the "right" to an "adequate education" declared in the decisions and the "duty" of the state to fund this right are nothing more than the views of the current justices of the supreme court of what constitutes good social policy and, therefore, do not have the force and effect of law.

Whereas, the legislature hereby finds and declares that the amount of state funding for public education required by the constitution has been and remains zero dollars, and that the legislature, not the supreme court, has the exclusive power and discretion to authorize any additional state funding, and that, to the extent not prohibited by part I, article 28-a, the state may continue to delegate some or all of the responsibility for providing public education to the local school districts; now therefore, be it

Resolved by the House of Representatives, the Senate concurring:

That the legislature hereby finds and declares that the school tax structure in effect prior to the Claremont II decision is constitutional and shall continue to be used for the 2001 tax year and subsequent tax years and until such time as modified by the representative branches.

That the commissioner of the department of revenue administration is specifically directed to continue to execute the applicable law which was in effect prior to the Claremont II decision including but not limited to establishing school-related tax rates for towns and certifying school appropriations for the 2001 tax year and subsequent tax years.