

## New Hampshire's *Claremont* Case and the Separation of Powers

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### I. INTRODUCTION

Court decisions involving the adequacy of public education raise some obvious separation of powers problems. These include the institutional competency of courts to determine what level of education is adequate and how much funding is necessary to reach that level, and the authority of courts to enforce such judgments. This article will examine these problems through New Hampshire's serial education funding litigation, the *Claremont* case.<sup>1</sup>

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1. I use the phrase "*Claremont* case" to refer to the line of cases that commenced with *Claremont Sch. Dist. v. Gov.*, 635 A.2d 1375 (N.H. 1993) and *Claremont Sch. Dist. v. Gov.*, 703 A.2d 1353 (N.H. 1997). These initial decisions are generally known as *Claremont I* and *Claremont II*, which is how I will refer to them. I count, and will refer to, the challenge to Justice Batchelder's participation in *Claremont II* as *Claremont III* (*Claremont Sch. Dist. v. Gov.*, 712 A.2d 612 (N.H. 1998)); the advisory opinion on former Governor Shaheen's "ABC" education funding plan as *Claremont IV* (*Opinion of the Justices (School Financing)*, 712 A.2d 1080 (N.H. 1998)); the State's request for an extension to implement a new education funding system as *Claremont V* (*Claremont Sch. Dist. v. Gov.*, 725 A.2d 648 (N.H. 1998)); the advisory opinion on the constitutionality of a proposed tax plan referendum as *Claremont VI* (*Opinion of the Justices (School Financing)*, 725 A.2d 1082 (N.H. 1999)); the *Claremont* plaintiffs' challenge to a "phase-in" in certain communities of the state property tax as *Claremont VII* (*Claremont Sch. Dist. v. Gov.*, 744 A.2d 1107 (N.H. 1999)); the *Claremont* plaintiffs' successful request for attorney's fees as *Claremont VIII* (*Claremont Sch. Dist. v. Gov.*, 761 A.2d 389 (N.H. 1999)); the advisory opinion on a targeted aid plan proposed by former State Senator Fred King as *Claremont IX* (*Opinion of the Justices (Reformed Public School Financing System)*, 765 A.2d 673 (N.H. 2000)); the decision upholding the constitutionality of the state property tax as *Claremont X* (*Sirrell v. State*, 780 A.2d 494 (N.H. 2001)); and the "accountability decision" as *Claremont XI* (*Claremont Sch. Dist. v. Gov.*, 794 A.2d 744 (N.H. 2002)). Commentators have truncated matters by referring to the accountability decision, which I refer to as *Claremont XI*, as *Claremont III*. See e.g. John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 Vand. L. Rev. 2351, 2395 (2004) (stating that "In *Claremont III*, the court declared that 'accountability is an essential component of the State's [constitutional] duty and . . . the existing statutory scheme has deficiencies that are inconsistent with the State's duty to provide a constitutionally adequate education'"). This, however, does not give a true sense of the serial nature of the litigation. Indeed, while not discussed in this article, there has also been a *Claremont XII* (*Baines v. N.H. Sen. Pres.*, 876 A.2d 768 (N.H. 2005)) (rejecting challenge to process used to pass education funding law), and a *Claremont XIII* (*Hughes v. Speaker of N.H. H.R.*, 876 A.2d 736 (N.H. 2005)) (rejecting challenge to process used to pass education funding law). More importantly, *Claremont XIV* (*Londonderry Sch. Dist. SAU #12 & a. v. N.H.*, Case No. 2006-0258 (Apr. 19, 2006)), which involves the question of whether education funding legislation is unconstitutional

While *Claremont I*, which announced that the State has a duty to provide an adequate education and to guarantee adequate funding, was unanimously decided,<sup>2</sup> the New Hampshire Supreme Court's extension of that holding to require a particular definition of an adequate education in *Claremont II*,<sup>3</sup> and later to require "standards of accountability" in *Claremont XI*,<sup>4</sup> provoked dissenting opinions that charged that the majority had violated the separation of powers.<sup>5</sup>

In each case, the majority's response was to summarily deny any violation. In *Claremont II*, the majority stated, "[w]e agree with [dissenting] Justice Horton that we were not appointed to establish educational policy. . . . That is why we leave such matters . . . to the two co-equal branches of government."<sup>6</sup> Similarly, in *Claremont XI*, in which two of the five justices dissented, the majority stated, "[w]e recognize that we are not appointed to establish educational policy and have not done so today."<sup>7</sup> Unfortunately, summarily denying that the Court had violated the separation of powers was the extent to which the majority examined the issue, while the dissent's treatment was only slightly less superficial. This article will attempt to help fill this void.<sup>8</sup>

I will start by briefly reviewing the history of education funding litigation because this context is essential to understanding the *Claremont* case.<sup>9</sup> I will then undertake a limited review of the *Claremont* case. Finally, I will consider *Claremont* from the standpoint of the separation of powers. I begin by examining the text and structure of the State Constitution and then consider whether there are judicially discoverable and manageable standards for determining what level of education is adequate and how much funding is necessary to reach that level. Because there is a textually demonstrable commitment of education funding and education policy to

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because it does not define an adequate education and determine its cost based on such a definition, and thus squarely involves the separation of powers, is now before the Supreme Court.

2. 635 A.2d at 1382.

3. 703 A.2d at 1359.

4. 794 A.2d at 745.

5. *Claremont II*, 703 A.2d at 1362-63 (Horton, J., dissenting); *Claremont XI*, 794 A.2d at 761-63 (Nadeau and Dalianis, JJ., dissenting).

6. *Claremont II*, 703 A.2d at 1360.

7. 794 A.2d at 760. Note that one of the dissenters, Justice Nadeau, retired in December 2005.

8. This article is not the first examination of the *Claremont* case from the standpoint of the separation of powers. In *Letters to the Educators*, Attorney Eugene Van Loan III, writing under the pseudonym Rasputin, examined the topic as part of a comprehensive critique of the *Claremont* case. Eugene Van Loan III, *Letters to the Educators*, <http://www.mainstream.net/nhpolitics> (accessed May 22, 2006).

9. See Andru H. Volinsky, *New Hampshire's Education-Funding Litigation: Claremont School District v. Governor*, 83 Neb. L. Rev. 836, 844 (2005) ("Our experience in New Hampshire with the *Claremont* case is representative of the state-constitution-based school-funding litigation that has developed across the nation in response to the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.").

the legislative branch, and because what an adequate education comprises and costs are quintessentially political questions, *Claremont* represents a clear trespass on legislative powers and should be overruled.

## II. CLAREMONT IN CONTEXT

Education funding litigation is not unique to New Hampshire. According to the Campaign for Educational Equity,<sup>10</sup> as of November 2005, “[l]awsuits challenging state methods of funding public schools have been brought in [forty-five] of the [fifty] states.”<sup>11</sup>

The *Claremont* case is part of what has been called the “third wave” of school funding litigation.<sup>12</sup> The first wave began in the late 1960s,<sup>13</sup> and involved challenges under the federal equal protection clause.<sup>14</sup> The first successful case was in 1971, when the California Supreme Court held that education was a fundamental right and was violated by “substantial disparities among school districts in the amount of revenue available for education” in *Serrano v. Priest*.<sup>15</sup>

The first wave was short-lived. In 1973, the United States Supreme Court held that education was not a fundamental right under the federal

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10. Information regarding the Campaign for Educational Equity can be found at its website “Access,” at <http://www.schoolfunding.info> (accessed May 22, 2006). It was formed in June 2005 by Teachers College, Columbia University. Teachers College’s President Michael Levine in launching the organization “explained that the new campaign is designed to overcome the gap in educational access and achievement between America’s most and least advantaged students. ‘We consider ‘the gap’ to be the educational equivalent of AIDS or cancer in medicine,’ he said.” Access, *Michael Rebell Will Lead “Campaign for Educational Equity” at Teachers College*, <http://www.schoolfunding.info/news/policy/6-16-05rebelltotc.php3> (June 16, 2005). The website of the *Claremont* plaintiffs also refers to “the gap.” New Hampshire Citizens’ Voice Project, *A Statewide Community Dialogue About Quality Education*, <http://www.nhevp.org/fundgap.php> (accessed May 22, 2006).

11. The Access website reports that the only states not to have undergone education funding litigation are Delaware, Hawaii, Mississippi, Nevada and Utah. <http://www.schoolfunding.info/litigation/litigation.php3> (accessed May 22, 2006).

12. Commentators have described “three waves” of school funding litigation. Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 Temp. L. Rev. 1151, 1152 (1995); see William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: the Massachusetts Decision as a Model*, 35 B.C. L. Rev. 597, 598 (1994) (“challenges to the school finance systems of the various states can be divided into three distinct ‘waves’ of cases”); see also William S. Koski, *Of Fuzzy Standards and Institutional Constraints: a Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 Santa Clara L. Rev. 1185, 1188 (2003).

13. *Burrus v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff’d*, 397 U.S. 44 (1970); *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff’d sub. nom. McInnis v. Oglive*, 394 U.S. 322 (1969); see Koski, *supra* n. 12, at 1213-14.

14. Koski, *supra* n. 12, at 1188 (“[S]chool finance litigation initially focused on the federal Constitution’s Equal Protection Clause and was fueled by the argument that per-student funding should be substantially equal or at least not dependent upon the wealth of the school district in which the student resided.”).

15. 487 P.2d 1241, 1265 (Cal. 1971).

Constitution in *San Antonio Independent School District v. Rodriguez*,<sup>16</sup> and applied rational basis review to uphold the challenged education funding system.<sup>17</sup> In his dissent, Justice Marshall encouraged prospective litigants to turn to state constitutions to achieve their objectives, urging that “nothing in the Court’s decision today should inhibit further review of state educational funding schemes under state constitutional provisions.”<sup>18</sup>

The second wave broke almost immediately after *Rodriguez* when the New Jersey Supreme Court issued *Robinson v. Cahill*,<sup>19</sup> which held that spending disparities between school districts violated the New Jersey Constitution’s education clause, which required “a thorough and efficient system of free public schools.”<sup>20</sup> Second wave litigation sought equalized per pupil spending based on state education clauses, particularly equal protection clauses.<sup>21</sup> For example, in 1976, the California Supreme Court reaffirmed the result in *Serrano* under the state constitution’s equal protection clause.<sup>22</sup>

The third wave began in 1989 with cases such as the Supreme Court of Kentucky’s *Rose v. Council for Better Education*,<sup>23</sup> and involved a shift from “equity” to “adequacy.” Rather than seeking to equalize spending among school districts based on equal protection arguments, third wave litigation maintained that the education clauses of state constitutions required a minimum level of education and that the state is required to provide a level of funding that is adequate to provide that education.<sup>24</sup>

The shift was politically motivated. Equity litigation created winners and losers because it caused wealth to be transferred from richer to poorer school districts. Naturally, the school districts whose pieces of the education funding pie got thinner were not happy.<sup>25</sup> In contrast, by seeking to

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16. 411 U.S. 1, 33 (1973) (“It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”).

17. *Id.* at 49-55 (concluding that “local control” was a sufficient state interest to satisfy rational basis review).

18. *Id.* at 138 n. 100 (Marshall, J., dissenting). Allegedly, Marshall described his judicial philosophy as “you do what you think is right and let the law catch up.” Mark R. Levin, *Men in Black: How the Supreme Court is Destroying America* 17 (Regnery Publ., Inc. 2005).

19. 303 A.2d 273 (N.J. 1973).

20. *Id.* at 294.

21. See Koski, *supra* n. 12, at 1191; Heise, *supra* n. 12, at 1152; Thro, *supra* n.12, at 603.

22. *Serrano v. Priest*, 557 P.2d 929, 957-58 (Cal. 1976).

23. 790 S.W.2d 186 (Ky. 1989).

24. See Koski, *supra* n. 12, at 1192; Heise, *supra* n. 12, at 1153; Thro, *supra* n. 12, at 603.

25. A well known example in New Hampshire of the political unpopularity of equity litigation is the effort by Killington to secede from Vermont and join New Hampshire. See e.g. Daniel Barrick, *Vermonters Persist in Desire to Move*, Concord Monitor B1 (Feb. 2, 2005).

enlarge the size of the pie, adequacy litigation created the impression that everyone was a winner.<sup>26</sup>

Adequacy litigation is considerably more policy laden than equity litigation. Once a court has determined that education is a fundamental right, the court's subsequent review is limited to whether there is equal per pupil spending. Adequacy litigation, on the other hand, requires a court to determine what level of education is adequate and how much funding is necessary to reach that level. Thus, adequacy litigation raises concerns about the institutional competence of courts to make such judgments and the authority of courts to enforce such judgments.<sup>27</sup>

Nevertheless, the results of third wave litigation have heavily favored plaintiffs. According to the Campaign for Educational Equity, plaintiffs have triumphed in twenty-one states and lost in only seven states.<sup>28</sup> Where plaintiffs have lost, courts have held that questions regarding educational adequacy are not justiciable because they are political questions. For example, in *Coalition for Adequacy & Fairness, Inc. v. Chiles*,<sup>29</sup> the Florida Supreme Court held that "plaintiffs failed to demonstrate . . . an appropriate standard for determining 'adequacy' of support provided by state that would not present a substantial risk of judicial intrusion into the powers" of the representative branches.<sup>30</sup> In contrast, the high courts of other states,

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26. See Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform*, 55 *Hastings L.J.* 1077, 1198 n. 554 (2004) ("Adequacy was seen as a more politically appealing theory of reform that would permit the big spenders to continue spending big, while at the same time ensuring an adequate education for all school children.").

27. *But see* Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 *Harv. J.L. & Pub. Policy* 569, 583 (2004) ("The adequacy standard is perhaps also more palatable to legal commentators and the public because it intrudes less upon the principle of separation of powers. It is one thing to find that a system does not meet the constitutionally required minimum standard and is therefore unconstitutional until it is improved to meet that standard. This is the fundamental function of courts: to say what the law is.").

28. *Supra* n. 10. Massachusetts and Texas are listed as both winners and losers.

29. 680 So. 2d 400 (Fla. 1996).

30. *Id.* at 408. See *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) ("It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense."); see also *Ex parte James*, 836 So.2d 813, 819 (Ala. 2002) ("Continuing the descent from the abstract to the concrete, we now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature. Accordingly, compelled by the authorities discussed above – primarily by our duty under § 43 of the Alabama Constitution of 1901 – we complete our judicially prudent retreat from this province of the legislative branch in order that we may remain obedient to the command of the people of the State of Alabama that we 'never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.'") (emphasis in original); *Marrero v. Commonwealth of Pa.*, 739 A.2d 110, 113-14 (Pa. 1999) ("[W]hat constitutes an 'adequate' education or what funds are 'adequate' to support such a program . . . are matters which are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government."); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995) (noting that, in attempting to define what constitutes a "thorough and efficient" education under the New Jersey Constitution, "the New Jersey Supreme

such as New Hampshire, have treated it as self evident that questions regarding educational adequacy are justiciable.<sup>31</sup>

### III. AN ABRIDGED *CLAREMONT* CHRONOLOGY

At the center of the *Claremont* case is Part II, Article 83 of the State Constitution, which in part provides that:

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 . . .<sup>32</sup>

Despite the enigmatic nature of a “duty” that involves “cherish[ing] the interest of” a number of things including public schools,<sup>33</sup> the New Hampshire Supreme Court in 1993 held that this “language commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools.”<sup>34</sup>

The Court further held, despite the lack of any direct or indirect mention of qualitative or quantitative measures, that “[A]rticle 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,”<sup>35</sup> that there is a “corresponding right of the citizens to

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Court has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort, and court attention. The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature”).

31. See *Claremont II*, 703 A.2d at 1360. See also *Lake View Sch. Dist. No. 25 of Phillips County v. Huckabee*, 2005 Ark. LEXIS 776 (Dec. 15, 2005) (“This court’s refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education.”); *Rose*, 790 S.W.2d at 211 (“In spite of any protestations to the contrary, we do not engage in judicial legislating. We do not make policy. We do not substitute our judgment for that of the General Assembly. We simply take the plain directive of the Constitution, and, armed with its purpose, we decide what our General Assembly must achieve in complying with its solemn constitutional duty.”).

32. N.H. Const. pt. II, art. 83.

33. See Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 Cap. U. L. Rev. 37 (1996) (describing mandate to cherish as “inherently nebulous”).

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

35. *Id.* at 1376.

its enforcement,”<sup>36</sup> and that “[a]ny citizen has standing to enforce this right.”<sup>37</sup> The Court, however, did not “define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor.”<sup>38</sup>

In *Claremont II*, which was issued in 1997, the New Hampshire Supreme Court decided that defining the parameters of educational adequacy was not a task for the representative branches after all. The Court struck down a definition of educational adequacy developed by the State Board of Education,<sup>39</sup> and said instead it would “look to the seven criteria articulated by the Supreme Court of Kentucky [in the *Rose* decision] as establishing general, aspirational guidelines for defining educational adequacy.”<sup>40</sup> These so-called “general, aspirational guidelines” are:

- (1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- (3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (6) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
- (7) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.<sup>41</sup>

The Court added that it “anticipated” that the representative branches would “promptly develop and adopt specific criteria implementing these guidelines.”<sup>42</sup>

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36. *Id.* at 1381.

37. *Id.*

38. *Id.*

39. *Claremont II*, 703 A.2d at 1357-58.

40. *Id.* at 1359.

41. *Id.*

42. *Id.*

In *Claremont II*, the Court also changed the nature of the funding duty from guarantor to provider, as it held that “[t]o the extent that the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State.”<sup>43</sup> The Court also gave the representative branches a grace period to replace the extant funding system, which relied heavily on the local property tax.<sup>44</sup>

The Court also held that a “constitutionally adequate public education is a fundamental right.”<sup>45</sup> Because “the fundamental right at issue is the right to a State funded constitutionally adequate public education,”<sup>46</sup> the legislature could allow school districts “to dedicate additional resources to their schools.”<sup>47</sup> The Court saw it as “basic,” however, that the State must assure “comparable funding.”<sup>48</sup>

In *Claremont IX*, the New Hampshire Supreme Court issued an advisory opinion that reiterated the change in the nature of the State’s funding duty. It opined that proposed legislation that relied on local property taxes to fund some of the legislatively defined cost of educational adequacy would “directly contradict the mandate of Part II, Article 83, which imposes upon the State the exclusive obligation to fund a constitutionally adequate education.”<sup>49</sup>

The Court also gratuitously opined that educational adequacy had “yet to be defined,”<sup>50</sup> despite the enactment of RSA 193-E:2 in 1998, which essentially codified the “general, aspirational guidelines” handed down in *Claremont II*.<sup>51</sup> For good measure, the Court added that “[i]t is not possible to determine the level of funding required to provide the children of

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43. *Id.* at 1357.

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

45. *Id.* at 1359. It is noteworthy that in *Claremont I* the court had said that “a free public education is at the very least an important, substantive right,” which is a lower level right under equal protection analysis than a fundamental right. 635 A.2d at 1381. *Claremont II* does not attempt to explain how, in the intervening four years, the right to an education grew from a substantive right to a fundamental right.

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

47. *Id.* at 1360.

48. *Id.* This makes the *Claremont* case a hybrid of equity and adequacy theory. Every school district must receive comparable state funding, which is equity theory, but school districts may use local taxes to increase the level of funding, which avoids the political problems experienced in Vermont with equity litigation. *Supra* n. 25.

49. *Claremont IX*, 765 A.2d at 676.

50. *Id.* at 677.

51. See N.H. Rev. Stat. Ann. §193-E2 (1998). In 2005, RSA 193-E:2 was re-titled, “Criteria for an Equitable Education.” However, the criteria remain unchanged.

this State with a constitutionally adequate education until its essential elements have been identified and defined.”<sup>52</sup>

In *Claremont XI*, the Court held that “accountability is an essential component of the State’s duty.”<sup>53</sup> It explained that:

Accountability means that the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether, in delegating its obligation to provide a constitutionally adequate education, the State has fulfilled its duty.<sup>54</sup>

The Attorney General, who since 1999 has taken the position that the *Claremont* case “mandated” accountability, argued that extant statutes and regulations satisfied this “mandate.”<sup>55</sup> The Court, however, held that the “existing statutory scheme has deficiencies that are inconsistent with the State’s duty to provide a constitutionally adequate education.”<sup>56</sup>

The Court held that certain education regulations known as the “minimum standards”<sup>57</sup> for school approval were “in clear conflict with the State’s duty to provide a constitutionally adequate education” to the extent they “excuse noncompliance solely based on financial conditions.”<sup>58</sup> Accordingly, to this extent, the minimum standards were deemed “facially insufficient.”<sup>59</sup> The Court also was critical of the New Hampshire Educa-

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52. *Claremont IX*, 765 A.2d at 677.

53. *Claremont XI*, 794 A.2d at 745.

54. *Id.* at 751.

55. *Id.* at 752. The Attorney General previously had “characterized *Claremont II* as issuing four mandates: ‘define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability.’” *Id.* at 749. *Claremont II*, however, says nothing about either delivery or accountability. Moreover, as long as adequate funding is being provided, the duty is being met. Therefore, it should not matter constitutionally whether the legislature “determined” the cost of an adequate education or picked a number from a hat. Similarly, as long as an adequate education is being provided, it should not matter constitutionally whether it is being delivered through accountability or through UPS. The court properly chose not to base its holding in *Claremont XI* on this “concession,” as the Attorney General cannot bind the legislature. *Id.* at 750-51. Instead, it reasoned that “meaningful” “standards of accountability” were required because “[i]f the State cannot be held accountable for fulfilling its duty, the duty creates no obligation and is no longer a duty.” *Id.* at 751. The manifest problem with this reasoning is that the constitution does hold the representative branches accountable for its education policy choices, albeit to the voters not the court, as the legislature and governor must stand for reelection every two years.

56. *Id.* at 745.

57. N.H. Admin. R. Ann. 306.01 (2006). The “minimum standards” are minimum only in the sense that they are required for State approval for student attendance and state funding. They are quite extensive and detailed.

58. *Claremont XI*, 794 A.2d at 755.

59. *Id.* The court had never before used the phrase “facially insufficient” to describe a law or regulation’s constitutional status. While it sounds like “facially unconstitutional,” it is a completely different animal. A facially unconstitutional challenge to a legislative act is “the most difficult challenge to mount successfully” and to succeed “the challenger must establish that no set of circumstances exists

tion Improvement and Assessment Program (“NHEIAP”) because the Department of Education “is limited to using the results [of assessment tests] to encourage school districts to develop a local education improvement and assessment plan,” which the Court felt was not a “meaningful” application of assessment tests.<sup>60</sup> Borrowing language that had been suggested by the Attorney General, the Court “conclud[ed] that the State ‘needs to do more work.’”<sup>61</sup>

In sum, the 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.

#### IV. CLAREMONT AND THE SEPARATION OF POWERS

Part I, Article 37 of the New Hampshire Constitution requires that governmental powers be separated between the three branches of government:

In the government of this state, the three essential powers, to wit, the legislative, executive and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.<sup>62</sup>

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under which the Act would be valid.” *U.S. v. Salerno*, 481 U.S. 739, 745 (1987); see *State v. Brobst*, 857 A.2d 1253, 1255 (N.H. 2004) (discussing overbreadth doctrine). “Facial insufficiency” appears to mean that the challenger simply must show that the law was not written the way the court would have written it.

60. *Claremont XI*, 794 A.2d at 758.

61. *Id.* at 759. The Attorney General’s view of the respective roles of the branches was that the representative branches “are responsible for crafting and implementing a long-term solution to the problems with the educational funding system found by this Court. The Court is responsible for deciding whether the Legislature has adopted a satisfactory definition and for determining that the Legislature has finished its initial tasks under *Claremont II*, or that it needs to do more work.” *Id.* Thus, in the view of the Attorney General, the judiciary’s role is to tell the legislature how high to jump, while the legislature’s role is to jump that high.

62. N.H. Const. pt. I, art. 37. In *Claremont V*, the court, apparently frustrated that nearly a year had passed since the issuance of *Claremont II*, during which time “the legislature has primarily put its efforts into the consideration of legislation (the ABC plan) that was determined to contain an unconstitutional funding mechanism and proposed constitutional amendments designed to nullify in whole or in part this court’s decisions in *Claremont I* and *Claremont II*,” intimated that the “chain of connection” language meant it could act to fund public education in the absence of legislative action. 725 A.2d at 650, 652. Such a construction of Part I, Article 37 of the New Hampshire Constitution would be the proverbial exception that swallows the rule because by the same reasoning the legislature could exercise judicial powers if it felt the court was not meeting its constitutional duties. What this language refers to is one branch exercising a power that is of a nature that belongs to another branch, where expressly provided by the constitution. One example is Part II, Article 38 of the New Hampshire

As the New Hampshire Supreme Court has explained, this “[s]eparation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people.”<sup>63</sup>

The Court has utilized the “political question” doctrine developed by the federal courts to prevent judicial violation of the separation of powers.<sup>64</sup> Among other circumstances, a case involves a nonjusticiable political question “where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”<sup>65</sup>

### A. Text and Structure

If the separation of powers means anything, it means that one branch of government cannot exercise powers that are textually committed by the constitution to another branch. Yet that is exactly what a judicially enforceable duty to provide an adequate education and provide adequate funding entails, because the constitution commits these matters to the representative branches.

The “power of the purse” is textually committed to the legislature as the constitution gives only the legislature the power to raise taxes,<sup>66</sup> and only money that the legislature has appropriated can be spent.<sup>67</sup> In general, it has long been understood that, under the separation of powers, when and how to exercise the “power of the purse” is exclusively a legislative call.<sup>68</sup> Indeed, that is one of the reasons why some have seen fit to refer to the judiciary as the “least dangerous branch.”<sup>69</sup>

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Constitution, which provides that the senate “shall be a court” for impeachments. N.H. Const. pt. II, art. 38; see also *The Federalist No. 47*, 249 (James Madison) (George W. Carey & James McClellan eds., 2001).

63. *In re Governor and Exec. Council*, 846 A.2d 1148, 1154 (N.H. 2004) (quoting *In re Mone*, 719 A.2d 626, 631 (N.H. 1998)).

64. *Baines*, 876 A.2d at 774-75 (citing *Baker v. Carr*, 369 U.S. 186, 209 (1962)).

65. *Hughes*, 876 A.2d at 743 (quoting *In re Judicial Conduct Comm.*, 751 A.2d 514, 516 (N.H. 2000)).

66. N.H. Const. pt. I, art. 28; N.H. Const. pt. II, art. 5.

67. N.H. Const. pt. II, art. 56.

68. See Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 Harv. J. on Legis. 297, 300 (1988) (“The Framers’ decision to invest the Legislative Branch with the control over the purse was neither arbitrary nor novel. Rather, in assigning the Legislature the power of the purse, the Framers were relying on their familiarity with the lessons of Roman, English, and colonial history; with the history of the American states prior to the adoption of the Constitution; and with English and continental political theory.”).

69. See *The Federalist No. 78*, *supra* n. 62 (Alexander Hamilton) (“Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The

The New Hampshire Supreme Court has recognized that the separation of powers would be violated if the judiciary were to attempt to require the legislature to make a particular type of appropriation. Indeed, only eight years prior to *Claremont I*, the Court had held that Part I, Article 18, which in relevant part provides that the “true design of all punishments being to reform, not to exterminate mankind,” did not authorize the superior court to order the State to provide a college education to a State prison inmate.<sup>70</sup> Rather, the “superior court exceeded its jurisdiction” because, in part, the judiciary “cannot violate the separation of powers by invading the right of the legislature to appropriate money for prison programs. . . .”<sup>71</sup>

Any remedy for an alleged deprivation of “adequate funding” would require a court to order the State to spend money that the legislature has not appropriated, which would violate Part II, Article 56.<sup>72</sup> Thus, there cannot be a judicially enforceable duty to provide adequate funding.

The power to make education policy is just as obviously textually committed to the legislative branch. The constitution vests the “supreme legislative power” in the legislature,<sup>73</sup> and gives the legislature “full power and authority” to make laws.<sup>74</sup> Consequently, to use the Supreme Court’s own words, “[a]ny educational policy or rule declared by the legislature or promulgated under authority delegated by it may not be reversed or vacated judicially on the ground that it must be regarded as impolitic.”<sup>75</sup>

Yet that is precisely what the Supreme Court did in *Claremont II*, when it struck down a definition of educational adequacy developed by the State Board of Education. The Court contended that it struck down the State Board’s definition because the definition did not “sufficiently reflect the letter or spirit of the State Constitution’s mandate.”<sup>76</sup> However, the

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

70. *State v. Evans*, 506 A.2d 695, 697 (1985) (quoting N.H. Const. pt. I, art. 18).

71. *Id.* at 699. The court also ruled that judiciary could not violate the separation of powers by invading “the right of the executive to devise and implement rehabilitative and educational programs at the State prison.” *Id.*

72. See N.H. Const. pt. II, art. 56. “No moneys shall be issued out of the treasury of this state, and disposed of, (except such sums as may be appropriated for the redemption of bills of credit, or treasurer’s notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, by and with the advice and consent of the council, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.” *Id.*

73. N.H. Const. pt. II, art. 2.

74. *Id.* at art. 5.

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

76. *Claremont II*, 703 A.2d at 1357.

Court did not explain what it was about the definition that was not sufficiently reflective of the constitutional mandate except that “in the first instance, it is the legislature’s obligation, not that of individual members of the board of education, to establish educational standards that comply with constitutional requirements.”<sup>77</sup> This explanation is unconvincing.

For one thing, the Court’s precedent established that it was constitutional for the legislature to delegate authority to administrative agencies, such as the Board of Education, as long as it provided “some standards or general policy to guide the administrative agency. . . .”<sup>78</sup> The Court suggested that the authority to define educational adequacy could not similarly be delegated because the “constitution places the duty to support the public schools ‘on the legislators and magistrates.’”<sup>79</sup> But that simply begs the question why the legislature did not have the discretion to carry out its duty by delegating to the State Board the authority to define “adequacy.” Additionally, under this reasoning, the legislature should be prohibited from delegating any aspect of the duty to provide an adequate education, which as later *Claremont* decisions make clear, is not the case.<sup>80</sup>

For another thing, if the problem was that the legislature could not delegate the task of defining educational adequacy, then the Court did not need to “look to” the Kentucky parameters, as all that the representative branches would need to do to meet their “obligation” “to establish educational standards that comply with constitutional requirements,”<sup>81</sup> would be to directly enact the Board of Education’s definition or another definition. The conclusion that the Supreme Court simply wanted to define adequacy itself is inescapable.

This conclusion is further supported by the language of Part II, Article 83. As noted earlier, there is no mention of any qualitative standard of education. Rather, the duty is simply to “cherish the interest of literature and the sciences, and all seminaries and public schools. . . .”<sup>82</sup> A very strong case can be made that this language is hortatory.<sup>83</sup> At best, this language is what commentators call “Category I” constitutional language,<sup>84</sup>

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77. *Id.* at 1358.

78. *In re Strandell*, 562 A.2d 173, 178 (N.H. 1989).

79. *Claremont II*, 703 A.2d at 1357 (quoting N.H. Const. pt. II, art. 83).

80. *See Claremont XI*, 794 A.2d at 751 (standards of accountability must allow the Court “to determine whether, in delegating its obligation to provide a constitutionally adequate education, the State has fulfilled its duty”).

81. *Claremont II*, 703 A.2d at 1358.

82. N.H. Const. pt. II, art. 83.

83. *See Van Loan*, *supra* n 8.

84. *See Thro*, *supra* n. 12, at 605-06 (“In some states, ‘Category I’ clauses impose a legislative duty which is met by simply establishing a public school system. In other states, ‘Category II’ clauses require that the system be of a specific quality or have some characteristic such as ‘uniformity.’ The ‘Category III’ education clauses go beyond the specific quality level of Category II and set up the

and “merely mandate[s] some system of free public schools with no requirement as to support or quality.”<sup>85</sup> But whether the language is hortatory or mandatory, it is impossible to read as requiring the multifarious “guidelines” enumerated in *Claremont II*. Instead, such a reading can fairly be described as “a display of stunning judicial imagination.”<sup>86</sup>

*Claremont II*'s holding that it was unconstitutional to use the local property tax to fund an adequate education was also politically based. Whether the tax was constitutional depended upon how the taxing district was delineated.<sup>87</sup> If it was delineated as the school district, as the trial court had defined it, then the rate and assessment would be uniform, and the tax would be constitutional. On the other hand, if the taxing district was delineated as the entire State, as the Supreme Court delineated it, then the tax would be unconstitutional because rates and assessments varied between school districts.

Because the purpose of the local property tax was to meet the State's duty to provide an adequate education, the Supreme Court reasoned that it was a State tax.<sup>88</sup> Again, the problem with this reasoning is that it is purely results oriented as it offers no satisfactory explanation why the State can delegate other aspects of its educational duties, but not the funding aspect. It also fails to explain why various other duties that the State delegates to municipalities can be funded with local property taxes when, in theory, they are also State duties.<sup>89</sup>

Another problem with this reasoning is that it is inconsistent with how the Court had described the State's funding duty in *Claremont I*. There, the Court said that the duty was to “guarantee adequate funding,”<sup>90</sup> which

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school system for a specific purpose. Finally, in the few states with ‘Category IV’ clauses, education is the ‘primary,’ ‘fundamental’ or ‘paramount’ duty of the state legislature.’). Note that Thro incorrectly classifies New Hampshire as a Category IV state as there is no language in Part II, Article 83 describing public education as a “primary,” “fundamental” or “paramount” duty. *Id.* at 606. Thro, however, correctly describes the Massachusetts education clause (which is a “nearly identical provision regarding education,” *Claremont I*, 635 A.2d at 1378) as a Category I clause, “which cannot be regarded as imposing a quality standard.” Thro, *supra* n. 12, at 611.

85. Jon Mills & Timothy McLendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make “Adequate Provision” for Florida Schools*, 52 Fla. L. Rev. 329, 344 (2000).

86. *Hancock v. Commr. of Educ.*, 822 N.E.2d 1134, 1160 (Mass. 2005) (Cowan, J., concurring).

87. See Susan E. Marshall, *The New Hampshire State Constitution: A Reference Guide* 121 (Praeger 2004) (“The legislative authority to impose taxes is limited by the constitutional requirement that they be ‘reasonable and proportional.’ Reasonable and proportional taxes are equal in valuation and uniform in rate. . . . To have a uniform valuation and uniform rate, a tax must be uniform throughout the taxing district, so that a state tax must be uniform throughout the state, a county tax throughout the county, and a town tax throughout the town.”) (citations omitted).

88. *Compare Claremont II*, 703 A.2d at 1356, with *Holt v. Antrim*, 9 A. 389, 389 (N.H. 1886) (“Local education is a local purpose for which legislative power may be delegated to towns.”).

89. See *Claremont II*, 703 A.2d at 1363 (Horton, J., dissenting).

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

connotes a role where the State, acting as a guarantor, would assure that less affluent school districts have sufficient funding, as opposed to paying for the entire cost of an adequate education in all school districts. Thus, the Supreme Court, in order to strike down the extant education funding system, changed the nature of the State's duty from the guarantor of adequate funding to its exclusive provider.<sup>91</sup>

It is not just the constitution's delineation of governmental powers that compels the conclusion that education policymaking is textually committed to the representative branches. Article 83 does so as well as it makes the duty one for "the legislators and magistrates."<sup>92</sup> If the language "shall be the duty . . . to cherish" is no mere statement of aspiration, but "commands, in no uncertain terms,"<sup>93</sup> then it necessarily follows that the language "shall be the duty of the legislators and magistrates" commands every bit as unequivocally "that the duty be fulfilled by the legislative and executive branches, without oversight or intrusion by the judiciary."<sup>94</sup>

Despite the clear textual commitment of education policymaking to the legislature, the Supreme Court has, under the guise of interpreting the constitution, played the role of a "super" legislature from the outset. While *Claremont I*'s declination to "define the parameters of the education mandated by the constitution"<sup>95</sup> may sound like deference to the representative branches, it is not.

Assuming for the sake of argument that Article 83 "imposes on the State a duty to provide a constitutionally adequate education to every child in the public schools in New Hampshire and to guarantee adequate funding,"<sup>96</sup> it nonetheless is quite an interpretive leap to conclude that this duty requires that State government define an adequate education, and that it define adequacy in a one-size-fits-all manner. For example, it is certainly arguable that a more efficacious way to develop the parameters of a quality of public education is by letting school districts function as laboratories of

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91. See also *Claremont IX*, 765 A.2d at 677 (stating that it is "the State's obligation to underwrite the cost of an adequate education for each educable child"). The hostility of the Supreme Court to property taxes in general can be seen in *Claremont X*, where the Court came within one vote of declaring the statewide property tax unconstitutional. See 780 A.2d 494.

92. See N.H. Const. pt. II, art. 41 (referring to Governor as "supreme executive magistrate").

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

94. *Hancock*, 822 N.E.2d at 1160 (Cowin, J., concurring). There are other examples that demonstrate that the Court's treatment of the language of Part II, Article 83 has been inconsistent. For example, it is not just public schools that the legislators and magistrates have a duty to "cherish" but "seminaries" and "the interest of literature and the sciences." N.H. Const. pt. II, art. 83. Yet the Court has given no effect to this language. The reason cannot be that the language is too ambiguous because the Court previously stated that the framers understood seminaries to mean colleges. See *Sisters of Mercy v. Town of Hooksett*, 42 A.2d 222, 225 (N.H. 1945).

95. See *Claremont I*, 635 A.2d at 1381 (declining to define educational parameters because "that task is, in the first instance, for the legislature and the Governor").

96. *Id.* at 1376.

education policy and develop their own separate definitions<sup>97</sup> or by letting market forces do so through school choice.<sup>98</sup>

Telling the representative branches that they have the “task” of defining an adequate education, in a decision purporting to interpret the constitution, is simply an insidious way of ordering the legislature to pass a certain type of legislation. If the text of the constitution means anything, however, it is the legislature’s call as to what level of government should be responsible for defining an adequate education and indeed whether there should be a governmental definition of an adequate education at all. While the Court’s declination in *Claremont I* to “define the parameters of the education mandated by the constitution” may sound like deference to the representative branches, it is not.

The representative branches’ compliance with *Claremont I* emboldened the Court. In *Claremont II*, the Court struck down the State Board of Education’s definition, announced its own “general, aspirational guidelines for defining educational adequacy,” and indicated that it anticipated the representative branches “will promptly develop and adopt specific criteria implementing these guidelines. . . .”<sup>99</sup> Thus, the legislature’s role had been reduced to implementing a program of public education that reflected the Court’s policy views.

Subsequent cases involved increased judicial micro-managing of education policy. In *Claremont IX*, even though the definition of an adequate education was not before it, the Court opined that the legislative definition, which essentially codified the *Claremont II* guidelines, was insufficient, and indicated that the definition should be written at a level of detail from which its cost could be determined.<sup>100</sup> In *Claremont XI*, the Court held that the duty to provide an adequate education required “standards of accountability.”<sup>101</sup> Because the extant statutes and regulations were not sufficiently “meaningful,”<sup>102</sup> the State “need[ed] to do more work,”<sup>103</sup> which is a fetching euphemism for rewriting the minimum standards and the NHEIAP to the Court’s liking.

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97. See *Rodriguez*, 411 U.S. at 50 (“An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State’s freedom to ‘serve as a laboratory; and try novel social and economic experiments.’ No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.”) (citation omitted).

98. See Jennifer L. Smith, *Educational Vouchers in Indiana – Considering the Federal and State Constitutional Issues*, 34 Val. U. L. Rev. 275 (1999).

99. 703 A.2d at 1359.

100. 765 A.2d at 677.

101. 794 A.2d at 745.

102. *Id.* at 758.

103. *Id.* at 759.

Critiquing the legislature in this manner is clearly beyond the scope of how the Supreme Court had previously characterized judicial review, which simply “authorizes courts to determine whether a law is constitutional, not whether it is necessary or useful.”<sup>104</sup> Thus, the court “simply compares the legislative act with the constitution; [and] since the constitution clearly cannot be adjudged void, the courts have no choice but to declare any act which is inconsistent with it to be of no effect.”<sup>105</sup>

While one would never know it from reading the *Claremont* case, there are differences of opinion regarding how best to improve public education. The divide is political not legal. Those on the conservative side of the political spectrum typically favor the principle of subsidiarity, which pushes decision making down to the lowest possible level.<sup>106</sup> Accordingly, school districts, rather than the State, should run public schools, while parents should be able to choose their children’s schools.<sup>107</sup> Those on the liberal side of the political spectrum typically favor centralization of education policy and oppose school choice.<sup>108</sup> Interpreting Article 83 to require a single definition of educational adequacy for the entire State and uniform standards of accountability is simply a political judgment, that centralized bureaucratic control of public education is better policy than local control and school choice, camouflaged as constitutional law.

The structure of the constitution also 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. To name a few examples, government cannot take away our firearms,<sup>109</sup> prevent us from exercising the religion of our choice,<sup>110</sup> take our property without just compensation,<sup>111</sup> or prevent us

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104. *State v. LaFrance*, 471 A.2d 340, 343 (N.H. 1983).

105. *Id.* See *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (“So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide the case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”).

106. See N.H. Republican St. Comm., *2005-2006 Republican Party Platform*, <http://www.nhgop.org/resources/platform.html#edu> (“Local control of education policy and education funding creates the best-managed school systems.”) (accessed May 22, 2006).

107. See *id.* (“Laws should be implemented to encourage school choice and competition and allow all parents to choose the best public, private, charter or home school program for their children.”).

108. See N.H. Democratic Party, *2004 New Hampshire Democratic Party Platform*, <http://www.nhdp.org/platform/platform.asp#EDUCATION> (“We believe in the primacy of public education and oppose attempts to reduce the public commitment to all schools. . . . We require that the State Board of Education develop policies for the benefit of local boards that outline our collective concept of adequacy in public education.”) (platform is no longer available on the listed website and a copy of the original website is on file with the *Pierce Law Review*).

109. N.H. Const. pt. I, art. 2-a.

110. *Id.* at art. 5.

111. N.H. Const. pt. I, art. 12.

from ventilating our opinions.<sup>112</sup> Part II, the Form of Government, in contrast, divides governmental powers between the three branches without specifically enumerating how to exercise those powers.<sup>113</sup>

Moreover, it expressly provides that the legislature has “full power and authority” to make “all manner of wholesome and reasonable” laws “as they may judge for the benefit and welfare of this state.”<sup>114</sup> The Supreme Court has construed this language to mean that “courts may not declare acts of the Legislature void on the sole issue whether they are ‘wholesome and reasonable.’ The Legislature is to judge whether they are for ‘the benefit and welfare’ of the state.”<sup>115</sup> It would be incongruous with this structure, which precludes some governmental actions but does not require any actions, leaving it to the branch most responsive to the people to determine what is for “the benefit and welfare of this state,” to interpret Article 83 to impose a judicially enforceable duty on the legislature to design and implement a curriculum based on qualitative guidelines provided by the Supreme Court and to enact and utilize “standards of accountability” that the Court deems “meaningful.”

#### B. *Judicially Discoverable and Manageable Standards*

Another characteristic exhibited by cases that involve nonjusticiable political questions is “a lack of judicially discoverable and manageable standards” for resolving the question.<sup>116</sup> The need for such standards in adequacy litigation is obvious as courts must determine what level of education is adequate and how much funding is necessary to reach that level. Perhaps the biggest problem a court attempting to develop such standards faces is that the relationship between school performance and funding is hardly the self-evident proposition that the *Claremont* case, and adequacy doctrine in general, assumes. Rather, “there are significant theoretical and empirical disputes as to the importance of finance in the delivery of a quality education.”<sup>117</sup>

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112. *Id.* at art. 22.

113. N.H. Const. pt. II, art. 2 (legislative power); *id.* at art. 41 (executive power); *id.* at art. 72-a (judicial power).

114. *Id.* at art. 5.

115. *Coleman*, 183 A. at 586.

116. *Hughes*, 876 A.2d at 743.

117. Obhof, *supra* n. 27, at 595; *see also* W. Lance Conn, *Funding Fundamentals: The Cost/Quality Debate in School Finance Reform*, 94 Educ. L. Rep. 9, 10 (1994) (“Despite over two hundred studies in nearly thirty years, educational researchers have not yet shown convincingly that school expenditures are related to educational achievement in any systematic way.”); *see generally* Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 Cornell J.L. & Pub. Policy 633, 656 n. 148 (2002) (collecting articles).

Perhaps the paradigmatic example that it is not just love, but adequacy as well, that money cannot buy is the *Missouri v. Jenkins* desegregation case.<sup>118</sup> The United States District Court, since 1985, had issued remedial orders designed to desegregate the Kansas City Missouri School District by creating “magnet schools” to attract white students.<sup>119</sup> The “massive expenditures” ordered by the District Court financed, among other things, air-conditioned classrooms, a 2,000-square-foot planetarium, green houses and vivariums, a twenty five-acre farm with an air-conditioned meeting room for one hundred and four people, a Model United Nations wired for language translation, broadcast capable radio and television studios with an editing and animation lab, a temperature controlled art gallery, movie editing and screening rooms, a 3,500-square-foot dust-free diesel mechanics room, 1,875-square-foot elementary school animal rooms for use in a zoo project, and swimming pools.<sup>120</sup> The per pupil cost far exceeded the costs in any other school district in Missouri.<sup>121</sup> Yet “student achievement levels were still at or below national norms at many grade levels.”<sup>122</sup> Mercifully for the taxpayers of Missouri, in 1995 the United States Supreme Court put an end to the District Court’s spending spree.<sup>123</sup>

Nevertheless, various “cost studies” have been developed to determine the cost of an adequate education.<sup>124</sup> A majority of states, including New Hampshire, have undertaken such studies voluntarily in response to education funding litigation.<sup>125</sup> In a few states, the studies were ordered by the courts.<sup>126</sup> The most popular types of cost studies are “professional judgment” and “successful schools.”<sup>127</sup>

Professional judgment is just that, as it defines the cost of an adequate education as what “experts” believe it costs to provide either their own

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118. 515 U.S. 70 (1995).

119. *Id.* at 76-77.

120. *Id.* at 79.

121. *Id.*

122. *Id.* at 100 (internal quotation omitted).

123. *Id.* at 102-03.

124. See e.g. James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 *Yale L. & Policy Rev.* 463, 475 (2004) (“[R]eliance on costing-out studies promises to be one of the most important trends in school finance litigation over the next decade.”); Steve Smith, *Education Adequacy Litigation: History, Trends, and Research*, 27 *UALR L. Rev.* 107, 114 (2004) (“[W]ith courts across the country finding education systems unconstitutional, the next logical step was to create some type of rationale or methodology to determine adequate funding levels”).

125. See generally Campaign for Educ. Equity, *Costing Out*, <http://www.schoolfunding.info/policy/CostingOut/overview.php3> (accessed May 22, 2006) (providing background on the response to cost-based educational equity litigation) (original website on file with the *Pierce Law Review*).

126. *Id.* These states were Arizona, Arkansas, New York, Ohio and Wyoming. *Id.*

127. Janet D. McDonald et al., *School Finance Litigation and Adequacy Studies*, 27 *UALR L. Rev.* 69, 93 (2004); Ryan & Saunders, *supra* n. 124, at 476-77.

vision of an adequate education, State standards, or some other measure.<sup>128</sup> Successful schools studies define the cost of an adequate education as average spending among schools or school districts meeting selected benchmarks.<sup>129</sup> Despite the multiplicity of approaches, what all cost studies have in common is that they are completely arbitrary.

Consider the initial education funding law passed in response to *Claremont II*.<sup>130</sup> It was based on a cost study prepared by Augenblick & Myers, Inc. using the successful schools approach.<sup>131</sup> The study identified school districts in which forty to sixty percent of the third and sixth grade students had proficiency ratings of “Basic” or better on the State’s standardized NHEIAP tests.<sup>132</sup> The sample was then reduced to the school districts that accounted for the fifty percent of the students with the lowest base costs,<sup>133</sup> which was defined as per pupil expenditure less costs for special education, summer school, all costs reimbursed by federal funds, and various other costs.<sup>134</sup> The per pupil cost of an adequate education was calculated based on the average base cost among these school districts.<sup>135</sup> In 1999 this number was \$3,669.00.<sup>136</sup> This figure was then reduced by a 9.75 percent discount factor to produce a \$3,311.00 per pupil cost of an adequate education, which was used to determine the amount of State funding.<sup>137</sup>

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128. Deborah A. Verstegen, *Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 St. Louis U. Pub. L. Rev. 499, 503 (2004).

129. R. Craig Wood & Bruce D. Baker, *An Examination and Analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas*, 27 UALR L. Rev. 125, 145 (2004).

130. N.H. Rev. Stat. Ann. § 198:40 (1999) (repealed 2005).

131. 1998 N.H. Laws 321 (Chapter 267:1); see Campaign for Educ. Equity, *New Hampshire Fact Sheet*, [http://www.schoolfunding.info/states/nh/costingout\\_nh.php3](http://www.schoolfunding.info/states/nh/costingout_nh.php3) (accessed May 22, 2006) (outlining the calculations and recommendations of the study) (original website on file with the *Pierce Law Review*).

132. N.H. Rev. Stat. Ann. § 198:40(I)(b)(1) (repealed 2005). The NHEIAP ranks students in one of four categories: Novice, Basic, Proficient, or Advanced. N.H. Dept. of Educ., *NHEIAP FAQ*, <http://www.ed.state.nh.us/education/doe/organization/curriculum/Assessment/nheiapFAQs.htm> (accessed May 22, 2006) (original website on file with the *Pierce Law Review*). Districts where more than sixty percent of the students scored at the Basic or better levels were excluded on the ground that they were providing more than an adequate education, while districts where fewer than forty percent of the students scored Basic or better were excluded on the ground that they were not providing an adequate education. Douglas E. Hall & Richard A. Minard, Jr., *Plumbing the Numbers #7 School Finance Reform: Trends & Unintended Consequences* 5 (N.H. Ctr. for Pub. Policy Stud. April 2003) (also available at <http://www.unh.edu/nhcpps/plumbing/plumbing7.pdf>).

133. N.H. Rev. Stat. Ann. § 198:40(I)(b)(2) (repealed 2005).

134. *Id.* at § 198:40(I)(a) (repealed 2005).

135. *Id.* at § 198:40(I)(b)(3) (repealed 2005).

136. Hall & Minard, *supra* n. 132, at 5.

137. *Id.* at 7.

In *Claremont VII*, the plaintiffs urged the Supreme Court to write the 9.75 percent discount factor out of the formula because it lacked a “sufficient legal basis.”<sup>138</sup> The plaintiffs were correct about the pedigree of the discount factor as it was a plug by the legislature to keep the total cost of an adequate education at \$825 million.<sup>139</sup> But under that standard of review every other component of the formula could be found wanting as well. The definition of base cost, the choice of the NHEIAP tests, the choice of the “Basic” proficiency rating, and the selection of school districts where forty to sixty percent of students score at “Basic” or better are also not legally based.

For example, the only answer to why the sample should be school districts where forty to sixty percent of students score at “Basic” or better on the NHEIAP tests is that an “expert” says so. What is a court to do then when such a cost study is challenged as unconstitutional and a different expert testifies that in order to determine the cost of an adequate education the sample should be school districts where fifty to seventy percent of students score at or above “Proficient,” or that base cost should be defined differently, or that a professional judgment study showed that per pupil expenditures should be \$8,000.00 higher?<sup>140</sup> There certainly is no legal standard to guide the court.

Another shared attribute of cost studies is that they are unreliable because they ignore the numerous other variables affecting education performance besides funding, such as the competence of administrators, the quality of teachers, the talents and motivations of students, and the involvement of parents.<sup>141</sup> Because of these variables, the cost of an adequate education necessarily varies not just by school district or by school but by student. Accordingly, in order to reliably calculate the cost of an

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138. 744 A.2d at 1108.

139. Hall & Minard, *supra* n. 132, at 7 n. 3.

140. A study relied on by the plaintiffs at the trial court level in the Massachusetts *Hancock* case argued that the per pupil cost of an adequate education was \$13,000, which was nearly \$8,000 higher than spending in one of the target school districts. *Hancock ex rel. Hancock v. Driscoll*, 2004 WL 877984 at \*121 (Mass. Super. 2004). The trial court did not find the study “helpful” because it represented “to some extent a wish list of resources that teachers and administrators would like to have if they were creating an ideal school with no need to think about cost at all” and because “the context in which this study was conducted – a lawsuit involving funding issues for the very districts in which the panel members teach and work – gives one pause about its total objectivity.” *Id.*

141. See Michael Heise, *Litigated Learning and the Limits of Law*, 57 Vand. L. Rev. 2417, 2446 (2004) (“[W]hat is reasonably clear is that something as complex as student academic achievement almost assuredly does not pivot on any single variable, such as funding, teacher quality, racial composition, or class size.”); see also Eric A. Hanushek, *When School Finance “Reform” May Not Be Good Policy*, 28 Harv. J. on Legis. 423, 438 (1991) (“[T]he aggregate data provided by the 187 separate estimates lead relentlessly to the conclusion that, after family backgrounds and other educational inputs are considered, differences in educational expenditures are not systematically related to student performance.”).

adequate education, the calculation must be done on a student-by-student basis and the calculation must account for the particular effect of non-financial variables on each student's performance. Until somebody comes up with a cost study that does so, the best that can be said about cost studies is that they provide equal State funding per student.

But even if the cost of an adequate education could be determined, education funding is not something that can be considered in isolation because education is just one of many services that State and local government provide. There are no judicially discoverable and manageable standards for determining how much of the State's budget can be devoted to public education without compromising the ability of State and local government to enforce environmental regulations, maintain public health programs, or provide for the public safety, to name just a few examples.<sup>142</sup> Thus, education funding is an issue that belongs in the Statehouse, not the courtroom.

There also are no judicially discoverable and manageable standards for determining what level of education is an adequate education. Ironically, the *Claremont* case illustrates that the question is thoroughly political.

*Claremont I* seemed to hold out some hope that the New Hampshire Supreme Court would leave the making of education policy to the legislature to a greater degree than other state supreme courts which had also held that their states' constitutions imposed duties to provide and fund an adequate education. Unlike these courts, which immediately proceeded to define educational adequacy,<sup>143</sup> the *Claremont I* court declined to "define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor."<sup>144</sup> Of course, which branch would control education policy would hinge upon what the Supreme Court intended to do "in the second instance." On the one hand, if the court's review were restricted to determining whether the definition is "inadequate," for example, a thirty percent literacy rate,<sup>145</sup> then the legis-

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142. Education funding litigation seeks to override the political process by imposing a higher value on education spending than on other government spending. The Supreme Judicial Court of Massachusetts recently refused to hold that the Commonwealth was under-funding education "[b]ecause decisions about where scarce public money will do the most good are laden with value judgments, those decisions are best left to our elected representatives." *Hancock*, 822 N.E.2d at 1156.

143. *Rose*, 790 S.W.2d at 212-13; *McDuffy v. Sec. of the Exec. Off. of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993). Note that in *Hancock* the Supreme Judicial Court of Massachusetts backed away from using the Kentucky "capabilities" as the lodestar for whether the Commonwealth was providing an adequate education. 822 N.E.2d at 1153. Rather, "*McDuffy* . . . did not mandate any particular program of public education, [and the] seven 'capabilities' listed in *Rose* do not in themselves prescribe a specific curriculum." *Id.*

144. 635 A.2d at 1381.

145. *Cf. Chiles*, 680 So. 2d at 409 (Overton, J., concurring) ("While 'adequate' may be difficult to quantify, certainly a minimum threshold exists below which the funding provided by the legislature

lature would retain the primary role in setting education policy.<sup>146</sup> If, on the other hand, the review were to involve determining whether the legislative definition of adequacy is, well, adequate, then the court would be at large in the field of education policy and the branches' roles would be reversed.

*Claremont II*'s "aspirational guidelines" made it clear that henceforth the Supreme Court intended to take the primary role in setting education policy.<sup>147</sup> Justice Horton, who had been part of the unanimous *Claremont I* decision, dissented because, "[m]y problem is that I was not appointed to establish educational policy, nor to determine the proper way to finance the implementation of this policy. Those duties, in my opinion, reside with the representatives of the people."<sup>148</sup>

Horton argued that the majority had defined "general adequacy" when all that Part II, Article 83 required was "Constitutional adequacy."<sup>149</sup> The former was a question to be left to the political branches because "it is clear that one man's adequacy is another's deficiency."<sup>150</sup> Reasoning that the scope of the duty was coterminous with the purpose of Part II, Article 83, and that the purpose was found in the language, "the preservation of a free government," Horton concluded that there is constitutional adequacy "if the education provided meets the minimum necessary to assure the preservation of a free government."<sup>151</sup> He then proceeded to define "constitutional adequacy" as "reading, writing, and mathematics . . . exposure to history and the form of our government, [and] the first three elements of the Kentucky standard adopted by the majority, but not necessarily the balance."<sup>152</sup>

The majority, of course, had a different take on things. "We agree with Justice Horton that we were not appointed to establish educational policy. . . . That is why we leave such matters, consistent with the Consti-

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would be considered 'inadequate.' For example, were a complaint to assert that a county in this state has a thirty percent illiteracy rate, I would suggest that such a complaint has at least stated a cause of action under our education provision.").

146. While this approach makes the court's role critic, as opposed to chef, it still does not provide a manageable standard of review because inadequacy, like pornography, would depend on the eye of the beholder. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("[U]nder the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

147. 703 A.2d at 1359.

148. *Id.* at 1361 (Horton, J., dissenting).

149. *Id.*

150. *Id.*

151. *Id.* at 1362.

152. *Id.* at 1361-62.

tution, to the two co-equal branches of government.”<sup>153</sup> The majority’s rebuttal, at best, simply assumes what needs to be proven.<sup>154</sup> Moreover, it is belied by their “aspirational guidelines,” which leave the legislature no room to establish education policy.<sup>155</sup> Rather, all that is left is for the legislature to “promptly develop and adopt specific criteria implementing these guidelines.”<sup>156</sup>

While Horton criticizes the majority for setting education policy, his approach represents a difference in degree, not in kind, from the majority’s. Limiting the scope of the duty to providing the education “necessary to assure the preservation of a free government” may theoretically reduce the number of potential answers to the question, what is an adequate education, but it does not convert that question from a political question into a legal question.

For example, Horton “would include in the constitutional standard the first three elements of the Kentucky standard adopted by the majority, but not necessarily the balance.”<sup>157</sup> But whether knowledge of economics (element two) is more important to the preservation of a free government than knowledge of the arts (element five) is a matter of opinion.

Additionally, the Kentucky criteria contain other elements that might be deemed necessary to the preservation of a free government. For example, one might reasonably believe that “vocational training” is as necessary to preserving a free government as “written communication skills.” And one might reasonably believe that skills that do not appear in the Kentucky criteria – such as sufficient physical fitness to serve in the armed forces – are essential to preserving a free government.<sup>158</sup> Just as “one man’s adequacy is another’s deficiency,” what type of education is “the minimum necessary to preserve a free government” is also a matter of opinion. Both are political questions.

Ironically, the majority’s description of the nature of an adequate public education shows how political the question is:

A constitutionally adequate public education is not a static concept removed from the demands of an evolving world. It is not the

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153. *Id.* at 1360 (majority).

154. Note that the majority’s profession of deference to the representative branches is qualified by the phrase “consistent with the Constitution,” which the majority had just interpreted to require the representative branches to “develop and adopt specific criteria implementing” the Kentucky guidelines. *Id.* at 1359.

155. *See id.* (defining “educational adequacy” according to the Kentucky “aspirational guidelines”).

156. *Id.*

157. *Id.* at 1362 (Horton, J., dissenting).

158. *See e.g.* Paul Cartledge, *The Spartans* 32 (Overlook Press 2003) (discussing the Agoge, the system of compulsory education in Sparta).

needs of the few but the critical requirements of the many that it must address. Mere competence in the basics – reading, writing, and arithmetic – is insufficient in the waning days of the twentieth century to insure that this State’s public school students are fully integrated into the world around them. A broad exposure to the social, economic, scientific, technological, and political realities of today’s society is essential for our students to compete, contribute, and flourish in the twenty-first century.<sup>159</sup>

If an “adequate public education is not a static concept removed from the demands of an evolving world,”<sup>160</sup> which I agree it is not, then whether the public schools are providing an adequate education is not something that judges can discover by recourse to the text of the constitution, the Supreme Court’s precedents,<sup>161</sup> or history.<sup>162</sup> Rather, it is a question of policy to be answered by the elected branches.<sup>163</sup>

Of the three branches of government, the judiciary is the least institutionally suited to adjusting education policy to “the demands of an evolving world.” The judiciary must wait for the appropriate lawsuit to set education policy. The legislature, in contrast, is able to change education policy as often as necessary. And while a judge only gets to hear the views of the litigants’ “experts,” the legislature can listen to anyone it thinks might be helpful. If it “is not the needs of the few but the critical requirements of the many that [an adequate education] must address,”<sup>164</sup> then the body

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

160. *Id.*

161. If anything, precedent indicates that the constitution does not impose a judicially enforceable duty upon the State to provide and fund an adequate education. See *Fogg v. Bd. of Educ.*, 82 A. 173, 174-75 (N.H. 1912) (“The primary purpose of the maintenance of the common school system is the promotion of the general intelligence of the people constituting the body politic and thereby to increase the usefulness and efficiency of the citizens, upon which the government of society depends. Free schooling furnished by the state is not so much a right granted to the pupils as a duty imposed upon them for the public good.”); *Holt*, 9 A. at 389 (“Local education is a local purpose for which legislative power may be delegated to towns.”).

162. History also indicates that the constitution does not impose a judicially enforceable duty upon the State to provide and fund an adequate education. As the Supreme Court noted in *Claremont I*, “no State funding was provided at all for education in the first fifty years after ratification of the constitution.” 635 A.2d at 1381; see also Walter A. Backofen, *Claremont’s Achilles’ Heel: The Unrecognized Mandatory School-Tax Law of 1789*, 43-1 N.H. B. J. 26 (Mar. 2002) (discussing the Law of 1789, in effect until 1919, which provided neither equal nor adequate funding for public schools).

163. See *Marrero*, 739 A.2d at 112 (“The Constitution ‘makes it impossible for a legislature to set up an educational policy which future legislatures cannot change’ because ‘the very essence of this section is to enable successive legislatures to adopt a changing program to keep abreast of educational advances.’ It would be no less contrary to the ‘essence’ of the Constitutional provision for this Court to bind future Legislatures and school boards to a present judicial view of a constitutionally required ‘normal’ program of educational services. It is only through free experimentation that the best possible educational services can be achieved.”).

164. *Claremont II*, 703 A.2d at 1359. I cannot help pointing out that the “[i]t is not the needs of the few but the critical requirements of the many” language sounds a lot like Mr. Spock’s last words to

ected by and regularly accountable to the many, the legislature, is its logical expositor.<sup>165</sup>

Ironically, the crown jewel of the *Claremont* case, its “standards of accountability,” illustrates why judges should leave education policymaking to the representative branches. The legislature will not be able to use standards to generate improvement by purposefully making standards hard, or even impossible, to achieve without running the risk that schools will be deemed inadequate for not attaining such standards. Consequently, *Claremont* may well result in lower standards and a lower level of education performance than would otherwise be the case. Public school students may get an adequate education, but that is all that they will get.

## V. CONCLUSION

The New Hampshire Supreme Court has said that the separation of powers requires that it “be as zealous in protecting the rights of the other coequal branches” as it is in protecting its own rights.<sup>166</sup> Because there is a textually demonstrable commitment of education funding and education policy to the legislative branch, and because what an adequate education comprises and costs are quintessentially political questions, *Claremont* represents a clear trespass on legislative powers and should be overruled. If *Claremont* is not overruled, then it is about time that the representative branches take to heart James Madison’s words in *The Federalist No. 49*, “[t]he several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers,”<sup>167</sup> and start acting like co-equals.

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Admiral Kirk in *Star Trek II*: “Do not grieve, Admiral. . . . It is logical. . . . The needs . . . of the many . . . outweigh . . . the needs of the few.” *Star Trek II: The Wrath of Khan* (Paramount 1982) (motion picture).

165. It should come as no surprise, then, that if “taken literally, there is not a public school system in America that meets” *Claremont II*’s aspirational guidelines. William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & Pol. 525, 548 (1998); see also Obhof, *supra* n. 27, at 595 (describing the guidelines as “essentially useless”).

166. *Evans*, 506 A.2d at 699.

167. *The Federalist No. 49*, *supra* n. 62 (James Madison).