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## The Original Understanding of the New Hampshire Constitution's Education Clause

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## The Original Understanding of the New Hampshire Constitution's Education Clause

EDWARD C. MOSCA\*

### I. INTRODUCTION

In 1993, the New Hampshire Supreme Court held that “part II, article 83 [of the state constitution] imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding,”<sup>1</sup> and that this duty is enforceable by the judiciary.<sup>2</sup> This decision, known as *Claremont I*, was the wellspring of a line of decisions that has radically changed both the manner in which public education is funded in New Hampshire and the respective roles of the judicial branch and the representative branches in formulating education policy.<sup>3</sup>

Since the adoption of the state constitution in 1784, public education in New Hampshire had been funded primarily with local taxes.<sup>4</sup> The *Clare-*

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1. *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1376 (N.H. 1993).

2. *Id.* at 1381 (“Having identified that a duty exists and having suggested the nature of that duty, we emphasize the corresponding right of the citizens to its enforcement.”).

3. I will refer to these decisions as the *Claremont* decisions or the *Claremont* case, even though the latest decision does not contain “Claremont” in the caption. See *Londonderry Sch. Dist. SAU # 12 v. State (Londonderry I)*, 907 A.2d 988 (N.H. 2006). The supreme court has referred to the first two decisions as *Claremont I* and *Claremont II*. In *Claremont II*, which I will discuss in more detail later, the court struck down the definition of an adequate education developed in response to *Claremont I*. See *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1357–58 (N.H. 1997). *Claremont II* declared an adequate education a fundamental right, *id.* at 1359, ruled the funding system was unconstitutional, *id.* at 1357, and set a deadline for the legislature to implement a new funding system, *id.* at 1360. Commentators have referred to a decision issued in 2002, *Claremont Sch. Dist. v. Governor (Claremont III)*, 794 A.2d 744 (N.H. 2002), which held that the state’s duty to provide an adequate education required “standards of accountability,” as *Claremont III*. See, e.g., John Dayton & Anne Dupre, *School Funding Litigation: Who’s Winning the War?*, 57 VAND. L. REV. 2351, 2395 (2004). By my count, the court has, so far, issued fourteen *Claremont* decisions. See Edward C. Mosca, *New Hampshire’s Claremont Case and the Separation of Powers*, 4 PIERCE L. REV. 409, n.1 (2006) (synopsizing *Claremont* decisions).

4. Under a law passed in 1789, which remained in effect until 1919, the legislature set a total amount to be spent annually on all common schools. To raise that sum, each town or other taxable place was required to collect from its taxpayers an amount equivalent to its percentage of the state’s tax base multiplied by the total amount of spending. For example, if the total amount of spending was set at \$10,000 and a town’s tax base was two percent of the state’s tax base, that town had to collect \$200. However, all of the taxes raised in a town or taxable place were then spent on its own schools; that is, there was no revenue redistribution by the state. See, e.g., WALTER A. BACKOFEN, JUDICIAL ACTIVISM ON BEHALF OF PUBLIC EDUCATION IN NEW HAMPSHIRE: THE COURT AS HISTORIAN AND LAWMAKER 10–11 (2000). While later laws introduced state aid, the majority of the funding remained local. See

*mont* decisions flatly rejected this long tradition of local control of the funding of public education: “Whatever the State identifies as comprising constitutional adequacy it must pay for. None of that financial obligation can be shifted to local school districts, regardless of their relative wealth or need.”<sup>5</sup>

The *Claremont* decisions also flatly rejected the longstanding judicial construction of Part II, Article 83 as allowing the legislature to exercise plenary control over education policy.<sup>6</sup> Instead, notwithstanding the separation of powers principle set forth in Part I, Article 37<sup>7</sup> and the constitution’s explicit commitment of the powers to make laws,<sup>8</sup> raise taxes,<sup>9</sup> and spend money<sup>10</sup> to the representative branches, Article 83 has become the source of “mandates,” which are to be declared by the judiciary and implemented by the representative branches.<sup>11</sup> Moreover, the court, in its most recent decision, *Londonderry I*, announced the power to effectuate these mandates itself.<sup>12</sup>

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DOUGLAS E. HALL, LESSONS FROM NEW HAMPSHIRE: WHAT WE CAN LEARN FROM THE HISTORY OF THE STATE’S ROLE IN SCHOOL FINANCE 1642-1998, at 2 (1998), available at <http://www.nhpolicy.org/education/history1.html>. When the court struck down the state’s education funding system in 1997, “[l]ocally raised real property taxes [we]re the principal source of revenue for public schools, providing on average from seventy-four to eighty-nine percent of total school revenue.” *Claremont II*, 703 A.2d at 1354.

5. *Londonderry I*, 907 A.2d at 995. Following *Claremont II*, the legislature set the cost of an adequate education at \$825 million, see *Sirrell v. State*, 780 A.2d 494, 497 (N.H. 2001), which was approximately fifty-five percent of total education spending. See N.H. DEPT. OF EDUC., STATE SUMMARY REVENUE AND EXPENDITURE OF SCHOOL DISTRICTS 1999-2000 (2003), <http://www.ed.state.nh.us/education/data/ReportsandStatistics/FinancialReports/SummaryRevenueExpenses/SummaryRevenueExpenses1999-2000/SummaryRevExp1999-2000.htm>.

6. See, e.g., *City of Franklin v. Hinds*, 143 A.2d 111, 113 (N.H. 1958) (“The manner in which educational policy of cities shall be formulated is determined by the Legislature and not the courts.”); *Amyot v. Caron*, 190 A. 134, 139 (N.H. 1937) (“[T]he unrestricted legislative control is not doubtful.”); *Trs. of Dartmouth Coll. v. Woodward*, 1 N.H. 111, 137 (1817) (“I am aware that this power of the hands of the legislature may, like every other power, at times be unwisely exercised; but where can it be more securely lodged? If those whom the people annually elect to manage their public affairs, cannot be trusted, who can? The people have most emphatically enjoined it in the constitution, as a duty upon ‘the legislators and magistrates, in all future periods of the government, to cherish the interests of literature and the sciences and all seminaries and public schools.’”).

7. N.H. CONST. pt. I, art. 37.

8. N.H. CONST. pt. II, arts. 2, 5.

9. N.H. CONST. pt. I, art. 28, pt. II, art. 5.

10. N.H. CONST. pt. II, art. 56.

11. See *Londonderry I*, 907 A.2d 988, 990 (N.H. 2006) (*Claremont II* “issued ‘four mandates: define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability’”).

12. After holding that “the current education funding and ‘definitional’ statutory framework falls well short of the constitutional requirements established in this court’s *Claremont* decisions,” the court went on to set a deadline for the representative branches to “define with specificity the components of a constitutionally adequate education,” and threatened that “[s]hould they fail to do so, we will then be required to take further action to enforce the mandates of Part II, Article 83.” *Id.* at 995.

Given the *Claremont* cases' sweeping rejection of longstanding governmental practice, its radical deviation from the court's own precedents and the obvious separation of powers issues raised by a judicially enforceable duty to provide and fund an adequate education, *Claremont*'s constitutional pedigree should be a matter of substantial importance. The court, in *Claremont I*, based its interpretation of Article 83 on the original understanding.<sup>13</sup> This article will examine whether the court's *Claremont* jurisprudence actually comports with the original understanding.

This article will begin by reviewing the gloss that subsequent *Claremont* decisions have placed on *Claremont I*'s holdings, in order to have a complete basis to compare the court's *Claremont* jurisprudence to the original understanding. Next, this article will examine the original understanding of Article 83. As part of this examination, I will discuss and critique the court's analysis of, and conclusions about the original understanding. My conclusion is that we can be quite certain that the voters who adopted Article 83 did not understand it to impose the sort of duty to provide and fund an adequate education that has been fashioned in the *Claremont* decisions. This article will finish by examining whether *Claremont* should be preserved on account of stare decisis. My conclusion in this regard is that the benefits of overruling *Claremont* overwhelmingly outweigh any costs.

## II. A SYNOPSIS OF THE CLAREMONT DECISIONS

In *Claremont I*, which was issued in 1993, the New Hampshire Supreme Court held that "part II, article 83 [of the state constitution] imposes a duty on the State to provide a constitutionally adequate education to

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13. See *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1377–78 (N.H. 1993) ("In interpreting an article in our constitution, we will give the words the same meaning that they must have had to the electorate on the date the vote was cast. 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."). *Claremont I* is the only decision in the *Claremont* cases that attempts to justify the notion of a duty to provide an adequate education. Subsequent *Claremont* decisions mention neither historical evidence nor pre-*Claremont* precedent, but cite only prior *Claremont* decisions, see, e.g., *Claremont Sch. Dist. v. Governor (Claremont III)*, 794 A.2d 744, 760 (N.H. 2002) ("[I]n the nearly nine years since this court issued the decision in *Claremont I*, we have rendered eight subsequent opinions directly related to that initial decision. In each of these decisions, this court considered whether the actions of the State conformed to the governing constitutional principles expressed in *Claremont I* and *Claremont II*"), and breezily dismiss charges that the court was setting education policy. See, e.g., *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1360 (N.H. 1997) ("We agree with [dissenting] Justice Horton that we were not appointed to establish education policy . . . . That is why we leave such matters . . . to the two co-equal branches of government"); *Claremont III*, 794 A.2d at 760 ("We recognize that we are not appointed to establish educational policy and have not done so today.")

every educable child in the public schools in New Hampshire and to guarantee adequate funding.”<sup>14</sup> The court also held that this duty is judicially enforceable: “[W]e emphasize the corresponding right of the citizens to [the duty’s] enforcement. . . . Any citizen has standing to enforce this right,”<sup>15</sup> which the court described as “an important substantive right.”<sup>16</sup>

However, the court did not “define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor.”<sup>17</sup> Thus, *Claremont I* implied that the court would leave the making of education policy primarily to the representative branches.

Following remand and a “trial on the merits,”<sup>18</sup> the trial court “ruled in a detailed and thoughtful opinion” that “the education provided in the plaintiff school districts is constitutionally adequate” and that “the New Hampshire system of funding public elementary and secondary education guarantees constitutionally adequate funding to each of the plaintiff school districts.”<sup>19</sup> The case was then re-appealed and, in 1997, the court issued *Claremont II*.

In *Claremont II*, the court decided that defining the parameters of educational adequacy was not a task for the representative branches after all. The court struck down a definition of educational adequacy developed by the State Board of Education<sup>20</sup> and said that it would “look to the seven criteria articulated by the Supreme Court of Kentucky as establishing general, aspirational guidelines for defining educational adequacy.”<sup>21</sup> These “general, aspirational guidelines” are:

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14. *Claremont I*, 635 A.2d at 1376.

15. *Id.* at 1381.

16. *Id.* Under state equal protection analysis, a “substantive” right triggers a lower level of scrutiny than a “fundamental” right. See *In re Sandra H.*, 846 A.2d 513, 517 (N.H. 2004) (classifications involving a fundamental right “must be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose,” while classifications involving an important substantive right “must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation”).

17. *Claremont I*, 635 A.2d at 1381.

18. *Claremont II*, 703 A.2d at 1354.

19. *Id.*

20. *Id.* at 1357–58. The ground given by the court for striking down the state board’s definition—that the duty of defining an adequate education was non-delegable—is specious. It makes no sense that the constitution would allow the legislature to delegate the task of providing an adequate education, see *Claremont Sch. Dist. v. Governor (Claremont III)*, 794 A.2d 744, 755 (N.H. 2002), but not defining it. Also, if the problem was simply that the task of defining adequacy could not be delegated, then there was no reason for the court to have gone on to adopt the Supreme Court of Kentucky’s so-called “general, aspirational guidelines for defining educational adequacy.” See Mosca, *supra* note 3, at 421.

21. *Claremont II*, 703 A.2d at 1359. The Kentucky decision, *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989), is one of the cases that marked the beginning of the so-called “third wave” of education funding litigation, which is distinguished by the use of the education clauses of state constitutions, rather than state equal protection clauses, to challenge a state’s system of financing

(1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;

(2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;

(3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;

(4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;

(5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

(6) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

(7) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.<sup>22</sup>

The court added that it anticipated that the representative branches would “promptly develop and adopt specific criteria implementing these guidelines.”<sup>23</sup> Thus, the duty of the representative branches had been reduced from defining the parameters of an adequate education to designing and implementing a program of public education based on the court’s parameters.<sup>24</sup>

The court in *Claremont II* also changed the nature of the funding duty. Rather than acting as a guarantor of adequate funding, the State henceforth would be the exclusive provider of this funding as the court held that local property taxes could not be used to pay for any portion of the cost of an

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public education. See Mosca, *supra* note 3, at 411–14 (discussing three waves of education funding litigation).

22. *Claremont II*, 703 A.2d at 1359.

23. *Id.*

24. Compare *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1381 (N.H. 1993) (holding it was a task for the legislature and the governor to define the parameters of the education mandated by the constitution), with *Claremont II*, 703 A.2d at 1359 (anticipating that the legislature will promptly develop and implement the guidelines). Justice Horton, who had been part of the unanimous *Claremont I* decision, dissented, reasoning as follows: “My problem is that I was not appointed to establish educational policy.” *Claremont II*, 703 A.2d at 1361 (Horton, J., dissenting). It is perhaps revealing of the mindset of the court that Horton described the purpose of his dissent as “explain[ing] to the students and taxpayers of this State why I am unable to effect needed reform.” *Id.*

adequate education: “To the extent that the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State.”<sup>25</sup> It also set a deadline for the representative branches to replace the extant funding system, which relied heavily on the local property tax.<sup>26</sup>

The court in *Claremont II* also elevated the constitutional right to an adequate education from an “important, substantive right”<sup>27</sup> to a “fundamental right.”<sup>28</sup> While the court “agree[d] with those who say that merely spending additional money on education will not necessarily insure its quality,”<sup>29</sup> it saw it as “basic” that the State must assure “comparable funding.”<sup>30</sup> Thus, the duty to guarantee adequate funding had come to mean that the cost of an adequate education must be based on comparable per-pupil spending and that all of this cost must be funded with state taxes.

In 2002, the court held that “standards of accountability are an essential component of the State’s duty to provide a constitutionally adequate education”:<sup>31</sup>

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25. *Claremont II*, 703 A.2d at 1357. Dissenting Justice Horton pointed out that the majority’s treatment of education funding was anomalous because “[p]olitical subdivisions, at their own expense, carry out state duties on elections, fire and police protection, land use control and other exercises of the police power, provisions of highways, sanitation and the structure of staffing and local government.” *Id.* at 1363 (Horton, J., dissenting).

26. *Id.* at 1360 (“[T]he present funding system may remain in effect throughout the 1998 tax year.”). At the time, “[l]ocally raised real property taxes [were] the principal source of revenue for public schools, providing on average from seventy-four to eighty-nine percent of total school revenue.” *Id.* at 1354.

27. *Claremont I*, 635 A.2d at 1381.

28. *Claremont II*, 703 A.2d at 1359. *Claremont II* does not attempt to explain how, in the four years between *Claremont I* and *Claremont II*, the right to an education grew from a substantive right to a fundamental right.

29. *Id.* at 1360.

30. *Id.*

31. *Claremont Sch. Dist. v. Governor (Claremont III)*, 794 A.2d 744, 752 (N.H. 2002). In the interim, the court had issued an additional eight *Claremont* decisions. In 1998, the court rejected a challenge to Justice Batchelder’s participation in *Claremont II*, *Claremont Sch. Dist. v. Governor*, 712 A.2d 612, 614–15 (N.H. 1998), issued an advisory opinion rejecting former Governor Shaheen’s “ABC” education funding plan, *Opinion of the Justices (School Financing)*, 712 A.2d 1080 (N.H. 1998), and denied the state’s request for an extension to implement a new education funding system, *Claremont Sch. Dist. v. Governor*, 725 A.2d 648, 651–52 (N.H. 1998). The court was just as busy in 1999, issuing an advisory opinion on the constitutionality of a proposed tax plan referendum, *Opinion of the Justices (Tax Plan Referendum)*, 725 A.2d 1082 (N.H. 1999), granting the *Claremont* plaintiffs’ challenge to a “phase-in” in certain communities of a state property tax to fund public education, *Claremont Sch. Dist. v. Governor*, 744 A.2d 1107, 1112–13 (N.H. 1999), and granting the *Claremont* plaintiffs’ request for attorney’s fees, *Claremont Sch. Dist. v. Governor*, 761 A.2d 389, 394 (N.H. 1999). In 2000, the state senate requested an advisory opinion upon the constitutionality of a “targeted aid” education funding system, which defined the cost of an adequate education, but partially funded that cost with local property taxes. In *Opinion of the Justices (Reformed Public School Financing System)*, 765 A.2d 673 (N.H. 2000), the court confirmed the change in the nature of the state’s funding duty from guarantor to provider, opining that the proposed legislation would “directly contradict the

Accountability means that the state must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether, in delegating its obligation to provide a constitutionally adequate education, the state has fulfilled its duty.<sup>32</sup>

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mandate of Part II, Article 83,” *id.* at 676, because “its proposed funding mechanism would rely, in part, upon local property taxes to pay for some of the cost of an adequate education.” *Id.* And, apparently in case that was not clear enough, the court “reiterated” that one of the “core holdings from earlier *Claremont* decisions” was: “the New Hampshire Constitution imposes solely upon the state the obligation to provide sufficient funds for each school district to furnish a constitutionally adequate education to every educable child.” *Id.* at 677. The court also “reiterated,” quite gratuitously because the issue was not before it, that educational adequacy had “yet to be defined.” *Id.* This was despite the enactment of RSA 193-E:2 in 1998, which essentially codified the “general, aspirational guidelines” handed down in *Claremont II*. See 1998 N.H. Laws 548 (Chapter 389:1). The court added, despite the legislative determination in the proposed law in issue that an adequate education cost \$900,000,000, that “[i]t is not possible to determine the level of funding required to provide the children of this State with a constitutionally adequate education until its essential elements have been identified and defined.” *Opinion of the Justices*, 765 A.2d at 677. And, in 2001, by a mere one vote majority, the court upheld the constitutionality of the state property tax. See *Sirrell v. State*, 780 A.2d 494, 504 (N.H. 2001).

32. *Claremont III*, 794 A.2d at 751. The court reasoned that “[i]f the State cannot be held accountable for fulfilling its duty, the duty creates no obligation and is no longer a duty.” *Id.* This reasoning ignores that the constitution provides for accountability through the democratic process as all legislators and the governor must stand for reelection every two years.

The court went on to “determine whether the existing statutes, regulations and rules satisfy this obligation,” *id.* at 752, and held that certain education regulations known as the “minimum standards” for school approval, see N.H. CODE ADMIN. R. ANN. ED. 306.01 (2006), were “in clear conflict with the State’s duty to provide a constitutionally adequate education” to the extent they “excuse compliance solely based on financial conditions,” *Claremont III*, 794 A.2d at 755, and to this extent the minimum standards were deemed “facially insufficient.” *Id.*

The court had never before used the phrase “facially insufficient” to describe a law or regulation’s constitutional status. While it sounds “facially unconstitutional,” it is a completely different animal. A facially unconstitutional challenge to a legislative act is “the most difficult challenge to mount successfully,” and to succeed “the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987); *State v. Brobst*, 857 A.2d 1253, 1254–57 (N.H. 2004) (discussing overbreadth doctrine). “Facial insufficiency” appears to mean that the challenger simply must show that the law was not written the way the court would have written it.

Two of the five justices dissented on separation of powers grounds:

We believe that by deciding the State is required to set standards that when applied indicate whether the school districts are providing an adequate education and hold those school districts accountable, the majority moves unnecessarily into the province of the legislative and executive branches. . . . Nor should the court sit in continuous judgment over educational policy decisions made by the legislature and the [g]overnor, which may very well be a consequence of today’s decision.

*Claremont III*, 794 A.2d at 763.

The court also was critical of the New Hampshire Education Improvement and Assessment Program because the Department of Education “is limited to using the results [of assessment tests] to encourage school districts to develop a local education improvement and assessment plan,” which the court felt was not a “meaningful” application of assessment tests. *Id.* at 758. Borrowing language that had been suggested by the Attorney General, the court “conclud[ed] that the State ‘needs to do more



Thus, in less than a decade, Article 83's charge to the representative branches had evolved from defining the parameters of an adequate education (*Claremont I*),<sup>33</sup> to "promptly develop[ing] and adopt[ing] specific criteria implementing" parameters chosen by the court (*Claremont II*),<sup>34</sup> to having to include in the "specific criteria" implementing the court's parameters "standards of accountability" that enable judicial oversight of public education.<sup>35</sup>

In 2006, the court issued *Londonderry I*,<sup>36</sup> which involved a number of challenges to a recently passed education funding law, House Bill 616, including that it "fail[ed] to define, determine the cost of, and ensure delivery of a constitutionally adequate education."<sup>37</sup> House Bill 616 involved "targeted aid."<sup>38</sup> It repealed a funding law that had provided a base amount

work' to fulfill its duty to provide a constitutionally adequate education and incorporate meaningful accountability in the education system." *Id.* at 759.

The Attorney General had taken the position that the respective roles of the branches was that the representative branches

are responsible for crafting and implementing a long-term solution to the problems with the education funding system found by this Court. The Court is responsible for deciding whether the legislature has adopted a satisfactory definition and for determining that the legislature has finished its initial tasks under *Claremont II*, or that it needs to do more work.

*Claremont III*, 794 A.2d at 755. In other words, according to the Attorney General, the supreme court's constitutional role is to tell the legislature how high to jump, while the legislature's constitutional role is to jump that high.

33. *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1381 (N.H. 1993).

34. *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1359 (N.H. 1997).

35. *Claremont III*, 794 A.2d at 751.

36. *Londonderry Sch. Dist. SAU # 12 v. State (Londonderry I)*, 907 A.2d 988 (N.H. 2006). In the interim, the court rejected two challenges to the legislative process used to pass a new education funding law. See *Hughes v. Speaker of N.H. House of Representatives*, 876 A.2d 736 (N.H. 2005); *Baines v. N.H. Senate President*, 876 A.2d 768, 784 (N.H. 2005).

37. *Londonderry I*, 907 A.2d at 990. The challenge to House Bill 616 was based on the concept advanced by the Attorney General and accepted by the court, without analysis, that *Claremont II* imposed certain "mandates" on the representative branches: "In [*Claremont III*], we acknowledged the State's assertion that [*Claremont II*] issued 'four mandates: define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability,' and that these four mandates comprise the State's duty to provide an adequate education." *Id.* The Attorney General's "assertion" is manifestly wrong, see *Mosca, supra* note 3, at 417 n.55, and undermines the interests of the legislature.

38. The proposed legislation rejected in *Opinion of the Justices (Reformed Public School Financing System)*, 765 A.2d 673, 675 (N.H. 2000), also, as discussed previously, involved "targeted aid." However, unlike that legislation, House Bill 616 did not set forth the cost of an adequate education. Because it did not, the court could not declare it unconstitutional on the ground that on its face it did not "provide sufficient funds for each school district to furnish a constitutionally adequate education to every educable child." *Id.* at 677. Therefore, the court declined the plaintiffs' request that it exercise its original jurisdiction to review House Bill 616:

[P]laintiffs . . . filed a petition for declaratory relief in this court in 2005 seeking a determination that House Bill 616 is unconstitutional. After considering the parties' briefs regarding whether we should exercise our original jurisdiction, we concluded that 'while substantial questions of constitutional law are presented by this case, we believe further factual development is necessary in the superior court before those questions are decided.' Accordingly, the plaintiffs' action was dismissed without prejudice.

of state funding to every school district on an equal per pupil basis and then provided additional “targeted aid,” i.e., additional funding that varied from town to town.<sup>39</sup> Instead, House Bill 616 provided only “targeted aid,” which was determined using factors such as property tax base,<sup>40</sup> income,<sup>41</sup> and the number of students who were proficient in English.<sup>42</sup>

The majority<sup>43</sup> reasoned that “the definition of a constitutionally adequate education is essential to all other issues, including the cost of a constitutionally adequate education and the method by which to raise the necessary funds.”<sup>44</sup> Accordingly, it “stay[ed] that portion of the case containing the trial court’s findings that the legislature has failed to determine the cost, failed to satisfy the requirement of accountability and established a non-uniform tax rate”<sup>45</sup> and “retain[ed] jurisdiction with the expectation

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*Londonderry I*, 907 A.2d at 989–90. The trial court, however, did not conduct a trial to determine whether House Bill 616 “provide[ed] sufficient funds for each school district to furnish a constitutionally adequate education to every educable child,” *Opinion of the Justices*, 765 A.2d at 677, but rather granted summary judgment in favor of the plaintiffs on the grounds “that the State has failed to fulfill its duty to define a constitutionally adequate education, failed to determine the cost of an adequate education, and failed to satisfy the requirement of accountability, and that House Bill 616 (the current education funding law) creates a non-uniform tax rate in violation of Part II, Article 5 of the New Hampshire Constitution.” *Londonderry I*, 907 A.2d at 989. As the same result could have been accomplished at the outset in the supreme court, one wonders whether this is what the court had in mind when it sent the case to the superior court.

39. See N.H. REV. STAT. ANN. § 198:40 (1999 & Supp. 2006) (repealed 2005). The “targeted aid” was based on relative income and property tax base. 2004 N.H. Laws 366–67 (Chapter 200:20). The amount of per-pupil funding in the repealed law was derived from a formula intended to calculate the cost of an adequate education. For the 1999/2000 through the 2002/2003 school years, the amount of per-pupil funding was determined based on a cost study. 1999 N.H. Laws 32–33 (Chapter 17:41). The amount of per-pupil funding for the 2003/2004 and 2004/2005 school years was determined by applying an inflation factor to the cost for the 2002/2003 school year. 2003 N.H. Laws 453 (Chapter 241:4).

40. N.H. REV. STAT. ANN. §§ 198:40-a, 198:40-c (1999 & Supp. 2006).

41. *Id.* § 198:40-b.

42. *Id.*

43. The court split over how to review House Bill 616. Four of the five justices agreed that the initial focus should have been on whether the representative branches had defined an adequate education, while the fifth, Justice Duggan, believed that the salient issue was whether House Bill 616 funded the cost of an adequate education in the plaintiff school districts. Duggan rejected the majority’s approach because, “even if the legislature provides a more specific definition of an adequate education, that definition is meaningless unless the legislature also determines what that specifically-defined education will cost.” *Londonderry I*, 907 A.2d at 1001 (Duggan, J., dissenting). Of the four justices who framed the issue as whether the representative branches had defined an adequate education, one, Justice Galway, disagreed with the majority over the remedy. *Id.* at 1002 (Galway, J., dissenting).

44. *Id.* at 995.

45. *Id.* The trial court’s order was based on the concept that *Claremont II* imposed certain “mandates” upon the representative branches: “In [*Claremont III*], the Supreme Court adopted the State’s assertion that *Claremont II* issued ‘four mandates: define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability.’ These four mandates collectively constitute the State’s duty to provide a constitutionally adequate public education.” *Londonderry Sch. Dist. SAU # 12 v. State*, No. 05-E-0406, 2006 WL 563120, at \*4 (N.H. Super. Ct. Mar. 8, 2006). Similarly, the majority’s analysis of House Bill 616 assumed these mandates: “In [*Claremont III*] we acknowledged the State’s assertion that . . . *Claremont II* issued ‘four mandates: define an adequate education, determine the cost, fund it with constitutional taxes and ensure its delivery through

that the political branches will define with specificity the components of a constitutionally adequate education before the end of fiscal year 2007.”<sup>46</sup>

By “specificity,” the majority meant “sufficiently clear to permit common understanding and allow for an objective determination of costs.”<sup>47</sup> The representative branches could not simply codify the “general, aspirational guidelines” issued in *Claremont I* because that made it “impossible for school districts, parents, and courts, not to mention the legislative and executive branches themselves, to know where the State’s obligations to fund the cost of a constitutionally adequate education begin and end.”<sup>48</sup>

If the representative branches failed to define adequacy “with specificity . . . before the end of fiscal year 2007,”<sup>49</sup> the majority indicated that “we will then be required to take further action to enforce the mandates of Part II, Article 83 of the New Hampshire Constitution.”<sup>50</sup> These remedies included the remedies suggested by Justices Duggan and Galway in their separate opinions and “appointing a special master to aid in the determination of the definition of a constitutionally adequate education.”<sup>51</sup> Justice

accountability,” and that these four mandates comprise the state’s duty to provide an adequate education.” *Londonderry I*, 907 A.2d at 990. The State, however, clearly was not making such an “assertion” as House Bill 616 neither defined an adequate education, *see* N.H. REV. STAT. ANN. § 193-E:2, nor calculated its cost. *See* N.H. REV. STAT. ANN. §§ 198:40-a, 198:40-b, 198:40-c. Thus, the court eschewed the fundamental question presented by House Bill 616: does Part II, Article 83 actually impose such mandates on the representative branches?

46. *Londonderry I*, 907 A.2d at 995.

47. *Id.*

48. *Id.* at 994. In 1998, the legislature, in RSA 193-E:2, codified the “general, aspirational” guidelines announced in *Claremont II*. 1998 N.H. Laws 548 (Chapter 389:1). In *Opinion of the Justices (Reformed Public School Financing System)*, 765 A.2d 673 (N.H. 2000), the court adumbrated *Londonderry I* as it indicated that RSA 193-E:2 was not the sort of definition it expected because it did not believe that RSA 193-E:2 could be used to calculate the cost of an adequate education. *Id.* at 677.

49. *Londonderry I*, 907 A.2d at 995.

50. *Id.* Note that the *Claremont II* mandates, which were grounded only on the court’s “acknowledgment” of the Attorney General’s “assertion” that *Claremont II* imposed these mandates, *see supra* note 46, *infra* note 55, are here given constitutional pedigree as they are referred to as the “Part II, Article 83 mandates.”

51. *Londonderry I*, 907 A.2d at 995. The majority agreed with Justice Galway’s concern that this court or any court not take over the legislature’s role in shaping educational and fiscal policy. . . . However, the judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential.

*Id.* at 996. The only authority provided by the majority for this power was a case decided in 2004, *In re Below*, 855 A.2d 459 (N.H. 2004), which involved redistricting. However, there is nothing in *Below* that suggests that the power of the judiciary to redistrict was derived from some general power to impose judicial remedies whenever the court believes that constitutional rights are being hollowed out. *Id.* at 473. The majority’s view of the court’s remedial powers turns the framer’s understanding of the judiciary’s powers on its head. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (“Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or

Duggan's remedy was to "remand this case to the trial court for further factual development regarding whether the funding provided in House Bill 616 is sufficient to fund a constitutionally adequate education,"<sup>52</sup> while Justice Galway would have "declare[d] House Bill 616 unconstitutional on its face"<sup>53</sup> because "by remanding to the superior court, or by appointing a special master, we risk usurping the legislature's prerogative to set educational and fiscal policy."<sup>54</sup>

To recap the gloss that the supreme court has placed on Part II, Article 83: Article 83 mandates that the representative branches define an adequate education in a manner that gives "specific substantive content" to *Claremont II*'s aspirational guidelines,<sup>55</sup> that is "sufficiently clear to permit common understanding and allow for an objective determination of costs,"<sup>56</sup> and that incorporates standards of accountability to enable judicial oversight.<sup>57</sup> Additionally, Article 83 mandates comparable per pupil spending<sup>58</sup> and that the entire cost of an adequate education be funded with state taxes.<sup>59</sup> Finally, Article 83 empowers the court to effectuate these

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injure them. The [e]xecutive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.")

52. *Londonderry I*, 907 A.2d at 998. Duggan appeared ready to discard the "mandate" to define an adequate education: "Indeed, in my view, a legislative determination of the cost of a constitutionally adequate education using an acceptable method for determining that cost could also satisfy the need to define a constitutionally adequate education." *Id.* at 1001. These so-called "acceptable methods," however, are completely arbitrary. See Mosca, *supra* note 3, at 428.

53. *Londonderry I*, 907 A.2d at 1002. While Galway thought the court should "stay this ruling until the end of fiscal year 2007 so that school districts will receive the state funding they anticipated," *id.*, should the representative branches fail to define an adequate education in the interim, his remedy would result in public schools receiving no funding. Thus, it suffers from the same illogic as the approach attributed to an American officer during the Vietnam War by reporter Peter Arnett: "It became necessary to destroy the village to save it."

54. *Id.* Galway argued that the court's role should end "[o]nce the legislature provides the children of this [s]tate with what it determines to be a constitutionally adequate education." *Id.* To do otherwise, would be to "sit in continuous judgment over educational policy decisions" and "the legislature's fiscal policy." *Id.* Here, Justice Galway is quoting from the dissent in the accountability decision, *Claremont III*, which was written jointly by Justices Nadeau (who in the interim retired and was replaced by Galway) and Justice Dalianis. Justice Dalianis' position is curious as a judicially written definition of an adequate education and/or determination of the cost of an adequate education, which she endorsed in *Londonderry I*, and seems to be a far more egregious trespass on legislative powers than the "standards of accountability" which she rejected in *Claremont III*.

55. *Londonderry I*, 907 A.2d at 990.

56. *Id.* at 995.

57. *Claremont Sch. Dist. v. Governor (Claremont III)*, 794 A.2d 744, 751 (N.H. 2002).

58. *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1360 (N.H. 1997).

59. *Londonderry I*, 907 A.2d at 995.

mandates itself, in the absence of what it deems satisfactory action by the representative branches.<sup>60</sup>

### III. THE ORIGINAL UNDERSTANDING OF PART II, ARTICLE 83

“An obvious starting point in interpreting part II, article 83 is to determine what the particular words used meant in 1784.”<sup>61</sup> So let us begin with the text of Article 83.

#### A. *Text*

Part II, Article 83, which was adopted as part of the 1784 New Hampshire Constitution,<sup>62</sup> originally provided:

ENCOURAGEMENT of LITERATURE, etc.

Knowledge, and Learning, generally diffused through a community, being essential to the preservation of a free government, and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the Legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufacturers, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.<sup>63</sup>

#### 1. *The Absence of Standards.*

The manifest textual problem with construing Article 83 to impose “a duty on the State to provide a constitutionally adequate education to every

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60. *Id.* at 996.

61. *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1378 (N.H. 1993).

62. “New Hampshire has had two constitutions. The first was the temporary constitution of 1776, the first written constitution adopted in the original colonies, which predated the United States Declaration of Independence by six months. The second was the permanent constitution, which went into effect in 1784.” SUSAN E. MARSHALL, *THE NEW HAMPSHIRE CONSTITUTION: A REFERENCE GUIDE* 1 (2004).

63. N.H. CONST. pt. II, art. 83, reprinted in MARSHALL, *supra* note 62, at 243.

educable child in the public schools in New Hampshire and to guarantee adequate funding,”<sup>64</sup> as the court did in *Claremont I*, is that Article 83 says nothing at all about “adequacy.” It simply says that “it shall be the duty of the Legislators and magistrates, in all future periods of this government, to cherish the interest of . . . public schools.”<sup>65</sup> Indeed, this was the very reason that the trial court had dismissed the plaintiffs’ claims. “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.”<sup>66</sup>

The court’s textual analysis simply eschews discussion of the absence of any standards in Article 83. Instead, the court framed the relevant question as whether “the duty . . . to cherish the interest of . . . public schools”<sup>67</sup> was mandatory, or a statement of aspiration. “To suggest that the language of Article 83 is not mandatory because other states’ constitutions, many drafted over 100 years after ours, contain more concrete, tangible standards of quality of education and quantity of support is an analysis we cannot endorse.”<sup>68</sup>

However, even if Article 83 is mandatory, that still leaves the question: what does Article 83 mandate? To construe the meager language “cherish the interest of . . . public schools”<sup>69</sup> to mandate a public education system based upon the multifarious guidelines enumerated in *Claremont II*<sup>70</sup> is, as one judge has colorfully put it, “a display of stunning judicial imagination.”<sup>71</sup> Stated differently, the interpretive problem is not that Article 83

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64. *Claremont I*, 635 A.2d at 1376.

65. N.H. CONST. pt. II, art. 83.

66. *Claremont I*, 635 A.2d at 1377.

67. N.H. CONST. pt. II, art. 83.

68. *Claremont I*, 635 A.2d at 1378. To the contrary, the mere fact that a state constitution has an education clause does not mean that a particular standard of quality is necessarily mandated. After all, forty-nine states have education clauses of some form. Yet, the clauses have a variety of different wordings. Given the differences in wording, courts should not assume that all of them mandate the same or nearly the same quality standard. Instead, the court should focus on the actual language of the education clause and the way it compares to the educational provisions of other states.

William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 605 (1994). In *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1359 (N.H. 1997), the court compounded this error by adopting the “seven criteria articulated by the Supreme Court of Kentucky as establishing general, aspirational guidelines for defining educational adequacy,” although the Kentucky education clause describes the duty as to “provide for an efficient system of public schools throughout the state.” *Id.* at 1362 (Horton, J., dissenting) (quoting the Kentucky Constitution).

69. N.H. CONST. pt. II, art. 83.

70. *Claremont II*, 703 A.2d at 1359–60.

71. *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1160 (Mass. 2005) (Cowin, J., concurring).

contains standards that are less “concrete”<sup>72</sup> and “tangible”<sup>73</sup> than the standards in education clauses of other state constitutions. It is that it contains no standards at all.

It is unclear what point the court was trying to make when it observed that many of the state constitutions containing concrete, tangible standards in their education clauses were drafted more than 100 years after Article 83.<sup>74</sup> It is clear, however, one does not need to look 100 years down the road, as the court seemed to imply, in order to find state constitutions “contain[ing] more concrete, tangible standards” regarding public education.<sup>75</sup> Various extant state constitutions contained such standards.

For example, the Pennsylvania Constitution of 1776 provided that:

A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices: And all useful learning shall be duly encouraged and promoted In one or more universities.<sup>76</sup>

The North Carolina Constitution of 1776 also provided:

That a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged, and promoted, in one or more universities.<sup>77</sup>

The Georgia Constitution of 1777 provided that “[s]chools shall be erected in each county and supported at the general expense of the State, as the legislature shall hereafter point out.”<sup>78</sup>

Additional evidence of contemporaneous “concrete, tangible standards”<sup>79</sup> can be found in neighboring Vermont’s constitution. The Vermont Constitution of 1777 provided that:

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72. *Claremont I*, 635 A.2d at 1378.

73. *Id.*

74. *See id.*

75. *Id.*

76. PA. CONST. of 1776, § 44, available at <http://www.yale.edu/lawweb/avalon/states/pa08.htm>. The 1776 Pennsylvania Constitution was in effect until 1790.

77. N.C. CONST. of 1776, art. XLI, available at <http://www.yale.edu/lawweb/avalon/states/nc07.htm>. The 1776 North Carolina Constitution was in effect until 1868. See John V. Oarth, *Symposium: “The Law of The Land”: The North Carolina Constitution and State Constitutional Law: North Carolina Constitutional History*, 70 N.C. L. REV. 1759 (1992).

78. GA. CONST. of 1777, art. LIV, available at <http://www.yale.edu/lawweb/avalon/states/ga02.htm>. The 1777 Georgia Constitution was in effect until 1789.

79. *Claremont I*, 635 A.2d at 1378.

A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town; making proper use of school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this State, ought to be established by direction of the General Assembly.<sup>80</sup>

If the purpose of Article 83 was to impose “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,”<sup>81</sup> the framers presumably would have used language at least as particular as that used in the extant constitutions of Pennsylvania, North Carolina, Georgia, and Vermont.<sup>82</sup> The lack of such language suggests that the voters who adopted Article 83 would not have understood Article 83 to require even universal public education, never mind the “adequate education” fashioned in the *Claremont* decisions.<sup>83</sup>

## 2. Putting the Duty to Cherish Public Schools in Context

The court also looked to the purpose of Article 83 to determine the meaning of its “duty . . . to cherish the interest of . . . public schools.”<sup>84</sup> The court described the purpose as “spreading the opportunities and advantages of education through the various parts of the country” in order to “preserv[e] a free democratic state.”<sup>85</sup> Based on this purpose, the court

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80. VT. CONST. of 1777, § XL, available at <http://www.yale.edu/lawweb/avalon/states/vt01.htm>. The 1777 Vermont Constitution was in effect until 1786. Vermont became the fourteenth state in 1791 and, in 1793, adopted a new constitution.

81. *Claremont I*, 635 A.2d at 1376.

82. The Pennsylvania Constitution “became a model for numerous other state constitutions which followed suit.” Ken Gormley, *Pennsylvania Supreme Court Review, 1990 Forward: A New Constitutional Vigor for the Nation’s Oldest Court*, 64 TEMP. L. REV. 215, 216 (1991).

83. The Northwest Ordinance of 1787 also indicates that the contemporaneous understanding of language such as Article 83’s “cherish the interest of literature and the sciences, and all seminaries and public schools” was that it was exhortatory. The Northwest Ordinance used language similar to Article 83’s as it declared that “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 340 (July 13, 1787) [hereinafter JOURNALS], available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc032121\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc032121))). However, that language would have been viewed as exhortatory since the Land Ordinance of 1785, which also applied to the Northwest Territory, already specifically provided that each township would have its own public school: “There shall be reserved the lot N 16 of every township, for the maintenance of public schools, within the said township.” 28 JOURNALS, *supra*, at 378 (May 20, 1785), available at [http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=028/lljc028.db&recNum=389&itemLink=r?ammem/hlaw:@field\(DOCID+@lit\(jc028100\)\)%230280390&linkText=1](http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=028/lljc028.db&recNum=389&itemLink=r?ammem/hlaw:@field(DOCID+@lit(jc028100))%230280390&linkText=1).

84. N.H. CONST. pt. II, art. 83.

85. *Claremont I*, 625 A.2d at 1377–78.



concluded that the language “‘shall be the duty to cherish’ . . . commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools.”<sup>86</sup> However, the court never explained how this conclusion—that Article 83 requires universal public education—leads to *Claremont I*’s holding that Article 83 imposes a duty to “provide a constitutionally adequate education . . . and to guarantee adequate funding.”<sup>87</sup>

It is, to say the least, quite a leap of logic to go from “provide an education to all its citizens,” to “provide a constitutionally adequate education to all its citizens.”<sup>88</sup> Indeed, it is also a leap of logic to go from “spreading the opportunities and advantages of education through the various parts of the country” in order to “preserv[e] a free democratic state” to “provide an education to all its citizens.”<sup>89</sup> The bigger problem with the court’s textual analysis, however, is that it is much too truncated.

While one would never know it from reading the *Claremont* cases, the duty to cherish public schools is just one of many duties established by Article 83, which in turn is just part of a larger constitution. When the duty “to cherish the interest of . . . public schools”<sup>90</sup> is viewed in these contexts, it bears no resemblance to the duty to provide and fund an adequate education described in the *Claremont* cases.

The duty to cherish the interest of public schools is just one of many duties enumerated in Article 83. There are also duties to “encourage private and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufacturers, and natural history of the country,” and “to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.”<sup>91</sup> Yet none of these has ever been deemed a command. It would be quite peculiar to include a single mandatory duty in a lengthy enumeration of exhortations. It is more reasonable, therefore, to read the duty to cherish public schools as the same sort as the other Article 83 duties.

Even if the duty “to cherish” could be distinguished from the duties to “encourage,” and “countenance and inculcate,”<sup>92</sup> public schools are just one of several objects whose “interest” Article 83 says “the Legislators and

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86. *Id.*

87. *Id.* at 1376.

88. *Id.* at 1376–77.

89. *Id.* at 1377.

90. N.H. CONST. pt. II, art. 83.

91. *Id.*

92. *But see Claremont I*, 635 A.2d at 1378 (providing similar contemporary definitions of “encourage” and “cherish”).

magistrates” have a duty to “cherish.” More specifically, Article 83 says that “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.”<sup>93</sup> There is nothing in this language that suggests that public schools should take priority over the other objects of the duty to cherish. If anything, its position as last in the enumeration suggests that it may have been considered the least important means of “spreading the opportunities and advantages of education.”<sup>94</sup> In sum, the context indicates that the duty to cherish the interest of literature, the sciences, and all seminaries is at least coextensive with the duty to cherish the interest of all public schools.<sup>95</sup> It follows then that if the duties to cherish the interest of literature, the sciences, and all seminaries are exhortatory, so too is the duty to cherish the interest of the public schools.

There is an even bigger flaw in the court’s textual analysis than its selective parsing of the language of Article 83. Even if the duty to cherish the interest of the public schools could be distinguished from all of the other duties enumerated in Article 83, *Claremont’s* conceptualization of this duty is irreconcilable with the structural nature of the constitution.

Since the adoption of the New Hampshire Constitution of 1784, the principle of separation of powers between the three branches of government has been expressed in Part I, Article 37, which reads 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.<sup>96</sup>

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93. N.H. CONST. pt. II, art. 83.

94. *Id.*

95. The historical evidence also indicates that no special emphasis was placed on the duty to cherish the public schools. On “7th Nov. 1783, the General Court passed an act for the encouragement of literature and genius, and for securing to author the exclusive right and benefit of publishing their literary productions for twenty year,” but did not turn to the public schools until 1789. NATHANIEL BOUTON, THE HISTORY OF EDUCATION IN NEW HAMPSHIRE: A DISCOURSE DELIVERED BEFORE THE NEW HAMPSHIRE HISTORICAL SOCIETY, *reprinted in* 4 COLLECTIONS OF THE NEW HAMPSHIRE HISTORICAL SOCIETY 20 (Concord, N.H., Marsh, Capen and Lyon 1834). “As a further evidence of the new impulse given to education, social libraries were established in several towns of the State, and a medical society was incorporated (1791) by an act of assembly.” GEORGE BUSH, HISTORY OF EDUCATION IN NEW HAMPSHIRE 13 (Washington D.C., Government Printing Office 1898).

96. N.H. CONST. pt. I, art. 37. *See* MARSHALL, *supra* note 62, at 232–33.

Echoing James Madison's words in *The Federalist No. 47*,<sup>97</sup> the court has described this separation of powers as "essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people."<sup>98</sup> The second part of the constitution, which is titled the Form of Government, effectuates the separation of powers by distributing governmental powers between the three branches. However, the *Claremont* decisions simply ignore the structural nature of the constitution.

The constitution of 1784 conferred the powers to make laws, raise taxes, and spend money on the representative branches.<sup>99</sup> The lawmaking power was conferred without any requirements as to how it was to be exercised. Rather, the legislature was conferred the "full power and authority" to make "all manner of wholesome and reasonable" laws "as they may judge for the benefit and welfare of this state."<sup>100</sup> Similarly, the taxing and spending powers authorized, but did not require, any particular taxes or expenditures.<sup>101</sup> Reading Article 83 to require the representative branches to provide a particular standard of education or a particular quantum of funding to the public schools, as the court did in *Claremont I*,<sup>102</sup> is irreconcilable with this general grant to the representative branches of the lawmaking, spending, and taxing powers.

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97. THE FEDERALIST NO. 47 (James Madison). James Madison explained that the separation of powers principle was needed to prevent tyrannical government. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." *Id.*

98. *In re Governor & Executive Council*, 846 A.2d 1148, 1154 (N.H. 2004) (quoting *In re Mone*, 71 A.2d 626, 631 (N.H. 1998)). The court has utilized the "political question" doctrine developed by the federal courts to prevent judicial violation of the separation of powers. *Baines v. N.H. Senate President*, 876 A.2d 768, 774–75 (N.H. 2005) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Among other circumstances, a case involves a nonjusticiable political question "where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Hughes v. Speaker of N.H. House of Representatives*, 876 A.2d 736, 743 (N.H. 2005) (quoting *In re Judicial Conduct Comm.*, 751 A.2d 514, 516 (N.H. 2000)). By each measure, what level of education is adequate and how much funding is necessary to reach that level are quintessentially political questions. See Mosca, *supra* note 3.

99. See MARSHALL, *supra* note 62, at 233–34, 240. Under the current version of the New Hampshire Constitution, the power to make laws is found in part II, articles 2 & 5, the power to raise taxes in part I, article 28 and part II, article 5, and the spending power in part II, article 56.

100. N.H. CONST. pt. II, art. 5; MARSHALL, *supra* note 62, at 233–34. The electorate was particularly solicitous about protecting legislative power. Prior versions of the Constitution of 1784 proposed a governor possessing the power to veto legislation. 9 NEW HAMPSHIRE STATE PAPERS 859, 883 (Nathaniel Bouton ed., Concord, N.H., Pearson 1875), available at <http://www.sos.nh.gov/archives/PDF/NHSP-V09.pdf>. These were rejected in 1781 and 1782 in large measure due to "disapproval of the strong governor concept." MARSHALL, *supra* note 62, at 12. The Constitution of 1784 contained no executive veto and even changed the title of the governor to president. 9 NEW HAMPSHIRE STATE PAPERS, *supra*, at 903, 909. It was not until 1792 that amendments established the office of governor, see N.H. CONST. pt. II, art. 41, and the veto power, see N.H. CONST. pt. II, art. 44.

101. N.H. CONST. pt. I, art. 28, pt. II, arts. 5, 56; MARSHALL, *supra* note 62, at 234, 240.

102. See *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1376 (N.H. 1993).

The gloss placed on the *Claremont I* holdings by subsequent *Claremont* decisions runs roughshod over the principle of separation of powers. Interpreting the constitution to require that the legislature define an adequate education in a manner that gives “specific substantive content” to *Claremont II*’s aspirational guidelines,<sup>103</sup> that is “sufficiently clear to permit a common understanding and allow for an objective determination of costs,”<sup>104</sup> and that incorporates standards of accountability to enable judicial oversight,<sup>105</sup> makes a mockery of the constitution’s grant to the legislature of the “supreme legislative power” and the “full power and authority” to make laws.<sup>106</sup> The court’s assertion in *Londonderry I* that, in the absence of what it deems satisfactory action by the representative branches, it is constitutionally empowered to “take further action to enforce the mandates of Part II, Article 83 of the New Hampshire Constitution”<sup>107</sup> represents the very government of men and not of laws that the founding generation abhorred.<sup>108</sup>

The language of Article 83 is consistent with the separation of powers. Although the court described Article 83 as imposing a duty on “the State,”<sup>109</sup> which implies that the duty applies to state government as a whole, the language of the article explicitly provides that the duties it enumerates are duties only “of the Legislators and magistrates.”<sup>110</sup> The term “magistrate” refers to the executive branch.<sup>111</sup> Thus, the language of Article 83 indicates that the legislative and executive branches are responsible for determining and effectuating the form and scope of its various duties.<sup>112</sup>

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103. *Londonderry Sch. Dist. SAU # 12 v. State (Londonderry I)*, 907 A.2d 988, 990 (N.H. 2006).

104. *Id.* at 995.

105. *Claremont Sch. Dist. v. Governor (Claremont III)*, 794 A.2d 744, 751 (N.H. 2002).

106. N.H. CONST. pt. II, arts. 2, 5.

107. *Londonderry I*, 907 A.2d at 995.

108. MASS. CONST. pt. I, art. 30. This famous phrase was coined by John Adams, the father of the Massachusetts Constitution, upon which New Hampshire “modeled much of [its] constitution,” and which “contains a nearly identical provision regarding education.” *Claremont Sch. Dist. v. Governor (Claremont I)*, 625 A.2d 1375, 1378 (N.H. 1993). It meant a government based on the separation of powers, which it describes as follows:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

MASS. CONST. pt. I, art. 30.

109. *Claremont I*, 635 A.2d at 1376.

110. N.H. CONST. pt. II, art. 83.

111. *See id.* art. 41 (referring to Governor as a supreme executive magistrate). Under the Constitution of 1784, there was a president rather than a governor, but the president was also the “supreme executive magistrate.” *See* MARSHALL, *supra* note 62, at 238.

112. *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1160 (Mass. 2005) (Cowin, J., concurring) (“Where the drafters explicitly conferred authority on only two of the branches of government, [the Supreme Court] cannot ordain the third branch ‘overseer.’”). *See* *Bush v. Gore*, 531 U.S. 98, 112–13

In sum, the holdings of the *Claremont* cases are irreconcilable with the text of the constitution. Assuming for the sake of argument that Article 83 should be read to require public schools, its language cannot be read to prescribe any qualitative standards or any quantifiable level of financial support for these public schools. Nor can Article 83 be read to provide for any judicial oversight of the representative branches' superintendence of the public schools. Thus, *Claremont's* "standards of accountability,"<sup>113</sup> its "general aspirational guidelines for defining educational adequacy,"<sup>114</sup> and even its, by comparison relatively mild, admonition in *Claremont I* that the representative branches define an adequate education,<sup>115</sup> represent a sweeping judicial redrafting of Article 83.

### B. History

Contemporaneous constructions of constitutional provisions carry great weight.<sup>116</sup> Accordingly, let us turn to the law of 1789.

#### 1. The Law of 1789

Five years after Article 83 was adopted as part of the constitution of 1784, a law was passed under which "all the laws of this State respecting Schools be, and they hereby are, repealed" because "the Laws respecting Schools have been found not to answer the important end for which they were made."<sup>117</sup> In place of these repealed laws, the law of 1789, which remained in effect until 1919,<sup>118</sup> required all towns to provide public schools and established a system for funding these schools.<sup>119</sup> However, the law of 1789 neither required that all towns provide the same minimum curriculum, nor did it provide comparable state funding for public schools. To the extent, then, that the law of 1789 reflects the original understanding of Article 83, it belies the notion that Article 83 was understood to require the system of public schooling described by the *Claremont* decisions.

In relevant part, the text of the law of 1789 is set forth below:

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(2000) (Rehnquist, C.J., concurring) (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)HERE? (providing that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, electors for President and Vice President" and "leaves it to the legislature exclusively to define the method of appointment.")HERE?. MISSING END PARENTHESIS

113. *Claremont Sch. Dist. v. Governor (Claremont III)*, 794 A.2d 744, 752 (N.H. 2002).

114. *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1359 (N.H. 1997).

115. *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1381 (N.H. 1993).

116. *Wheeler ex rel. Boulanger v. Morin*, 35 A.2d 513, 517 (N.H. 1943).

117. 5 LAWS OF NEW HAMPSHIRE: FIRST CONSTITUTIONAL PERIOD 449 (Henry Harrison Metcalf ed., 1916).

118. 1919 N.H. Laws 155 (Chapter 106); see HALL, *supra* note 4.

119. See 5 LAWS OF NEW HAMPSHIRE, *supra* note 117.

[T]he Select men of the Several towns & Parishes within this State be, and they hereby are, empowered and required to assess annually the Inhabitants of their respective towns, according to their polls and ratable estates, in a sum to be computed at the rate of five pounds for every twenty shillings of their proportion for public taxes for the time being and so for a greater or lesser sum. Which sums, when collected, shall be applied to the sole purpose of keeping an English Grammar School or Schools for teaching reading, writing and arithmetic, within the towns and parishes for which the same shall be assessed; except said town be a Shire or half shire town: in which case, the School by them kept shall be a grammer School for the purpose of teaching the latin and greek languages, as well as reading, writing and arithmetic as aforesaid.<sup>120</sup>

Thus, while all towns were required to provide a school “for teaching reading, writing and arithmetic,” shire towns and half shire towns, which were the county seats, were also required to teach “the latin and greek languages.” This disparate treatment suggests that Article 83 was not understood to require that “every educable child in the public schools”<sup>121</sup> receive the same minimum qualitative standard of education.

Turning next to the funding system established by the law of 1789, a town was required to collect taxes based on its “proportion for public taxes,” and the entire amount of taxes collected in each town was required to be spent on public schools within that town. A town’s “proportion” was determined in the following manner.

The legislature set the total amount of spending for the year.<sup>122</sup> In 1790, it set the amount at approximately the pound equivalent of \$16,500, which was periodically increased over intervals ranging from one to twenty-two years until it reached \$750,000 in 1905.<sup>123</sup> Each town was required to collect from its taxpayers a percentage of the total spending amount that was equivalent to the town’s percentage of the state’s tax base.<sup>124</sup> For example, if a town’s taxable wealth comprised two percent of

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120. *Id.*

121. *Claremont I*, 635 A.2d at 1376.

122. Walter A. Backofen, *Claremont’s Achilles Heel: The Unrecognized Mandatory School-Tax Law of 1789*, 43 N.H.B.J. 26, 27 (2002). See also N.H. CTR. FOR PUB. POLICY STUDIES, BUDGET HISTORY AND DRIVERS: BUDGET OF THE STATE OF NEW HAMPSHIRE 59 (2003) [hereinafter BUDGET HISTORY], available at <http://www.nhpolicy.org/jan142003.pdf> (“In the new law the legislature set the specific amount to be raised for schools in each town and established personal fines for selectmen who did not do so.”).

123. Backofen, *supra* note 122, at 27. See also BUDGET HISTORY, *supra* note 122, at 60 (summary of the amounts that various towns were required to raise under the law of 1789 in selected years).

124. BACKOFEN, *supra* note 4, at 10–11.

the taxable wealth in the state in 1790, the law required that town to collect from its taxpayers an amount equivalent to two percent of \$16,500.

In other words, the law of 1789 did not provide funding based upon a set amount per student or even a set amount per town; instead, it provided funding based upon the towns' respective tax bases. As a result, the law of 1789 would have produced the "comparable funding" that the court in *Claremont II* described as "basic" to the concept of adequacy<sup>125</sup> only if students and taxable wealth were similarly distributed from town to town. As one would imagine, there was not a similar distribution.<sup>126</sup>

For example, although the amount of total spending set by the legislature in 1830 was approximately one dollar per pupil, spending varied between municipalities from approximately twenty-five cents per child to eight dollars per child.<sup>127</sup> While Enfield and Eaton reported about the same number of school-age children in their 1830 census returns, Eaton had only about one-half of Enfield's tax base.<sup>128</sup> As a result, per pupil state funding in Eaton would have been approximately only one-half of that in Enfield.

The disparities between towns increased over time. The Journal of the Constitutional Convention of 1850 reported that:

Twenty towns out of the 230 in the State raised last year one third part of all the money required by law for the support of common schools. The number of scholars in these towns is a fraction more than one fifth of the whole number in the State.<sup>129</sup>

As a result, the towns were not "enjoy[ing] as nearly as may be practicable, equal advantages of education."<sup>130</sup> By 1900, less than five percent of towns contained fifty percent of the state's tax base.<sup>131</sup>

The law of 1789 also cannot be seen as providing a base amount of adequate funding to all towns, notwithstanding the funding disparities between towns. The Journal of the Constitutional Convention of 1850 noted that, "[t]he legislators of New Hampshire have not been unobservant of that excellent article in our constitution, which enjoined upon them, 'the encouragement of literature and the sciences, and the cherishing of all se-

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125. *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1357, 1360 (N.H. 1997).

126. See WALTER A. BACKOFEN, *NEW HAMPSHIRE'S PUBLIC SCHOOL SYSTEM: 1789-1918*, at 1 (2002) ("Funding inequities among schoolchildren were guaranteed from the beginning, compounded by an increasing stratification of the state's wealth, and made still worse by a statewide fragmentation into school districts that lasted from 1805 to 1885.").

127. WALTER A. BACKOFEN, *ON THE PERVERSION OF NEW HAMPSHIRE HISTORY* 8 (2006).

128. BACKOFEN, *supra* note 126, at 17.

129. STATE OF N.H., *JOURNAL OF THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF NEW HAMPSHIRE* 53 (1850), available at <http://www.sos.nh.gov/archives/PDF/ConConvText.pdf> [hereinafter JOURNAL].

130. *Id.*

131. BACKOFEN, *supra* note 126, at 17.

minaries and public schools.”<sup>132</sup> Nevertheless, “our common schools are still far from being what they should be and might be.”<sup>133</sup> The culprit was the law of 1789.

If a town’s tax base did not increase as fast as the state’s tax base during the intervals between adjustments of the overall spending amount, the town’s proportionate share of overall spending decreased. Since a town’s “proportion” determined the amount of school taxes it would collect, this meant that in the towns becoming poorer in relative terms, tax revenue collected under the law of 1789 decreased even if the number of pupils stayed the same or increased.<sup>134</sup> For example, the Journal of the Constitutional Convention of 1850 noted that a “material” increase in the amount of overall spending was “needed at this time, especially by the small towns, and those of middling population; for while these remain nearly stationary, others increase in both respects. The proportional valuation of the farming towns, heretofore, becomes less, even while they do not diminish in numbers or amount of property.”<sup>135</sup> As a result, many of the relatively poorer towns imposed additional taxes in order to fund schools at a higher level than provided under the law of 1789.<sup>136</sup> In a town that did not, the education budget could be “reduced to the point of devastation for its schools.”<sup>137</sup>

In sum, the law of 1789 is the antithesis of what one would expect if the original understanding of Article 83 was that it imposed the type of duty to provide and fund an adequate education fashioned in the *Claremont* decisions.

## 2. The Court’s Examination of History

Incredibly, the *Claremont I* decision never mentions the law of 1789. Instead, the court’s examination of the “surrounding circumstances” at the time the constitution of 1784 was adopted<sup>138</sup> was a survey of prior educa-

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132. JOURNAL, *supra* note 129, at 52.

133. *Id.* at 53.

134. BACKOFEN, *supra* note 127, at 8–9.

135. *See* JOURNAL, *supra* note 129, at 53.

136. BACKOFEN, *supra* note 127, at 15. The JOURNAL, *supra* note 129, at 53, noted that, “unless by special vote they add to the sums required to be raised by law their means of education are unduly abridged.” *Cf.* Tucker v. Aiken, 7 N.H. 113, 128 (N.H. 1834) (“The selectmen are bound to make this assessment if a town should not vote to raise any money for the support of schools; but towns may, if they think proper, vote to raise a larger sum than the selectmen are thus bound to assess; and with a commendable zeal in the cause of education this is often done.”).

137. BACKOFEN, *supra* note 4, at 12.

138. *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1379 (N.H. 1993).



tion laws dating back to 1642.<sup>139</sup> Laws passed over a hundred years prior to passage of Article 83 have dubious relevance to the original understanding of Article 83, while the more recent laws also have dubious relevance because the law of 1789 repealed all existing education laws for the reason that “the Laws respecting Schools have been found not to answer the important end for which they were made.”<sup>140</sup> However, to the extent that these pre-1784 laws reflect what the voters who adopted the constitution understood Article 83’s “duty . . . to cherish the interest of . . . public schools” to mean, they certainly did not understand it to require the sort of “adequate education” fashioned by *Claremont*.<sup>141</sup>

The court’s review began with education laws passed in 1642 and 1647, which was a time when “New Hampshire and Massachusetts were united as a single province.”<sup>142</sup> The law of 1642, however, had nothing to do with public education. Rather, it was a mandatory home schooling law, which had the express purpose of inculcating religion.<sup>143</sup> Parents and masters to whom children had been apprenticed were responsible for providing “so much learning as may inable them perfectly to read the [E]nglish tongue, & knowledge of the Capital Lawes,” and “once a week (at the

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139. *Id.* at 1379–80. Because there was “an extensive history of public education in this State,” which comprised part of the “background” to the constitutional convention, the court found “unconvincing” the contention that “the framers and the 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.” *Id.* at 1380. To the contrary, “the contemporary understanding was that part II, article 83 imposed a duty on the State to provide universal public education and to support the schools.” *Id.* at 1380–81. As noted previously, it requires a leap of logic to go from “provide universal public education” to an adequate education. It also requires an antecedent leap of logic to go from “an extensive history of public education” to “universal public education.” Thus, the court’s use of history, like its textual analysis, is unpersuasive.

140. 5 LAWS OF NEW HAMPSHIRE, *supra* note 117, at 449.

141. *Claremont I*, 635 A.2d at 1380–81. The court also offered exchanges between Governor Wentworth and the province’s General Assembly in 1771 and Governor Gilman and the legislature in 1795 as evidence of the “surrounding circumstances,” claiming in particular that the latter “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 public education and to support the schools.” *Id.* However, these exchanges are not weighty evidence of the original understanding. It is, at best, doubtful that the colloquy between Wentworth and the Assembly in 1771 was on the voters’ minds when they ratified Article 83 a decade and one-half later, while the 1795 colloquy between Gilman and the legislature could not have influenced the voters’ understanding of Article 83 a decade earlier. In any case, there is no mention in either of an “adequate education” or even universal public education.

142. *Id.* at 1379. New Hampshire was part of the Massachusetts Bay Colony from 1641 to 1679, and again from 1688 to 1691.

143. MASSACHUSETTS BAY SCHOOL LAW (1642), available at <http://personal.pitnet.net/primary/sources/schoollaw1642.html>. The court noted at the outset of its historical review that the Puritans “emigrated ‘chiefly to enjoy and propagate their religion.’” *Claremont I*, 635 A.2d at 1379 (quoting BOUTON, *supra* note 95, at 5).

least) catechiz[ing] their children and servants in the grounds & principles of Religion.”<sup>144</sup>

The law of 1647 was also known as the Old Deluder Satan Act because, as the preamble indicates, it was intended to counter Lucifer’s yearning to keep men illiterate to prevent them from reading scripture:

It being one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures, as in former times by keeping them in an unknown tongue, so in these latter times by persuading from the use of tongues, that so that at least the true sense and meaning of the original might be clouded and corrupted with false glosses of saint-seeming deceivers; and to the end that learning may not be buried in the grave of our forefathers, in church and commonwealth, the Lord assisting our endeavors . . . .<sup>145</sup>

The court’s characterizations of this law as introducing the principles that “schooling was to be provided for all children, and that the State would control education,”<sup>146</sup> were gross overstatements. It was only when a town reached fifty families that it “shall forthwith appoint one within their town to teach all such children as shall resort to him to write and read.”<sup>147</sup> And it was only when any town “increase[d] to the number of one hundred families or householders, they shall set up a grammer school . . . to instruct youth so far as they shall be fitted for the university.”<sup>148</sup> This may have left Exeter, one of the four New Hampshire towns under Massachusetts jurisdiction, without a public school.<sup>149</sup> The only provincial control was the

144. See MASSACHUSETTS BAY SCHOOL LAW, *supra* note 143. The law further provided that the selectmen could assess a “penaltie of twentie shillings for each neglect therin,” and that, if the parents or master were found “negligent of their dutie in the particulars aforementioned wherby children and servants become rude, stubborn & unruly,” the selectmen could “take such children or apprentices from them & place them with some masters for years . . . which will more strictly look unto, and force them to submit unto government according to the rules of this order.” *Id.*

145. The Old Deluder Act (1647), in 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 203 (Nathaniel B. Shurtleff ed., Boston, William White 1853), available at <http://personal.pitnet.net/primarysources/deluder.html>.

146. *Claremont I*, 635 A.2d at 1379.

147. The Old Deluder Act, *supra* note 145. The cost was to “be paid either by the parents or masters of such children, or by the inhabitants in general.” *Id.*

148. *Id.*

149. BOUTON, *supra* note 95, at 10–11. Bouton stated:

Let it be borne in mind, that Portsmouth, Dover, Hampton and Exeter, then the only towns in New-Hampshire, were under the jurisdiction of Massachusetts. To these of course the above law extended, so far as they had the requisite number of families. In 1680, the number of legal voters in Portsmouth was 71; in Dover, 61; in Hampton, 57; and in Exeter, 20. We may therefore, presume that schools were kept in at least three of these towns, during this dark period of our history.

*Id.* Exactly how many children would have fallen outside the ambit of the law of 1647 is unknown as the earliest census on record with the New Hampshire Secretary of State is from 1732. New Hamp-

requirements that the towns hire a teacher and set up a grammar school when they reached a certain size. The towns had the discretion to determine how much money would be raised to pay the schoolmasters and fund the schools.<sup>150</sup>

The next law mentioned by the court was a 1693 law, which was described as “requiring the towns’ selectmen to raise money by ‘an equal rate and assessment’ on the inhabitants for the construction and maintenance of schools ‘and allowing a Sallary to a School Master’” and assessing a penalty “for failure to comply with the statute.”<sup>151</sup> However, it was repealed in 1706.<sup>152</sup> Although it was largely readopted in 1714, it no longer carried a penalty for noncompliance.<sup>153</sup>

The court then turned to the law of 1719.<sup>154</sup> This law, however, was simply an updated version of the 1647 Old Deluder Satan Act as it provided that

Every Town within this Province having the number of Fifty Householders or upwards, Shall be constantly provided of a Schoolmaster to teach Children & youth to read and write. And where any Town or Towns have the number of one Hundred Families or Husholders [sic], there Shall also be a Grammer School Sett up and kept in every Such Town, & Some Discreet person of good Conversation well Instructed in the Tongues shall be procured to be Master thereof, every Such Schoolmaster to be Suitably Encouraged and paid by the Inhabitants.<sup>155</sup>

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shire Archives and Records Management, <http://www.sos.nh.gov/archives/genealogy.html> (last visited Nov. 23, 2007). *But see* BACKOFEN, *supra* note 4, at 9. Backofen stated:

A town just shy of fifty families was one of no mean size in a society of settlers; while all such towns, combined, were still home to about 25% of the children under 16 years of age in New Hampshire’s Grafton County as late as the first federal census of 1790.

*Id.*

150. BUSH, *supra* note 95, at 11.

151. *Claremont I*, 635 A.2d at 1379 (quoting BUSH, *supra* note 95, at 10–11). The law actually had a broader scope as the taxes were “for the building & repayring [sic] of meeting houses, Ministeres houses School houses, And allowing a Sallary to School Master in Each Towne within this Province.” 1 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD 561 (Albert Stillman Batchellor, ed., 1904).

152. 1 LAWS OF NEW HAMPSHIRE, *supra* note 151, at 560.

153. 2 LAWS OF NEW HAMPSHIRE, *supra* note 151, at 144 (1913). The law stated:

[I]t is hereby further Enacted & Ordained that the Building and Repairing of Meeting Houses, Ministers Houses School Houses and Allowing a Sallary to a School Master of each Town within this province, The Select men in their Respective Towns shall raise mony by an Equal Rate and Assessment upon the Inhabitants in the Same manner as in this present Act directed for the Maintenance of the Minister And Every Town within this province, shall from and after the publication hereof; Provide a School Master for the Supply of the Town.

*Id.*

154. *Claremont I*, 635 A.2d at 1380.

155. LAWS OF NEW HAMPSHIRE, *supra* note 153, at 336–37; BUSH, *supra* note 95, at 11.

While, as the court noted, “a penalty was provided for failure to comply with the statute,”<sup>156</sup> the law also provided for the possibility of exemptions to towns “incapable of Complying with [sic] this act.”<sup>157</sup> In 1721, the requirement that towns with one hundred or more families provide grammar schools was extended to parishes within the town.<sup>158</sup>

These laws remained the basis of New Hampshire’s system of public education until the law of 1789 was passed.<sup>159</sup> Thus, neither universal public education nor State funding for public education were required by law when Article 83 was adopted. Rather, children in towns of under fifty families were not entitled to any public education; children in towns of between fifty and one hundred families were entitled only to a schoolmaster to teach reading and writing; and only children living in towns of one hundred or more families were entitled to grammar schools. The towns, not the province, were responsible for funding the schoolmasters and grammar schools.

Nor was there any custom or practice of universal public education or State support of public schools when Article 83 was adopted. According to New Hampshire historians George Bush and Nathaniel Bouton: “From the beginning of the eighteenth century until near its close there was great apathy in the matter of maintaining schools, and law respecting education being but partially enforced.”<sup>160</sup> Since “there were less than fifty families in a large portion of the towns and the inhabitants exceedingly scattered, schools were greatly neglected. Many children were taught all that they ever knew of reading and writing at home.”<sup>161</sup> As the court noted in *Claremont I*, in 1771, Governor Wentworth complained that: “The Insufficiency of our present Laws for this purpose, must be too evident, seeing nine tenths of your Towns are wholly without Schools, or have such vagrant foreign Masters as are much worse than none: Being for the most part unknown in their principles & deplorably illiterate.”<sup>162</sup>

In sum, to the extent that New Hampshire’s pre-1784 education laws reflect what the voters who adopted the constitution understood Article 83’s “duty . . . to cherish the interest of . . . public schools”<sup>163</sup> to mean, they

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156. *Claremont I*, 635 A.2d at 1380.

157. LAWS OF NEW HAMPSHIRE, *supra* note 153, at 337.

158. *Id.* at 358.

159. HALL, *supra* note 4.

160. BUSH, *supra* note 95, at 12–13.

161. BOUTON, *supra* note 95, at 12–13. “It must then be recollected, that during the period under review, the settlements in New Hampshire were greatly multiplied. Instead of 4 towns fringing the eastern border of the State, about 170 were incorporated, and a sparse population spread over the interior.” *Id.*

162. *Claremont I*, 635 A.2d at 1380 (citation omitted).

163. N.H. CONST. pt. II, art. 83.

certainly did not understand it to require the sort of “adequate education” fashioned by the *Claremont* decision. Indeed, they would not even have understood it to require universal public education.

### 3. *The Constitutional Convention of 1850*

Another historically significant event not mentioned in *Claremont I* is the Constitutional Convention of 1850. In relevant part, the convention recommended that Article 83 be moved to the Bill of Rights section of the constitution and that it be replaced in the Form of Government section by the following articles:

89. The Legislature shall make provision for the establishment and maintenance of free common schools, at the public expense, and for the assessment and collection, annually, in the several towns and places in this State, of a sum not less than one hundred and twenty-five dollars for every dollar of State taxes, apportioned to them respectively, to be applied exclusively to the support of such schools.

90. The supervision of public instruction shall be vested in a State Superintendent, and such other officers as the Legislature shall direct.

91. The State Superintendent shall be chosen, biennially, by the qualified electors of the State, in such manner as the Legislature shall provide; his powers, duties, and compensation shall be prescribed by law.<sup>164</sup>

If Article 83 had been understood to “impose[] 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,”<sup>165</sup> it would have been pointless to have added proposed Article 89.<sup>166</sup> Clearly, then, the “very remarkable assembly of the highest learning and ability of the state”<sup>167</sup> at the convention of 1850 did not read Article 83 in the same manner as the *Claremont* court.

Proposed Articles 90 and 91 were thought necessary by the Convention’s “committee on Education” because:

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164. JOURNAL, *supra* note 129, at 192.

165. *Claremont I*, 635 A.2d at 1376.

166. The same is true for the court’s lesser assertion that Article 83 “commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools.” *Id.* at 1378.

167. *Hale v. Everett*, 53 N.H. 9, 147 (1868).

While free schools are admitted by all to be indispensable to our security and prosperity as a people, there is not the same unanimity of sentiment with reference to the best methods of improving and superintending them. Many men think that the powers already conceded to the Legislature by the Constitution are entirely adequate to the wants of the people. *The resolution which the committee have agreed to offer for the consideration of the Convention does not confer new power upon the Legislature, but it proposes to make that permanent which is now changeable; to make that imperative which is now optional.* It makes it incumbent upon the people to elect, from time to time, at least one officer who shall devote his time and talents to the great work of popular education. . . . Let him devise the best methods of securing good school houses, good teachers and good books. Let him study school architecture and bring before the people the most approved modes of constructing, warming and ventilating school houses. . . . The whole subject of education is open for the investigation of such an officer. He might hold correspondence with ministers of instruction in foreign kingdoms, and with learned societies in our own and foreign lands. It would be his duty, as well as privilege, to become familiar with text books and apparatus, and be able to recommend suitable books and furniture for each district that might consult him.<sup>168</sup>

Thus, this “very remarkable assembly” believed that the sort of State control of public education that the *Claremont* decisions assert Article 83 made mandatory<sup>169</sup> was merely “optional.”

#### 4. Precedent

The court, up until *Claremont*, treated Article 83’s duty to cherish the interest of the public schools as a political, not a legal, matter. For exam-

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168. JOURNAL, *supra* note 129, at 54–56 (emphasis added).

169. Londonderry Sch. Dist. SAU # 12 v. State (*Londonderry I*), 907 A.2d 988, 990 (N.H. 2006). The court stated:

In *Claremont School District v. Governor (Accountability)*, . . . 794 A.2d 744 (2002), we acknowledged the State’s assertion that *Claremont School District v. Governor*, . . . 703 A.2d 1353 (1997) (*Claremont II*) issued “four mandates: define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability,” and that these four mandates comprise the State’s duty to provide an adequate education.

*Id.*

ple, in 1817 in the famous *Dartmouth College* case,<sup>170</sup> the court said so emphatically:

I am aware that this power in the hands of the legislature may, like every other power, at times be unwisely exercised; but where can it be more securely lodged? If those whom the people annually elect to manage their public affairs, cannot be trusted, who can? The people have most emphatically enjoined it in the constitution, as a duty upon “the legislators and magistrates, in all future periods of the government, to cherish the interests of literature and the sciences and all seminaries and public schools.” And those interests will be cherished, both by the legislature and the people, so long as there is virtue enough left to maintain the rest of our institutions. Whenever the people and their rulers shall become corrupt enough to wage war with the sciences and liberal arts, we may be assured that the time will have arrived, when all our institutions, our laws, our liberties must pass away,—when all that can be dear to freemen, or that can make their country dear to them, must be lost, and when a government and institutions must be established, of a very different character from those under which it is our pride and our happiness to live.<sup>171</sup>

In 1936, the court made the same point, albeit with far less flourish: “Any educational policy or rule declared by the Legislature or promulgated under authority delegated by it may not be reversed or vacated judicially on the ground that it must be regarded as impolitic.”<sup>172</sup> In 1958, the court said, “the manner in which educational policy of cities shall be formulated is determined by their Legislature and not the courts.”<sup>173</sup> A case decided by the court in 1971 involved as its “principal issue . . . whether the Laconia School Board may compel the city to appropriate funds for services and programs that in the judgment of the school board exercised in good faith are essential to an adequate educational system.”<sup>174</sup> Yet the decision nowhere mentions Article 83.<sup>175</sup>

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170. The case was appealed to the United States Supreme Court, where the Great Chief Justice, John Marshall, wrote an opinion for the Court famously holding that the charter incorporating Dartmouth College was a contract protected by the United States Constitution from legislative modification. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

171. *Trs. of Dartmouth Coll. v. Woodward*, 1 N.H. 111, 137 (1817).

172. *Coleman v. Sch. Dist. of Rochester*, 183 A. 586, 589 (N.H. 1936).

173. *City of Franklin v. Hinds*, 143 A.2d 111, 113 (N.H. 1958).

174. *Laconia Bd. of Educ. v. City of Laconia*, 285 A.2d 793, 794 (N.H. 1971).

175. *See id.*

### C. Conclusion

Given the importance of education to the founding generation and the nearly contemporaneous passage of the law of 1789, one can argue that the original understanding of Article 83's duty to cherish the interest of public schools was that the representative branches were required to establish some system of public schools. On the other hand, the text of Article 83 suggests that even this may be going too far because it would be quite peculiar to include a single mandate in a lengthy enumeration of exhortations.

What is not arguable, however, and what matters is that there is no textual or historical support for the proposition that Article 83 was understood to mandate any qualitative standard of education or quantifiable level of state financial support.

It is incontestable that Article 83 contains no language establishing qualitative educational standards or quantifiable funding levels. Hence, it can only be read to leave these matters to the discretion of the "[l]egislators and magistrates" charged with effectuating the duty to cherish the interest of public schools.<sup>176</sup> Reading Article 83 in a different manner also would be inconsistent with the nature of the constitution's grants of the powers to make laws, raise taxes, and spend money, which leaves the exercise of these powers to the discretion of the representative branches. Turning to history, the funding system under the law of 1789, which lasted until 1919, is just the opposite of what one would expect if Article 83 had been understood to mandate "adequate funding,"<sup>177</sup> let alone the "comparable funding" that the court in *Claremont II* described as "basic" to the concept of adequacy.<sup>178</sup>

In sum, the language of the constitution and the historical record indicate that the voters who adopted Article 83 did not understand it to give rise to the sort of duty to provide and fund an adequate education fashioned in the *Claremont* decisions.

## IV. CLAREMONT AND STARE DECISIS

Because *Claremont* is not a correct interpretation of the constitution, the question becomes whether it is protected by stare decisis. In considering *Claremont* and stare decisis, the salient consideration is that stare decisis "is at its weakest" where a court "interpret[s] the Constitution because [its] interpretation can be altered only by constitutional amendment or by

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176. N.H. CONST. pt. II, art. 83.

177. *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1376 (N.H. 1993).

178. *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1360 (N.H. 1997).



overruling [its] prior decisions.”<sup>179</sup> Probably the most well known and celebrated example of a court rejecting stare decisis is the U.S. Supreme Court’s decision in *Brown v. Board of Education*, which overruled an interpretation of the federal constitution that was more than half a century old.<sup>180</sup>

The constitutional stakes raised by *Claremont* are especially high because *Claremont* is obviously an incorrect interpretation of Article 83 and because *Claremont* represents a manifest violation of the separation of powers principle which is the foundation of our system of government. In contrast, not much of a case can be made that *Claremont* has proven workable or that it has resulted in any reliance interests.<sup>181</sup>

Despite nearly a decade having passed between *Claremont II* and *Londonderry I*, it apparently remained “impossible for school districts, parents, and courts, not to mention the legislative and executive branches themselves, to know where the state’s obligations to fund the cost of a constitutionally adequate education begin and end.”<sup>182</sup> This track record strongly suggests that the *Claremont* decisions are unworkable. While the court and the proponents of *Claremont* would lay the blame squarely on the repre-

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179. *Agostini v. Felton*, 521 U.S. 203, 236 (1997). See *Providence Mut. Fire Ins. Co. v. Scanlon*, 638 A.2d 1246, 1248 (N.H. 1994) (stating that “considerations in favor of stare decisis are at their acme in cases involving contract rights, where reliance interests are involved”) (internal quotation and citation omitted). Some scholars have argued that it is inappropriate to ever apply stare decisis to preserve an erroneous precedent when a constitution is involved:

Suppose now that a court is faced with a conflict between the Constitution on the one hand and a prior judicial decision on the other. Is there any doubt that, under the reasoning of *Marbury*, the court must choose the Constitution over the prior decision? If a statute, enacted with all of the majestic formalities for lawmaking prescribed by the Constitution, and stamped with the imprimatur of representative democracy, cannot legitimately be given effect in an adjudication when it conflicts with the Constitution, how can a mere judicial decision possibly have a greater legal status? If the Constitution says X and a prior judicial decision says Y, a court has not merely the power, but the obligation, to prefer the Constitution. Furthermore, if courts must search for the true meaning of the Constitution, rather than the meaning ascribed to it by the Congress or the President, there is no apparent reason why they must not also prefer the document’s true meaning to the meaning ascribed to it by a precedent court.

Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 27–28 (1994); see also Steven G. Calabresi, *Text, Precedent and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 315 (2005) (arguing “an obligation on the part of the Court to defer to the political branches on the question of when a precedent is causing more harm than good . . .”).

180. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (overruling the “separate but equal” doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896)); see also *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (overruling *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525 (1923)); *Boulders at Stafford, LLC v. Town of Stafford*, 903 A.2d 1021, 1029 (N.H. 2006) (overruling, in part, *Metzger v. Town of Brentwood*, 374 A.2d 954 (N.H. 1977) and *Powers v. Town of Hampton*, 480 A.2d 143 (N.H. 1984)).

181. See *Scanlon*, 638 A.2d at 1248 (stating factors favoring application of stare decisis are reliance and workability of decision).

182. *Londonderry Sch. Dist. SAU # 12 v. State (Londonderry I)*, 907 A.2d 988, 994 (N.H. 2006).

sentative branches, on the ground that they failed to properly effectuate the mandates of *Claremont II*,<sup>183</sup> ironically such criticism proves the point. A court decision that imposes an affirmative duty on the representative branches to pass certain types of laws or raise a certain amount of taxes is inherently unworkable if the representative branches see their constitutional duties differently, or would rather face the court's displeasure rather than the voters' displeasure.<sup>184</sup>

Even if the court were to follow through on its unfortunate suggestion in *Londonderry I*, that it may and would "take further action to enforce the mandates of Part II, Article 83," in the absence of what it deems satisfactory action by the representative branches,<sup>185</sup> *Claremont* would remain unworkable. The "appropriate remedies" threatened by the court were:

- (1) invalidating the funding mechanism established in House Bill 616 as set forth in the concurring opinion of Justice Galway;
- (2) appointing a special master to aid in the definition of a constitutionally adequate education, . . . or
- (3) implementing the remedy outlined in the concurring opinion of Justice Duggan and remanding the case to the trial court "for further factual development and a determination of whether the State is providing sufficient funding to pay for a constitutionally adequate education."<sup>186</sup>

Striking down the funding system created by House Bill 616 would be an effective remedy only to the extent that the representative branches responded to that threat by defining an adequate education within the court's deadline.<sup>187</sup> Otherwise, this remedy would result in there being no funding at all for public education, which is a decidedly odd remedy if the disease to be cured is an inadequate education. While this approach worked in *Claremont II*—the representative branches eventually enacted a statewide property tax when the court struck down the extant funding system but

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183. These "mandates" are: "define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability." *Id.* at 990 (internal citation and quotation omitted).

184. This aspect of *Claremont* shows just how prescient James Madison was when he wrote that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." THE FEDERALIST NO. 51 (James Madison).

185. *Londonderry I*, 907 A.2d at 995.

186. *Id.*

187. *See id.* ("As to the core definitional issues, we will retain jurisdiction with the expectation that the political branches will define with specificity the components of a constitutionally adequate education before the end of fiscal year 2007.")

allowed it to “remain in effect through the 1988 tax year”<sup>188</sup>—there is no guarantee that future legislatures and governors will be as compliant.

Having a special master or a trial judge determine what an adequate education is and costs is an effective remedy only to the extent that the special master or the trial judge can actually make such a determination and that the representative branches then deliver that education and raise the concomitant taxes. The proposition that the judiciary can develop and maintain a better system of public education than the representative branches is untenable.

The judiciary is the branch least institutionally suited to setting education policy and budgets. It must wait for the appropriate lawsuit to set education policy. The legislature, in contrast, is able to change education policy as often as necessary. Judges have no special training in setting education policy or budgets, and far less regular exposure than elected officials to the conditions in the public schools. Compounding these problems, a special master or trial judge setting education policy and budgets will have a far narrower perspective to consider than elected officials. The special master or trial judge will get to hear only from the litigants’ “expert witnesses.” Legislative bodies, in contrast, can listen to anyone who might be helpful. Most importantly, unlike elected officials, judges in New Hampshire are unaccountable to those affected by their decisions. In sum, having a special master or a trial judge determine what an adequate education is and costs could well result in public school students receiving a less adequate education than what they would have received from the representative branches.

Even if a special master or a trial judge could determine what an adequate education is and costs, the question remains whether the representative branches will deliver that education and raise the concomitant taxes. While the representative branches in other states have complied when their supreme courts ordered them to increase education spending by a certain amount,<sup>189</sup> there is no guarantee that New Hampshire legislatures and governors will be as compliant.<sup>190</sup>

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188. *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1360 (N.H. 1997). And, since I wrote this article, this also worked in *Londonderry I* as the representative branches enacted a definition to the plaintiffs’ liking.

189. See Eugene Van Loan, *Judicial Review and Its Limits*, 47 N.H.B.J. 52, 52–53 (2006) (discussing Supreme Court of Kansas’ *Montoy v. Kansas* decision, in which “the court ordered the Kansas Legislature to immediately raise another \$143 million to support education—or else”).

190. What makes New Hampshire *sui generis* in this regard is that the state has neither an income tax nor a sales tax, but compliance with the “mandate” that the entire cost of an adequate education be funded with state taxes may necessitate such a tax. See DOUGLAS E. HALL, *SCHOOL FINANCE REFORM: BASIC FACTS & ESTIMATES 2000 ISSUE* (2000), available at <http://www.nhpolicy.org/education/facts00.html> (estimating 3.25% income tax required to raise \$825 million).

Turning to whether the *Claremont* cases have resulted in any reliance interests, it is questionable whether anybody would be harmed if the *Claremont* cases were overruled because there is no evidence that *Claremont* has improved the quality of public education.

In sum, the benefits of overruling the *Claremont* cases—the correction of an obviously incorrect constitutional interpretation and bringing state government back into line with the separation of powers principle—overwhelmingly outweigh any costs.

## V. CONCLUSION

The founding generation viewed public education as essential to preserving the republican governments they established after breaking from England.<sup>191</sup> This view can be seen throughout the writings of John Adams.

In 1765, Adams observed that “wherever a general knowledge and sensibility have prevailed among the people, arbitrary government and every kind of oppression have lessened and disappeared in proportion.”<sup>192</sup> In 1787, he recommended the following:

Children should be educated and instructed in the principles of freedom. Aristotle speaks plainly to this purpose, saying, “that the institution of youth should be accommodated to that form of government under which they live; forasmuch as it makes exceedingly for the preservation of the present government, whatsoever it be.”<sup>193</sup>

Other giants of the founding generation expressed similar views. For example, Thomas Jefferson, in the preamble to the Bill for the More General Diffusion of Knowledge, which was introduced to the Virginia legisla-

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191. LORRAINE SMITH PANGLE & THOMAS L. PANGLE, *THE LEARNING OF LIBERTY* 1 (1993). Pangle stated:

The classic account of the reasons for the instability of republican government focused on education as the heart of the problem. Republics, it was argued, require an extraordinary degree of public-spiritedness, self-restraint, and practical wisdom in their citizens. To form such virtues of heart and mind, an especially intense and carefully supervised moral education of the young is essential.

*Id.*; GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 426–27 (1998) (1969); M.H. Hoeflich, *Law in the Republican Classroom*, 43 U. KAN. L. REV. 711, 713 (1995) (Founders “recognized that the survival of the republic depended upon the development of a uniquely American and republican culture and the transmission of this culture to the youth of the new nation. They understood thoroughly that the time to shape attitudes and opinions is youth.”).

192. John Adams, *A Dissertation on the Canon and Feudal Law*, in *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* 21 (C. Bradley Thompson ed., 2000).

193. John Adams, *A Defence of the Constitutions*, in *THE POLITICAL WRITINGS OF JOHN ADAMS* 285 (George W. Carey ed., 2000).

ture in 1779, argued that public education was the best safeguard against governmental overreaching:

[T]hat even under the best forms, those entrusted with power have, in time, and by slow operations, perverted it into tyranny; and it is believed that the most effectual means of preventing this would be, to illuminate, as far as practicable, the minds of the people at large, and more especially to give them knowledge of those facts, which history exhibiteth, that, possessed thereby of the experience of other ages and countries, they may be enabled to know ambition under all its shapes, and prompt to exert their natural powers to defeat its purposes . . . .<sup>194</sup>

Benjamin Franklin argued for the institution of a school in his home city of Philadelphia in order to promote good government:

[A]s might supply the succeeding Age with Men qualified to serve the Publick with Honour to themselves, and to their Country . . . (and who would learn) the Advantages of Civil Orders and Constitutions . . . the Advantages of Liberty, Mischiefs of Licentiousness, Benefits arising from good Laws and a due Execution of Justice.<sup>195</sup>

The same perspective prevailed in New Hampshire. In 1792, Governor Josiah Bartlett stated to the legislature:

Every regulation that will have a tendency to diffuse knowledge and information, and to encourage virtue, morality & patriotism among the people, especially among the Youth and rising generation, cannot fail of being abundantly useful and beneficial to the State, as it is a maxim well established "That no Republic can be lasting and happy unless accompanied with Knowledge and public virtue in the People at large."<sup>196</sup>

In 1792, the historian Jeremy Belknap admonished that teachers should, "teach by their example as well as by their precepts; that they govern themselves, and teach their pupils the art of self-government [sic]."<sup>197</sup> An 1827 law enjoined teachers

to take diligent care, and use their best endeavors, to impress on the minds of children and youth committed to their care and in-

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194. PANGLE & PANGLE, *supra* note 191, at 107.

195. Hoeflich, *supra* note 191, at 713 (quoting Benjamin Franklin, *Proposals Relating to the Education of Youth in Pennsylvania*, in 3 THE PAPERS OF BENJAMIN FRANKLIN 392-413 (Leonard W. Labaree et al. eds., 1961)).

196. THE PAPERS OF JOSIAH BARTLETT 385-86 (Frank Meyers ed., 1979).

197. 2 JEREMY BELKNAP, THE HISTORY OF NEW HAMPSHIRE 247 (1970).

struction, the principles of piety and justice, and a sacred regard to truth, love of their country, humanity and benevolence; sobriety, industry and frugality; chastity, moderation and temperance; and all other virtues which are the ornaments of a human society. And it shall be the duty of such instructors, to endeavor to lead those under their care into a particular understanding of the tendency of the before mentioned virtues to preserve and perfect a republican form of government, and to secure the blessings of liberty, as well as to promote their future happiness; and the tendency of the opposite vices to slavery and ruin.<sup>198</sup>

In an address to the New Hampshire Historical Society in 1833, Nathaniel Bouton stated:

New England owes her intellectual and moral glory to her religion, secondarily to her schools. Although, then, we cannot compete with our bretheren of the middle and western States in the gigantic race of wealth, population and internal improvements; yet we may retain our preeminence in education and in moral and religious character.

Need I add, it is the soundest policy of the State to encourage education? That this is, at once, an effective check to crime and barrier to pauperism? That it inspires noble sentiments—holds under restraint the baser passion;—ennobles virtue and is one guarantee of the permanence of our republican institutions?<sup>199</sup>

The irony of the *Claremont* decisions, then, is that the court, in the name of effectuating Article 83's duty to cherish the interest of public schools, has engaged in the very sort of governmental overreaching that the state's founders hoped to thwart by "spreading the opportunities and advantages of education through the various parts of the country."<sup>200</sup>

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198. 3 LAWS OF THE STATE OF NEW HAMPSHIRE 217 (Concord, N.H., Hill & Moore 1822).

199. BOUTON, *supra* note 95, at 32–33. See H.E. Parker, *The Academical Institutions of New Hampshire*, in EDWIN D. SANBORN, HISTORY OF NEW HAMPSHIRE 352 (Manchester, N.H., John B. Clarke 1875) ("In common with other settlers of New England, the people of New Hampshire from the first placed a high estimate upon education. Knowing that in a free State, where the people govern, it is indispensable that they be virtuous and intelligence, the developing of such a population has never been lost sight of. Hence the laws have always carefully looked after the instruction of the young, that not a child may grow up in ignorance either of its moral duties or of those branches of knowledge which should fit it for successful citizenship.").

200. N.H. CONST. pt. II, art. 83.