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**I. INTRODUCTION**

Our experience in New Hampshire with the *Claremont*\(^1\) 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*.\(^2\) In *Rodriguez*, the Court closed the door to federal litigation when it found that education is not a fundamental right protected by the United States Constitution. However, the Court opened the door to litigation in the state courts by noting that many

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state constitutions specifically mention a right to education and this mention may be considered a basis for fundamentality as a matter of state constitutional law.3

II. THE NEW HAMPSHIRE CONSTITUTION—“CHERISH” IS THE WORD

New Hampshire was a part of the Bay Colonies, along with Massachusetts, Rhode Island, and Maine until 1679. The four provinces, and later four states, have a great deal in common. Much of New Hampshire’s constitution and early education laws were borrowed from Massachusetts. New Hampshire’s Education Clause, adopted in 1784, and copied from the Massachusetts clause written by John Adams, provides:

[Encouragement of Literature . . . ] Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufacturers, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.4

The New Hampshire Education Clause is in the part of the state constitution that describes the form of government and not where individual rights are identified. This placement underscores the purpose of the clause to preserve our participatory form of democracy, as John Adams intended.

Jumping ahead just a bit, specific phrases of the Education Clause were interpreted by the New Hampshire Supreme Court in Claremont School District v. Governor (Claremont I), the first appellate decision in the case.5 The court looked at the definitions of key words in Article 83 as those definitions existed in 1784:

3. Id. at 418.
4. N.H. CONST. pt. 2, art. 83 (amended 1877 & 1903). Article 83 was amended in 1877 to prohibit money raised by taxation from being used by religious schools and amended again in 1903 to change the language concerning control of corporations and monopolies. Id.
5. 635 A.2d 1375 (N.H. 1993) [Claremont I]. The court’s linguistic analysis was largely based on an affidavit by Richard Lederer, Ph.D., that was submitted to the trial court. Mr. Lederer, at the time, was an author and lecturer in English at the St. Paul’s School located in Concord, New Hampshire. Mr. Lederer wrote about his experience as an expert linguist and volunteer assistant to our legal team in Richard Lederer, Adventures of A Verbivore (1994).
"ENCOURAGEMENT: Incitement to any action or practice, incentive; favour, countenance, support;"; "LITERATURE: Learning; skill in letters;"; "DIFFUSED: Spread abroad, widespread; dispersed over a large area; covering a wide range of subjects," Oxford English Dictionary (2d ed. 1989); "GENERALLY: so as to include every particular, or every individual," id.; "DUTY: That to which a man is by any natural or legal obligation bound," Sheridan supra; "CHERISH: To support, to shelter, to nurse up."6

The Claremont I court then concluded:
The Encouragement of Literature clause, incorporating the sense of these definitions, thus declares that knowledge and learning spread through a community are "essential to the preservation of a free government," and that "spreading the opportunities and advantages of education" is a means to the end of preserving a free, democratic state. The duty of ensuring that the people are educated is placed upon "the legislators and magistrates, in all future periods of this government," and that duty encompasses supporting all public schools . . . .7

The New Hampshire Supreme Court, in Claremont I, rejected the trial court's notion that the grand terms of Article 83 were merely "hortatory" or aspirational.8 In so doing, the court revived our lawsuit and committed itself to a second decision on school funding four years later.9

III. NAILED AT THE YMCA

Our initial legal team was formed at the YMCA in Concord, New Hampshire in the early 1990s. My memory may be a little off, but I could swear that I was asked to join the Claremont Lawsuit Coalition's legal team while standing buck naked in front of my gym locker

7. 635 A.2d at 1378. The duty to cherish education is one of only two affirmative duties placed on the legislature by the New Hampshire Constitution. The other duty is to provide for the succession of constitutional officers in time of war. N.H. Const. pt. 2, art. 5-A.
8. 635 A.2d at 1378. "We do not construe the terms 'shall be the duty . . . to cherish' in our constitution as merely a statement of aspiration." Id.
9. Id. at 1376. The odds of us achieving even this first victory were decidedly slim. New Hampshire is a conservative state. Our judges are appointed by conservative governors. The chief judge at the time of the Claremont I decision was David Brock. Justice Brock, a former prosecutor, was appointed to the court by Governor Meldrim Thomson, who was widely known for his indiscriminate "ax the tax" pledge and close alliance with the arch-conservative newspaper, the Manchester Union Leader. Justice Brock showed great courage in leading the court in all of the significant Claremont decisions. See also, Molly McUsic, The Use of Education Clauses in School Finance Reform Litigation, 28 Harv. J. on Legis. 307, 337 (1991) ("The constitutions of Massachusetts and New Hampshire, written in the distinctive style of the 1780's, contain magnificent lists of the goals of public education, but only oblige the legislature to 'cherish' them . . . . There may be factual situations where a school financing regime inadequately 'encourages' a specified level of education, but it is a difficult standard to prove.").
at the Y. I was recruited by the initial organizer of our team Arpyar Saunders. Arpy asked me to join the legal team because we were friends and he saw the need for a trial lawyer committed to representing the underdog.

Arpy Saunders was a constitutional law professor at the Franklin Pierce School of Law. Arpy had been approached to sue the State over school funding by Tom Connair, a lawyer who chaired the Claremont School Board. The Claremont Board had tried in vain to attract lawyers in private practice to the effort and contacted Arpy because of his constitutional law background. Together, we recruited another litigator and Y member John Garvey to round out the team. Garvey lived in Franklin, one of the five poor towns that would become our clients. He was also with a large firm, and we thought he could bring personal as well as firm resources to the team. Thus comprised, we thought we had done a good job of creating a legal team whose members allowed us access to the Pierce law students, the resources of a large firm, and a connection to my firm's long support of civil liberties causes.

The three of us soon learned that the proposed suit was the second effort by a coalition of poor school districts to take on the State over school-funding issues. The first suit, filed ten years before our organizational effort, ended with an informal settlement. The State, however, had never kept its part of the settlement bargain.

IV. LESSONS LEARNED FROM JESSEMAN V. STATE

Jesseman v. State was a funding equity suit filed in the early 1980s in the Merrimack County Superior Court on behalf of a half-dozen poor districts, some students and some taxpayers. The legal team was led by two well-respected and thoughtful lawyers—Jack Middleton and Arthur Nighswander—and assisted by Dick Goodman, a former school superintendent and University of New Hampshire professor. Their litigation quickly became bogged down by the State's extensive discovery demands. The trial court eventually certified an undifferentiated, amorphous record to the supreme court,

10. Franklin Pierce was the fourteenth U.S. President and the only one from New Hampshire.
12. Id. As part of the settlement, the State had promised to contribute eight percent of the State's cost of education to a targeted aid plan. The State's contribution, however, never exceeded four percent.
14. Arthur Nighswander is the oldest practicing lawyer in the state. Jack Middleton is the senior lawyer in the state's largest law firm. Both men have lent extensive advice and encouragement to our efforts.
where the case was received with a great deal of skepticism. Just getting the case to the supreme court for interlocutory review had exhausted the resources of the petitioners’ legal team.

As the court considered the merits of the Jesseman case, the legislature considered altering the state school-funding system by adding a component of need-based, targeted aid. John Sununu was governor at the time. The legislature and Governor Sununu created a funding plan that targeted eight percent of the cost of education to help the poorest school districts. This would have increased the total state contribution to about twelve percent, an improvement, but still leaving New Hampshire last in the nation in state funding.

Governor Sununu insisted that the authorizing legislation be devoid of any language that committed the State to providing funding that was fair, equitable, or adequate for any particular purpose. The legislation was pegged at eight percent and that was that. The funding was also residual in that the legislation was not intended to create an entitlement for the poor schools or the children that attended them. The targeted aid program was to receive funding as the funds were available. The petitioners, without resources and uncertain of the court’s willingness to take on the issue, accepted these terms and withdrew their suit in settlement of the case.

As part of the legislative effort, the State hired Professor John Augenblick to devise a formula to distribute the promised eight percent. The targeted aid funding plan then—and forever after—became known as the “Augenblick formula.”

Unfortunately, the Augenblick funding topped out at only four percent. While it is doubtful that the full eight percent would have been enough to improve the lot of the state’s poor students, four percent was certainly insufficient to allow the poor districts to improve their offerings in any significant way.

By 1989, the Claremont School District had cut its sports programs and kindergarten. The district also lost the accreditation for its high

15. David Souter was a member of the New Hampshire Supreme Court at the time.
16. Governor Sununu later became chief of staff for President George H.W. Bush. He was an imperious governor, not known for his willingness to compromise.
18. Id.
19. In a stroke of irony or intentional disdain, Governor Craig Benson appointed former Governor Sununu to head a commission designed to find a fair solution to the current funding crisis. It is unclear now what will become of the Sununu/Benson Commission, because Governor Benson lost his race to John Lynch in 2004. To this day, Governor Sununu considers the Claremont decisions “foolish.” Ex-governor Criticizes School Funding Plan, Concord Monitor, Dec. 4, 2004, at B-1.
21. New Hampshire continues to be the only state without universal public kindergarten. See NH Lawmakers, Back First Ever State Aid for Kindergarten, Education Week, June 12, 1996.
school because it could not afford repairs to the school's physical plant that were repeatedly demanded by the accrediting agency. Governor Sununu's broken promises and the loss of accreditation caused the Claremont School District to reorganize the effort to sue the State, leading it to Professor Saunders.

We learned a few things from the Jesseman experience. First, funding exigencies and the lack of political power of the poor districts made it unlikely that we could ever rely on a residual funding plan. Second, if we took on the State, the Attorney General would try to bankrupt our resources to avoid resolution. Third, we had to get to the supreme court early, on a clean record, to establish that the Education Clause of the New Hampshire Constitution created enforceable rights.

These considerations led us to draft a detailed, factually rich complaint and to encourage the State to move to dismiss the complaint for failing to state a claim upon which relief could be granted. The court, with this approach, could only dismiss our case if it concluded that we were not entitled to relief under any construction of the facts we alleged. If we survived a motion to dismiss, we would then negotiate like hell and hope to conclude the matter a year or two after our initial filing, which was made in June 1991. Our strategy worked... sort of. We filed our complaint to some fanfare and baited the assistant attorneys general to file a motion to dismiss, but then the plan went awry. The trial judge promptly granted the motion and threw us out of court. In a year's time, rather than negotiating, we faced a high stakes appeal to the New Hampshire Supreme Court, but we were able to do so on our clear description of the facts.

V. CLAREMONT I—THE COURT RECOGNIZES THE CONSTITUTIONAL RIGHT TO A PUBLIC EDUCATION

Our lawsuit was filed on behalf of five poor school districts, five students and five property taxpayers. We chose these different groups

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22. Ironically, the attorney general who opposed us through most of the school-funding litigation graduated from Claremont's Stevens High School. He graduated from Stevens, however, at a time when the textile mills in Claremont were still flourishing, paid their property taxes and provided jobs for the numerous kids who dropped out of Stevens High to work in the mills. Former Attorney General Jeffrey Howard now sits on the U.S. Court of Appeals for the First Circuit.

23. David Long served as our consultant in drafting the complaint and forming our initial strategy. His knowledge of the law of education funding was, and continues to be, remarkable.


of petitioners to ensure that at least one group would have standing to challenge the school-funding system. Our claims were that our clients were denied the equal protection of the law by the State's school-funding scheme. We argued as well that the Education Clause guaranteed that students should receive a level of education sufficient for them to participate in our democracy and that the schools in our districts fell short of this standard. Finally, we argued under the Tax Clause of the New Hampshire Constitution that the property taxes collected to pay for education were state taxes, and, as such, they must be uniform throughout the state.

On August 13, 1992, the trial judge ruled that all three groups of petitioners had standing to challenge the funding system, but dismissed all of our claims on their merits. As noted supra, the judge ruled that Article 83 was merely "hortatory" and, therefore, unenforceable as being without any real standards. Ignoring the analysis in Rodriguez, the judge found that education was not a fundamental right even though New Hampshire's constitution had a specific education clause. As a result, the legislative prerogative concerning education policy, including funding, was unassailable. Finally, as education was a local and not a state duty, the taxes to pay for education were local taxes that needed only to be uniform within the municipality. Different school tax rates, even multiples of five and six hundred percent between districts, were of no consequence. Our motion for reconsideration was denied in November, 1992.

We began to plan for this appeal before we filed suit. Having now been dismissed, our planning proceeded on a few different levels. We prepared to address the legal issues with our research and in our briefs. Perhaps more importantly, we realized that we were also affecting public policy by bringing the lawsuit, and, because of this, we had the responsibility to educate the public. Much of our thinking on these points came from discussions with our colleagues in the New Hampshire Legal Services program and from discussions with our peers who litigated school finance cases all over the country. We met the latter at conferences organized by Professor Alan Hickrod and Bob Lenz.

27. N.H. Const. pt. 2, art. 5 (prohibits taxes that are "unreasonable, disproportionate and burdensome").
29. Id. at 8–10.
31. Bob Lenz was lead counsel in the Illinois school-funding litigation. Professor Hickrod was a professor of education at Southern Illinois University and the president and a moving force with the American Education Finance Association.
We worked to inform the public through the media. We wrote our pleadings in plain English. We spent hours explaining our positions to members of the press. Remember, the first appeal in our case was filed in 1992, before websites became ubiquitous. When local papers would not carry our stories, we used press contacts outside the state to force our local media outlets to pay attention. At times we staged events just to garner the publicity. Although it was held a little after the first appeal, one of our more successful events was a fundraiser called, "The Last Bake Sale for Education." Tom Connair’s request that Governor Stephen Merrill contribute home-baked brownies became the subject of a national Associated Press story. Governor Merrill did not think our plea for baked goods was funny. "The funding of education is a serious matter . . . ." his spokesman intoned.32

In addition to educating the public, we felt that we had to find a way to show that the lawsuit was acceptable to people held in high regard by the justices and that our funding challenge did not threaten our New Hampshire way of life. We tried two approaches, one of which led to a quite comical scene at the New Hampshire Supreme Court itself.

First, we knew that the recently elected senate president, Ralph Hough, did not support the State’s position in the litigation. Senator Hough represented the upper valley, a well-educated, affluent area of western New Hampshire that includes Dartmouth College. We, of course, could not speak to Senator Hough, because he was represented by counsel. So, we let two intermediaries in the Senate know that political leaders in other states had "switched sides" in their school-funding litigation in order to make a point. Eventually, the two intermediaries, Senator Wayne King from Rumney and Senator Jeanne Shaheen from Madbury, worked with Senator Hough to file a brief independent from the State’s brief. Bill Glahn, a former assistant attorney general and co-counsel to the *Jesseman* petitioners in the first school-funding case, wrote the brief and focused on the history of our Education Clause. The New Hampshire Supreme Court drew heavily on Senator Hough’s brief in describing the history of the Article 83 in its decision that revived our suit.33

The second approach we used to give the court some breathing room was also designed to overcome one of our most glaring shortcomings as counsel. We didn’t have enough juice.

Arpy Saunders, John Garvey, and I were all mid-career lawyers. We were certainly not the peers of the justices. Other states had more

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the academic research body that produced most of the experts in school finance litigation and that sponsored our conferences.
notable legal teams. The Alabama legal team, for example, was led by retired Alabama Chief Justice C.C. Bo Torbett, Jr.34 We felt we had to add some heft to the legal team. This belief led us to recruit the most senior, best-known lawyers in our state to join us. We approached the named partners of the state’s largest firms and focused on senior lawyers from those regions of the state in which our five justices had practiced before joining the bench. All of these leaders of the state bar willingly volunteered for service. They reviewed our brief, made suggestions, and, most importantly, signed the brief as co-counsel.

The efforts to garner attention and credibility paid off on the day of oral argument. The New Hampshire Supreme Court was packed for the argument. The supreme court building is a stately, but relatively small brick building, consistent with our sense of Yankee frugality. Fittingly, it is located on Noble Drive in Concord. The justices enter the courtroom through dark paneled doors behind their bench and face the well of the court where the advocates stand. The well of the court has a beautiful working fireplace that is commonly used during the winter.

The public area of the court was completely filled by the time we were ready for argument, and there were no seats for the group of senior co-counsel that we had recruited. At the last minute, we arranged for extra chairs to be brought in front of the bar of the court so that our senior co-counsel could squeeze in around us at counsel table. There must have been a dozen senior co-counsel shoe-horned into the small area around the three of us who were arguing the case. The bailiff announced the entry of the justices, and Chief Justice Brock entered through the paneled doors, looked to his right, and nodded to the assistant attorney general set to argue the case. He then looked over at our crowd and visibly did a double-take at our assemblage.

We were also very lucky on appeal. The Supreme Judicial Court for the Commonwealth of Massachusetts decided their school-funding case while our court was considering our appeal.35 The Massachusetts court decided the case in favor of the poor schools, based on its analysis of the identical constitutional language in both Massachusetts’ and New Hampshire’s state constitutions. Our court relied on the Massachusetts decision because of the shared constitutional history of the two states.36

The court’s decision in Claremont I recognized the right to a constitutionally adequate education for the first time in New Hampshire history. The court also revived our tax claim and sent us back to the

34. See Alabama Coalition for Equity, Inc. v. Fob James, Governor, 713 So.2d 869 (Ala. 1997). Justice Torbett now practices with Maynard, Cooper & Gale, P.C. in Montgomery, Alabama.
36. Claremont I, 635 A.2d at 1378.
trial court to prove our allegations. Now our work began in earnest. Our organizational troubles also started.

**VI. SURVIVING UNTIL CLAREMONT II**

The court's decision sent us back to the trial court to prepare for trial. Unfortunately, we were sent right back to the same trial judge who had dismissed our case in the first instance. Judge George Manias was a courteous judge who was not unkind to us—he just did not think we had any business trying to affect education policy through the courts. He was a tall, balding man who, whenever things got contentious, would rest his entire face and most of his bald head in his huge hands. His approach was referee-like, in that he would not make decisions so much as try to ensure that neither side unfairly gained the upper hand. This approach led to his denying the State's numerous motions to hold us in contempt, but it also resulted in his allowing the State's abusive discovery requests. It seemed that the State was permitted to demand that we produce the same information over and over again, and this was in the context of schools that already had numerous state reporting duties.

While the State demanded extensive discovery, the Department of Education dragged its feet on producing statistical data in a form we could use. Our team of statistical experts was unable to cope with the artificial impediments created by the State. Money was also very tight for us. Eventually, after having received over $35,000 for their expert work, our team of statisticians withdrew from the case in a very public way just about four months before trial was to begin. Governor Merrill used the withdrawal as the basis for a press conference that painfully exposed our financial weaknesses and gave him yet another opportunity to castigate us as "broad-based taxers."

To make matters worse, my law firm had just broken up. I later came to understand that the break-up was an effort to separate the Shaheen name from the suit so that Jeanne Shaheen would not be encumbered when she ran for governor. By January 1996, four months before our scheduled trial, our crises had come to a head.

By this time, I had become the informal leader of our group. Garvey left the legal team and Professor Saunders suspended his work.

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37. Former Governor Sununu pronounced the decision "just dumb." *Sununu Calls Ruling a "Dumb Decision," Manchester Union Leader, Jan. 2, 1994, at 4.* Governor Merrill predicted no progress would be made towards resolution, "[given the tax-and-spend mentality of the plaintiffs' lawyers. . .]" *Merrill Doubts Quick End To Education-Funding Suit; Talks Possible, but He Expects Case To Continue in Court, Manchester Union Leader, Jan. 5, 1994, at 6.*

38. In New Hampshire, this is not a political term of endearment. It is used to describe anyone who supports efforts to make our state tax system more equitable.
but later returned to help with the trial. Our resources were limited and we were in dire straits.

I was convinced, however, that the supreme court had telegraphed its ultimate decision in Claremont I. The court had already reached the key legal conclusion that provision of a constitutionally adequate education was a state duty. If the duty belonged to the State, then the taxes to pay for that duty had to be state taxes. If nothing else, we could prove that the local school districts levied taxes at wildly varying rates and that this violated the Tax Clause.\(^39\) The court could have issued this finding as part of Claremont I if it had not been so deferential to the legislature and Governor.\(^40\) All we had to do was remain standing long enough to return to the New Hampshire Supreme Court for a second appeal.

Our clients could not afford to run their schools, let alone pay for the lawsuit. The money we raised from donations from individuals and associations went to pay expenses. Anyone associated with our effort, it seemed, became *persona non grata* with the Governor and legislature. This ruled out asking for help from the big firms that depended on their state contacts to service their clients.

Our legal effort went forward with the help of a young law student intern, Scott Johnson, who became the manager of our extensive document database. The director of the state's legal services program John Tobin also volunteered. John took unpaid leave from his job to work on the case. The state school boards association gave us their legal counsel, Ted Comstock, for six months and allowed us to freely consult with their in-house policy director Dean Michner. We then went out and recruited help from our friends in small firms. This effort brought us Jed Callen, an environmental lawyer, Pat Quigley, a solo family lawyer, and Tom Hersey, a pony-tailed, ex-marine who had been a newspaper reporter before going to law school. Dick Hesse, another Franklin Pierce law professor, also joined our effort.

Except for Ted Comstock, none of the new recruits knew anything about education law. I was the only trial lawyer in the group. We organized our effort in two parts. The new lawyers learned the details of the educational programs and facilities in a pair of districts, one poor and the other wealthy. They then presented the stark contrasts at trial. Scott Johnson and I presented the portion of the case that

\(^39\) N.H. Const. pt. 2, art. 5.

\(^40\) *Claremont I*, 635 A.2d at 1381 ("We are confident that the legislature and the Governor will fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government.").
described the overall state system and prepared to challenge the array of experts retained by the State.41

Tom Hersey was given a special job. He ran the press operations for the lawsuit as if it were a political campaign. He developed a message of the day, sat with the reporters during trial, and fed it to them. Tom's efforts resulted in front-page, statewide news stories about the case every day during the entire six-week trial.

VII. CLAREMONT II42—THE SYSTEM IS UNCONSTITUTIONAL

As we struggled to prepare for trial, we got lucky again. The Commissioner of the Department of Education, Charles Marston, retired and offered to testify for us. Charlie Marston was a committed educator who had served for over thirty years with the New Hampshire Department of Education, ending as its commissioner. Charlie was well-respected throughout the state and knew our state school system inside and out. As commissioner, Charlie was a former defendant in our lawsuit. I now began working closely with Charlie to prepare him as a fact witness for trial.43

Charlie testified about the expansive educational opportunities offered by our wealthiest schools that rivaled the most prestigious prep schools in the country and detailed the conditions in our poorer schools, where broken windows went unrepaired, school children wore their coats during class in the winter, and textbooks, in the mid-1990s, taught schoolchildren that some day we might put a man on the moon. The Soviet Union was also a current threat according to the wall maps in the schools of our districts. Charlie also explained how our tax system disadvantaged communities without property wealth and described the crazy quilt of widely varying school tax rates.44 Finally, Charlie testified about how the State's chronic underfunding of its

41. The State had hired two economists from Dartmouth and one from MIT. It also hired Eric Hanushek, the leading defense proponent of the proposition that "money does not make a difference" in public school offerings. Finally, the State retained the full time assistance of a Plymouth State College computer professor to testify and compile statistical evidence.
42. Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997) [Claremont II].
43. Commissioner Marston died on Sept. 4, 2004. His Claremont testimony was mentioned in his eulogy at his request.
44. It was not a mere coincidence that our five school districts—Claremont, Allenstown, Franklin, Lisbon, and Pittsfield—were all failed mill towns that lacked a ski hill or lakefront property and were not located on the state's two interstate highways. School-funding cases often reflect bad economic development decisions.
own Department of Education had left it unable to supervise the public schools in the state. 45

Charlie was our first witness at trial and testified for two-and-a-half days. With his educator's style and flat New England accent, he was as persuasive a witness as we could possibly have hoped for.

We followed Charlie with his predecessor as commissioner Jack MacDonald, who had become the undersecretary of the U.S. Department of Education after leaving New Hampshire. Jack was followed by Douglas Brown, who had served as deputy commissioner under Jack and Charlie. We did not call the then-sitting commissioner Betty Twomey, because we did not have the funds to take her deposition prior to trial and we did not know what she would say. As it turned out, she must have supported our position, because the State did not call her as witness either.

The paired-district presentations followed the commissioners. A few of the stronger witnesses came from the wealthy districts. Most of these teachers and administrators had served in poor districts and were painfully aware of their shortcomings, because they came to know just how much was available to the children in wealthy schools.

We closed our case by presenting a proposed definition of adequacy 46 and the testimony of our only two out-of-state witnesses—Professors Van Mueller and Terry Schultz of the University of Minnesota. Terry and Van had visited every school in our five paired districts and prepared a qualitative study of the educational offerings. We ended our case with Terry's slide show of 800 slides. The slides were shown on two projectors that placed side-by-side the programmatic offerings and physical facilities in the poor and wealthy schools in New Hampshire. The photographic evidence skewered the notion that we had a single state school system. Later, we provided the supreme court with color copies of the 800 photos as an appendix to our initial brief.

The State, with its two attorneys general who had been detailed to our case for over five years, and their twenty-four boxes of trial evi-


46. The definition was crafted by Robert L. Fried, Ed.D., an education professor who happened to live in Concord, New Hampshire. Professor Fried's working thesis was that adequate education provides the range of educational facilities, programs, and services necessary for every New Hampshire child, regardless of circumstance of birth or family endowment, to have a fair and reasonable opportunity of acquiring the skills, knowledge, and values necessary to develop as a responsible and productive citizen and to continue formal and informal learning as an adult.

dence, then presented its defense. The State presented the testimony of its trial experts in laborious—some would say monotonous—detail. One by one, the State’s experts tried to disprove the obvious. They argued that tax rates were not a fair measure of tax effort and that the differing rates should be ignored by the judge. They presented graphs and testimony to justify the funding system. They claimed that residents of poor towns had a lower demand for education; otherwise, they would surely have moved to towns with better schools. In response to our complaints about outdated computers that were wheeled from classroom to classroom in poor schools, Paul Snow of Plymouth State College testified that it was preferable to teach computer courses without the actual use of a computer.\textsuperscript{47}

By the time we got to the testimony of the State’s last witness, Dr. Eric Hanushek, it was obvious that money made a difference to schools and that his bromide to the contrary was just plain wrong. The best that Hanushek could offer in closing the State’s case was that money had to be spent wisely in order to make a difference in the lives of schoolchildren.

We had buttons printed to commemorate the close of the hearing that read, “I survived the Claremont trial.” Judge Manias and his clerk appreciated the buttons. The two assistant attorneys general did not.

The gubernatorial election of 1996 occurred while we awaited Judge Manias’ decision. Jeanne Shaheen was the Democratic candidate. We assisted the Shaheen campaign behind the scenes, and her platform included a promise to settle our suit. She won the election handily.

The trial judge ruled against us\textsuperscript{48} (again), but, in doing so, he could not avoid the math. School-funding cases are all about the math. Poor districts have little property value against which to levy taxes. No matter how high they raise tax rates, poor school districts can never raise sufficient revenues. As long as the funding system is based upon local taxes, the inequities will always exist.

Even Judge Manias, though denying us relief, found:

\begin{quote}
To some extent, the amount of revenue that a school district raises is dependent upon the value of the property in that district . . . . In 1994, Franklin’s “equalized property value” . . . per student was $183,626, while Gilford’s equalized property value per student was $536,761. As a result, “property rich” Gilford had a significantly greater assessed value upon which taxes could be imposed for the support of its schools than did Franklin. Gilford
\end{quote}

\textsuperscript{47} At one point, Dr. Carolyn Hoxby of MIT informed us that academic economists generally reached their peak intellectual capacity when they were about her age. She was the youngest economist on the State’s team.

raised more money per student than Franklin, even while taxing its residents at lower rates.\footnote{Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1355 (N.H. 1997) \textit{[Claremont II]} (quoting unpublished Order of Dec. 6, 1996). In 2003, I was invited to speak as part of the Monadnock Lyceum series in Peterborough, New Hampshire. At that time, the equalized value per pupil in the cooperative district that included Peterborough ranged from $250,000 per pupil in Antrim to $1,105,000 per pupil in Dublin.}

Now in office, Governor Shaheen took up right where her Republican counterpart, Governor Merrill had left off. Every position argued by the Shaheen administration on appeal was precisely from the Merrill playbook and the court rejected every one of the Shaheen/Merrill arguments.\footnote{The decision was 4–1. \textit{Claremont II}, 703 A.2d at 1353. Chief Justice Brock wrote the majority opinion. \textit{Id.}\textit{.} Justice Horton dissented on justiciability grounds. \textit{Id.} at 1364.}

The court found that the property tax levied to fund education was a state tax that was required to be uniform throughout the state. It found that the funding of schools through disproportionate taxes was unconstitutional, and, finally, the court found that a state-funded, constitutionally adequate, public elementary and secondary education is a fundamental constitutional right that subjects all related legislative decisions to careful court scrutiny.

In unambiguous language, the court ruled that:

\begin{quote}
There is nothing fair or just about taxing a home or other real estate in one town at four times the rate that similar property is taxed in another town to fulfill the same purpose of meeting the State's educational duty. Compelling taxpayers from property-poor districts to pay higher tax rates and thereby contribute disproportionate sums to fund education is unreasonable.\footnote{\textit{Id.} at 1357.}
\end{quote}

The court cited \textit{Brown v. Board of Education}\footnote{347 U.S. 483 (1954).} in stating "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."\footnote{\textit{Id.} at 1358 (quoting \textit{Brown v. Bd. of Educ.}, 347 U.S. at 493).} It adopted the Kentucky standards for defining a constitutionally adequate education as a guide for our state's anticipated legislative efforts.\footnote{\textit{Id.} at 1359 (adopting the Kentucky Supreme Court's standard for constitutionally adequate education established in \textit{Rose v. Council for Better Educ., Inc.}, 790 S.W.2d 186, 212 (Ky. 1989)).} Finally, the court repeated its confidence in the legislature and the governor to fix the problem and stayed its decision invalidating the school-funding system for sixteen months, until the start of the next full tax year.\footnote{\textit{Claremont II}, 703 A.2d at 1360–61.}

Thus, the local property tax as the sole means to fund schools was set to expire on March 31, 1999.

The court order that resulted from \textit{Claremont II} was a self-enforcing one that almost worked. Beginning on April 1, 1999, taxes for
schools could not be levied under the existing system, bonds could not be sold, and schools would be unable to open in September 1999.

VIII. EFFORTS TO AVOID REMEDY

The court's order sent the matter back to the legislature and Governor for resolution. New Hampshire has a very quirky legislature. Although we have a population of only a little over one million, we have 400 representatives in our House and twenty-four senators. Legislators are paid $100.00 per year and meet in session from January through June. Our governor, the representatives, and senators are elected for two-year terms. The Senate was about evenly split between Republicans and Democrats at the time that remedies were being fashioned. The House was still heavily Republican, the Republicans were themselves split between conservatives and moderate "Main Streeters."

Governor Shaheen proposed the Advancing Better Classrooms ("ABC") plan. The plan had reasonable provisions for establishing a state accountability system and for helping to improve schools. Its funding mechanism, however, was a sham. Governor Shaheen proposed to create a statewide property tax to fund schools. The apparent tax rate of the statewide tax would be uniform throughout the state. The plan, however, would then rebate all taxes that were not necessary to pay for the schools in the local school system. The wealthy schools districts would continue to enjoy the same effective tax rate advantage that had been in place for decades and the state's resources, its mountains and lakes and ocean front, would continue to serve only the needs of those school districts in which they were located.

The ABC plan was referred to the supreme court for an advisory opinion by a group composed of conservative senators and senators friendly to us. The advisory opinion was requested on May 21, 1998. The court, allowing interested parties to submit comments until June

56. N.H. CONST. pt. 2, art. 15.
57. Id. pt. 2, arts. 9, 27, 42.
59. The State's tourism expenditures and highway improvements that service these tourist destinations also benefit primarily the interests of the wealthy towns, even though the poorest residents of the state help pay for them.
60. We had tried to negotiate improvements to ABC that would have given it a chance at constitutionality, but failed. At our last meeting, the Attorney General and the Governor's legal counsel threatened that we should get on the train because it was about to leave the station. Implicit in the comment was the threat that the Governor would support efforts to amend the constitution if ABC did not pass.
2, 1998, received 119 comments. The court then issued an unprecedented order for oral argument. The court selected a group of lawyers and non-lawyers to present oral argument from the list of those who had submitted comments. Our team was an unlikely amalgam of arch-conservatives who opposed any state plan and lawsuit supporters. The Attorney General, the minority leader of the house, the Governor's personal counsel, counsel for the Democrats in the Senate, the newly appointed State Board of Education chair and the commissioner of the Department of Revenue Administration all argued for constitutionality. However, the court held to its position that tax rates must be uniform both on their face and in effect. The decision, finding ABC unconstitutional, was issued on June 23, 1998.61 The next day, Governor Shaheen vetoed the court's computer modernization budget.62

There were a number of efforts to amend the state constitution before and after the ABC decision. Governor Shaheen teamed with Speaker Donna Sytek to propose one of the amendments. They collaborated with the Attorney General, who released an opinion that stated the obvious: schools would not be able to raise money through local taxes after March 31, 1999.63 The two-part approach of Shaheen's support and the Attorney General's opinion were choreographed for release on September 4, 1998. The Attorney General and the Governor called us just prior to their news conference to ask that we not be too harsh in our criticism of the Governor, because she believed she had to support the amendment to gain credibility in the process of developing a remedy. The amendment vote failed a few days later,64 and Governor Shaheen's credibility did not improve.

Governor Shaheen was reelected on November 3, 1998. On November 9, 1998, the State moved for a two-year extension of the looming deadline. Its motion claimed that the State had acted in good faith, but that the State would be unable to meet the deadline. The efforts to pass amendments were touted as part of the good faith effort to comply with the court order.

On November 24, the extension motion was argued. The court rejected the motion the very next day in an unusual order that was signed by all five sitting justices (including the one previous dissenter).65 The court again made clear its thought of a parallel between our case and Brown v. Board of Education by citing Cooper v.

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62. The budget was not restored until 2002.
65. See Claremont, 725 A.2d at 651–52 (citing motion for extension).
Aaron.\textsuperscript{66} In \textit{Cooper}, the Supreme Court denied an extension of time to implement the \textit{Brown} decision.\textsuperscript{67} The Court's order was issued the day after oral argument and was signed by all the justices.

While ABC, the amendments, and the extension were debated, two legislators worked on the unthinkable—a statewide income tax plan to fund public education.\textsuperscript{68} The income tax plan was held back, awaiting the failure of the other funding plans.

We also began meeting with a team of senators to craft a consent decree that would increase spending immediately, but give the State more time to fully comply with the court order. Senator Bev Hollingworth spearheaded the effort.\textsuperscript{69} Governor Shaheen was kept informed by Senator Hollingworth. At various points we had reason to be optimistic, but those reasons soon faded.

Slightly different versions of the income tax plan percolated through the House and Senate. The House vote was on March 4, 1999, to pass a four-percent income tax. The tax passed 194–190,\textsuperscript{70} while a competing funding bill supported by the Speaker was killed.

The Senate plan was for a three-and-a-half-percent income tax.\textsuperscript{71} Senator Below advised us that he could gain support for the income tax from the senator who represented the rural north country, Fred King, if Below limited the cost of the school-funding plan to $825 million. The compromise would also bring along the moderate Republican senator who represented our client, Pittsfield. Now the Governor and the Senate President Junie Blaisdell, the senator from Claremont, began working together. They presented a hodgepodge of increases in existing fees and taxes that failed.\textsuperscript{72}

After a twelve-hour session, and much to Governor Shaheen's surprise, the Senate passed its version of the income tax on March 25, 1999.\textsuperscript{73} Through a procedural manipulation, rather than having both income tax bills referred to a committee of conference, the House version required a second vote.

The Governor now went to work in the House. She let word out that an income tax would not pass on her watch. She warned legislators that there were not enough votes to override her veto and that a

\textsuperscript{66} \textit{Claremont}, 725 A.2d at 650 (citing \textit{Cooper v. Aaron}, 358 U.S. 1 (1958)). The Court wrote that, "absent extraordinary circumstances, delay in achieving a constitutional system is inexcusable." \textit{Id.}

\textsuperscript{67} \textit{Cooper v. Aaron}, 358 U.S. at 14–17.

\textsuperscript{68} The plan was called Hager–Below after Representative Liz Hager and Senator Clifton Below.

\textsuperscript{69} Senator Hollingworth became senate president in 2000, resulting in New Hampshire being led by three women as governor, speaker, and senate president.

\textsuperscript{70} \textit{Manchester Union Leader}, Mar. 7, 1999, at B2.

\textsuperscript{71} \textit{Manchester Union Leader}, Mar. 26, 1999, at 1A.

\textsuperscript{72} \textit{Manchester Union Leader}, Mar. 10, 1999, at 11A.

\textsuperscript{73} \textit{Manchester Union Leader}, Mar. 26, 1999, at 1A.
vote for an income tax was meaningless political suicide. I remember sitting in the old second floor gallery of the House before the vote, watching as Governor Shaheen's staff summoned House members one by one to the Governor's office. We had the moderate Republicans and a few of the conservatives ready to vote our way, but we couldn't win without Democratic support. Governor Shaheen carried the day. The income tax bill failed, 211 to 168.74

The court's deadline came and passed. Teachers all over the state received notice that they would not be rehired for the next school year, because funding was uncertain. On April 13, 1999, the House speaker and minority leader presented yet another compromise plan based on a hodgepodge approach.75 The hodgepodge plan garnered the support of the School Boards and Superintendents' Associations that feared schools would close. We were in trouble.

A temporary plan to fund schools was passed four weeks after the deadline, on April 29, 1999.76 The Governor signed the plan into law on the same day. The plan was based on an arbitrary $825 million funding amount. About half of the plan's revenues came from a state-wide property tax that was no more than a renamed portion of the local property tax. About half the funding was new, from the hodgepodge of increased taxes and fees and from tobacco settlement money. The plan funded about twenty-seven percent of the costs of public schools. Just before leaving office in 2002, Governor Shaheen made the plan permanent.77 Each year since, the plan has been modified in some way to reduce the State's share. We are currently at about twenty percent state funding and trending downward.78

Our group has returned to the New Hampshire Supreme Court since Claremont II to challenge the funding plans on their face. To its great credit, the court has not retreated from earlier decisions. We have succeeded in having the court find the various plans unconstitu-

74. Manchester Union Leader, Mar. 31, 1999, at 1A. Governor Shaheen won one more two-year term as governor and then, in 2002, ran for the U.S. Senate against Governor Sununu's son. She lost.

75. The plan excluded the ski areas from an increase in the entertainment taxes. This led to the quip of the day by the teachers union lobbyist Dennis Murphy, that "Poor families would be taxed when they bowled, but the wealthy could ski for free." Personal Notes of Andru H. Volinsky.

76. Manchester Union Leader, Apr. 30, 1999, at 1A.


tional on a number of occasions.\textsuperscript{79} We also succeeded in getting paid (at least partially).\textsuperscript{80}

IX. CONCLUSION

I have concluded that our school-funding problem is incapable of political resolution unaided by direct court involvement. Our small state lacks a revenue infrastructure on which a fair funding plan can be built, but increasing or changing New Hampshire’s tax system is politically untenable. Our districts’ residents, even when they understand the tax issues and elect representatives who will protect their interests, do not have sufficient numbers to affect statewide votes. Further court action will be the only way to make a lasting change. Having reached this conclusion, I do not believe that we can rely solely on the courts. We must continue to educate and engage our citizens on two fronts and we must do so outside of the regular political institutions.

First, we must help the residents of New Hampshire understand the implications of our current funding system, which allows us to disproportionately tax the poor while denying children in poor districts the services that they need.\textsuperscript{81} The poor pay more and receive less. But, to look at this as only a problem of poorer communities is shortsighted. We all need and benefit from a better educated workforce and citizens more capable of critical thought. A school system that fails to address critical needs disenfranchises us all. This, I am afraid, is a very difficult message to get across. Second, the court must not falter under legislative and executive attack. Our New Hampshire Constitution is the repository of important rights, and those rights cannot be protected absent faith in the viability of our courts as an equal branch of government.

It has been a long, painful struggle, but one that many of us see as having no acceptable alternative. Dr. Seuss would be proud of our lot. Changing the discriminatory mindset of our leaders and helping them find courage is harder than selling green eggs and ham.

\textsuperscript{79} See \textit{e.g.}, Claremont Sch. Dist. v. Governor, 794 A.2d 744 (N.H. 2002); Opinion of the Justices, 765 A.2d 673 (N.H. 2000).

\textsuperscript{80} See Claremont Sch. Dist. v. Governor, 761 A.2d 389 (N.H. 1999) (recognizing a common law cause of action for attorney’s fees, but not allowing for the repayment of court costs).

\textsuperscript{81} To this end, we helped start a public engagement effort called the Citizens’ Voice Project. See NH Citizens’ Voice Project, \textit{at} www.nhcvp.org.