Bill as Introduced

2003 SESSION

03-0015
04/09

HOUSE CONCURRENT RESOLUTION ***HCR 14***

A RESOLUTION declaring it to be wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education.

SPONSORS: Rep. Pepino, Hills 51; Rep. Giuda, Graf 13; Rep. Balboni, Hills 59; Rep. Soltani, Merr 37; Rep. Woods, Straf 69; Sen. Boyce, Dist 4; Sen. Kenney, Dist 3; Sen. Gallus, Dist 1

COMMITTEE: Ways and Means

ANALYSIS

This house concurrent resolution declares that it is wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education.

HCR 14 – AS INTRODUCED

03-0015
04/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

A RESOLUTION declaring it to be wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education.

Whereas, the members of the executive and legislative branches of the state of New Hampshire, having made and subscribed an oath to God and to the state and its constitution, or alternatively, by affirming under the pains and penalties of perjury, their allegiance to the state of New Hampshire and its constitution pursuant to part II, article 84 of said constitution, hereby find that the New Hampshire supreme court decisions in the Claremont cases were wrong and that the supreme court does not have the power to tell the legislature whether and how to set educational policy and whether and how much to spend on education and that, accordingly, these aspects of the Claremont I and Claremont II decisions and any and all consequences that flow therefrom do not have the force and effect of the law; and

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

(a) Part I, article 1, relative to the origin and object of government.

(b) Part I, article 2 relative to individual property rights.

(c) Part I, article 6 relative to local control of education, both religious and secular.

(d) Part I, article 12, relative to the consent of the governed on taxation.

(e) Part I, article 28, relative to the consent of the people, or their representatives in the legislature, prior to the establishment or imposition of a tax.

(f) Part I, article 28-a, relative to the prohibition on unfunded mandates.

(g) Part I, article 31 and part II, article 2, relative to the authority of the legislature to make laws.

(h) Part II, article 83, relative to the New Hampshire supreme court's inconsistent and unsupported interpretation of "cherish" to mean "to require payment for" within the context of this article; and

Whereas, the legislature hereby finds and declares that the tax structure in effect prior to the Claremont II ruling to be legally binding until such time as the legislature may vote to change it; and

Whereas, the basis for this legislative finding includes the following:

(a) Under part I, article 37, the people of New Hampshire have a right to a government based upon the separation of powers. The legislature finds that it would be a violation of this right for the legislature to delegate to the judiciary or to allow the judiciary to assert, directly or indirectly, any of the legislative powers vested exclusively in the general court by part II, article 2.

(b) The legislative power vested exclusively in the general court by part II, article 2 includes the power and discretion to determine whether and how to set educational policy and whether and how much to spend on education. Therefore, the legislature finds that it is wrongful for the judiciary, either directly or indirectly, to define educational adequacy or the cost of educational adequacy.

(See, e.g., Coleman v. School District of Rochester, "The courts may not declare acts of the legislature void on the sole issue whether they are 'wholesome and reasonable.' The legislature is to judge whether they are for 'the benefit and welfare' of the state.")

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

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

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

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

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

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

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

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

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

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

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

Resolved by the House of Representatives, the Senate concurring:

That the legislature hereby finds and declares that the school tax structure in effect prior to the Claremont II decision may continue to be used until such time as modified by the representative branches, and has been modified by the representative branches.

Amendments

Rep. Pepino, Hills 51
February 28, 2003
2003-0434h
04/09

Amendment to HCR 14

Amend the title of the resolution by replacing it with the following:

A RESOLUTION declaring the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

Amend the resolution by replacing all after the title with the following:

Whereas, under part 1, article 37 of the constitution of the state of New Hampshire, the 3 essential powers of the government of this state, the legislative, the executive and the judicial, are to be kept as separate from and independent of each other as the nature of a free government will admit; and

Whereas, only by a consistent and strict adherence to a separation of the powers of the 3 branches of the government can the rights of the people set forth in part 2 of the constitution be preserved, and the form of government set forth in part 2 be maintained; and

Whereas, the language of part 1, article 37 applies with equal force to the judicial as to the legislative and executive branches; and

Whereas, were part 1, article 37 to apply with less force to the judicial than to the legislative and executive branches, the legislative and executive branches would be inferior to, subordinate to, and dependent upon the judicial branch, and our system of government would be oligarchical and not republican; and

Whereas, it is the duty of the executive and legislative branches, pursuant to the oaths taken by their members under part 2, article 84, no less than it is of the judicial branch, pursuant to the oaths taken by its members, not to contravene any portion of the constitution, and to be vigilant for and to oppose any contravention by another branch; and

Whereas, upon the occurrence of a palpable attempt on the part of the judicial branch to exercise any authority inconsistent with the judicial function, it is the right and duty of the legislative and executive branches to intervene to the extent deemed by them necessary, within the scope of their enumerated powers, to oppose and defeat such exercise, thereby to safeguard the fundamental principle of our form of government that each of its 3 branches should be confined to its constitutional limits; and

Whereas, in its decisions in the Claremont school funding cases, the judicial branch

unambiguously directed the legislative and executive branches to pass laws "implementing" an "adequate education" based upon "seven criteria articulated by the Supreme Court of Kentucky," and to pass laws establishing "standards of accountability," and unambiguously stated that it reserved for itself the ultimate authority to determine the sufficiency of these laws; and

Whereas, for the judiciary to rule that the constitution of New Hampshire requires the legislature and executive branches to enact into law a certain definition of an "adequate education" or a definition of an "adequate education" based upon or incorporating certain criteria or parameters, or to enact into law any definition of an "adequate education" at all, adds legislative and executive powers to those of the judicial and unconstitutionally involves the judicial branch in the core policy-making functions of the legislative and executive branches; and

Whereas, for the judiciary to rule that the constitution of New Hampshire requires the legislature and executive branches to enact into law "standards of accountability," adds legislative and executive powers to those of the judicial and unconstitutionally involves the judicial branch in the core policy-making functions of the legislative and executive branches; and

Whereas, in its decisions in the Claremont school funding cases, the judicial branch unambiguously directed the legislative and executive branches to fund public education and unambiguously directed the legislative and executive branches how to do so; and

Whereas, for the judiciary to rule that the constitution of New Hampshire requires the legislature and executive branches to enact into law a certain system for funding public education or a system for funding public education based upon or incorporating certain criteria or parameters, or that the legislative and executive branches are required to enact into law any system at all for funding public education, adds legislative and executive powers to those of the judicial and unconstitutionally involves the judicial branch in the core policy-making functions of the legislative and executive branches; and

Whereas, at no time over the course of the 2 centuries of New Hampshire's statehood prior to the Claremont decisions did the judicial branch ever assert any authority to control, direct, or shape the educational policies to be pursued by the legislative and executive branches in terms of "adequacy" or any other qualitative measure; and

Whereas, at all times over the course of the 2 centuries of New Hampshire's statehood prior to the Claremont decisions, the judicial branch confined its review of statutory enactments and administrative actions respecting education to the constitutionality of the challenged statute or action and never considered the "adequacy" or any other qualitative measure of the statute or action.

Whereas, for the legislative and executive branches to treat as binding upon them any ruling by the judicial branch directing them to enact definitions agreeable to the judicial branch of "adequate education," or "systems of accountability" or to enact a particular system for funding public education, would attenuate the republican form of government established by part 2 of the New Hampshire constitution, and be subversive of representative government; and

Whereas, the scope of part 2, article 83 is not limited to cherishing the interest of public schools alone, but expressly encompasses as well cherishing the interest of literature, the sciences, and all seminaries; and further expressly states there to be a duty to "encourage," "countenance" and "inculcate" many other pursuits and virtues as well; and

Whereas, by its very terms, and in accordance with its original understanding, part 2, article 83 applies equally to the many matters therein enumerated, and the historical record is clear that it was left to the legislative branch to decide which of these matters, if any, would be funded from the public purse and, consistent with the fundamental principle of the separation of powers, these legislative decisions were not subjected to judicial review; and

Whereas, acceptance by the legislative and executive branches of the judiciary's directives in the Claremont decisions would not merely be to surrender to the judiciary a portion of the legislative and executive power to set educational policy, but to set a precedent by which the judiciary may justify the exercise of legislative and executive policy-making powers over any number of other matters; and

Whereas, the Claremont directives that the legislative and executive branches must enact a certain definition of an "adequate education," and "systems of accountability" and a certain system of funding public education constitute a palpable exercise by the judicial branch of powers not granted to it by the constitution of New Hampshire, and the legislative and executive branches have the right and are duty bound to prevent the exercise of such powers in order to maintain within their respective limits the three branches of the government of this state; and

Whereas, the judicial branch is not constitutionally empowered to direct the legislative and executive branches to define an "adequate education;" and

Whereas, the judicial branch is not constitutionally empowered to direct the legislative and executive branches to adopt "standards of accountability;" and

Whereas, the judicial branch is not constitutionally empowered to direct the legislative and executive branches to "guarantee adequate funding" of public education; now therefor, be it

Resolved by the House of Representatives, the Senate concurring:

That the legislature, having fully considered the foregoing enumeration of constitutional principles and having fully considered the foregoing enumeration of deficiencies inherent to the Claremont rulings, finds that the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

2003-0434h

AMENDED ANALYSIS

This house concurrent resolution declares the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

FILE COPY

Rep. Pepino, Hills 51
February 28, 2003
2003-0434h
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Amend the resolution by replacing all after the title with the following:

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Whereas, only by a consistent and strict adherence to a separation of the powers of the 3 branches of the government can the rights of the people set forth in part 2 of the constitution be preserved, and the form of government set forth in part 2 be maintained; and

Whereas, the language of part 1, article 37 applies with equal force to the judicial as to the legislative and executive branches; and

Whereas, were part 1, article 37 to apply with less force to the judicial than to the legislative and executive branches, the legislative and executive branches would be inferior to, subordinate to, and dependent upon the judicial branch, and our system of government would be oligarchical and not republican; and

Whereas, it is the duty of the executive and legislative branches, pursuant to the oaths taken by their members under part 2, article 84, no less than it is of the judicial branch, pursuant to the oaths taken by its members, not to contravene any portion of the constitution, and to be vigilant for and to oppose any contravention by another branch; and

Whereas, upon the occurrence of a palpable attempt on the part of the judicial branch to exercise any authority inconsistent with the judicial function, it is the right and duty of the legislative and executive branches to intervene to the extent deemed by them necessary, within the scope of their enumerated powers, to oppose and defeat such exercise, thereby to safeguard the fundamental principle of our form of government that each of its 3 branches should be confined to its constitutional limits; and

Whereas, in its decisions in the Claremont school funding cases, the judicial branch

unambiguously directed the legislative and executive branches to pass laws "implementing" an "adequate education" based upon "seven criteria articulated by the Supreme Court of Kentucky," and to pass laws establishing "standards of accountability," and unambiguously stated that it reserved for itself the ultimate authority to determine the sufficiency of these laws; and

Whereas, for the judiciary to rule that the constitution of New Hampshire requires the legislature and executive branches to enact into law a certain definition of an "adequate education" or a definition of an "adequate education" based upon or incorporating certain criteria or parameters, or to enact into law any definition of an "adequate education" at all, adds legislative and executive powers to those of the judicial and unconstitutionally involves the judicial branch in the core policy-making functions of the legislative and executive branches; and

Whereas, for the judiciary to rule that the constitution of New Hampshire requires the legislature and executive branches to enact into law "standards of accountability," adds legislative and executive powers to those of the judicial and unconstitutionally involves the judicial branch in the core policy-making functions of the legislative and executive branches; and

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Whereas, at no time over the course of the 2 centuries of New Hampshire's statehood prior to the Claremont decisions did the judicial branch ever assert any authority to control, direct, or shape the educational policies to be pursued by the legislative and executive branches in terms of "adequacy" or any other qualitative measure; and

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Whereas, for the legislative and executive branches to treat as binding upon them any ruling by the judicial branch directing them to enact definitions agreeable to the judicial branch of "adequate education," or "systems of accountability" or to enact a particular system for funding public education, would attenuate the republican form of government established by part 2 of the New Hampshire constitution, and be subversive of representative government; and

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Whereas, by its very terms, and in accordance with its original understanding, part 2, article 83 applies equally to the many matters therein enumerated, and the historical record is clear that it was left to the legislative branch to decide which of these matters, if any, would be funded from the public purse and, consistent with the fundamental principle of the separation of powers, these legislative decisions were not subjected to judicial review; and

Whereas, acceptance by the legislative and executive branches of the judiciary's directives in the Claremont decisions would not merely be to surrender to the judiciary a portion of the legislative and executive power to set educational policy, but to set a precedent by which the judiciary may justify the exercise of legislative and executive policy-making powers over any number of other matters; and

Whereas, the Claremont directives that the legislative and executive branches must enact a certain definition of an "adequate education," and "systems of accountability" and a certain system of funding public education constitute a palpable exercise by the judicial branch of powers not granted to it by the constitution of New Hampshire, and the legislative and executive branches have the right and are duty bound to prevent the exercise of such powers in order to maintain within their respective limits the three branches of the government of this state; and

Whereas, the judicial branch is not constitutionally empowered to direct the legislative and executive branches to define an "adequate education;" and

Whereas, the judicial branch is not constitutionally empowered to direct the legislative and executive branches to adopt "standards of accountability;" and

Whereas, the judicial branch is not constitutionally empowered to direct the legislative and executive branches to "guarantee adequate funding" of public education; now therefor, be it

Resolved by the House of Representatives, the Senate concurring:

That the legislature, having fully considered the foregoing enumeration of constitutional principles and having fully considered the foregoing enumeration of deficiencies inherent to the Claremont rulings, finds that the directives of the judicial branch in the Claremont cases that the legislative and executive branches define an "adequate education," adopt "standards of accountability," and "guarantee adequate funding" of a public education are not binding on the legislative and executive branches.

2003-0434h

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Speakers

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HCB 14 Date 3/5/2003

Committee Ways & Means

** Please Print All Information **

Name	Address	Phone	Representing	(check one) Pro	Con
Steve Varnum	288 Kearsarge Mtn Rd Warner	456-3153	Childrens Alliance		X
DENNIS MOUNCE	672 HOSE RD, MAN, NH		WE THE PEOPLE	X	
Jerome Holden	PO Box 1055 Wolfeboro NH	5695335	we the people	V	
W. R. "BJ" CARR	PO B 1435 NEW LONDON	763-4908	NFIB/NH	✓	
Rich Tomasso	2 Clocktower Rd Nashua	579 0724	LPN N	✓	
Richard Bosa	1465 Woodbury Ave #261 Portsmouth	334-6996		✓	
Brian Semprini	Governor's Office			✓	
Kathleen Souza	H/L Dist. 51			✓	
Rogers J. Johnson	Dist 83			✓	
Phyllis Woods	District 69			✓	
Mary Mayberry	Grafton District 13			X	
James Stephan				X	

Hearing Minutes

HOUSE COMMITTEE ON WAYS AND MEANS

PUBLIC HEARING ON HCR 14

BILL TITLE: **declaring it to be wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education.**

DATE: 3/5

LOB ROOM: 902 **Time Public Hearing Called to Order:** _____

Time Adjourned: _____

(please circle if present)

Committee Members: Reps. Major, J. Gilbert, V. Clark, Hess, Langone, Giuda, Griffin, Camm, Gibson, Jasper, Hinkle, Hughes, Ingram, McCormick, Roessner, Almy, Davis, Espiefs, C. Hamm, Hammond and C. Pappas.

Bill Sponsors:

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

See attached

March 5, 2003

HCR 14, declaring it to be wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education.

Chairman Major opened the hearing on this bill at 2:15 p.m. and recognised its prime sponsor, Rep. Leo Pepino. Rep. Pepino distributed an amendment, #0434h, which essentially changes the bill to a copy of last session's HCR 14; and a copy of this committee's "blurb" on that bill from last session. The bill passed the House, but was killed in the Senate.

No questions.

At the sponsor's request, the chair next recognized Edward Mosca, speaking in support of the bill. Mr. Mosca said that people both inside and outside the Legislature are suffering from "Claremont fatigue" --- they just don't want to deal with it any more. However, we all have sworn to support the State and Federal constitutions. He said that means we are not obligated to follow orders from the Supreme Court which are outside of their legal area of responsibility. He said we're never going to get past the problems generated by the Claremont decisions until we clear up this jurisdictional ambiguity. He thinks that HCR is a necessary antecedent to the budget and whatever we decide to do about education. He said that the court's directives in the Claremont decision are a clear violation of Part 1, article 37 of the state Constitution. He quoted from Hamilton's Federalist Papers on the importance of the separation of powers and pointed out that the dissenting voices in the Claremont decisions said that their dissent was based on maintaining the separation of power. He claims that the specifications listed in the Court's decision are in fact a statement of educational policy.

QUESTIONS:
Rep. Almy: If we passed a law taxing only one religion, and the Court struck that down, would you see that as a violation of separation of powers?
Ans.: Not at all. It is appropriate for the court to rule on established legislation. The violation is for them to make the policy in advance of its establishment in legislation by the Legislative body.

No further questions.

The chair next recognized Rep. Greg Sorg, speaking in support of the bill. Rep. Sorg is an attorney and a member of the Judiciary Committee. He supports the practice of judicial review, even though it never existed in law before the 18th century. He gave a history lesson on the development of judicial review. His point was that none of the founders of this country ever expressed any intent to extend judicial review to state governments; it was only an element of national government. In addition, the New

Hampshire constitution specifically states that sovereignity rests with the people. The people are represented by the Legislature, not by the Court.

QUESTIONS:
Rep. Almy: Doesn't the fact that we have state constitutions, unlike the British who only have the national constitution deriving from the Magna Carta, mean that we also need a method of review at the lower levels?
Ans.: I would postulate just the opposite, that having only a national constitution would necessitate review at different levels.

Rep. Espiefs: Are you bound by the decisions of the Supreme Court?
Ans: I am bound to uphold the Constitution of the state, as I understand it, not as the Court does.

Rep. Gibson: In the British system, do magistrates have the power to change the definition of a well-known word?
Ans: They could, but their decision would be subject to the revision by their legislative body.

Rep. Pappas: Do you support Federal judicial review?
Ans: I haven't really decided on that. Some people whose opinions I respect certainly feel that it is legitimate and possibly necessary.

No further questions.

The chair next recognized Sen. Robert Boyce, one of the co-sponsors of this Resolution. His opinion is that the Court's Claremont decisions were wrong, and we need to correct them.

No questions.

Next to speak in support of the bill was Rep. David Hess, indicating that he represented leadership's strong support of the Resolution.

QUESTIONS:
Rep. Espiefs: What do you hope to accomplish with this bill?
Ans: It puts the Legislature on record in opposition to the opinion of the Court.

Rep. Almy: Then why doesn't Leadership put forth a constitutional response, rather than just resolutions objecting to the Court opinion?
Ans: In fact, there have been constitutional amendments passed by this body, and at least a dozen before it this term.
Followup: How would you protect the people from unjust law, without judicial review?

Ans: The court has no force by which to enforce its opinions; it depends upon the good will of the other branches of government and of the people.

Rep. Espiefs: You are aware that similar decisions have been made in other states. Do you know of other attempts to overturn or embarrass the courts?
Ans: I've heard of some efforts in several states that have seen up to 20 years of litigation, but I do not know the extent of those efforts. But we have a New Hampshire decision, and the New Hampshire constitution is similar in wording to only one other: Massachusetts. And in no other state has the ruling of the court been as extensive as the one here.
Followup: Do you know if the state asked for a rehearing on this decision?
Ans: No, I do not know. Current rules prohibit a rehearing request. But there is an outstanding request to void the Court's decision and to return it to the Merrimack District.
Further: Do you believe that the Court acted in bad faith?
Ans: No; I believe that they acted in violation of common sense. I attribute no ill will to them, simply lack of evaluation of the consequences of their decision.

Rep. Almy: Are you aware that back in the 1700's we established a statewide tax to support education?
Ans: I know that funding of education has had a checkered history.

Rep. Hamm: I worry that this state could also be in litigation on education funding for 20 years. Aren't you concerned that this bill just raises the level of contentiousness?
Ans: No.

Next to speak, also in support of the Resolution and the amendment, was Rep. Dan Itse. Rep. Itse said that he feels it important that whenever we see what we perceive as a violation of the constitution, that we stand up and say so. He particularly objects to the manner in which the Court convolutedly defined the word "cherish". He pointed out that the sentence in which it is used directs legislators to do so, not the Legislature. He thinks that the statement doesn't prohibit the Legislature from providing financial aid to education, but neither does it require it. He also pointed out that prior to 1958, there was not even any reference to a state Supreme Court.

No questions.

The chair next recognized former representative Paul Mirski, who said that the Claremont rulings have been almost a fixation with him ever since they were delivered. He said they contain many inconsistencies and have caused innumerable problems. He thoroughly supports the Resolution. In particular, he pointed out that when our constitution was adapted from that of Massachusetts, they specifically changed the reference for "cherish" from the Legislature to individual legislators. He does not believe that the Court had a nefarious intent in making their decision, but he does think that over the years they have had increasing interest in making policy.

No questions.

The chair next recognized Howard Wilson, from Andover, who said that this committee had legislation before it two weeks ago, to correct the abuses of the Claremont decision, but we ITL'd it. He thinks is our last chance to do the right thing.

No questions.

The chair next recognized Richard Bosa, from Portsmouth, speaking in support of the Resolution. He said that the Courts have for years been attempting, and sometimes succeeding, in creating law. He gave as an example the fact that a lawyer can not be sued for consumer fraud. He thinks that we are losing all of our rights through judicial action.

No questions.

Next, Richard Meyers, executive director of Live Free New Hampshire, spoke in support of the Resolution. He said that he had supported the previous Resolution, two years ago. He thinks that the Court had good intentions, but that they also thought that they knew better than the Legislature what would be good for the state. He said that objectivity is conspicuously absent from the Claremont I decision. Even if they did know better what should be done in the area of education policy, he does not want to be represented by a small group of unelected officials. He agreed with Mr. Mirski that the change between the Massachusetts and New Hampshire constitutions are significant. Normal jurisprudence requires greater consideration to differences between documents than to their similarities. By using ellipses in their quotation from the Constitution, the NH Court chose to hide that difference. He thinks that's a clear intent to establish public policy.

No questions.

The chair next recognized James Leslie, from Somersworth, who said that he supports the Resolution but would provide his testimony in written form, to save us some time.

No questions.

The chair next recognized Ken Blevins, from Bow, who said that he supports the Resolution but does not think that it goes far enough. He thinks that "adequacy" should be set at zero dollars, because he believes in education only at the local level. He wants the court taken out of the question completely.

No questions.

The chair then recognized Rep. Tony Soltani, speaking in support of the bill. He said that he thinks that the New Hampshire Constitution ought to include an obligation to provide every child with a good education, but it doesn't. He thinks it entirely wrong for the Court to have manipulated definitions to find such an obligation. He said that the worst element of the Claremont decisions were that they were outcome-driven, not principle-driven.

No questions.

Cards in support of the bill had been received from Rep. Lars Christiansen and from Nancy Wall, of Hollis, both of whom did not ask to speak.

There being no additional testimony offered, the public hearing on HCR 14 was closed at 3:45 p.m.

The business before it being complete for the day, the committee adjourned at 3:50 p.m.

Respectfully submitted,

Vivian R. Clark
Committee Clerk

Testimony

SOLTANI/MOSCA P.L.L.C.
TONY F. SOLTANI, Esquire
ADMITTED IN NH & ME
EDWARD C. MOSCA, Esquire
ADMITTED IN NH

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FILE COPY

March 5, 2003

VIA HAND-DELIVERY

Representative Norman L. Major
12 Kingston Road
Plaistow, NH 03865

Re: HCR 14

Dear Representative Major:

Thank you for the opportunity to talk to you and your committee regarding HCR 14.

As a preliminary matter, I want to address two issues not contained in the text of HCR 14, but that nonetheless directly affect HCR 14.

The first issue is what I have heard called Claremont fatigue. I have heard that some in the Legislature are just tired of dealing with the issue of the propriety of the Claremont decisions. This school of thought maintains that Claremont is a settled part of our legal and political landscape, and that those who believe that Claremont represents unbridled judicial activism inconsistent with our system of government need to get over it and get on with their lives. There are at least two major problems with this school of thought.

The first is that the United States and New Hampshire Constitutions are the supreme law of this state, and every person elected governor, councilor, senator and representative in this state is solemnly committed by oath taken pursuant to Part I, Article 84 to support these Constitutions. The typical response to this observation is – true, but it is for the judiciary, not for the other branches to say what the Constitution means.

Nobody really believes this without any qualifications. For example, if the Court were to say that the Constitution imposes a duty upon the Legislature to pass laws discriminating against Catholics, I hope and believe that, notwithstanding the source, no legislator would attempt to follow such an order because, among other things, Part I, Article 2 prohibits such laws.

Those who believe in judicial supremacy would respond – that is an extreme example and the Court would never do something so extreme. That misses the point entirely. Whether or not the Court would do something so extreme, the point is that nobody would countenance such a palpable violation of the Constitution, which proves that even the most ardent supporters of judicial supremacy believe that the Constitution has an independent and ascertainable meaning.

The second problem with the we need to just get over Claremont and get on with our lives school of thought is that it is just wishful thinking to think that we are ever going to get past Claremont if we do not confront it directly. This brings me to the second preliminary issue that directly affects HCR 14, which is the school of thought that the budget has to come first and matters such as HCR 14 are distractions that we cannot afford until a budget has been passed.

When the Court issued Claremont II on December 17, 1997, it retained jurisdiction. More than five years have passed and the Court continues to retain jurisdiction and it shows no sign of closing the docket on Claremont. To the contrary, based on the last decision, it appears that the Court intends to sit as a super-legislature over education for the foreseeable future. The Court's retention of jurisdiction serves no constitutional purpose, is demeaning to the Legislature and Governor, unconstitutionally interferes with the other branches, and is tantamount to an invitation to Andy Volinsky to ask the Court to secondguess whatever you may do.

So far from being a distraction, HCR 14 is a necessary condition antecedent to the budget and whatever you may do that affects education.

Turning now to HCR 14, one of its virtues is that it is self-explanatory. So, rather than walking through it point by point, I will focus briefly on just one point: that the Claremont directives to define adequacy, guarantee adequate funding and set standards of accountability are as palpable a violation of Part I, Article 37 as the example I gave earlier of laws discriminating against Catholics would be to Part I, Article 2.

Those of you who have read the Claremont decisions are aware that the Court repeatedly asserts that it is not setting educational policy. For example, quoting from the 1997 Claremont II decision, '[w]e agree with Justice Horton that we were not appointed to establish educational policy." In the 1998 ABC advisory opinion, "[w]e repeat what we said in Claremont II, that we were not appointed to establish educational policy." And in the most recent decision, "[w]e recognize that we are not appointed to establish educational policy and we have not done so today."

The reason that the Court makes this point over and over and over again is that the New Hampshire Constitution prohibits the judiciary from making educational policy. Part I, Article 37 of the New Hampshire Constitution expresses this principle of maintaining a separation of powers between the branches of government 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."

The federal constitution, like our state Constitution, is based upon a separation of powers between the different branches of government. As you know, Madison, Hamilton and Jay wrote a series of papers in favor of the ratification of the United States Constitution, which we call the Federalist Papers. Federalist #47 explained why it is imperative to maintain a separation of powers between the branches:

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary selfappointed, or elective, may justly be pronounced the very definition of tyranny."

Montesquieu, in his *Spirit of Laws*, stated the same point succinctly and powerfully, when he wrote, "there is no liberty, if the power of judging be not separated from the legislative and executive powers."

As you know, Justice Horton dissented in Claremont II because, in his words, "[m]y problem is that I was not appointed to establish educational policy, nor to determine the proper way to finance its implementation." In the most recent Claremont decision, there were two dissenters, and on the same basis – that the majority was violating the separation of powers by setting educational policy.

Part of what Justice Horton and his colleagues disagreed about in Claremont II was whether the Court was setting policy by directing the legislative and executive branches to pass laws "implementing" an "adequate education" based upon "seven criteria articulated by the Supreme Court of Kentucky."

Considering the criteria shows who was right:

> "(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in

academics or in the job market."

That is quite a mouthful, and that is precisely the point. These criteria are so detailed and so specific that nothing is left for the Legislature and Governor to do with respect to defining adequacy. The Court already has defined adequacy for them.

The detail and specificity of these criteria make it obvious that the Court is engaged in policy-making, but even simply ordering the Legislature to define adequacy violates Part I, Article 37.

For the Court to order the Legislature to define adequacy is for the Court to play a proactive role in determining the specific content of legislation, which violates Part I, Article 37. It is totally incompatible with and subversive of our system of government, which acts at the instance of and with the consent of the governed. The same analysis applies to guaranteeing adequate funding or setting standards of accountability, so I won't repeat it.

HCR 14 upholds the duty the Legislature has to support the New Hampshire Constitution by declaring the Claremont directives that the legislative and executive branches define an adequate education, adopt standards of accountability and guarantee adequate funding as not binding on the legislative and executive branches. It may be the most important vote this Legislature takes because, as Representative Pepino noted, it will go a long way to determining whether we will have an excellent education or simply an adequate education for our children.

I hope that the forgoing is helpful to you and your committee.

Although I am sending this on the letterhead of my law firm, that is only for my convenience. The views expressed are my own.

Yours very truly,



Edward C. Mosca

A:\5MAR03.HCR14.TESTIMONY.wpd

FILE COPY

Ways and Means Committee
March 5, 2003
2:00 PM - LOB 202

Summary of Testimony on HCR 14

(declaring it to be wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education)

Rep. Gregory M. Sorg*

HCR 14 is a resolution repudiating the Supreme Court's decisions in the Claremont school funding cases. This resolution implicates the supposed power of the judicial branch of the government of this state to interpret the Constitution with binding effect on all three branches.

This supposed power, known as "judicial review", is an American innovation, first applied by the U.S. Supreme Court in 1803 in the case of Marbury vs. Madison. Judicial review had then, and still has, no precedent in English jurisprudence, notwithstanding that the British legal system and the British common law formed the basis of our own. It originated in two specific contexts out of the perceived need for a legal theory by which to justify opposing and nullifying the excesses of a particular legislature: in the first, in the 1760's, against those of the British Parliament, in which Americans had no representation; and in the second, in the 1780's, against those of the proposed United States Congress, with which Americans as yet had no experience. In neither instance did the principal proponents of the power of judicial nullification on constitutional grounds of legislative acts advocate its application against the legislature of a state by its judiciary. No need was perceived for such a check upon legislatures with which the people had had many years' experience, as a consequence of which were considered to be sufficiently under control.

However legitimate the power of judicial review may be on the federal level as a result of acceptance of the arguments made on its behalf during the period between proposal and ratification of the federal Constitution, no basis exists for its legitimacy on the state level in the absence of specific provision for it in a given state's Constitution.

The Constitution of New Hampshire specifically proclaims the people to be sovereign. Inasmuch as the power of making decisions from which there can be no appeal is a core attribute of sovereignty, the exercise of that power by a group of five lawyers, politically appointed for life, unaccountable to the people, and, by the nature of their office isolated from the people by design, is particularly unjustified.

*B.A. in history, University of Maryland, College Park, Maryland (1972); J.D., Washington & Lee University, Lexington, Virginia (1976); admitted to the practice of law in the District of Columbia (1977) and the State of New Hampshire (1981); Member of the House, Grafton District 11, and member of the Judiciary Committee.

FILE COPY

Testimony in Support of HCR 14

Presented March 5, 2003
by Richard Meyers,
Executive Director,
Live Free New Hampshire

An attorney could be disbarred for doing what the Supreme Court of this state did in Claremont I.

Good afternoon. My name is Richard Meyers. I am the Executive Director of Live Free New Hampshire and a member of the advisory board of the New Hampshire Center for Constitutional Studies. As an advocate of freedom and a student of constitutional law, it is my privilege to agin present testimony in support of House Concurrent Resolution 14, declaring the New Hampshire supreme court's Claremont decisions to be an unconstitutional violation of the separation of powers mandate under part I, article 37 of the New Hampshire constitution. Those of you who were here may remember that I was present at a similar hearing on this issue two years ago.

By way of background, I reside in the town of Merrimack and earn my living as the VP of Engineering for a high tech company in Nashua.

The thing that could get an attorney disbarred is being intentionally deceitful. And that is exactly what I think the authors of Clairmont I did in that decision. It's either that or they, and their staff, are more incompetent than any of us can reasonably believe.

I can think of no other way to explain the error that is at the core of their work. Oh, I'm sure they were well-meaning, just as our hypothetical, and soon-to-be-disbarred attorney would be. They knew what they were doing, and in their minds, they did it for good-purpose. That is the justification all those who engage in it have for what is called "Judicial Activism", which is when a judge puts their sense of what is "right" over what the Law demands.

The amended HCR 14 before you, which I want to complement it's authors on, cites many examples of how the Justices expanded their ruling far beyond what

was necessary. This is further evidence of their deed, and their intent, to use this ruling to amend our Constitution, to make law, to implement their sense of what is good public policy. And who knows, maybe they are smarter or better qualified to determine such things than you all are, but I, for one, don't want to live in a state where a few unelected oligarches have such power.

I am hoping that you agree, and that you're willing to do something about it. Frankly, this resolution is mild by comparison with what some have suggested. For what it's worth, it's the official position of the Republican party of this state that these men should be removed from office by Bill of Address. Finding their words non-binding, as called for by HCR 14 is little more than a wrist slap. But one that is indeed much-needed.

So, what was the error I spoke of earlier? It was saying that Part II Article 83 requires our state to fund public education when our state isn't even mentioned in that section of our Constitution. Here are the main conclusions from Clairmont I:

1. Encouragement of Literature clause of New Hampshire Constitution imposes a duty on the State to provide a constitutionally adequate education to every educable child and to guarantee adequate funding.
2. Language in New Hampshire Constitution that "it shall be the duty of the legislators and magistrates . . . to cherish . . . public school" is not merely a statement of aspiration; such language commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools.

However, the object of the sentence they quote is not the state, it's the "Legislators and magistrates". These are the people who hold office, not the state or an agency of the state. If it creates a financial obligation, it does so on you, not New Hampshire. Is it even worth mentioning how unlikely that is?

The central issue of the Clairmont case was whether Part II Article 83 was a statement of aspiration or a mandate. Common sense and simple grammar demand it be viewed, as it had been prior to December, 1999, as a statement of lofty goals. But the then sitting Supreme Court would have you believe otherwise. How did they support this? Through deceit, and a crime of omission. What they omitted, was the section of the Massachusetts Constitution that would prove them wrong.

If you've read it, and I hope you have, you will remember that most of the so-called justifications are suggestions or indications that their conclusions about "cherish" meaning "pay for" are valid. The main support comes from the then recent Massachusetts Supreme Court ruling that their verison of Part II Article 83 placed a requirement for their state to fund public education. Our Court said that, since Massachusetts has this obligation, and our Constitution is derived from theirs, that ours must have this meaning as well.

Except, their Part II Article 83 is different than ours in a very significant way: Theirs uses the word "legislatures", where ours has "legislators". So, whatever might be true in Massachusetts can not be used to understand what is true here, and the Justices knew that. It's the kind of thing you learn in your first year of Law School. The Clairmont I ruling not only doesn't mention this difference, it hides it. In a roughly 4000-word document, when they cite the relevant text of the Massachusetts Constitution, they use the ". . ." notation to leave out thirteen words, including the critical one that defines to whom the stated duty applies. Why else would they do that, but to hide the truth they knew was there?

A violation of the separation of powers doctrine? It is unquestionably that. I'd suggest that it's also a violation of their oath of office. But political realities often require measured responses to outlandish acts. I submit that you have before you a resolution that fits that formula to a tee. It is my that hope that you will vote in favor of HCR 14, and by so doing, help put a stop to what could well be called, judicial tyranny.

FILE COPY

March 5, 2003

Honorable members of the committee:

Please enter the following into the record pursuant to HCR_14.

I lend my voice as a citizen of New Hampshire in support of passage of this resolution for the following reasons among others.

1.) As a New Hampshire voter I expect my elected representatives to live by their oath to God to defend the constitution of New Hampshire (NH constitution part 2 art. 84).

2.) The NH Supreme Court over stepped it's separate power of adjudicating and infringed on the role of our elected legislature by ordering a deadline and requiring that school funding legislation be subject to their final approval.

3.) The Court finding a "RIGHT" in "Part SECOND - FORM OF GOVERNMENT" rather than in "PART FIRST-BILL OF RIGHTS" defies the obvious intended structure of our constitution as well as logic and common sense.

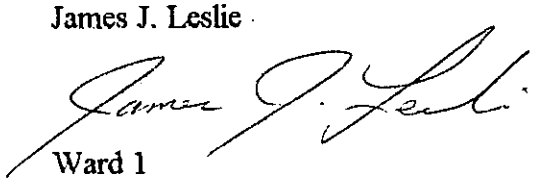
4.) Selectively applying the right to an adequate education and the funding of it, while simultaneously excluding the other 23 items listed in the same sentence of Part 2 article 83 from the same application, is grammatically impossible if the sentence is to retain any meaning whatsoever. This is alluded to in HCR_14 (#15 & 16).

5.) Failure of the Legislative and executive branches to set right, this clear violation of the separation of powers by the Court, is to deny their oath to defend the constitution. This abdication of legislative and executive duty sets a precedent for un-elected Judges to control both content and funding of any future legislation they choose to meddle in. This precedent effectively strips the citizens of New Hampshire of any true representative government whenever the Court chooses to decree from the bench what is best for us. Tyranny with noble intentions is still tyranny.

As a taxpaying, voting citizen, I respectfully request that HCR_14 be passed by the house the senate and signed by the Governor to set this violation of freedom and representative government right.

Thank You, and may God bless you for keeping your oath to Him in this Matter,
Respectfully submitted on March 5th in the year of our Lord 2003 by

James J. Leslie



Ward 1
Somersworth, NH.

STATEMENT By Leo S. Pepino FILE COPY

SB 101-FN, relative to mooring permits and fees. **MAJORITY: INEXPEDIENT TO LEGISLATE. MINORITY: OUGHT TO PASS.**

Rep. David M. Lawton for the Majority of Resources, Recreation and Development: This bill seeks to change the way in which New Hampshire lakes are added to the state moorings program. The majority of the Resources Committee believes that this change is unnecessary since the present method is working soundly. Currently, the authority to add lakes to the program rests solely with the legislature. If SB 101-FN were passed, this legislative authority would be completely by-passed and replaced by a costly Department of Safety hearing process. The committee believes that the legislature is the best avenue for citizens who wish to add new lakes to the state moorings program. It is the duty and responsibility of this "General Court" to strike a balance between the interests of shorefront property owners on a particular lake and the users of lake resources throughout the state. Since this legislative route has been proven to work well in the past there doesn't seem to be any reason to turn over this responsibility to the Department of Safety at this time **Vote 10-7.**

Rep. Judith T. Spang for the Minority of Resources, Recreation and Development: There are currently 969 lakes and ponds in New Hampshire where moorings are largely unregulated. This bill improves upon the current legislative process for reviewing entrance of lakes into the existing moorings program by substituting a hearing process which is less cumbersome, allows for hearings on location and in season, and provides for decision-making by professionals with expertise and familiarity with the lake in question.

WAYS AND MEANS

HB 762-FN-A, increasing the tobacco tax to allow for a healthy families trust fund and for increased funding for the tobacco use prevention fund. **INEXPEDIENT TO LEGISLATE**

Rep. Kevin L. Camm for Ways and Means: A majority of the committee felt that the objectives of this bill relative to teen smoking were certainly worthwhile. However, for the following reasons regarding the funding (a 50 cent increase to the cigarette tax), we voted ITL: our cigarette sales are very high (per capita) due to the impact of cross border sales; collateral damage primarily to border community businesses and resulting state tax revenues, where not convincingly addressed; damage such as lost business profits, rooms & meals, gasoline, beer and wine; and employment. Should Health and Human Services determine this program is a priority, they should first offer to incorporate the program and its associated costs in the department's budget with their other requests. This tax increase (96%) hits our low and moderate-income smokers the hardest, those that can least afford it. In reality, this program will not reduce their reliance on smoking but will certainly lower their disposable income. And finally this bill will establish another dedicated fund. **Vote 11-7.**

HCR 14, declaring the New Hampshire supreme court's Claremont decisions to be an unconstitutional violation of the separation of powers mandate under part I, article 37 of the New Hampshire constitution. **MAJORITY: OUGHT TO PASS WITH AMENDMENT. MINORITY: INEXPEDIENT TO LEGISLATE**

Rep. Robert Giuda for the Majority of Ways and Means: The Claremont decisions raise two important questions. First, should it be the policy of this state to settle for mere adequacy in education, as the New Hampshire Supreme Court directs, or should our goal be excellence. The second, and far more important question, is whether we will maintain the people's right to a government based upon a separation of powers among the branches of government, or whether we will allow one branch of government, the judiciary, to assume authority that belongs to the other branches.

Our system of government is based upon a system of checks and balances. One of these checks and balances is the separation of powers among the three branches. In the Claremont decisions, the New Hampshire Supreme Court violated the separation of powers by directing the other branches to pass legislation establishing a system of public education based upon certain parameters drawn from a decision by the Supreme Court of Kentucky.

HCR 14 does not reject the theory of judicial review. It does not assert that the Legislature, or the Governor, can "overrule" court decisions, or that courts cannot review legislation affecting education or tax policy. Rather, HCR 14 simply affirms the well settled proposition that the power of judicial review is not the power to direct the other branches to pass legislation and that, consequently, the directives by the Supreme Court in the Claremont decisions that the legislature is required to pass certain legislation based upon parameters set forth by the court are not binding upon the legislature. **Vote 9-7.**

Rep. Susan W. Almy for the Minority of Ways and Means: The minority of the committee objects strongly to the vote of OTP/A on HCR 14. By voting for this resolution, members of the majority are saying that the citizens of our state do not have the right to petition the courts for redress of their constitutional rights. The Supreme Court has not, as the majority believe, told the legislature how to fund education, but only that education, a constitutional right, must be funded, and funded in a fair and equitable manner. It is the opinion of the minority that HCR 14 is an affront to the doctrine of separation of powers. As an HCR this bill has no force of law. The minority questions the purpose of this legislation.

FILE COPY

Howard L. Wilson
POBox 91
Andover,NH 03216
603-735-5427
stoneanarch@tds.net

Ways & Means Committee
202 LOB March 5, 2003 2 PM

Re: HCR 14

~~Between the original resolution and the proposed amendment,there is nothing need be said.~~

I will credit Ken Blevens (Libertarian, for US Senate 1998) with putting forth the original idea of $zero as the criteria for an "adequate" education cost definer.And,through trickle down theory,such idea has been embedded,in HCR 14.

~~With the foregoing stated~~,I urge this committee to find HCR 14,as Ought to Pass.

For Liberty,

Howard L. Wilson

Howard L. Wilson

Per Rep. Hess:
Discussed presentation, ref. Jane (Nancy) Council DTC —
by this committee

SB#2RO

Seminar

CONTINUED FROM PAGE 4

representatives with twice his years of schooling.

Session Five - Keynote - "Undue Influence of Grant-driven Environmental Groups"

Ron Arnold of the Center for the Defense of Free Enterprise (www. cdfe.org) and author of the book "Undue Influence," presented a thorough look at environmental policy and the groups seeking to create it.

The "Environmental Movement" isn't groups like the Audubons, it's the large groups that want control like the Pew Trust, W Alton Jones, and 200 other large groups operating out of the Rockefeller offices. They get together to decide what kind of laws and regulations we'll live by. It was established in 1985. It recruits and trains people to put into the bureaucracy. Both into low-level civil service (hard to fire them) and at the top through appointments, etc.

The Nature Conservancy is the largest group with $250 million in assets. It owns the largest preservation reserves by buying them. What's not so well known is that they usually sell the land back to governments for a profit, even though they promise to manage it in perpetuity. Or they later develop the land for wealthy individuals. Mr Arnold petitioned the Solicitor General to see if this was illegal. 18 months later he came back: it was legal.

It started as a group of biologists in 1920's. The Board of Directors are all millionaires, billionaires, or on the boards of major foundations and trusts - money gained by industrialists and bankers mostly. They recently rigged an election in Nebraska over dams and irrigation.

Conservation easements, a popular tool, is a cloud on the title. It limits development rights on land so you own less than fee interest in the land. It's generally for your lifetime but really is forever. Who would buy land with a clouded title? The government, of course!

The federal government owns 1/3 of America's land. States own another 15%. City and county ownership varies due to seizures and claims. According to the 1990 census, there are 85,006 governments in this country, which includes school districts and port authorities. All of which have the power of eminent domain.

According to Prof. Schnidman of Harvard, the reality is there's no power to stop eminent domain if due process is followed and payment is made. Eminent domain isn't a police power, it's the power of a sovereign to take private property for public use without consent. It's inherent in every sovereign power. It's dormant until legislature authorizes its use or decides to limit it. Most states have same rules as the federal government.

Remember, if private property disappears but demand stays the same, what's left increases in value.

A 1972 unanimous supreme court decision, Lynch vs Household Finance Corp (405 US 538), essentially validated Madison's 1792 statement. The dichotomy between personal liberty and property rights is a false one. Property doesn't have rights, people do. Rights of property are personal rights (aka civil rights). It's useful for Bowens actions, to assert your property rights and civil rights, so cite it in your brief. Lynch also notes right to personal travel.

When dealing with statutes, fate of the property is at the mercy of the court. There have been no wins against the ESA, which trumps property rights. Annals 1 has statements on property, particularly June 8th and Aug 17th 1789.

Police power is to enforce regulation, generally to prevent use that's detrimental to others. It's the power of the sovereign to regulate property which may lower its value, so you can petition government to stop development or activity.

Local governments have no inherent power to zone, so it must be a granted power of the State. Check what the granted power is according to the statute. Zoning is a state, not federal, judicial question.

Federal involvement came from the environmental movement. President's Council on Environmental Quality helps oversee management of all environmental laws. What we need is a President's Council on Private Property which could at least act as an ombudsman, but there's been no progress yet. It could be done with an executive order since it's just an executive branch function.

Question and Answer Session

How can towns get more authority over actions from State and Federal level? Get on planning boards. Write laws for your congressman to submit and urge them to pass. If you are involved in the process you can open it up. We can also change mindset of authority. Go back to original authority: town to county to state.

You can generally challenge government money going to groups on first amendment and due process grounds.

Challenge ordinances by claiming "no rational relation to a legitimate government interest".

Can challenge zoning law at local and state level - as long as you don't violate state statute.

You can't say what it means to own something, you have a bundle of rights (fee ownership). Police power can override it with reasonable frame of reference and proper authority. Claims of ownership to require permits, or use as collateral for debts are related to police power, thwarts your ownership.

Conflict in sovereignty, personal vs governmental, can infringe our property rights. Forfeiture laws are a big problem and a challenge to our rights.

Impact Fees? Relatively new area of law, not enough case law to go on. Turn into police power or regulatory power, upheld with zoning authority. Due process issue? Fees can be challenged.

What about ANWR drilling? An estimated 16 billion barrels are available. The caribou population is 4 times higher than when drilling started. Drilling would cover only 5-8% of the proposed area. Many environmental groups have claimed the reserve would only produce 6 months worth of oil. Which is true - if we were to shut off all other sources of oil.

When dealing with statutes, fate of the property is at the mercy of the court.

Other Resources

Court cases:
Deering vs Tibbits - NH police powers and takings.
Burrows vs City of Keene (1981)
Grondin vs Town of Hinsdale (1982)

Web sites:
www.constitution.org,
www.FIJA.org,
www.versuslaw.com,
www.findlaw.com,
www.thomas.gov,
www.antishyster.com,
www.westlaw.com has a free 14-day trial, www.patriotcaucus.com is an internet law school,
www.lawschool.cornell.edu is a large resource on constitutional law.
You can get NH supreme court decisions emailed to you, plus other NH legal info is available at www.webster.state.nh.us

Books:
"Trashing the Economy" and "Handling The Land Use Case".

Ultimate Education Solution:

The Libertarian Party of New Hampshire has begun a drive to advance the ultimate solution to education — complete separation of school and state.

"The 'Live Free or Die' state is a natural for promoting separation of school and state," acknowledged party chair Danielle Donovan, "It's time the education issue is elevated. Liberty depends on it."

The Separation of School & State Alliance is at the forefront of the debate. They offer a proclamation as an expression of support for the concept. Supporters are encouraged to read and sign the proclamation.

It's time the education issue is elevated.

Proclamation

for the Separation of School & State:

Whereas, parents have both the responsibility and the right to provide for an education for their children, and

Whereas, a state-financed school system — even one that is well funded and staffed with talented, caring teachers — will not address the differing expectations parents hold for their children, and

Whereas, the assumption of parents' financial responsibility and consequent undermining of their authority leads to weaker families and societal decline, and

Whereas, the politically strongest factions inevitably use schools to shape attitudes and control the content of children's minds,

Thus, it is clear that reform of state schooling will not solve the education crisis.

Therefore, we must end government compulsion in education funding, attendance, and content. Separation of school and state is essential to restore parental responsibility and create an environment of educational freedom in which students and teachers can flourish.

By my signature below, I proclaim publicly that I favor the Separation of School and State.

X _____

Name _____

Address _____

City/State/Zip Code _____

Signed proclamations can be sent to: Separation of School & State Alliance, 4578 N First #310, Fresno, CA 93726, faxed to: (209) 292-7582, e-mail: sepschool@psnw.com, or signed on-line at: www.sepschool.org

Voting Sheets

HOUSE COMMITTEE ON WAYS AND MEANS

EXECUTIVE SESSION on HCR 14

BILL TITLE: **declaring it to be wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education.**

DATE: 3/19/03

LOB ROOM: 202

Amendments:

Sponsor: Rep. Pepino (Jasper/Hughes) OLS Document #: 0434h accepted by voice vote

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Jasper

Seconded by Rep. Hinkle

Vote: 11-7 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: NO

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Vivian R. Clark, Clerk

OFFICE OF THE HOUSE CLERK 2003 SESSION

WAYS AND MEANS

Bill #: HCR 14 **Title:** _____

PH Date: ___/___/___ **Exec Session Date:** 3/19/03

Motion: OTP/A **Amendment #:** 0434h

MEMBER	YEAS	NAYS
Major, Norman L, Chairman	11	
Gilbert, Jeffrey D, V Chairman	A	
Clark, Vivian R, Clerk	1	
Hess, David W	2	
Langone, John S		1
Giuda, Robert J	A	
Camm, Kevin L	A	
Griffin, Mary E	3	
Gibson, John M	4	
Jasper, Shawn N	5	
Hinkle, Peyton B	6	
Hughes, Daniel M	7	
Ingram, Russell F	8	
McCormick, Tom F	9	
Roessner, Kurt J	10	
Almy, Susan W		2
Davis, Frank W		3
Espiefs, Peter S		4
Hamm, Christine C		5
Hammond, Lee M		6
Pappas, Christopher C		7
	11-7	
TOTAL VOTE:		

Printed: 2/13/2003

Committee Report

F

MAJORITY
COMMITTEE REPORT

COMMITTEE: **Ways and Means**

BILL NUMBER: **HCR 14**

TITLE: declaring it to be wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education.

DATE: March 19, 2003 CONSENT CALENDAR YES ☐ NO ☒

☐ OUGHT TO PASS

☒ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

HCR 14 is a rejection of judicial activism. In its Claremont decision the court set out guidelines defining and for funding an adequate education. The Legislature should find that the court has set such standards not found within the Constitution. This resolution is not a rejection of the judicial responsibility to measure the constitutionality of legislation relating to education or tax policy. It, in fact, makes clear that the Legislature understands and respects the separation of powers. This resolution takes the pulse of the Legislature. The minority questions the purpose of the resolution. That purpose is to make it clear that we find the lines of responsibility between the judicial and legislative branches have been crossed in the Claremont decisions. HCR 14 can be seen as a measure of our resolve to defend our constitutional responsibilities in the future. Justice Horton said it best when in his dissent he stated: "My problem is that I was not appointed to establish educational policy, nor to determine the proper way to finance the implementation of this policy...Those duties, in my opinion, reside with the representatives of the people... My job is to determine whether the structures for providing and financing education.....meet the mandates of the Constitution."

Vote 11-7.

Rep. Shawn N. Jasper
FOR THE MAJORITY

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

Ways and Means

HCR 14, declaring it to be wrongful for the judiciary, either directly or indirectly, to define an adequate education or the cost of an adequate education. **OUGHT TO PASS WITH AMENDMENT**

Rep. Shawn N. Jasper for the Majority of Ways and Means: HCR 14 is a rejection of judicial activism. In its Claremont decision the court set out guidelines defining and for funding an adequate education. The Legislature should find that the court has set such standards not found within the Constitution. This resolution is not a rejection of the judicial responsibility to measure the constitutionality of legislation relating to education or tax policy. It, in fact, makes clear that the Legislature understands and respects the separation of powers. This resolution takes the pulse of the Legislature. The minority questions the purpose of the resolution. That purpose is to make it clear that we find the lines of responsibility between the judicial and legislative branches have been crossed in the Claremont decisions. HCR 14 can be seen as a measure of our resolve to defend our constitutional responsibilities in the future. Justice Horton said it best when in his dissent he stated: "My problem is that I was not appointed to establish educational policy, nor to determine the proper way to finance the implementation of this policy...Those duties, in my opinion, reside with the representatives of the people... My job is to determine whether the structures for providing and financing education.....meet the mandates of the Constitution. **Vote 11-7.**

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Representative Shawn N. Jasper
For the Majority of Ways and Means

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MINORITY
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(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

In declaring that the directives of the judicial branch are not binding upon the legislative and executive branches, this resolution defies the concept of a tripartite, co-equal division of governmental authority, the system of checks and balances established by the framers of the United States Constitution and reaffirmed in *The Federalist Papers* and by more than two centuries of court decisions. The resolution questions the judicial branch's most basic responsibility, the right to interpret the state's constitution. Members of the committee believe that, carried to its logical conclusion, such an assertion threatens the basic rights of all members of society to seek judicial redress. Passage of the resolution, while non-binding in law, is an impediment to effective governance and an unworthy use of legislative power.

Vote .

Rep. Christine C. Hamm
FOR THE MINORITY

Original: House Clerk
cc: Committee Bill file

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Ways and Means

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