# THE STATE OF NEW HAMPSHIRE
# SUPREME COURT

No. 2019-0500

Contoocook Valley School District, *et. al.*
v.
The State of New Hampshire, *et. al.*

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APPEAL PURSUANT TO SUPREME COURT RULE 7
FROM
CHESHIRE COUNTY SUPERIOR COURT

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## AMICUS CURIAE BRIEF

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-on behalf of-
Senators Harold French and Robert Giuda
-and-
Representatives Gregory Hill, Carol McGuire and Andrew Renzullo

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## TEXT OF RELEVANT CONSTITUTIONAL PROVISIONS

**Mass. Const. Pt. I, Art. 3:**

As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily.

And the people of this commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided, notwithstanding, that the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at all times, have the exclusive right of electing their public teachers, and of contracting with them for their support and maintenance.

And all moneys paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

Any every denomination of Christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law.

[*June 16, 1780; Art. XI of the Amendments was substituted for this.*]

**Mass. Const. Amend. Art. XI:**

Instead of the third article of the bill of rights, the following modification and amendment thereof is substituted:

As the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government; - therefore, the several religious societies of this commonwealth, whether corporate or unincorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses: and all persons belonging to any religious society shall be taken and held to be members, until they shall file with the clerk of such society, a written notice, declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract which may be thereafter made, or entered into by such society: - and all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the common-wealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.

[*Adopted by the General Court during the sessions of the years 1832 and 1833, and approved and ratified by the people on November 11, 1833.*]

**Mass. Const. Pt. II, Ch. V, §II:**

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

[*June 16, 1780; see Amendments, Arts. XVIII, XLVI, XCVI and CIII.*]

**N.H. Const. Pt. I, Art. 6:**

As morality and piety, rightly grounded on Evangelical principles, will give the best and greatest security to government, and lay in the hearts of men the strongest obligations to due subjection; and as the knowledge of these, is most likely to be propagated through a society by the institution of the public worship

of the Deity, and of public instruction in morality and religion; therefore, to promote those important purposes, the people of this State have a right to empower, and do hereby fully empower the Legislature to authorize from time to time, the several towns, parishes, bodies-corporate, or religious societies within this State, to make adequate provision at their own expense, for the support and maintenance of public Protestant teachers of piety, religion and morality.

Provided notwithstanding, that the several towns, parishes, bodies corporate, or religious societies, shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance. And no portion of any one particular religious sect or denomination shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination.

And every denomination of Christians demeaning themselves quietly, and as good subjects of the State shall be equally under the protection of the law: and no subordination of any one sect or denomination to another, shall ever be established by law.

And nothing herein shall be understood to affect any former contracts made for the support of the ministry; but all such contracts shall remain and be in the same State as if this constitution had not been made.

[*June 2, 1784; amended 1968 to remove sectarian references.*]

**N.H. Const. Pt. I, Art. 37:**

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.

[*June 2, 1784*]

**N.H. Const. Pt. I, Art. 38:**

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 the laws necessary for the good administration of government.

[*June 2, 1784*]

**N.H. Const. Pt. II, Art. 83:**

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.

[*June 2, 1784*]

## ISSUES PRESENTED

I. Whether the Court's decision in *Claremont I* faithfully applied the originalist standard of review chosen by the Court itself.

II. Whether the Court's decision in *Claremont I* was erroneous by reason of its failure to consider the effect of Article 6 of Part I of the New Hampshire Constitution on the scope of Article 83 of Part II.

III. Whether the Court's decision in *Claremont I* was erroneous by reason of its over-reliance upon the contemporaneous Massachusetts *McDuffy* decision.

IV. Whether the Court's decision in *Claremont I* was erroneous by reason of its establishing the basis for the judiciary to make specific education funding policy determinations in subsequent cases, in violation of the separation of powers.

V. Whether *Claremont I* should be overruled, and full authority over education funding policy determination restored to the political branches of the government.

## STATEMENT OF THE CASE

On December 30, 1993, in the case of *Claremont School District v. Governor*, 138 N.H. 183, 683 A.2d 1375 (1993) (hereinafter "*Claremont I*"), the New Hampshire Supreme Court, on constitutional grounds under the "Encouragement of Literature" portion of Part II, Article 83 (hereinafter "Article 83"), interposed the judicial branch into the sensitive and controversial area of public school finance. Declaring in *Claremont I* that "in New Hampshire a free public education is at the very least an important, substantive right," 138 N.H. at 192, the Court expressed confidence "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." *Id.* at 193.

The problem with *Claremont I* that has bedeviled the Legislature and the Court ever since is that, while few dispute as a matter of *public policy* the proposition that New Hampshire's children should have the opportunity to receive the best education practicable, the Court's declaration of it as a matter of *constitutional right* has empowered any person aggrieved by any biennial school funding law enacted by the majority of the 400 member House of Representatives and the 24 member Senate to bypass the political process and seek to have a majority of the 5 member Supreme Court set it aside. This has become the public education funding model followed over the past quarter century, with no end in sight unless the Court were itself to end it.

The practical effect of the Supreme Court's interpretation of Article 83 has been to constitute the judicial branch a *de facto* third chamber of the legislative branch, with a negative on the other two, in the determination of state education policy and funding. This status has assumed all the indicia of permanency as *Claremont I* has come to be regarded as settled law by the Supreme Court on

behalf of the judicial branch and by the Attorney General on behalf of the executive branch. The legislative branch has not been a participant, as such, in a series of cases of momentous importance in which it, of the three branches of New Hampshire's government, has had the most at stake and has in the hands of the other two been made the biggest loser.

The challenge the present situation poses to the separation of powers is, or should be, obvious. There is presently no effective constitutional check against the judicial branch's delving into any area of public policymaking it wishes merely by conferring constitutional status upon a political dispute that ought to be left to the political process.

In the case of education funding, efforts to amend the Constitution to restore public education funding's pre-*Claremont I* status as a purely legislative concern have been unavailing. The experience of the thirteen Legislatures elected since 1993 has been that even in the most favorable circumstances, there is always a sufficient number of legislators in opposition to prevent proposal of such an amendment by the necessary 60 percent of each chamber prescribed by N.H. Const., Pt. II, Art. 100(a). Additionally, the Legislature has no effective means by which to review Supreme Court decisions with an eye towards confining the judicial branch, through impeachment for malpractice or maladministration in office under N.H. Const., Pt. II, Arts. 17 and 38, to its assigned constitutional role.

The Legislature is comprised overwhelmingly of lay people who serve part-time as essentially unpaid volunteers, *Id.*, Art. 15. Whatever the theoretical virtue of service so constituted, legislative membership in practice is disproportionally comprised of persons either wealthy, retired, spouse- or labor union-supported, or which in other ways does not equip it to challenge the soundness of constitutionally-based decisions of the Supreme Court. Though they swear an oath to uphold it, *Id.*, Art. 84, members typically know little of the Constitution's text, and nothing of its history or of the doctrine of the separation

of powers. This collective ignorance is impossible of correction, because membership typically changes substantially following each biennial election. The Legislature's sheer numbers make persuasion by means of one-on-one interaction a practical impossibility and reaching broad consensus difficult. Both in committee and on the floor of each chamber, its members deliberate in public. Having no practical control over their workload and unable to attend to their offices full-time, they're susceptible to the temptation to defer complex policy decisions to executive branch administrative agencies and the judicial branch, in order to ease the burden upon themselves.

Thus the *impasse* that threatens to keep the Court embroiled permanently in what the Court's present members - none of whom was on the Court in 1993 - must know are policy issues that they are unqualified and constitutionally *dis*qualified to decide. *Claremont I* presented the Court with a textbook example of the applicability of the "political questions" doctrine, whereby a court voluntarily refrains from ruling because the matter before it had been entrusted to the elected branches of the government, to be worked out by the give and take of the political process. *In re Judicial Conduct Committee*, 145 N.H. 108, 751 A.2d 514 (2000).

The Legislature relies totally upon the integrity of the members of the Supreme Court to keep faith with the Constitution, and neither engage in politics nor encroach into legislative territory. It is essential, therefore, that members of the Court be intellectually honest, impartial, introspective and self-aware. *Cf.* N.H. Const., Pt. I, Art. 35. They must be willing to confront and correct its errors, placing the interests of the broader scheme of constitutional self-government ahead of *stare decisis* and institutional reputation.

In the present context, the Court must be willing to re-examine *Claremont I* with an open mind. To the legislative branch - or at least to the members of it who are parties to this Brief - the *Claremont* series of cases is only secondarily

about education. It is more fundamentally an ongoing challenge to its authority over the policymaking function that the Constitution reposes in it and it alone. *Id.*, Pt. II, Arts. 2 and 5.

It is appropriate, therefore, that the defense by the Attorney General in this litigation, insofar as it encompasses the institutional interests of the legislative branch, be supplemented by actual serving legislators for the purpose of urging the Court to free itself of the responsibility it imposed upon itself in 1993, and recognize that *Claremont I* was incorrectly decided, overrule it, dismiss the present litigation, and to that extent restore the constitutional order.

## SUMMARY OF ARGUMENT

I. In *Claremont I,* the Court did not faithfully apply the standard of review chosen by the Court itself of giving the words in the Constitution the same meaning they must have had to the electorate on the date the vote to ratify the Constitution was cast by placing itself as nearly as possible in the situation of the parties at the time, so that it may gather the voters' intention from the language used, viewed in the light of the surrounding circumstances. Instead, it violated this standard in three fundamental ways, first by not giving weight to the fact that none of the colonial era statutes it cited required the Province of New Hampshire to fund public education; second by not giving weight to the fact that no State funding whatsoever was provided for education in the first fifty years after ratification of the Constitution; and third by not giving weight to the absence in Article 83 of specific and unambiguous wording that could easily have been included to make clear that public education was to be funded at the State level, had that been the intention of the Constitution's framers and ratifiers.

II. Article 37 of Part I recognizes that while as a practical matter the separation of powers among the three branches of the government cannot be absolute, their interaction is regulated by the Constitution taken as a whole. The Court's ruling in *Claremont I* that Article 83 imposes a duty on the State to provide a "constitutionally adequate" education to every educable child and to guarantee adequate funding failed to address the limiting effect the original version of Article 6 of Part I had on the scope of the duty of the legislators imposed by Article 83. In point of historical fact, Article 6 protected the right of localities to control education against a state takeover by ensuring the right of the people to keep both the choice and payment of teachers in their hands at the local level. Accordingly, the duty of the legislators in the discharge of their offices under Article 83 was originally limited by the rights reserved to the people under

Article 6, such that that duty extended no further than the power to compel localities to make adequate provision *at their own expense* for the support and maintenance of public teachers, reserving to them at all times the exclusive right of choosing their own public teachers and of contracting with them for their support and maintenance.

III. The precedent from another jurisdiction most relied upon by the Court to buttress its decision in *Claremont I*, that of the Supreme Judicial Court of Massachusetts in *McDuffy v. Secretary of the Executive Office of Education,* 415 Mass. 545, 615 N.E.2d 516 (1993), suffers from the same historiographical defect as *Claremont I*, in that in interpreting the Massachusetts Constitution's counterpart to Article 83, the SJC failed to consider the limiting effect upon the duty of the Legislature imposed by the Massachusetts Constitution's counterpart to Article 6, the result being the same misapprehension of the allocation of authority originally made by the Constitution between the state and local levels on the subject of providing and paying for public education.

IV. It was futile to suppose, as the Court professed to do in *Claremont I*, that conferring the status of a constitutional right upon a constitutional provision as studiously vague as that of Article 83 would not lead to further litigation to establish the specific parameters of that right. The present case is only the latest round of such litigation, and by actuating it in *Claremont I* the Court has been unable to avoid becoming enmeshed in the formulation of public policy, a legislative function no more legitimate as a subject for adjudication than would be an attainder as a subject for legislation.

V. For these reasons, *Claremont I* and all its progeny should be overruled, the present litigation dismissed, the *status quo ante* reestablished, and full authority over education funding policy restored to the political branches of the government.

## ARGUMENT

### I. The Basis and Rationale of the Court's Ruling in *Claremont I*

On August 13, 1992, in an opinion by Judge George L. Manias, the Merrimack County Superior Court ruled in the case of *Claremont School District v. Judd Gregg, Governor,* #91-E-306-B, that the plaintiffs' petition for injunctive relief and declaratory judgment must be dismissed for failure to state a claim upon which relief could be granted. Judge Manias' order stated in relevant 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."

On December 30, 1993, in an opinion by Chief Justice David Brock, the Supreme Court ruled in *Claremont I* - the plaintiffs' appeal of Judge Manias' ruling - 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. 138 N.H. at 184.

In addressing the question of whether Judge Manias committed legal error when concluding that Article 83 imposes no constitutional duty upon the state to support public education, the Supreme Court correctly and commendably invoked as the standard for its "narrow task" that "[i]n 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," and that 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." 138 N.H. at 186 (internal citations and quotation marks omitted).

In the execution of its task, the Court made use of five basic interpretive aids: (1) definitions found in either Thomas Sheridan's 1780 *A General Dictionary of the English Language* or the 1989 edition of the *Oxford English Dictionary* of the words "encouragement," "literature," "learning," "diffused," "duty," and "cherish" contained in Article 83; (2) the interpretation given by the Supreme Judicial Court of Massachusetts (hereinafter "SJC") in *McDuffy v. Secretary of the Executive Office of Education,* 415 Mass. 545, 615 N.E.2d 516 (1993) (hereinafter "*McDuffy*") to the contemporaneous and allegedly "nearly identical provision regarding education" contained in the Massachusetts Constitution; (3) quotations from selected histories of public education in the colonial and immediate post-colonial periods (N. Bouton, *The History of Education in New Hampshire: A Discourse Delivered Before the New Hampshire Historical Society* (1833); E. Cubberley, *Public Education in the United States 15* (1919); and G. Bush, *History of Education in New Hampshire* 10-11 (1898)); (4) references to seven education laws of the colonial period (those of 1642, 1647, 1669, 1693, 1714, 1719 and 1721) found in *Laws of New Hampshire, Vol. 1 Province Period* (1679-1702) and *Vol. 2 Province Period* (1702-1745); and (5) excerpts from three late-colonial era addresses (Governor Wentworth to the Council Chamber of the House of Assembly of April 13, 1771, his message to the General Assembly of December 14, 1771, and the General Assembly's reply to the latter of December 30, 1771).

Respecting the definitions, the Court concluded as follows:

> "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."

138 N.H. at 187.

Respecting *McDuffy*, the Court adopted as its interpretation of Article 83 the SJC's interpretation of the Massachusetts Constitution's counterpart provision (Part II, Ch. 5, §2):

> "'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.'"

*Id.*; quoting *McDuffy*, 415 Mass. at 564.

The Court then concluded "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." 138 N.H. at 187.

Respecting the histories, the Court found that "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." *Id.* at 188.

Respecting the statutes, the Court had no choice but to acknowledge that "these laws required the *towns* to fund public education." *Id.* at 189 (emphasis added).

Respecting the address excerpts, the Court asserted that, statutes notwithstanding, the April 13, 1771 address to the Council Chamber of the House of Assembly of Governor John Wentworth - the last British colonial Governor of New Hampshire - "made clear" 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."

*Id.* at 189-190.

After stating that these interpretive aids comprised the background informing the Constitutional Convention as it began drafting the State Constitution in 1781, the Court asserted that "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." *Id.* at 190.

The Court then jumped ahead to 1795, quoting from an address of Governor Gilman to the Senate and House of Representatives as follows: "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." *Id.* at 190-191. To which address the House and Senate are quoted as stating in reply:

> "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."

*Id.* at 191.

The Court concluded that "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." *Id.*

## II. Why the Court's Ruling in *Claremont I* was Incorrect

### A. The ruling was against the weight of the Court's chosen standard of review.

The standard the Court itself chose in *Claremont I* in determining the question of whether Article 83 imposed a constitutional duty upon the state to support public education was for the Court to give the words in the Constitution the same meaning they must have had to the electorate on the date the vote was cast, and to place itself as nearly as possible in the situation of the parties at the time the Constitution was ratified so that it may gather their intention from the language used, viewed in the light of the surrounding circumstances. 138 N.H. at 186. Having adopted this standard at the beginning of its opinion, by its end the Court has violated it in three fundamental ways.

First, it acknowledged that none of the seven colonial era statutes it cited required the Province of New Hampshire to fund public education; that in fact those statutes directly addressing the subject required the *towns* to fund it. The Court deflected this seemingly highly pertinent evidence of the lawmakers' intention, gleaned "from the language used, viewed in the light of the surrounding circumstances," by retreating to Governor Wentworth's April 13, 1771 address to the Council Chamber of the House of Assembly, which - with all due respect to the Court's characterization - did *not* make clear that "the duty to educate remained with the State [*sic*; Province]." See *Id.* at 189-190.

Second, the Court professed itself to be "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." *Id.* at 191. In view of the standard of constitutional review the Court had imposed upon itself, what the earliest legislatures acting under the

newly ratified Constitution actually *did* would, in point of fact, be the very *best* evidence available to enable the Court to place itself "as nearly as possible in the situation of the parties at the time the instrument was made," enabling it to "gather their intention from the language used, viewed in the light of the surrounding circumstances." *Id.* at 186. *See*, in particular, Walter A. Backofen, *Claremont's Achilles Heel: The Unrecognized Mandatory School-Tax Law of 1789*, 43 N.H.B.J. 26 (March 2002), which provides historical context, not supportive of the Court's interpretation of Article 83, for the Legislature's above-quoted reply to Governor Gilman's 1795 address (*supra*, pp. 19-20). As summarized by Professor Backofen:

> "[T]he 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."

43 N.H.B.J. at p. 27.

Professor Backofen was mistaken in concluding that had the Court in *Claremont I* acknowledged and embraced the school funding law of 1789, it "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*." By mandating *local*

support for public education, the law of 1789, rather than being "an act of early enlightenment," 43 N.H.B.J. at p. 28, was merely an implementation of the legislators' duty under Article 83 "to cherish the interests of...all seminaries and public schools" within the limitations imposed by Article 6 of Part I discussed *infra* under the immediately succeeding subheading.

The relevance of Professor Backofen's scholarship to the Legislature's reply to Governor Gilman's 1795 address lies instead in the fact that, coming as it did only six years after enactment of the "unrecognized Law of 1789," and lacking as it does any *mention* of - just as the law itself lacked any *provision* for - state support of education, the Legislature's pledge "most cordially [to] embrace all proper measures" to diffuse, promote, cherish and perpetuate the various objects of Article 83, those "proper measures" did not encompass state funding of schools.

The Court deflected *this* seemingly highly pertinent evidence by retreating to and quoting from *McDuffy*, saying:

> " '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.' *Id.*"

138 N.H. at 191.

Thus did the Court pull itself up by its bootstraps: It not only deferred to its counterpart in another state to decide the meaning of the Constitution of this state, but it adopted that counterpart's tactic of using the *absence* of evidence of the proposition to be proved as evidence of the *truth* of the proposition.

Third and finally, while giving careful study to the definitions contained in Sheridan's 1780 *General Dictionary of the English Language* of the words "encouragement," "learning," "duty," and "cherish" found in Article 83, the Court gave no weight to words such as "appropriate," "fund," "pay for," or "finance," *not* found in Article 83, words that surely were extant at the time. As shall be shown *infra* under the immediately following subheading, the absence of such words in Article 83 was intentional, reflecting that, pursuant to Article 6 of Part I, the Constitution as originally drafted, understood and ratified, withheld from the Legislature authority to impose funding of the cost of public education at the state level.

**B. The Court failed to consider the effect of Article 6 of Part I on the scope of Article 83 of Part II.**

Article 37 of Part I of the New Hampshire Constitution (hereinafter "Article 37") reads in full as follows:

> "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."

By these words, Article 37 recognizes that while as a practical matter the separation of powers among the three branches of the government cannot be absolute, their interaction is regulated by the Constitution taken as a whole. Article 37's last phrase metaphorically characterizes the Constitution as the interweaving of numerous threads (the two parts and their numerous articles) creating in their totality "one indissoluble bond of unity" (a single document) and "amity" (the absence of conflict). It follows that, it being philosophically impossible for any article to be in conflict with any other article, no article may be

considered separately from the rest, and the interpretation of any one article must harmonize - must be consistent - with that of every other article.

The Court's interpretation of Article 83 in *Claremont I* as imposing 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, 138 N.H. at 184, failed to address Article 83's relationship to - its consistency with - Article 6 of Part I (hereinafter "Article 6"), which originally read in relevant part as follows:

> "As morality and piety, rightly grounded on Evangelical principles, will give the best and greatest security to government, and lay in the hearts of men the strongest obligations to due subjection; and as the knowledge of these, is most likely to be propagated through a society by the institution of the public worship of the Deity, and of public instruction in morality and religion; therefore, to promote those important purposes, the people of this State have a right to empower, and do hereby fully empower the Legislature to authorize from time to time, the several towns, parishes, bodies-corporate, or religious societies within this State, to make adequate provision at their own expense, for the support and maintenance of public Protestant teachers of piety, religion and morality.
>
> "Provided notwithstanding, that the several towns, parishes, bodies corporate, or religious societies, shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance."

In light of Article 6's plain wording, the overall thrust of the Constitution on the subject of control of public education policy and funding is revealed to be *precisely the opposite* of that attributed to it by the Court in *Claremont I*. Article 6 protects the right of localities to control education against a state takeover by ensuring the right of the people to keep both the choice *and payment* of teachers in their hands at the local level.

That the right of local control of education guaranteed by Article 6 included what the late Twentieth Century mindset might have regarded as the dubious privilege of paying for teachers' support and maintenance merely

demonstrates a sagacious recognition by our forebears that with funding comes control, meaning that with *state* funding would inevitably come *state* conditions for its use, something that the Eighteenth Century American mindset abhorred.

An understanding of this fundamental difference between contemporary and Eighteenth Century attitudes on the role of state government in public education can be gleaned from the view of the subject held by Thomas Jefferson, imparted by Alan Pell Crawford in *Twilight at Monticello: The Final Years of Thomas Jefferson* (New York, Random House, 2008), at p. 131 (emphasis added):

> "Only when the people were fully engaged in securing their own liberties, Jefferson argued, was republican government on the national or even continental scale possible. The way to have 'good and safe government,' Jefferson told State Senator Joseph C. Cabell of Virginia in 1814, 'is not to trust it all to one, but to divide it among the many, distributing to every one exactly the functions he is competent to.
>
> "The national government should be entrusted with severely limited powers - chiefly, to regulate relations between the states and between the United States and foreign governments. State governments would be responsible for 'what concerns the States generally,' the counties with county affairs, and the wards with everything else. The wards, the counties, the states, and the union of states would form a 'gradation of authorities,' establishing a 'system of fundamental balances and checks,' preventing power from being consolidated at ever higher levels.
>
> *"The wards would be entrusted with what was ultimately most vital to the survival of the republic itself: the education of children. Wards would fund, build, and run public primary schools where children would be taught subjects that would equip them to exercise their liberties responsibly. The establishment and administration of the schools would also provide an ongoing education in self-government for the parents. The notion that schools could be better run by 'any other general authority of the government, than by the parents within each ward [is] a belief against all experience,' Jefferson told Cabell in February 1816. Entrust the states with responsibility for education, and one might as well turn over to them 'the management of all our farms, our mills, and our merchants' stores' - a policy that, of course, later generations of collectivists would endorse.*
>
> "Jefferson's belief in wards was 'not founded in views of education only,' he told Governor Wilson Cary Nicholas on April 2, 1816, 'but infinitely more as the means of a better administration of government,

and the eternal preservation of its Republican principles. The operation of schools would be only one of the many responsibilities left to the wards."

Jefferson's idea that populous and extensive countries could remain free and self-governing as long as local government flourished was rooted in the example of New England:

> "Despite Jefferson's attempts to locate the source of his ward republic ideas in the ancient history of Great Britain, where he had actually seen it operate most vigorously was in the New England townships. Their stiff resistance to his efforts to enforce the embargo taught him how fierce ordinary Americans could be when their liberties were threatened, and this was a lesson he did not forget. *He was forthright, moreover, in telling his fellow southerners that he had seen local government at its most vital not in their own states but in those of the North. Wards, 'called townships in New England... have proved themselves the wisest invention ever devised by the wit of man for the perfect exercise of self-government, and for its preservation.'*"

*Twilight at Monticello* at pp. 132-133 (emphasis added).

Traditional New England self-government on the local level - including governance and funding of primary and secondary education - survives in New Hampshire to this day, but is under constant attack by various parties for various motives running the gamut from altruistic to nakedly self-interested. Whether the Eighteenth Century model of decentralized government advocated and articulated by Thomas Jefferson is preferable to the contemporary model of centralization, in which power is exercised *on behalf of* the people rather than *by* them, is certainly a subject worthy of debate. But the fact that the Jeffersonian model has been in abeyance and the statist model in ascendance over much of the past century and a half is no reason to declare the debate over by means of a judicial decree on constitutional grounds that not only lacks support in the Constitution but contradicts the Constitution as originally written, understood and ratified.

The function of education as perceived by Jefferson, "where children would be taught subjects that would equip them to exercise their liberties

responsibly," and the establishment and administration of which "would also provide an ongoing education in self-government for the parents," *Twilight at Monticello* at p. 132, finds expression in the New Hampshire Constitution not only implicitly in the original version of Article 6, but expressly in Article 38 of Part I (hereinafter "Article 38"), which reads as follows:

> "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 the laws necessary for the good administration of government."

Among the definitions of "recur" is to go back, think about and discuss. To go back, think about and discuss the fundamental principles of the Constitution in order that the officers and representatives of the State of New Hampshire are held faithful to the Constitution and accountable to the people is, by Article 38, one of the few affirmative obligation of the people to be found in its Bill of Rights. Clearly the institution best suited to acquit this obligation is the public schools, and the best means to insulate the public schools and the instruction they provide from the corrupting influences of persons or governmental entities remote from the people and hostile to democratic self-government is to maintain them locally, with local resources. Or so our Founders believed, and incorporated into New Hampshire's fundamental law in order to ensure.

Were they wrong? It is manifestly plain that the centralized state- and teachers' union-dominated public school systems of today are generating battalions of citizens ignorant of, if not actually hostile to, the principles and societal advantages of the limited and participatory democratic self-government

enshrined in our constitutions, state and federal. Too many children are emerging from their state-funded public educational experience not only unmindful of the libertarian individual rights ideals of the American Revolution, but as adherents instead of the authoritarian-tending group entitlements doctrines of the French and Russian Revolutions, whether or not they graduate ever having heard of either.

It is not the purpose of this Brief to argue public education policy except to the extent that it was incorporated into the Constitution in 1784 and thereby made part and parcel of "that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." Clearly, the chain of connection among Articles 6, 37, 38 and 83 respecting public education was the desire to keep education as local as practicable in order to ensure preservation of the means to understand and apply the fundamental principles of the Constitution. This desire cannot be achieved if education is funded entirely, or even primarily, through state government.

Accordingly, if the role of the Court in determining the meaning of the Constitution is, as the Court acknowledged it to be in *Claremont I*, to "give the words the same meaning that they must have had to the electorate on the date the vote was cast" so that the Court could "gather their intention from the language used, viewed in the light of the surrounding circumstances," 138 N.H. at 186, the policy objectives pursued by the original *Claremont* plaintiffs would have been deemed unconstitutional had they been asserted in 1784. It follows that the 1993 ruling of the Court that the *Claremont I* plaintiffs' policy objectives were *mandated* by the Constitution as ratified in 1784 was incorrect.

Properly understood in their historical context, the juxtaposition of Article 6 and Article 83, the former in the part of the Constitution devoted to the rights of the individual and the latter in the part devoted to the mechanics of governing, make abundant sense; they are "consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity."

Article 83 dovetails with Article 6's grant of authority to the Legislature to authorize provision locally "for the support and maintenance of public Protestant teachers of piety, religion and morality." The duty of the legislators in the discharge of their offices under Article 83 is limited by the rights of the people reserved under Article 6. But Article 6 received no mention in *Claremont I*, and - as far as can be determined - no mention even in any *pleading* in the case, at either the Superior or Supreme Court level.

In *Claremont I,* the Court interpreted Article 83 in isolation, without regard to Article 6. Given the obvious relationship between the two, given the fact that in 1784 public schools were sectarian-based (as reflected by the containment of seminaries and public schools between the same pair of commas in Article 83), and given the mandate of Article 37 that "the whole fabric of the constitution" be interpreted and applied so as to constitute "one indissoluble bond of union and amity," the Court's failure to consider and harmonize this relationship constituted error, resulting in an incorrect interpretation of Article 83.

### C. The *McDuffy* decision failed to consider the effect of the Massachusetts Constitution's counterpart to Article 6 of Part I on the scope of its counterpart to Article 83 of Part II.

The text of the opinion in *Claremont I* takes up nine pages of the New Hampshire Reports and contains no endnotes. The text of the majority opinion in *McDuffy* takes up 75 pages of the Massachusetts Reports and contains 92 endnotes. The reliance of *Claremont I* upon *McDuffy* is overt and extensive, and understandable given both the two states' origins as a single colony and the common authorship of much of their respective Constitutions.

In light of this Court's reliance upon *McDuffy*, its failure to identify the relationship between Article 6 and Article 83 can well be assigned to inadvertence, given the SJC's failure to identify the relationship between the

parallel articles of Massachusetts' Constitution. Viewed charitably, the SJC's lapse may be attributed to the fact that the Massachusetts Constitution's counterpart (Part I, Article 3) to New Hampshire's Article 6 had been superseded very early. The 1833 ratification of Article of Amendment XI removed all secular content from the original Article 3, thereby confining the constitutionally protected right of local control to sectarian education only, and eliminating Article 3 as an impediment to state aid to secular education. Given the SJC's apparent obliviousness to Article 3 as originally ratified, its conclusions as to the original meaning and scope of the Massachusetts Constitution's counterpart (Part II, Chapter V, Section II) to New Hampshire's Article 83 are necessarily flawed, and being so can have no legitimate bearing by way of analogy upon Article 83's original meaning and scope.

Whatever may have been the original interplay between their Massachusetts Constitution counterparts correctly understood, under New Hampshire's Articles 6 and 83 it was not the state that delegated "some of the implementation of the duty [to support the public schools] to local governments," *McDuffy,* 415 Mass. at 606, but local governments that delegated it to the state. In New Hampshire, ultimate authority over the subject of public education was vested in the lowest level of government, not the highest, and the Article 83 "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" was limited by Article 6 merely to authority to require maintenance and support of education at the local level.

**D. The duty imposed by Article 83 of Part II is entrusted to the discretion of legislators, not judges.**

Unlike its Massachusetts counterpart, Article 83 gives general direction not to the Legisla*ture*, but to the legisla*tors* as individuals. It is an appeal to the

consciences and judgment of the individuals serving in the Legislature as this state's policymakers. Under the Constitution as ratified in 1784, the state could, in fulfillment by the legislators of their duty to "cherish" the enumerated Article 83 objectives, direct the towns to make provision for public education and specify how much funding they must raise in order to do so, but that was the limit of its authority to compel action on the subject. In order "to cherish the interest of literature and the sciences, and all seminaries and public schools" beyond this - that is, to operate and fund public schools and impose a curriculum at the state level - required consent of the towns to the waiver of their exclusive rights on the subject guaranteed them by Article 6.

Obviously times changed, as times will. They had changed enough by the 1850s that the Legislature, its members mindful of their duty under Article 83, but presumably mindful also of the limit on its exercise imposed by Article 6, for the first time began devoting state funding to public education. The present public education paradigm, created in its basic form in 1919, has experienced many statutory modifications over the succeeding century. Further change, even revolutionary change conceivably leading to the abolition altogether of government-owned and -operated schools, and complete parental choice in an expanded elementary and secondary education marketplace that would include the Internet, may come to be the opinion of the majority of legislators as how best to discharge their Article 83 duty to cherish the interest of the public schools. Giving constitutional status to one version of what is in fact an ever-evolving issue of policy stifles innovation borne of experience that has activated all previous public education policy and funding changes. That members of the legislative branch do not respond to societal change as rapidly as members of the judicial branch would wish, and that the changes made legislatively do not accord with their notions of wisdom, does not confer authorization to the judicial branch to brush the political

process aside and impose change by the subterfuge of transforming policy options into constitutional mandates.

In the 1992 Superior Court litigation preceding *Claremont I*, the petitioners had protested in injured innocence that they were not seeking to have the court direct the Legislature to enact specific legislation or to raise taxes. "Rather," so they said in their Objection to the State's Motion to Dismiss, "the petitioners seek a declaratory judgment pursuant to RSA 491:22, where the rights and duties of the parties are determined." *Objection*, at p. 22.

Any candid reader of this demurral would have recognized that obtaining that declaratory judgment would be only the first step; the proverbial camel's nose in the tent. For just as *Baker v. Carr*, 369 US 186, 7 L.Ed.2d 663 (1962) (holding that federal courts have jurisdiction in cases involving state legislative reapportionment) led inevitably to *Reynolds v. Sims*, 377 US 533, 11 L.Ed.2d 506 (1964) (holding that state legislative seats must be apportioned on the basis of equal populations), so too would a ruling holding that Article 83 imposes a duty on the State to provide a "constitutionally adequate" education and to guarantee adequate funding lead inevitably to a future decision quantifying that duty.

And so it did. In *Claremont School District v. Governor*, 142 N.H. 462, 703 A.2d 1353 (1997) (hereinafter "*Claremont II*"), the Court quantified the legislators' duty thusly:

> "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."

142 N.H. at 474-475.

The constitutional problem with the Court's moving from a mere generalized declaration of the legislators' duty in *Claremont I* to a concrete statement of the parameters of that duty in *Claremont II* is that it amounted to the five members of the judicial branch dictating to the 424 members of the legislative branch the *content* of their duty as legislators. A more obvious and astonishing violation of the separation of powers, and a greater challenge to our State's constitutional order, is difficult to imagine. With each additional edition of the *Claremont* saga, the Supreme Court has implanted the judicial branch ever deeper into constitutional territory in which it does not belong, and which it is the duty of the legislative branch to resist.

## III. Conclusion

Writing well over a century ago, Oliver Wendell Holmes made the following observations on the origins of the common law, which describe perfectly what has taken place with respect to constitutional law in the *Claremont* series of school funding cases:

> "A very common phenomenon, and one very familiar to the student of history, is this: The customs, beliefs or needs of a primitive time establish a rule or formula. In the course of centuries, the custom, belief or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received."

O. W. Holmes, Jr., *The Common Law*, Lecture I (1881).

The custom, belief and perceived need of late Eighteenth Century New England was that education should be kept local. At the same time, the need was felt that no locality should fail to provide education. The results were Article 6 of Part I of the New Hampshire Constitution and Article 3 of Part I of the Massachusetts Constitution, which preserved locally provided and locally funded education as a matter of right, but which at the same time authorized the Legislature to compel every locality to provide it at their expense. In order better to ensure that the Legislature *would* so compel, both states in Part II of their respective Constitutions elevated the interests of the public schools to a duty to be cherished - by the Legisla*ture* in Massachusetts and by the Legisla*tors* in New Hampshire - as an inducement to the exercise of the carefully circumscribed coercive power granted to the Legislature in Part I.

In New Hampshire, the "rule or formula" for providing public education established by the interplay of Article 83 and Article 6 was followed for many

years, in conformity with and in pursuance of the original basis for its creation. But over the course of time, as state funding began and once begun became a customary and familiar part of the public education model, the custom, belief and perceived necessity that generated the rule eroded and was largely if not totally forgotten. But the rule itself remained intact, in that in New Hampshire, education remained local and the percentage of its cost funded by the state - as we were constantly reminded as though it were something of which to be ashamed - remained among the nation's lowest.

Unlike the common law rules that were the subjects of Justice Holmes' lecture, the rule involved in *Claremont I* was of constitutional magnitude, and so its form could not easily be modified to fit a new meaning. Any adaptation of the rule "to explain it and to reconcile it with the present state of things" would have to retain its present form exactly as worded. The ingenious minds of the attorneys for the *Claremont I* plaintiffs were up to the task. They thought up, and successfully asserted, a ground of policy which seemed to explain the purpose of Article 83 consistent with its wording and with the then-prevalent public education paradigm; that is, the "present state of things." In order to be successful, however, this updated explanation required that the forgotten interplay between Article 83 and Article 6 remain forgotten. And so it did, thereby enabling the updated explanation to receive the blessing of this Court, and the rule to be adapted to fit that explanation and enter upon a new career, albeit with content 180 degrees different from that which had given rise to it: Now it was the *state* that had the responsibility to provide public education and the *state* that had the responsibility to fund it.

A continued adherence to the unsound precedent announced by this Court in *Claremont I* cannot end well for the Supreme Court as an institution. At some point a choice will have to be made in the Legislature between, on the one hand representing the legitimate preferences and interests of its members' constituents,

and on the other indulging further the pretentions of the Court as self-appointed third legislative chamber. The Court should reconsider *Claremont I* guided more than it was in 1993 by considerations of the separation of powers. The Supreme Court of Illinois applied the separation of powers doctrine to that state's own school funding case, *Committee for Educational Rights v. Edgar*, 174 Ill.2d 1, 672 N.E.2d 1178, 220 Ill.Dec. 166 (1996), saying as follows:

> "It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.
>
> "To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois. Judicial determination of the type of education children should receive and how it can best be provided would depend on the opinions of whatever expert witnesses the litigants might call to testify and whatever other evidence they might choose to present. Members of the general public, however, would be obliged to listen in respectful silence. We certainly do not mean to trivialize the views of educators, school administrators and others who have studied the problems which public schools confront. But non-experts - students, parents, employers and others - also have important views and experiences to contribute which are not easily reckoned through formal judicial fact-finding. In contrast, an open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives."

174 Ill.2d at 28-29.

Upon reconsideration of *Claremont I*, this Court should conclude that it will no longer, under the guise of constitutional interpretation, presume to lay down

policy guidelines for or issue ultimatums to the Legislature. It should conclude, as did Justice Rosellini in dissent in Washington State's school funding case, that:

> "I would be surprised to learn that the people of this state are willing to turn over to a tribunal against which they have little if any recourse, a matter of such grave concern to them and upon which they hold so many strong, though conflicting views. If their legislators pass laws with which they disagree or refuse to act when the people think they should, they can make their dissatisfaction known at the polls. They can write to their representatives or appear before them and let their protests be heard. The court, however, is not so easy to reach, nor is it so easy to persuade that its judgment ought to be revised. A legislature may be a hard horse to harness, but it is not quite the stubborn mule that a court can be. Most importantly, the court is not designed or equipped to make public policy decisions, as this case so forcibly demonstrates."

*Seattle School District No. 1 v. State,* 90 Wash.2d 476 at 563-64, 585 P.2d 71 at 120 (1978), (Rosellini, J., dissenting, joined by Hamilton & Hicks, JJ).

Inherent in any consensus about an "adequate" education is a difficult balance between irreconcilable value systems. Judges may have their own ideas of what constitutes an adequate education, but they are constitutionally constrained from forcing them, merely because they are judges, upon other equally well-informed persons who have different values.

**Respectfully Submitted,**

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## CERTIFICATE OF COMPLIANCE

I, Gregory M. Sorg, hereby certify pursuant to Rule 16 (11) of the Rules of the Supreme Court of New Hampshire, that this Brief contains approximately 9,380 words, excluding the Table of Contents, Table of Authorities, and Text of Relevant Constitutional Provisions, which is fewer than the 9,500 words permitted by this Court's rules. In making this certification, counsel has relied upon the word count feature of the computer program used to prepare this Brief.

May 5, 2020.

Gregory M. Sorg

## CERTIFICATE OF SERVICE

I, Gregory M. Sorg, hereby certify pursuant to Rule 18 of the 2018 Supplemental Rules of the Supreme Court of New Hampshire for Electronic Filing, that a copy of this Brief shall be served on each of Daniel E. Will, Esq., Anthony J. Galdiere, Esq. Lawrence M. Edelman, Esq., Samuel R. V. Garland, Esq., Michael J. Tierney, Esq., and Elizabeth E. Ewing, Esq., through the Supreme Court's e-filing system.

May 5, 2020.

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