Claremont I and II - Were They Rightly Decided, and Where Have They Left Us?

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INTRODUCTION

Our children embody the enduring wonder of life. They hold our hopes for the future. We want them to be happy, to succeed in whatever they do both in work and in play. We want them to contribute to our country and the world in constructive ways.

But for these hopes to be realized our children must be educated—they must possess the requisite skills and knowledge to function well in this ever-changing world. Yet, are we, as a society, meeting our responsibility to educate our children? What do we expect of our public schools? How important are these schools to us? Is a public education fit for the times guaranteed as a constitutional matter?

These questions loomed large in the New Hampshire Supreme Court’s decisions in Claremont I and Claremont II, issued respectively in 1993 and 1997.1 Constituting New Hampshire’s core education rulings, they are among the Court’s most controversial exercises of constitutional jurisprudence.2

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1 Claremont Sch. Dist. v. Governor (Claremont I), 635 A.2d 1375 (N.H. 1993); Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353 (N.H. 1997).
2 Claremont I and Claremont II were followed by a number of other decisions going into 2008, though many of these were not directly related to the actual Claremont litigation. See, e.g., Claremont Sch. Dist. v. Governor (Claremont III), 712 A.2d 612 (N.H. 1998) (dismissing challenge to Justice Batchelder’s participation in Claremont II); Opinion of the Justices (School Financing) (Claremont IV), 712 A.2d 1080 (N.H. 1998) (declaring that the proffered “ABC” funding plan did not pass constitutional muster); Claremont Sch. Dist. v. Governor (Claremont V), 725 A.2d 648 (N.H. 1998) (denying the State’s request for an extension of time to enact a constitutional funding scheme); Opinion of the Justices (Tax Plan Referendum) (Claremont VI), 725 A.2d 1082 (N.H. 1999) (declaring a proposed tax plan referendum to be inappropriate); Claremont Sch. Dist. v. Governor (Claremont VII), 744 A.2d 1107 (N.H. 1999) (declining to sustain a “phase-in” for a state property tax scheme); Claremont Sch. Dist. v. Governor, (Claremont VIII), 761 A.2d 389 (N.H. 1999) (granting attorney’s fees to
Instituted in 1991 in the Merrimack County New Hampshire Superior Court by five “property poor” school districts, five students, and eight taxpayers and parents, the Claremont litigation broadly challenged, on several state constitutional grounds, New Hampshire’s funding of public education. The Superior Court (Manias, J.) initially dismissed the litigation, holding that it failed to present claims for which relief could be granted under State constitutional law.

In Claremont I, however, the New Hampshire Supreme Court unanimously reversed this dismissal. It construed Part II, Article 83 (Article 83) of the State Constitution as reposing duties upon the State, enforceable in court, to provide “a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding.” Article 83, the education provision of the State Constitution, provides in pertinent part:

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.

The Supreme Court declined in Claremont I to define the specifics of a constitutionally adequate education or the means to provide for it, deferring
“in the first instance” to the Legislature and Governor, though it declared that “a free public education is at least an important, substantive right,” one “held by the public to enforce the State’s duty.” Further, Claremont I barely discussed the petitioners’ contention—one that would prove critical in Claremont II—that the education funding system’s reliance on local property taxes, with varying tax rates, violated State Constitution Part II, Article 5’s (Article 5) requirement that taxes be imposed and levied so that they are “proportional and reasonable.” The Court remanded the case to the Superior Court for further proceedings.  

A trial took place in mid-1996 and extended over six weeks. The Superior Court again ruled for the State. In a detailed decision, with many findings of fact, the Superior Court concluded that the petitioners had not proven:

- that the education system failed to provide in the petitioner school districts constitutionally adequate education;
- that the education system failed to provide in those districts constitutionally adequate funding;
- that the education system violated equal protection rights; or
- that the education system, despite its heavy reliance on local property taxes for funding, failed to pass muster under Article 5.

In Claremont II, however, the Supreme Court reversed the Superior Court’s decision based only in regard to the lower court’s tax ruling, the fourth bullet above. It held that the locally levied property tax that supported education constituted a form of “State tax,” and this “State tax,” with its “varying property tax rates,” impermissibly impacted taxpayers in a disproportionate and unreasonable manner, contrary to Article 5.  

Although the Claremont II Court did not squarely consider whether the Superior Court had otherwise erred in sustaining as constitutional the State's system of education, it nonetheless elaborated on the nature of the right to an “adequate” education beyond what the Superior Court had done, and it classified “a State funded, constitutionally adequate public education” as a “fundamental right” reviewable pursuant to “a standard of strict judicial scrutiny.” It also expressly declared the Superior Court’s reliance on an

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8 Claremont Sch. Dist. v. Governor (Claremont I), 635 A.2d 1375, 1381 (N.H. 1993).
9 Id. at 1377; N.H. Const. pt. 2, art. V.
10 Id. at 1382.
12 Id. at 1357.
13 Id. at 1358–59.
education adequacy definition created by the State Board of Education to be inappropriate, thus suggesting that an incorrect legal measuring rod for “adequacy” had been applied. Moreover, contrary to certain of the Superior Court’s core findings and conclusions against the petitioners, it described the record, “[r]egardless of . . . [the measure used to] meet the test for constitutional adequacy, [as] demonstrat[ing] that a number of plaintiff communities are unable to meet existing standards despite assessing disproportionate and unreasonable taxes.” As to a remedy, the Court directed the other two branches of Government, subject to a deadline, to make education and finance reforms so that the State would provide a constitutionally adequate public education through taxes that met the dictates of Article 5.

Some commentators decry these decisions as exemplifying judicial activism at its worst. They accuse the New Hampshire Supreme Court of failing to stay within proper judicial bounds, acting in disregard of constitutionally derived doctrines such as separation of powers and avoidance of political questions, and irresponsibly embroiling itself in education issues beyond its authority and its ability to craft a remedy.

Others, however, vigorously defend the decisions. They see them as beacons of judicial statesmanship, which, if anything, did not go far enough to confront the State’s longstanding failure to provide New Hampshire school children with the education the Constitution mandates.

14 Id. at 1357–58.
15 Id. at 1357. Though the Court made this quoted statement in the context of reaching its tax ruling, the statement certainly suggests that the Court had serious questions concerning the findings underlying the Superior Court’s other rulings. Id.
16 Id. at 1360–61.
18 See, e.g., Andru H. Volinsky, New Hampshire’s Education-Funding Litigation: Claremont School District v. Governor, 635 A.2d 1375 (N.H. 1993), Modified, 703 A.2d 1353 (N.H. 1997), 83 NEB. L. REV. 836, 855 (2005) (“[T]he court must not falter under legislative and executive attack. Our New Hampshire Constitution is the repository of important rights, and those rights cannot be protected absent faith in the viability of our courts as an equal branch of government”); Thomas P. Connair, Preface to The Claremont Education Lawsuit, CLAREMONT LAWSUIT COALITION (1998) http://www.claremontlawsuit.org/infobook/preface.html (“Born out of a concern for our children and their education, this case is a tribute to the vision of our Founding Fathers that education was essential to the preservation of a free government, and a
This article concludes that the New Hampshire Supreme Court correctly determined in *Claremont I* that Article 83 established enforceable positive constitutional rights for the provision and funding of an adequate public education. The Court acted properly in recognizing that the judiciary had an important role to play to assure these important constitutional rights. *Claremont I* properly upheld the State’s constitutional obligation to accord the State’s public school children with access to an education that would at all times enable them to be good citizens productive in their work. The decision also reflected proper regard for the prerogatives of the elected branches by leaving to them, at least initially, the development of an operational definition of “adequacy” in education, along with the responsibility to fashion “the appropriate means” to provide for it.19

The *Claremont II* decision, however, does not earn like approbation. It fails to stand up strongly as a tax ruling. It does not constitute a good appellate review of the other Superior Court rulings against the petitioners. The Court majority, after issuing its decision, deferred to the elected branches to give them time to fashion a remedy. Its decision, however, was not well received, or easily accepted, by many in the Legislature. Only after much resistance and much delay did the elected branches manage to put in place certain educational “adequacy”/funding reforms.

Whatever their merits or flaws, this article sees these two decisions as having importantly and positively impacted New Hampshire’s public education system. The decisions had a good deal to do with ushering in needed reforms, so that the education system now operates with a specific definition for a constitutionally adequate education, regular assessment and accountability tools, and a “costing out” of “adequacy” linked to associated funding. The decisions have thus better positioned the public education system to meet the challenges of the future.

In critically revisiting *Claremont I* and *Claremont II*, this article proceeds in three parts. Part I reviews the background of the *Claremont* litigation in New Hampshire; its place among like litigation across the country; the issues the suit initially raised; the manner in which the case proceeded, including the Superior Court rulings; and the issues the Supreme Court actually confronted and those it avoided in the two decisions.

Part II analyzes the defensibility of both *Claremont I* and *Claremont II*. It considers whether the Supreme Court correctly construed the pertinent state constitutional provisions, whether it should have entered the education

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19 *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1381 (N.H. 1993).
adequacy/funding fray, and whether the Court properly carried out its appellate role in Claremont II.

Part III addresses the enduring legacy of the decisions, whether they were rightly or wrongly decided, and, in particular, whether the response to these decisions has left New Hampshire with a better system of public education.

I. CLAREMONT I AND CLAREMONT II

1. Background

a. In New Hampshire: The History Leading Up to the Filing of the Litigation

New Hampshire has insisted upon the provision of public education in some form since colonial times. Indeed, Article 83 of the State’s 1784 Constitution explicitly enshrined the obligation to “cherish” education. However, many considered, as the Claremont litigation itself reflects, that the Legislature and Executive failed over the years to effectively meet the constitutional duty to offer and fund public school education throughout the State.

The Legislature early on, in 1789, created a state tax on polls and estates for education with the revenues to be raised and spent locally. It also

20 See Claremont I, 635 A.2d at 1379; Brief for the Ralph Degnan Hough, President of the New Hampshire Senate at 21–39, Claremont Sch. Dist. v. Governor, 138 N.H. 183 (1993) (No. 92-711) [hereinafter Hough Brief] (describing education in New Hampshire going back to the colonial period, and seeking to show the State’s commitment to the provision of public education over time). See generally EUGENE A. BISHOP, THE DEVELOPMENT OF A STATE SCHOOL SYSTEM IN NEW HAMPSHIRE (N.Y.C., Teacher’s Col., Columbia Univ., 1930). But see Edward C. Mosca, The Original Understanding of the New Hampshire Constitution’s Education Clause, 6 PIERCE L. REV. 209, 235–36 (2007) [hereinafter Mosca, Original Understanding] (“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’ to mean, they certainly did not understand it to require the sort of ‘adequate education’ fashioned by the Claremont decision. Indeed, they would not have understood it to require universal public education.”).

21 N.H. CONST. pt. 2, art. LXXXIII.

22 The tax worked as follows: “The legislature set the total amount of spending [for education] for the year. In 1790, it set the amount at approximately the pound equivalent of $16,500. . . . 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. For example, if a town’s taxable wealth comprised two percent of 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.” Mosca, Original Understanding, supra note 20, at 229–30. While the tax reflected
required local communities of a certain size to maintain certain types of schools and meet certain curriculum standards. The State acted over the years and into the twentieth century to increase the tax for education funding, and to exercise, in various ways and degrees, oversight and control of the localities' education efforts.

Nonetheless, the actual support the State provided, or required, to assure good public education in all its areas or regions never matched the expressed constitutional imperative or its underlying ideals. Such was the condition of public education in New Hampshire as of 1900 that one commentator described it as “not a pleasing one.”

With the exception of larger towns where education was taken seriously, most of the teachers were not only untried but had limited education, school houses left much to be desired in terms of sanitation, neatness, and comfort, the school boards were more concerned with the local tax rate than they were with the welfare of children, supplies and text were severely limited, and there was little evidence of

the acceptance by the State of responsibility for public education, it resulted in markedly different amounts being raised by different towns in a manner not related to actual school needs. Id. See also Walter A. Backhoven, Claremont's Achilles Heel: The Unrecognized Mandatory School-Tax Law of 1789, 43 N.H.B.J. 26, 26–27 n.16 (2002).

23 The law required that all towns provide "English Grammar School or Schools for teaching reading, writing and arithmetic," though "shire towns," or “half shire towns" had to offer “a grammar school for the purpose of teaching the Latin and Greek languages as well as reading, writing, and arithmetic.” Douglas E. Hall, Lessons from New Hampshire: What We Can Learn from the History of the State's Role in School Finance 1642-1998, NEW HAMPSHIRE CENTER FOR PUBLIC POLICY STUDIES 3 (1998) http://www.nhpolicy.org/UploadedFiles/Reports/history1.html.

24 Though the original amount allocated for education under the Law of 1789 equaled the approximate equivalent of $16,500, by 1905 this had been increased to $750,000, with the property subject to taxation expanded over time to include improved and unimproved land and buildings of non-residents, and with the towns and districts allowed to raise additional sums for education by further taxation. See Backhoven, supra note 22, at 27; Hall, supra note 23, at 4. In 1828, moreover, the State, through a “Literacy Fund” started to distribute monies to the towns. See GEORGE G. BUSH, HISTORY OF EDUCATION IN NEW HAMPSHIRE 17 (Washington D.C. Government Printing Office 1893); WILLIAM H. MANDREY, A SUMMARY OF THE DEVELOPMENT OF THE NEW HAMPSHIRE STATE DEPARTMENT OF EDUCATION 1900-1965 1 (N.H. Dep't of Educ., 1968); BISHOP, supra note 20, at 43; Holbart Pillsbury & Huntley H. Spaulding, Resources, Attractions, and its People, A History, in A CLAREMONT READER supra note 17, at 21. The State’s actual control and oversight of the education effort of the localities also proceeded, with school districts established in the early 1800s, and various forms of local/state superintendence utilized throughout the nineteenth century and going into the early twentieth century. See generally Pillsbury, supra, at 20–25; MANDREY, supra, at 1–8.

25 See MANDREY, supra note 24, at 2.
professional supervision. Transportation, where furnished, was poor, there was no requirement for the number of school days to be in session and compulsory attendance was unknown. ... [Though] ... the high schools were frequently well treated ... [m]any towns refused to pay tuition and so parents were forced to provide both the funds and the transportation to the schools. Many able youngsters were deprived of a high school education because their families couldn’t afford to pay nor solve transportation problems.  

In 1919, the evident deficiencies of the education system triggered major reforms. The Legislature, with the strong prodding and backing of then Governor John H. Bartlett, enacted “the Great School Law of 1919.” This aimed at greatly strengthening the State's role in education and making the supporting funding scheme more equitable with a better measure of direct state support.

The reform measures included a new State Board of Education, a centralized authority to work to achieve, among other things, equalization of educational opportunity; a Commissioner of Education to be employed by the State Board to act as its chief executive officer; the establishment of minimum standards, including a minimum school year of thirty-six weeks, for defined “standard schools”; the creation of a state-wide supervisory system for schools; and a new finance system.  

This new finance system featured the local property tax as the principal revenue source, capped and floored, however, as to tax rates, with a form of equalization/foundation aid

26 See Mandrey, supra note 24, at 2-3. In regard to the tax system of that time, the State opined in its Claremont II brief: “By the early 1900’s the [tax] system had become entirely unworkable. Whatever multiplier the State set [that is, its steps to increase the required tax] resulted in some towns raising far too little and others raising far too much.” Brief for the State at 82–83, Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353 (N.H. 1997) (No. 97-001) [hereinafter Brief for the State]. Further, the tax system’s equity problems were worsened by the manner of distribution of the tax revenues by the towns to the school districts that from 1805 until 1885 were allowed by law to exist as subdivisions of towns and had become quite numerous (indeed at one point exceeding 2000). Id. Poorer school districts within a town did not fare well in the division of revenues. Id. See also Bishop, supra note 20, at 39 (describing the bad impact of the 1805 “districting law” as follows: “the dividing and subdividing into districts increased until the school units, in a great number of cases, were so small as to make effective support absolutely impossible”). Overall, the system resulted in “the village school provid[ing] an education far superior to that available in rural areas.” Brief for the State, supra, at 83.

27 See Bishop, supra note 20, at 102–10; Hall, supra note 23, at 11–15; Mandrey, supra note 24, at 8–13.
coming directly from the State. The Great School Law of 1919 established the core structural framework for education and funding that was still essentially in place at the time of the institution of the Claremont litigation.

State funding for education, however, remained a major concern. In 1947, another major education reform effort took place. This included a large but temporary increase of direct State support, accompanied by measures that, among other things, called upon the State to provide more direct funding both through a "general aid" program and through a reformed foundation aid program. The money was meant to assist school districts that could not finance cost-defined education programs for elementary and middle school students and also, for the first time, high school students, with a local property tax capped at $6.00 per thousand of equalized valuation of the district. Yet, the Legislature soon failed to appropriate monies contemplated by these measures.

In 1971, the Laconia Board of Education pursued litigation that, among other issues, sought to challenge the constitutionality of the State’s education funding system as violative of equal protection guarantees under the Federal Constitution. The New Hampshire Supreme Court, however, “declined to decide the constitutional question in part because its resolution ‘would require . . . a financial and statistical background which is not available in this case or in this record.’”

In the 1980s, education proponents continued to seek to decrease the State’s reliance on local property taxes and to increase state funding. These efforts centered on attempts to increase State foundation aid. In 1982, along these lines, several school districts, and a number of students and taxpayers...

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28 Simply put, foundation aid programs generally sought to meet a defined or determined education cost per student in a district through local property tax contributions, supplemented where needed, and to assure the defined or determined foundation education cost, by extra funds coming particularly from the state. BISHOP, supra note 20, at 102–10; Hall, supra note 23, at 6, 11–15; MANDREY, supra note 24, at 8–13.
30 Fillion, supra note 29, at 78–87; Hough Brief, supra note 20, at 37–40; Hall, supra note 23, at 7–8; MANDREY, supra note 24, at 27–28.
31 Drew Dunphy, Moving Mountains in the Granite State: Reforming School Finance and Defining Adequacy in New Hampshire, 2 STUD. IN JUD. REMEDIES AND PUB. ENGAGEMENT, No. 4, 2001, at 5; Hall, supra note 23, at 8; MANDREY, supra note 24, at 28.
instituted a funding equity suit in the Merrimack Superior Court known as *Jesseman v. State of New Hampshire*. This suit invoked Article 83, and contended that the State’s system of school finance, with its heavy reliance on local property taxes, failed to enable the proper realization of education in all districts for all children. The suit ended inconclusively, however, in 1985 when the State integrated a new needs-based targeted Foundation Aid program into the education funding mix, known as the “Augenblick formula.”

Though some saw the “Augenblick formula” program as establishing the general goal of having the State cover at least eight percent of overall educational expenditures through foundation aid, the program did not obtain the funding to accomplish this. Its perceived under-funding, coupled with the view that it in any event did not go far enough to reform the education financing system, had much to do with bringing about the *Claremont* litigation.

By the early to mid-1990s, about the time the *Claremont* litigation was being pursued, the State was exercising significant responsibility both in the funding and the delivery of public education. It provided direct funding primarily through Foundation Aid, Building Aid, and Catastrophic Aid (aid for special education); it had in place Minimum Standards for School Approval that included comprehensive requirements concerning a large range of matters; it had developed curricular frameworks to serve as guides for effective curriculum development; and it had begun to offer a state-wide testing program, known as the Education Improvement and Assessment Program, to provide a measure of student competency and achievement.

The State’s Department of Education (NHDOE), headed by the Commissioner of Education and working with the State Board of Education (State Board), was tasked with providing regulatory direction, monitoring,

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35 Id.
37 Dunphy, *supra* note 31, at 5; Hall, *supra* note 23, at 10; Volinsky, *supra* note 18, at 840. In *Claremont V*, the Court observed that the State’s Attorney General had acknowledged in oral argument that “the funds anticipated to be distributed under the Augenblick Formula were never appropriated.” *Claremont V*, 725 A.2d at 649.
38 Dunphy, *supra* note 31, at 5.
evaluative oversight, and instructional assistance to schools (including handling compliance with Minimum Standards for School Approval and administration of the state-wide testing program).\footnote{N.H. REV. STAT. ANN. §\textsuperscript{1} 21-N:1-11 (2007); N.H. REV. STAT. ANN. § 186:40-a (2015); N.H. REV. STAT. ANN. §§ 193-C:3 (2013).} Among its other responsibilities, the NHDOE acted to administer and channel federal aid through various programs to school districts, to administer the teacher certification rules adopted by the State Board, and to play a major role in the creation and administration of a number of vocational technical centers throughout the State—centers that enjoyed substantial state financial support.\footnote{See, e.g., N.H. REV. STAT. ANN. § 21-N:11 (2007).} The State Board served to manage the whole education system, with power to hear and resolve certain education disputes, and develop and issue regulations.\footnote{See generally N.H. REV. STAT. ANN. §§ 186:1-11 (2015).}

Yet, it remained the case that the school districts (operating through SAUs or School Administrative Units) continued to bear the major responsibility for providing public education, largely without, even in the minds of certain NHDOE officials, sufficient state oversight or involvement.\footnote{See, e.g., Transcript of Record Vol. 1 at 81–85, 172–77, Vol. 28 at 92–96, Claremont Sch. Dist. v. Governor, No. 91-E-0306 (N.H. Super. Ct. Dec. 6, 1996) (testimony of retired NHDOE Commissioner Charles Marston and William Ewert, NHDOE Administrator of Policy Development Initiatives and Director of the New Hampshire Education Improvement and Assessment Program).} The localities often seemed to strain—and arguably failed—to obtain the needed funding for their schools. The undisputed reality was that since 1919 local revenues in the form of local property taxes provided a very large portion—up to about ninety percent—of total school revenue, and New Hampshire regularly placed last in the country in direct State aid to education.\footnote{Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353, 1354–56 (N.H. 1997).}

By 1989, the Claremont School District had initiated major cuts in its education programs.\footnote{Volinsky, supra note 18, at 840.} It also failed to make needed building repairs and indeed came to lose its high school accreditation.\footnote{Id. at 841.} The Claremont School
Board, led by its chairperson, Thomas Connair, himself an attorney, began to explore a litigation strategy to obtain more State funding.\footnote{Id. at 839.}

Mr. Connair convinced Arpiar Saunders, Esq., then a professor of constitutional law at the Franklin Pierce School of Law in Concord, New Hampshire, to institute school funding litigation.\footnote{Id.} Two other attorneys, Andru H. Volinsky, Esq., and John Burwell Garvey, Esq., agreed to work with Professor Saunders.\footnote{Id.} Four additional school districts (Allenstown, Franklin, Lisbon Regional, and Pittsfield), eight taxpayers and parents, and five students joined the litigation as petitioners, and the case was filed “with some fanfare” in June, 1991.\footnote{Id. at 841.}

b. Elsewhere

While the Claremont case was prompted by what many saw as the State’s long-term failure to meet its constitutional duty to “cherish” the public education of its school children, it also stands as one of a number of law suits across the country that commentators have classified as the “third wave” of education quality/education funding litigation. These “third wave” suits are based on the education clauses in state constitutions, and they generally seek to have the state courts recognize and enforce constitutional provisions positively imposing upon the states the duty to provide an education often described by the term “adequate.”\footnote{See, e.g., Christopher E. Adams, Is Economic Integration the Fourth Wave in School Finance Litigation, 56 EMORY L.J. 1613, 1619-22 (2007) (discussing the three “waves” of litigation); Kelly Thompson Cochran, Beyond School Funding: Defining the Constitutional Right to an Adequate Education, 78 N.C. L.REv. 399, 413–17 (2000); Amy L. Moore, When Enough Isn’t Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts, 41 U. TOL. L. REV. 545, 555–56, 560 (2010); Mosca, NH’s Claremont Case, supra note 17, at 411–13.}

The first of the above-referenced three “waves” of litigation started in the late 1960s and was based on Fourteenth Amendment claims under the federal Constitution’s guarantee of equal protection. This “wave,” however, was essentially broken in 1973 by the United States Supreme Court’s decision in San Antonio School District v. Rodriguez. 411 U.S. 1 (1973). In that case, involving an equal protection class action challenge to Texas’ significant reliance on local property taxes to fund education, the United States Supreme Court manifested strong reluctance to expand the reach of federal equal protection and involve the courts in education funding disputes. \textit{Id.} at 17–18. It deemed the asserted wealth-based discrimination and improper infringement on educational opportunity stemming from local property tax usage to call for no more than “rational basis” equal protection review, not the “strict scrutiny” review generally undertaken when “fundamental rights” were implicated. \textit{Id.} at 37–39. On that basis,
The “adequacy” suits trace their roots to the seminal, indeed epochal, decision of *Brown v. Board of Education*, where the United States Supreme Court, in abandoning the notion that “separate but equal” race-divided education passed constitutional muster, firmly recognized that our nation’s continued democratic vitality depended on the offering of equal opportunity to good education. As the Court then pointedly stated: “[E]ducation is the very foundation of good citizenship . . . it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”

The Court concluded that the challenged tax system passed constitutional muster as it could be seen as legitimately promoting local control of education. *Id.* at 49–51. The Court majority (*Rodriquez* was a 5–4 decision) did not entirely close the door to relief under the federal Constitution to assure at least some level of public education—indeed in a later case in 1986, the Court expressly noted that it had still not “definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.” See Papasan v. Allain, 478 U.S. 265, 285 (1986); *see also* Kadramus v. Dickinson Pub. Sch., 487 U.S. 450, 466 n.1 (Marshall, J. dissenting) (stating that the question “remains open today”); cf. Plyer v. Doe, 457 U.S. 202, 221 (1982) (applying an intermediate level of equal protection scrutiny in regard to a challenge to a state’s denial of education access to children of undocumented aliens). Nonetheless, *Rodriquez* worked effectively to hamper the utilization of the federal equal protection clause as the linchpin for education quality/education funding litigation challenges. Adams, *supra*, at 1619; Moore, *supra*, at 558.


Yet this “wave” stalled going into the late 1980s with many state courts increasingly manifesting unwillingness to invalidate state education finance systems, or take on the task of crafting remedies for them, squarely on the basis of an educational equity approach. See generally *Michael A. Rebell, Courts & Kids: Pursuing Educational Equity Through the Courts* 16–17, 133–34 n.11 (2009). Beginning in about 1989, a third “wave” of litigation emerged, the *Claremont* case among them. Mosca, NH’s *Claremont Case*, supra note 17, at 411–12.

While perhaps helpful in describing legal developments, the “wave” metaphor, particularly in regard to the second and third “waves” of suits, is far too simplistic. Cases in the time frames of the “waves” often blended equity and adequacy concerns, and adequacy determinations certainly have a strong equity dimension. The *Claremont* litigation had adequacy and equity aspects, in regard to both students and taxpayers.


56 *Id.* at 493.
To be sure, “adequacy” suits do not focus on achieving school desegregation. Rather, they seek to assure that all children, whether located in poor or rich areas, are offered a proper education. They challenge funding practices, but they look beyond the funding issues to the quality of the education itself.

All of the post-Brown education quality/funding cases, no matter the “wave” with which they have been associated, gained impetus from the nation’s failure to achieve the goal of desegregated schools. All of them sought to confront and eradicate the continued enormous disparities in education opportunity based on socio-economic and race/ethnic status.

In *Parents Involved in Community Schools v. Seattle School District*, the United States Supreme Court markedly curtailed voluntary school desegregation plans. In so doing, the Court strengthened the withdrawal of the federal courts from the school desegregation struggle—something that had been occurring since the early 1970s. As this withdrawal proceeded, the nation experienced “a clear trend of rising resegregation.” The result was that black and Latino students attended predominantly minority schools in markedly higher percentages, and schools in high-poverty areas became overwhelmingly populated by minority students. The persisting education gap today is stark and threatens our national wellbeing.

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57 See infra notes 58–63 and accompanying text.
59 REBELL, supra note 54, at 1–2, 126 nn.1–10 (describing this retreat, which included decisions, like *Missouri v. Jenkins*, 515 U.S. 70 (1995), that moved federal district courts to terminate desegregation decrees).
60 Id. at 2.
61 Id. Rebell underscores Justice Breyer’s dissent in *Parents Involved in Community Schools v. Seattle School District*, where it was “noted that in 2000, over 70 percent of all black and Latino students attended predominantly minority schools, a higher percentage than thirty years earlier . . . [and] between 1980 and 2003, the percentage of white students in schools attended by the average black student fell from 45 to 29 percent.” 551 U.S. at 803–69 (Breyer, J., dissenting).
62 REBELL, supra note 54, at 2, 126–27 n.11 (citing data indicating that “black and Latino students make up 80 percent of the student population in high poverty areas,” with high poverty schools defined as having 90-100 percent of the student population as poor).
63 As was stated in the 2013 report “For Each and Every Child”:

> While some young Americans—most of them white and affluent—are getting a truly world-class education, those who attend schools in high poverty neighborhoods are getting an education that more closely approximates school in developing nations. In reading, for example, although U.S. children in low-poverty schools rank at the top of the world, those in our highest-poverty schools are performing on a par with children in the world’s lowest-achieving countries. With the highest poverty rate in
Shortly prior to Claremont, similar litigation in certain other states (Kentucky, Texas, and Montana) had been successful. Moreover, as the Claremont litigation proceeded through the 1990s, school-funding litigation in both Massachusetts and Vermont was also being pursued, and these cases resulted in favorable rulings for the plaintiffs. The times thus seemed to favor a renewed “adequacy-equity” litigation challenge in New Hampshire.

2. The Early Proceedings

a. The Issues and Relief Sought

Initially, the Claremont petitioners advanced six counts in their “Petition for Declarative and Injunctive Relief.” They claimed:

- Count I: New Hampshire’s system of financing education “failed to spread the opportunities and advantages of education equitably” among students, thereby failing “to diffuse knowledge and learning generally throughout the State” in violation of Article 83.

- Count II: the State “failed to adequately and equitably fund public elementary and secondary schools” at levels consistent with the education duty owed by virtue of Article 83.

- Count III: the State’s foundation aid statutes, RSA 198:27-33, worked to unconstitutionally cap or restrain state aid to public education at eight percent “in direct violation of the constitutional requirement that education be adequately funded and that the opportunity and advantage be spread equitably among all New Hampshire students attending elementary and secondary public schools.”


• Count IV: the State's system of financing education violated “the equal protection requirements of the New Hampshire State Constitution.

• Count V: the foundation aid statutes (see Count III) also constituted an equal protection violation.

• Count VI: the State's heavy reliance on local property taxes to finance schools violated State Constitution Article 5 as it constituted an “unreasonable, disproportionate, and burdensome” tax.66

The Petition highlighted what the petitioners claimed were large disparities among the State’s school districts in ability to finance education through local property taxation, and the low level of the State’s direct contribution to education funding.67 As described by one of the petitioners’ attorneys, the petitioner school districts were “failed mill towns that lacked a ski hill or lakefront property and were not located on the state's two interstate highways.”68 These districts, it was claimed, did not come close to having the same fiscal ability to raise taxes as the property-rich districts, and did not offer at all a comparable education.69

The individual petitioners looked to obtain class-action status to represent students and taxpayers in the petitioner school districts.70 For relief, the petitioners sought a declaration that the State’s system of education finance was unconstitutional and appropriate injunctive relief absent prompt constitutional compliance by the State.71

b. Motion to Dismiss and Superior Court Order

The State, through the New Hampshire Attorney General, moved to dismiss all of the petitioners' counts. It asserted that the petition failed to advance “justiciable” claims,72 was barred by the doctrines of official,
legislative and sovereign immunity, and did not offer any proper substantive grounds for the granting of any relief.\textsuperscript{73}

The case had been specially assigned to Superior Court Associate Justice, George L. Manias, an experienced jurist.\textsuperscript{74} By order dated August 13, 1992, Judge Manias granted the State's motion, not because of any justiciability concern, but on the ground that the petitioners had failed to state a substantive claim for which relief could be granted.\textsuperscript{75}

Judge Manias characterized the State's justiciability arguments as "meritless."\textsuperscript{76} He gave short shrift to the State's argument that the political question doctrine\textsuperscript{77} rendered the case nonjusticiable "due to the 'lack of judicially discoverable and manageable standards for resolving it [and] the impossibility of deciding it without an initial policy determination of a kind clearly for nonjudicial discretion.'"\textsuperscript{78} Judge Manias underscored that "[t]he courts have the duty to interpret constitutional provisions," and observed that "[t]he issues raised in the plaintiffs' petition are no more political questions than any other constitutional challenges."\textsuperscript{79}

Nor was Judge Manias persuaded by the State's argument that "this matter is nonjusticiable because the Court is incapable of fashioning an adequate remedy with regard to the plaintiffs' equal protection claims," that "courts generally lack the institutional ability to assess the constitutionality or the 'equity' of expenditure differences by reference to individual pupils' educational needs."\textsuperscript{80} He noted that "[o]nce again [the State] ignore[s] the fact that the interpretation of constitutional provisions is the Court's duty [and] . . . [t]he Court is certainly capable of determining the existence of any constitutional rights or obligations between the parties and leaving the legislature to enact laws in compliance with the standards determined by the Court."\textsuperscript{81} He also rejected the State's immunity contentions, noting that the State was not immune from suit in "a declaratory judgment action

\textsuperscript{73} Order on Mot. to Dismiss (Manias Order), Claremont Sch. Dist. v. Governor (Claremont I), No. 91-E-0306-B at 1 (Merrimack Cty. Super. Ct. Aug. 13, 1992).
\textsuperscript{74} Judge Manias was appointed to the bench in 1985 by Republican Governor John Sununu, and retired in 2005.
\textsuperscript{75} See Manias Order.
\textsuperscript{76} Id. at 2.
\textsuperscript{77} Put simply, under this doctrine the Courts stay away from deciding matters that too much implicate the political workings and responsibilities of the other branches of government.
\textsuperscript{78} Manias Order, at 3-4.
\textsuperscript{79} Id. at 4 (citation omitted).
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 5 (citations omitted).
challenging the constitutionality of State action,” and that the defendant officials were being sued in their official capacities. 82

Judge Manias went on, however, to rule that the petitioners’ claims were not reasonably susceptible to a construction that would permit recovery. With respect to Counts I and II of the Petition that alleged violations of Article 83, Judge Manias observed that this Article did not “set forth any standards by which the court may identify . . . a duty [owed to the petitioners] and determine whether [the State has] breached that duty.” 83 He explained:

[The] . . . clause contains no language regarding equity, uniformity, or even adequacy of education. Thus, the New Hampshire Constitution imposes no qualitative standard of education which must be met. Likewise, the New Hampshire Constitution imposes no quantifiable financial duty regarding education; there is no mention of funding or even of “providing” or “maintaining” education. The only “duty” set forth is the amorphous duty “to cherish . . . public schools” and “to encourage private and public institutions.” The language of pt. 2, art. 83 is hortatory, not mandatory. 84

Judge Manias also ruled that the petitioners did not raise a viable claim in Count III in regard to the foundation aid statutes. This count, in his view, relied “on a nonexistent constitutional ‘duty’ to adequately finance and equitably spread educational opportunity,” and he did not see these statutes, in any event, as imposing an eight percent aid cap as the petitioners claimed. 85 He further determined that the petitioners’ equal protection counts (Counts IV and V) failed. 86 For him, Article 83 neither explicitly nor implicitly established a fundamental right to “equal educational opportunity,” 87 and he ruled that New Hampshire’s statutory education scheme passed muster under equal protection using both “a rational basis test” and the “middle tier scrutiny of the substantial relationship test.” 88

82 Id. at 5–6 (citation omitted).
83 Id. at 8.
85 Id. at 11–12.
86 Id. at 12–17.
87 Id. at 13–14.
88 A court may apply the particularly exacting test of “strict scrutiny” in an equal protection challenge where a “suspect” classification, such as one based on race, is involved, or where the challenge concerns a recognized “fundamental right.”
Finally, as to the petitioners’ contention that the State’s system of school finance violated the strictures of Article 5 by imposing an unreasonable, disproportionate and burdensome tax for education, Judge Manias concluded that this also failed to set forth a proper claim. Judge Manias saw the “ad valorem property taxes levied at the local level” as not needing to meet any constitutional uniformity requirement on a statewide basis.\(^9\)

After Judge Manias denied the petitioners’ motion to reconsider, they appealed to the New Hampshire Supreme Court.

c. The *Claremont I* Decision

While the case was on appeal, the petitioners not only continued their efforts to have the public informed of the litigation and its public policy implications,\(^9\) they also enlisted the support of many of the “senior, best-known lawyers in [the] State.”\(^9\) So it was that, at the oral argument on appeal, it was noted that Chief Justice David A. Brock,\(^9\) upon entering the courtroom to hear the arguments, “did a double-take at [the] assemblage” of about “a dozen senior co-counsel shoe-horned into the small area around [the mid-career attorneys] who were [actually] arguing the case.”\(^9\)

The oral argument itself contained a revealing exchange between the Justices and Assistant Attorney General Leslie J. Ludke during which Attorney Ludke conceded that the State could not pass laws making public school education no more than a local option, perhaps not offered at all—that a constitutional duty existed “to educate the children of the towns and cities of the State.”\(^9\) Attorney Ludke insisted, however, that this obligation arose by virtue of the dictates of State Constitution, Article 5 and Part I, Article 5.

\(^89\) *Manias Order*, at 17–18.

\(^90\) The petitioners’ public relations efforts continued throughout the litigation. Indeed, one of the assisting lawyers, Thomas F. Hersey, Esq., handled “press operations” during the later trial, and was instrumental in obtaining regular and extended news coverage. See Volinsky, *supra* note 18, at 847. The case impacted New Hampshire’s political scene in a major way. For some it offered the promise of a better, more equitable society, with a better tax structure; for others, it constituted a threat to New Hampshire’s traditional way of limited government and limited taxation.

\(^91\) Volinsky, *supra* note 18, at 844.

\(^92\) Former Chief Justice Brock served in that capacity from October 6, 1986 through December 31, 2003. He was first appointed to the Supreme Court as an Associate Justice on June 9, 1978. He thus served on the Court for twenty-five years. His appointments were made by Republican Governors.

\(^93\) Volinsky, *supra* note 18, at 844.

requiring the Legislature to make only “wholesome and reasonable”
laws, and only act in a manner consistent with the fundamental public good
or benefit. She did not concede to the existence of constitutional duties,
enforceable in court, requiring the State to provide and support “adequacy”
in public education.

In a unanimous opinion authored by Chief Justice Brock and issued on
December 30, 1993, the New Hampshire Supreme Court reversed Judge
Manias’s dismissal of the case, holding that “part II article 83 imposes a duty
on the State to provide a constitutionally adequate education to every
educable child in the public schools in New Hampshire and to guarantee
adequate funding.”

In its decision, the Court barely discussed the petitioners’ Article 5 Tax
Count, saying only that “because petitioners have not had an opportunity to
develop a record in support of their claim,” it was being remanded along with
the rest of the case. As to the other Counts in the case, however, the Court
deemed “the trial court’s determination that the State had no duty to support
public education [to] so permeate[] its decision to dismiss [that] . . . [its]
narrow task [came down] to determining] whether the trial court committed
legal error when it concluded that no duty [as to education] exists.”

In construing Article 83, the Court employed an “originalist” approach.
Consistent with New Hampshire precedent, the Court sought to

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95 N.H. Const. pt. 2, art. V; pt. 1, art. XXXVIII.
96 Recording of Oral Argument, 635 A.2d 1375 (No. 92-711). Article 5 accords to the
General Court or Legislature the power “to make . . . all manner of wholesome and
reasonable . . . laws . . . so as the same be not repugnant or contrary to this constitution.” N.H. Const. pt. 2, art. V. Part I, Article 38 states, among other things, that the “people . . . have a
right to require of their lawgivers and magistrates, an exact and constant observance of . . . [the fundamental principles of the constitution] in the formation and execution of the
laws necessary for the good administration of government.” N.H. Const. pt. 1, art. XXXVIII.
97 Recording of Oral Argument, 635 A.2d 1375 (No. 92-711).
98 The Justices who joined the Chief Justice were: former Chief Justice William A. Grimes
sitting by special assignment; and Associate Justices William F. Batchelder, William R.
Johnson, and Sherman D. Horton. Two of these Justices had been appointed by Republican
Governors and two by Democrats.
According to Justice Horton, unanimity was achieved—that is, he and former Chief Justice
Grimes joined the decision—because the Court at that time declined to define what a
“constitutionally adequate education” was, and agreed to describe the State’s funding duty to
be that of a “guarantor.” Interview with Sherman D. Horton, Retired Justice, (July 9, 2014).
100 Claremont I, 635 A.2d at 1377.
101 Id.
102 STEPHEN G. BREYER, MAKING OUR DEMOCRACY WORK 76 (2011) (“The judges who follow
this [originalist or historical] approach look to history to discover what those who wrote the
“give the words [used] the same meaning that they must have had to the electorate on the date the vote [to approve the article] was cast...gathering [that] intention from the language used, viewed in the light of the surrounding circumstances.”

The Court began its analysis by indicating that weight would be given to the Massachusetts Supreme Judicial Court’s recent interpretation in *McDuffy v. Secretary of the Executive Office of Education* of a provision in Massachusetts’ Constitution that was “nearly identical” to Article 83. The Massachusetts Supreme Judicial Court had held in *McDuffy* that the Commonwealth’s Constitution required it to “provide an education for all its children...to prepare them to participate as free citizens of a free State” and “to do so today, and in the future.” New Hampshire’s Article 83 was modeled on the education provision in the Massachusetts Constitution, adopted only four years earlier. The Massachusetts provision flowed from the hand of John Adams, a strong proponent (as discussed infra at Part II.1.a. with accompanying notes) of the importance of education in assuring the continuation of our democracy. That the Massachusetts Supreme Judicial Court had ruled as it did plainly had an enormous impact on the Claremont I Court.

Like the Massachusetts Supreme Judicial Court, the New Hampshire Supreme Court examined the meaning of the words of the pertinent education provision, utilizing dictionaries of the 1784 period. It concluded that these words expressed and imposed an actual duty—a “command” that New Hampshire’s “legislators and magistrates, in all future periods of this government...support[] all public schools.” The Court agreed with the analysis in the *McDuffy* decision that “[t]he breadth of the meaning of...[the ‘duty...to cherish’ term] together with the articulated ends for which this duty to cherish is established, strongly support...that...[it]

Constitution most likely thought about the content and scope of a constitutional phrase, and they interpret the phrase accordingly.”

103 *Claremont I*, 635 A.2d 1377–78 (citations omitted) (quotations omitted).
105 *McDuffy*, 615 N.E.2d at 548, 555.
107 *Claremont I*, 635 A.2d at 1378.
108 *Id.* (quotations omitted).
encompasses . . . a duty to ensure that the public schools achieve their object and educate the people. 109

The Court cited past New Hampshire decisions which had discussed the meaning of Article 83. 110 These decisions recognized, in their respective contexts, that Article 83 established an actual obligation, a duty “of paramount importance” to educate “in comprehensive terms.” 111

In reviewing the “surrounding circumstances” at the time the [1784] constitution was adopted,” the Court found “that the framers and the general populace understood the language contained in part II, article 83 to impose a duty on the State to educate its citizens and support the public schools.” 112 Surveying early New Hampshire history, it found a deep commitment to public education. 113 While it acknowledged that the early State laws required the localities to fund schooling (with no actual State funding for schools provided “in the first fifty years after ratification of the [1784] constitution”), the Court highlighted statements by such leaders as Governor Wentworth in the late colonial period and Governor Gilman in 1795 that evinced an understanding “that the duty to educate remained with the State.” 114 The Court quoted extensively from a “reply” the State’s Senate and House members made in 1795 to Governor Gilman in regard to the importance of education. 115 In that “reply,” they described “[t]he encouragement of Literature [as being] a sacred and incumbent Duty upon the Legislature,” necessary for the preservation of our republican form of government. 116 The Court quoted the Massachusetts McDuffy opinion as support for the conclusion that “[though] local control and fiscal support has been placed in greater or lesser measure through our history on local governments [this] does not dilute the validity of the conclusion that the duty to support the public schools lies with the State.” 117

With the duty to provide and support education thus recognized as a State constitutional imperative, the Court then “emphasize[d] the corresponding right of the citizens to its enforcement.” 118 It described “a free

109 Id. (quoting McDuffy, 615 N.E.2d at 526).
110 Id. at 1378–79.
111 Id. See In re Davis, 318 A.2d 151 (N.H. 1974); Fogg v. Board of Educ. of Union Sch. Dist. of Littleton, 82 A. 173 (N.H. 1912); State v. Jackson, 53 A. 1021 (N.H. 1902); Farnum’s Petition, 51 N.H. 376 (1871).
113 Id. at 1379–80.
114 Id. at 1380–81
115 Id. at 1380.
116 Id. at 1381 (quotations omitted).
117 Id. (quotations omitted).
118 Claremont Sch. Dist. v. Governor (Claremont I), 635 A.2d 1375, 1381 (N.H. 1993).
public education as at least an important substantive right,” one “not based on the exclusive needs of a particular individual, but rather a right held by the public to enforce the State’s duty, [with] any citizen having standing to enforce this right.”

The Court reposed upon the legislature and governor, “in the first instance,” the task of “defining the parameters of the education mandated by the constitution.” It declared, however, that “the State’s constitutional duty extends beyond mere reading, writing, and arithmetic, [and] includes broad educational opportunities needed in today’s society to prepare citizens for their role as participants and as potential competitors in today’s marketplace of ideas.” It concluded, remanding the case to the Superior Court for further proceedings:

We are confident that the legislature and the Governor will fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government.

3. The Superior Court Trial and Decision

a. The Claims

After the case was remanded, the petitioners amended their pleadings. They abandoned their challenges to the State’s foundation aid statutes (their original Counts III and V) and instead proceeded with four counts. They claimed:

- Count I (Education Equity/Adequacy Count): failure by the legislature and the Governor “to spread the opportunities and advantages of education equitably and adequately among all educable New Hampshire students . . . having thereby failed to diffuse knowledge and learning generally throughout the State” in violation of Article 83;

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119 Id.
120 Id.
121 Id.
122 Id.
• Count II (Equity/Adequacy Funding Count): failure “to adequately and equitably fund the public elementary and secondary schools of the State,” also in violation of Article 83;

• Count III (Equal Protection Count): breach of the State’s equal protection guarantees to “the Petitioner student class,” arising from the operation of the State’s “school finance system;” and

• Count IV (Tax Count): violation of the Article 5 rights of “the class of petitioner taxpayers” as “the New Hampshire school finance system results in unreasonable, disproportionate and burdensome taxation.”

The petitioners continued to seek to pursue the case as a class action, and continued to seek as relief the restructuring of the education funding system away from the local property tax.

The petitioners’ legal team had by this time lost some of its members, and the legal effort suffered from lack of strong financial support. The petitioners found themselves in “dire [financial] straits.” It reached the point that Attorney Volinsky, who had become the “informal leader” of the litigation effort, seriously considered dropping all but the Tax Count because of the crisis in resources. As to this count, Attorney Volinsky felt “that the Supreme Court had telegraphed its ultimate decision in Claremont [that because] the court had already reached the key legal conclusion that provision of a constitutionally adequate education was a state duty . . . then the taxes to pay for that duty had to be state taxes . . . [and] if nothing else,

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124 Id. at ¶¶ 47-50.
125 Id. ¶¶ 5-8. The case, however, did not obtain class action status. Judge Manias granted the State’s Motion to Strike the class action allegations, and he proceeded to decide the case without deeming the petitioner districts to be “representative of property poor districts in this state [or that] the comparison districts [the petitioners utilized to seek to show the existence of education disparities and the impact of limited funding were] representative of the property rich districts in this state.” See Memorandum Decision and Judgment (Manias Opinion), Claremont Sch. Dist. v. Governor (Claremont II), No. 91-E-306-B at 57 n.5 (N.H. Super. Ct. Dec. 6, 1996). The comparison districts were: Lebanon for Claremont; Rye for Allenstown; Moultonborough for Pittsfield; Gilford for Franklin; and Lincoln-Woodstock for Lisbon. Id.
126 Amended Petition, supra note 123, at Part V (Relief Requested).
127 Attorney Garvey left, and Professor Saunders suspended his participation to later return to assist with the trial. Attorney Volinsky’s law firm had broken up. Volinsky, supra note 18, at 845-46.
128 Id.
129 Id. at 846.
130 Id. at 845; Interview with Andru H. Volinsky, Attorney for Petitioner (May 11, 2015). (according to Attorney Volinsky, he discussed with his colleagues dropping the suit altogether).
we could prove that the local school districts levied taxes at wildly varying rates and that this violated the [Article 5] Tax Clause.’ The Claremont petitioners did not, however, drop the other counts. The case kept its focus largely on children and not taxes.

b. The Trial

After Judge Manias took a one-week view of pertinent schools, the Claremont trial commenced on May 6, 1996, and extended through June 20, 1996, a period of six weeks. Forty-eight witnesses testified and hundreds of exhibits were received. The petitioners proceeded without significant expert assistance in making their challenge to the State’s school finance system. They presented no statistically-based expert testimony regarding the question of whether the system’s heavy reliance on local property taxes, somewhat tempered by state aid of various forms, caused inequities or failings in educational opportunities of a constitutional dimension.

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131 Volinsky, supra note 18, at 846.
132 Attorney Volinsky succeeded in keeping the whole case going by enlisting the assistance of other lawyers and organizations, and by obtaining the particular assistance of a former New Hampshire Commissioner of Education, Charles Marston. Volinsky, supra note 18, at 846–47; Interview with Andru H. Volinsky, Attorney for Petitioner (May 11, 2015).
133 Volinsky, supra note 18, at 845–47. The petitioners did seek, however, to have the Tax Count decided apart from the rest of the case, but Judge Manias denied their Motion to Bifurcate this Count, and their later Motion for Partial Summary Judgment and Motion for Interlocutory Transfer. See State’s App., C-1 at 53-56, Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353 (N.H. 1997) (No. 97-001); see also State’s App., C-2 at 527-531, Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353 (N.H. 1997) (No. 97-001).
135 Id. at 44.
136 Id. at 32.
137 About three months before the trial was scheduled to begin, the experts the petitioners had retained to study the New Hampshire financial system “withdrew from the litigation.” Id. at 32. Judge Manias agreed to a one-month delay of the trial, but did not allow the petitioners “to hire new experts and generate new expert reports.” Id. at 32–33. Instead, and with the State’s accord, he ruled that the “existing report” the departed experts had generated would be allowed into evidence, but the petitioners declined to offer this report. Id. at 33. The Report, entitled “The New Hampshire System of School Finance: A Model of Disparity, July 1995,” prepared by Kern Alexander, Richard Salmon, Deborah Strickland, and Richard Hiller, concluded, based upon a statistical study of school funding and expenditures, that New Hampshire’s system of education finance resulted in substantial inequity and disadvantage for students in property poor school districts. According to Attorney Volinsky, who provided to the authors a copy of the report, the petitioners did not present it because it needed the testimony of the experts themselves to be helpful. Interview with Andru H. Volinsky,
The parties differed as to the working definition of “adequate” education that Judge Manias should utilize in his treatment of the petitioners’ first three counts. Though directed to do so by the Supreme Court in *Claremont I*, the legislature and governor had not fashioned a definition of “the specifics of” an “adequate” education. As a consequence, Judge Manias did not have any definition from the legislature before him. Instead, he received from the State a definition the State’s Board of Education had crafted specifically for the litigation, and another from the petitioners, prepared by a retained expert, Dr. Robert Fried, an educator and former member of the Concord, New Hampshire School Board.

The State’s proffered definition had been written by the State’s Board of Education chair, Ovide Lamontagne, and had been endorsed by a majority of the State Board. It had not, however, gone through any rule-making process. The definition described an “integrated system of shared responsibility between state and local government,” essentially corresponding to what the State saw as its then-existing system, and asserted that such a system contained “the appropriate means to provide an adequate education.”

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Attorney for Petitioner (May 11, 2015). According to Attorney Ludke, however, the report was flawed in its design, methodology and computations, and did not in any event present strong statistical evidence supportive of the petitioners’ positions. Interview with Leslie J. Ludke, Attorney (Apr. 29, 2015). See also State’s Proposed Findings of Fact and Rulings of Law at XXIII No. 33–34, Claremont Sch. Dist. v. Governor (*Claremont I*), No. 91-E-306-B (N.H. Super. Ct. Apr. 29, 1996) (criticizing the work of these experts and asserting “[b]ecause of the multitude of errors in design, methodology and computation, . . . [their report] will not assist the Court in resolving any question raised in the litigation;” and “[t]he results of the . . . [experts’] study show an extremely weak association between tax base and spending [on education]”).

138 *Manias Opinion*, at 25, 27.
139 *Claremont Sch. Dist. v. Governor* (*Claremont I*), 635 A.2d 1375, 1381 (N.H. 1993).
142 Id. at 166–69.
143 Judge Manias’s Opinion sets forth the entire definition:

An adequate public elementary and secondary education in New Hampshire is one which provides each educable child with an opportunity to acquire the knowledge and learning necessary to participate intelligently in the American political, economic, and social systems of a free government. The components of an adequate public elementary and secondary education are as follows:
1. Broad and well-balanced curricula to equip students with basic knowledge and skills in language arts and reading, mathematics, science, social studies, arts, health, physical education, computers, and consumers and workplace technology and to allow students the opportunity to learn a foreign language;

2. Programs and activities to promote the development of character and citizenship;

3. Legally qualified administrative and teaching professionals who focus on student achievement and on implementing the state's educational program;

4. Safe and orderly facilities for educating students;

5. Evaluation and assessment of the effectiveness of the educational program, teachers, instructional methods, and organizational structure; and

6. Evaluation of student academic performance to determine what students have learned and what skills they have acquired.

The appropriate means to provide an adequate education is through an integrated educational system of shared responsibility between state and local government. An integrated system of shared responsibility allows local districts to implement diverse approaches tailored to meet changing student needs, and also allows the State Board of Education to establish policies which respond to the evolving demands of the American political, economic, and social systems.

Within this integrated system of shared responsibility, the State establishes the framework for the delivery of educational services at the local level. Effective management of education requires delegation of authority to local school districts. Comprehensive state laws and rules, including laws and rules pertaining to the financing of education, laws dividing the state into governmental units for the financing and delivery of educational services, laws and rules setting minimum educational standards, and laws and rules generally regulating the manner in which local districts deliver educational services, comprise the framework of New Hampshire's integrated system of shared responsibility.

Under the auspices of the State Board of Education and the Department of Education, the State establishes standards and curriculum frameworks, attendance and graduation requirements, facilities requirements, and minimum standards for school approval; establishes legal qualifications for teachers and administrators, and approves in-state professional preparation programs for both; organizes school districts into administrative units, and authorizes other organizations of operating school districts in whole or in part; administers federal programs such as special education and vocational education; and provides technical, financial and administrative support for the delivery of educational services.
For his part, Dr. Fried presented four “Cornerstones” as a definition for an adequate education which, among other things, focused on seeking to address the particular needs of each child, whatever his or her background (often termed “vertical equity” in education).\textsuperscript{144}

The petitioners, through their team of lawyers,\textsuperscript{145} sought to prove the allegations in their first three counts by evidence that:

The effectiveness of this integrated educational system in achieving educational adequacy is measured in many ways both by the State and the local districts. State rules require districts to develop programs for assessing and evaluating the educational services delivered in their district. Standardized tests are administered and the results evaluated at both the state and local levels. In addition, the Department of Education oversees the local districts’ delivery of educational services through the school approval process, the collection and compilation of financial and statistical data, and the New Hampshire Educational Improvement and Assessment Program. For local school districts which voluntarily participate in the school accreditation program administered by the New England Association of Schools and Colleges (NEASC), the State reviews the accreditation status of the schools within these districts.

\textit{Mantas Opinion}, at 26–27.

\textsuperscript{144} Judge Manias’s Opinion also sets forth these in their entirety:

\textit{Cornerstone One.} An “Adequate Education” is one that provides the physical, personnel, curricular, and material resources necessary for children to acquire the skills, knowledge, and values necessary to develop as responsible and productive citizens and to continue formal and informal learning as adults.

\textit{Cornerstone Two.} An “adequate education” recognizes and responds appropriately to conditions that children possess when they enter school that affect their ability to acquire the skills, knowledge, and values necessary to develop as responsible and productive citizens and to continue formal and informal learning as adults.

\textit{Cornerstone Three.} An “adequate education” is managed at the district and building level to provide efficient and effective organization and utilization of resources for the benefit of student educational achievement.

\textit{Cornerstone Four.} An “adequate education” is one that results in a level of student educational achievement that meets the standards necessary for the acquisition of skills, knowledge, and values required for responsible and productive citizens and to continue formal and informal learning as adults.

\textit{Id.} at 27–28.

\textsuperscript{145} The legal team of attorneys then included, besides Attorney Volinsky, John E. Tobin, Jr. Esq., of New Hampshire Legal Assistance, Theodore E. Comstock, Esq., general counsel for the State School Boards Association, Jed Z. Callen, Esq., Patricia B. Quigley, Esq., Richard Esty, Esq., and Thomas F. Hersey, Esq. A then legal intern, Scott F. Johnson, also provided assistance, as did Professor Richard A. Hesse of the Franklin Pierce School of Law and Dean Michener of the State School Boards Association.
The education offered in the petitioner districts was markedly inferior in many important ways to the education provided in certain comparable, more property-rich districts and did not measure up to a constitutionally adequate education;

- the students in the poorer districts performed markedly worse than students in the richer districts on tests designed to determine whether the education effort was succeeding, and did not go on to post-secondary experiences in a like manner or in like numbers; and

- the State’s education finance system, with its heavy reliance on local property taxes, deprived the petitioner districts of the funding ability requisite to provide an “adequate” education.

As to their Tax Count, the petitioners presented evidence to support their contentions that the local property tax scheme for education financing implicated the State in all its aspects, operated to achieve a state purpose, worked to fulfill state-mandated minimum education standards, and, overall, constituted a state tax which did not meet constitutional dictates.

The petitioners’ case consisted of testimony and exhibits coming from a number of different sources. It began with two former NHDOE Commissioners, a former Deputy Commissioner, and the Commissioner of the Department of Revenue Administration (“DRA”). Testimony involving “paired-district presentations,” or comparisons presented by a number of teachers and school administrators, who had worked in the petitioner districts and/or in the proffered comparison property-richer districts constituted a major feature of the case. The petitioners presented Dr. Fried as an expert to discuss his definition of “adequacy.” They offered, as well, two other retained experts, Professors Van Mueller and Terry Schultz of the University of Minnesota, concerning their “qualitative study of the educational offerings” in the five petitioner districts and in selected five “paired” property-rich districts, which, they claimed, showed in detail glaring educational disparities between the petitioner district’s provision of education and that provided by the richer districts.

The petitioners presented many exhibits and charts, going to, among other matters, the markedly different tax rates that existed among the State’s

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147 See Volinsky, supra note 18, at 848.
148 Id.
149 Id. at 848.
districts. They ended their case by showing many slides that Professor Schultz had prepared: “The slides were shown on two projectors that placed side by side the programmatic offerings and physical facilities in the poor and wealthy schools in New Hampshire.”\textsuperscript{150} This presentation, it was claimed, “skewered the notion that we had a single school system.”\textsuperscript{151}

For its part, the State, through Assistant Attorneys General Ludtke and Patrick E. Donovan, presented its case through several outside experts (some with national reputations in economics and public policy), certain NHDOE and DRA officials, an official from the New England Association of Schools and Colleges (“NEASC”) an independent accreditation organization, and the Chair of the State’s Board of Education.\textsuperscript{152}

The State contended:

- The education provided in the petitioner districts through the existing system passed muster when properly evaluated utilizing the State’s proffered “adequacy” definition;
- any deficiencies or failings at any time in a particular petitioner district, or in connection with a particular school or particular students, stemmed from local failings, not anything fairly attributable to the State or its system;
- the system’s mechanism for funding education, though it involved differential local property tax rates, still succeeded in fairly enabling, without undue tax burdens within any petitioner district, the raising of sufficient funding for schools;
- the use of local property taxes did not result in any constitutional problems but was beneficial; and
- the local tax scheme for education funding did not violate Article 5.

A major feature of the State’s case was to extol the claimed virtues of the local property tax as a means for funding education in New Hampshire. The

\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Among the State’s expert witnesses were: Prof. Colin Campbell, Emeritus Professor of Economics, Dartmouth College; Prof. William A. Fischell, Professor of Economics, Dartmouth College; Prof. Caroline Hoxby, Assistant Professor of Economics, Harvard University; Prof. Eric A. Hanushek, Professor of Economics and Public Policy, University of Rochester; and Dr. Paul Snow, a statistician who had done considerable work in regard to education funding in New Hampshire.
State’s experts generally opined that funding via local property taxes, coupled with the direct aid the State provided, resulted in a fair, efficient, and effective system that, despite varying district tax rates, did not overly burden any taxpayers within the petitioner districts, and allowed for significant local control.

c. The Superior Court Decision

On December 6, 1996, Judge Manias issued a 190-page decision, including many findings of fact and rulings of law. He decided that the petitioners had not proved their case.

Judge Manias treated each of the petitioners’ counts separately, and concluded that while there were marked differences in local property tax rates, and while the educational conditions and resources in the poorer petitioner districts did not meet those of the richer comparable districts, it had not been shown that the system operated to offer less than “adequate” education in the petitioner districts. Judge Manias found no “adequacy” violation, no funding problem of a constitutional dimension, no equal protection abridgment, and no violation of Article 5.

i. The Education Equity/Adequacy Count

Judge Manias approached the merits of the petitioners’ Education Equity/Adequacy Count by first addressing what “adequacy” definition he would use. He opted for the definition proffered by the State: one developed by the Board of Education, “part of the executive branch,” one which required schools to offer “broad and well-balanced curricula including arts, humanities, health, and computer and consumer education, and programs to promote the development of character and citizenship.”

The definition “encompass[ed] important state programs necessary to educational adequacy, such as the Educational Improvement and Assessment Plan and the Minimum Standards for School Approval.”

In contrast, Judge Manias did not credit Dr. Fried’s definition. He deemed Dr. Fried’s definition to have been developed without sufficient regard for, or research into, New Hampshire’s and other states’ education efforts, and to wrongly call for “rais[ing] the concept of ‘vertical equity’ [as

154 Id. at 28–29.
155 Id. at 29.
expressed in Cornerstone Two] to a constitutional mandate.”¹⁵⁶ For him, the Fried definition did not provide, as did the State’s definition, manageable criteria to assess the “adequacy” of the education New Hampshire offered.¹⁵⁷

In evaluating the evidence concerning educational “adequacy” against the “adequacy” definition he had accepted, Judge Manias first considered the petitioners’ expert offerings.¹⁵⁸ These consisted of the presentations of Drs. Mueller and Schultz, which were based upon a study they had done matching each of the petitioner school districts with a paired selected property-rich district.¹⁵⁹ “[T]he purpose of this comparison approach [according to Dr. Mueller] was to examine whether the structure of education finance allowed achievement of educational adequacy in the petitioner districts.”⁶⁰ Though he found both Drs. Mueller and Schultz qualified to testify as experts, Judge Manias strongly criticized their methodology, and questioned their bias.⁶¹ He concluded that their study, with accompanying testimony, merited little

¹⁵⁶ See Memorandum Decision and Judgment (Manias Opinion), Claremont Sch. Dist. v. Governor (Claremont II), No. 91-E-306-B at 29–32 (N.H. Super. Ct. Dec. 6, 1996). Judge Manias defined vertical equity as “the unequal treatment of unequals, meaning that students receive different educational services depending upon their individualized needs.” Id. at 30. Judge Manias’s rejection of “vertical equity” for purposes of assessing constitutionally required adequacy, however, seems to run counter to the Supreme Court’s Claremont I holding that “each educable child” is entitled to an “adequate” education, which is “adequately funded. Claremont Sch. Dist. v. Governor (Claremont I), 635 A.2d 1375, 1376 (N.H. 1993). Certainly, as discussed in Part III.3. infra, the State presently incorporates notions of “vertical equity” in its “costing out” and funding for an “adequate” education.

¹⁵⁷ Manias Opinion, at 31–32. Judge Manias found that “[t]he state Board of Education’s definition of educational adequacy sets forth the essential components of an adequate education and refers to objective criteria by which adequacy may be assessed.” Id. at 160 (dealing with the State’s Proposed Finding, Part XII, “Educational Adequacy,” No. 2, Claremont Sch. Dist. v. Governor (Claremont II), No. 91-E-306-B at 42–43 (N.H. Super. Ct. Dec. 6, 1996)). As to Dr. Fried’s definition, Judge Manias granted a proposed State finding of fact as follows: “The statement of educational adequacy prepared by Dr. Robert Fried is not judicially manageable because it is based upon unidentified individual student needs. Dr. Fried’s definition of educational adequacy does not contain manageable standards which this Court could apply to determine compliance with the New Hampshire Constitution.” Id. at 161 (dealing with the State’s Proposed Finding, Part XII, “Educational Adequacy,” No. 12, Claremont Sch. Dist. v. Governor (Claremont II), No. 91-E-306-B at 42–43 (N.H. Super. Ct. Dec. 6, 1996)).

¹⁵⁸ Id. at 32.
¹⁵⁹ Id. at 35.
¹⁶⁰ id.
¹⁶¹ Id. at 41–43.
Their evidence constituted, for him, a slanted and rushed effort to support, unscientifically, a "predetermined hypothesis." Judge Manias then reviewed the petitioners' "non-expert evidence." He acknowledged that it indicated that the educational opportunities offered in the petitioner districts (which had larger percentages of poorer "at-risk" children) compared unfavorably to those offered in the comparison property-rich districts.

Yet, for Judge Manias, "the fact that disparities exist (which the State concedes) does not necessarily impact the determination of adequacy." He did not see the legal issue before him as one of equity, or determining whether "substantially uniform" education was being offered throughout the State. He did not consider the duties arising from Article 83 to encompass "a uniformity or equity component." Nor did he see the petitioners prevailing merely because they were able to show that one student, or a grouping of students attending a particular school, had not received an "adequate" education opportunity at some point in time. Rather, he opined that for the petitioners to prevail on their Education Equity/Adequacy Count, proceeding not as representatives of other districts or persons, they needed to prove "that constitutional inadequacies exist in the petitioner school districts and that those inadequacies are attributable to defects in the education system itself, . . . [that] the inadequacy resulted from the system devised and enforced by the legislative and executive branches." It would not suffice if the inadequacy stemmed from failures of the petitioner districts themselves,

162 Id. at 41.
164 Id. at 43.
165 Id. at 87. As to "educational inputs," a good deal less money was being spent per pupil; larger student-teacher ratios existed; less access persisted in regard to state-of-the-art technology; less time and resources were being devoted to curriculum development; troublesome facilities issues remained less apt to be timely dealt with; and less resources generally were being made available for "enrichment programs," foreign language study, arts and music, and advanced placement and honors courses. Id. at 44–51. As to "educational outputs," students in the petitioner districts went on to attend four year colleges in lesser numbers, and appeared to do less well generally on assessment tests. Id. at 52–55.
166 Id. at 62–63.
167 Id. at 54–56, 58, 62–63.
168 Id. at 55, 62–63.
170 Id. at 61–62.
who, “[u]nder any interpretation of [Claremont I’s pertinent language, bore] some responsibility for education delivery after lawful delegation.”

In considering the evidence, Judge Manias did not deem the “education input” disparities in regard to per-pupil spending and student-teacher ratios to be overly concerning. Nor did he consider that the evidence going to other “education inputs” established any constitutional inadequacy in the provision of education that could be attributed to the State.

Judge Manias highlighted that the testimony he had received from school officials was often contradicted or undermined by “prior inconsistent statements” they had made to the State in the course of minimum standards reviews, or to NEASC in regard to accreditation reviews, or to the public concerning such matters as the state of technology, curriculum development, and facilities. He was not impressed by the petitioners’ proffered explanation in regard to facilities that such prior inconsistent statements were often made to avoid adverse consequences such as loss of funding or loss of accreditation.

Though he recognized that the State may not “abdicate the [education] obligation imposed . . . by the Constitution,” Judge Manias stated: “The local districts may not abdicate their obligations either.” He opined specifically

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171 *id.* at 61. This important issue—whether the State may be deemed to lack responsibility for the failings of the districts—was not later addressed by the Supreme Court in *Claremont II*.

172 *Manias Opinion*, at 62–65. Among other things, Judge Manias pointed out that two of the petitioner districts (Lisbon and Claremont) spent more than the state average cost per pupil for 1993/94 of $509.00, and three (Franklin, Allenstown and Pittsfield) spent less, with the biggest disparity being Franklin in an amount of $1568.00. *Id.* at 63. As to Franklin and Allenstown, however, Judge Manias noted that, due to accounting particularities, their cost per pupil numbers did not include the federal aid they received for their schools. *Id.* at 64. He underscored that teacher salaries, which “account for up to two-thirds of a district’s budget” also “can range considerably depending on factors which are not necessarily related to teacher competence.” *Id.* at 64–65. As to student-teacher ratios, he found that the petitioner districts’ “lower[ed] around the state average, and none of the deviations present[ed] a cause for concern.” *Id.* at 65.

173 *Id.* at 65–72, 77–87. As to at-risk students, Judge Manias observed that all of the petitioner districts had “programs designed to address the needs of their at-risk student populations” and “that none of the evidence concerning at-risk population issues demonstrates constitutional inadequacy.” *Id.* at 71. As to “enrichment activities, art, language and music programs, and advanced placement and honors courses,” Judge Manias concluded that while “some disparities exist,” programs of this type are available in the petitioner districts, and it had not been shown that the petitioner districts’ programs “violated any minimum standards or were otherwise constitutionally inadequate.” *Id.* at 72.

174 *Id.* at 67, 69–70, 81–87.

175 *Id.* at 83–84.

176 *Id.* at 86.
in regard to poor facilities and the petitioners' evidence that certain of their districts' structures failed to meet State Minimum Standards:

Under the definition of educational adequacy, the appropriate means of providing education is through an integrated system of shared responsibility between state and local government. This requires the state and local school districts to work together within the statutory framework to ensure that all Minimum Standards for School Approval are satisfied. The petitioner districts may not represent, via signed documents, that their school facilities meet all minimum standards, and then blame the state for noncompliance. 177

Judge Manias also was not swayed by the evidence the petitioners had presented concerning differential "education outputs." 178 He found that students in the petitioner districts broadly went on to "forms of post-secondary education" in percentages somewhat in line with the property-rich districts, and that factors other than school funding and school offerings, such as "demographic and socio-economic circumstances, may cause students to delay, rather than forgo, their commencement of post-secondary pursuits at higher rates than comparison district students." 179 He pointed out also that New Hampshire students did comparatively very well on the National Assessment of Educational Progress ("NAEP") test, which served as a nation-wide measure of student performance, and that New Hampshire

177 Memorandum Decision and Judgment (Manias Opinion), Claremont Sch. Dist. v. Governor (Claremont II), No. 91-E-306-B at 86 (N.H. Super. Ct. Dec. 6, 1996). Judge Manias observed as well in regard to facilities: "the contrast between the testimony adduced at trial and prior statements makes it difficult for the Court to determine the actual state of facilities in the petitioner districts." Id. at 81. He also later stated: "While the Court accepts the petitioners' contention that there are [facilities] problems, wholesale acceptance of the petitioners' position would require the Court to conclude that . . . [petitioner] personnel misrepresented the state of their facilities, and that the NEASC visiting . . . [personnel] did not notice glaring inadequacies or chose to ignore them. A record full of prior inconsistent statements and contrary information does not provide a basis for a constitutional decision." Id. at 84. He saw facilities issues as not fairly attributable to the State. Id. at 84–87. In this regard, he offered a number of instances where a petitioner district, Allenstown, though financially able to do so, did not cure facilities issues, and he opined that the evidence showed that the petitioner districts had good success in obtaining voter approval of bonds for facilities improvement. Id. at 84–86.
178 See id. at 73–89.
179 Id. at 73–74.
students ranked well in regard to Scholastic Aptitude Test ("SAT") results.\textsuperscript{180}
As to the State’s recently implemented NHEIAP tests, he stated, among other things, that it was hard to draw reliable conclusions, as “access to at least several years of scores from all grades is necessary.”\textsuperscript{181}

Judge Manias observed that “[t]he witnesses from the petitioner districts, most notably the teachers, were impressive in their dedication . . . [and that] despite all evidence concerning inadequacies, the petitioner school district teachers are doing an exceptional job of educating their students.”\textsuperscript{182} He acknowledged: “The petitioners have demonstrated that educational funding realities can present more difficult decisions for the petitioner districts than for the comparison districts.”\textsuperscript{183} However, and though he also expressly noted that “nothing in [his] Order should be seen as an endorsement of the current system or the Department of Education [and that] clearly, education in this State is in need of attention and, perhaps, significant reform,” he ruled that the petitioners had failed to show that the system itself violated the dictates of “adequacy” imposed by Article 83; that is, they failed to show “that (1) constitutional inadequacies exist and (2) those inadequacies are the result of the State[’s] ‘excessive reliance on local property revenues.”\textsuperscript{184}

\textbf{ii. The Equity/Adequacy Funding Count}

Turning to the petitioners’ Equity/Adequacy Funding Count, Judge Manias defined the issue to be “whether the [State’s] financing system meets the . . . constitutional obligation to guarantee adequate funding for primary and secondary education.”\textsuperscript{185} The focus here was on the impact of local property taxes which had constituted, “on average [since 1919] from [seventy-four] to [eighty-nine] percent of total school revenue,” with State aid making up only about eight percent, thereby placing “New Hampshire last in the nation in terms of percentage of state support.”\textsuperscript{186} Nationally, the states on average covered about fifty percent of the costs of education.\textsuperscript{187}

\textsuperscript{180} Id. at 74–75.
\textsuperscript{181} Id. at 75–77. The NHEIAP tests were those tests used as part of the State’s Education Improvement and Assessment Program to measure student competency and achievement. \textit{Id}
\textsuperscript{182} Memorandum Decision and Judgment (Manias Opinion), Claremont Sch. Dist. v. Governor (Claremont II), No. 91-E-506-B at 87 (N.H. Super. Ct. Dec. 6, 1996).
\textsuperscript{183} Id. at 88.
\textsuperscript{184} See id. at 89.
\textsuperscript{185} Id. at 90. Here too, Judge Manias did not read Claremont I as requiring “the State to guarantee equitable or uniform funding for education.” \textit{Id}
\textsuperscript{186} Id. at 91–92.
\textsuperscript{187} Id. at 106.
Indisputably, property-poor districts like the petitioner districts had to impose higher tax rates than comparable property-rich districts to raise money for education—in some instances many times higher. Though Judge Manias “accept[ed] the petitioners’ contention that petitioner district residents face higher tax rates, and thus may have more difficulty raising the local funds necessary to support their schools,” he went on to opine: “Tax rate, standing alone, is not an accurate measure of tax burden; other factors, such as income level, partially determine the ‘burden’ a tax actually imposes. . . . [H]igher tax rates do not necessarily generate higher tax burdens.”

He then referenced evidence presented by the State that focused on school taxes as a percentage of median income. This showed that in 1993, the residents of two of the petitioner districts (Pittsfield and Allenstown) paid school taxes less than a percentage point above the state average, as measured as a percentage of median income (6.35% and 6.24% compared to the state average of 5.69%); the residents in two of the districts (Franklin and Lisbon) actually paid less than the state average (5.24% in both cases); and the residents of Claremont paid only slightly more than the state average (5.81%). He observed that though these numbers do not “resolve the issues presented by . . . [the Equity/Adequacy Funding Count, they] provide some context to the petitioners’ contention that the system of school financing is unconstitutional because the school tax rates in the petitioner districts significantly exceed those in the comparison districts.”

Judge Manias, however, saw “the main thrust of the petitioners’ argument . . . [to be] that the eight percent average annual state contribution, the bulk of which is distributed through the Foundation Aid program, is not sufficient to meet that program’s stated purpose of sharing educational costs to the end that more needy school districts are assisted in providing adequate education.”

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189 Id.
190 Id. at 107-13.
191 Id. at 108.
192 Id. On appeal, the petitioners sharply criticized these statistics as “misleading and disingenuous.” They argued that “the income calculations exclude all the incomes of the second homeowners who live on the lake in Moultonborough, the ocean in Rye or near the ski areas in Gilford and Lincoln . . . [and, further, the evidence’s] focus on residential property also excludes from consideration the extensive business development in Lebanon. As a result, the earnings of full time residents are compared in the poor and wealthy communities as if schools were supported equally by those residents alone.” See Appellants’ Brief at 74, Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353 (N.H. 1997) (No. 97-001) [hereinafter Brief of Appellants]. It is noted also that the mere use of “median” income values may not fairly reflect the actual earnings dispersion that existed in the pertinent districts.
educational programs and education throughout New Hampshire is improved.” As to this, and with his focus on the actual financing of the petitioner districts, Judge Manias credited State evidence showing that the petitioner districts received considerable state aid, including considerable Foundation Aid, so that “in fiscal year 1994, the petitioner districts funded [no more than] between [fifty-five] and [sixty-eight] percent of their budgets through local taxation.”

Judge Manias concluded that the petitioners had not established “that school districts lack the local resources necessary to provide an adequate education under the present financing structure. To the contrary, the evidence suggests that the towns and cities which comprise each of the petitioner school districts have sufficient resources to educate their students.” While he acknowledged that the financing system posed certain “hardships and difficulties” for residents in property-poor districts, “that Rye, with its several miles of beach front property, has greater property values than Allenstown . . . [and] that Lebanon, with its significant industrial development, has a higher tax base than Claremont,” he deemed that “the petitioners have not demonstrated that the way in which the state system funds and assists the petitioner school districts does not guarantee that those districts have adequate funding.”

iii. The Equal Protection Count

In dealing with the petitioners’ Equal Protection Count, Judge Manias saw “the petitioners’ real challenge” to be directed at the State’s laws calling for local school districts predominantly to support schools through local property taxes. He treated this challenge as “directed at the impact or

193 Manias Opinion, at 108–09.
194 Id. at 109–11. The petitioners also claimed that this evidence presented an erroneous and misleading picture, “based upon mythical tax rates that . . . [Dr. Snow, one of the State’s experts] . . . computed.” Brief of Appellants, supra note 192, at 73. The State countered that Dr. Snow had performed his analysis in a scientifically acceptable manner, and “[t]he record supports the trial court’s acceptance . . . of the results of his analysis.” Brief of the State, supra note 26, at 54.
195 Manias Opinion, at 111–12.
196 Id. at 113. In regard to State funding, Judge Manias referenced an Alternative Foundation Aid Program enacted after Claremont I, which established a definite minimum expenditure per “weighted pupil” of $4,700.00, and prescribed that if a district is determined to be not fairly able to raise that amount, it is “entitled to receive an amount of aid sufficient to bring . . . [its] fiscal capacity up to this level.” Id. at 95–96 (reviewing then N.H. Rev. Stat. Ann. §198:36, III and IV).
197 Id. at 125.
effect of facially neutral and evenhandedly applied school financing statutes” which created “a division of the state into districts which have unequal property bases.”

Though he deemed that the petitioners failed “to allege a [necessary] discriminatory purpose [and failed] to prove that any disparities [with regard to education were] attributable to the challenged local tax statutes,” Judge Manias nonetheless proceeded to determine whether the complained-of disparate impact on the petitioners’ students, arising from the operation of the State’s local property tax education system, passed equal protection “middle-tier” level scrutiny—that is, whether the scheme was “reasonable, not arbitrary, . . . rest[ing] upon some ground of difference having a fair and substantial relationship to the object of the legislation.” In this regard, he had earlier determined that it was not for him, but for the Supreme Court to deem “a right as fundamental under the New Hampshire Constitution,” and “for purposes of [that] order, education [was] be regarded as an important substantive right” not requiring “strict scrutiny” equal protection review, but the “fair and substantial relationship,” “middle-tier” review just described.

Judge Manias found that the challenged statutory funding structure passed constitutional muster. He saw it as reasonable, not arbitrary: not imposing unreasonable restrictions on the petitioners’ rights (indeed he had earlier found that the petitioners had failed to prove that the financing system did not allow for the provision of an adequate education). It offered the benefit of being based upon “a stable and expandable revenue source . . . [which also vested] significant local control . . . in local school districts.”

Though he agreed that some districts were better able, due to their property wealth, to exercise local control options, he still concluded that the “evidence [did] not show that the petitioner districts [did] not exert local control.” He stated that “accepting local control as a valid state objective and justification does not require that the State prove that local control exists to the same extent in all districts,” and he noted, in that regard, that “[i]n order to ensure a uniform minimum expenditure, the legislature [through its Foundation Aid Statutes] has provided for state supplementation of local

198 Id. at 128–29.
199 Id. at 121, 129–30 (quotation omitted).
200 Id. at 119–22.
202 Id. at 111, 130.
203 Id. at 130.
204 Id. at 107, 132.
revenues, according to a formula designed to measure the need of the districts."\textsuperscript{205} He strongly highlighted his view that the pertinent financing legislation's reliance on local property taxes beneficially resulted in the usage of a good revenue source which had allowed spending on education to "increase[ ] dramatically during the course of the century."\textsuperscript{206}

iv. The Tax Count

Lastly, Judge Manias turned to the petitioners' Tax Count, and their contention that usage of the local property tax as the main means to finance education violated the dictates of Article 5. He observed that he needed first to determine whether the tax at issue constituted a "state tax or a municipal tax," as any questions related to reasonableness or proportionality depended on that issue being first resolved.\textsuperscript{207} He stated that "[t]he determination of the character of the school tax has never been directly addressed by the Supreme Court," though in past cases "the Supreme Court appears to have treated the school tax as a local tax."\textsuperscript{208}

Though he recognized that Claremont I established a state duty to provide an adequate education, and that "the duty pursuant to which a tax is raised may bear on the characterization of the tax as a state or local tax," he went on to say:

Under New Hampshire law, the determination of whether a tax is a state tax or a local tax does not depend solely upon the duty pursuant to which the tax is raised . . . [r]ather the test is a factual one: the Court must identify the entity that controls the mechanics of assessment and collection . . . inquire into the disposition of the tax revenues after their collection . . . [and] inquire into the legislative history and origins of the tax."\textsuperscript{209}

Judge Manias found that "municipalities control[led] the mechanics of assessment and collection of local property taxes," and that the local school

\textsuperscript{205} Id. at 132.
\textsuperscript{206} Id. at 133.
\textsuperscript{207} Memorandum Decision and Judgment (Manias Opinion), Claremont Sch. Dist. v. Governor (Claremont II), No. 91-E-306-B at 135 (N.H. Super. Ct. Dec. 6, 1996).
\textsuperscript{208} Id. at 135 n.18 (citing Opinion of the Justices, 287 A.2d 756, 758 (N.H. 1972); Monadnock Sch. Dist. v. Fitzwilliam, 203 A.2d 46, 51–52 (N.H. 1964)).
\textsuperscript{209} Manias Opinion, at 136 (citing Boston, Concord & Montreal Railroad v. State, 60 N.H. 87, 96 (1880)).
boards “prepare[d] [their] own budget[s]” despite needing to meet state minimum standards, which did not, in his view, deprive local authorities of essential control. He highlighted that “[t]he property tax, once collected, is managed and expended by the municipality in accordance with their budget; and the property tax does not become part of the State treasury.” He did not see the local property tax as having attributes of taxes, such as the Business Profits Tax, which clearly were state taxes with the State being the taxing district. He wrote:

From the time that the citizens of each municipality vote on the budget, through the process of assessment of local property and the ultimate collection and disposition of property tax revenue, the state has a limited role. Accordingly, with reference to the first test for determining the character of a tax, the mechanics of assessment, collection, and disposition, of a tax, . . . the school tax is a local tax.

Judge Manias also saw the “the tax’s origin and legislative history” as supportive of the view that the tax was local. He relied upon “an expert report on the origin and history of the school tax” offered by the State (prepared by Professor Campbell) indicating “that the Legislature adopted a system of local property taxation [beginning in 1919 with the Great School Law] because it provides a stable and expandable revenue source, and also provides school districts with significant control over their schools.”

Having thus deemed the tax to be local, Judge Manias quickly concluded that the petitioners had presented no evidence to suggest “it [was] disproportionate within the local taxing districts.” He denied the petitioners relief as to their Count VI.

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210 Id. at 136–37.
211 Id. at 139.
212 Id. at 141.
213 Id. (citing Boston, Concord & Montreal, 60 N.H. at 96).
215 Id.
216 Id. at 142.
217 Id.
v. The Superior Court Concluding Remarks

In concluding, Judge Manias observed that his decision “should not be construed as a judicial endorsement of the current public school system, its method of funding, or the operation of the Department of Education.” As to these “serious issues . . . [they] must be addressed,” but by “the Legislature, the Governor and the people of the State,” not the courts.

The petitioners appealed Judge Manias’s decision to the Supreme Court.

4. Claremont II

a. The Arguments

In their appeal to the Supreme Court, the petitioners mounted a broad challenge to Judge Manias’s decision. They generally claimed that he had badly erred in failing to see the merits of their case, adopting a flawed adequacy definition and refusing to place proper responsibility on the State for established “adequacy” failings. The result to them: Judge Manias had left undisturbed an education system fraught with constitutional flaws.

In its brief on appeal, the State defended Judge Manias’s decision, which it asserted was fully supported by the evidence. Its overarching theme was

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218 Id. at 142–43.
219 Id. at 143.
220 It is noted that among his rulings Judge Manias denied the State’s contentions that the petitioner Districts lacked standing or capacity, as “lesser units of government,” or “agents of the state” to challenge the State’s education system, and, among other things, the degree the State directly funded education. Manias Opinion, at 169 (denying the State’s Proposed Findings, Part XXIV “Standing” Nos. 1, parts of No. 2, and No. 4). The Supreme Court never addressed this standing issue in Claremont II. For cases which have recognized the standing of school districts to challenge claimed unconstitutional educational funding statutes. See Gannon v. State, 319 P.3d. 1196, 1212–15 (Kan. 2014); Neeley v. W. Orange-Cove, 772–76 (Tex. 2005).
221 See Brief of Appellants, supra note 192.
222 Id. at 23–24.
223 Id. at 86.
224 Id. at 98–99.
225 See Brief for the State, supra note 26.
that the petitioners had simply not proved their case.\textsuperscript{226} The State underscored the claimed weakness of the petitioners’ non-expert evidence, even as supplemented with certain suspect expert testimony.\textsuperscript{227} It contended that the petitioners had failed in any credible way, with use of proper, non-biased scientific or expert evidence, to establish any entitlement to relief, especially in the face of the strong defense it had advanced largely through many nationally recognized experts.\textsuperscript{228}

The State devoted only five pages of its 99-page brief to the petitioners’ Tax Count.\textsuperscript{229} Here, it averred that Judge Manias acted correctly in ruling that the determination of “the characterization of a tax [is a] factual question requiring review of the machinery of assessment and collection, the character and situation, the disposition made of the tax when collected, and the legislative history and policy considerations surrounding the tax;”\textsuperscript{230} and it contended that the Superior Court’s factual determinations, resulting in the conclusion that the property taxes for schools were “local taxes,” merited affirmance. It stated: “It is well established that the legislature has broad authority to define the territorial limits of a taxing district . . . [and] by law and by operation, the town is the taxing district for each school district.”\textsuperscript{231}

The State conceded that the precise question as to the nature of the tax had not yet “been squarely addressed by . . . [the] Court,” but asserted that “prior opinions ha[d] treated school taxes as local taxes.”\textsuperscript{232} Though the petitioners argued that the property tax must be deemed “effectively” a state tax “because local districts, such as petitioner districts, cannot control the manner in which the funds are spent,” the State highlighted that Judge Manias had expressly found to the contrary.\textsuperscript{233}

b. The Majority Decision

On December 17, 1997, the Supreme Court issued \textit{Claremont II}, encompassing a majority decision and a dissent.\textsuperscript{234} Speaking for himself and

\begin{itemize}
\item[\textsuperscript{226}] Id. at 21.
\item[\textsuperscript{227}] Id. at 24.
\item[\textsuperscript{228}] Id. at 27.
\item[\textsuperscript{229}] Id. at 94–99.
\item[\textsuperscript{230}] Id. at 94–95.
\item[\textsuperscript{231}] See Brief for the State, supra note 26, at 95 (citation omitted).
\item[\textsuperscript{232}] Id. (citing not just the two cases Judge Manias raised but also Gilsum v. Monadnock Sch. Dist., 202 A.2d 790 (N.H. 1964)).
\item[\textsuperscript{233}] Id. at 96.
\item[\textsuperscript{234}] Claremont Sch. Dist. v. Governor (\textit{Claremont II}), 703 A.2d 1353 (N.H. 1997).
\end{itemize}
three of the other Justices, Chief Justice Brock stated at the outset, in very strong terms, the majority’s holding:

In this appeal, we hold that the present system of financing elementary and secondary public education in New Hampshire is unconstitutional. To hold otherwise would be to effectively conclude that it is reasonable, in discharging a State obligation, to tax property owners in one town or city as much as four times the amount taxed to others similarly situated in other towns or cities. This is precisely the kind of taxation and fiscal mischief from which the framers of our State Constitution took strong steps to protect our citizens.

While observing that Judge Manias, in “a detailed and thoughtful opinion,” had ruled against the petitioners on all their counts, the majority announced that, having decided the Article 5 issue, they “need not reach the plaintiffs’ other claims.”

The pivotal question under Article 5 was whether the school property tax was to be deemed a state or local one. As to this, the majority determined that Judge Manias had erred in focusing too much on control of the “mechanics of assessment and collection of local property taxes, including the budgeting function,” and in failing to place dispositive weight on the purpose of the tax, which was “overwhelmingly a State purpose.”

Claremont I here figured quite large—since, under that precedent, the State had a duty to provide a constitutionally adequate education to every educable child in the State, and to guarantee funding, it followed, according to the majority, that the school tax effectuated a State purpose of support for public schools and thus must be deemed a State tax under Article 5.

The majority did not expressly discuss why the State could not delegate to the localities, to some degree, this State education funding duty as it had done in regard to the actual delivery of education. Nor did it discuss why it

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235 The Chief Justice was joined by Associate Justices William R. Johnson, John T. Broderick and retired Associate Justice William F. Batchelder, sitting by designation. Three of these Justices had been appointed by Republican Governors, and one by a Democrat.

236 Claremont II, 703 A.2d at 1354.

237 Id. at 1354.

238 Id. at 1355–56. The Majority thus rejected Judge Manias’s view of the “character” of the school tax, with his focus on how the tax was budgeted, assessed, collected, and expended and on its legislative history and origin. See Memorandum Decision and Judgment (Manias Opinion), Claremont Sch. Dist. v. Governor (Claremont II), No. 91-E-306-B at 136–41 (N.H. Super. Ct. Dec. 6, 1996).

239 Claremont II, 703 A.2d at 1356.
was permissible, for example, for the State to delegate, in part, health, safety, and welfare functions and their funding to localities, and not do the same for education. It did emphasize the special status of education in the State’s constitutional scheme, observing:

[Public education differs from all other services of the State. No other governmental service plays such a seminal role in developing and maintaining a citizenry capable of furthering the economic, political and social viability of the State. Only in part II, article 83 is it declared a duty of the legislature to “cherish” a service mandated by the State Constitution. . . . That the State, through a complex statutory framework, has shifted most of the responsibility for supporting public schools to local school districts does not diminish the State purpose of the school tax. Although the taxes levied by local school districts are local in the sense that they are levied upon property within the district, the taxes are in fact State taxes that have been authorized by the legislature to fulfill the requirements of the New Hampshire Constitution.]

To support the conclusion that the school property tax must be deemed a State tax for purposes of Article 5, the majority referenced some precedential support, but also observed that the issue was one “of first impression.” It did not deal with the precedent Judge Manias and the State had referenced which treated the school tax, in various contexts, as being of a local character.

Having deemed the school tax to be a State tax for purposes of Article 5, the majority then had no difficulty finding it to be both disproportionate and unreasonable. Referencing the dramatically different equalized tax rates the record revealed—showing, for example, that the tax rate in Pittsfield was more than four times higher than the one in Moultonborough—it stated that it did not need to “look further to hold that the school tax is [unconstitutionally] disproportionate.” In regard to “reasonableness,” which the majority deemed to mean “just,” it stated:

240 Id. (citation omitted).
241 Id. at 1356–57. See infra note 391 and accompanying text (explaining that this precedent provides no real support for the majority’s position).
243 Id. at 1354.
244 Id. at 1357–58.
There is nothing fair or just about taxing a home or other real estate in one town at four times the rate that similar property is taxed in another town to fulfill the same purpose of meeting the State’s educational duty. Compelling taxpayers from property-poor districts to pay higher tax rates and thereby contribute disproportionate sums to fund education is unreasonable. Children who live in poor and rich districts have the same right to a constitutionally adequate education.  

The majority went on to state, though speaking against findings and conclusions of Judge Manias that certainly also pertained to other counts, that “[r]egardless of whether existing State educational standards meet the test for constitutionally adequacy, the record demonstrates that a number of plaintiff communities are unable to meet existing standards despite assessing disproportionate and unreasonable taxes.” After repeating its holding that “the varying property tax rates across the State” failed to pass constitutional muster under Article 5, the majority explicitly directed: “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.”

Though the majority had stated at the outset that it would not be reaching Judge Manias’s denial of relief as to the petitioners’ other counts, it proceeded nonetheless to make a number of other important pronouncements concerning educational adequacy and the importance of education as a constitutional right. It did this as dicta, that is, in statements outside the

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245 Id. at 1357.
246 Id. In so finding, the majority spoke counter to Judge Manias’s conclusion that “the petitioners have failed to sustain their burden of proving that under the current system, the State is not providing the petitioner school district students with an adequate education and adequate educational funding.” Memorandum Decision and Judgment (Manias Opinion), Claremont Sch. Dist. v. Governor (Claremont II), No. 91-E-306-B at 142 (N.H. Super. Ct. Dec. 6, 1996). See also id. at 160 (granting the State’s proposed finding, Part XII “Educational Adequacy” No. 8 that “[e]ach of the five petitioner districts has sufficient educational inputs to successfully implement its educational programs”).
247 Claremont II, 70 A.2d at 1357.
First, it opined that the definition of educational adequacy crafted by the State Board of Education and adopted by Judge Manias “does not sufficiently reflect the letter or the spirit of the State Constitution’s mandate . . . [inasmuch as] in the first instance, it is the legislature’s obligation, not that of the individual members of the board of education, to establish educational standards that comply with constitutional requirements.” The majority referenced and accepted “the seven criteria articulated by the Supreme Court of Kentucky as establishing general aspirational guidelines for defining educational adequacy . . . [fit to serve as] benchmarks of a constitutionally adequate public education.” It expressed its anticipation, “[w]ithout intending to intrude upon prerogatives of other branches of government,” that these branches “will promptly develop and adopt specific criteria implementing these guidelines.” It noted in that regard, quoting from an important Washington State Supreme Court opinion, that the judiciary’s role was “to construe and interpret the word ‘education’ by providing broad constitutional guidelines,” while it is for the legislature “to give specific substantive content to the word and to the programs it deems necessary to provide that ‘education’ within the broad guidelines.”

The majority further indicated, lauding “local control” as having “a valuable role in public education,” that nothing in the majority’s opinion would “prevent the legislature from authorizing local school districts to

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249 Put another way, dicta in an opinion are statements on issues which were not necessary to the decision actually reached in the case. Unlike actual court holdings, dicta lacks binding authority.

250 Id. at 1357–58.

251 Id. at 1359 (quoting from the influential case of Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)). These criteria are: “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.”

252 See N.H. CONST. pt. I, art. XXXVII.

253 Claremont II, 703 A.2d at 1359.

254 Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353, 1359–60 (N.H. 1997) (quoting Seattle Sch. Dist. No. 1 of King Cnty. v. State, 585 P.2d 71, 95 (Wash. 1978)).
dedicate additional resources to their schools or to develop educational programs beyond those required for a constitutionally adequate public education." But, it insisted:

The State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy; ... [it is basic ... that in order to deliver a constitutionally adequate public education to all children, comparable funding must be assured in order that every school district will have the funds necessary to provide such education.]

Second (and again by way of dicta) the majority declared “a State funded constitutionally adequate public education” to be “a fundamental right,” meaning: a right whose impingement is subject “to strict judicial review with the result that there must be a compelling state interest to sustain the legislation, ... a right ... not based on the exclusive needs of a particular individual, but rather ... [one] held by the public to enforce the State’s duty.” It explained this determination by observing that the “State Constitution[, unlike the Federal Constitution,] specifically charges the legislature with the duty to provide public education,” and “[s]econd, and of persuasive force, ... even a minimalist view of educational adequacy recognizes the role of education in preparing citizens to participate in the exercise of voting and first amendment rights.”

The majority observed that this fundamental right does not mean “horizontal resource replication from school to school and district to district,” but that it “may be achieved [variously] in different schools possessing, for example, differing library resources, teacher-student ratios, computer software, as well as the myriad tools and techniques that may be employed by those in on-site control of the State’s public elementary and secondary school systems.” Where, however, “an individual school or school district offers something less than educational adequacy, the governmental action or inaction will be examined by a standard of strict judicial scrutiny.”

While the majority agreed with the dissenting Justice Horton that “we were not appointed to establish educational policy, nor to determine the

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255 Id.
256 Id. at 1360.
257 Id. at 1358–59 (citations omitted).
258 Id. (citations omitted).
259 Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353, 1359 (N.H. 1997).
260 Id.
proper way to finance its implementation—matters left, “consistent with our Constitution, to the two co-equal branches of government”—they stated: “We disagree with [the dissent] that the taxation of property to support education must reach the level of confiscation before a constitutional threshold is crossed.”

The majority concluded by observing, “The legislature has numerous sources of expertise upon which it can draw in addressing educational financing and adequacy including the experience of other States that have faced and resolved similar issues;” it would not remand at that time, “but instead stay all further proceedings until the end of the upcoming legislative session and further order of this court to permit the legislature to address the issues involved in this case.” It allowed “the [then] present funding mechanism [to] remain in effect through the 1998 tax year” to enable “an orderly transition to a new system,” and announced its confidence that “the Legislature and the Governor will act expeditiously to fulfill the State’s duty to provide for a constitutionally adequate public education and to guarantee adequate funding in a manner that does not violate the State Constitution.”

c. The Dissent

In his dissent, Justice Horton took pains to indicate that he also saw “the current financing matrix for education . . . [as] far from desirable,” but he stated that he felt it inappropriate for the Court to “involve . . . [itself] in social engineering, no matter how worthy the cause, when the constitution and the decisions of those charged with the obligation of forming social policy are compatible.” Justice Horton differed with the majority both with respect to its “definition of the standard” for the duty to provide a constitutionally adequate education and with respect to its conclusion that the present manner of funding education through local property taxes was unconstitutional.

Undertaking a “careful reading” of Article 83, Justice Horton concluded that the duty it imposed for educational “adequacy” “would be satisfied if the education provided [met] the minimum necessary to assure the preservation of a free government,” that is, it only need satisfy “the first three elements of the Kentucky standard adopted by the majority but not necessarily the balance (mental and physical wellness, arts, preparation for advanced education) that are part of the New Hampshire standard.”

261 Id. at 1359–60.
262 Id. at 1360.
263 Id. at 1360–61 (citations omitted).
264 Id. at 1361.
265 Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353, 1361 (N.H. 1997).
education or vocations). His view was that these “first three elements” formed the education “constitutional ‘nut,’” and he stated that “[i]t is conclusive from the factual findings below that this constitutional nut has been provided by the school districts, well within their respective resources.”

Turning expressly to “the definitive holding of the majority,” the tax ruling, Justice Horton opined that while Article 5 indeed requires that taxes be levied in a proportional and reasonable manner, “the issue of proportionality, in this case, is driven by a determination of the appropriate taxing district” and here the majority erred in “equating [a State] ‘duty’ with [a local] ‘purpose’ and ignoring the fact that governmental duty can be delegated to subdivisions.” For his part, he would “move from an analysis of duty to an analysis of purpose, and hold that the purpose in education taxation is a local purpose, the education of children of the school district.”

Justice Horton defended his position by pointing out that “[t]he State delegates many of its constitutional duties to its political subdivisions and provides for taxation to support satisfaction of the delegated duties at the local level.” With this “determination of duty and delegation,” Justice Horton concluded that he “was driven to a holding that the constitutional education nut is properly delegated and the purpose, for taxation purposes, is demonstrably local [and that]:”

Given the legislature’s proper delegation, its clear designation of the taxing district, the discerned purpose of

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266 Id. at 1361–62 (citation omitted). See supra note 251 for a discussion of the Kentucky Rose guidelines.
267 Claremont II, 70 A.2d at 1362.
268 Id.
269 Id.
270 Id. (citation omitted).
271 Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353, 1362–63 (N.H. 1997) (citation omitted). He explained, in this regard, that, over the years, and to deal with “[t]he general duties of the State, imposed by the Constitution, [such as the] provision for the general good (pt. I, art. 1), protection of the people (pt. I, arts. 3, 12) provision for the general benefit and welfare (pt. II, art. 5) and provision for government and ordering (pt. II, art. 5) [as well as to deal with] more specific duties, such as the provision of a constitutionally adequate education and a guarantee of adequate funding . . . provision of courts and legal remedies (pt. I, art. 14; pt. II art. 4), provision of elections (pt. II, art. 5), and provision for the raising of taxes (pt. II, art. 5) . . . [p]olitical subdivisions, at their own expense, [have] carried 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 and staffing of local government [as well as provision of] facilities and some staffing for our court system,” and, of course, have been largely responsible to raise school funding. Id. at 1363 (citations omitted).
the tax, and its obvious proportionality within the taxing district, I would hold that the trial court was correct in deciding, in the context of this case, that the part II, article 5 tests of reasonability and proportionality have been met by the current tax system.  

As to reasonableness, Justice Horton stated that this “should be measured against an objective standard . . . [and] where the taxing act becomes a taking act, the tax is unreasonable.” Here, according to Justice Horton, “[f]ailure of the school districts, the primary obligors, to provide funding for the education nut by virtue of the unreasonableness of their respective taxes, would trigger the State’s guarantee obligation, . . . [with] the State [then needing to] step in and provide funding, or such part thereof as will reduce the tax burden to a reasonable level.” Justice Horton found, however, that “[t]he test of absolute reasonability is not developed in this case.

Justice Horton went on to state that while he did not “quarrel” with the majority’s “characterization” of “the right of the student to education” as constituting a “fundamental” one, it was not made in the context of finding an equal protection violation, and thus lacked “materiality.” For his part, moreover, he saw the “record below [as] demonstrat[ing] that the constitutional nut is provided to all students . . . ; the funding scheme is not constitutionally infirm [and] there is no equal protection violation.”

Justice Horton concluded: “Although I have some quarrels with aspects of the decision below, none are the subject of this appeal, and I agree for the most part with the result reached by the trial court in a mostly excellent opinion.”

II. DEFENSIBILITY

Our evaluation of Claremont I hinges on whether the Supreme Court rightly concluded that Article 83 actually imposes enforceable “adequacy” duties, and whether the Court, in taking on the “adequacy” issues, acted in accord with constitutional separation of power restraints. Our evaluation of

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272 Id.
273 Id. at 1364 (citation omitted).
274 Id.
275 Id.
276 Id.
277 Id.
278 Id.
279 Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353, 1364 (N.H. 1997)
Claremont II hinges on whether the Court rightly decided the tax question, and whether it otherwise properly carried out its appellate role.

1. Claremont I
   a. The Meaning of Article 83

   Is the “cherish . . . public schools” language in Article 83 nothing more than an aspirational, hortatory statement imposing no constraints on the Legislature beyond what the voters may demand and require? Or is it, as the Supreme Court determined in Claremont I, the expression of a real duty and constitutional imperative to provide for, and assure the funding of, “adequate” education for New Hampshire’s public school students?

   The text itself is phrased archaically.279 Analogous education provisions in the constitutions of other States offer, in some instances, somewhat more concrete duty language.280 What’s more, the “duty” to “cherish . . . public schools” in the Article is only one of a number of enumerated “duties.”281 Article 83 also imposes “duties” on:

   [T]he legislators and magistrates . . . to cherish the interest of literature and the sciences and all seminaries . . . 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 principals of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality,

279 REBEIL, supra note 54, at 18. Van Loan sees Article 83 to be much like Part I, Article 38, which, among other things, confers upon citizens the “right to require” their elected officials to do their jobs properly, and he asserts this is similarly hortatory, imposing no justiciable rights. See Van Loan Letters, supra note 17, Letter No. 11 (“What Was The Original Understanding?”).

280 E.g. N.Y. CONST. art. XI, § 1 (“[T]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”); KY. CONST. § 183 (provision of “an efficient system of common schools throughout the State”); WASH. CONST. art IX, § 1 (“It is the paramount duty of the state to make ample provision for the education of all children.”); see generally Conn. Coalition for Just. in Ed. Funding, Inc. v. Rell, 990 A.2d 206, 228–232, n.27 (Conn. 2010) (discussing many state constitutional education provisions, with varying “qualitative” language).

281 N.H. CONST. pt. II, art. LXXXIII.
sincerity, sobriety, and all social affections, and generous sentiments, among the people.\textsuperscript{282}

Article 83 is also not contained in the Constitution’s Bill of Rights Part (Part I), but in that Part (Part II) dealing with government structure,\textsuperscript{283} and its expressed “duty” is directed to “the legislators and magistrates,” not precisely to the State or government institutions.\textsuperscript{284}

Yet, Article 83 plainly and straightforwardly imposes upon our government officials (not as individuals but as persons bearing responsibility in their official capacities for the operation of our government institutions) the “duty . . . to cherish . . . public schools” in strong terms.\textsuperscript{285} It introduces this “duty” by stressing the importance of the diffusion of knowledge and learning “[for] the preservation of a free government”; and it characterizes the provision of education across the State, in its “various parts,” as “highly conducive to promote this end.”\textsuperscript{286} It then describes the “duty” to “cherish” as mandatory for all time (“it shall be the duty of the legislators and magistrates, in all future periods of this government”).\textsuperscript{287} Though derided by some commentators as a tool for constitutional analysis,\textsuperscript{288} the dictionaries of the 1780’s defined “cherish” to have, as one of its common meanings, that of actual support; and it was used that way by important personages of the time, including John Adams.\textsuperscript{289} Thus, by its terms, Article 83 requires the State’s

\textsuperscript{282} Id.
\textsuperscript{283} Mosca, \textit{NH’s Claremont Case}, supra note 17, at 425–426 (“The structure of the constitution . . . belies the assertion that Article 83 imposes any judicially enforceable duty on state government to provide an adequate education. Part I, the Bill of Rights, specifically enumerates limitations on governmental power. . . . Part II, the Form of Government, in contrast, divides governmental powers between the three branches without specifically enumerating how to exercise those powers.”); \textit{Van Loan Letters}, supra note 17, Letter No. 11 (“What Was The Original Understanding?”) (“[S]ince the Encouragement of Literature Clause was not placed in the Bill of Rights section of the Constitution, one would have expected the Claremont Court to have found this fact to be an impediment to its conclusion that it established a right to education.”).
\textsuperscript{284} See \textit{Van Loan Letters}, supra note 17, Letter No. 11 (arguing that Article 83 was thus “meant to inspire persons not to direct governments”).
\textsuperscript{285} \textit{N.H. Const.}, pt. II, art. LXXXIII.
\textsuperscript{286} Id.
\textsuperscript{287} Id. (emphasis added).
\textsuperscript{288} E.g., \textit{Van Loan letters}, supra note 17, Letter No. 2 (“What the Constitution Actually Says”) (castigating the Claremont Court for engaging in a claimed dubious form of “dictionary jurisprudence” to justify its reading of the term “cherish” as being more than a hortatory expression directed just at individuals not institutions).
\textsuperscript{289} \textit{Claremont Sch. Dist. v. Governor} (\textit{Claremont I}), 635 A.2d 1375, 1378 (N.H. 1993) (observing that the 1780 T. Sheridan, A General Dictionary of the English Language, defined “Cherish” to mean: “To support, to shelter, to nurse up”). \textit{See also McDuffy v. Sec’y of Exec.}
leaders to provide at all times a public education that is designed to enable all of the State’s children to become, through learning, productive citizens who will assure “the preservation of a free government.”

While the Article contains other “duties,” this does not detract from the importance it accords public education itself. The nature of such other “duties” needs to be assessed in their own contexts. That Article 83 was placed in Part II of the Constitution and not Part I may be seen as reflecting its importance. Just as other structures of our republican government must be maintained, so must the proper provision of education. “The framers’ decision to place the provisions concerning education . . . [in Part II rather than Part I] demonstrates that the framers conceived of education as fundamentally related to the very existence of government.”

Prior New Hampshire court precedent offers assistance in determining the nature and breadth of the pertinent Article 83 duties. The precedent, though not squarely on point, may be fairly read as being essentially supportive of Claremont I. These cases recognized that Article 83 did impose a duty or injunction to cherish education, something “more than a mere sentimental interest,” a duty “of paramount importance,” though it

Office of Educ., 615 N.E. 2d 516, 523–526 (Mass. 1993) (reviewing the dictionaries of the era in more detail and observing that “[t]he term ‘cherish’ was used in the Eighteenth Century to import a meaning which is no longer, or which is much less, in vogue today. . . . [that] according to common usage in the late Eighteenth Century, a duty to cherish was an obligation to support or nurture.”). McDuffy also referenced the writings of such important policy-makers of the era as John Adams and John Hancock to show how “cherish” was used in the “support” sense. Id. at 525–26.

McDuffy, 615 N.E. 2d at 528 (“[A] sensible reading of the [pertinent] language is that each object of the duty to cherish is to be cherished in accordance with its nature. ‘Interests’ are unlike institutions, and so are ‘cherished’ in different ways from institutions. The ‘university at Cambridge’ is different from ‘public schools and grammar schools in the towns’ and so is cherished differently from them.”). This point is not appreciated, for example, in Mosca, Original Understanding, supra note 20, at 225, where it is stated: “There is nothing in the [pertinent language of Article 83] that suggests that public schools should take priority over the other objects of the duty to cherish.”

Records of the pertinent Constitution Convention proceedings discuss the importance accorded education. It was stated in regard to Article 83: “From the deepest impression of the vast importance of literature in a free government, we have interwoven with and made its protection and encouragement a part of the constitution itself.” See Address of the Convention for Framing a New Constitution or Form of Government for the State of New Hampshire, Exeter, New Hampshire 14 (1782).

McDuffy, 615 N.E. 2d at 527. While Article 83 accords the State broad power to control and regulate education, it requires the State to use this power to provide a level or quality of education fit to preserve our way of life. See State’s Supp. Brief (Aug. 31, 1993), Claremont Sch. Dist. v. Governor (Claremont I), 635 A.2d 1375 (N.H. 1993).

E.g., In re Davis, 318 A.2d 151, 152 (N.H. 1974) (“Our State constitution imposes upon government the duty of providing for the education of its citizens.”); State v. Jackson, 53 A.
also recognized the preeminence of the Legislature in regard to education policy and manifested a strong unwillingness to limit legislative discretion or second-guess legislative action in the area. 294

A review of the State’s actual provision of public education when Article 83 was enacted shows that while a school system then existed oriented to have children learn, at a minimum, how to read and write, it had been “in decline, principally because of the failure of local town officials to meet their legal duty.” 295 Moreover, many children lived outside the more populated areas and did not have easy access, if at all, to schools. 296 Yet, “the authors of the Constitution enacted the Education Clause against this background of

1021, 1023 (N.H. 1902) (“[S]omething more than a mere sentimental interest was intended.”); Farnum’s Petition, 51 N.H. 376, 379 (1871) (“[T]he constitution enjoins the duty, in very general and comprehensive terms . . . as one of paramount public importance.”). 294 E.g. Coleman v Sch. Dist. of Rochester, 183 A. 586, 586 (N.H. 1936) (the scope of legislative authority is broad in dealing with education, and the courts “may not declare acts of the Legislature void on the sole issue whether they are `wholesome and reasonable’ ”); Trs. of Dartmouth Coll. v. Woodward, 1 N.H. 111, 137 (1817). Van Loan argues that Fogg v. Board of Educ. of Union Sch. Dist. of Littleton, 82 A. 173 (N.H. 1912) supports the view that Article 83 did not provide rights to the public to enforce an education duty, but rather worked only to serve the important purpose of “encourag[ing] the creation of an educated citizenry.” See Van Loan Letters, supra note 17, Letter No. 12 (“If There Are Education Rights, Whose Rights Are They?”). Fogg involved a claim by parents of a right of transportation for their child who otherwise had to walk several miles to get to the nearest school. In that context, and in ruling in favor of the parents on statutory grounds, the Supreme Court characterized “[f]ree schooling furnished by the state [as] not so much a right granted to the pupils [than] a duty imposed upon them for the public good . . . [and stated that] the fundamental purpose of the public school system is the protection and improvement of the state as a political entity.” Fogg, 82 A. at 175. That this was stated in the context of that case hardly suggests that a defined floor of education may not be deemed to be an enforceable State duty which may be insisted upon, certainly, by affected or injured members of the public.

295 Hough Brief, supra note 20, at 24; see also Claremont Sch. Dist. v. Governor (Claremont I), 635 A.2d 1375, 1380 (N.H. 1993) (quoting Governor Wentworth’s message to the General Assembly in late 1771 to the effect “that the local town officials had failed to meet their duties under the prior laws and that corrective action was necessary by the State itself”); BUSH, supra note 24, at 12–13 (“From the beginning of the 18th Century until near its close (1700s there was great apathy in the matter of maintaining schools, the law respecting education being but partially enforced.”); NATHANIEL BOUTON, THE HISTORY OF EDUCATION IN NEW HAMPSHIRE: A DISCOURSE, DELIVERED BEFORE THE NEW HAMPSHIRE HISTORICAL SOCIETY, AT THEIR ANNUAL MEETING IN CONCORD, JUNE 12, 1833 10–18 (Concord N.H., Marsh Capen and Lyon 1833) (highlighting as causes for this education neglect “inhabitants exceedingly scattered,” and the tumult and discord of the period with much warfare).

296 Mosca, Original Understanding, supra note 20, at 234 (“[N]either 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.”).
widespread failure . . . and did so to assure public education by means of positive constitutional duty.”

As in Massachusetts, the importance of public education and public schools in New Hampshire has been well articulated since colonial times both in constitutional and policy pronouncements; and the State has supported public education over the years, though, to be sure, imperfectly. Moreover, as the State moved from its Puritan beginnings to more modern settings, the education the public schools offered did not remain static, but evolved and expanded to meet new conditions; and it moved forward to offer basic education in all regions. During this time, the State continued to exercise overall control, oversight and direction for public education, though schools also very much remained subject to the control of the localities. In short, while it is certainly possible to fault the education the State has offered, the constitutional command to “cherish” education has been in place since 1784 “as a cornerstone of our democratic system.”

To be sure, an attempt was made in the State’s Constitutional Convention of 1850 to move Article 83 to the Bill of Rights Part of the Constitution and to add articles to the Form of Government Part (Proposed Articles 89 through 91) that would have explicitly required the Legislature to “make provision for the establishment and maintenance of free common schools, at the public expense,” (proposed Article 89), constitutionally provide for a minimum funding level for education to be raised “in the several towns and places in this State,” (same proposed Article), and establish for “[the supervision of public instruction,” the elected position of “State Superintendent” with “such other officers as the Legislature shall direct” (proposed Articles 90 and 91). Some commentators contend that these proposals reflect that Article 83 was then not seen as establishing any mandatory, enforceable rights to “adequacy” in education and to “adequate” funding. Yet in proposing
these measures, the 1850 Convention, as reflected in reports issued by its Standing Committee on Education, was focused upon achieving concrete improvement of the then existing pre-Civil War education system and its funding, and not upon the reach or breath of Article 83 itself.304

In regard to proposed Articles 90 and 91, creating the constitutional office of State Superintendent, the Committee on Education opened its Report by underscoring the importance of public education. It stated: “The importance and necessity of popular education to the permanence and security of our free institutions . . . [we] take for granted” and “free schools are admitted by all to be indispensable to our security and prosperity as a people.”305 It went on to observe that its proposals for a constitutional State Superintendent position and other State positions, though “not confer[ring] new power upon the Legislature,” would make “that permanent which is now changeable; to make imperative which is now optional.”306 Proposed Articles 90 and 91 thus represented an attempt to have the State adopt, at the constitutional level, a particular form of supervisory attention to foster schools and education.

In regard to proposed Article 89, the Committee opined in another Report that “the common or primary schools deserve the special encouragement and support of the State, and that the duty of sustaining them is imperative, both on legislators and on the people.”307 It observed that while, “[t]he legislators of New Hampshire have not been unobservant of that excellent article of our constitution [Article 83], which enjoined upon them . . . ‘the cherishing of all seminaries and public schools’. . . . our common schools are still far from being what they should be and might be” and [to deal with the evident problems], that is, “to supply existing wants and remedy existing defects more pecuniary means are needed . . . [to be ensured

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304 See JOURNAL, supra note 302, at 54.
305 Id.
306 Id.
307 Id. at 52 (emphasis added).
by an express provision in the constitution authorizing and requiring the legislature to grant them.”

Upon review of the above, to include the pertinent historical context, it hardly appears that the 1850 Convention took any definite or clear position concerning the breadth or reach of Article 83, or whether or to what degree the Article, by itself, called for the Legislature to assure “adequate” education, or whether, or to what degree the Judiciary could play any role in assuring Article 83’s dictates. Rather, the Convention recognized education to be an imperative State “duty,” and it sought to effect detailed education reforms to improve the system in place and its funding. In any event, none of the Convention’s proposals were adopted—they were defeated for any number of reasons.

What is very significant in construing Article 83 is that its core language originated with John Adams through his drafting of the Massachusetts Constitution of 1780. Adams was, without question, a strong proponent of the importance of education and the imperative for the State to nurture and support it to maintain our democratic way of life.

The writings of this central founding father plainly reflect that he did not consider his “cherish” public education constitutional language to lack teeth—to be something that could be ignored if the Legislature wished to do so. Rather, they confirm his strong dedication to the essentiality of education to the preservation of our republican form of government.

As was said by the Massachusetts Supreme Judicial Court in the McDuffy case, in discussing the significance of Adams: “There is substantial evidence that John Adams believed that widespread public education was integral to the very existence of a republican government.”

Adams, for example, wrote about education only three years before his drafting of the Massachusetts Constitution in the following strong terms:

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308 Id. at 52–53 (emphasis added). The Committee specifically discussed the inequities then evident in the provision of education across the State, stating that “[t]here is a need . . . of increasing from time to time the percentage of appropriation that the children and youth in every part of the State may enjoy as nearly as may be practicable, equal advantages in education.” Id.

309 See Backhoven, supra note 22, at 28 (“In effect, the Constitutional Convention of 1850 was the opening skirmish in a battle over school-tax reform that did not climax until the Court declared a winner in 1993.”).

310 Id. at 27.


312 Id. at 535.
The instruction of the people, in every kind of knowledge that can be of use to them in the practice of their moral duties, as men, citizens, and Christians, and of their political and civil duties, as members of society and freemen, ought to be the care of the public, and of all who have any share in the conduct of its affairs, in a manner that never yet has been practiced in any age or nation. The education here intended is not merely that of the children of the rich and noble, but of every rank and class of people down to the lowest and poorest. It is not too much to say, that schools for the education of all should be placed at convenient distances, and maintained at the public expense. The revenues of the state would be applied infinitely better, more charitably, wisely, usefully, and therefore politically, in this way, than even maintaining the poor. This would be the best way of preventing the existence of the poor.\textsuperscript{313}

He also wrote in 1785:

The whole people must take upon themselves the education of the whole people and be willing to bear the expenses of it. There should not be a district of one mile square, without a school in it, not founded by a charitable individual, but maintained at the public expense of the people themselves.\textsuperscript{314}

Adams’ views were not only found nearly verbatim expression in our 1784 Constitution, they were echoed in important contemporaneous pronouncements concerning education by major New Hampshire policy makers such as Governor Gilman and members of the State Legislature with whom this Governor worked.\textsuperscript{315} It is thus hard to delimit the meaning of Article 83 as being only aspirational, without force or mandatory content.

Article 83, as drawn particularly from Adams, calls for education to be “cherished” in real terms, as a “duty,” continuously over time and during all periods, to preserve our way of life.\textsuperscript{316} This is a fair description of its “basic

\textsuperscript{313} Id. at 536 n.54 (citing John Adams, In a Defense of the Constitutions of Government (1787)).

\textsuperscript{314} See Diane Ravitch, Reign of Error, Pre-Introduction (2014).

\textsuperscript{315} Claremont Sch. Dist. v. Governor (Claremont I), 635 A.2d 1375, 1380–81 (N.H. 1993).

\textsuperscript{316} N.H. Const. pt. II, art. LXXXIII.
purposes and values. A “pragmatic” method of constitutional construction focused upon these “basic purposes and values” supports the Supreme Court’s view of Article 83 as imposing on our government the requirement that our children be accorded the opportunity, at public expense, to obtain education sufficient to enable them properly to function as citizens.

This construction, which sees a free K–12 public education as a very important, if not fundamental right flowing from the expressed mandatory positive duty in Article 83 (not as just a discretionary entitlement), also recognizes that the duty to provide education must evolve to meet society’s needs. The constitutionally required education, whether called “adequate,” or “sound basic education,” may have been little more than “the basics” years ago, but today it certainly must constitute more than “mere reading, writing and arithmetic.” It must suffice, to fulfill the purposes of the Article, “to prepare citizens for their role as participants and as potential competitors in today’s market place of ideas.”

It is not “a display of stunning judicial imagination” for the Court to see in the “cherish” duty an obligation to provide a level of public education fit for the times; nor is it creating a constitutional right “out of whole cloth” or a form of “results oriented jurisprudence.” Though it speaks in somewhat archaic terms, Article 83 is no less meaningful than such

317 See Breyer, supra note 102, at 76–87 (explaining that his “pragmatic” approach to constitutional interpretation involves the discernment of a phrase’s “basic purposes and values.”)
318 Id.
319 As is also discussed more infra, State Constitutions differ from the Federal Constitution in that they do impose affirmative constitutional duties or obligations or “positive rights.” See Rebell, supra note 54, at 24–25 (“In contrast to the negative restraints of the federal constitution, the structure of most state constitutions, especially in key areas of state responsibility like education, incorporate ‘positive rights’ that require affirmative governmental action—and implicitly call for judicial review if the other branches fail to take that action.”).
320 Id. (“The term ‘sound basic education’ . . . appears to describe most accurately the midrange level of quality educational training in substantive skills that virtually all of the courts have agreed is necessary for students to function productively in the twenty-first century.”).
321 Claremont I, 635 A.2d at 1381.
322 Id.
323 This was an expression offered by a concurring Justice (Cowin, J) in Hancock v. Commissioner of Education, in criticizing the Massachusetts Supreme Judicial Court’s earlier McDuffy decision for seeing in that State’s constitutional “cherish” language the expression of the criteria set forth in the Rose case for education. 822 N.E.2d 1134, 1160 (Mass. 2005); see also Mosca, NH’s Claremont Case, supra note 17, at 421.
324 Van Loan Letters, supra note 17, Letter No. 8.
challenging constitutional terms as “due process,” or “equal protection.” Its dictates are real and enforceable.

b. Separation of Powers Concerns

Did the Claremont I Court err in entering the education “adequacy” fray? Is educational “adequacy” entirely within the province of the elected branches, particularly the Legislature, or is there a role for the Judiciary to assure Article 83 constitutional duties and rights upon proper court challenge?

While historical arguments challenging the legitimacy of judicial review in regard to the constitutionality of legislative or executive action certainly exist, the train has left the station long ago on this issue, and it is now clear beyond cavil that the courts, both federal and state, regularly exercise broad judicial review and act to strike down or declare unconstitutional legislative and executive acts. This sort of “judicial activism” is the norm, carried out by both “liberal” and “conservative” judges. As Van Loan has conceded: “[R]egardless of anyone’s lingering doubts about judicial review’s legitimacy, we are where we are and judicial review is a fact of life in 21st century America.”

Judicial review in the constitutional realm seems particularly appropriate in disputes concerning the proper functioning of our democracy, where the other branches have not been able or willing to be effective. Thus, the Courts have acted in the post-World War II era in such important areas as the

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326 See, e.g., In re Below, 855 A.2d 459, 464–65 (N.H. 2004) (“It is the role of this court in our co-equal, tripartite form of government to interpret the Constitution and to resolve disputes arising under it. . . . We are the final arbiter of State constitutional disputes.”) (quotations and citations omitted).
327 See REBELL, supra note 54, at 4 (writing in 2009: “[J]udicial activism” is defined in terms of declaring legislative acts unconstitutional, the conservative Rehnquist Court was the most activist in American history. . . . The Roberts Court appears to be continuing or even accelerating this trend.”).
328 See Van Loan, Judicial Review, supra note 325, at 63. See also Van Loan Letters, supra note 17, Letter No. 11 (stating “[J]udicial review was only a fraction of the Court’s work in the eighteenth century. The regulatory state with its explosion of statutory and administrative law is a creature of the twentieth century.”).
329 See REBELL, supra note 54, at 50–51 (citing JOHN H. ELY, DEMOCRACY AND DISTRESS (1980)) (stating “judicial intervention is especially justified when there is substantial malfunction in the democratic processes of one or both of the other political branches. Such a democratic malfunction often occurs in decision making on educational finance and sound basic education issues.”).
desegregation of schools, and voter apportionment, implementing and following through on controversial and often far-reaching remedies. Indeed, it has been an era of "public law litigation," with the courts across the country and in New Hampshire tackling a broad range of issues and matters, to include prison reform and the realization of community oriented treatment and assistance for persons with serious mental illness.

Is there therefore any real basis to argue, when it comes to the guarantees in our state constitutions associated with public education—positive constitutional rights so important to the continued functioning of our democracy and the perpetuation of our republican culture—that the Judiciary should play no role whatsoever particularly in the face of what may be seen as long-standing failure of the other branches to assure the offering

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332 See REBELL, supra note 54, at 4 ("The Supreme Court’s second [school desegregation] ruling, Brown II [349 U.S. 294 (1955)] . . . authorized the federal courts to oversee the implementation of school desegregation by local school districts. In so doing, it initiated ‘a new model of public law litigation’ in accordance with which both federal and state courts have for the past half century issued broad remedial decrees that go beyond the traditional judicial role of resolving private disputes between individuals and substantially affect the implementation of public policy.").
334 See Class Action Settlement Agreement, Amanda D. v. Hassan, Civ. No. 1:12-cv-53-SM (entered Feb. 12, 2014), http://www.ada.gov/olmstead/documents/nh-final-settlement.pdf. This settlement works to provide, on a long term basis, a range of community mental health services, including housing and employment initiatives, with continued court oversight. It is expected to impact on thousands of people with serious mental illness.
335 As one commentator has stated in highlighting the importance of education today: “[T]he vastly expanded electorate encompassing individuals of both genders and all classes, races, and ethnic groups, combined with contemporary expectations that a citizen’s role is to analyze issues rationally and make individual electoral decisions, renders the link between effective education and the maintenance of a viable democracy more important than ever.” REBELL, supra note 54, at 45.
of proper education opportunity to all children? It is certainly provocative to opine that “[t]he Constitution does not establish the Court as a panel of philosopher-kings.” But New Hampshire’s Constitution imposes on state judges the responsibility to assure constitutional rights, including rights of a positive nature.

This said, it is also true that certain disputes may be non-justiciable, or not amenable to judicial treatment or involvement, and the doctrine of separation of powers, as drawn from both the federal and state constitutions, operates to keep the courts from insinuating themselves inappropriately in certain matters. New Hampshire’s separation of powers principles flow from Part I, Article 37 of the State Constitution, and call for the powers of government to be carried out by the three branches in such a manner that one branch is prohibited from “encroach[ing] upon another branch’s power as to usurp from that branch its constitutionally defined function.” The nonjusticiability of a political question is primarily a function of the separation of powers.

A case raises a non-justiciable “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; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

While a number of state supreme courts have dismissed claims challenging education systems on this basis, or because of “separation of powers” concerns, the majority of state supreme courts that have dealt with these

336 See Van Loan Letters, supra note 17, Letter No. 9 (“Is Education Too Important To Be Entrusted To The Politicians?”).
339 Id. at 217. See also In re Judicial Conduct Comm., 751 A.2d 514, 515–17 (N.H. 2000) (using federal precedent to deal with the political question issue).
cases have not taken this position. Like Judge Manias did explicitly here and as the Supreme Court did implicitly, they have accepted the notion that these suits raise serious justiciable constitutional issues implicating the important matter of education, and that it would be, as the Rose court put it, “a denigration of . . . constitutional duty” to not exercise appropriate judicial review in regard to whether the Legislature was actually meeting its constitutional responsibilities in regard to education.

As was discussed supra in Part II.1.a, Article 83 speaks in mandatory terms, requiring the State (its Legislators and Magistrates) “to cherish [that is, support] public schools.” Language like this “both empowers and obligates.” While New Hampshire’s Constitution particularly vests the Legislature with the authority to fashion education policy for the state’s public schools and the responsibility to fund them, it does not contain any language that the Judiciary should play no role in determining whether constitutional compliance has been achieved. It contains no language saying that public education is a matter left to the unreviewable discretion of the Legislature, or to the two other branches. Rather, Article 83 sets forth


See generally Justice in Educ. Funding, Inc v. Rell, 990 A.2d 206, 225–226 n.24 (Conn. 2010); REBELL, supra note 54, at 17, 134–35 n.12 (collecting cases).


N.H. CONST. pt. II, art. LXXXIII.


See Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 778 (Tex. 2005) (the Texas Supreme Court, in construing its state’s constitutional mandate “to establish and make suitable provision for the support and maintenance of an efficient system of public education,” stating: “If the framers had intended the Legislature’s discretion to be absolute, they need not have mandated that the public education be efficient and suitable; they could instead have provided only that the Legislature provide whatever public education it deemed appropriate.”), see Campaign for Fiscal Equity, Inc. v. State, 801 N.E. 2d 326, 351 (N.Y. 2003) (Smith, J. concurring) (discussing N.Y. CONST., art. XVII, §1 “The aid, care and support of the needy are public concerns and shall be provided by the state . . . in such manner and by such means, as the legislature may from time to time determine.”). Though several attempts have been made since the Claremont I and II decisions to amend the Constitution to at least limit the Judiciary’s role, these have not succeeded. See infra note 419 and accompanying text.
constitutional “dut[ies]” to support education from which flow corresponding “jural correlative” rights.  

To be sure, in dealing with “adequacy,” or like constitutional standards in education, the state courts are not acting to enforce a limitation, or negative restriction, on governmental power, but to assure positive rights. This is seen by some commentators as inappropriate judicial policy-making creating “entitlements.” A mandatory, positive constitutional right, however, is not the same thing as a discretionary entitlement. As one commentator has explained:

[A] positive constitutional right imposes an affirmative obligation on the state to ‘realize and advance the objects and purposes for which . . . powers have been granted.’ . . . Judicial review, in such a regime, must serve to insure that the government is doing its job and moving policy closer to the constitutionally prescribed end.

The Washington State Supreme Court recently highlighted once again, as it had more than thirty years before in an earlier education case, the important “distinction between positive and negative constitutional rights.”

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348 See McCleary v. State, 269 P.3d 227, 247–248 (Wash. 2012) (quoting Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 91 (Wash. 1978)) (footnotes omitted) (“By imposing upon the State a paramount duty to make ample provision for the education of all children residing within the State’s borders, the constitution has created a ‘duty’ that is supreme, preeminent or dominant. Flowing from this constitutionally imposed ‘duty’ is its jural correlative, a correspondent ‘right’ permitting control of another’s conduct. Therefore, all children residing within the borders of the State possess a ‘right,’ arising from the constitutionally imposed ‘duty’ of the State, to have the State make ample provision for their education. Further, since the ‘duty’ is characterized as paramount the correlative ‘right’ has equal stature.” (emphasis in original)). While Van Loan questions the legitimacy of any corresponding rights associated with any Article 83 “duty,” it may not fairly be disputed that, rightly or wrongly, once the mandatory positive constitutional duty arising from Article 83 was recognized, it followed easily that associated rights existed for some to enjoy the benefits flowing from the duty and for those affected or interested persons to be able to take effective steps, through court action, to assure fulfillment of the duty. See Van Loan Letters, supra note 17, Letter No. 4 (“Not All Duties Create Rights”).

349 See, e.g., Van Loan Letters, supra note 17, Letter No 5 (“A Constitution Is Not a Menu of Entitlements”) (bemoaning the recognition of the Article 83 education duty, decrying the establishment of constitutional “entitlements,” and seeing this as the setting up of the State “as a dispenser of benefits, as a redistributor of wealth and as an agency of social engineering.”).  


352 McCleary, 269 P.3d at 248.
As to “[t]he vast majority of constitutional provisions . . . framed as negative restrictions on government action . . . the role of the court is to police the outer limits of government power, relying on the constitutional enumeration of negative rights to set the boundaries . . . [whereas] [p]ositive constitutional rights do not restrain government action; they require it.”

In regard to such rights, moreover, “federal limits on judicial review such as the political question doctrine or rationality review are inappropriate . . . [i]nstead in a positive right context we must ask whether the state action achieves or is reasonably likely to achieve ‘the constitutionally prescribed end.’”

The question of “adequacy” may be a difficult one, but so are many constitutional issues. The task has been made easier through the many cases that have been decided across the country. These have established a “broad consensus” as to this term’s “core meaning,” the nature of the education or educational opportunity, it connotes. Indeed, “[v]irtually all of the courts that have defined their constitutional language have agreed that a basic education that meets contemporary needs is one that ensures that a student is equipped to function capably as a citizen and to compete effectively in the global labor market.”

The definition standards the Courts have adopted in these cases are not “illusory” or so imprecise and constantly evolving as to be immune from judicial review. Rather, they “define[] the contours of the [constitutional] requirement, against which the facts of a case may then be measured” though they “must [also] serve the future.”

The courts have now also been provided “practical tools for developing judicially manageable approaches for dealing with complex educational issues and implementing effective remedies,” with the acceptance throughout the country of “standards-based” education reform. Realized through combined federal-state initiatives, such reform has resulted, or is oriented

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353 Id. (citation omitted).
354 Id. (quotations and citations omitted).
355 See REBELL, supra note 54, at 18.
356 Id.
358 Id.
359 See REBELL, supra note 54, at 20.
360 The States have been prodded by federal laws, particularly the No Child Left Behind Act of 2001, 20 U.S.C. § 6301 et seq. (2015) (“NCLB”), the latest overhaul of the Elementary and Secondary Education Act (“ESEA”), combined with actions of various Presidents and the federal Department of Education, to establish high substantive academic or skills-set standards and accountability mechanisms in schools. While “standards-based” reform has been going on for some time, going back at least as far as 1983 and the publication then by the National Commission on Excellence in Education of the landmark and disturbing “A Nation At Risk” report, controversy presently exists concerning the acceptance of “Common Core” standards across the country. These academic standards in English/language arts and math, arising from
to produce, school systems operating with substantive content standards in all major subject areas, set at levels so as to produce students with skills and knowledge fit for the times. With these standards in place, all other aspects of the system, and all educational inputs, need to function with "[t]he . . . aim to create a coherent system of standards, resources, and assessments that will result in significant improvements in achievement for all students." 

Such "standards-based" education reform operates to infuse "the concept of educational opportunity . . . [with] substantive content," and also "provide[s] judges with workable criteria for crafting practical remedies." It enables the courts to sensibly consider, with use of sophisticated fact-finding approaches, whether a particular education system, or grouping of schools, actually offers an approach to learning, with proper funding, that may be deemed to meet such constitutional standards as "adequate," or "sound basis education." 

To find constitutional compliance in regard to "adequacy," the courts will want to find:

[R]ational educational standards that set out what it is that children should be expected to learn . . . standards [that] should meet or exceed a constitutional floor of an adequate

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a Common Core State Standards Initiative begun in 2009 by the Council of Chief State School Officers and the National Governors Association, have been accepted by most states, but some are now resisting them or abandoning them. This being said, in this age of marked inequality in wealth and income, the standards-based education reform movement, operates, at its best, as a progressive undertaking to extend and assure quality educational opportunity to all children. It insists that all levels of government work together on an ongoing basis to realize the education our children need. But see, DIANE RAVITCH, REIGN OF ERROR (Vintage Books 2013) (powerful and scathing criticism of the contemporary education reform movement, particularly its corporate, privatization and high stakes testing aspects).

361 See REBELL, supra note 54, at 20.
362 Id.
363 The courts are quite capable of employing sophisticated fact-finding approaches, with extensive use of expert evidence, in dealing with complex disputes. See, e.g., id. at 13 ("Concerns about the courts’ capacity to engage in sophisticated fact gathering and remedial processes have . . . been muted by empirical investigations of what courts actually do in these cases."). Indeed, "[t]he irony is that while . . . pundits persist in arguing that the courts’ new role [that is, active judicial involvement in the social policy sphere] is usurping legislative powers, Congress and the State legislatures themselves are continually asking the courts to take on more of these policy-making activities by passing regulatory statutes that directly or implicitly call for expanded judicial review. A prime example is the Individuals with Disabilities in Education Act in which Congress set forth a detailed set of substantive and procedural rights and explicitly established a new area of court jurisdiction for individual suits, regardless of the amount in controversy." Id.
364 Id. at 21.
base for children. Second . . . an adequate method of assessing whether children are actually learning what is set out in the standards. Third . . . adequate funding so as to accord to schools the ability to provide instruction in the standards. And fourth . . . adequate accountability and oversight by the State over those school districts so as to insure that the districts are fulfilling the State’s constitutional responsibility.\footnote{Id. at 38 (citing Moore v. State, Case No. 3AN-04-0756 (Alaska June 21, 2007)). Rebell himself sees a court’s task as ensuring: that the State adopts “challenging academic content and performance standards that define in concrete terms the content of a sound education”; that the State require the actual determination of the “cost of providing all students the opportunity for a sound education” with adoption of a funding system that provides the requisite resources; that the State “develop and implement instructional programs and accountability mechanisms that will provide all students with meaningful educational opportunities”; and that the State adopt good measures to “assess the extent to which student performance has improved as a result of . . . reforms.” Id. at 57. \textit{REBELL, supra} note 54, at 53–55 (discussing comparative institutional functional capacities research he and a colleague conducted respecting the judicial, legislative and executive branches and stating: “[t]he key conclusions we reached were that the rational-analytic decision-making mode of the courts was effective for articulating fundamental principles, while the legislature’s mutual adjustment decision-making mode was better equipped to develop specific policies through broad political compromises, and the administrative agency’s pragmatic-analytic decision-making approach was most useful for understanding and reflecting grassroots implementation needs.”).}

In carrying out this review, courts function best when they keep in mind both their institutional strengths and weaknesses.\footnote{\textit{Id. at 56–105} (discussing a “successful remedies model”).} They are not institutionally well positioned to, and are indeed constitutionally constrained from, micromanaging education or doing any “social engineering,” but they are especially effective, when constructively working with the other branches, in undertaking constitutional review of the level of quality of offered education, the associated funding, the assessments, and the accountability mechanisms. In sum, they best act to meet their judicial function in these cases when they articulate and insist on the pertinent constitutional principles, dealing with determinations of constitutional compliance, and, if necessary, remedies, through proper fact-finding processes and procedures. A court may need to do this over an extended period of time, confronting, as difficult as this may be, the complexity of the task and its demands on judicial resources.

Specific policy approaches to create proper learning standards in all subject areas, to “cost-out” and devise education funding schemes, to provide
effective instruction and accountability, and to put in place student assessment measures are best left to the other branches to develop, subject to court review only for constitutionality. An expectation of reasonableness and good faith must serve as the lodestar to keep the courts within proper bounds. The goal is not to have conflict among the branches, but to achieve together the fulfillment of constitutional obligations owed to our children.

As the Supreme Court of Texas stated in deeming its constitutional task to assure the proper delivery of education as judicially manageable:

[We do not] agree . . . that the constitutional standards of adequacy, efficiency and suitability are judicially unmanageable. These standards import a wide spectrum of considerations and are admittedly imprecise, but they are not without content. At one extreme, no one would dispute that a public education system limited to teaching first grade reading would be inadequate, or that a system without resources to accomplish its purposes would be inefficient and unsuitable. At the other, few would insist that merely to be adequate, public education must teach all students multiple languages or nuclear biophysics, or that to be efficient, available resources must be unlimited. In between, there is much else on which reasonable minds should come together, and much over which they may differ. The judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness . . . [in applying concepts of] due process of law, equal protection, and many other constitutional provisions.
In late 2014, the Supreme Court of South Carolina wrestled with an education adequacy review, and did this in a manner seeking to avoid getting inappropriately enmeshed in specific education policy development and management.  

Upon review of the evidence that had been presented at the trial level concerning both measurable education “inputs” for the students (i.e. available resources including funding) and “outputs” (i.e. indications of student success), the Court’s majority (it was a 3-2 decision) held that the State failed to offer the requisite opportunity to acquire a minimally adequate education in the plaintiff districts. These districts were largely rural, serving largely poor student populations.

The Abbeville majority, however, did not then impose its own detailed remedy. Rather, it highlighted the limits of its role—its refusal to get stuck in what it termed a “quagmire” of over-involvement with education—and called upon the parties to develop a remedial plan per a timetable for the Court’s ultimate constitutional review. The majority referenced as “instructive” certain cases from other jurisdictions where the State High Courts had approached the crafting of remedies showing deference to the other branches.

In New Hampshire, the Supreme Court took pains in Claremont I, Claremont II, and in subsequent opinions to avoid becoming overly enmeshed in the management of our educational system. Recognizing its limitations, and the constitutional and institutional inappropriateness of engaging in day-to-day education micromanagement, the Court continuously deferred to the other branches, or gave them time to act, in regard to such matters as making funding reforms, developing accountability measures and systems, and developing the specifics for substantive education “adequacy”

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372 Id. at 164, 175.
373 Id. at 164.
374 Id. at 176.
375 Id. at 176 (discussing favorably the New York Court of Appeals decision in Campaign for Fiscal Equity, Inc. v. New York, where, though affirming “the trial courts [liability] holding that the State had denied New York City school children a sound basic education,” the Court of Appeals “stopped short” of endorsing the trial court’s “sweeping” remedial directive, but entered a more limited order going to having the State cost out the requisite required education, and make structural reforms); Campbell Cnty. Sch. Dist. v. State, 907 P. 2d at 1238 (Wyo. 1995) (outlining considerations and factors that needed to be integrated into the remedy, but leaving it to the Legislature to fashion the specifics).
standards. Yet, it did act to carry out what it saw as its core constitutional duties.

Thus, when the legislature failed to meet the deadline announced in *Claremont II* for achieving funding and education reform, the Court did not grant a requested extension of time or allow for “phase-in’s” of a new system, but literally forced the Legislature to enact a new state-wide tax funding scheme to avoid a shut-down of the schools, or a constitutional crisis. Thereafter, going into 2008, the Court looked to the other branches, with much forbearance, to carry out standards-based education reforms. It sought to have “adequacy” in education sufficiently defined, the cost of it determined, the proper funding of it achieved, and its delivery ensured through good assessment and accountability mechanisms.

In both Massachusetts and Vermont, the courts experienced less resistance from the other branches, and in both states substantial education reforms were promptly enacted and implemented. And when confronted several years after *McDuffy* with further litigation presenting compelling

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376 *See e.g.*, *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353 (N.H. 1997); *Claremont Sch. Dist. v. Governor (Claremont XI)*, 794 A.2d 744 (N.H. 2002); *Londonderry Sch. Dist. SAU No. 12 v. State (Claremont XII)*, 907 A.2d 988 (N.H. 2006).


379 *See Dunphy*, *supra* note 31, at 25-28 (discussing the “scramble for a school funding solution” that occurred at the last minute). The funding scheme the Legislature enacted, H.B. 117, called for $825 million for public schools in fiscal year 2000, constituting over 60% of expenses, with more than one-half of these monies to be raised through a statewide education property tax. The new tax was to be levied at a uniform rate of $6.60 per thousand. If a district could cover its education costs with less than what was raised by the tax, the excess was to go to the State to assist other more property-poor districts. This spawned a “donor-donee” controversy. *See Sirrell v. State (Claremont X)*, 780 A.2d 494 (N.H. 2001).

Moreover, the funding level the legislation established, though tied to a calculus of what “adequacy” should cost, was seen by some as insufficient, resulting in an asserted shortfall of many millions. *Dunphy*, *supra* note 31, at 28.


381 In Massachusetts, the Legislature enacted the Education Reform Act of 1993, G.L. ch. 69-c 71, which, was described later by the Massachusetts Supreme Judicial Court in the following glowing terms: “[t]he act ... radically restructured the funding of public education across the Commonwealth based on uniform criteria of need, and dramatically establishing, for the first time, ... uniform, objective performance and accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts.” *See Hancock v. Comm'r of Ed.*, 822 N.E. 2d 1134, 1138 (Mass. 2005). In Vermont, as Rebell notes, “within months of the court’s decision [in *Brigham*] the legislature enacted a dramatic set of sweeping education finance reforms [Act 60, the Equal Educational Opportunity Act of 1997].” *See Rebell*, *supra* note 54, at 28.
evidence that constitutional compliance had still not been achieved for students in low income, minority-populated school districts, the Massachusetts Supreme Judicial Court, in the face of what a plurality of the Court deemed the State’s good faith actions in seeking to realize far-reaching reforms, opted to terminate the litigation.\footnote{See Hancock, 822 N.E.2d at 1134, 1139–40; see also Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 784–85, 789–90 (Tex. 2005) (applying a deferential “standard of arbitrariness” in concluding that the lower court had erred in ruling that the State’s structuring and funding of education was not meeting constitutional adequacy requirements).}

In some other states, courts which have found constitutional education deficiencies have met with a good deal more resistance. Much litigation has occurred; some courts have backed off,\footnote{In Ohio, for example, “[i]n 2002 the [Ohio Supreme Court] terminated its jurisdiction after a new judge who was critical of the court’s [earlier] adequacy ruling replaced a member of the majority who had voted for the education finance reforms.” See REBELL, supra note 54, at 146 n.8; see also State v. Lewis, 789 N.E.2d 195, 202–03 (Ohio 2003); DeRolph v. State, 780 N.E.2d 529, 530 (Ohio 2002). “In Alabama, after a change in its membership following an election, the [Alabama Supreme Court] sua sponte reopened Alabama Coalition for Equity v. Spiegelman, 713 So.2d 937 (Ala. 1997), a case it had decided for the plaintiffs in 1993, and after soliciting arguments from the two sides, dismissed the case, citing separation of power and justiciability concerns.” REBELL, supra note 54, at 146 n.8. In Nebraska, the state Supreme Court, in declining to find the case before it to be justiciable, commented at some length on the extended litigations in other states and wrote: “The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states’ school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.” Nebraska Coal. for Educ. Eq. and Adequacy v. Heineman, 731 N.W.2d 164, 182–83 (Neb. 2007).} but others have resolutely persevered to seek to achieve education reform.\footnote{For example, on March 7, 2014, the Kansas Supreme Court, in another of its education decisions issued over several years, affirmed a lower court ruling that the State had failed to meet education “equity” constitutional requirements in enacting and implementing certain funding legislation, and remanded with instructions to the lower court to take enforcement actions which could include the alteration or blocking of the pertinent funding legislation. See Gannon v. State, 319 P.3d 1196, 1251–52 (Kan. 2014). The Gannon Court also remanded the issue of “adequacy” for further review. Id. at 1252. This was not the first time the Kansas Supreme Court had determined to take on the Legislature over education. See e.g., Montoy v. State (Montoy IV), 138 P.3d 755 (Kan. 2006) (dismissing litigation concluding that the State had substantially complied with the Court’s remediation directives). On September 11, 2014, the Washington State Supreme Court, after hearing, and as part of its dealings with public education over time, held the State in contempt for failing to honor an order to submit by a date certain in April 2014 “a complete plan for fully implementing its program of basic education for each school year between now and the 2017–18 school year,” to include “a phase-in schedule for fully funding each of the components of basic education.” McCleary v. State, No. 84362-7, 2014 Wash. LEXIS 898, at *1, *7 (Wash. Sept. 11, 2014). The Washington Court called the contempt proceeding “the culmination of a long series of events, not merely the result of a single violation.” Id. at *5. In response to the State’s
generally approached their duties reluctantly, seeking the cooperation of the other branches. “What is significant in these situations . . . is that, when the courts in these states stood firm and insisted on constitutional compliance, ultimately they have prevailed.”

It is true that a number of courts have recently manifested increased discomfort particularly in dealing with what have been termed “second generation” cases—that is, cases where the legislature has taken action, usually court-compelled, to make education reforms, and the issue is whether it has done enough, with funding often a focus. Indeed, as earlier stated, some courts, such as the Massachusetts Supreme Judicial Court, have in those circumstances essentially deferred to the legislature, only insisting upon a showing of good faith, and are not willing to intervene in the absence of arbitrary legislative inaction or the “breakdown of the political process.”

"suggestion” that the Court “may be approaching its constitutional bounds and entering into political and policy matters reserved to the legislature,” the Court stated it had no “wish to dictate the means by which the legislature carries out its constitutional responsibility or otherwise directly involve itself in the choices and trade-offs that are uniquely within the legislature’s province . . . [but it ] has fulfilled its constitutional role to determine whether the State is violating constitutional commands and having held that it has . . . issued orders within its authority directing the State to remedy its violation, deferring to the legislature to determine the details.” Id. at *4. The Court did not, however, impose immediate sanctions or other remedies, but allowed the State the opportunity to purge the contempt during the 2015 legislative session. Id. at *6. By Order dated August 13, 2015, however, and with the State’s continued failure, even after special legislative sessions, to enact an acceptable compliance plan, the Court imposed a “remedial penalty” of $100,000.00 per day, with the proviso that “should the legislature hold a special session and during that session fully comply with the court’s order, the court will vacate any penalties accruing during that session.” McCleary v. State, No. 84362-7, at *9-10 (Wash. Aug. 13, 2015). The Court observed that this action was “less intrusive than any other available options, including directing the means the State must use to come into compliance.” Id. at *9.

385 Rebell, supra note 54, at 90–91. In New Jersey, the state Supreme Court has acted with particular force, and with controversy, to impact on education financing and delivery. Extended litigation has occurred (and continues) with a good deal of back and forth with the Legislature. See, in particular, the New Jersey Supreme Court’s decisions and orders in the lines of cases from Robinson v. Cahill, 303 A.2d 273 (N.J. 1973) and from Abbott v. Burke, 495 A.2d 376 (N.J. 1978). Rebell observes, referencing Abbott v. Burke XIX, 971 A.2d 989 (N.J. 2009), “the New Jersey Supreme Court recently denominated its long remedial efforts as a ‘success’ in that ‘children in . . . Abbott districts . . . show measurable educational improvement.’” Rebell, supra note 54, at 145 n.6. See also id. at 39–41 (discussing the Arkansas Supreme Court’s decisions in the Lake View Sch. District No. 25 v. Huckabee litigation, from 2002 through 2007, involving use of special masters, and comprehensive review of education reform initiatives, with the Court coming to highlight “a need for ‘constant vigilance to ensure the constitutional goal is met.’” Lake View Sch. Dist. No. 25 v. Huckabee, 257 S.W. 3d 879, 883(Ark. 2007)).

386 See Simon-Kerr & Sturm, supra note 369, at 88–89.

387 Id. at 100–01.
It is also true that courts are legitimately loathe to fashion remedies that involve compelling Legislatures to appropriate money particularly when more money by itself may not be solely the answer. Yet, is such a degree of deference, or arguable abdication of responsibility, appropriate in the face of continued non-compliance with constitutional requirements?

The difficult challenge for the courts, whether the particular “adequacy” litigation concerns the putting in place of education “adequacy” standards, or assuring appropriate funding, or performing oversight of education programming and accountability/assessment mechanisms, or carrying out combinations of these, is to assure that the states are offering the requisite education opportunity to all public education students, while not becoming unduly enmeshed in education policy-making.

Again, it is certainly necessary for the courts in New Hampshire and elsewhere to proceed in a manner consistent with separation of powers principles. Education policy in New Hampshire and elsewhere is very much vested in the other branches of government, particularly the Legislature, and the courts should not be “social engineers,” as Justice Horton expressed in his dissent in Claremont II. Yet, when it comes to public education in New Hampshire, we are dealing with a mandatory positive duty (with corresponding rights) enshrined in our Constitution for the purpose of preserving the essence of our culture.

2. Claremont II

a. The Defensibility of the Tax Ruling

Did the Supreme Court rule correctly in Claremont II when it deemed the funding of public education largely through local property taxes to be violative of Article 5? The decision fails satisfactorily to explain why it was not permissible for the State to delegate substantial funding responsibilities to localities to meet their local educational needs, while remaining possessed of the ultimate duty to assure that the funding mix, with reasonable taxation, resulted in the provision of “adequate” support for all students.

388 See generally id. at 99. Simon-Kerr and Sturm suggest that to counter “mounting resistance and fueled separation of powers fears,” adequacy litigation strategists should consider advocating for “nonmonetary remedies,” such as early childhood programs, to obtain court buy-in. Id. at 121. They raise as “one of the boldest proposals” seeking “a socio-economically integrated education” as a remedy, referencing James E. Ryan, Schools, Race and Money, 109 YALE L.J. 249, 307 (1999-2000) and Adams, supra note 54. Simon-Kerr & Sturm, supra note 369, at 121–22.
The majority’s tax ruling in Claremont II rested almost entirely on the holding in Claremont I that the provision of a constitutionally adequate education to all public school students was a State duty.\(^{389}\) It ignored that Claremont I deemed the State’s funding duty to be that of a “guarantor,” not that of the initial provider, a distinction without which Claremont I would not have been a unanimous decision;\(^{390}\) and it did not squarely deal with Justice Horton’s dissenting views in regard to delegation.

The pre-Claremont New Hampshire precedent concerning the local school tax provides scant support for the majority’s position.\(^{391}\) Though the Supreme Court had not before actually determined the character of the tax, it had indicated in a number of decisions the view that it was of a “local” nature.\(^{392}\)

The funding scheme the Legislature had put in place certainly contemplated that the localities would be the “principal source of revenue for public schools, providing on average between seventy-four to eighty-nine percent of total school revenue,” with the State playing a much smaller back-up role.\(^{393}\) The system reflected a strong ethos that schools should be very much subject to “local control,” both as to education delivery and funding.

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\(^{389}\) Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353, 1356 (N.H. 1997).

\(^{390}\) See supra note 99.

\(^{391}\) See Claremont II, 703 A.2d at 1356. The majority particularly cited Opinion of the Justices, 4 N.H. 565, 571 (1829), for the proposition that “[t]he taxes imposed by the legislature for the support of schools... are, in their nature, state taxes.” This opinion, however, referenced the pre-1919 tax regime, which imposed a definite form of statewide tax, see discussion supra at note 26, not a system in which local property taxes with varying rates were predominantly featured. The majority also cited language from the Opinion of the Justices, 149 A. 321, 325 (N.H. 1930), saying that, with the 1829 Opinion of the Justices decision in mind, the consequence is that “[t]here is abundant justification in fact for taking this property out of the class taxed locally, and taxing it at the average rate throughout the state.” Claremont II, 703 A.2d at 1356. The cited 1930 tax opinion language, however, concerned a proposed tax on the property of public utilities. It was offered in the context of the Court deeming the proposed tax to be a state one, where it was levied at the average state rate and collected by the state, though the revenues were later to be differentially distributed to localities using local rates and then used for local purposes. None of this easily relates to an evaluation of the character of the school tax, and it certainly does not easily follow that the Claremont II decision reflected “a reiteration of principles articulated in [these] two earlier cases.” Laurie Reynolds, Uniformity of Taxation and the Preservation of Local Control in School Finance Reform, 40 U.C. DAVIS L. REV. 1835, 1848 n.39 (2007).


\(^{393}\) Claremont II, 703 A.2d at 1354; see id. at 1354–55 (discussing how the funding system operated); see also Memorandum Decision and Judgment (Manitas Opinion), Claremont Sch. Dist. v. Governor (Claremont II), No. 91-E-306-B at 91–92, 136–40 (N.H. Super. Ct. Dec. 6, 1996).
The local property tax raised funds to be expended locally for the fulfillment of local education.

Justice Horton underscored in his dissent the undeniable reality that in New Hampshire “[t]he State delegates many of its constitutional duties to its political subdivisions and provides for taxation to support satisfaction of the delegated duties at the local level.” He explained that while “[t]he State is the seminal unit for all aspects of government . . . [t]he State has the power to delegate these functions of government,” and this delegation may occur with regard to a wide spectrum of duties, both specific and general, to include “fire and police protection.” He criticized the majority for “equating ‘duty’ with ‘purpose’ in undertaking its analysis, ignoring the fact that governmental duty can be delegated to its subdivisions.” He saw “the purpose in education taxation . . . [to be] a local purpose, the education of children in the school district.” He concluded by determining that the financing system reflected a proper delegation of the education responsibility, and that the tax had not been shown to be unreasonable in its application within the petitioner districts.

If a good part of the State’s duty to keep us safe through police protection may properly be delegated to the localities, along with funding responsibility, why is it not also the case that a good part of the State’s duties respecting education, including funding, may properly be delegated to the localities, with the local funding through local taxation then fulfilling a local educational purpose? The majority simply does not answer this question. To be sure, it does highlight education’s importance to our continued well-being, and the elevated constitutional nature of the State duty, but it avoids the question of delegation. This constitutes a serious flaw in the decision.

The petitioners also argued that the school tax must, as a factual matter, be deemed a state one because of the State’s involvement in its implementation, and because the local school districts lacked real budgetary discretion due to the need to satisfy the State’s minimum education
standards. Judge Manias plainly did not share the petitioners’ view as to the significance of the State’s involvement with the local property tax. His analysis of the school tax issue, which included his examination of how it actually worked, concluded that the tax was very much of a local character and operated to foster real local control. He importantly found that the school districts retained sufficient discretion in controlling their budgets. The Supreme Court majority, however, hardly took up these factual matters on appellate review. Its focus was on what it deemed the clear purpose of the school tax, described “to be overwhelmingly a State purpose and dispositive of the issue of the character of the tax.”

Though the majority highlighted what it saw as the “unreasonableness” of the widely disparate tax rates, it never actually discussed or squarely dealt with Judge Manias’s findings, whether right or wrong, to the effect that though the tax rates widely differed, the petitioners had not established that the actual tax burdens on the residents of the petitioner districts were unreasonable compared to those of the residents in property-rich districts. The majority also did not discuss or squarely deal with Judge Manias’s


403 Id. at 137 (finding that “the existence of the minimum standards does not demonstrate that the petitioner school districts do not control their own budgets”).

404 Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353, 1356 (N.H. 1997).

405 Id. at 1357.

406 Manias Opinion, at 107-08. For a study that offers defenses to the use of property taxes for education funding and seeks “to correct misconceptions regarding school funding and property taxes,” including the notion that “[p]roperty tax rates are a reasonable measure of property tax burden,” see Daphne A. Kenyon, The Property Tax-School Funding Dilemma, Public Focus Report, LINCOLN INSTITUTE OF LAND POLICY (2007), https://www.lincolninst.edu/pubs/dl/1308_Kenyon%20PFR%20Final.pdf. Yet, reliance on local property taxes to fund education has been seen by many as problematic. Such a funding approach prompted less concern in the nineteenth century when “many school funding systems were created . . . to finance schools in predominantly rural communities . . . [and where] population and property wealth were distributed more evenly.” See Reynolds, supra note 391, at 1840 n.12. This is not the case today, however, given the large and disturbing “socioeconomic segregation of the populace.” Id. at 1840. In this regard, it is worth noting that the Washington Supreme Court has recently reaffirmed that it does not deem local property taxes as an appropriate funding mechanism in its state for education as it is “neither dependable nor regular,” that is, “subject to the whim of the electorate,” and it is also “too variable insofar as . . . [they] depend on the assessed valuation of taxable real property at the local level.” See McCleary v. State, 269 P.3d 227, 252 (Wash. 2012).
findings that the aid the State provided made up a good portion of the budgets of the petitioner districts.407

In short, the majority’s large avoidance of discussion of Judge Manias’s findings, combined with its failure to tackle the delegation position of Justice Horton, left it open to the charge that it not only erred in its tax ruling but was pursuing “social engineering.” 408

b. The Defensibility of its Major Education Pronouncements

Although praising Judge Manias for his “detailed and thoughtful opinion,”409 and going on to state that it would “not reach the petitioners’ other claims,”410 the Claremont II majority nonetheless proceeded to make a number of major pronouncements, identified and discussed supra Part I.4.b., going to these other claims. In so doing, the majority was plainly seeking to insist that the dictates of its Claremont I decision be honored and that the other two branches proceed to fashion a better “standards-based” education system attuned to the evolving “adequacy” needs of New Hampshire school children. It claimed it understood that it was “not appointed to establish education policy.”411 Whatever one may think of these pronouncements,412

407 Manias Opinion, at 111.
408 It does not appear that any other state Supreme Court has sustained such a tax “uniformity” challenge. See Reynolds supra note 391, at 1847, 1847 n.37.
409 Claremont II, 703 A.2d at 1354.
411 Id. at 1360.
412 As to an “adequacy” definition, it is worth noting that the Rose aspirational guidelines for education “adequacy” have been accepted by many courts. See Gannon v. Kansas, 319 P.3d 1196, 1227 (Kan. 2014). As to whether education constitutes an enforceable state constitutional “fundamental right,” see Doe v. Superintendent of Schools of Worcester, 653 N.E.2d 1088, 1095 (Mass. 1995) (stating that “McDuffy should not be construed as holding that the Massachusetts Constitution guarantees each individual student the fundamental right to an education”). Yet, in New Hampshire, Claremont II announced, though in dicta, a fundamental right to “a state funded constitutionally adequate education.” 703 A.2d at 1359. Further, this right was declared to be “not based on the exclusive needs of a particular individual, but . . . a right held by the public to enforce the State’s duty,” and any citizen would be entitled to obtain court relief “when an individual school or school district offers something less than educational adequacy”—with “the governmental action or lack of action that is the root cause of the disparity . . . examined by a standard of strict judicial scrutiny.” Id.; see also Claremont Sch. Dist. v. Governor (Claremont I), 635 A.2d 1375, 1381 (N.H. 1993) (stating that “[a]ny citizen has standing”). This “citizens” view of standing does not, however, enjoy the support of recent cases. See Duncan v. New Hampshire, 102 A.3d 913, 924–25 (N.H. 2014) (amending the State’s declaratory judgment statute allowing for taxpayer actions without a showing of particularized injury declared unconstitutional; Part II, Article 74 of the State Constitution requires private parties to claim concrete personal injury to bring suit); see also Baer v. N.H. Dep’t of Educ., 8 A.3d 48, 52 (N.H. 2010) (stating that
they would have been better made in the context of subjecting Judge Manias’s rulings to proper appellate review.

Unquestionably, the majority had serious problems with Judge Manias’s education-centered (other than Article 5) rulings. It disapproved of the definition Judge Manias had used to evaluate adequacy; it spoke against his findings that the petitioner districts had adequate funding to deliver adequate education; and it determined that Judge Manias had used the wrong standard in regard to the petitioners’ Equal Protection Count when it declared education to be a fundamental right, not something less. It is also true that Judge Manias’s determination to not hold the State responsible for any inadequacy stemming from local district failings was open to challenge. Yet, by acting as it did, giving short shrift to Judge Manias’s detailed findings and legal conclusions and not squarely confronting them, the majority again opened itself up to the charge of inappropriate “social engineering.”

As it turned out, in 2002 Claremont XI explicitly identified four essential mandates to be derived from Claremont I and II: “define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability.” These mandates were then used by the Court in that decision, and later as well in Claremont XII, to review the State’s compliance with its constitutional education obligations. Nonetheless, although the core holding of Claremont II was an important tax decision, the Court’s failure to address properly Judge Manias’s non-tax rulings is troublesome.

“Claremont did not create an exception to the statutory requirements of RSA 491:22 [the declaratory judgment statute] . . . . The petitioners must still allege a present legal or equitable right”). See generally Cochran, supra note 54 (discussing the challenges and hurdles that such education suits would, in any event, face).

415 Claremont II, 703 A.2d at 1357.
416 Id. at 1357.
417 Id. at 1358–59.
418 For example, when faced with the argument that “[New York City] Board of Education mismanagement” could serve to shield the State from education responsibility for New York City schools, the New York Court of Appeals in Camp. for Fiscal Eq., Inc. v. New York, 801 N.E.2d 326, 343 (N.Y. 2003) (quotations and citations omitted), held: “[T]he Board of Education and the City are ‘creatures or agents of the State,’ which delegated whatever authority over education they wield. Thus, the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally mandated rights.”

417 Claremont Sch. Dist. v. Governor (Claremont XI), 794 A.2d 744, 749 (N.H. 2002).
418 See id.; Londonderry Sch. Dist. SAU No. 12 v. State (Claremont XII), 907 A.2d 988, 990 (N.H. 2006); see also Londonderry Sch. Dist. SAU No. 12 v. State (Claremont XIII), 958 A2d 930, 933 (N.H. 2008) (Broderick, C.J., dissenting) (stating that in Claremont II the Court “made it clear that the State was responsible to [carry out the four mandates]”).
Without undertaking a detailed review of the less than warm reception Claremont II received in some quarters in the State, suffice it to say that this decision, more than Claremont I, roiled the New Hampshire political waters. It was not easily accepted by the Governor and by many in the Legislature; it inspired a multitude of proposed constitutional amendments; it caused difficult relations between the Governor and the Legislature; and it prompted strong criticism of the Court.

Some saw Claremont II as judicial activism at its worst, the imposition on the State of a centralized system of education to be financed by broad-based taxes (perhaps an income tax) and run by non-elected judges—a system much at variance with New Hampshire’s tradition of local control, local financing, and limited taxation, and slated to fail. The decision

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419 See Eugene Van Loan, Claremont Redux, 53 N.H.B.J. 38 (2013) (“In every session of the legislature since Claremont II was decided in 1997, numerous constitutional amendments dealing with educational funding have been proposed to the Legislature—but not a single one has made it out of the Legislature to be put to the voters.”); see also Molly A.K. Connors, Lawmakers Likely to Make Another Run at Constitutional Funding Amendment, CONCORD MONITOR, Nov. 24, 2012, http://concordmonitor.com/home/2973415-95/amendment-education-funding-lawmakers?print=true (“The House has tried about 80 times to pass a school funding amendment.”).

420 E.g., Senator Judd Gregg stating right after the issuance of Claremont II “for a court to usurp the legislative prerogative is to flirt with the threat of despotism that led to the Boston Tea Party and a call for independence that began our nation.” Judd Gregg, Supreme Court Ruling ‘Arrogant, ‘Absurd’, UNION LEADER, Dec. 19, 1997 at A18; Richard Lessner, NH Can No Longer “Live Free or Die” If Ruled by Black-Robed Monarchs, UNION LEADER, Dec. 19, 1997 at C1 (“Americans—Granite Staters—you no longer live in a free country. You are ruled by monarchs in black robes, arrogant Hapsburgs elected by no one and answerable to no one.”).

421 E.g., Mosca, NH’s Claremont Case, supra note 17, at 418 (“[T]he New Hampshire Supreme Court’s interpretation of Article 83 has made the provision of a homogeneous public education through a centralized command-and-control system, which has the Supreme Court at its helm, the constitutional law of New Hampshire.”). Some have argued that Claremont-type suits, along with many other well-meaning education reform initiatives, have resulted to date in little more than throwing large sums of money at a very difficult challenge—the improvement of student performance—with little discernible return on the investment. A leading proponent in this camp, Eric Hanusek, of the Hoover Institute of Stanford University, indeed testified along those lines as an expert witness for the State in the trial before Judge Manias. See Transcript of Record Vol. 31 at 70–202, Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353 (N.H. 1997). Yet there now seems to be general agreement, Hanusek included, “that ‘money matters’ [in achieving better education], so long as it is spent efficiently on the appropriate resources.” William S. Koski, Courthouses vs. Statehouses, 109 MICH. L. REV. 923, 927 (2010). There is no agreement, however, on the appropriateness and effectiveness of judicial intervention in the education fray. See generally id. at 930–38.
constituted a direct challenge to the Legislature’s control of taxes and funding, something no legislature likes.

*Claremont II* also imposed significant restrictions upon the fashioning of an appropriate funding mechanism. It mandated that only “state” taxes could be utilized to fund constitutionally adequate education, and “[t]o the extent that the property tax is used in the future . . . the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State.”

Thus, while it did not require the use of “a uniform expenditure per pupil throughout the State . . . [recognizing that] the cost of a constitutionally adequate education may not be the same in each school district,”

*Claremont II* did not allow local property taxes, as such, with any degree of varying rates, to be part of the funding mix to pay for the required education. Local property taxes, for example, had been utilized in the “phased-in” funding mix established in 1993 in Massachusetts to effect major education reform there, though in a way that operated to limit a locality’s contribution with consideration accorded to its tax base.

*Claremont II* was deemed to not permit the “ABC” program which Governor Shaheen had quickly developed after *Claremont II*, where, along with the enactment of a standards-based definition for “adequacy” and accountability reforms, a state-wide property tax to fund adequate education was to be put in place, qualified, however, by “special” abatements for taxpayers in property-rich districts so that they would not need to directly

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*see* Bruce D. Baker, *Evaluating the Recession’s Impact on State Financing Systems*, 22 Educ. Pol’y Analysis Archives, no. 91, at 3 (“There exists an increasing body of evidence that substantive and sustained school financing reforms [certainly prompted in part by the courts] matter for improving both the level of and distribution of short term and long term student outcomes.”).

*Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1357 (N.H. 1997).


*See* Hancock v. Comm’r Educ., 822 N.E. 2d 1134, 1142 (Mass. 2005) (explaining the utilized funding scheme, “phased in over seven years,” as follows: “The act [the 1993 Education Reform Act] guarantees that each public school district receive its foundation budget through a combination of Commonwealth and local funds. Where, before 1993, the Legislature ceded to municipalities virtually unlimited control over school budgets, the act now requires municipalities to provide a standardized contribution to education. A municipality’s required contribution to its foundation budget depends in large part on its equalized property valuation. The Commonwealth provides the difference between municipalities’ mandatory funding obligations and their respective foundation budget amounts. In practice, districts in wealthier communities with high property valuations receive most of their funding from local property tax receipts, while districts serving communities with less valuable property receive most of their funding from the Commonwealth.”).
finance property-poor districts. The decision was also deemed to not allow “phase-in’s” to a new state-wide property tax system, or a financing approach which utilized local taxes to some degree and was, to some degree, focused on targeted aid.

This tax stance, seen by some as an affront to legislative constitutional prerogatives, and subversive of “local control,” resulted in much acrimonious litigation over tax schemes, and efforts to amend the Constitution. It compelled the State to take on the full burden to fund “adequacy” even for districts or areas which were wealthy and/or less in need of assistance. While the Legislature finally enacted a state-wide property tax in 1999 with no abatements and no “phase-in’s” to avoid a school shut-down, it did so only after the expiration of the deadline the Court had set, and with much difficulty. It may have been an easier task to gain the cooperation of the two other branches in the realization of “adequacy” education reform if the tax debate produced by Claremont II had not been so divisive.

To be sure, in the face of later moves by the Legislature and Governor in the mid-2000s to depart from the state-wide property tax, go to a more “targeted” system, and eliminate “donor” and “donee” districts, the Justices, with some change in membership, and disagreement among themselves, avoided paralyzing constitutional confrontations with the other branches over Claremont requirements through 2008. Yet, at the same time, and continuing through their Londonderry decision of 2006, the Justices pushed the other branches—indeed threatened a variety of remedies—to obtain further reforms, including those pertaining to funding.

429 Justice Hicks, who wrote the majority opinions in Claremont XII in 2006 and Claremont XIII in 2008, ascended to the Supreme Court in 2004, appointed by democratic Governor John Lynch. Thus, he was not on the Court when it decided either Claremont I or Claremont II. Other new Justices who handled Claremont XII and Claremont XIII were Justices Linda S. Dalianis, James E. Duggan, and Richard E. Galway. Justices Dalianis and Duggan were appointed by Democratic Governor Shaheen, and Justice Galway by Republican Governor Benson.
430 In 2006, in litigation challenging HB 616, see discussion supra note 428, the Court affirmed the trial court’s finding that the State had “failed to define a constitutionally adequate
At present, the Court is not dealing with any Claremont-related litigation. Yet, and partly due to this litigation, many changes in education have occurred.

III. WHERE WE ARE WITH THE CLAREMONT MANDATES

The State has acted to meet each of the core Claremont mandates but with delay and lingering questions as to whether full compliance has been achieved. It has moved to define an “adequate” education, to ensure its delivery through assessments and accountability mechanisms, to determine its cost, and to fund it with constitutional taxes.431

1. Definition

Though not accomplished until 2007, the Legislature now has in place a definition of the opportunity to acquire an adequate education that is not limited to general aspirations, but is tied to much more specific standards and explanations. The pertinent statute432 not only contains the broad criteria for an “adequate” education derived from the Kentucky Supreme Court’s Rose education.” Londonderry Sch. Dist. SAU No. 12 v. State (Claremont XII), 907 A.2d 988, 989 (N.H. 2006). A majority (Justices Hicks, Chief Justice Broderick and Justice Dalianis) opted to retain jurisdiction to allow the elected branches until the end of fiscal year 2007 to fashion “with specificity the components of a constitutionally adequate education.” Id. at 995. The majority “urge[d] the legislature to act,” warning that if it did not timely do so the Court would “then be required to take further action to enforce the mandates of . . . Article 83.” Id. at 995–96. Justice Duggan would have approached the case differently and would have remanded the case immediately to the Superior Court for trial particularly on education funding issues. Id. at 996 (Duggan, J., concurring). Justice Galway, would have affirmed the trial court’s ruling that HB 616, with its funding mechanism, was unconstitutional on its face, and he would not have further retained the case. Id. at 998 (Galway, J., concurring in part and dissenting in part). As it was, no further court action proved necessary, at least in the eyes of three of the Justices (Justices Hicks, Dalianis and Galway). This majority of Justices declared the case moot in 2008, over the dissents of the other two Justices (Chief Justice Broderick and Justice Duggan), after the Legislature had enacted certain reforms, to include a more developed and detailed “adequacy” definition and approaches “to determine the cost of and [to] fund a constitutionally adequate education.” See Londonderry Sch. Dist. SAU No. 12 v. State (Claremont XIII), 958 A.2d 930, 931, 933 (N.H. 2008). The Court’s majority manifested a definite reluctance to continue court action in the face of the steps the Legislature had taken to move forward to fulfill the Claremont mandates.


case, it also explicitly establishes, as “Substantive Educational Content of an Adequate Education,” that schools meet specific school approval standards established by regulation in a wide range of learning areas.

These school approval standards, moreover, must “clearly set forth the opportunities to acquire the communication, analytical and research skills and competencies, as well as the substantive knowledge expected to be possessed by students at the various grade levels, including the credit requirement necessary to earn a high school diploma”; must be reviewed, revised and updated, as necessary by the Legislature at least every ten years to “ensure that the high quality of the standards is maintained”; and must be accompanied by good “curriculum frameworks for each area of education.”

In July 2010, the State Board of Education moved to enhance the quality and rigor of its standards by adopting the Common Core State Standards in regard to mathematics and English language arts/literacy skills. The Federal Department of Education, in its dealings with the State concerning NCLB, has recognized that the State has acceptable “college and career-ready expectations for all students.”

2. Accountability/Assessment

a. Accountability Mechanisms

The federal NCLB law has very much impacted the State’s accountability and assessment initiatives for student achievement. Enacted in early 2002, NCLB imposed some daunting challenges: it generally

435 That is, in English/language arts and reading, mathematics, science, social studies, arts education, world languages, health education, and physical education. The State’s comprehensive Minimum Standards regulations are very much focused on students achieving defined “competencies” in regard to multiple content areas, with promotions from grade to grade dependent on such achievement. See, e.g., N.H. Code R. Ed. § 306.141 (2015).
437 See supra note 360.
439 Congress is in the process of seeking to overhaul NCLB. This has not yet occurred as of the cutoff date for this article, August 15, 2015. For further discussion of this proposed overhaul. See infra notes 497–498 and accompanying text.
required States, per a State Plan, and through a progression of “adequate yearly progress” (“AYP”) toward established “measurable objectives,” to succeed in having all its students meet the State’s established “proficiency” levels of academic achievement by 2014.440 The federal law also required that the accountability features of the State’s Plan allow for the identification of schools and districts “for improvement” (generally because the school or district has failed for two consecutive years to make AYP).441 In addition, the law provided for effective follow-up, perhaps “corrective action” strategies, and ultimately, if all else failed, substantial district/school restructuring, closings, or takeovers of responsibilities.442

Prior to 2012, the Legislature had enacted significant accountability statutory requirements. School districts needed to annually report how they were doing, “at the school and district level” in regard to many education “indicators.”443 Schools needed to demonstrate that they were providing the requisite opportunity for an adequate education through satisfaction of either an input-based accountability approach tied to meeting specific school approval standards, or via a performance-based approach having student outcomes on tests as an important feature, along with other measures.444 The NHDOE was accorded oversight responsibility for accountability, and the power to deal with struggling districts and schools over time, but not to actually take over a district or school.445

Further, in a chapter entitled “School Performance and Accountability,”446 and prompted in part by NCLB, the Legislature specified that:

- “[o]n or before the 2013–2014 school year, schools shall ensure that all pupils are performing at the basic level or above on the statewide assessment as established in RSA 193-C”.447

441 Id.
442 See generally id. at § 6316. The specified accountability follow-up progression in this section of NCLB for identified struggling schools covers only those receiving Title I ESEA funding. Most New Hampshire schools fit that category.
444 N.H. REV. STAT. ANN. §§ 193-E:3-b to E:3-e (2014).
445 Id.
447 Id. at H:2. It is noted that this stated goal fails to talk in terms of “proficiency,” as required by NCLB. In recent years, the State’s assessment tests, the NECAP tests discussed above, have not graded students using “basic” as one of the its achievement levels.
schools meet statewide performance targets as initially approved by a Legislative Oversight Committee; and

- the Commissioner of Education follow through with annually identified “schools [and districts] that are not meeting the statewide performance targets,” (“designated as in need of improvement”) through implementation of local improvement plans or corrective action plans—but with no allowance for an actual takeover of the “daily operations of any local public school.”

With this statutory framework in place, and acting to meet certain NCLB requirements, the State, through the NHDOE, established annual performance targets for student achievement in reading and mathematics, together with state targets for student testing participation, attendance, and high school graduation. These all figured in determining annually whether a school or district was making requisite AYP. Moreover, the NHDOE issued and publicized annually, beginning in 2003 and going into 2012, AYP reports which identified struggling districts and schools and provided information on the corrective steps that were being taken.

Yet, over time many districts and schools failed to meet AYP in whole or in part. They were labeled as failing. The numbers of such districts and schools became alarming.

On April 3, 2012, when the NHDOE released that year’s Adequate Yearly Progress Reports showing that over seventy percent of schools were failing to meet AYP goals in one or more ways, the Commissioner of

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448 Id.
450 See N.H. DEP’T OF EDUC., ADEQUATE YEARLY PROGRESS UPDATES AND RESULTS http://www.education.nh.gov/instruction/accountability/ayp/index.htm (last visited Nov. 21, 2015) [hereinafter AYP REPORTS]. It is clear that full congruence between the state and federal accountability systems has never been achieved. Indeed, in its ESEA Flexibility Waiver Request, discussed more fully infra, the NHDOE stated “the federal accountability system...does not support either the input-based or proficiency-based components specified by state law.” N.H. DEP’T OF EDUC., NEW HAMPSHIRE ESEA FLEXIBILITY WAIVER REQUEST at 20 (June 5, 2013), http://education.nh.gov/accountability-system/documents/flexibility-waiver-request20130605.pdf [hereinafter FLEXIBILITY WAIVER REQUEST].
451 See generally AYP REPORTS, supra note 450.
452 Press Release, N.H. Department of Education (Apr. 3, 2012). It was announced: “One hundred and twenty-one (26%) schools made AYP in all areas measured and 332 (71%) schools did not...[T]hirty schools are identified as new SINIs [Schools in Need of Improvement]...Of the 161 AYP district reports issued, fifty-two (32%) districts made AYP and 107 (66%) did not...Sixteen new districts are preliminarily identified as in need of improvement, increasing the number of [such] districts to 101 (62%).”
Education, Virginia M. Barry, spoke out strongly against the NCLB means of accountability. She characterized the disheartening results to be “ample evidence that the accountability system is broken, not that the vast majority of schools in New Hampshire are failing.”

She continued: “In New Hampshire we need an accountability system that rewards the great schools and accurately identifies those schools and districts that need our support.”

On June 23, 2013, the NHDOE succeeded in obtaining for the State a two-year NCLB waiver from the federal Department of Education. This waiver excused compliance with several NCLB requirements concerning student performance and school success, to include compliance with the 2014 “proficiency” requirements and the strict continuation of the AYP accountability system. The waiver allowed the State to focus its resources in ways it considered more attuned to its needs, with better chance of success. It could concentrate on integrating its assessments and its accountability mechanisms into the new common core scenario, working

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453 Id.
454 Id. Indeed, in utilizing its alternative “input/performance-based” approaches established in RSA 193-3-b through RSA 193-E: 3-e, the NHDOE has issued a number of Adequacy Reports, with the latest one showing that in 2014 all New Hampshire schools were satisfying at least one of the two approaches and were thus all deemed to be offering the opportunity for an adequate education. See N.H. DEP’T OF EDUC., 2014 ADEQUACY REPORT 8 (Oct. 1, 2014), http://www.education.nh.gov/instruction/school_improve/documents/adequacy-report14.pdf. However, it obviously should be concerning if a school is deemed to provide the opportunity for an adequate education through the input approach, but its students, or a good number of them, are not performing well enough for it to satisfy the performance-based approach. The 2014 Adequacy Report indicates that 48 schools (or over 10%) did not meet the performance-based standards. Id. Among these are a number from the petitioner school districts in the Claremont litigation: Stevens High School from the Claremont District; the Paul A. Smith School from the Franklin District; and the Pittsfield Middle School from the Pittsfield District. See 2013-14 School Profile: Stevens High School, N.H. DEP’T OF EDUC., http://my.doe.nh.gov/profiles/profile.aspx?s=20140&year=2014&tab=accountability (last visited Nov. 22, 2015); 2013-14 School Profile: Paul A. Smith School, N.H. DEP’T OF EDUC., http://my.doe.nh.gov/profiles/profile.aspx?s=20650&year=2014&tab=accountability (last visited Nov. 22, 2015); 2013-14 School Profile: Pittsfield Middle School, N.H. DEP’T OF EDUC., http://my.doe.nh.gov/profiles/profile.aspx?s=26550&year=2014&tab=accountability (last visited Nov. 22, 2015).

456 See FLEXIBILITY WAIVER REQUEST, supra note 450, at 8 (setting forth the specifics of the waiver request that ultimately was obtained).
with districts in regard to teacher development and evaluation, and being particularly supportive of certain identified struggling schools.\footnote{See generally id.; see also generally Waiver Renewal Request, supra note 455. The Waiver Renewal Request, as approved, presents as two major new features: (1) a Performance for Competency Education (PACE) Pilot program through which four school districts, (with more to follow), will utilize performance-based assessments in their schools, with a move away from standardized assessment tests; and (2) the use of the College Board’s SAT as the test assessment at the 11th grade level. Flexibility Waiver Request, supra note 450, at 16. For further discussion of assessments, see infra Part III.2.b.}{457}

With this waiver in place, the Legislature enacted amendments to RSA 193-H and 193-C in late 2013. These amendments accorded particular attention and assistance to “focus” and “priority” schools, defined generally as low performing schools that receive federal ESEA funds.\footnote{N.H. Rev. Stat. Ann. § 193-H:3 (2014). In its Flexibility Waiver Request, supra note 450, at 69–78, the NHDOE discussed in detail its manner of identifying, the State’s “focus” and “priority” schools, and its strategies and plans to help these schools improve and succeed. See also Waiver Renewal Request, supra note 455, at 70–87. Of the approximate 230 Title I schools in New Hampshire, forty are presently so designated. Id. at 71–72, 83–84.}{458} They call for “local education improvement plans” to remedy “identified problems,” in these particular schools,\footnote{N.H. Rev. Stat. Ann. § 193-H:4 (2014). The more generalized requirement for “local improvement plans” for schools considered “in need of improvement,” was eliminated by legislative amendments in 2013.}{459} for the NHDOE to respond to “requests” for assistance,\footnote{N.H. Rev. Stat. Ann. § 193-H:4, I(b) (2014).}{460} and for the NHDOE to otherwise provide assistance and monitoring—though neither it nor the Board of Education may “take control of the daily operations of any local public school.”\footnote{Id. at 22.}{461}

The pertinent Waiver documents the NHDOE has submitted reflect a move away from what has been termed a “shaming by naming” system\footnote{Id.}{462} overly-dependent on standardized testing. The expressed goal is to realize a system that insists on “ambitious but achievable annual measurable objectives,”\footnote{Id.}{463} uses a “balanced system of assessments,”\footnote{Id.}{464} and enjoys the availability of a “broad set of supports” to deal with the differential learning challenges schools and students present.\footnote{Id.}{465} The NHDOE seeks to achieve the bringing together of all available resources from leveraged, accessible and multi-layered networks of expertise and assistance, to enable schools and well-qualified, supported teachers\footnote{Id.}{466} to provide a more personalized,
competency-based education experience that succeeds in affording each student the knowledge, skills and work habits he/she will need to succeed in the challenges of life.467

The State remains firmly committed to having an efficient, locally-oriented standards-based education system, focused on the attainment of competencies, where accountability constitutes an essential feature. It has, in its latest waiver renewal request, adopted as a major “continued” goal the reduction of “gap[s] of [proficiency] achievement” for each measured subgroup of students by “half [in six years] based on assessments administered.”468

The above said, the future of the NCLB Waiver approach is presently in considerable jeopardy. In July 2015, both the United State Senate and the House of Representatives passed differing overhauls of NCLB. The bills now are being submitted to a conference committee to resolve differences.469

Any overhaul of NCLB that gets finally enacted and becomes law will undoubtedly result in the elimination of any compulsion to continue to meet the dictates of waivers concerned with, and arising from, a replaced law.

467 See generally FLEXIBILITY WAIVER REQUEST, supra note 450, at 47–98.
Both the Senate and House bills, though to different degrees, would operate to alter federal law and accord to the States considerably more authority and/or flexibility in carrying out accountability and other education initiatives.\(^{470}\)

b. Assessment Results

The Statewide Education Improvement and Assessment Program requires, consistent with NCLB, that student assessment testing be administered in grades three through eight and in one grade in high school,\(^{471}\) and the State has accomplished this in recent years through the New England Common Assessment Program (“NECAP”), together with Rhode Island, Vermont, and, in part, Maine.\(^{472}\) In 2015, however, the State transitioned out of the NECAP assessment rubric to a new testing/assessment program tied to its new common core state standards—but, to repeat, with a move away from too much reliance on standardized testing.\(^{473}\)

No attempt is here made to present an in-depth review as to how well New Hampshire’s public school system is doing in educating its students. To be sure, the “Nation’s Report Card,” developed through the federal National Assessment of Education Progress (“NAEP”) program, reports New Hampshire students to be performing at or near the top of the country in mathematics and reading at grades four, eight, and twelve.\(^{474}\) Moreover,

\(^{470}\) Klein, supra note 469.


\(^{473}\) Indeed, the new PACE pilot program, discussed supra note 457, manifests the NHDOE’s commitment to greater use of more locally managed performance-based assessments integrated in a student’s actual schooling to evaluate whether the student has achieved requisite competencies and skills. This pilot program has gained the approval of the Federal Department of Education. See Press Release, Governor Hassan, Department of Education Announce Federal Approval of New Hampshire’s Pilot Competency-Based Assessment Program First-In-The-Nation Accountability Strategy Offers Reduced Level of Standardized Testing with Locally Managed Assessments (Mar. 5, 2015), http://education.nh.gov/news/pace.htm.

fourth grade and eighth grade NAEP proficiency in both mathematics and reading showed definite improvement from 2003 to 2013. Yet, the NAEP results also show that in both mathematics and reading, at all the tested grade levels, large numbers of New Hampshire students have not attained full proficiency levels. For example, while New Hampshire twelfth graders did well in comparison to the performance of twelfth graders in other states, less than one-third of them scored at the fully proficient level in mathematics, and less than one-half of them did so in reading. Further, the test results show that fourth and eighth grade students eligible for free or reduced school lunch (“FRL students”), an indicator of difficult economic circumstances,

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7 He asserts that to score “Basic” on the NEAP exams reflects “probably a B or C student,” while to attain “Proficient” “reflects solid achievement... a solid A and not less than a strong B+.” See Ravitch, supra note 314, at 47. If one accepts this, and measures the extent that New Hampshire students scored “Basic” or better, the picture is much better. For example, 74% of twelfth graders scored “Basic” or better in mathematics in 2013, and 81% scored “Basic,” or better in reading. State Snapshot Report for 2013: Grade Twelve Mathematics, supra note 476; State Snapshot Report for 2013: Grade Twelve Reading, http://education.nh.gov/instruction/assessment/naep/documents/snapshot_gr12_reading13.pdf (last visited Nov. 21, 2015).
averaged significantly lower than non-FRL students, with the gap remaining fairly much the same over several years.\textsuperscript{478}

The 2013–2014 statewide NECAP assessment results also show substantial percentages of students scoring less than fully proficient at all tested grade levels and in all tested subject areas (reading, writing, mathematics, and science):\textsuperscript{479}

- In reading, 23\% of students statewide scored below fully proficient;
- in writing, 42\% of students; and
- in mathematics, 35\% of students; and
- in science, 67\% tested this low.\textsuperscript{480}

Like those in NEAP, the NECAP results are more concerning when one considers the test achievement gaps that continue to exist between students from affluent circumstances and those from economically disadvantaged backgrounds.\textsuperscript{481} As examples:

- In mathematics, from 2007 to 2013 economically disadvantaged fourth grade students went from 47\% to 55\%
proficiency while non economically disadvantaged students in that grade went from 73% to 80% proficient; and
• in reading the former group went from 55% to 59% proficiency while the latter went from 79% to 81%.  

Furthermore, four of the five petitioner districts in the Claremont litigation (Allenstown, Claremont, Franklin and Pittsfield) showed NECAP scores in 2013–2014 for reading, mathematics and writing markedly lower than the respective state averages. Claremont, for example, had an average of 65% proficient or better in reading, compared to the state average of 77%, 55% in mathematics compared to 65%, and 42% in writing compared to 58%.  

The Oyster River Cooperative School District, in contrast, had 2013–2014 NECAP test scores in the three areas that bettered the state average in each category by a large margin—86% to 77% in reading, 80% to 65% in mathematics, and 74% to 58% in writing.  

An assessment of student performance or of schools themselves should not rest solely on test results and, to repeat, nothing here purports to offer a refined analysis of student achievement. However, the highlighted test results here suggest that education challenges lie ahead.

3. Funding  

It is open to question whether the State has properly determined the cost of the delivery of an “adequate” education and put in place requisite funding.

In 2007, again with court prodding, the Legislature passed legislation committing it to “use the definition of the opportunity for an adequate education in RSA 193-E:2-a to determine the resources necessary to provide essential programs, considering educational needs;” and, to further this,
and for many months in 2007 going into 2008, a Joint Legislative Oversight Committee on Costing an Adequate Education ("the Committee") studied the cost issue in great depth.\(^{487}\)

In a final report issued on February 1, 2008, the Committee set forth its process and conclusions.\(^{488}\) Adopting what it termed a "legislative cost analysis model"\(^{489}\) to determine the "adequacy" cost, and working with the previously established statutory definition of an "opportunity for an adequate education," it concluded that "[t]he universal cost of providing the opportunity for an adequate education as defined by RSA 193-E:2- a...equals $3,456 per pupil."\(^{490}\)

The Committee also concluded that substantial, additional differentiated aid for at-risk students with greater education needs had to be provided.\(^{491}\) The "universal cost" plainly did not suffice for English language learners ("ELL"), special education students, and those from economically disadvantaged circumstances i.e. students eligible for the federal free and reduced lunch program ("FRL").

Moreover, the additional cost exigencies for these categories of at-risk students varied considerably. For example, to educate a special education student in a self-contained program as opposed to a less restrictive environment such as a modified regular classroom involved considerably greater expense.\(^{492}\) And the best costing approach for economically disadvantaged students required focus not just on each student individually.

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\(^{487}\) The Committee was composed of ten official members coming from both political parties. It held hearings across the State, met many times, studied a vast amount of educational data, and obtained the assistance of many education experts. See J. LEGIS. OVERSIGHT COMM. ON COSTING AN ADEQUATE EDUC., FINAL REPORT AND FINDINGS OF THE JOINT LEGISLATIVE OVERSIGHT COMMITTEE PURSUANT TO 2007 LAWS CHAPTER 270, at 6-10 (N.H. 2008) [hereinafter FINAL REPORT].

\(^{488}\) See generally id.

\(^{489}\) Id. at 12. This is one of a number of "costing" approaches that have been employed by courts, and legislatures. See id. at 11. While some commentators are quite critical of these "costing" methodologies, others deem them to be workable tools. Compare Eric A. Hanushek & Alfred A. Lindseth, Schoolhouses, Courthouses and Statehouses: Solving the Funding-Achievement Puzzle in America's Public Schools 178 (2009) (arguing that the expert methodology to design and "cost-out" in the education finance area does no more than "give the illusion of providing valid, useful and reliable information"), with Rebell, supra note 54, at 64–67 (seeing their utility though acknowledging they are imperfect). See also William S. Koski, Courthouses vs. Statehouses?, 109 Mich. L. Rev. 923, 926, 939–41 (2010).

\(^{490}\) FINAL REPORT, supra note 487, at 24. The Committee’s calculations took into account certain salary/benefit changes as well as certain costs associated with instructional materials, technology, teacher professional development, facilities operation/maintenance, and transportation. Id. at 18–24.

\(^{491}\) Id. at 27–33.

\(^{492}\) Id. at 28–29.
but also on the total needs of all students in a high poverty school. This was so because, as the Committee determined based on its research, “[a] high concentration of low-income students in a school has negative effects on all students and the school as a whole.”

The differentiated aid the Committee suggested involved substantial sums:

- For each ELL student, $675.00;
- for each special education student “educated in a modified regular classroom and/or a resource room,” $1,789.00; and
- for each special education student “educated in a self-contained program or other restrictive placement,” $3,610.00.

Further, while the Committee did not lay out “a specific formula” for FRL students, it did determine that in schools with the highest concentrations of free or reduced lunch eligibility, students need additional differentiated aid in an amount that is equal to the universal cost of providing an adequate education so that, combined, the universal cost and differentiated aid will equal twice the universal amount.

While the State’s present “adequacy” funding structure is based very much on the Committee’s report, it does not incorporate, or continue, all its key differentiated aid recommendations. To be sure, and after a consumer price index adjustment in 2013, a “base per pupil cost” of $3,498.00 is now in place, as well as such differentiated aid amounts as $684.00 for each ELL.

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493 Id. at 31.
494 Id. at 28–29.
495 Final Report, supra note 487, at 31. The Committee also recommended: use of “a school-based allocation and accounting formula in calculating the cost of adequacy, including differentiated aid, transitional assistance to districts without kindergarten programs to help them put these in place, and the adoption of “a method to periodically recalculate the cost [for the opportunity for an adequate education] based on current data or an appropriate index for inflation.” Id. at 33–36.
496 This article’s coverage does not extend beyond August 15, 2015. As of that date, and following the Governor’s late June 2015 veto of the Legislature’s proposed budget, the State still does not have an operating budget in place for fiscal years 2016 and 2017 (running from July through June). In its just-ended session, however, the Legislature did not pass any law altering the State’s core adequacy aid funding statutes for regular public schools, and “[e]ducation funding details were not part of the difference of opinion between the Governor and legislature.” See New Hampshire School Boards Association Legislative Bulletin, (June 26, 2015) http://archive.constantcontact.com/fs127/1102189777311/archive/1121486974021.html; Interview of Dean Michener, NHSBA Dir. of Gov’t Aff., July 19, 2015 [hereinafter Michener Interview].
student, and (though not part of the Committee’s original recommendations) $684.00 for each third grade student who had not tested at the proficient level for reading and was not otherwise eligible for any differentiated aid. The “two-tiered” approach for special education, however, was never adopted, only a single aid number per student which is now $1,882.00.498 Furthermore, the present law only provides a single aid number for each FRL student (now $1,749.00) with no school-denominated assistance.

The differentiated aid that is now in effect is thus a good deal less than what the Committee originally suggested or intended. Indeed, the original bill the Committee presented to the Legislature in 2008 contained an adequacy aid package which could have resulted in a particularly disadvantaged student receiving over $11,000.00 for the opportunity for an adequate education;499 yet under present law, by contrast, such a particularly disadvantaged student can obtain a funding allocation of about $7,800.00.500

The present law covers the calculated adequacy-related cost through a Statewide Education Property Tax (SWEPT) which is geared to raise about 363 million dollars by means of a rather low state-wide tax rate,501 and by education/stabilization grants. These latter grants are oriented both to make up the difference, if any, between the calculated amount of due adequacy monies and what is provided through SWEPT and to not permit disruptive variance in state aid for a municipality from one year to the next.502

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498 This change was at least in part prompted to not provide “any sort of incentive for more restrictive placement.” See S.B.539-FN-L (Apr. 21, 2008) (statement of Rep. Rous, Chair, H. Educ. Comm.).
499 See S.B. 539, 2008 Sess. (N.H. 2008) (as originally introduced) [hereinafter SB 539]. The bill allowed for “two-tiered” assistance for special education, so that a special education student in a self-contained program would be allotted an additional $3610.00 beyond the base cost; further, since this proposed law also offered a graduated aid formula for poverty schools, if this special education student went to a school with 48% or more of its students receiving RFL, he/she would be accorded an additional $3,450.00, together with an additional $675.00 if eligible for EEL assistance. Together with the base $3,450.00 the total is $11,185.00.
500 Such a student would be accorded the universal or base amount of $3,498.00 plus $1,749.00 (RFL), $684.00 (ELL), and $1,882.00 (special education) for a total of $7,813.00. See N.H. REV. STAT. ANN. § 198:40-a (2012); see also N.H. REV. STAT. ANN. § 198:40-d (2012).
502 In this regard, RSA 198:41 also specifies certain caps on education grants going from one fiscal year to the next, as well as certain stabilization grants so as to not allow a municipality to see its state education aid fall. See N.H. REV. STAT. ANN. § 198:41, III, IV (2012). The caps, which presently do not allow a district to receive more than 108 percent of what it had received in “adequacy” aid the previous year, certainly operate to disadvantage districts that have seen increases in their student population (or ADMA), and they have caused a number of
earlier observed, present law also calls for consumer price index adjustments in regard to “adequacy” aid monies each biennium beginning July 1, 2013.\textsuperscript{503}

Though the State has thus accomplished a “costing” study for “adequacy” and has enacted legislation which employs the results of this study to go about the process of raising the state revenues to fund an opportunity for an adequate education, it is debatable whether this “costing” and the subsequent funding legislation, has actually resulted, in real terms, in providing New Hampshire schools, through state monies, with the resources requisite to actually deliver on the “adequacy” promise.

Education funding statistics offer grounds to argue that the Claremont-mandated state funding for an “adequate” education may not be occurring. Since the 2004-2005 school year, the State average cost to educate a child has exceeded $10,000.00, and for the 2013-2014 school year it rose to $15,458.93.\textsuperscript{504} The school districts thus spend a good deal more than $3498.00 to educate a child. Indeed, they spend a good deal more per
student even with actually granted differential aid factored in. How may these disparities be explained?

Besides the fact that the Legislature did not provide the differentiated aid the “costing” committee had recommended, many school districts offer schooling that exceeds the minimum standards by, for example, having smaller class sizes, with smaller teacher-student ratios. More specifically, school costs were simply left out of the calculation of “universal cost,” such as those for school nurses/health services, teacher aides, and central administrative staff. Salary estimates for teachers were also arguably pegged well below the State average. If the core assumptions underlying the “costing” of education were altered, then the “universal cost” estimate would change quite dramatically.

What’s more, the State’s “adequacy” funding is subject, as previously mentioned, to consumer price index adjustments, but these adjustments only began as of July 1, 2013. Education spending, however, has been increasing at an average annual rate of approximately 2% between the 2005–2006 and 2013–2014 school years, and at a much higher rate for several years before.

506 Id.
507 Id.
508 Id. at 7 (showing that if “a few additional costs that the vast majority of schools must fund in order to operate as they currently do” are factored in—that is, costs for school nurses, superintendents, and administrative central support, with teacher salaries set at the average—then “the total per pupil universal cost...[would go up] 27% over the Costing Committee’s estimate used in the legislation”). It should also be said that one can strongly question not merely the student-teacher/principal/guidance counselor ratios the Committee used (which arguably appeared not in sync with New Hampshire’s actual experience, and not reflective of the fact that many of New Hampshire’s schools are small) but also the salary levels the Committee adopted, and its cost estimates for many items such as special education, and maintenance/operations, among others. See Hearing on S.B. 539 before the S. Comm. on Educ., 2008 Sess. (N.H. 2008) (statements of Rick Trombley, Dir. of Public Affairs, NEA-NH and Nathan S. Greenberg, Superintendent of SAU # 12 (Londonderry)) (criticizing the proposed bill for not utilizing real numbers in a number of ways when coming up with its cost estimates for “adequacy”); see also Londonderry Sch. Dist. SAU No. 12 v. State (Claremont XIII), 958 A.2d 930, 937 (N.H. 2008) (Duggan, J., dissenting) (highlighting the substantial criticisms the Court had received as to the State’s “costing” of “adequacy”).
All of this raises questions as to the “adequacy” of the “adequacy” funding the Legislature provides.

The State has also reverted back to a larger dependence on the local property tax for education. For the 2013–2014 school year, local property taxes constituted 57.7% of total education revenues. To be sure, this is not on the order of magnitude that existed pre-Claremont when the localities raised in the area of 75% to 89% of the revenues, but it is a rising percentage. In the 2000–2001 school year, for example, local taxes accounted for 40.4% of the sources of revenue.

Of note: markedly differing local property tax rates, something that so concerned the Court in Claremont II, exist today. For example,

- Rye’s local education tax rate per thousand of equalized valuation ($3.99) is over four times less than that for Allenstown ($16.03);
- Moultonborough’s ($2.01) is almost ten times less than Pittsfield’s ($19.55); and
- Lebanon’s ($11.55) is about 60% that of Claremont ($19.08).

As to per pupil spending equity, another major concern of the Claremont Court, the school districts are spending markedly different amounts per student. In regard to per student spending for elementary students in the 2013–2014 school year, for example, and looking just at the five Claremont petitioner districts (Allenstown, Claremont, Franklin, Lisbon, and Pittsfield) compared to the “comp” districts in the case (Rye, Lebanon, Guilford, Lincoln-Woodstock, and Moultonborough), the “comp” districts are spending a good deal more per student in each case, ranging from a low
differential of $330.94 (Allenstown/Rye), to a high of $10,480.04 (Franklin/Gilford).\footnote{N.H. DEP’T OF EDUC., COST PER PUPIL BY DISTRICT: 2013-2014, http://education.nh.gov/data/documents/cost_pup13_14.pdf (last visited Nov. 22, 2015). The data shows that Claremont spent $4,549.70 less per elementary student than Lebanon, and Pittsfield spent $5,738.84 less than Moultonborough. See also HALL II, supra note 510; at 9 (concluding at that time that “[t]he school finance reform that followed the Claremont II decision by the NH Supreme Court did not result in any change toward greater student equity”).}

Moreover, the State has not been meeting certain school funding needs in other important ways.\footnote{Id., supra note 502. We note that in its session ending June 30, 2015, the Legislature passed a proposed budget that did not alter for the 2016 fiscal year either the 108% cap or the stabilization grants for communities receiving them. Michener Interview, supra note 496. For fiscal year 2017, however, the cap was slated to be raised to 160% and a phase-out of stabilization grants was to begin. Id. It was contemplated also that in fiscal year 2018, the cap would be entirely repealed with continuation of the phase-out of stabilization grants. Id.} Beyond the artificial “cap” placed on “adequacy” aid discussed \textit{supra},\footnote{Id.} a long term moratorium barring funding for new building projects, going back to 2010, remains in place;\footnote{NHSBA Summary, supra note 501; see also N.H. REV. STAT. ANN. § 198:15-a (2012). The Legislature’s proposed budget for the next two fiscal years did not seek to end the moratorium. Michener Interview, supra note 496.} special education funding is only being funded to approximately 70 to 75% of eligible entitlements;\footnote{Id.; supra note 502.} and vocational education tuition and transportation aid is only meeting approximately 70 to 75% of eligible entitlements.\footnote{NHSBA Summary, supra note 501; see also N.H. REV. STAT. ANN. § 188-E:7 to :9 (2008); N.H. CODE ADMIN. R. ED § 1405.01. The Legislature’s proposed budget for the next two fiscal years did not call for better funding either with regard to special education eligible entitlements or vocational education tuition and transportation aid. Michener Interview, supra note 496.}

It may thus be asked: Is the State meeting the funding mandates of Claremont, or is it failing to realistically “cost out” what is needed for the opportunity to receive an adequate education, and broadly failing to pay for such education per the dictates of \textit{Claremont II}?

**CONCLUSION**

\textit{Claremont I} and \textit{II} stand as landmark decisions in which the New Hampshire Supreme Court boldly entered into the public education arena. Together, the two decisions constitute strong expressions that the State of New Hampshire must, by constitutional imperative, provide its public school
children an education that prepares them to be capable citizens in our modern political and economic setting, and that the State needs to do this via a funding mechanism that does not depend on local property values but rather the wealth of the State as a whole.

The decisions are neither as irresponsible as their critics contend, nor as free from fair criticism as their defenders suggest. There is no simple answer to whether they were correctly decided.

In our opinion, the Claremont I Court correctly held that the “cherish... public schools” language of Article 83 imposes upon the State enforceable duties to provide an “adequate” education, with assurance of “adequate” funding, for New Hampshire’s school children. In so ruling, the Court did not engage in judicial activism, but rather legitimately acted to carry out its judicial function of resolving disputed constitutional issues.

Nor did the Court err in Claremont II by describing the nature of an “adequate” education as more than just the bare minimum or something forever fixed in time. It was quite defensible for the Court to view the State’s education duty as being of an evolving nature—obligating the State to provide New Hampshire’s children with schooling that prepares them to be both informed citizens and effective competitors for good work opportunities in our modern and changing world.

It was also appropriate for the Court to leave to the Legislature and Governor, at least in the first instance, the task of fleshing out the specifics of a constitutionally adequate education and the proper means for its provision. In so doing, the Court exhibited both regard for the limits of its authority and ability and due respect for the legislative and executive branches.

The core tax ruling in Claremont II, however, rests on much less solid ground. It failed to explain why the State was not entitled to at all delegate to the localities its constitutional educational funding function (defined in Claremont I as a “guarantee” function); it did not grapple with the trial court’s conclusion that the petitioners had failed to establish that the large variances in the local property tax rates actually resulted in unreasonable differential tax burdens; it did not deal with the trial court’s findings that the local property tax remained a “local” tax, notwithstanding the State’s involvement with the administration and collection of the tax, and/or the school districts’ need to satisfy State-imposed minimum standards; and it constituted a major departure from the State’s long history of “local control” in the delivery of public school education with local property taxes serving as the main funding mechanism.

To many, the tax ruling appeared to be an unjustified extension of the application of Article 5—a direct judicial challenge, clothed in constitutional garb, to the State’s culture of limited government, limited taxation and local control; and it turned the focus of the litigation away from a consideration of
whether the State was required to provide New Hampshire school children with an “adequate” education and toward a controversy over taxes. If this tax ruling was wrong, then the corresponding remedy (left initially to the elected branches)—the restructuring of school financing with the provision of a constitutionally adequate education through an acceptable state tax scheme under Article 5—does not follow.

The Claremont II majority’s handling of the Superior Court’s dismissal of the petitioners’ other contentions (their challenges to the adequacy, funding and equity of the system under Article 83 and under equal protection) is also troubling. The majority determined that the right to “a State-funded constitutionally adequate education” was a fundamental right, that the Superior Court had adopted an inappropriate “adequacy” definition, and that the record established that at least some of the petitioner districts were not meeting acceptable education standards due to funding difficulties—yet it made these pronouncements while not actually subjecting any of the underlying and largely contrary pertinent lower court rulings to standard appellate review. It also made no comment concerning Judge Manias’s discounting, because of “prior inconsistent statements,” the testimony of certain school officials to the effect that in many respects the education in the petitioner districts was inadequate; nor did it grapple with Judge Manias’s refusal to deem the State responsible for education deficiencies that strongly implicated failings at the local level and not, in his view, the State “system.”

Despite what was otherwise said in the opinion, the only new holding in Claremont II was a controversial tax determination, a decision perhaps more difficult for the Legislature and Governor to accept and respond to in a cooperative manner than would have been a decision which squarely dealt with the trial court’s treatment of the petitioners’ other, more education-oriented, claims.

Yet, and in significant part because of these decisions, the State’s education system is both different and better than what previously existed, though it continues to operate with real funding issues. The system now seeks in a measurable way to provide the opportunity for an adequate education state-wide, for property-rich districts and for property-poor districts, and for children of all backgrounds, with less reliance on local funding than was the case pre-Claremont.

The system operates, with federal involvement, on the basis of specific state-wide standards for defining the opportunity for an adequate education, with evolving assessments and accountability mechanisms, and with an “adequacy” funding approach drawn from a legislative “costing” study. It is moving to deliver quality education, getting beyond high-stakes testing and federal standardization, and allowing strong local governance and individual
teacher discretion. The goal in short: to adopt supportive education approaches that work.

Poverty and other challenges certainly affect the State’s ability to succeed in educating all New Hampshire’s students so that they graduate able to function as good citizens and productive workers in our times. Yet, as New Hampshire strives to educate its school children better, the Claremont I and II decisions serve to orient the State in a good direction.

Among the biggest challenges is the poverty situation of many students. Poverty unquestionably affects student achievement and it needs to be addressed along with school reform. See RAVITCH, supra note 314, at 93 ("Poverty matters. Poverty affects children’s health and well-being. It affects their emotional lives and their attention spans, their attendance and their academic performance. Poverty affects their motivation and their ability to concentrate on anything other than day-to-day survival. In a society of abundance, poverty is degrading and humiliating.").

In 2012, the nation’s child poverty rate was a shocking 22%, “higher than in any advanced nation.” Id. at 94 (noting that “[i]n Finland, which has an excellent school system, 5 percent of the nation’s children live in poverty . . . the U.S. rate . . . is about double the rate found in such countries as the United Kingdom, Canada, New Zealand and Australia . . . triple the rate in Germany, Austria, and France . . . [and] quadruple the rate of such nations as Denmark, Slovenia, Norway, the Netherlands, Cyprus . . . and Iceland.”). In New Hampshire, which for years has been a leader among the States in keeping child poverty down, the rate is still about 11%. NATIONAL CENTER FOR CHILDREN IN POVERTY: NEW HAMPSHIRE PROFILE, http://www.nccp.org/profiles/NH_profile_7.html (last visited Nov. 22, 2015); KIDS COUNT DATA CENTER: NEW HAMPSHIRE CHILDREN IN POVERTY, http://datacenter.kidscount.org/data/tables/43-children-in-poverty-100-percent-poverty?loc=1&loc=2&detailed=2/3/false/869,36,868,867,133/any/321,322 (last visited Nov. 22, 2015). Moreover, it is clear that a family needs income of about twice the federal poverty rate to meet basic needs, and 28% of New Hampshire’s children (a rate still well below the national one of 44%, but nonetheless high) live in such low-income homes. NATIONAL CENTER FOR CHILDREN IN POVERTY: NEW HAMPSHIRE LOW-INCOME CHILDREN, http://www.nccp.org/profiles/NH_profile_6.html (last visited Nov. 22, 2015); KIDS COUNT DATA CENTER: NEW HAMPSHIRE CHILDREN BELOW 200% POVERTY LEVEL, http://datacenter.kidscount.org/data/tables/47-children-below-200-percent-poverty?loc=1&loc=2&detailed=2/3/false/869,36,868,867,133/any/329,330 (last visited Nov. 22, 2015); see also Research Bulletin, Southern Education Foundation, A New Majority, Low Income Students Now in Majority in the Nation’s Public Schools (Jan. 2015), http://www.southerneducation.org/Our-Strategies/Research-and-Publications/New-Majority-Diverse-Majority-Report-Series/A-New-Majority-2015-Update-Low-Income-Students-Now.aspx (showing that in 2013, 51% of the students in the public schools were low income, that is, eligible for free or reduced lunches, with New Hampshire being the State having the lowest percentage of such students—27%). For a probing description and analysis of the widening class-based opportunity gap among children in this country stemming from income and wealth inequality—a study which underscores the enormous obstacles children from less affluent circumstances face to achieve any improvement in economic and social status, see ROBERT D. PUTNAM, OUR KIDS, THE AMERICAN DREAM IN CRISIS (2015).