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AMENDING THE NEW HAMPSHIRE CONSTITUTION (CACR 12): EDUCATION WILL NO LONGER BE FUNDAMENTAL TO THE CITIZENS OF NEW HAMPSHIRE

This Policy Brief asserts that the Concurrent Resolution Proposing Constitutional Amendment relating to education (CACR 12)[1] is inimical to the educational interests of the citizens of New Hampshire. The proposed constitutional amendment would remove education as a fundamental right and reduce education to a legitimate interest of the state, similar to most activities undertaken by government. Walking back the constitutional importance of education in order to overturn the *Claremont* decisions ill serves the interests of the State and the needs of its citizens.

I. *Claremont I & II*

In December of 1993, the New Hampshire Supreme Court handed down its decision in *Claremont School District v. Governor*[2] declaring the system of funding public education to be unconstitutional. The Supreme Court held that the New Hampshire Constitution (New Hampshire Constitution, Part II, Article 83 (1784) see appendix for text) imposes a duty on the State to "provide a constitutionally adequate education to every educable child in the public school in New Hampshire

The views expressed are those of the authors and do not necessarily reflect the views of the Program, the Department, or the University.

[1] CACR is the acronym for Constitutional Amendment Concurrent Resolution.

[2] 138 N.H. 183 (1993).

and to guarantee adequate funding."[3] The Court continued, "The right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the public to enforce the State's duty."[4] The Supreme Court remanded the case, expressing confidence in the Governor and the legislature to fulfill their constitutional obligation to define an adequate education and to appropriately fund that adequate public education[5] "essential to the preservation of a free government."[6] Governor Merrill, perhaps expressing less confidence in the judiciary, warned in his State of the State address that the *Claremont* decision "threatens to shake the social and economic foundations of this state."[7]

By 1997, the *Claremont* case had worked its way back to the New Hampshire Supreme Court.[8] The trial court on remand found the education provided by the plaintiff school districts to be adequate and that the New Hampshire system—one dependent upon locally assessed property taxes—does not violate the New Hampshire Constitution.[9] The Supreme Court in *Claremont* II reversed the lower

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[3] *Id.* at 184. "An obvious starting point in interpreting part II, article 83 is to determine what the particular words used meant in 1784" *id.* at 187. For example, "'Cherish' meant 'to support, to shelter, to nurse up'" *id.* Thus, the court used a strict constructionist approach to its constitutional review.
[4] *Id.* at 192.
[5] See Deborah A. Verstegen &Terry Whitney, *From the Courthouses to Schoolhouses: Emerging Judicial Theories of Adequacy and Eq*uity, 11 EDUC. POL'Y 330, 349 (1997) ("The high courts have found that today an adequate education is defined by the best system: it is a quality system, it provides excellence in education, and it equips all children with certain competencies that allow them to be citizens and compete in a global marketplace.").
[6] Claremont, 138 N.H. 183 at 193.
[7] M. Sommerfield, *N.H. Governor Comes Out Against Broad Tax for Schools*, EDUC. WEEK 12 (Jan. 19, 1994).
[8] Claremont School District v. Governor, 142 N.H. 462 (1997) (hereinafter Claremont II).
[9] *Id*. at 465-66.

court's decision, with only Justice Horton dissenting,[10] holding that the property tax levied to support public education was "a State tax and as such is disproportionate and unreasonable in violation of part II, article 5 of the New Hampshire Constitution."[11] Essentially, the court ruled that the State has the responsibility for providing elementary and secondary education, which it places on the school districts as a local function. Therefore, the school districts must raise money through the collection of real estate taxes to pay for the schools. The Court gave the legislature and the Governor until the end of 1998 to find a remedy to expeditiously "fulfill the State's duty to provide a constitutionally adequate public education and to guarantee adequate funding in a manner that does not violate the State Constitution."[12]

The Supreme Court held, "[e]ducation is a duty of the New Hampshire state government "expressly created by the State's highest governing document, the State Constitution."[13] Furthermore, the Supreme Court asserted that public education is not only different from other governmental services, its role is critical "in developing and maintaining a citizenry capable of furthering the economic, political, and social viability of the State."[14]

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[10] The dissent after characterizing the "current financing matrix for education [as] far from desirable" asserted:

> I should not involve myself 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. This is not to say that I infer an absence of regard in the decision of the majority for the proper role of this court.

Id. at 477 (Horton, J. dissenting).

[11] *Id.* at 466.

[12] *Id.* at 477.

[13] *Id.* at 469.

[14] *Id.*

This strong statement about the importance of public education echoes the position of the United States Supreme Court in the landmark case *Brown v. Board of Education*.[15] The High Court wrote:

> Today, education is perhaps the most important function of state and local governments . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right, which must be made available to all on equal terms.[16]

Similarly, the United States Supreme Court in *Plyler v. Doe* asserted, "We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government and as the primary vehicle for transmitting the values on which our society rests."[17] The New Hampshire Supreme Court's position on public education and the responsibility of state government to provide for that education squares with the United States Supreme Court pronouncements.

In short, our nation's highest court and the New Hampshire Supreme Court view education as critically important in providing equality of opportunity for individual economic and social advancement and to preserve the very foundations of our democratic institutions.[18] Because of the importance of education to its citizens and our democratic way of life, the New Hampshire Supreme Court declared education to be a "fundamental right."[19] This decision is critical because any action

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[15] 347 U.S. 484 (1954).
[16] *Id.* at 491.
[17] 457 U.S. 202, 211 (1982).
[18] Claremont Sch. Dist. v. Governor, 142 N.H. at 472.
[19] *Id.* at 474. The Dissent does not disagree with this proposition, but questions its applicability to the case. Justice Horton wrote, "[The Majority] finds the right to be fundamental. I do not quarrel with

taken by government that diminishes a fundamental right of its citizens must be reviewed by the judiciary using a "strict scrutiny" analysis, the most stringent test for government action under the Equal Protection Clause.

The New Hampshire Supreme Court in *Claremont I* and *II* held that the children of our state have a constitutional entitlement to receive an adequate education guaranteed by adequate funding, and that the constitutionally protected right to an adequate education is fundamental requiring the most exacting judicial review of governmental actions that may abridge that right.[20] However, before we briefly review education as a fundamental right of citizens, we will briefly look at the response to the *Claremont* decisions that led to the current proposed constitutional amendment.

II. Response to School Finance Litigation

The *Claremont* cases are part of a body of cases in which the plaintiff claims that the state legislature has violated the state's constitutional duty pertaining to financially support public education. Because every state has a state constitutional provision providing for the establishment of a public school system,[21] school finance litigation has the potential to be a nationwide legal issue.[22] Constitutional issues of

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this characterization, but note that its materiality is based on the plaintiffs' claim of a violation of equal protection." *Id.* at 482.

[20] *Id*. at 472.

[21] *See, e.g.,* Or. Const. art. VIII, § 3; Iowa Const. art. IX, § 3; Tenn. Const. art XI, § 12.

[22] *See, e.g*., Lobato v. Colorado, 218 P.3d 358 (Colo. 2009); Committee for Educ. Equality v. Missouri, 294 S.W.3d 477 (Mo. 2009) Scott v. Virginia, 443 S.E.2d 138 (Vt. 1997); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); McDaniel v. Thomas, 285 S.E.2d 156 (1981); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

school finance have "evolved over time, issues of equity in funding, have given way to increased attention to funding adequacy and, more recently, accountability."[23]

Judicial review of school finance litigation raises a question of whether a state legislature has met its constitutional duty to provide for and support public education.[24] *Serrano v. Priest* ushered in the modern era of school finance reform litigation and changed the way California funds public education.[25] Since *Serrano*, forty of the 50 states joined California with school finance litigation challenging their funding structure for public education.[26] Some states such as New Jersey, California, North Carolina, Connecticut, Tennessee, and New Hampshire have had multiple cases brought challenging their state's school finance system.

A victory for the plaintiffs in school finance cases typically compels the legislature to take some action to remedy the constitutional injury. This is how the separation of powers is supposed to work: a system of checks and balances designed to serve the people and preserve liberty, and is an essential structure of our system of government. Consequently, responses to school finance reform litigation are to be expected, but the importance of maintaining the proper checks and balances between the branches of government is imperative.[27]

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[23] John Dayton & Anne Dupree, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2354 (2004).

[24] *See, e.g.,* McDuffy v. Secretary of Education, 615 N.E.2d 516, 517-518 (Mass. 1993)(a question before the court was whether the education clause in that constitution imposed a duty on the state, or was merely "hortatory" or "aspirational" The court concluded it was an affirmative duty, and "the only duty imposed on the executive and legislative branches.").

[25] 487 P.2d 1241 (1971). Commonwealth v. Dedham, 16 Mass. (1 Tyng) 141, 146 (1819) is an example of an early case involving school finance litigation. The issue was one of whether the town of Dedham was adequately financing its public schools.

[26] William E. Thro, *School Finance Litigation as Facial Challenges*, 272 ED. LAW REP. 687, 687-89 (2011).

[27] Courts play an important role in resolving school finance disputes and ensuring that a state meets its obligations. *See, e.g.,* Mark A. Paige, *Book Review: Courts and Kids,* 117 AMERICAN JOURNAL OF EDUC. 4,

Opponents to the Court's *Claremont II* ruling cast the judiciary as the branch that needed to be checked and its power balanced. Then Senator and former New Hampshire Governor, Judd Gregg, in his response to *Claremont II* (1997) stated, "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."[28] Richard Lessner, in an editorial in the state's influential newspaper, *The Union Leader*, characterized the *Claremont II* decision as the "tyranny" of "[t]his monstrous regiment of Judges!": "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."[29]

Two themes emerged from the opponents' responses to the court's decision: 1) the New Hampshire Supreme Court violated the traditional separation of powers and 2) the public should adopt a constitutional amendment to sidestep the court's decision. The implication is that that the judges did not have the authority to find the present system of funding unconstitutional because it called for a tax remedy. The unstated argument was that this is what the people wanted as embodied through legislative action. Lessner, in *The Union Leader's* editorial, stated, "What the Legislature can and should do is refer this to the people of New Hampshire in the

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603-606, (2011).

[28] Judd Gregg, *Supreme Court Ruling 'Arrogant,' 'Absurd'*, THE UNION LEADER A18 (Dec. 19, 1997).

[29] Richard Lessner, *NH Can No Longer "Live Free or Die" If Ruled by Black-Robed Monarchs*, THE UNION LEADER C1 (December 19, 1997).

form of a constitutional question."[30] The remedy, in other words, was to change the Constitution, not to meet the requirements of the Constitution.

III. Constitutional Amendments

The call for a constitutional amendment to undo the *Claremont* decisions was first heeded by State Senator Jim Rubens in early 1998.[31] His amendment would have made education a local responsibility instead of a state responsibility. The amendment failed to win legislative approval to take to the voters. Legislative responses to judicial decisions seeking to amend the constitution are rare and not very successful. For example, after *Brown v. Board of Education*, Alabama in 1956, sought to derail the desegregation decision by passing a constitutional amendment arguing that the will of the people must prevail; however, the constitutional amendment was declared unconstitutional.[32] Similarly, Kansas proposed constitutional amendments limiting the authority of courts in school funding cases[33] and Missouri introduced a bill in its state senate during a school funding challenge that prohibited future judicial intervention in school funding disputes.[34] To date, these legislative restraints on judicial authority have failed.

Unfortunately, in New Hampshire the legislative response to the *Claremont* decisions seeks to follow the same path of not correcting the constitutional problem,

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[30] *Id.* ("If the black-robed oligarchs in Concord are offended by the system of taxation the people of New Hampshire have freely chosen as an affront to the constitution--then let us amend the constitution and send the court packing.") *Id.*
[31] Jim Rubens, *A N.H. Schools Plan Without State Taxes*, PORTSMOUTH SUNDAY HERALD D3 (January 4, 1998).
[32] JOHN DAYTON, EDUCATION LAW: PRINCIPLES, POLICIES, AND PRACTICES (2012).
[33] David J. Hoff, *Kansas Lawmakers Agree on Spending Plan,* EDUC. WEEK 23 (July 13, 2005). *See also,* Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021 (2006).
[34] Robert C. Johnston, *Bar on Finance Cases Sought,* EDUC. WEEK 17 (March 2, 2005).

but rather change the constitution to meet the preferred outcome. The latest constitutional amendment once again seeks to rewrite the relationship between the state and its citizens by altering its responsibilities for providing and financing public education. The amendment, as of March 16, 2012, appears below.

Be it Resolved by the House of Representatives, the Senate concurring, that the

Constitution of New Hampshire be amended as follows:

I. That the second part of the constitution be amended by inserting after article 5-b the following new article:

[Art.] 5-c [Public Education.] In fulfillment of the provisions with respect to education set forth in Part II, Article 83, the legislature shall have full power and authority and the responsibility to define reasonable standards for elementary and secondary public education, to establish reasonable standards of accountability, and to mitigate local disparities in educational opportunity and fiscal capacity. Further, the legislature shall have full power and authority to determine the amount of, and the method of raising and distributing, state funding for public education.

This amendment does two things. First, it removes education as a fundamental right of its citizens by the insertion of the word "reasonable." This reduces the quality of the right to an education moving it from a fundamental right, such as voting, to a legitimate right, such as driving. This diminishment of the

right to an education—the real target of this amendment—will limit future court deliberations on state education funding issues to the lesser "rational basis" legal test rather than "strict scrutiny analysis." This would not remove the courts from considering whether government has violated a right, but it greatly increases the chances of the state prevailing in the suit.[35] Second, it applies the requirement for the State to fund education to only those students where disparity in educational opportunity and fiscal capacity exist. Under this amendment, the state discharges its responsibility to educate all of its youth only through targeted aid to some.

From Strict Scrutiny Analysis to Rational Basis: Tipping the Scales toward Legislative Power

The amendment removes education as a fundamental right. Proponents crafted this language to make it easier for the state to win *Claremont* style lawsuits. Because the Supreme Court concluded in the *Claremont* decisions that education is a fundamental right, the court used strict scrutiny analysis to review the actions of the State..[36] This is a stringent test protecting any right that is fundamental for its citizens. To pass this test the State must show that its objective is compelling and the means used to achieve the objective are necessary. This test sets a high bar for government. However, CACR 12 sets a very low bar by (a) reducing the value of

[35] For example, a supporter Senator Jeb Bradley stated, the amendment would "ratchet back without completely dissolving the court's ability to rule on any legislative outcomes. Joey Cresta, *Bradley: Reform School Funding*, PORTSMOUTH HERALD A4 (March 1, 2012).
[36] Strict scrutiny analysis is also triggered when a suspect classification is created by state action. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Loving v. Virginia, 388 U.S. 1 (1967).

education to only a "legitimate" state objective, and, concomitantly, (b) reducing the level of scrutiny the courts apply to state actions regarding education.

This test is called rational basis and is the most permissive or lenient test that the courts apply to the constitutionality of state laws. Unlike strict scrutiny analysis, rational basis places the burden of proof of establishing unreasonableness on the plaintiff who is challenging the state's action. It is the most deferential test to government requiring only a minimum level of judicial analysis. Under strict scrutiny the governmental objective must be compelling and its actions must be necessary to achieve the objective, whereas rational basis only requires that the objective be legitimate (not compelling) and the means to achieve it are rational (rather than necessary). Which of the two tests is used is important to the outcome of the litigation. Clearly, the sponsors of the amendment want to reduce the level of judicial scrutiny of their school funding legislation.

An example of a court's use of rational basis is found in a 1982 challenge to New York's system of funding public education. The challenge failed because the 1894 New York constitution only required that the state provide a "sound basic education."[37] New York's highest court used the rational basis test because education was only considered to be a legitimate and not a fundamental right of its citizens. However, the dissent argued that education was fundamental to the future of the State and its citizens. Justice Fuchsberg argued, "without education there is no

[37] Brd. of Educ. v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982).

exit from the ghetto, no solution to unemployment, no cutting down on crime."[38] It is the "great equalizer."[39]

In *Claremont* the New Hampshire Supreme Court found that the State's constitution, which dates back to 1784, confers upon its citizens a fundamental right to receive an education and a concomitant responsibility upon the state to provide that education. CACR 12 seeks to rescind that fundamental right established 228 years ago. CACR 12 takes decisive and definitive action to eliminate education as a fundamental interest of the citizens of New Hampshire. Diminishing the importance of education is particularly troubling given education is fundamental to a person's prospects for success. The values that we profess shape the actions that we take. If education is not constitutionally fundamental, it becomes no more important than deciding where to place a traffic light or what requirements are necessary to get a fishing license. Our longstanding commitment to equality of educational opportunity necessitates that education remain a fundamental interest for our great state of New Hampshire.

Uncertainty and New Rounds of School Finance Litigation

Second, CACR 12 transfers the thorny issue of how best to pay for a constitutional adequate education to an equally thorny issue what and how much constitutes a "disparity" in educational opportunity and fiscal capacity. How many missing programs or activities constitute a disparity of educational opportunity? How far must the disparity of fiscal capacity be from the designated non-disparity

[38] *Id.* at 371 (Fuchsberg, J., dissenting).
[39] *Id.*

point? Will one standard deviation from the designated equalized assessed valuation define and trigger disparity? The language in CACR 12 creates great mischief in deciding what disparity means, how is it applied, and whether the definition and application of what constitutes a disparity is even reasonable or rational.

CACR does not solve important problems; it exacerbates them and continues the uncertainty over education funding in New Hampshire. More time and limited resources will be chewed up in future school finance litigation. The importance of education to the citizens and future of the State is diminished by enshrining in the New Hampshire Constitution an espoused value that education is not fundamental. Senator Bradley got it wrong when he stated that "[a]nything is going to be a marked improvement on where we are today."[40] CACR 12 is not an improvement; education as a fundamental right is reduced and future litigation is forecast by its passage. It is curious and disconcerting that the legislature drafted legislation to increase support for private and home-school education [41] at the same time that it proposes CACR 12, which reduces the fundamental value of education for those who stay.

IV. CONCLUSION

Education is fundamental to the future of the individual and it is fundamental to the future of our democratic society.[42] We must not reduce its significance

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[40] Cresta, *supra* note 35 at *id*.
[41] *See* HB 1607 and SB 372.
[42] It must be noted that the United States Supreme Court in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) did not find that education was a federal fundamental right, nor was wealth found to be a suspect classification. There is no education clause in the United States Constitution. This case shifted school finance cases to the state courts for resolution because education is commonly

through a constitutional amendment. The constitution is crucial in defining what is important to society. The framers of our constitution deliberately made it difficult to alter the values embodied in the document. They were prescient that the head winds of a given time should not require a major tack in the direction of the ship of state. A major change of course must receive the highest level of analysis and sober reflection. After careful consideration, CACR 12 does not serve the best interests of the people of New Hampshire.

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considered to be federal interest, a state responsibility, and local function. However, the High Court opined, the "need is apparent for reform in tax systems which may well have relied too long and too heavily on local property tax." *Id.* at 58-9.

APPENDIX

Part II, Article 83 of the New Hampshire Constitution

Adopted in 1784

Art. 83 Encouragement of Literature, etc.; Control of Corporations, Monopolies, etc.

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