

## THE STATESMEN ARE IN THE CENTER

The version of the constitutional amendment designed to reverse the holdings of the Claremont and Londonderry cases that the state is constitutionally obligated to pay the entire cost of an “adequate” education for every student in every school district in New Hampshire which recently passed the Senate has been long in coming and makes eminent sense.

The Senate proposal, however, did not expressly say anything about the nature of the Court’s role in the new regime. The consequence of silence on this issue would be to leave things where they are. The problem is that the status quo is defined by the Claremont and Londonderry cases and those cases say that because education is supposedly a right, the constitutionality of any act of the Legislature dealing with education must be judged according to the Court’s most exacting form of judicial review—what is known as the “strict scrutiny test”. Under this test, the Legislature is not permitted to exercise its discretion to make its own choice among competing means to an end; if it doesn’t make what *the Court* considers to be the *best* choice, its choice is struck down.

To his credit, Governor Lynch--who spearheaded the Senate proposal--has repeatedly stated that he had assumed that the fair import of the proposal was to put an end to the Claremont-style of judicial oversight over educational policy. The House Republican leadership has responded by offering an amendment to the Senate proposal which makes this explicit. To their credit, the Republicans’ proposal does not completely eliminate judicial review in this area; instead, it states that when the Legislature undertakes to set educational policy or funding levels, its acts may be reviewed for their “reasonableness”.

Those on the left scream that reducing the Court’s role over education funding threatens our entire system of checks and balances. These critics, however, misapprehend the fundamental difference between the right to education and virtually every other right protected by our constitution. All other rights—such as freedom of speech, freedom of religion, the right to privacy, etc.—are what we call negative rights. This means that as to them the constitution says to Government, thou shall not interfere. The right to education, however, is an affirmative right; as to it, the constitution says to Government, thou shall provide.

This difference has monumental consequences for what should be the scope of judicial review in each case. When the Court strikes down a law on the grounds of its infringement of our right to free speech, the Court’s job is done. At that point, the Legislature may either try to find some other way to accomplish its goal without violating free speech or it may even scrap the whole project. Since the Court has nothing to say about what the Legislature may do, we are not unduly burdening our democratic system by tolerating a form of judicial review which is tilted in favor of protecting our negative rights. When it comes to affirmative rights, however, the situation is reversed. If the Court strikes down some legislative act on the grounds that it has not satisfied the state’s

duty to provide an education, the Legislature cannot respond by doing nothing. And since it must do something, that inevitably invites the Court to tell it what to do (which, of course, is exactly what the Court has threatened to do in the Londonderry case). The net result is that, when it comes to affirmative rights, the Judiciary almost inescapably gets involved in setting public policy. The way, then, that we preserve democracy in this situation is to limit judicial review to only those cases in which the judges can say that the Legislature's product is so deficient that it would be "unreasonable" to let it stand.

Those on the right, however, cry that reasonableness is in the eye of the beholder and that the judges will still substitute their own judgment for that of the Legislature. What this group fails to recognize is that the word "reasonable" is a term of art in constitutional jurisprudence. When applied to judicial review, it means that the Court must uphold the constitutionality of a legislative act if it is "not arbitrary" or has a "rational basis". (These phrases, by the way, are not mine; they may be found in innumerable Supreme Court decisions and are treated by the Court as synonyms.) The point is that "reasonableness" does have a settled meaning. It means that a challenged legislative act is presumed to be constitutional, that a challenger has the burden of proof to demonstrate that it is unconstitutional and that the challenger can only succeed if he/she can establish that the act has no rational basis. Quite properly, this is a heavy burden.

In the final analysis, then, the Senate proposal to amend the constitution, as clarified by the House Republican amendment, strikes the right balance on the issue of judicial review. It will not satisfy the purists on either side—but nothing will satisfy them except unconditional surrender by the other side. I prefer to cast my lot with the statesmen in the center.

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