Don't amend the constitution, pick better judges

Peter J. Hansen

ANOTHER VIEW

MANY OPPONENTS of the New Hampshire Supreme Court's Claremont decisions believe that a constitutional amendment is the only effective remedy. In my view this remedy entails problems of its own. Above all, there is something inappropriate about amending our state's constitution in response to manifestly unjustified court decisions. This makes the state's fundamental political document a hostage to the folly of a few justices.

The court based its Claremont decisions on a phrase in the New Hampshire Constitution which says that legislators and magistrates should "cherish the interest of literature and the sciences, and all seminaries and public schools." The obvious question is why the court interpreted "cherish" to mean "fund," at least in the case of public schools.

In the first Claremont decision the justices showed that as early as the colonial period, New Hampshire made laws governing public education. However, this hardly establishes that funding education was a state obligation, even by statute, to say nothing of the constitution.

Moreover, the court offered no explanation of how its interpretation could be reconciled with the absence of any state funding of education during the 50 years after the adoption of New Hampshire's constitution in 1784. It seems that the justices knew where they wanted to go, and weren't going to let the constitution stand in their way. But is the proper response to rewrite the constitution, adding clunky phrases attempting to limit the court's jurisdiction? I think there is a better way.

Abraham Lincoln, following the infamous Dred Scott decision of 1857, urged not that Americans amend the nation's Constitution — an idea he would have abhorred — but that they resist the United States Supreme Court in every legal manner, and seek the establishment of a "new judicial rule." He insisted that judges are no better or worse than other men, and that they respond to political opposition — especially when the decisions inspiring that opposition are unreasonable.

There has been considerable political opposition to the Claremont decisions, notably the passage of House Concurrent Resolution 14 this past January. HCR 14 asserted legislative control over school funding and stated that the Supreme Court erred in its Claremont decisions. This opposition is beginning to bear fruit. The latest Claremont decision, released last month, continued in the line of the earlier decisions — but was noticeably less aggressive. The court found that the state is failing to guarantee students an adequate education, but it established no deadline or timetable for remedying the perceived problem.

More importantly, this time the court split 3-2. The two dissenters were two relatively new justices, Joseph Nadeau and Linda Dalianis, who said the court should "conclude its jurisdiction" over education in New Hampshire. Apparently Nadeau and Dalianis, having no personal involvement in the earlier Claremont decisions, view them more critically.

So there is reason to hope that sanity will eventually prevail, even in the chambers of the Supreme Court, without clumsy rewriting of our constitution.

Moreover, the movement for a constitutional amendment doesn't seem to be getting anywhere. It is now more than four years since Claremont II, and no proposed amendment has garnered the 60 percent support needed in both houses of the Legislature.

Perhaps that's just as well. If an amendment does reach the ballot, it may fail to gain the two-thirds statewide vote necessary for ratification. Such a defeat, even if by a minority of voters, would constitute a major setback. Momentum would then rest with advocates of judicial usurpation, broad-based taxation and centralized control of schools.

For both theoretical and practical reasons, therefore, we should focus our efforts elsewhere. We should continue to articulate and proclaim our opposition to the Claremont decisions; and we should demand that our elected officials do what they can within the law to resist the court. The state's Executive Council has failed to do this. The council confirmed Gov. Jeanne Shaheen's three recent Supreme Court nominees with little serious questioning — despite the turmoil caused by the court's recent misbehavior, and despite the fact that all five councilors were Republicans confronting the nominees of a Democratic governor.

However, responsibility for the current situation rests less with Shaheen than with her Republican predecessors, who nominated the justices who produced the Claremont rulings. We live in an age of judicial activism; it's not enough to nominate judges with Republican Party credentials and high marks from the bar association. Future governors must examine prospective nominees with extraordinary care and intelligence.

This should be a major issue in the current campaign for governor. We should demand that the candidates explain how they would improve upon the poor performance of earlier governors in this regard.

In time the justices who gave us the Claremont decisions will no longer sit on the New Hampshire Supreme Court. We must strive to ensure that their successors respect our constitution, our elected representatives and the people of New Hampshire.

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