

## JUDICIAL ACCOUNTABILITY IN A TIME OF TUMULT: NEW HAMPSHIRE'S IMPEACHMENT CRISIS OF 2000\*

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### ABSTRACT

*In recent years, constitutional jurisprudence emerging from state courts has assumed increasing importance. The assertiveness of state courts, however, has generated considerable backlash, most often involving adverse reactions to particular court rulings, and commonly expressed in efforts to oust the judges responsible through the electoral or appointive processes by which judges in most states maintain their positions. In New Hampshire, there was a backlash involving a deeper challenge to the legitimacy of the entire judicial branch of government, driven by concerns about judicial accountability to citizens and officials in the elected branches. This Article looks at the impeachment of Chief Justice David Brock in 2000, in terms of its antecedents and its aftermath. The authors place the impeachment in the context of legislative-judicial relations over the course of the state's history and examine steps taken since the impeachment to help restore stability in those relations.*

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## I. INTRODUCTION

There is little doubt that the past thirty years have witnessed a substantial change in the scale, and significance, of state-level constitutional jurisprudence. By statistical measures alone, it would appear that "state courts have eclipsed the U.S. Supreme Court in shaping the meaning of constitutional values, both in their home states and throughout the nation."<sup>1</sup> Some have delivered surprisingly liberal rulings in areas such as "school finance, disparate impact proofs of discrimination, voter registration laws, abortion funding, religious liberty protections, takings, same-sex sodomy, and a host of criminal procedure protections."<sup>2</sup> Indeed, on the issue of gay marriage, the U.S.

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1. Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1635 (2010).

2. *Id.* at 1636.

Supreme Court itself followed where the state courts of Hawaii and Massachusetts initially led.<sup>3</sup>

This development, however, has generated considerable backlash among elected officials and elements of the electorate, which scholars have begun addressing.<sup>4</sup> Much of this literature addresses the political ramifications of particularly unpopular rulings, including opponents' attempts to oust offending judges through the electoral or appointive processes by which most hold office, and to undo any objectionable ruling's force by legislative action.<sup>5</sup>

Explicitly or implicitly, these particular state-level controversies raise the broader, age-old question of judicial accountability. Just how responsive should state judges be to public voices and elected authorities? Or, phrased in terms of institutional relations rather than judicial decision-making, just how independent of the people's elected representatives can or should state judiciaries remain?

Recent history does provide instances where both the nature and the sheer scale of backlash compel consideration of those broader issues, i.e., where not just specific court actions, but the entire institutional and even constitutional status of state judiciaries, are contested. That seems an apt description of what has happened in, for example, Kansas, where antagonism to a series of rulings by the state's supreme court led to proposals for a considerable expansion of elected officials' control over

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3. The precipitating case in Hawaii was *Baehr v. Lewin*, 852 P.2d 44 (Ha. 1993), in which the state supreme court found that sex-based classifications must be justified by a compelling state interest. In Massachusetts, the right of same-sex couples to marry was established by *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003). Twelve years later, the U.S. Supreme Court confirmed this as a constitutionally protected right in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

4. See Cass R. Sunstein, *Backlash's Travels*, 42 HARV. C.R.-C.L. L. REV. 435 (2007). Responses to the Hawaiian and Massachusetts high courts' rulings on gay marriage provide much of the subject-matter for analyses of anti-judicial backlash. For an example of a political scientist's perspective, see Tonja Jacobi, *How Massachusetts Got Gay Marriage: The Intersection of Popular Opinion, Legislative Action, and Judicial Power*, 15 J. CONTEMP. LEGAL ISSUES 219, 219–20 (2006). For an example of a legal scholar's viewpoint, see Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1493–95 (2006).

5. See ALICIA BANNON, *RETHINKING JUDICIAL SELECTION IN STATE COURTS* 1–2 (2016) (arguing that anti-judicial backlash in states has grown “increasingly politicized, polarized, and dominated by special interests”).

it.<sup>6</sup> Other states have witnessed similarly ambitious offensives against an array of judicial institutions and practices.<sup>7</sup>

Analyses of the roots, dynamics, and outcomes of this brand of backlash, focused on institutional structures and inter-branch relations, rather than particular court decisions and political opposition to them, are needed. To be useful, those analyses must acknowledge that what is really under consideration is nothing less than the judiciary's role in state government at a time of both heightened judicial assertiveness and vigorous opposition to it—a time of tumult.

In this regard, the experience of New Hampshire can be instructive. There, in the concluding decades of the twentieth century, concerns about judicial accountability and independence intensified until, in 2000, they finally exploded in the impeachment of the Chief Justice of the New Hampshire Supreme Court, David Brock. An historical analysis of that “time of tumult” suggests that the impeachment, while prompted by then-recent developments (a scandal suggesting widespread ethical lapses in the bench and bar, and a controversial series of court rulings on education funding) actually had deeper roots in a kind of structural disjunction within state government. Institutionally, the judicial branch had been “modernized,” while the organization and practices of the elected branches stayed firmly traditional. Actions that were taken in the aftermath of the Brock impeachment show one state's exploration of how such issues might be most effectively addressed.

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6. Legislators eventually went so far as to enact a 2015 measure licensing the withdrawal of funds from the judicial branch itself, should the high court continue resisting those proposals. For the background of the conflict, see Russell Berman, *The Court Case That Could Shut Down Kansas's Courts*, THE ATLANTIC (Sept. 5, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-court-case-that-could-shut-down-kansas-courts/403957>. The measure was withdrawn in February 2016. See Lincoln Caplan, *The Political War Against the Kansas Supreme Court*, NEW YORKER (Feb. 5, 2016), <http://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court>.

7. In some cases, it is the state supreme court that is targeted, with implications for the judiciary that court leads. For coverage of the political struggle over high courts in Arkansas, Oklahoma, and Pennsylvania, see Christina A. Cassidy, *Control of State Courts Becomes a Top Political Battleground*, ASSOCIATED PRESS (Apr. 3, 2016), <https://apnews.com/0b62b60670b148ab9611a5a8b58cb48f>. For an account of the scandal and dysfunction that might result from an overtly politicized state supreme court, see Lincoln Caplan, *The Destruction of the Wisconsin Supreme Court*, NEW YORKER (May 5, 2015), <http://www.newyorker.com/news/news-desk/the-destruction-of-the-wisconsin-supreme-court>.

## II. LEGISLATORS AND JUDGES IN THE NEW HAMPSHIRE CIVIC TRADITION

In June 1778, New Hampshire's voters established the first constitutional convention in history.<sup>8</sup> But those voters would reject two founding charters before finally confirming a constitution in 1784.<sup>9</sup> That constitution, revised in 1792, was deeply marked by the struggle against the crown, much of which had involved the colonial judiciary. Pre-revolutionary judges had served "at the pleasure of the king," and framers felt they often sacrificed justice to the dictates of royal administration.<sup>10</sup> Recognizing both the need for judicial impartiality and the peril that executive power might pose to it, they stipulated that judges of at least the high court would simply "hold their offices so long as they behave well," subject only to whatever age limitations the state might choose to impose.<sup>11</sup>

In fact, judges in New Hampshire would be insulated not only from the pressures of executive officers, but from the judgment of voters as well. The idea of judicial elections, uncommon at the founding, would gather support across the nation throughout the nineteenth century; nearly all states would eventually conclude that judges should, at some point, undergo some form of electoral process or, at least, re-appointment after a specified term set by elected officials.<sup>12</sup> Such measures have been repeatedly rejected by New Hampshire voters.<sup>13</sup> Today, New Hampshire remains one of only four states where judges are subjected to neither

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8. The constitution that New Hampshire's voters finally endorsed was heavily influenced by Massachusetts's constitution. In particular, it adopted the notion held by framers in Massachusetts that a constitution should foreground citizens' rights and derive the architecture of government from them. For a fine, concise summary of New Hampshire's early constitutional history, see SUSAN E. MARSHALL, *THE NEW HAMPSHIRE STATE CONSTITUTION* 3–22 (G. Alan Tarr ed., 2011).

9. *Id.* at 1.

10. Since the Act of Settlement in 1701, English judges had held tenure during "good behavior" and could be removed only by parliamentary impeachment. Colonial judges enjoyed no such security; they continued to serve "at the pleasure of the king." RICHARD MIDDLETON, *COLONIAL AMERICA: A HISTORY, 1607–1760*, at 319 (1992).

11. N.H. CONST. pt. 1, art. 35. Since 1792, judges' mandatory retirement has been set at age seventy.

12. For discussion of judicial elections in relation to judicial independence and accountability, see G. ALAN TARR, *WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES* 122–50 (2012).

13. On efforts to change judicial selection and tenure from 1784 through 1984, see CONSTANCE T. RINDEN & JANE LYMAN, *NEW HAMPSHIRE CONSTITUTIONAL AMENDMENT PROPOSALS* 16, 27 (3d ed. 1984). For the years 1985–2016, see S. JOURNAL, 150-3, 1987 Sess., at 41–43 (N.H. 1987); H. JOURNAL, 149-10, 1985 Sess., at 147 (N.H. 1985); *Advanced Bill Status Search*, N.H. GEN. CT., [http://www.gencourt.state.nh.us/bill\\_Status](http://www.gencourt.state.nh.us/bill_Status) (last visited Aug. 22, 2017) (providing a searchable database of bills from 1989 to present).

partisan, non-partisan, nor retention elections, nor to a formal and open-ended re-appointment process.<sup>14</sup>

#### *A. Legislative Primacy, Judicial Professionalization*

None of that, however, implied commitment to the *institutional* independence of the judicial branch of government, or even to the full and clear separation of governing branches.<sup>15</sup> Rather, the operational principle in New Hampshire, as in some other original states, was legislative primacy over both executive and judicial organs.<sup>16</sup> The governor is held to a two-year term, lacks the line-item veto power most state governors enjoy, and must share appointive and budgetary powers with a separately elected executive council.<sup>17</sup> And the 1784 constitution made the judiciary subject for a century and a half to plenary legislative power to create or abolish all courts in the state.<sup>18</sup>

14. The other states are New Jersey, Massachusetts, and Rhode Island. In the latter, judges serve for life. See *Judicial Selection in the States*, NAT'L CTR. FOR ST. CTS., <http://www.judicialselection.us> (compiling comprehensive information on judicial selection processes in each of the fifty states and the District of Columbia).

15. While supportive of the separation of powers in principle, the framers of New Hampshire's constitution would be considerably less emphatic on the subject than their counterparts in Massachusetts, where the constitutional provision on separation of powers provides explicitly that each of the three branches must never exercise the powers of the other two, so that there would be "a government of laws and not of men." MASS. CONST. pt. 1, art. 30. New Hampshire's constitution offers vaguer language, however, providing that the powers of the three branches "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 unity and amity." N.H. CONST. pt. 1, art. 37. As twenty-three of the thirty-seven articles in part 1 of the New Hampshire Constitution are copied almost word for word from the 1780 Massachusetts Constitution, this contrast is especially notable. See Richard B. McNamara, *The Separation of Powers Principle and the Role of the Courts in New Hampshire*, 42 N.H.B.J. 66, 69 (2001).

16. Although article 37 calls for separation of powers, it must be read in the context of both tradition and other sections. Susan Marshall consequently notes that, despite the wording of article 35, "the executive and judicial branches were weak and subservient to the legislature." MARSHALL, *supra* note 8, at 19.

17. Biennial election of governors is specified in part 2, article 42 of the New Hampshire Constitution, while election of a five-person Executive Council is specified in part 2, article 60. N.H. CONST. pt. 2, arts. 42, 60. A discussion of the Executive Council's appointive and fiscal powers is available on the state government's website. *An Overview of the Executive Council*, ST. N.H. EXECUTIVE COUNCIL, <https://www.nh.gov/council/about-us/index.htm> (last visited Sept. 8, 2017). The governor of New Hampshire is one of only six state governors lacking line-item veto powers. The situation of each is considered by Thomas P. Lauth in *The Other Six: Governors Without the Line-Item Veto*, 36 PUB. BUDGETING & FIN. 26 (2016).

18. As initially approved in 1784, and before its amendment in 1966, the language of part 2, article 4 of the New Hampshire Constitution gave the legislature full power to

Legislative primacy over the judiciary was solidified by the constitutional means placed at legislators' disposal for removing individual judges. While the constitution authorized judges to serve so long as they behaved well, it also authorized legislators to decide when that standard had been breached, and amply armed them to take corrective action.<sup>19</sup> Regarding impeachment, New Hampshire's legislators have enjoyed notably more robust powers than the Federal Constitution would grant the nation's legislators. In New Hampshire, legislators are constitutionally empowered to impeach judges for "malpractice or maladministration"<sup>20</sup>—terms rejected as vague and open to political abuse by the framers meeting at Philadelphia in 1787. The New Hampshire Constitution also enables legislators to remove judges by "bill of address," a legislative petition to the executive triggered by sub-impeachment level offenses<sup>21</sup>—another measure eschewed at Philadelphia. Finally, New Hampshire's legislators, unlike the nation's, are not expressly obliged to secure a two-thirds majority vote for conviction at an actual impeachment trial.<sup>22</sup> Judges, fully insulated from direct political pressure by either voters or executive officers, remained quite vulnerable to removal by legislative action.

In the state's early history, the principle of legislative primacy over the judiciary extended to the daily dispensation of justice in state courts. New Hampshire's legislators chose to maintain the revolutionary tradition whereby the adjudication of particular cases was directly monitored, and often undone, by the legislature.<sup>23</sup> As in some other

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create and abolish all courts in the state. N.H. CONST. pt. 2, art. 4. Article 4 was copied from part 2, article 3 of the 1780 Massachusetts Constitution. Unlike New Hampshire, however, the prior existence of a court of last resort in Massachusetts, called the Supreme Judicial Court ("SJC") in the 1780 Constitution, has been consistently understood to mean that the SJC has constitutional status independent of any legislative power to create or abolish courts. See *Walton Lunch Co. v. Kearney*, 128 N.E. 429, 432 (Mass. 1920).

19. N.H. CONST. pt. 2, art. 73.

20. *Id.* art. 38.

21. See *id.* art. 73.

22. The New Hampshire Constitution designates the lower house of the legislature as the "grand inquest of the state," requires that "all impeachments made by them, shall be heard and tried by the senate," and distinguishes impeachment from normal civil or criminal actions by limiting the effect of a conviction to removal from office. *Id.* arts. 17, 38–39. It also allows for removal by address for a cause that is not a sufficient ground for impeachment. *Id.* art. 73. Article 73 was amended in 1966 to provide a prior due process opportunity to be heard as a condition of removal by address. *Id.*

23. In the pre-revolutionary period, New Hampshire's and other colonies' legislatures had strenuously resisted royal grants of chancery powers to governors and their councils. Equity, colonists argued, should be determined by peoples' assemblies, which claimed the same powers Parliament enjoyed vis-à-vis English courts, or even expanded ones. See MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 14–60 (Da Capo Press reprinted ed. 1971) (1943).

states, New Hampshire litigants dissatisfied by the judgment of regular courts could, and often did, invoke the legislature's constitutional "redress of grievances" function, whereupon the people's assembly might set aside court decisions and order a new trial or even announce a decision of its own.<sup>24</sup> This practice, labeled "restoration to law,"<sup>25</sup> reflected the general belief that trained lawyers were not necessarily the most reliable sources of justice, which could flow at least as easily from the common sense of the common man as from the circumlocutions of cagey professionals.<sup>26</sup> It followed that the powers of those professionals should be circumscribed as well, something that could be achieved by opening important roles in adjudicative processes to laymen. No one in early-republican New Hampshire—or in any other states at the time—thought it strange that some judgeships might be entrusted to non-lawyers or that juries might be empowered to rule not only on facts at issue but also on points of law.

Yet, New Hampshire judges did see to it that their own powers as law-trained professionals were extensive. Measures included expanding the power of judges, both in the courtroom (by, for example, bringing juries more firmly under their control) and in chambers (by, for example, establishing the precedential value of published judicial decisions, a deliberate move toward judge-made law).<sup>27</sup> The state's handful of courts had originally performed fluid, overlapping duties (e.g., resolution of both law and equity cases) but over time, a clearer division of labor would be established, with particular functions apportioned to a wider array of tribunals. The effect was movement toward a more "professionalized" administration of justice in New Hampshire, with as many aspects of adjudication and court practice as possible placed in the hands of appropriately trained legal personnel. Further, judges did establish formal powers of judicial review very early in the republican period

24. McNamara, *supra* note 15, at 67 (citing Richard F. Upton, Separation of Powers in New Hampshire (1938) (unpublished J.D. thesis, Harvard Law School)). Historian John Reid submits that the democratized or "common-sense" justice thus delivered was often "unequal, crude, uncertain and often unfair, for partisan and corrupt interests sometimes entered into judgments." John Reid, *From Common Sense to Common Law to Charles Doe: The Evolution of Pleading in New Hampshire*, 1 N.H.B.J. 27, 30 (1959); see also JOHN PHILLIP REID, *CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE* 18–32 (2004).

25. See JOHN PHILLIP REID, *LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE* 65 (2008).

26. *Id.*; see also Timothy A. Lawrie, Note, *Interpretation and Authority: Separation of Powers and the Judiciary's Battle for Independence in New Hampshire, 1786–1818*, 39 AM. J. LEGAL HIST. 310, 310 (1995), reprinted in 46 N.H.B.J. 34 (2006).

27. JOHN PHILLIP REID, *LEGITIMATING THE LAW: THE STRUGGLE FOR JUDICIAL COMPETENCY IN EARLY NATIONAL NEW HAMPSHIRE* (2012).

through the *Ten Pound Act* cases (1786–1787),<sup>28</sup> in which lower court judges' insistence that jurists, rather than legislators, had the final word on constitutional interpretation carried the day, despite serious legislative resistance. Then, in *Merrill v. Sherburne*, judges exercised that power by declaring "restoration to law" unconstitutional *in toto*.<sup>29</sup>

Over the course of the nineteenth century, however, judicial review would be deployed with great caution and rarely used to block legislators' policy choices. There were more frequent judicial rebuffs in the post-Civil War era as state governments addressed the socio-economic implications of industrialization—most of which involved rulings on the taxing capacities of the state or separation of powers.<sup>30</sup> Yet, the great majority of decisions affirmed the constitutionality of statutes, as Table 1 *infra* shows. In fact, none of those decisions advanced the scope of judicial review much beyond the rather qualified bounds set by *Merrill*. Of all the New Hampshire cases on the constitutionality of legislative action in the entire nineteenth century, only about one-fifth held legislation unconstitutional.

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28. In 1785, the legislature empowered local justices of the peace to adjudicate debt or trespass claims under ten pounds where title to land was not involved. This would be an economical way for debtors to defend themselves from creditors' claims, as bench trials before local justices cost less than jury trials in distant courts, with court costs assessed against the losers. The Inferior Court of Common Pleas of Rockingham County, however, repeatedly rejected the law as a violation of litigants' constitutional right to a jury trial in civil cases. Some legislators threatened impeachment, but the judges held their ground and in the end had enough defenders in the legislature to prevail. See Richard M. Lambert, *The 'Ten Pound Act' Cases and the Origins of Judicial Review in New Hampshire*, 43 N.H.B.J. 37, 37–50 (2002); Lawrie, *supra* note 26, at 325–31.

29. 1 N.H. 199 (1818). In *Merrill v. Sherburne*, the court held that a legislative grant of a new trial, after reviewing a matter decided in a court, was unconstitutional as both a judicial action by the legislature and a retrospective application of the law to vested rights in a civil case. *Id.* at 217; see also Lawrie, *supra* note 26, at 331 (interpreting the judicial authority Justice Woodbury asserted as "less 'supreme' than balanced between extremes," claiming independence for the judicial branch but not denying concurrent powers of constitutional interpretation still claimed by the legislature).

30. On the taxing power of the state, the court in *State v. Express Co.*, 60 N.H. 219 (1880), and *Curry v. Spencer*, 61 N.H. 624 (1882), found statutes unconstitutional because they imposed taxes that were not proportional and reasonable. On separation of powers, the court in *Concord Railroad v. Greely*, 17 N.H. 47 (1845), found that the interpretation of the Bill of Rights and the constitutional validity of legislative action were matters for judicial decision. And in *Deming v. Foster*, 42 N.H. 165, 178–79 (1860), the court found that court rules would be subordinate to an act of the legislature within its constitutional powers, but that the courts had inherent authority to make rules of practice and procedure "as justice may require."

**Table 1:<sup>31</sup> Percent of New Hampshire Cases with Legislation Found Unconstitutional, 1817–1900**

| <b>Time Period</b>  | <b>Total Judicial Review Cases</b> | <b>Legislation Found Un-constitutional</b> | <b>Percent Uncon-stitutional</b> |
|---------------------|------------------------------------|--|----------------------------------|
| <b>1817-1865</b>    | <b>19</b>                          | <b>1</b>                                   | <b>5.3%</b>                      |
| <b>1866-1900</b>    | <b>55</b>                          | <b>15</b>                                  | <b>27.3%</b>                     |
| <b>19th Century</b> | <b>74</b>                          | <b>16</b>                                  | <b>21.6%</b>                     |

If the overall trajectory of nineteenth century legislative-judicial relations is considered, legislators' apparent contentment with the status quo is easy enough to understand: the primacy of the legislature in those relations was never seriously questioned. In fact, it was emphatically confirmed by the repeated exercise of legislators' constitutional power to make and unmake courts at will; no fewer than five such "court clearings," in which sitting judges were summarily dismissed and new ones appointed, occurred between 1813 and 1876.<sup>32</sup> The rationale behind these actions was partisan politics rather than antipathy to a particular court or judge, but that hardly diminished the brute fact of courts' ongoing, institutional vulnerability. Nor could individual judges be unaware of the uncertainty of their own tenure. While there had been no attempt to formally impeach a judge since 1790, no fewer than sixty-five were removed by means of legislative address before the turn of the twentieth century.<sup>33</sup>

In sum, what had emerged by the turn of the twentieth century was a *modus vivendi* by which the judicial branch was basically permitted to manage its own internal operations, while legislative enactments were for the most part confirmed and the legislature's institutional control of the judicial branch was accepted.

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31. This table reflects data taken from a case-by-case analysis, on file with the author, of seventy-four reported New Hampshire judicial review cases decided between 1817 and 1900.

32. MARSHALL, *supra* note 8, at 198.

33. *Id.* at 199. In 1790, the state House of Representatives voted to impeach Judge Woodbury Langdon, but he resigned before trial. Richard F. Upton, *The Independence of the Judiciary in New Hampshire*, 1 N.H.B.J. 28, 29 (1959). In 1795, an attempt to impeach Judge Thomas Pickering was thwarted when President Washington appointed him to the U.S. District Court for the District of New Hampshire, after which he then became the first federal official to be impeached and removed from office. The historical incidence of bills of address in New Hampshire is discussed in ROBERT B. DISHMAN, *A NEW CONSTITUTION FOR NEW HAMPSHIRE?* 68 (1956), and in MARSHALL, *supra* note 8, at 199.

*B. Modernizing State Government in New Hampshire*

That arrangement would unravel in the modern era, however. At the inception of the twentieth century, leaders of each of New Hampshire's two major political parties concluded that the practice of projecting partisan combat into the organization of the judiciary via court clearings should end. The inevitable retaliatory action obviated whatever small partisan gains had been achieved, and a periodically upended judiciary seemed to serve no one's longer-term interests. Efforts to preclude such actions by constitutional amendment proved fruitless, however, so party leaders decided that an informal understanding would have to do. The result was a kind of "gentlemen's agreement"<sup>34</sup> regarding the composition of at least the state's two highest courts, whereby each bench would contain representatives of both parties with the party in power retaining only a bare overall majority.<sup>35</sup>

In one sense, the arrangement worked quite well. The period from roughly 1901 to 1966 was one of notable calm, with no court clearings and nearly no removals by address. Yet the "gentlemen's agreement" would have unintended, and ultimately destabilizing, consequences. For in replacing disruptive but occasional judicial removals with orderly but ongoing and rather overt politicization, it helped open New Hampshire to the attentions of reformers concerned with attacking precisely such intrusions of political considerations into the administration of state-level justice. The antidote reformers proposed was full judicial independence from political influence. Their success in promoting that cause would eventually detach the state's judicial branch from the legislature, specifically from its original constitutional moorings.

The reform movement's seeds were planted by Roscoe Pound and the American Judicature Society, an organization he founded to ameliorate the "uncertainty, delay and expense" that had discouraged citizens from using state courts by granting jurists themselves more power to rationalize and standardize court procedures (via, for example, judicial councils).<sup>36</sup> By the 1930s, through the leadership of New Jersey Supreme Court Chief Justice Arthur Vanderbilt, a burgeoning "judicial

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34. McNamara, *supra* note 15, at 77; Upton, *supra* note 33, at 35. Upton cites William H. Sawyer, a former Chief Justice of the New Hampshire Superior Court, as his own source on this point. Upton, *supra* note 33, at 35.

35. Upton, *supra* note 33, at 35.

36. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 AM. B. ASS'N REP. 395 (1906), reprinted in 35 FED. RULES DECISIONS 273 (1964); see also DAVID C. STEELMAN, JOHN A. GOERDT & JAMES E. McMILLAN, CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM, at xi-xiii (2004 reprint) (2000).

modernization" movement was promoting a broader agenda.<sup>37</sup> It included fully unified court systems, the transfer of administrative and financial control over trial courts from county and municipal governments to state-level judicial leaders, and the strengthening of educational and disciplinary bodies directed by trained judges rather than laymen.<sup>38</sup> The overall aim was to gradually depoliticize justice throughout the state by expanding the locus of legal professionals applying legal reasoning and minimizing that of elected officials with political agendas.<sup>39</sup>

Not surprisingly, this was a movement with considerable appeal to elements within the New Hampshire judiciary, given the historic efforts made there to broaden judicial control of judicial affairs. In the second half of the twentieth century, the movement began securing significant victories. One was the supreme court's creation of a Judicial Conduct Committee (JCC), modeled after California's, where complaints about judicial behavior could be assessed by a body of judges and attorneys.<sup>40</sup> But how far a movement hoping to fully de-politicize state courts could go without challenging the power that New Hampshire's state legislature held over the judicial branch was not clear. Within the state, reformers understood that to succeed they would eventually have to address the constitutional provisions on which that power was based.<sup>41</sup>

By the 1960s, an important priority for judicial modernizers was ending New Hampshire's unique situation as the only state in the nation not providing explicit constitutional status for its highest court, so that its very existence would no longer depend on continued legislative forbearance. At the Constitutional Convention of 1964, delegates endorsed a proposed amendment that would constitutionalize both New Hampshire's supreme and superior courts, if approved by voters in the

37. See G. Alan Tarr, *Arthur T. Vanderbilt: A Retrospective*, RUTGERS U. CTR. FOR ST. CONST. STUD., [statecon.camden.rutgers.edu/sites/statecon/files/publications/vandy2.pdf](http://statecon.camden.rutgers.edu/sites/statecon/files/publications/vandy2.pdf) (last visited Sept. 8, 2017).

38. These and other proposals were advanced by reformers associated with the Institute of Judicial Administration at New York University School of Law, which Vanderbilt founded to promote the movement. *Institute of Judicial Administration: About Us*, N.Y.U., <http://www.law.nyu.edu/centers/judicial/aboutus> (last visited Sept. 8, 2017).

39. See, e.g., ARTHUR T. VANDERBILT, *JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS, AND SELECTION* (1956); ARTHUR T. VANDERBILT, *THE CHALLENGE OF LAW REFORM* (1955); ARTHUR T. VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT DAY SIGNIFICANCE* (1953).

40. The supreme court's JCC was first created in 1977. *History of the Judicial Conduct Committee*, N.H. JUD. BRANCH, <http://www.courts.state.nh.us/committees/judconductcomm/overview.htm> (last visited Aug. 25, 2017).

41. See DISHMAN, *supra* note 33 (calling for a more clearly independent state judiciary); see also Upton, *supra* note 33 (echoing that same call). Both authors urged constitutional status be granted to the supreme and superior courts.

next general election.<sup>42</sup> They also endorsed a proposed change to the constitutional language on bills of address, by which subjects of such actions would be granted a hearing before a joint committee of both legislative chambers.<sup>43</sup> Voters approved both proposals in 1966, giving New Hampshire the first constitutional courts in its history and providing due process protections for judges and other civil officers against politically-motivated bills of address. These were remarkable developments, rendering the New Hampshire courts and their judges more independent than they had ever been.

Modernizers claimed another significant victory in 1968 when a supreme court ruling established a unified bar under its own supervision.<sup>44</sup> One of the ruling's effects was to gradually close out the era of non-lawyer judges, many of whom still sat on municipal courts—another step toward fuller professionalization of the judiciary. The route to full court unification had to be statutory, and this too was finally achieved in 1971.<sup>45</sup> To render these advances permanent, reformers turned their eyes once again to the state constitution, and they would emerge from the 1974 Constitutional Convention with yet another victory. But this one would prove somewhat pyrrhic.

Modernizers had long believed that their program could not be complete until the actual administration of a unified judiciary was in the hands solely of judicial leaders.<sup>46</sup> At the 1974 Convention, that viewpoint

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42. The state constitution would be amended to include a new provision, article 72-a, stipulating that “[t]he judicial power of the state shall be vested in the supreme court, a trial court of general jurisdiction known as the superior court, and such lower courts as the legislature may establish under Article 4th of Part 2.” N.H. CONST. pt. 2, art. 72-a.

43. *Id.* art. 73. Part 2, article 73 would be amended to stipulate that:  
the cause for removal shall be stated fully and substantially in the address and shall not be a cause which is a sufficient ground for impeachment, and provided further that no officer shall be so removed unless he shall have had an opportunity to be heard in his defense by a joint committee of both houses.

*Id.*

44. *In re Unification of N.H. Bar*, 248 A.2d 709, 715 (N.H. 1968).

45. In 1968, Governor John King (who would later serve as chief justice of the state's supreme court) appointed a commission to study the court system, and in 1971 the state legislature decided to “improve the administration of justice and the efficient operation of all courts” by statutorily authorizing the fully unified court system reformers had long sought. See *A Brief History of the New Hampshire Court System*, N.H. JUD. BRANCH, [https://www.courts.state.nh.us/student/Court\\_System\\_history.pdf](https://www.courts.state.nh.us/student/Court_System_history.pdf) (last visited Sept. 8, 2017).

46. New Hampshire's modernizers took their cue on this from Chief Justice Vanderbilt's controversial opinion in *Winberry v. Salisbury*, 74 A.2d 406 (N.J. 1950), in which he wrote that the New Jersey Supreme Court's authority over court rules, while subject to law, was not subject to *statutory* law. Benjamin Kaplan and Warren J. Greene provided a thoughtful critique of that decision in *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951).

was instantiated in a proposal to insert a new article into the constitution by which the chief justice of the supreme court would become the administrative head of the entire court system, empowered to set, with the concurrence of a majority of the court, practice and procedure for all its component bodies.<sup>47</sup> The last sentence of the proposed amendment stipulated that “[t]he rules so promulgated shall have the force of law,” which sparked questions about whether the amendment, if adopted, would deprive the legislature of its longstanding powers to regulate court procedures by statute. Delegates were assured that legislators would not lose any powers they currently had.<sup>48</sup>

Voters’ approval of that resolution in 1978 appeared to cap over a decade of success for the judicial-modernization movement in New Hampshire, all the more remarkable for having been achieved in a state with a historic commitment to legislative oversight of the unelected branch of government. But there were parallel developments that, in hindsight, portended trouble ahead. For what was perhaps most notable about the modernization of the judiciary between 1966 and 1978 was that it had occurred precisely while voters were emphatically *rejecting* efforts to similarly modernize and professionalize the executive and legislative branches of government.

By the last third of the twentieth century, New Hampshire was one of only two states where governors served two-year rather than four-year terms, one of only two states where governors shared executive authority with an elected executive council, and one of only six states where governors lacked line-item veto powers.<sup>49</sup> Modernizers had set their sights on bringing New Hampshire closer to national norms in each area, and they seemed to have reasonable expectations of success: a 1963 constitutional study committee of the state legislature did recommend

47. See N.H. CONSTITUTIONAL CONVENTION, JOURNAL OF THE CONVENTION TO REVISE THE CONSTITUTION 261 (1974).

48. Delegate Martin Gross queried Delegate Arthur Nighswander, a member of the committee that drafted the resolution’s language: “Is my understanding correct that this amendment, if adopted, would not deprive the Legislature of its right that it presently has, to regulate court procedure by statute?” Nighswander replied: “I would think any power they now have, they would still have.” *Id.* at 261–62.

49. The only other state that has two-year gubernatorial terms is Vermont. ROBERT MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES xxvi–xxx (2d ed. 2006). The only other state with an elected executive council sharing executive responsibilities is Massachusetts, although the latter’s council has much less involvement in gubernatorial decisions. See THE EXECUTIVE BRANCH OF STATE POLITICS: PEOPLE, PROCESS, AND POLITICS 303–04, 333–34 (Margaret R. Ferguson ed. 2006). The other states where governors lack a line-item veto are Indiana, Nevada, North Carolina, Rhode Island, and Vermont. MADDEX, *supra*, at xxvi–xxx.

such changes, the thrust of which were endorsed by the Constitutional Convention of 1964.<sup>50</sup>

But as general inclinations gave way to specific proposals, modernizers' optimism proved ill-founded. Proposals to actually extend the governor's term to four years have been rejected seven times by delegates to constitutional conventions since 1956, twice (1971 and 1980) by voters on ballot questions submitted by the legislature, and nine times by legislators themselves, most recently in 2015.<sup>51</sup>

Voters and elected representatives proved similarly recalcitrant on efforts to modernize their legislative branch. Here, too, what reformers aimed for was what a national body, the Citizens Conference on State Legislatures, called "state legislative professionalism."<sup>52</sup> In 1971, that organization ranked all state legislatures on a scale of professionalism and effectiveness measured by such factors as staffing levels, compensation, committee structure, facilities, size, and ethics. New Hampshire's legislature ranked an unimpressive thirty-ninth.<sup>53</sup> In fact, the 1963 constitutional study committee had recommended measures to address those deficits. These had included increasing the size of the Senate while reducing that of the House, increasing legislators' pay from

50. Voters themselves approved that thrust by affirming a ballot question that the 1964 Convention produced on the general subject. The full wording of Resolution 58 read:

Are you in favor of amending the Constitution to clarify and reinforce the executive powers of the governor by providing that he shall be vested with the executive power, shall be responsible for faithful execution of the laws and may by appropriate legal action enforce constitutional and legislative mandates within the executive branch?

RINDEN & LYMAN, *supra* note 13, at 61; *see also* Op. of the Justices (Requiring Attorney Gen. to Join Lawsuit), 27 A.3d 859, 867–68 (N.H. 2011).

In November 1966, seventy percent of New Hampshire voters would approve that language. As Susan Marshall writes, this amendment was intended to strengthen the executive power and responsibility, which must nonetheless "be exercised within the dictates of the constitution and the lawful enactments of the legislative branch." MARSHALL, *supra* note 8, at 171.

51. N.H. DEP'T OF STATE, STATE OF NEW HAMPSHIRE MANUAL FOR THE GENERAL COURT 1985, at 444–45 (1985); N.H. CONSTITUTIONAL CONVENTION, CONVENTION TO REVISE THE CONSTITUTION, MAY 1984 (1984); H. JOURNAL, 151-6, 1987 Sess., at 126–27 (N.H. 1987); H. JOURNAL, 150-3, 1986 Sess., at 114–15 (N.H. 1986); H. JOURNAL, 149-11, 1985 Sess., at 175 (N.H. 1985); H. JOURNAL, 148-6, 1983 Sess., at 43–44 (N.H. 1983); *Advanced Bill Status Search*, *supra* note 13.

52. Christopher Z. Mooney, *Measuring State Legislative Professionalism*, 26 ST. & LOC. GOV'T REV. 70, 70–71 (1994). On attempts to professionalize state legislatures, *see* PEVERILL SQUIRE, THE EVOLUTION OF AMERICAN LEGISLATURES: COLONIES, TERRITORIES, AND STATES, 1619–2009, at 266–316 (2012); JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 161–62 (2002).

53. THE CITIZENS CONFERENCE ON STATE LEGISLATURES, THE SOMETIME GOVERNMENTS: A CRITICAL STUDY OF THE 50 AMERICAN STATE LEGISLATURES 40–42, 51–53 (1973).

the level set in 1889, and giving the legislature new authority to enact different classes and types of taxes.<sup>54</sup>

But New Hampshire's voters have decided, repeatedly, that they simply do not want to replace their traditional "citizen" legislature with a more fully "professionalized" one. The size of the House of Representatives was fixed at an unwieldy 375–400 in 1942.<sup>55</sup> Since that date, constitutional amendments to reduce it have been rejected thirty-five times by delegates at constitutional conventions, eight times by voters on ballot questions, and eleven times by legislators themselves.<sup>56</sup> The size of the Senate was also set in 1877.<sup>57</sup> Since then, delegates to state constitutional conventions have voted down twenty resolutions to increase it. In the three instances where convention delegates did endorse such resolutions—in 1912, 1964, and 1974—voters rejected them.<sup>58</sup> Legislators in regular session have rejected five such proposals themselves.<sup>59</sup> Proposals to improve legislative compensation have been rejected thirty-five times at constitutional conventions, four times on ballot questions, and thirty-six times in legislative sessions.<sup>60</sup> Proposals to hold annual rather than biannual legislative sessions have met similar fates.<sup>61</sup>

By the latter third of the twentieth century, then, New Hampshire state government had undergone an oddly schizophrenic transformation. Within the judiciary, the longstanding civic norm of legislative control of the judicial branch had been eclipsed, thanks to local spokesmen of a national movement to de-politicize the administration of state-level justice. But at the same time, attempts to similarly modernize the legislative and executive branches were rejected resoundingly and consistently, in vigorous confirmation of the state's

54. *A Modern Constitution for New Hampshire: A Summary of the Report of the Commission to Study the State Constitution*, 6 N.H.B.J. 208 (1964).

55. In 1877, a constitutional amendment basing representation in the House of Representatives on population was adopted. In 1942, a resolution adopted at the second session of the 1938 constitutional convention fixing the number of representatives between 375 and 400 was adopted. See RINDEN & LYMAN, *supra* note 13, at 15.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Thomas Little and David Ogle, two authors who conducted a recent comparison of state legislatures, concluded "[t]he New Hampshire General Court is considered one of the least professional legislatures in the country, with its low salary and limited staffing . . . . New Hampshire's state legislators must be considered perhaps the closest thing to pure citizen legislators that can be found in the United States." THOMAS H. LITTLE & DAVID B. OGLE, *THE LEGISLATIVE BRANCH OF STATE GOVERNMENT: PEOPLE, PROCESS, AND POLITICS* 347 (Alicia Merritt, Ellen Rasmussen & Martha Ripley Gray, eds., 2006).

civic populism. The unelected branch had been granted a wider degree of autonomy, while the elected ones were, if anything, even more closely attuned to the *vox populi* than they had ever been. In retrospect, it is clear that this was a formula for conflict.

C. *The Gathering Storm: Administrative Conflicts and the Fairbanks Scandal*

In 1983, New Hampshire, like most states that had opted for court unification, moved to state-level funding for its newly-consolidated judiciary. Courts' budgets would no longer be left to the towns and municipalities that had long held that responsibility. Now, legislators in a famously frugal state would be required to allot moneys to a body that was suddenly far less answerable to them than it had ever been.<sup>62</sup>

Perhaps adding to those legislators' unease, as Table 2 *infra* shows, the percentage of cases in which the New Hampshire Supreme Court found legislation unconstitutional increased dramatically between 1967 and 2000. In light of all this, it was perhaps not surprising that by the 1980s, the "gentlemen's agreement"—by which, apart from initial appointments, New Hampshire's courts had been spared the close attention of elected officials—had ended.

Table 2:<sup>63</sup> New Hampshire Judicial Review Outcomes, 1967–2000, Compared to Outcomes in 1817–1966

| Time Period | Total Judicial Review Cases | Legislation Found Un-constitutional | Percent Uncon-stitutional |
|-------------|-----------------------------|-------------------------------------|---------------------------|
| 1817-1900   | 74                          | 16                                  | 21.6%                     |
| 1901-1966   | 108                         | 17                                  | 15.7%                     |
| 1967-2000   | 69                          | 31                                  | 44.9%                     |

62. Jeffrey W. Leiding, *The Move Toward State Financing: A New Hampshire Approach*, 7 JUST. SYS. J. 103, 103–08 (1982). New Hampshire was the last state in the nation to have a state court administrator. DAVID C. STEELMAN & ANNE E. SKOVE, NAT'L CTR. FOR STATE COURTS., CREATION OF STATE COURT ADMINISTRATIVE OFFICES AND SELECTION OF STATE COURT ADMINISTRATORS 7 (2007), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/734>.

63. This table reflects data taken from a case-by-case analysis, on file with the authors, of 251 reported New Hampshire judicial review cases, decided between 1817–1900 and 1901–2000.

A set of controversies first fixed those officials' attentions on the extent to which expansion of the supreme court's new administrative powers over the judiciary came at the expense of any sort of statutory oversight. One significant test came in *State v. LaFrance*, which was prompted by a superior court judge's enforcement of a court policy barring police officers from wearing their firearms in court.<sup>64</sup> The legislature attempted to override the policy by statute, but the supreme court in *LaFrance* declared the statute an unconstitutional infringement of the judiciary's right to control court practices, established by constitutional amendment in 1978.<sup>65</sup> Reaction to the case—and to the New Hampshire Bar Association's apparent willingness to close ranks around the supreme court on the issue—was swift and strong: delegates to the 1984 constitutional convention considered resolutions calling for the election of judges, the dissolution of the unified bar, and especially for constitutional language explicitly qualifying the "force of law" now given to rules promulgated by the supreme court.<sup>66</sup> None of the measures secured endorsement from the required two-thirds of delegates. But the last, which would have amended the language of 1978's article 73-a to make supreme court rules "effective only when not inconsistent with statute," came close, at sixty percent.<sup>67</sup> Supporters hoped that would at least warn the justices that legislators were not prepared to relinquish all input into the operations of the state's courts. In fact, the measure's sponsor specifically warned that the court would "bear the political cost" if that warning went unheeded.<sup>68</sup>

A more significant dispute over control of court procedures involved the rules of evidence, and this time it would be the champions of legislative prerogatives who could claim affiliation with developments on the national level. In 1994, the U.S. Congress amended the Federal Rules of Evidence so that evidence of prior sexual offenses by a

64. 471 A.2d 340, 341–42, 346 (N.H. 1983).

65. *Id.* at 346–47.

66. *Id.* Fourteen past presidents of the N.H. Bar Association joined in the filing of an *amicus* brief on the *LaFrance* case, endorsing the court's position. See William F. Batchelder, *The Independence of the Judiciary in New Hampshire Revisited*, 39 N.H.B.J. 62, 66 (1998). Delegates' proposals at the 1984 constitutional convention are found in N.H. CONSTITUTIONAL CONVENTION, *supra* note 51.

67. Resolution 100, by which sponsors hoped to expand legislators' role in setting court rules, did secure the support of a clear majority on the constitutional convention's Committee on Judicial Power. The resolution, including efforts to amend it so that legislators could override court-set rules with a simple majority rather than the two-thirds supermajority originally proposed, entailed considerable debate among delegates. That debate and the final vote are available in N.H. CONSTITUTIONAL CONVENTION, *supra* note 51, at 235–49.

68. *Id.*

defendant accused of sexual assault or child molestation would be admissible in the current trial “on any matter to which it is relevant.”<sup>69</sup> The change was intended to help prosecutors secure convictions in cases where victims, fearing retaliation in light of the defendant’s history, often withdrew or withheld testimony. It enjoyed a measure of support among law enforcement officials in New Hampshire, and legislators prepared a similar action for the state. Since New Hampshire is one of a handful of states where legislators can request advisory opinions from the justices of their state supreme court on the constitutionality of proposed legislation, in 1996 that protocol was invoked.<sup>70</sup>

But the advice that the justices gave in 1997, known as the *Prior Sexual Assault Evidence* (“PSAE”) opinion,<sup>71</sup> distressed not only supporters of the bill in question, but also a large body of legislators concerned about the broader arc of legislative-judicial relations. The justices reminded legislators that in 1985 the court had adopted evidentiary standards specifically ruling out evidence on criminal propensity and indicated that, since the proposed statute would run afoul of the court’s own, newly-constitutionalized rule-making authority, it would likely violate the separation of powers.<sup>72</sup> What troubled some legislators was the distinction the justices drew between “substantive” laws, which were unquestionably the domain of the legislature, and “procedural” rules, which the court claimed for itself alone.<sup>73</sup> The problem, to PSAE’s critics, was that the determination of what actually constituted a “procedural” matter in the first instance would now have to lie fully and exclusively with the court. The future role of the legislature on questions once understood to lie fully or at least partially within its bailiwick (e.g., mandatory sentences) seemed far less clear than it had been.

By the time of the PSAE opinion, in fact, some legislators were thinking darker thoughts not only about the reach of the supreme court’s administrative powers, but about its capacity to responsibly exercise the

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69. Congress rejected the recommendation from the Federal Judicial Conference and the U.S. Supreme Court that it reconsider and retract the proposed rule change. The judiciary’s concern was that the proposal broke with the common law tradition by which the overall character of a defendant or evidence suggesting a propensity to crime is generally excluded from consideration in court. FED. R. EVID. 413; *see also* Penny J. White, *The Continuing Evolution of the Federal Rules of Evidence, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* (Gordon M. Griller & E. Keith Stott, Jr., eds., 2002).

70. *See* Op. of the Justices (Prior Sexual Assault Evidence), 688 A.2d 1006, 1007 (N.H. 1997).

71. *Id.*

72. *See* Danielle Matton, *An Examination of Federal Rules of Evidence 413, 414, and 415 and the Adoption of These Rules by the States*, 41 N.H.B.J. 28 (2000).

73. McNamara, *supra* note 15, at 81–82.

privilege it had recently secured of governing and monitoring the judicial branch as a whole. What brought these fears to the surface was the "Fairbanks scandal," which seemed to represent an egregious failure by the judiciary's internal ethical watchdogs.

Probate attorney John Fairbanks had served thirty-three years as a part-time district court judge before disappearing on December 29, 1989. The previous day, he had been indicted by a grand jury for embezzling \$1.8 million from probate clients. Somehow, he would manage to evade the law until found dead in a Las Vegas hotel in March 1994.<sup>74</sup>

Complaints about Fairbanks's work as a fiduciary extended back to the 1970s and persisted into the 1980s. They were duly filed with the Professional Conduct Committee (PCC), which was established in 1975 under supreme court supervision to oversee the conduct of attorneys, and even with the Sullivan County Attorney's office. Neither, however, took more than nominal action.<sup>75</sup> The JCC was similarly ineffective when complaints were brought to it about Fairbanks's conduct as a district judge. Claims of disparate sentencing and indefensible delays had been brought there since 1982; there were even suspicions of sexual predation.<sup>76</sup> But the JCC had never felt it had grounds to give Fairbanks more than a private reprimand.

Officialdom finally began to bestir itself in 1985, when a set of aggrieved clients of Fairbanks invoked the assistance of Rep. Peter

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74. Paula Monopoli has provided a fine overview of the basic facts of the Fairbanks matter, and the state's response to them. See PAULA MONOPOLI, *AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS* 25 (1993). The Fairbanks affair attracted both local and national media coverage. For examples of the former, see Royal Ford, *Scandalous Judge's Legacy Won't Die; Rural N.H. Town Reels from Tale of Disorder in the Court*, BOS. GLOBE, Sept. 18, 1997, at B1; Paul Montgomery, *Small-Town Scandal Still Casts a Long, Dark Shadow*, N.H. MAG., July 1999, at 8. For an example of national coverage, see Frank Baker, *After 3 Years, Search Continues for Judge Accused of Theft From Clients*, L.A. TIMES, Jan. 17, 1993, at A4, [http://articles.latimes.com/1993-01-17/news/mn-2072\\_1\\_john-fairbanks](http://articles.latimes.com/1993-01-17/news/mn-2072_1_john-fairbanks).

75. In 1976, Ms. Diane Trudeau complained to the PCC that Fairbanks was pillaging her father's estate. But the PCC, which then included Fairbanks as a member, concluded that he had done nothing wrong. In 1987, complaints by Mrs. Prentice Coonley-Demers, involving Fairbanks's management of her mother's estate, did lead the PCC to remove him as guardian; but the matter was ended with no further consequences when he paid a settlement of \$41,000. MONOPOLI, *supra* note 74, 4-5. In 1988, John H. Tweedy brought to both the PCC and the District Attorney's office allegations about Fairbanks's management of a trust fund for Tweedy's mentally disabled brother. His complaint elicited no more substantive responses than prior ones against Fairbanks had. Tweedy, however, would prove unwilling to let the matter drop. See Roger Talbot, *Fairbanks Case Prober Puzzles, then Startles, NH Lawmakers*, MANCHESTER UNION LEADER (Nov. 14, 1996), <http://www.gnbtaxpayers.com/FAIRBANKS,%20JOHN,%20JUDGE%20-%20SCANDAL%20&%20COVER-UP.pdf> (page 5 of the PDF).

76. See Royal Ford, *supra* note 74, at B1.

Burling.<sup>77</sup> A full investigation of both Fairbanks and the probate court by the PCC would finally be initiated as a result. By the end of 1989, when Fairbanks fled, creditors and victims had filed claims amounting to some \$6 million against him in U.S. bankruptcy court.

The scandal, however, was already reaching well beyond the misdeeds of John Fairbanks. By 1990, when the JCC charged probate court Judge Harry Spanos with misconduct for failing to properly monitor Fairbanks's activities, New Hampshire citizens and their representatives had serious concerns that the Fairbanks case was just "the tip of the iceberg."<sup>78</sup> Those concerns would be reinforced by the PCC's report, which implicated wider circles of the legal community in unprofessional, unethical, and even illegal behavior. The supreme court attempted to calm the waters by designating a statewide probate administrative judge responsible for bringing accountability and uniformity to the probate courts. But by that time, questions about whether the court system itself could be trusted to clean up the rot were rife.

What seemed most distressing was the difficulty of acquiring information from the court's internal ethical monitors about what had actually happened. Both the PCC and the JCC insisted on protecting the confidentiality of materials collected during their own inquiries, which critics saw as a means of shielding the legal community from proper public scrutiny and accountability.<sup>79</sup> In 1996, state legislators authorized a joint legislative committee to assess the investigation of

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77. Those clients included the children of client Helen Meding, who would complain not only about Fairbanks, but about the unresponsiveness of the Sullivan County Probate Court and the Dartmouth National Bank's willingness to deliver estate funds to him despite his failure to meet the deadline for inventorying the estate's assets. John Tweedy's continuing complaints would be merged with those of the Meding offspring. See *MONOPOLI*, *supra* note 74, at 5–7.

78. As quoted in a magazine article, New Hampshire Sen. Eleanor Podles observed that "[p]eople are doing crazy things with their money now (out of distrust for their lawyers). . . . [T]he Fairbanks case 'is just the tip of the iceberg. There's a lot more to this.'" Jeff Feingold, *A Legal Black Eye*, *SPECTATOR*, Sept. 1990, at 11, 11, (appearing in N.H. Senate, Legislative Documents Relating to SB 513 (1996 Session), N.H. GEN. CT., at 37, [http://gencourt.state.nh.us/SofS\\_Archives/1996/senate/SB513S.pdf](http://gencourt.state.nh.us/SofS_Archives/1996/senate/SB513S.pdf) (last visited Aug. 29, 2017)).

79. Representative Burling went so far as to file a petition with the supreme court asking it "to release for public inspection any and all professional conduct files as may be in existence regarding the late John Fairbanks, whether held by the Court or by the Professional Conduct Committee." *In re Burling*, 651 A.2d 940, 941 (N.H. 1994). The court acknowledged that it could in certain circumstances override its own administrative rule on the confidentiality of disciplinary committees' investigations, and conceded the gravity of the Fairbanks matter. *Id.* at 943 (citing N.H. SUP. CT. R. 37(17)). But it denied Burling's petition nonetheless. *Id.*

Fairbanks by the PCC, JCC, and Attorney General's office—essentially, an investigation of prior investigations. In the course of its work, this “Fairbanks I Committee” called for testimony from Chief Justice David Brock.

Brock defended the confidentiality policies of the PCC and the JCC, which he explained were necessary in cases where potentially libelous accusations had been made but were not yet proven. Above all, Brock argued, the Fairbanks scandal was attributable to remaining gaps in the professionalization of the New Hampshire judiciary. His recommendations included ending all part-time judgeships, and replacing elected registers of probate with administratively-trained judicial appointees, if necessary by constitutional provision.<sup>80</sup>

But there was an alternative explanation, inferable from the testimony of Governor and former Attorney General Steve Merrill: that the professionalization of the judicial branch had already gone much too far.<sup>81</sup> What it all amounted to, Merrill suggested, was actually the removal of judges and lawyers from public accountability, and the results were now before the state.<sup>82</sup> The “professionals” who knew or should have known about Fairbanks's conduct had not only failed in their duty but engaged in a conspiracy of silence by which law enforcement had been stymied.<sup>83</sup>

The Fairbanks I Committee held several government agencies responsible for “a systematic failure of government to do its basic duty of protecting citizens from itself.”<sup>84</sup> But that hardly satisfied legislators convinced that the full scale of judicial corruption had not yet been revealed, or proper correctives adopted. Two more investigating committees, Fairbanks II and III, would be authorized to pursue the matter further, each with additional investigatory tools (full subpoena power for Fairbanks II; that, and a private investigator for Fairbanks

80. Brock's recommendation to replace elected registers of probate with trained and appointed ones referred to the Sullivan County Register, who had been returned to office by voters for forty years, and whose arguably inept record-keeping had made it practically impossible to track or document Fairbanks's embezzlement. See N.H. House of Representatives, Legislative Documents Relating to HB 1593-FN (1996 Session), N.H. GEN. CT., at 13, [http://gencourt.state.nh.us/SofS\\_Archives/1996/house/HB1593H.pdf](http://gencourt.state.nh.us/SofS_Archives/1996/house/HB1593H.pdf) (last visited Aug. 29, 2017).

81. *Id.* at 14.

82. *Id.*

83. Merrill argued that the problem was not unprofessional or politicized courts, but inadequate financial and statutory resources available for the prosecution of white-collar crime. He directly rejected Brock's agenda, openly endorsing both the system of part-time judges and the continued election of probate registers. *Id.*; see also MONOPOLI, *supra* note 74, at 21.

84. MONOPOLI, *supra* note 74, at 22.

III). Sponsors of the Fairbanks III Committee, in fact, publicly aimed for nothing less than “a permanent legislative committee for oversight of courts and police.”<sup>85</sup>

The 1998 report of that committee aired a wide variety of complaints about the daily operations of courts in New Hampshire’s reconfigured judiciary: the rising costs of litigation, disrespect toward pro se clients, the bar association’s close ties to the bench, and more.<sup>86</sup> In fact, there was surprisingly little about John Fairbanks or investigations of him in the report. It did, however, fulfill the charge of its sponsors to re-examine the effects of the “adoption of part II, articles 72-a and 73-a of the state constitution, relative to the judicial powers of the courts and the supreme court and its administration.”<sup>87</sup>

#### D. *The Claremont Decisions on Education Funding*

Nationally, the 1960s witnessed the beginning of a movement to treat quality of public education as a right, to which all citizens were entitled and which public authorities were bound to maintain whatever the inconvenience. It was, essentially, a new front of the “rights revolution” associated with the Warren Court, to which activists had turned for relief from conditions that elected officials had been unable or unwilling to address. In this case, the issue was gross inequities in the quality of public schools, traceable mainly to enormous variations in the tax revenues available to the local school districts charged with financing them.<sup>88</sup>

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85. H.R. 1338-FN-A, 155th Gen. Court, 1998 Sess. (N.H. 1998), [http://gencourt.state.nh.us/SofS\\_Archives/1998/house/HB1338H.pdf](http://gencourt.state.nh.us/SofS_Archives/1998/house/HB1338H.pdf). HB 1338 authorized the Fairbanks III Committee to scrutinize not only Fairbanks’s actions and prior investigations of them, but more generally “the workings of judiciary and law enforcement agencies and any other entity which impacts on the ability to identify and investigate criminal wrongdoing by state actors and attorneys in this state.” *Id.* Rep. Barbara Richardson, one of HB 1338’s sponsors, openly stated her intention to create a body exercising permanent oversight of courts and police at the January 27, 1998, public hearing of the Judiciary and Family Law Committee. See N.H. House of Representatives, Legislative Documents Relating to HB 1338-FN-A (1998 Session), N.H. GEN. CT., at 14, [http://gencourt.state.nh.us/SofS\\_Archives/1998/house/HB1338H.pdf](http://gencourt.state.nh.us/SofS_Archives/1998/house/HB1338H.pdf) (last visited Aug. 29, 2017) [hereinafter Legislative Documents Relating to HB 1338].

86. Legislative Documents Relating to HB 1338, *supra* note 85, at 36, 38.

87. H.R. Amendment to H.R. 1338-FN-A, 155th Gen. Court, 1998 Sess. (N.H. 1998), [http://gencourt.state.nh.us/SofS\\_Archives/1998/house/HB1338H.pdf](http://gencourt.state.nh.us/SofS_Archives/1998/house/HB1338H.pdf).

88. See ALLAN R. ODDEN & LAWRENCE O. PICUS, *SCHOOL FINANCE: A POLICY PERSPECTIVE* (5th ed. 2014); Alexandra Natapoff, 1993: *The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 EDUC. L. REP. 755 (1994). Regarding New Hampshire’s situation, see Todd A. DeMitchell & Barbara H. Krysiak, *School Finance Reform in the “Live Free or Die” State: Personal, Legal, and Policy Responses to Claremont School District v. Governor*, 8 INT’L J. EDUC. REFORM 89 (1999).

Scholars have tracked three separate waves of school-funding litigation since the 1960s.<sup>89</sup> In the first two, activists built “equality” cases for public assistance to disadvantaged school districts by evoking equal protection clauses in first the federal, then state constitutions.<sup>90</sup> In the movement’s third wave, activists shifted their strategy. Essentially, litigants would now claim not that state constitutions required equal funding for poor districts, but rather that they were constitutionally mandated to provide an “adequate” education for even the poorest. That is: effectively educating everyone was a prime constitutional directive, and must be achieved by whatever means policymakers could devise; whether any sort of fiscal redistribution would be required was a secondary consideration.<sup>91</sup>

This argument would prove considerably more successful. In 1993, the Supreme Judicial Court of Massachusetts, in *McDuffy v. Secretary of Executive Office of Education*,<sup>92</sup> would follow Montana, Texas, and Kentucky<sup>93</sup> in finding for plaintiffs advancing this claim. It determined that, given its eighteenth century context, language in the state constitution’s education clause describing legislators’ and magistrates’ duty to “cherish” the cause of learning could not be construed as merely “aspirational or hortatory.” Rather, the duty described was material, and binding.<sup>94</sup>

The Massachusetts ruling heartened activists in New Hampshire, since language on education in New Hampshire’s constitution had been largely borrowed from that of Massachusetts (and, since New Hampshire had been governed as part of Massachusetts from 1641 to

89. 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, 600–03 (1994).

90. In the first wave, activists invoked most frequently the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. That strategy ended when the U.S. Supreme Court ruled in *San Antonio Independent School District v. Rodriguez*, that inequities in school financing did not, in fact, violate the equal protection clause. 411 U.S. 1, 4–6 (1973). In the movement’s second wave, activists focused on public education mandates and equal protection clauses written into state constitutions. But most high courts found that the constitutional clauses on which litigants based their claims to state-based financial relief were simply too loose to support them. An exception was *Robinson v. Cahill*, where the New Jersey Supreme Court found that the state’s school-funding statute violated its mandate to provide a “thorough and efficient” education to all. 303 A.2d 273, 294 (N.J. 1973). For the general record, however, see generally ODDEN & PICUS, *supra* note 88.

91. Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 287–88 (2007).

92. 615 N.E.2d 516, 528 (Mass. 1993).

93. Umpstead, *supra* note 91, at 285.

94. *McDuffy*, 615 N.E.2d at 548.

1680, much of the history of the Massachusetts high court referenced in *McDuffy* was directly relevant to New Hampshire as well). On December 30, 1993, the New Hampshire Supreme Court, in what would be known as *Claremont I*,<sup>95</sup> essentially adopted the *McDuffy* reasoning. Chief Justice Brock, writing for a unanimous court, declared that the sort of education that might mold independent, intellectually competent citizens was indeed a constitutional right in New Hampshire, and that the duty to provide it must be conscientiously fulfilled by the state's elected officials rather than assigned to localities.<sup>96</sup>

But from 1994 to 2000, the supreme court would reject several proposals from legislators in response.<sup>97</sup> Taken as a whole, these rulings sparked a barely containable fury toward the supreme court in general and toward Chief Justice David Brock in particular, as author of the most consequential decisions.<sup>98</sup>

The essential problem was that New Hampshire was not Massachusetts. In Massachusetts, what reformers aimed for was simply a return to the level of state funding for public education that had prevailed prior to a tax revolt in the 1980s.<sup>99</sup> They had no need to endorse innovative levels of redistribution, just the *status quo ante*. Reformers in New Hampshire did not have that luxury. They had couched their argument as a plea for educational "adequacy" in all school districts; but in truth, "adequacy" could not be achieved without substantive movement toward an "equality" the state had never embraced. In fact, achieving the adequate education for all that the court had demanded could only mean overturning fiscal arrangements that were simultaneously inequitable and extremely well protected, both politically and constitutionally.

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95. *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1377–78 (N.H. 1993).

96. *Id.* at 1381.

97. *See infra* note 108.

98. *See DeMitchell & Krysiak, supra* note 88, at 88, 89. Only in New Hampshire did opposition encompass an attempt to pass a constitutional amendment overturning a state supreme court decision on school finance. *Id.* at 95. The effort was launched following editorializing in the *Manchester Union Leader* (now the *New Hampshire Union Leader*) demanding such a measure and has persisted, in various forms with various sponsors and various levels of support, ever since, despite failing to reach its goal. *See* John DiStaso, *Constitution Change Pushed*, MANCHESTER UNION LEADER, Dec. 19, 1997, at A1; *see also* Andru H. Volinsky, *New Hampshire's Education-Funding Litigation: Claremont School District v. Governor*, 635 A.2d 1375 (N.H. 1993), modified, 73 A.2d 1353 (N.H. 1997), 83 NEB. L. REV. 836 (2014).

99. Massachusetts's "Proposition 2.5" was a ballot measure calling for a 2.5% ceiling on total annual property taxes, and on property tax increases. It went into effect in 1982, after which local school districts had considerably fewer funds available.

That was because the framers of New Hampshire's constitution had broken with the Massachusetts model by specifically denying state lawmakers recourse to "excise" or "estate" (generally read as "sales" or "income") taxes.<sup>100</sup> State revenues had been confined to fees for particular services, penalties, special-benefit assessments and the like until business profits and enterprise taxes, and eventually a state lottery, were added in modern times.<sup>101</sup> Reflecting the historic prioritization of local over state government in New Hampshire, the main source of public revenue in the state was and remains local property taxes. However, part 2, article 5 of the constitution requires that all "assessments, rates, and taxes" funding government at large be "proportional and reasonable."<sup>102</sup> The *Claremont* plaintiffs had relied on precisely that provision, arguing that local property taxes could be described as neither proportional nor reasonable when property-poor districts charged far higher tax rates than wealthy ones and collected far lower revenues anyway.<sup>103</sup> Opponents, for their part, insisted that property taxes need not be equitable *across* school districts so long as they were equitable *within* them.<sup>104</sup> That had indeed been the traditional understanding, and breaking from it would prove traumatic.

Somehow, state policymakers had to find the money to ameliorate fiscal disparities across school districts, and those revenues would have to meet the "proportional and reasonable" criterion. But their options were severely limited by constitutional restraints on income and sales taxes. Theoretically, they could enact a state-wide property tax, from which poor school districts could collect funds paid in by richer ones. But that was not palatable for elected officials in one of the most tax-averse states in the country.<sup>105</sup>

In 1997, the New Hampshire Board of Education finally offered what officials considered a feasible response. It entailed the claim that the state's constitutional responsibility would be fulfilled by defining and monitoring educational adequacy while establishing the means for

100. Marcus Hurn, *State Constitutional Limits on New Hampshire's Taxing Power: Historical Development and Modern State*, 7 *PIERCE L. REV.* 251, 252–53 (2009).

101. *Id.* at 253–54.

102. N.H. Const. pt. 2, art. 5.

103. *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1377 (N.H. 1993).

104. A recent, detailed analysis of argumentation in *Claremont I* and *Claremont II* has been provided by John M. Lewis and Stephen E. Borofsky, in *Claremont I and II—Were They Rightly Decided, and Where Have They Left Us?*, 14 *U.N.H. L. REV.* 1 (2016).

105. See Hurn, *supra* note 100, at 252–54. Hurn argues that there is "no other state in the union with a structure of taxing powers and limits comparable to New Hampshire's." *Id.* at 252. On sales taxes, in particular, Hurn notes that "New Hampshire remains unique among the states in denying the legislature the power to levy excise taxes as such." *Id.* at 253.

school districts to raise their own funds. The *Claremont* plaintiffs objected and would again litigate all the way to the supreme court; and the court would again rule in their favor.<sup>106</sup> In *Claremont II*, as the decision was called, the court concluded that the obligation to provide statewide revenues could be neither skirted nor delegated; and those revenues, to be “proportional and reasonable,” could not be drawn mainly or even largely from local property taxes, given the enormous disparities in tax revenues across school districts.<sup>107</sup> This was perhaps the single most controversial of the court’s holdings in the entire education funding imbroglio, as it seemed to close off any way of resolving the matter short of a statewide property tax.

New Hampshire’s lawmakers, however, remained unwilling to make appreciable alterations in the state’s fiscal practices. For the next several years relations between the supreme court and the elected branches would spiral downward as the court rejected additional attempts to meet the mandate it had set without doing irreparable harm to the cherished traditions of minimal taxation and maximum devolution of authority to local government.<sup>108</sup> Over the course of those years, the *Claremont* decisions generated hostility towards Brock and his court that dramatized and metastasized the tensions invoked by institutional modernization.

In both 1998 and 1999, state legislators formulated no fewer than twelve measures aimed not only at reversing the *Claremont* holdings but

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106. *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353 (N.H. 1997).

107. *Id.* at 1354–57.

108. The most significant of these was probably a unanimous advisory opinion issued by the justices in 1998. *Op. of the Justices (Sch. Fin.)*, 712 A.2d 1080 (N.H. 1998). In that opinion, they considered aspects of the Advancing Better Classrooms (“ABC”) plan proposed by Governor Jeanne Shaheen, which would have avoided a statewide property tax by instead establishing uniform property tax rates for education across all school districts. The justices advised that, since the Shaheen plan would return all taxes beyond those needed for local educational purposes to the districts that had paid them, it would leave in place the fiscal disparities already found constitutionally objectionable. In their view, the plan would therefore leave the state in ongoing violation of part 2, article 5 of the state constitution, stipulating that all state taxes must be “proportional and reasonable.” N.H. CONST. pt. 2, art. 5. That same year, in *Claremont III*, the supreme court rejected a citizen suit arguing that *Claremont II* had been tainted because a retired justice had replaced a recused one in the deliberations. *Claremont Sch. Dist. v. Governor (Claremont III)*, 712 A.2d 612 (N.H. 1998). Subsequently, in *Claremont V*, the court denied the state’s request for an extension of time to find an education-financing scheme. *Claremont Sch. Dist. v. Governor (Claremont V)*, 744 A.2d 1107 (N.H. 1999). The following year, an advisory opinion (*Claremont VI*), found against legislative plans to hold a referendum on a new tax plan. *Op. of the Justices (Tax Plan Referendum) (Claremont VI)*, 725 A.2d 1082 (N.H. 1999). And in *Claremont VII*, the court refused to countenance an extended “phase-in” period for a new statewide property tax. *Claremont Sch. Dist. v. Governor (Claremont VII)*, 761 A.2d 389 (N.H. 1999).

reducing the power and reach of the supreme court that had issued them.<sup>109</sup> Those bills' ambitions included limiting the court's ability to set rules without legislative oversight; adding a judicial-evaluation dimension to the process of selecting justices; and transferring the supervision of judicial conduct from the court's own Judicial Conduct Committee to a legislative body. Those bills would not pass.<sup>110</sup> But the stakes were clearly rising.

In all, it was perhaps not surprising that the first attempt to remove Chief Justice Brock from his position arose in 1999, when Rep. Paul Mirski and Sen. Mary Brown filed a bill of address against him.<sup>111</sup> It would not secure endorsement of the joint legislative committee required before such a bill could proceed to the governor. A much more strenuous effort, however, awaited.

### III. THE IMPEACHMENT OF DAVID BROCK

The chain of events that led to the impeachment of the Chief Justice in 2000 emerged from unusual circumstances within the court itself. Court Clerk Howard Zibel had grown concerned about certain actions of Justice Stephen Thayer, including the candor of Thayer's financial disclosure forms and the nature of his involvement in a disciplinary matter indirectly involving a creditor of his (the *Feld* case, a matter already under consideration at the Judicial Conduct Committee).<sup>112</sup> At the time, Thayer was in the midst of a highly contentious divorce, and his wife's appeal of the decision was scheduled to come before the supreme court.<sup>113</sup> Naturally, all sitting justices would have to recuse themselves from the appeal, an unprecedented situation requiring Chief Justice Brock to appoint replacement judges for the entire bench.<sup>114</sup> In a

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109. Michele DeMary, *Legislative-Judicial Relations on Contested Issues: Taxes and Same-Sex Marriage*, 89 JUDICATURE 202, 204 (2006).

110. However, other bills transferring responsibility for courts' own security arrangements from themselves to county sheriffs' offices and creating a study committee to review the 1978 constitutional amendment giving the supreme court's administrative rules force of laws, did pass. *Id.* at 202, 204.

111. H.R. Address 1, 156th Gen. Court, 1999 Sess. (N.H. 1999), <http://www.gencourt.state.nh.us/legislation/1999/HA0001.html>. House Address 1 ("HA1") was introduced and referred to the Joint Committee on Address. H. JOURNAL, 156-4, 1999 Sess. (N.H. 1999), <http://gencourt.state.nh.us/house/caljournals/journals/1999/houjou18.htm>.

112. *Feld's Case*, 737 A.2d 656 (N.H. 1999). For a thorough discussion of the entire *Feld* matter, see Steven Endres & Kelly Swartz, *Assisting Through Silence: The Impact of Feld's Case on the N.H. Rules of Professional Conduct*, 41 N.H.B.J. 36 (2000); see also MARY E. BROWN, *THE IMPEACHMENT TRIAL OF THE NEW HAMPSHIRE SUPREME COURT CHIEF JUSTICE* app. 2, at 271 (2001).

113. BROWN, *supra* note 112, app. 3, at 292.

114. *Id.*

conference at which Thayer was present, Brock announced his final replacement choices, and Thayer vigorously protested one of them.<sup>115</sup> That came dangerously close to violating not only the judiciary's own Code of Judicial Conduct, but even sections of the state's criminal law defining unlawful influence on public servants.<sup>116</sup>

Other justices were concerned, but they hoped that privately reprimanding Thayer would conclude the matter.<sup>117</sup> However, when apprised by phone that Zibel felt obliged to reveal his own misgivings about Thayer's behavior in the *Feld* case and other instances to the Attorney General, Thayer responded with language that might be interpreted as threatening (e.g., "We can either hang together on this or hang separately," and "If Zibel files this, it'll blow up the Supreme Court").<sup>118</sup> Repeating such language to the Chief Justice himself, Thayer left Brock to decide whether he himself was now obliged to report what might be construed as witness tampering and obstruction of government administration.<sup>119</sup>

Brock had Zibel's memo, which described not Thayer's most recent actions but only his earlier ones, delivered to Attorney General Philip McLaughlin.<sup>120</sup> From the moment when the matter was transferred from the judiciary to an elected branch of government, matters would steadily worsen for Chief Justice Brock.

McLaughlin decided that an investigation into the behavior of a supreme court justice was required—another act without precedent in the state's modern history.<sup>121</sup> Preliminary inquiries then led his investigators to decide that, beyond Thayer's actions, broader aspects of the court's daily *modus operandi* required scrutiny. They were disquieted by the apparent inclination of Brock, in particular, to give priority to the confidentiality of the conference room over the duty to report unethical or illegal behavior.<sup>122</sup> But what was downright disturbing was the fact, previously unknown outside the court itself, that recused justices had been routinely permitted to read, and comment (but not vote), on decisions in cases from which they had been disqualified.<sup>123</sup> In exchange for Thayer's agreement to resign from the bench,

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115. *Id.* app. 2, at 270.

116. *Id.* app. 3, at 301.

117. *Id.* app. 2, at 271.

118. *Id.* app. 3, at 299–300.

119. *Id.* app. 3, at 300–01.

120. *Id.* app. 3, at 283.

121. *Id.* app. 3, at 285.

122. *Id.* app. 3, at 289.

123. *Id.* app. 3, at 286.

McLaughlin elected not to prosecute Thayer.<sup>124</sup> Instead, he informed legislators that his investigation “revealed institutional practices of the Supreme Court which, in my judgment as the attorney for the people, should be examined.”<sup>125</sup>

An angry David Brock publicly denounced the McLaughlin Report as “an executive branch surprise attack on the judicial branch’s internal operating procedures,” while announcing that the court’s recusal policy—which had been in place long before he or any current justices had come to the court, and which, Brock insisted, had never been abused by anyone but Thayer—was now terminated.<sup>126</sup> None of that, however, deterred the House of Representatives from immediately authorizing an investigation by the House Judiciary Committee (HJC).

That body’s investigation would result in other, highly damaging claims against the Chief Justice. It uncovered suggestions that the chief justice might have privately assured Thayer that, whatever the choice of replacement justices on his wife’s divorce appeal, none who seemed objectionable would serve on the JCC panel considering his actions on the *Feld* case. Worse yet, the HJC learned that some thirteen years earlier, Brock might have made a phone call to a trial court judge apprising him that a litigant in his court was a politician with significant influence over judicial pay raises and other matters of interest. Finally, Brock’s own testimony would engender claims of perjury involving whether or when he had seen certain materials in the possession of the JCC, access to which had been denied the HJC counsel by virtue of confidentiality protocols. After a tumultuous session in which representatives aired a variety of grievances against Brock, the court, and the judiciary at large, the House of Representatives would overwhelmingly approve the three articles of impeachment the HJC recommended, and added a fourth on the recusal policy.<sup>127</sup>

However, just as Brock’s fortunes had declined when the elected branches began scrutinizing administrative actions within the judiciary, so would they improve when the time finally came to test the allegations that had emerged from those branches at an actual trial. The final outcome may have been foreshadowed by senators’ actions on pretrial motions. They were not prepared to accept the defense’s insistence that

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124. *Id.* app. 3, at 301.

125. *Id.* app. 3, at 278. McLaughlin’s report is among the materials relating to the Brock impeachment included in BROWN, *supra* note 112. Brown, a state senator, not only co-sponsored the 1999 bill of address against Brock, but she was also among the senators hearing evidence in his impeachment trial.

126. *Id.* app. 4, at 306–08.

127. H. JOURNAL, 156-20, 2000 Sess., at 1–4 (N.H. 2000), <http://www.gencourt.state.nh.us/house/caljournals/journals/2000/houjou56.html>.

they conduct the equivalent of a criminal trial, declining, for example, to require a high or even any single standard of evidence.<sup>128</sup> But they did favor the defense in other, crucial ways—in particular by requiring, over strenuous House objections, a two-thirds majority for conviction, and allowing for private deliberations. After two weeks of testimony, Brock would win acquittal rather easily.<sup>129</sup>

But the impeachment process as a whole, from the McLaughlin Report to Senate acquittal, certainly did focus public attention on New Hampshire's judicial organization and practices far more closely and thoroughly than anything else could have. Brock's ordeal was, in fact, cathartic in that it did catalyze larger efforts to enhance the accountability of a judiciary that had slipped from its original constitutional subordination to the peoples' representatives.

The task facing all three branches now would be achieving that without endangering the newfound independence of the judicial branch.

#### IV. CIVIC POPULISM IN THE POST-IMPEACHMENT ERA<sup>130</sup>

In his book on judicial modernization and court unification, Robert Tobin divides the enormous changes that state judiciaries undertook in the twentieth century into two phases.<sup>131</sup> In the first, usually initiated around mid-century, reformers "stressed judicial independence as a defense against external domination," an agenda Tobin describes as "conservative, firmly rooted in the legal-judicial culture, and very introverted."<sup>132</sup> Aware of the backlash that break from tradition has so often entailed, he goes on to argue that this first wave of state-level judicial reform should be followed by a second, in which effective

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128. Full transcripts of the entire impeachment trial, including debate and documentation of pre-trial motions, are available at the State Library of New Hampshire and in the library of the University of New Hampshire School of Law, both located in Concord, New Hampshire.

129. On the first three articles of impeachment, the votes were 18-4, 17-5, and 18-4. The fourth article addressed the recusal issue, and there the vote was 14-8—closer, but still nowhere near the two-thirds super-majority required for conviction. On all articles, the votes were bipartisan. Carey Goldberg, *New Hampshire Supreme Court Justice Is Acquitted in His Impeachment Trial*, N.Y. TIMES, Oct. 11, 2000, at A14.

130. By "civic populism," we refer broadly to extending the control by ordinary citizens over government, including (perhaps especially) the judiciary, often entailing the displacement of entrenched professional elements. For more on the notion of civic populism, see HARRY C. BOYTE, *CIVIC AGENCY AND THE CULT OF THE EXPERT* (2009); HARRY C. BOYTE, *EVERYDAY POLITICS: RECONNECTING CITIZENS AND PUBLIC LIFE* (2004); Harry C. Boyte, *Civic Populism*, 1 PERSP. ON POL. 737 (2003).

131. ROBERT W. TOBIN, *CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM*, at vii (1999).

132. *Id.* at 195.

responses are mounted to citizen concerns about “the integrity of the judicial process itself.”<sup>133</sup> Those concerns encompass judicial accountability, selection and discipline, public access to the court system and court records, the power of attorneys within the adversarial system, and more.<sup>134</sup> Such reforms, in Tobin’s view, “could only be effected by a mature, self-confident judiciary.”<sup>135</sup>

In the aftermath of the Brock impeachment, New Hampshire’s judiciary would be required to demonstrate exactly those qualities. Judicial leaders understood that the legislative action of 2000 had focused on David Brock, and a wide range of grievances regarding administrative, ethical, and decisional aspects of the judiciary’s performance as a fully independent branch of government. They and others within the state’s legal community recognized that the judiciary’s institutional independence had been established, but not yet fully legitimated. They recognized further that the path to legitimation lay in cooperation with elected officials to restore the “indissoluble bond of union and amity” among separate but connected branches of state government that part 1, article 37 of the state constitution requires.<sup>136</sup>

But the task would be complex. Productive, forward-looking reforms would have to be distinguished from regressive or reactionary ones, with the former embraced but the latter actively opposed.

#### *A. Contesting Professionalism in the Law*<sup>137</sup>

Those latter reforms often took the form of attempts to undo the professionalization of courts and adjudicative processes that had begun in the nineteenth century and concluded in the twentieth. A kind of constitutional or juridical aspect of the state’s generally populist civic culture, these attempts express the view, deeply rooted in New Hampshire’s history, that constitutional interpretation and the administration of justice ought not to be monopolized by such “elites” as unelected judges and credentialed attorneys, but should instead be exercised wherever practicable by “the people themselves.”<sup>138</sup> This has

133. *Id.* at 196.

134. *See id.*

135. *Id.* at 195.

136. N.H. CONST. pt. 1, art. 37.

137. The phrase “contesting professionalism” comes from the article by Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC’Y REV. 765 (2003).

138. *See* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 1–9 (2004); *see also* ELIZABETH BEAUMONT, *THE CIVIC CONSTITUTION: CIVIC VISIONS AND STRUGGLES IN THE PATH TOWARD CONSTITUTIONAL DEMOCRACY* 2–3 (2014); JOHN E. FINN, *PEOPLING THE CONSTITUTION* 1–2 (2014); Corey

been a largely partisan undertaking, initiated by Republican members of the legislature. In the decade after impeachment, divided government has generally made realization of the populist agenda difficult. Yet as this section indicates, supporters have shown remarkable tenacity, persisting in their efforts to this day. They undeniably represent a distinct, and strong, strain of New Hampshire's civic culture.

In the 2000 session of the legislature, a Republican representative co-sponsored a bill that would require the governor to appoint non-attorneys as judges, until non-attorneys would make up half of all judges in the state, with that ratio retained thereafter.<sup>139</sup> Deemed "inexpedient to legislate" in the House, it was followed in 2003 by a House resolution proposed by Republicans and urging the governor and executive council to consider appointing a non-lawyer to the supreme court.<sup>140</sup> That failed, as well. But in 2006, Republican House members filed yet another bill aimed at increasing laymen's roles within the judiciary. This one proposed the creation of "a superior court of common law," with all judges being non-lawyers "deemed to have common sense," with all matters tried to a jury, and with plea bargains or settlements prohibited.<sup>141</sup> That bill did proceed to a floor vote, where it was overwhelmingly rejected.

Populists also aimed to end the dominance of trained lawyers in courtroom practice, and could point to clear historical precedent for their efforts.<sup>142</sup> Since 1842, statutory law in New Hampshire has indeed provided that any litigant or party to a case may self-represent, or be represented "by any citizen of good character" (a 1999 statutory amendment provided that "a citizen shall be presumed to be of good character unless demonstrated otherwise").<sup>143</sup> In 2006, however,

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Brettschneider, *Popular Constitutionalism and the Case for Judicial Review*, 34 POL. THEORY 516 (2006), <http://www.jstor.org/stable/20452480>.

139. H.R. 1408, 156th Gen. Court, 2000 Sess. (N.H. 2000), <http://www.gencourt.state.nh.us/legislation/2000/HB1408.html>.

140. H.R. Res. 8, 158th Gen. Court, 2003 Sess. (N.H. 2003), <http://www.gencourt.state.nh.us/legislation/2003/HR0008.html>. The resolution was sponsored by five Republicans.

141. H.R. 1641-FN, 159th Gen. Court, 2006 Sess. (N.H. 2006), <http://www.gencourt.state.nh.us/legislation/2006/HB1641.html>. The bill was sponsored by four Republicans. When two of its co-sponsors offered an identical bill in 2007, it was again rejected, this time by voice vote. H.R. 245-FN, 160th Gen. Court, 2007 Sess. (N.H. 2007), <http://www.gencourt.state.nh.us/legislation/2007/HB0245.html>.

142. Legal historian Lawrence M. Friedman writes that admission to practice in New Hampshire courts required both experience and education between 1805 and 1833, but that all education or training requirements were abolished between 1842 and 1872. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 276-77, 566 (1973).

143. See N.H. REV. STAT. ANN. § 311:1 (1955), *amended by* Act of Jan. 1, 2000, 1999 N.H. Laws 251 (enacting S. 172, 156th Gen. Court, 1999 Sess. (N.H. 1999), <http://>

Republican representatives went considerably further by submitting a bill calling for a committee to study the effects of rescinding the charter of the New Hampshire Bar Association, replacing the supreme court's inherent power to regulate attorneys with statutory authority, and providing that any citizen of good character could be a member of the bar.<sup>144</sup> That bill passed by a comfortable margin in the Republican-controlled House. It died in the Senate, but only a year later a Republican introduced another bill to repeal the corporate status of the Bar Association.<sup>145</sup> The new bill called the Bar Association "a constitutionally prohibited monopoly and conspiracy of power in the practice of law," with an unlawful accumulation of assets that should on its dissolution "escheat to the state."<sup>146</sup> That too was unsuccessful, but its sponsor would try again in the 2011–2012 legislative session. At that point, his prospects seemed much improved.

Republicans enjoyed overwhelming legislative majorities in those years, first secured in the general election of November 2010.<sup>147</sup> In January 2011, soon after those remarks, Republican Rep. Daniel Itse introduced two bills giving voice to populist urges to roll back judicial power and expand that of the people and their elected legislators. The first, House Concurrent Resolution (HCR) 17,<sup>148</sup> repudiated the New Hampshire Supreme Court's 1875 decision in *Copp v. Henniker*, which had reaffirmed the constitutional right to a jury trial in civil cases, except in those varieties adjudicated by referees rather than juries prior

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[www.gencourt.state.nh.us/legislation/1999/SB0172.html](http://www.gencourt.state.nh.us/legislation/1999/SB0172.html)). This was co-sponsored by six Republicans and one Democrat.

144. H.R. 1768-FN, 159th Gen. Court, 2006 Sess. (N.H. 2006), <http://www.gencourt.state.nh.us/legislation/2006/HB1768.html>. This bill was sponsored by seven Republicans. Authority to regulate the bar had long been claimed by the New Hampshire judiciary as a reasonable exercise of its inherent power. See, e.g., *In re Unification of the N.H. Bar*, 248 A.2d 709, 711–12 (N.H. 1968); *In re Ricker*, 29 A. 559, 561, 578 (N.H. 1890); *Bryant's Case*, 24 N.H. 149, 152, 154, 158 (1851).

145. See H. JOURNAL, 159-9, 2006 Sess., at 807–12 (N.H. 2006), [http://www.gencourt.state.nh.us/house/caljournals/journals/2006/houjou2006\\_26.html](http://www.gencourt.state.nh.us/house/caljournals/journals/2006/houjou2006_26.html); S. JOURNAL, 159-10, 2006 Sess., at 324 (N.H. 2006), [http://www.gencourt.state.nh.us/Senate/calendars\\_journals/journals/2006/SJ%2010.pdf](http://www.gencourt.state.nh.us/Senate/calendars_journals/journals/2006/SJ%2010.pdf).

146. See H.R. 670, 160th Gen. Court, 2007 Sess. (N.H. 2007), <http://www.gencourt.state.nh.us/legislation/2007/HB0670.html> (finding the bill "inexpedient to legislate" in the House).

147. Newly elected House Speaker William O'Brien described the Republican triumph in distinctly populist tones, as a mandate for a "government of public servants and not elite rulers" that "stands with citizens and not over them." H. JOURNAL, 162-1, 2011 Sess. (N.H. 2010), [http://www.gencourt.state.nh.us/house/caljournals/journals/2011/houjou2011\\_05.html](http://www.gencourt.state.nh.us/house/caljournals/journals/2011/houjou2011_05.html).

148. H.R. Con. Res. 17, 162d Gen. Court, 2011 Sess. (N.H. 2011), <http://www.gencourt.state.nh.us/legislation/2011/HCR0017.html>.

to 1784.<sup>149</sup> Itse's objection lay mainly in his claim that the case's confirmation of those exceptions had been wrongly used to deny proper jury trials in what he called "the new class of civil cases . . . between the government and the people," e.g., cases involving parental rights.<sup>150</sup> His second bill, HCR 18,<sup>151</sup> would have similarly voided the historic *Merrill v. Sherburne* decision rejecting the practice of "restoration to law" as an unconstitutional exercise of judicial powers by the legislature.<sup>152</sup> The House Judiciary Committee rejected both of Itse's bills as "inexpedient to legislate."<sup>153</sup> But efforts to expand the powers of elected officials at the expense of unelected judges, and that of laymen over trained lawyers, were not over.

A Republican submitted a new bill calling for replacement of the New Hampshire Bar Association under the authority of the supreme court by "The Bar Association of the State of New Hampshire." That was to be a corporate body led by the governor, the executive councilors, and the majority and minority leaders of the House and Senate Judiciary Committees.<sup>154</sup> The bill failed, but in November 2011, several Republican legislators filed another that would eliminate the mandatory requirement that lawyers be members of a bar association or other professional organization as a condition for practicing law in the state.<sup>155</sup> That bill passed easily in the House. It was stymied in the Senate due in part to Democrats' stronger showing in the November 2012 elections.<sup>156</sup>

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149. 55 N.H. 179, 188, 202 (1875). That constitutional right to a jury trial had been defended by New Hampshire courts as early as the *Ten Pounds Act* cases of 1786–87. See generally Lambert, *supra* note 28. As in that earlier litigation, the point at issue in *Copp v. Henniker* was whether the legislature had the power to establish tribunals and conduct adjudication under its own aegis, apart from judicial institutions.

150. DANIEL C. ITSE, *THE PEOPLES LIBERTY: A COMMENTARY ON CONSTITUTION OF THE STATE OF NEW HAMPSHIRE* 21–22 (4th ed. 2007), <http://nhhra.org/sites/default/files/The%20Peoples%20Liberty.pdf>. New Hampshire courts currently assign certain cases in family law to quasi-judicial officers called "marital masters."

151. H.R. Con. Res. 18, 162d Gen. Court, 2011 Sess. (N.H. 2011), <http://www.gencourt.state.nh.us/legislation/2011/HCR0018.html>.

152. 1 N.H. 199, 199 (1818).

153. N.H.H.R. Con. Res. 18; N.H.H.R. Con. Res. 17.

154. H.R. 346, 162d Gen. Court, 2011 Sess. (N.H. 2011), <http://www.gencourt.state.nh.us/legislation/2011/HB0346.html>. This was voted "inexpedient to legislate." *Id.*

155. H.R. 1474, 162d Gen. Court, 2012 Sess. (N.H. 2012), <http://www.gencourt.state.nh.us/legislation/2012/HB1474.html>. This was co-sponsored by seven Republicans. *Id.*

156. H. JOURNAL, 162-11, 2012 Sess. (N.H. 2012), [http://www.gencourt.state.nh.us/house/caljourns/journals/2012/houjou2012\\_23.html](http://www.gencourt.state.nh.us/house/caljourns/journals/2012/houjou2012_23.html); S. CALENDAR, 162-19, 2012 Sess., at 7 (N.H. 2012), [http://www.gencourt.state.nh.us/Senate/calendars\\_journals/calendars/2012/sc%2019.pdf](http://www.gencourt.state.nh.us/Senate/calendars_journals/calendars/2012/sc%2019.pdf).

*B. "Redress of Grievances" and Jury Nullification*

There were, however, other fronts in populists' struggle against legal professionalism and professionals. As early as December 1, 2010, House Speaker William O'Brien had announced the establishment and membership of what was to be a new standing committee to be named the "Committee on Redress of Grievances,"<sup>157</sup> evoking the right of petition long enshrined in British, American, and New Hampshire jurisprudence.<sup>158</sup> Formally bipartisan, the committee's composition (eleven Republicans, four Democrats) actually reflected the strong Republican majority in the House.<sup>159</sup> Theoretically, the committee could consider grievances against any state official, but about two-thirds of complaints brought to it were against judges or marital masters.<sup>160</sup> Among them were six requests that a bill of address be filed, five requests that a judge be impeached, and three requests for other disciplinary action.<sup>161</sup> None would actually be removed by either address

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157. H. JOURNAL, 162-1, 2011 Sess. (N.H. 2010), [http://www.gencourt.state.nh.us/house/caljournals/journals/2011/houjou2011\\_05.html](http://www.gencourt.state.nh.us/house/caljournals/journals/2011/houjou2011_05.html).

158. See Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2153-57 (1998); see also Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 142-43 (1986). In the New Hampshire Constitution, the Bill of Rights has two separate articles relating to redress of grievances. Part 1, article 31 describes the entire purpose of the legislature as "the redress of public grievances and for making such laws as the public good may require," while part 1, article 32 states that the public has a right of assembly, a right to instruct their representatives, and a right to petition the legislative body for "redress of the wrongs done to them, and of the grievances they suffer." N.H. CONST. pt. 1, art. 31-32.

159. See *supra* note 156; see also *supra* note 155. In fact, all the petitions the Committee considered would be sponsored by Republican representatives. As early as 2008, five Republicans in the then Democratic-controlled House had sponsored House Bill 1543 to establish a procedure whereby members of the legislature could introduce citizens' petitions for redress of grievances. It had been rejected by a roll call vote, with only sixteen Democrats voting for it. See H. JOURNAL, 160-8, 2008 Sess. (N.H. 2008), [http://www.gencourt.state.nh.us/house/caljournals/journals/2008/houjou2008\\_24.html](http://www.gencourt.state.nh.us/house/caljournals/journals/2008/houjou2008_24.html).

160. That calculation reflects adjustments for missing, removed, or refiled petitions. See *infra* note 161.

161. This proposition comes from an analysis, on file with the authors, of data and information on petitions for redress of grievances, as reported by New Hampshire State Rep. Timothy Horrigan, Democratic member of the House Committee on Redress of Grievances. See Timothy Horrigan, *More Reasonably Good Stuff*, TIMOTHY HORRIGAN'S FORGOTTEN LIARS, <http://www.timothyhorrigan.com/index.002.html> (last visited Apr. 21, 2017). In January 2010, five Republicans co-sponsored bills of address against two marital masters and a district court judge for abuse of discretion in divorce cases. H. JOURNAL, 161-1, 2010 Sess. (N.H. 2010), [http://www.gencourt.state.nh.us/house/caljournals/journals/2010/houjou2010\\_06.html](http://www.gencourt.state.nh.us/house/caljournals/journals/2010/houjou2010_06.html). The Joint Committee on Address concluded that sufficient cause for removal had been presented in none of those cases, but it also reported that one of the marital masters might indeed be guilty of impeachable "malpractice." H. JOURNAL,

or impeachment, and the committee itself would be dissolved when Democrats regained control of the House that November.<sup>162</sup>

Yet the idea persists. As recently as 2014, legislators filed a bill proposing to reinstate the redress procedure by statute, with an appropriation for compensation of petitioners.<sup>163</sup> It was rejected by nearly a three-to-one margin,<sup>164</sup> but that setback proved no more discouraging to populists' efforts than prior ones. Certainly, none has dampened their enthusiasm for another measure aimed at enhancing the power of laymen in adjudication: jury nullification, or the intentional refusal by a jury to render a verdict, usually in a criminal trial, consistent with the instructions on relevant law by the trial judge.<sup>165</sup>

In the history of American jurisprudence, jury nullification has been deployed by a variety of groups pursuing a variety of agendas (including freedom of the press, in the celebrated *Zenger*<sup>166</sup> case of the colonial era).<sup>167</sup> Today, however, it is most often seen in libertarian terms, as a way for juries to serve as a check on government enforcement of what

161-21, 2010 Sess. (N.H. 2010), [http://www.gencourt.state.nh.us/house/caljournals/journals/2010/houjou2010\\_51.html](http://www.gencourt.state.nh.us/house/caljournals/journals/2010/houjou2010_51.html). In 2011, four Republicans filed a resolution calling for an investigation to determine whether grounds for impeachment in that case existed. H. JOURNAL, 162-3, 2011 Sess. (N.H. 2011), [http://www.gencourt.state.nh.us/house/caljournals/journals/2011/houjou2011\\_11.html](http://www.gencourt.state.nh.us/house/caljournals/journals/2011/houjou2011_11.html). But the House Judiciary Committee concluded in 2012 that a marital master, being an at-will employee, appointed by the judiciary, and thus not an officer, was not legitimately subject to impeachment under the state constitution. JUDICIARY COMMITTEE REPORT PURSUANT TO HR 7, 2011, H. CALENDAR, 162-34, 2012 Sess. (N.H. 2012), [http://www.gencourt.state.nh.us/house/caljournals/calendars/2012/houcal2012\\_34.html](http://www.gencourt.state.nh.us/house/caljournals/calendars/2012/houcal2012_34.html).

162. For criticism of that decision, see Darryl W. Perry, *NH House Removes the Grievance Committee*, FREE KEENE (Jan. 2, 2013), <http://freekeene.com/2013/01/02/nh-house-removes-the-grievance-committee>.

163. H.R. 1165, 163d Gen. Court, 2014 Sess. (N.H. 2014), <http://www.gencourt.state.nh.us/legislation/2014/HB1165.html>. Sponsored by three Republicans and one Democrat, House Bill 1165 was rejected by a House roll call vote, with its Democratic co-sponsor the only Democrat to vote for it. See *HB1165 Roll Call*, N.H. GEN. CT. (Feb. 12, 2014), [http://www.gencourt.state.nh.us/bill\\_status/Roll\\_calls/billstatus\\_rcdetails.aspx?vs=71&sy=2014&lb=H&eb=HB1165&sortoption=&txtsessionyear=2014&txtbillnumber=hb1165&ddlssponsors=&lsr=2536](http://www.gencourt.state.nh.us/bill_status/Roll_calls/billstatus_rcdetails.aspx?vs=71&sy=2014&lb=H&eb=HB1165&sortoption=&txtsessionyear=2014&txtbillnumber=hb1165&ddlssponsors=&lsr=2536).

164. The "inexpedient to legislate" motion vote was 249 yeas to 88 nays. *HB1165 Roll Call*, *supra* note 163.

165. Paula L. Hannaford-Agor, *Judicial Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts*, 28 N. ILL. U. L. REV. 407, 420 (2008).

166. Rex v. Zenger (1735), reported in 17 COMPLETE COLLECTION OF STATE TRIALS 675 (T.B. Howell ed., London, Hansard 1816).

167. See CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* (Cato Institute Press 2014) (1998); Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 118 (1998); Alan Schefflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 166 (1996).

are seen as unjust, immoral, or oppressive laws.<sup>168</sup> That was the likely sentiment of Republican legislators who, in January 2011, filed a bill that would allow juries “to judge the application of the law in relationship to the facts in controversy.”<sup>169</sup> Passed in both chambers and signed into law in June 2012, it empowered juries in New Hampshire to override the rulings of judges whom they believed were misinterpreting or misapplying the relevant law.<sup>170</sup> Supporters felt that the law also authorized defense attorneys to openly inform juries of this power, even over the objections of judges.<sup>171</sup>

That understanding of the statute soon came under question, however. After being convicted for drug trafficking, a criminal defendant asserted on appeal that the trial judge had failed to comply with the new statute by declining to apprise the jury of its nullification powers, effectively contravening his right to a “jury nullification defense.”<sup>172</sup> In a unanimous opinion, the New Hampshire Supreme Court upheld the trial judge and affirmed the conviction, insisting that “jury nullification is neither a right of the defendant nor a defense recognized by law” and denying that the law invoked was in any sense “a jury nullification statute.”<sup>173</sup> Since that decision was entered, Republican legislators have filed five bills in the House that would require a trial court to instruct the jurors that it is the province of the jury, and not the judge, to determine the applicability of the law to the facts of a case. In the 2013–2014 legislative sessions, three such bills failed in the House.<sup>174</sup>

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168. For example, the official 2016 national political platform of the Libertarian Party states: “We assert the common-law right of juries to judge not only the facts but also the justice of the law.” *2016 Platform*, LIBERTARIAN PARTY (May 2016), <https://www.lp.org/platform>.

169. H.R. 146, 162d Gen. Court, 2012 Sess. (N.H. 2012), <http://www.gencourt.state.nh.us/legislation/2012/HB0146.html>. This was co-sponsored by five Republicans.

170. N.H. REV. STAT. ANN. § 519:23-a (2014).

171. See Tim Lynch, *Jury Nullification Law Signed by New Hampshire Governor*, POLICEMISCONDUCT.NET (June 27, 2012), <https://www.policemisconduct.net/jury-nullification-law-signed-new-hampshire-governor/>.

172. *State v. Paul*, 104 A.3d 1058, 1058–59 (N.H. 2014).

173. *Id.* at 1062–63 (citations omitted). Writing for the court, Justice Robert Lynn rejected the claim and concluded that “it does not require the court to allow the defendant to inform the jury that it has the right to judge the law or the right to ignore the law.” *Id.* at 1063. One conservative national commentator asserted that the supreme court’s ruling had “eviscerated a law that was openly intended and widely interpreted as a shot in the arm for the right of jurors to consider the law as well as the facts in criminal cases.” J.D. Tuccille, *Jury Nullification Law Gutted by New Hampshire Supreme Court*, REASON.COM: HIT & RUN BLOG (Oct. 24, 2014), <http://reason.com/blog/2014/10/24/jury-nullification-law-gutted-by-new-ham>.

174. All three bills were rejected, with opposition from almost all Democrats. See H.R. 470, 164th Gen. Court, 2015 Sess. (N.H. 2015), <http://www.gencourt.state.nh.us/>

With Republicans regaining a House majority again in the November 2014 and 2016 elections,<sup>175</sup> however, Republican proponents of jury nullification inched closer to victory. A 2016 bill requiring the trial court to give the “jury nullification” instruction to jurors passed the House, only to be rejected in the Senate.<sup>176</sup> In 2017, House Republicans filed yet another jury nullification bill, which again passed the House in a narrow vote.<sup>177</sup> In May 2017, however, based on a unanimous Senate Judiciary Committee report that it was “inexpedient to legislate,” the bill was killed by a 17-6 roll call vote.<sup>178</sup>

The recent record of New Hampshire’s populists is one of both remarkable persistence and, thus far, constant failure. The persistence is easily explained: the values lying behind these measures can be traced to the state’s founding, and its earliest understanding of the judicial function in state government. To explain the failure, however, more recent history must be invoked. For if most legislators proved unreceptive to populists’ call for a “de-professionalized” judiciary resubordinated to legislative will, it may well have been because after the Brock impeachment—and precisely while radical proposals were emanating from populist quarters—representatives of that judiciary and responsible legislators were seeking out, and eventually finding, ways to bridge the gulf that had opened between elected officials and the judicial branch.

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legislation/2015/HB0470.pdf; H.R. 246, 164th Gen. Court, 2015 Sess. (N.H. 2015), <http://www.gencourt.state.nh.us/legislation/2015/HB0246.pdf>; H.R. 1452, 163d Gen. Court, 2014 Sess. (N.H. 2014), <http://www.gencourt.state.nh.us/legislation/2014/HB1452.pdf>.

175. See *New Hampshire House of Representatives Elections, 2014*, BALLOTPEDIA, [https://ballotpedia.org/New\\_Hampshire\\_House\\_of\\_Representatives\\_elections\\_2014](https://ballotpedia.org/New_Hampshire_House_of_Representatives_elections_2014) (last visited Sept. 9, 2017); *New Hampshire House of Representatives Elections, 2016*, BALLOTPEDIA, [https://ballotpedia.org/New\\_Hampshire\\_House\\_of\\_Representatives\\_elections\\_2016](https://ballotpedia.org/New_Hampshire_House_of_Representatives_elections_2016) (last visited Sept. 9, 2017).

176. H.R. 1270, 164th Gen. Court, 2016 Sess. (N.H. 2016), [http://www.gencourt.state.nh.us/bill\\_status/billText.aspx?sy=2016&id=438&txtFormat=pdf&v=current](http://www.gencourt.state.nh.us/bill_status/billText.aspx?sy=2016&id=438&txtFormat=pdf&v=current).

177. H.R. 133, 165th Gen. Court, 2017 Sess. (N.H. 2017), [http://www.gencourt.state.nh.us/bill\\_status/billText.aspx?sy=2017&id=88&txtFormat=pdf&v=current](http://www.gencourt.state.nh.us/bill_status/billText.aspx?sy=2017&id=88&txtFormat=pdf&v=current). This was opposed by all but three Democrats. Passage in the House was secured despite a minority report by a Democratic member of the House Judiciary Committee noting that “[t]he philosophy behind this bill has been uniformly rejected in the United States and has failed to pass at least twelve times in the past 23 years in New Hampshire.” H. CALENDAR, 156-10, 2017 Sess., at 10 (N.H. 2017), [http://www.gencourt.state.nh.us/house/caljournals/calendars/2017/HC\\_10.pdf](http://www.gencourt.state.nh.us/house/caljournals/calendars/2017/HC_10.pdf).

178. S. JOURNAL, 165-16, 2017 Sess., at 419 (N.H. 2017), <http://www.gencourt.state.nh.us/scaljournals/journals/2017/sj%2016.pdf>.

V. RESTORING INTERBRANCH COMITY: JUDICIAL INDEPENDENCE AND  
LEGISLATIVE PREROGATIVES

The central, and thorniest, issue has been legislative involvement in court rulemaking, i.e., in the actual processes by which justice would be determined and delivered in New Hampshire. Finding a solution that maintained the independent judiciary the state had finally achieved without rendering it utterly impervious to any input whatsoever from the people's elected representatives would be a halting, difficult process lasting well over a decade. Yet it appears to have succeeded, in no small measure because the state's voters, by their actions on crucial ballot questions, essentially compelled both branches to re-forge, on new grounds, the comity that had been lost.

*A. Sharing Constitutional Authority to Promulgate Court Rules*

On January 4, 2001, two bills were filed for constitutional amendments challenging the court's rulemaking power under part 2, article 73-a. The first was Constitutional Amendment Concurrent Resolution (CACR) 4,<sup>179</sup> which proposed repealing part 2, article 73-a altogether. The second was CACR 5,<sup>180</sup> by which court rules would retain the force and effect of law but be superseded by statute if conflict with one emerged. Since CACR 5 seemed to have better prospects, CACR 4's sponsor agreed to its dismissal.<sup>181</sup> Rep. Alf Jacobson, a legislator supporting CACR 5, claimed that most of the criticism of article 73-a was focused on one issue: secrecy in the Fairbanks scandal. He said: "I have looked at the Constitution . . . and I can't find anything in it that says that one branch of government shall operate in secret."<sup>182</sup>

Lawyers who argued in support of CACR 5 included Martin Gross, a resident of Concord.<sup>183</sup> Gross noted the many times in New Hampshire history when "the legislature has stepped in to reform the judicial process because the judges either would not or could not do it."<sup>184</sup> He also

179. H.R. Constitutional Amendment Con. Res. 4, 157th Gen. Court, 2001 Sess. (N.H. 2001), <http://www.gencourt.state.nh.us/legislation/2002/CACR0004.html>.

180. H.R. Constitutional Amendment Con. Res. 5, 157th Gen. Court, 2002 Sess. (N.H. 2002), <http://www.gencourt.state.nh.us/legislation/2002/CACR0005.html>.

181. N.H. House of Representatives, Legislative Documents Relating to CACR 4 (2001 Session), N.H. GEN. CT., at 2, 67-69, [http://gencourt.state.nh.us/SofS\\_Archives/2002/house/CACR4H.pdf](http://gencourt.state.nh.us/SofS_Archives/2002/house/CACR4H.pdf) (last visited Aug. 16, 2017).

182. N.H. Senate, Legislative Documents Relating to CACR 5 (2001 Session), N.H. GEN. CT., at 16, [http://gencourt.state.nh.us/SofS\\_Archives/2002/senate/CACR5S.pdf](http://gencourt.state.nh.us/SofS_Archives/2002/senate/CACR5S.pdf) (last visited Aug. 16, 2017) [hereinafter Legislative Documents Relating to CACR 5].

183. *Id.* at 54-55.

184. *Id.* at 54.

recounted the concerns he had had as a delegate to the 1974 Constitutional Convention, when he had pointedly questioned fellow delegate Arthur Nighswander about whether the language in the proposal for Article 73-a, giving court-promulgated rules “the force and effect of law,” would affect legislators’ “ability to provide by statute for court procedures in the future.”<sup>185</sup> His worst fears were realized, Gross explained, by the assertion in the *Prior Sexual Assault Evidence* (“PSAE”) advisory opinion that matters of procedure were under the “exclusive jurisdiction of the courts.”<sup>186</sup> “I don’t think it’s appropriate in light of our history,” he said, “for the court to have done what it’s seen to have done in PSAE to say that they are the only ones who know what’s best.”<sup>187</sup>

The bill came out of committee with a vote of 3-1 in favor of passage in January 2002,<sup>188</sup> and final passage by the Senate came in February 2002.<sup>189</sup> But when it appeared on the general election ballot in November 2002, a majority of voters (50.9%) rejected it.<sup>190</sup> That tally must have surprised CACR 5’s supporters, who had appeared convinced that the public fully supported a wider legislative, and reduced judicial, role in regulating courts. Yet when tested at the ballot box, the proposal failed to earn even majority support, let alone the two-thirds vote required to amend the constitution.<sup>191</sup>

Legislative critics of exclusive judicial authority over court rulemaking, however, were not deterred by their defeat. Just two months later, in January 2003, Rep. Henry Mock filed another CACR 5 bill, arguing that the public had been misled by the wording of the earlier version that voters had rejected in November.<sup>192</sup> Mock testified in a hearing on the bill that many voters had been confused because the ballot question asked whether “the General Court shall have the same

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185. N.H. CONSTITUTIONAL CONVENTION, *supra* note 47, at 261–62.

186. Op. of the Justices (Prior Sexual Assault Evidence), 688 A.2d 1006, 1012 (N.H. 1997).

187. Legislative Documents Relating to CACR 5, *supra* note 182, at 55.

188. S. CALENDAR, 157-6, 2002 Sess. (N.H. 2002), <http://www.gencourt.state.nh.us/scaljournals/calendars/2002/sencal6.html>.

189. S. JOURNAL, 157-6, 2002 Sess. (N.H. 2002), [http://www.gencourt.state.nh.us/Senate/calendars\\_journals/Journals/2002/senjou6.html](http://www.gencourt.state.nh.us/Senate/calendars_journals/Journals/2002/senjou6.html).

190. See STATE OF NEW HAMPSHIRE MANUAL FOR THE GENERAL COURT 2003, at 366 (2003), <https://archive.org/stream/manualforgeneral58newh#page/366/mode/2up>.

191. *Id.*

192. H.R. Constitutional Amendment Con. Res. 5, 158th Gen. Ct, 2003 Sess. (N.H. 2003), [http://gencourt.state.nh.us/SofS\\_Archives/2004/senate/CACR5S.pdf](http://gencourt.state.nh.us/SofS_Archives/2004/senate/CACR5S.pdf).

powers as the Supreme Court" over court rulemaking.<sup>193</sup> Those voters, Mock claimed, did not realize that the words "General Court" refer to the legislature and not to anything in the judicial branch.<sup>194</sup> The legislature concurred, and a new ballot question was prepared with the term "General Court" replaced by "Legislature."<sup>195</sup> In January 2004, the full House of Representatives approved it by roll-call vote, with Republican legislators in favor by an overwhelming margin.<sup>196</sup>

In April 2004, the Senate approved the bill, breaking along strict party lines.<sup>197</sup> In November 2004, it appeared again in the general election ballot. This time, it received a "yes" vote from 56.9% of the voters. But that did not represent the two-thirds majority required for the adoption of a constitutional amendment, so it failed again.<sup>198</sup> In fact, the 2004 vote would turn out to be the high-water mark of efforts to reassert clear legislative supervision of judicial administration constitutionally. Legislative efforts in 2006 and 2010 to introduce similar constitutional amendments would be found "inexpedient to legislate."<sup>199</sup>

Then in 2011, a bill was filed that involved a highly partisan political matter by calling for the New Hampshire Attorney General to join other states in mounting a legal challenge to the Federal Patient Protection and Affordable Care Act ("Obamacare").<sup>200</sup> It was passed by the House of Representatives in March 2011, with Democrats voting 92-0 against

193. See N.H. Senate, Legislative Documents Relating to CACR 5 (2003 Session), N.H. GEN. CT., at 43, [http://gencourt.state.nh.us/SofS\\_Archives/2004/house/CACR5H.pdf](http://gencourt.state.nh.us/SofS_Archives/2004/house/CACR5H.pdf) (last visited Aug. 16, 2017).

194. *Id.*

195. *Id.* at 2-4, 43.

196. Democrats voted against the measure by a margin of 62 to 42. See *CACR5 Roll Call*, N.H. GEN. CT. (Jan. 15, 2004), [http://www.gencourt.state.nh.us/bill\\_status/](http://www.gencourt.state.nh.us/bill_status/Roll_Calls/)

[billstatus\\_rcdetails.aspx?vs=17&sy=2004&lb=H&eb=CACR0005&sortoption=&txtsessionyear=2004&ddlsporsors=&lsr=298](http://www.gencourt.state.nh.us/bill_status/Roll_Calls/billstatus_rcdetails.aspx?vs=17&sy=2004&lb=H&eb=CACR0005&sortoption=&txtsessionyear=2004&ddlsporsors=&lsr=298). One independent representative voted against the bill. *Id.*

197. See *CACR5 Roll Call*, N.H. GEN. CT. (Apr. 29, 2004), [http://www.gencourt.state.nh.us/bill\\_status/Roll\\_Calls/billstatus\\_rcdetails.aspx?vs=46&sy=2004&lb=S&eb=CACR0005&sortoption=&txtsessionyear=2004&ddlsporsors=&lsr=298](http://www.gencourt.state.nh.us/bill_status/Roll_Calls/billstatus_rcdetails.aspx?vs=46&sy=2004&lb=S&eb=CACR0005&sortoption=&txtsessionyear=2004&ddlsporsors=&lsr=298).

198. See STATE OF NEW HAMPSHIRE MANUAL FOR THE GENERAL COURT 2005, at 450 (2005), <https://archive.org/stream/manualforgeneral59newh#page/450/mode/2up>.

199. See H. JOURNAL, 159-8, 2006 Sess. (N.H. 2006), [http://www.gencourt.state.nh.us/house/caljournals/journals/2006/houjou2006\\_24.html](http://www.gencourt.state.nh.us/house/caljournals/journals/2006/houjou2006_24.html) (voting down CACR 36 as "inexpedient to legislate"); H. JOURNAL 161-8, 2010 Sess. (N.H. 2010), [http://www.gencourt.state.nh.us/house/caljournals/journals/2010/houjou2010\\_20.html](http://www.gencourt.state.nh.us/house/caljournals/journals/2010/houjou2010_20.html) (adopting the majority report of the Judiciary Committee that CACR 20 was "inexpedient to legislate").

200. H.R. 89, 162d Gen. Court, 2011 Sess. (N.H. 2011), <http://www.gencourt.state.nh.us/legislation/2011/HB0089.html>.

it.<sup>201</sup> In May 2011, the Senate tabled the bill and adopted a resolution requesting a supreme court advisory opinion on whether the bill would violate the state constitution.<sup>202</sup> In June 2011, the justices answered that the bill would indeed violate constitutional separation of powers, in that it assumed legislative capacities beyond those set forth in the constitution.<sup>203</sup>

In September 2011, the Senate allowed the bill to die on the table.<sup>204</sup> But in October 2011, over unanimous opposition from Democrats, the House passed a resolution repudiating the advisory opinion.<sup>205</sup> When the Senate ignored the resolution, CACR 26 was filed in the House. As originally introduced, the bill proposed that part 2, article 73-a of the New Hampshire Constitution should be repealed altogether, thereby eliminating the constitutional authority of the chief justice to make rules governing the administration of the courts.<sup>206</sup> In March 2012, the House passed the bill, with Democrats voting 94-0 against it.<sup>207</sup>

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201. See *HB89 Roll Call*, N.H. GEN. CT. (Mar. 15, 2011), [http://www.gencourt.state.nh.us/bill\\_status/Roll\\_calls/billstatus\\_rcdetails.aspx?vs=60&sy=2011&lb=H&eb=HB0089&sortoption=&txtsessionyear=2011&txtbillnumber=HB89&ddlspnors=&q=1&lsr=335](http://www.gencourt.state.nh.us/bill_status/Roll_calls/billstatus_rcdetails.aspx?vs=60&sy=2011&lb=H&eb=HB0089&sortoption=&txtsessionyear=2011&txtbillnumber=HB89&ddlspnors=&q=1&lsr=335).

202. S. JOURNAL, 162-15, 2011 Sess. 297-98 (N.H. 2011), <http://www.gencourt.state.nh.us/scaljournals/journals/2011/SJ%2015.pdf>.

203. Op. of the Justices (Requiring Attorney Gen. to Join Lawsuit), 27 A.3d 859, 871 (N.H. 2011).

204. *Docket of HB89*, N.H. GEN. CT. (last updated Nov. 7, 2011), [http://www.gencourt.state.nh.us/bill\\_status/Bill\\_docket.aspx?lsr=335&sy=2011&sortoption=&txtsessionyear=2011&txtbillnumber=HB89&ddlspnors=&q=1](http://www.gencourt.state.nh.us/bill_status/Bill_docket.aspx?lsr=335&sy=2011&sortoption=&txtsessionyear=2011&txtbillnumber=HB89&ddlspnors=&q=1).

205. With that resolution, H. Res. 13, 162d Gen. Court, 2011 Sess. (N.H. 2011), wrote Andrew Cohen of *The Atlantic*, the Republican members of the House sought as legislators to “defend the power delegated to them in the Constitution by the people” rather than “let it be wrongfully handed over to unelected officials.” Andrew Cohen, *In New Hampshire, a GOP-Led Assault on the State Judiciary*, ATLANTIC (Oct. 13, 2011), <https://www.theatlantic.com/politics/archive/2011/10/in-new-hampshire-a-gop-led-assault-on-the-state-judiciary/246535>.

206. H.R. Constitutional Amendment Con. Res. 26, 162d Gen. Court, 2012 Sess. (N.H. 2012), <http://www.gencourt.state.nh.us/legislation/2012/CACR0026.html>.

207. *CACR26 Roll Call*, N.H. GEN. CT. (Mar. 21, 2012), [http://www.gencourt.state.nh.us/bill\\_status/Roll\\_calls/billstatus\\_rcdetails.aspx?vs=182&sy=2012&lb=H&eb=CACR0026&sortoption=&txtsessionyear=2012&ddlspnors=&lsr=2423](http://www.gencourt.state.nh.us/bill_status/Roll_calls/billstatus_rcdetails.aspx?vs=182&sy=2012&lb=H&eb=CACR0026&sortoption=&txtsessionyear=2012&ddlspnors=&lsr=2423) (last visited Aug. 16, 2017). That May, Rep. Paul Mirski testified before a Senate committee that his appointment in 1997 to a committee investigating the Fairbanks scandal had left him with a dark view of the judiciary, troubled by both administrative problems in the courts and corruption in the legal community. See Audio tape: Senate Judiciary Committee Public Hearing on CACR 26, at 2:30–4:45 (May 3, 2012), [http://www.gencourt.state.nh.us/bill\\_status/BillStatus\\_Media.aspx?lsr=2423&sy=2012&sortoption=billnumber&txtsessionyear=2012&txtbillnumber=CACR26](http://www.gencourt.state.nh.us/bill_status/BillStatus_Media.aspx?lsr=2423&sy=2012&sortoption=billnumber&txtsessionyear=2012&txtbillnumber=CACR26) [hereinafter Hearing on CACR 26]. For a newspaper account of the hearing, see John DiStaso, *NH Supreme Court Offers Compromise on Rule-Making*

Testifying on behalf of the supreme court in a Senate hearing on the bill, Justices Gary Hicks and Robert Lynn both expressed opposition to CACR 26 in its initial form.<sup>208</sup> Yet they also favored appropriate legislative authority in the court rulemaking process.<sup>209</sup> Soon after the conclusion of the hearing, the Senate Judiciary Committee adopted an amended version of CACR 26, giving the legislature concurrent power over court rulemaking with the chief justice, with statute superseding court-issued rules in the case of any conflict, but only if the statutes were “not otherwise contrary to this constitution.”<sup>210</sup> The full Senate voted 19-5 in support of the committee report.<sup>211</sup> In early June, the House of Representatives approved the Senate’s amended version of the bill by a vote meeting the three-fifths margin required for inclusion in the general election ballot in November 2012.<sup>212</sup> But it failed to gain the support of a majority of the voters.<sup>213</sup>

Even though CACR 26 was rejected by voters in November 2012, the supreme court itself would nonetheless endorse the essence of it. In fact, just days before that popular vote, the court had rendered a decision that went a long way toward rendering this issue, too, moot.<sup>214</sup> This outcome had been presaged in an article written soon after the conclusion of the Brock impeachment.<sup>215</sup> In March 2001, when he was an associate justice of the New Hampshire Superior Court, Robert Lynn wrote a bar journal article addressing “the role which the legislative and judicial branches of government should properly play in establishing procedural and evidentiary rules for New Hampshire courts.”<sup>216</sup> He gave particular attention to the supreme court’s 1997 advisory opinion that a proposed

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*Constitutional Amendment Plan*, N.H. UNION LEADER (May 3, 2012), <http://www.unionleader.com/article/20120503/NEWS06/120509947>.

208. Hearing on CACR 26, *supra* note 207.

209. *Id.*

210. S. Amendment to CACR 26, 162d Gen. Court, 2012 Sess. (N.H. 2012), <http://www.gencourt.state.nh.us/legislation/amendments/2012-2041S.html>.

211. *CACR26 Roll Call*, N.H. GEN. CT. (May 16, 2012), [http://www.gencourt.state.nh.us/bill\\_status/Roll\\_Calls/billstatus\\_rcdetails.aspx?vs=92&sy=2012&lb=S&eb=CACR0026&sortoption=&txtsessionyear=2012&ddlspponsors=&lsr=2423](http://www.gencourt.state.nh.us/bill_status/Roll_Calls/billstatus_rcdetails.aspx?vs=92&sy=2012&lb=S&eb=CACR0026&sortoption=&txtsessionyear=2012&ddlspponsors=&lsr=2423).

212. *See CACR26 Roll Call*, N.H. GEN. CT. (June 6, 2012), [http://www.gencourt.state.nh.us/bill\\_status/Roll\\_Calls/billstatus\\_rcdetails.aspx?vs=293&sy=2012&lb=H&eb=CACR0026&sortoption=&txtsessionyear=2012&ddlspponsors=&lsr=2423](http://www.gencourt.state.nh.us/bill_status/Roll_Calls/billstatus_rcdetails.aspx?vs=293&sy=2012&lb=H&eb=CACR0026&sortoption=&txtsessionyear=2012&ddlspponsors=&lsr=2423).

213. 2012 VOTERS’ GUIDE: EXPLAINING TWO AMENDMENTS TO THE NEW HAMPSHIRE CONSTITUTION PROPOSED BY THE LEGISLATURE 3 (2012); *Constitutional Amendment Questions—2012 General Election*, N.H. SECRETARY ST., <http://sos.nh.gov/2012ConConGen.aspx> (last visited Aug. 16, 2017).

214. *See infra* note 217 and accompanying text.

215. *See infra* note 216.

216. *See* Robert J. Lynn, *Judicial Rule-Making and the Separation of Powers in New Hampshire: The Need for Constitutional Reform*, 42 N.H.B.J. 44, 44 (Mar. 2001).

statute on the admissibility of prior sexual assault evidence (“PSAE”) would violate the separation of powers provision of the state constitution.<sup>217</sup> This decision was based on the court’s conclusion that rules of evidence are largely “procedural” rather than “substantive,” so they are within the exclusive rulemaking power of the courts and beyond the power of the legislature to change.<sup>218</sup> Lynn argued that judicial supremacy over procedural law: (a) is fundamentally inconsistent with the separation-of-powers doctrine, (b) can stifle efforts at reform, and (c) is not necessary to protect judicial independence.<sup>219</sup> This reasoning had made him a vocal supporter of the failed efforts to amend article 73-a that were reflected in CACR 5 (2002),<sup>220</sup> CACR 5 (2004),<sup>221</sup> and—after his appointment in 2010 to the supreme court—CACR 26 (2012).<sup>222</sup>

As a supreme court justice, however, Lynn, along with his colleagues, would be provided an opportunity to determine the scope of the *PSAE* decision as precedent for decisions on the law of evidence. In 2011, in *State v. Ploof*, the supreme court rejected an argument, based on the *PSAE* decision, that a statute on the involuntary commitment of sexually violent predators violated constitutional separation of powers principles by regulating evidence in such cases and “thereby usurping the judicial function of making relevancy determinations in sexual predator cases without regard for the particular facts or circumstances involved in such a case.”<sup>223</sup> Writing for a unanimous court, Justice Carole Ann Conboy explained that, as an advisory opinion rather than a litigated case, the *PSAE* decision did not constitute binding precedent.

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217. *Id.* at 45–46.

218. Op. of the Justices (Prior Sexual Assault Evidence), 688 A.2d 1006, 1012 (N.H. 1997).

219. Lynn, *supra* note 216, at 46. On separation of powers, Justice Lynn wrote: [T]he historical record both in New Hampshire and elsewhere plainly shows that there had never been a serious question as to the power of the legislature to make rules governing court practice and procedure; the central point in debates over court rule-making generally concerned the wisdom of extending this power to the judiciary, not removing it from the legislature. Yet . . . the court has completely shifted the focus of the rule-making analysis. Instead of the substance-procedure dichotomy serving as a limitation on *judicial* power (*i.e.*, by prohibiting the courts from making rules of substantive law) as had been understood by prior case law and by the drafters of article 73-a, it has now become a limitation on *legislative* power (by prohibiting the legislature from making procedural law).

*Id.*

220. H.R. Constitutional Amendment Con. Res. 5, 157th Gen. Court, 2002 Sess. (N.H. 2002), <http://www.gencourt.state.nh.us/legislation/2002/CACR0005.html>.

221. H.R. Constitutional Amendment Con. Res. 5, 158th Gen. Court, 2004 Sess. (N.H. 2004), <http://www.gencourt.state.nh.us/legislation/2004/CACR0005.html>.

222. H.R. Constitutional Amendment Con. Res. 26, 162d Gen. Court, 2012 Sess. (N.H. 2012), <http://www.gencourt.state.nh.us/legislation/2012/CACR0026.html>.

223. *State v. Ploof*, 34 A.3d 563, 575–76 (N.H. 2011).

Moreover, she wrote, “the circumstances of this case are different and the State does not ask us to reexamine *Opinion of the Justices*.”<sup>224</sup>

Then in 2012, just days before CACR 26 would be voted on by citizens as “Question 2” on the November general election ballot,<sup>225</sup> the court entered a unanimous decision in *Southern New Hampshire Medical Center* that the assertion of exclusive judicial authority over evidentiary rules in the *PSAE* advisory opinion “is inconsistent with prior precedent,” and “that th[is] area . . . is one in which the Judiciary and Legislature share concurrent authority, absent constitutional considerations, such as impairment of the court’s ability to function.”<sup>226</sup>

As submitted to voters in November 2012, the wording of CACR 26 was that article 73-a should be amended to give priority to a statute over a conflicting rule, but only if the judiciary found the statute constitutional. In *Southern New Hampshire Medical Center*, the supreme court interpreted article 73-a as adopted in 1974, and without the need for further amendment, to mean that the legislature fully retained its traditional concurrent authority over court procedure.<sup>227</sup> It is difficult to overstate the import of this ruling: in a spirit of both comity and prudence, the court itself was seeking to remove authority over court rulemaking as a source of legislative-judicial tension.

The new understanding on rulemaking authority had not been hammered out in a vacuum. Rather, it had developed alongside parallel, similarly difficult negotiations on the delineation and enforcement of judicial ethics.

### *B. Changes in Judicial Discipline Structure and Procedures*

The Brock court itself had decided to abandon its longstanding practice of allowing recused judges a non-voting role in drafting opinions even before the McLaughlin Report had brought it to light.<sup>228</sup> In fact, in

224. *Id.* at 576.

225. See sources cited *supra* note 213.

226. *In re S.N.H. Med. Ctr.*, 55 A.3d 988, 996 (N.H. 2012) (alteration in original) (quoting McNamara, *supra* note 15, at 82).

227. *Id.* at 996–97. Chief Justice Dalianis quoted the 1974 exchange between constitutional convention delegates Martin Gross and Arthur Nighswander, in which Nighswander assured Gross that the adoption of the resolution that became Article 73-a would not deprive the legislature of its concurrent power to regulate court procedure by statute, including laws concerning evidentiary rules. See N.H. CONSTITUTIONAL CONVENTION, *supra* note 47, at 261–62.

228. At the time, national judicial ethics models did not emphasize the risk of such a practice. The focus of the American Bar Association (“ABA”) Canon on disqualification of judges was overwhelmingly on trial judges and the circumstances in which litigants and lawyers might question their impartiality. For discussion of this proposition, see RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 29.4

September 2000, just after the House had voted to impeach the chief justice, the supreme court had commissioned a “Task Force for the Renewal of Judicial Conduct Procedures.”<sup>229</sup> Its assignment was to study judicial conduct procedures in New Hampshire and make recommendations for changes to assure that judges would comply with them. It delivered its report in January 2001, and in August of that year the supreme court decided to accept its recommendation to replace the existing code of judicial ethics with a new one modeled largely on the American Bar Association’s (“ABA”) 1990 version. As in the ABA code, compliance would be mandatory. Failure by a judge to comply with its canons could be the basis for disciplinary action.<sup>230</sup>

Another critical feature of the January 2001 report by the Task Force was its recommendations on the nature and membership of the body that would enforce that code.<sup>231</sup> The judges, lawyers, and laypersons who had composed the JCC after it was established in 1977 had all been appointees of the supreme court, following court-set rules.<sup>232</sup> The Task Force’s report, however, recommended that the JCC be replaced by a new Conduct Commission that would be independent of the supreme court, with membership to include appointees not only of the court but also of the Governor, the President of the Senate, the Speaker of the House, and the President of the New Hampshire Bar

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(2d ed. 2007 & Supp. 2015). It was not until 2007, when the ABA adopted a revised model code, that the national canons addressed the impropriety or appearance of impropriety of any ex parte communication by the judge deciding a case at the trial or appellate levels with a judge who has been disqualified from hearing the matter. MODEL CODE OF JUDICIAL CONDUCT r. 2.9 cmt. 5 (AM. BAR ASS’N 2007).

229. On the background for the formation of this task force, see Supreme Court of N.H. Order R-01-001, *In re Recommendations of Task Force for the Renewal of Judicial Conduct Procedures* (Jan. 23, 2001), [https://www.courts.state.nh.us/supreme/orders/r\\_01\\_001.htm](https://www.courts.state.nh.us/supreme/orders/r_01_001.htm).

230. The 1990 revision to the ABA model code to which the Task Force referred was significant for its substitution of the word “shall” for “should” throughout the document to make clear that its provisions were no longer just hortatory or prescriptive suggestions, but instead must be understood as rules that were mandatory and enforceable in their application to judge behavior. See James J. Alfini, Shailey Gupta-Brietzke & James F. McMartin IV, *Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform*, 48 S. TEX. L. REV. 889, 891 (2007); see also Cynthia Gray, *Controversy and Reform in New Hampshire*, JUD. CONDUCT REP., Spring 2001, at 5–6, <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR%20Spring%202001.ashx>.

231. JONATHAN DEFELICE & WILFRED L. SANDERS, JR., REPORT OF TASK FORCE FOR THE RENEWAL OF JUDICIAL CONDUCT PROCEDURES 3–6 (2001), <http://www.courts.state.nh.us/press/2001/rptjcc.htm>.

232. See VIRGINIA GARRELL-MICHAUD, AN EVALUATION OF THE SUPREME COURT OF NEW HAMPSHIRE “COMMITTEE ON JUDICIAL CONDUCT AND PROFESSIONAL CONDUCT COMMITTEE” 2–3 (1979).

Association.<sup>233</sup> Moreover, the new Commission should not be physically located at the supreme court but should have its own separate office, hold its meetings off of court premises, not be staffed by court personnel, and have separate funding, not provided under the budget of the supreme court.<sup>234</sup>

In May 2001, the supreme court entered an administrative order creating the new Conduct Commission with a new Code of Judicial Conduct and providing that the new body would be totally independent of the court system, with its own staff, office space, and funding, as suggested by the Task Force.<sup>235</sup> The order included transition provisions calling for the Court JCC (i.e., the pre-Commission JCC) to remain temporarily in existence to complete action on all matters pending before it on the effective date of the new code.<sup>236</sup>

All Court-JCC proceedings in those matters were to be governed by the pre-Task Force code of conduct, which would be supplanted by the new 2001 code when all pending Court-JCC cases were completed.<sup>237</sup> The new code of conduct would go into effect sixty days after funds were first appropriated by the legislature for its implementation.<sup>238</sup>

Those arrangements, however, ran counter to the expectation of the legislature that the JCC would be fully and immediately replaced by the new Commission.<sup>239</sup> Perhaps to reassert legislators' role in the process, the Senate promptly passed a bill endorsing the new disciplinary body envisioned by the Task Force report but increasing the number of legislative appointees, at the expense of those allotted the governor and

233. DEFELICE & SANDERS, JR., *supra* note 231, at 3.

234. *Id.* at 2, 5, 6.

235. Supreme Court of N.H. Order (May 7, 2001), <http://www.courts.state.nh.us/supreme/orders/ordr0507.htm>.

236. *Id.*

237. The text of the supreme court's Order of May 7, 2001 did not include any new procedural rules for judicial disciplinary proceedings. *See id.* As the new Conduct Committee ("CC") was being formed, David Hodges and John Newsom both resigned from being members of the JCC. A public radio report at the time indicated that Newsom was zealous in his defense of the JCC's rules of confidentiality, arguing that they were a necessary due process protection in judicial disciplinary proceedings. *See JCC Members Quit Committee and Sound Off*, NHPR NEWS, <http://info.nhpr.org/node/1197> (last visited May 23, 2016).

238. Supreme Court of N.H. Order, *supra* note 235.

239. For the comments in the Commission's annual report for fiscal year 2002, see STATE OF N.H. JUDICIAL CONDUCT COMM'N, REPORT OF THE JUDICIAL CONDUCT COMMISSION FOR FISCAL YEAR 2002, at 2 (2002), [http://wermenh.com/courts/annual\\_2002.html](http://wermenh.com/courts/annual_2002.html) ("The Judicial Conduct Commission was created with the expectation that the Supreme Court Commission on Judicial Conduct, which has the same duties, would be disbanded. That has not happened. Thus, two similarly named panels are operating in parallel, costing taxpayers money, and causing much confusion for the public.").

the supreme court.<sup>240</sup> That bill was referred to a conference committee, which elected to retain many of its original features, including expanded legislative authority to appoint citizen members and a further amendment requiring that attorneys appointed by the state bar president be subject to approval by the governor and the legislative leaders.<sup>241</sup> The bill was ultimately passed in both chambers, funded, and signed into law by Governor Shaheen in July 2001.<sup>242</sup> It provided that the new 2001 Supreme Court Code of Judicial Conduct would provide interim rules for the new Commission, to the extent those rules were not inconsistent with the new statute. It also emphatically rejected the idea of close ties between the disciplinary body and the supreme court, providing as well that the new Commission must adopt its own rules to replace the 2001 Supreme Court Code of Conduct no later than July 1, 2002.<sup>243</sup>

When the new statute became effective as of January 1, 2002, the State thus had two judicial conduct bodies—the new, independent Commission and the (pre-existing) Court JCC. The two bodies sought to communicate informally in 2002 to avoid overlap in their efforts.<sup>244</sup> But in September 2003, matters were further complicated by a new bill that was introduced, passed by both legislative chambers, and signed into law by Governor Craig Benson all on the very same day.<sup>245</sup> It included a provision requiring that all complaints against judges and clerks under the 2001 statute be directed to the new Commission.<sup>246</sup> Faced with this unexpected development, the Court JCC filed a petition in the supreme court in December 2003, seeking instructions about its own duties and challenging the constitutionality of the new judicial conduct statute.<sup>247</sup>

In a decision rendered on June 14, 2004, the supreme court held the statute unconstitutional.<sup>248</sup> Justices argued that the regulation of court

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240. S. 197-FN, 157th Gen. Court, 2001 Sess. (N.H. 2001), <http://www.gencourt.state.nh.us/legislation/2001/SB0197.html>.

241. S. JOURNAL, 157-19, 2001 Sess., at 687-92 (N.H. 2001), <http://www.gencourt.state.nh.us/scaljournals/Journals/2001/senjou19.html>.

242. Judicial Conduct Commission Act, 2001 N.H. Laws 267.

243. Under the statute, new rules to govern all proceedings before the new CC were approved and effective on May 10, 2002. See PROCEDURAL RULES OF JUDICIAL CONDUCT COMM'N (JUDICIAL CONDUCT COMM'N 2002), <http://wermenh.com/courts/proceduralrules.html>.

244. THE STATE OF N.H. SUPREME COURT COMM. ON JUDICIAL CONDUCT, ANNUAL REPORT 2002, at 6 (2002), <http://www.courts.state.nh.us/committees/judconductcomm/reports/annualreport2002.pdf>.

245. H.R. 4-FN-A, 158th Gen. Court, 2003 Sess. (N.H. 2003), <http://www.gencourt.state.nh.us/legislation/2003/HB0004.html>.

246. *Id.*

247. *In re* Petition of the Judicial Conduct Comm., 855 A.2d 535 (N.H. 2004).

248. *Id.* at 540-41.

proceedings and officers, including the power to discipline judges, is an inherent and exclusive power of the judicial branch; the state, they held, therefore violated the separation of powers doctrine.<sup>249</sup> The decision was an important one. The court had already demonstrated readiness to strengthen judicial ethics, to distance the enforcement body from itself, and to grant wider input by the elected branches into it. By voiding the September 2003 statute, however, it also demonstrated that final approval of the terms by which judicial ethics would be monitored belonged to the supreme court, not the legislature.

After that 2004 decision, the Supreme Court's Advisory Committee on Rules began revising the Code of Judicial Conduct and, in the spirit of the Task Force's recommendations, amending the membership structure of the disciplinary body. In January 2005, the court approved those recommendations.<sup>250</sup> The new, State JCC (differently composed and institutionally situated than the Court JCC, with a different code to enforce) would have eleven members<sup>251</sup>: (a) three trial judges and a court clerk appointed by the supreme court; (b) one attorney appointed by the state bar president; and (c) six public members, none of whom could be a judge, attorney, clerk of court, or elected or appointed public official: one appointed by the state bar president; one appointed by the supreme court; two appointed by the Governor; one appointed by the President of the Senate; and one appointed by the Speaker of the House.<sup>252</sup> The new code provisions also followed Task Force recommendations by providing that the State JCC would have a committee address determined by the committee and, subject to the availability of funds, would select its own office space, which should not be in the facilities of any branch of government. It would hire its own staff and prepare its own budget request, as a separate program accounting unit (PAU) within the judicial branch budget.<sup>253</sup>

In February 2005, the supreme court requested legislation regarding the State JCC's access to confidential information, e.g., hearings in child abuse and other cases not open to the public.<sup>254</sup> In what might be seen as a legislative acknowledgment of the constitutional legitimacy of the

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249. *See id.*

250. Supreme Court of N.H. Order R-2004-004, *In re December 2004 Report of the Advisory Committee on Rules* (Jan. 25, 2005), <https://www.courts.state.nh.us/supreme/orders/20050125.htm>.

251. *Id.* app. A.

252. This membership provision was thus much closer to that provided by the July 2001 bill than to the 2003 bill.

253. Supreme Court of N.H. Order R-2004-004, *supra* note 250.

254. S. 224, 159th Gen. Court, 2005 Sess. (N.H. 2005), <http://www.gencourt.state.nh.us/legislation/2005/SB0224.html>.

State JCC, a statute was passed and signed into law by Governor John Lynch in June 2005<sup>255</sup> allowing State JCC members to review such confidential information in closed sessions without the need to disclose details to the public.<sup>256</sup> Then, in September of that year, an important symbolic step was taken to emphasize the organizational independence of the State JCC from the supreme court. State JCC members voted, with the approval of the supreme court, to strike the words “Supreme Court” from its name, so that the official name of the body would be “The State of New Hampshire Judicial Conduct Committee.”<sup>257</sup>

In all of these developments, the judicial branch’s leaders showed a willingness to work with the legislature to implement the recommendations of the Task Force on Judicial Conduct. Yet they also insisted on compliance with the separation of powers and continued to defend judicial prerogatives.

### C. Merit Selection of Judges

After the Brock impeachment, the selection and tenure of judges in general drew considerable legislative attention in New Hampshire. In every session year from 2001 through 2016, with the exception of 2008 and 2013, bills were filed to change the existing processes, yet none gained much support after referral to committee.<sup>258</sup> Yet a more modest attempt to bring greater rigor to the process of judicial selection has enjoyed a (highly qualified) measure of success. It involves use of a “judicial-selection commission” to apply specified merit criteria in the consideration of judicial nominees, and it represents another effort to

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255. Act of June 15, 2005, 2005 N.H. Laws 129 (codified as amended at N.H. REV. STAT. ANN. § 490:30-a (2017)).

256. See N.H. REV. STAT. ANN. § 490:30-a (2017).

257. See THE STATE OF N.H. JUDICIAL CONDUCT COMM., ANNUAL REPORT 2008, at 5 (2008), <http://www.courts.state.nh.us/committees/judconductcomm/reports/annualreport2008.pdf>.

258. Bills proposing constitutional amendments that failed on judicial selection included CACR 2 (2002), CACR 16 (2002), CACR 33 (2002), CACR 3 (2003), CACR 7 (2009), CACR 24 (2012), CACR 12 (2014), CACR 16 (2014), CACR 8 (2015), and CACR 25 (2016). Bills proposing statutory changes that failed on judicial selection included HB 568 (2001), HB 582 (2002), SB 24 (2002), and HB 1134 (2004). Failed bills proposing constitutional amendments on judicial tenure included CACR 8 (2001), CACR 10 (2001), CACR 4 (2002), CACR 12 (2003), CACR 9 (2004), CACR 2 (2005), CACR 15 (2007), and CACR 21 (2010). Finally, failed bills proposing legislation on judicial tenure included HB 360 (2001), HB 467 (2001), HB 566 (2002), SB 86 (2002), HB 68 (2003), and HB 1185 (2010). There were two bills, however, that were enacted into law on the appointment of the superior court chief justice: HB 1135 (2004) and HB 413 (2006).

enhance judicial accountability without compromising judicial independence.<sup>259</sup>

The proposed judicial-selection commission was to consist of a mix of respected lawyers and citizens, which would then vet all judicial candidates; governors would select judges from the pool of qualified candidates thus assembled.<sup>260</sup> The idea was adopted by Governor Jeanne Shaheen, who gave it life by executive order in June 2000, a full month before the House of Representatives voted to impeach Brock.<sup>261</sup> One of the most notable judicial appointments Shaheen made through the new “merit selection” process was that of Linda Stewart Dalianis, who in 2000 became the first woman ever named to sit on New Hampshire’s five-member Supreme Court.<sup>262</sup>

Efforts to render the new merit-selection process permanent, however, have been unsuccessful. In January 2001, just two months after the conclusion of the Brock impeachment, a bipartisan bill was introduced in the New Hampshire Senate to establish a judicial nominating commission by statute.<sup>263</sup> Three weeks later, a bipartisan bill was introduced in the House proposing a virtually identical judicial nominating commission.<sup>264</sup> But both bills were deemed “inexpedient to legislate” by virtue of a 1977 advisory opinion of the supreme court suggesting that statutory creation of a judicial-selection commission would unconstitutionally infringe on the appointive powers of the governor and council.<sup>265</sup> Recognizing that only a constitutional amendment would resolve the matter, one was filed in 2002. But it failed

259. In 1940, Missouri became the first state to use a nominating commission to aid in the selection of judges. Today, the practice has been adopted in more than twenty states and is widely recognized as a viable alternative to both the election and the unassisted appointment of judges. For current information on the commission name, courts for which judges are nominated, authorization, terms, and dates covered by each state’s judicial nominating commission, see Shauna Strickland, Richard Schaffler, Robert LaFountain, & Kathryn Holt, *State Court Organization: Judicial Nominating Commissions*, NAT’L CTR. FOR ST. CTS., <http://www.ncsc.org/sco> (follow “List of Tables” hyperlink; then follow 1.5.a “Commission Name and Courts for which Judges are Nominated” hyperlink) (last modified June 30, 2017); see also Ryan J. Owens et al., *Nominating Commissions, Judicial Retention, and Forward-Looking Behavior on State Supreme Courts: An Empirical Examination of Selection and Retention Methods*, 15 ST. POL. & POL’Y Q. 211, 213 (2015).

260. *Id.* at 214.

261. Exec. Order No. 2000-9 (June 30, 2000), <http://sos.nh.gov/ExecOrderShaheen.aspx>.

262. *Supreme Court—Chief Justice Linda Stewart Dalianis*, N.H. JUD. BRANCH, <https://www.courts.state.nh.us/supreme/meetdalian.htm> (last visited Sept. 9, 2017).

263. S. 24, 157th Gen. Court, 2001 Sess. (N.H. 2001), <http://www.gencourt.state.nh.us/legislation/2002/SB0024.html>.

264. H.R. 582, 157th Gen. Court, 2001 Sess. (N.H. 2001), [http://gencourt.state.nh.us/SofS\\_Archives/2002/house/HB582H.pdf](http://gencourt.state.nh.us/SofS_Archives/2002/house/HB582H.pdf).

265. Op. of the Justices, 374 A.2d 638, 640 (N.H. 1977).

as well, for fear that it might unduly politicize the selection process.<sup>266</sup> So did another bipartisan legislative effort of 2003, again as an encroachment on executive-branch appointment powers.<sup>267</sup> Merit selection has lasted, for the most part, from that day to this—but only through gubernatorial executive actions.<sup>268</sup>

#### *D. Measuring the Performance of Sitting Judges and Marital Masters*

In 1987, the New Hampshire Supreme Court had introduced a judicial performance evaluation (JPE) program,<sup>269</sup> soon after the promulgation of national guidelines by the ABA.<sup>270</sup> Legislators, however, found the operation of that JPE process “sporadic at best.”<sup>271</sup> In April 2000, Governor Jeanne Shaheen signed legislation requiring the judiciary to design and implement a new JPE program, by which the performance of all superior, district, and probate courts would be evaluated at least every three years.<sup>272</sup> The program was to be in effect no later than the end of March 2001. At that time, the court adopted Rule 56, “Performance Evaluation of Judges,” setting provisional JPE

266. S. Constitutional Amendment Con. Res. 33, 157th Gen. Court, 2002 Sess. (N.H. 2002), <http://www.gencourt.state.nh.us/legislation/2002/CACR0033.html>; N.H. Senate, Legislative Documents Relating to CACR 33 (2002 Session), N.H. GEN. CT., at 17, [http://gencourt.state.nh.us/SofS\\_Archives/2002/house/CACR33H.pdf](http://gencourt.state.nh.us/SofS_Archives/2002/house/CACR33H.pdf) (last visited Aug. 16, 2017).

267. H.R. 130, 158th Gen. Court, 2003 Sess. (N.H. 2003), <http://www.gencourt.state.nh.us/legislation/2003/HB0130.html>.

268. In December 2003, Governor Craig Benson issued an executive order abolishing the merit selection commission that Shaheen had created. Exec. Order No. 2003-10 (Dec. 9, 2003), <http://sos.nh.gov/ExecOrderBenson.aspx>. Then in February 2005, soon after he won the governorship, John H. Lynch reversed Benson’s action with another executive order re-creating the commission. Exec. Order No. 2005-2 (Feb. 5, 2005), <http://sos.nh.gov/ExecOrderLynch.aspx>. In 2013, Lynch’s successor, Margaret Hassan, renewed it with an executive order of her own. Exec. Order No. 2013-06 (Apr. 23, 2013), <http://sos.nh.gov/ExecOrdersHassan.aspx>. In November 2016, Christopher T. Sununu was elected governor and he entered an order continuing the use of a merit selection commission for judges. Exec. Order No. 2017-01 (Feb. 6, 2017), <https://www.governor.nh.gov/news-media/orders-2017/documents/2017-01.pdf>.

269. *Judicial Performance Evaluation*, INST. FOR ADVANCEMENT AM. LEGAL SYS., <http://iaals.du.edu/sites/default/files/documents/publications/newhampshirejpe.pdf> (last visited Sept. 9, 2017).

270. See Malia Reddick & Rebecca Love Kourlis, *Judicial Performance Evaluation, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 155, 158–59 (Peter M. Koelling ed., 2016).

271. See N.H. Senate, Legislative Documents Relating to H.R. 568 (2000 Session), N.H. GEN. CT., at 7, [http://gencourt.state.nh.us/SofS\\_Archives/2000/senate/HB568S.pdf](http://gencourt.state.nh.us/SofS_Archives/2000/senate/HB568S.pdf) (last visited Sept. 9, 2017) (quoting the testimony of Rep. Henry Mock).

272. Act of Jan. 5, 2000, 2000 N.H. Laws 53, <http://www.gencourt.state.nh.us/legislation/2000/HB0568.html>.

program procedures and performance criteria pending approval of a final plan.<sup>273</sup>

The law might have raised legitimate questions about whether the legislature had the constitutional authority to require such a program by statute. The supreme court, however, rendered the issue moot by adopting a rule that directly followed the statutory language.<sup>274</sup> In March 2001, it formally established the JPE program in all state courts.<sup>275</sup>

The enhanced JPE program would measure the performance of judges against benchmarks jointly established by the supreme court and the Administrative Council for the Judicial Branch (a body consisting of the chief justice, the administrative judge for each trial court, and the state court administrator), and shared with the leaders of the other branches of state government.<sup>276</sup> Trial court judges and marital masters were now to be evaluated by uniform, carefully considered standards.<sup>277</sup> Although all records and information obtained during the JPE process were generally to be kept confidential, a judge or marital master who failed two consecutive performance evaluations or purposely failed to complete prescribed performance improvements would be deemed to have waived any right to confidentiality, and the results of his or her evaluations would be made public.<sup>278</sup>

273. Supreme Court of N.H. Order (Mar. 27, 2001), <http://www.courts.state.nh.us/supreme/orders/suprul56.htm>. The kind of JPE program that the statute required would follow the model of one first created in Alaska in 1975 to provide voters with information about individual judges facing retention elections. See Sharon Paynter & Richard C. Kearney, *Who Watches the Watchmen? Evaluating Judicial Performance in the American States*, 41 ADMIN. & SOC'Y 923, 933 (2010).

274. See N.H. Senate, Legislative Documents Relating to S. 249 (2014 Session), N.H. GEN. CT., at 6–7, [http://www.gencourt.state.nh.us/SofS\\_Archives/2014/senate/SB249S.pdf](http://www.gencourt.state.nh.us/SofS_Archives/2014/senate/SB249S.pdf) (last visited Aug. 28, 2017) (summarizing testimony of Howard Zibel on behalf of the Judicial Department and the Supreme Court in support of SB 249).

275. Supreme Court of N.H. Order on Supreme Court Rule 56 (Mar. 27, 2001), <https://www.courts.state.nh.us/supreme/orders/suprul56.htm>.

276. See N.H. SUPREME COURT, ANNUAL REPORT ON JUDICIAL PERFORMANCE EVALUATION PROGRAM 1–2 (2001), <http://www.courts.state.nh.us/pereval/jpe-2001-final-report.pdf>.

277. See N.H. SUP. CT. R. 56(II)–(IV).

278. *Id.* at (IV)(B)(III). In the event the evaluation results for a judge or marital master were made public, the rule provides that the identity of persons furnishing evaluation information about him or her under the JPE process would remain confidential.

It did not take long for judicial leaders to find a performance problem and show their responsiveness by reporting it to the leaders of the other branches of government. The JPE report for 2004 indicated that results for one of the superior court judges evaluated in 2003 was significantly below the norm. The results of the judge's follow-up evaluation showed a very significant improvement in every one of the component categories. See N.H. SUPREME COURT, ANNUAL REPORT ON JUDICIAL PERFORMANCE

In January 2011, new legislation was proposed for the establishment of a judicial performance review commission that would work with the judicial branch of government but would not be organizationally dependent on it. In 2012, an amended version of the bill was approved by both chambers and signed into law.<sup>279</sup> In a cooperative effort to meet the new requirements by the effective date of the amended statute, the supreme court then revised its rules to create a judicial performance advisory committee to make recommendations for strengthening the design and implementation of the JPE process.<sup>280</sup> The committee would consist of the administrative judges of the superior court and circuit court, the chairs of the Senate and House Judiciary Committees, the executive director of the New Hampshire Public Defender Program, the executive director of the Judicial Council (or a designee), a deputy attorney general, and the chair of the Bar Association's Committee on Cooperation with the Courts (or a designee).<sup>281</sup> An article in the state bar news indicated that the purpose of the committee would be "to make the evaluation process more accurate and fair, while improving the performance of judges and the judicial system as a whole."<sup>282</sup>

The collaboration between the New Hampshire legislature and judiciary since 2000 in the enhancement of the JPE program, begun by the judiciary in 1987, shows a gratifying degree of interbranch consensus about this approach to promoting judicial accountability. The adoption of standards against which to measure the quality of trial and appellate court judges in an ongoing manner is highly relevant to the consideration of whether any individual judge is perceived by regular day-to-day observers to have departed from the expectations for his or her office in a manner that is a disservice to citizens of the state. Indeed, the provisions in supreme court Rule 56 for the failure to perform at a satisfactory level, especially by purposeful failure to complete prescribed improvement steps, should, when necessary, be considered important criteria for deciding whether the behavior of a judge or marital master warrants investigation for potential removal by address or impeachment.

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EVALUATION PROGRAM 6 (2006), <http://www.courts.state.nh.us/pereval/jpe-2006-final-report.pdf>.

279. See N.H. REV. STAT. ANN. § 490:32 (2014).

280. See N.H. SUP. CT. R. 56(I)(B).

281. *Judicial Performance Evaluation*, *supra* note 269.

282. Kristen Senz, *Measuring Judicial Performance*, N.H.B. ASS'N (Feb. 19, 2014), <https://www.nhbar.org/publications/display-news-issue.asp?id=7197>.

*E. Judicial Decisions on State Education Funding*

The supreme court's deliberations over education funding did not end when the *Claremont VI* decision was entered in 1999,<sup>283</sup> before the commencement of the Brock impeachment proceedings. But the membership of the supreme court bench was changing, with Justices Sherman Horton and Stephen Thayer replaced by Justices Joseph Nadeau and Linda Dalianis in 2000.<sup>284</sup> In December 2000, just after the conclusion of the impeachment trial, four of the justices (with Nadeau and Dalianis joining Brock and Broderick) rendered an advisory opinion that a reformed public-school financing system proposed by the Senate would not "satisfy the requirements of part II, articles 5, 6, and 83 of the New Hampshire constitution."<sup>285</sup> After that, the fifth position on the bench was filled by the appointment of James Duggan to the court.

With three new justices on the court, its mix of judicial perspectives began to change on whether the state was meeting its education funding obligations under the state constitution. This change was evident in the *Sirrell* case, involving a statewide property tax for education funding.<sup>286</sup> In *Sirrell*, the justices reversed a trial court decision finding the statewide property tax unconstitutional as applied, which would have required the state to repay the \$880 million that had been collected under the tax to date.<sup>287</sup> David Brock and John Broderick, the last two justices whose involvement in education-funding litigation stretched back to *Claremont I*, would for the first time find themselves in the minority on a case regarding state action in this area. The three new justices saw no constitutional infirmity in the tax or in its implementation.<sup>288</sup>

In September 2001, the *Claremont* plaintiffs then asked the supreme court to declare that the legislature's newest education funding program was "unconstitutional on its face."<sup>289</sup> This time, Brock and Broderick found a third justice to support their view, Justice Duggan. The majority view was that the State's duty to provide a constitutionally adequate education must include measures of accountability, and since the new

283. *Claremont Sch. Dist. v. Governor*, 761 A.2d 389 (N.H. 1999).

284. On the appointment of Joseph P. Nadeau, see N.H. GOVERNOR & EXEC. COUNCIL, MINUTES: MARCH 8, 2000 (2000), [http://sos.nh.gov/1999-2001\\_Governor\\_and\\_Council\\_Minutes.aspx](http://sos.nh.gov/1999-2001_Governor_and_Council_Minutes.aspx) (click on "March 8, 2000"). On the appointment of Linda Stewart Dalianis, see N.H. GOVERNOR & EXEC. COUNCIL, MINUTES: APRIL 26, 2000 (2000), [http://sos.nh.gov/1999-2001\\_Governor\\_and\\_Council\\_Minutes.aspx](http://sos.nh.gov/1999-2001_Governor_and_Council_Minutes.aspx) (click on "April 26, 2000").

285. *Op. of the Justices (Reformed Pub. Sch. Fin. Sys.)*, 765 A.2d 673, 675 (N.H. 2000).

286. *Sirrell v. State*, 780 A.2d 494 (N.H. 2001) (per curiam).

287. *Id.* at 496.

288. *Id.* at 508.

289. *Claremont Sch. Dist. v. Governor (Claremont VII)*, 794 A.2d 744, 750 (N.H. 2002).

statutory program provided no actual mandate for either the local school district or the state education department to do anything, it did not fulfill the state's constitutional duty.<sup>290</sup>

In their dissent, Justice Nadeau and Justice Dalianis explicitly argued that the existing laws, rules, and regulations on the state's duty to provide a constitutionally adequate education are sufficient, and that the majority's definition of accountability exceeds what is constitutionally required.<sup>291</sup>

The *Claremont VII* decision was the last to be rendered in that long-running set of cases. After that, judicial involvement in school funding eventually reached a degree of closure through decisions in two cases involving the Londonderry School District.

In *Londonderry I*, the plaintiffs filed a trial court complaint in 2005, claiming the state had failed to comply with the supreme court's 1997 order in *Claremont II* to define a constitutionally adequate education.<sup>292</sup> When the matter was appealed, Brock and Nadeau had retired, so the supreme court now had two more justices who had not participated in any of the earlier *Claremont* decisions. In its decision, the supreme court affirmed the trial court's ruling for the plaintiffs.<sup>293</sup> It also retained jurisdiction over the core issue of what defines a "constitutionally adequate education," pending legislative response to the ruling.<sup>294</sup> However, it withheld a ruling on the remaining issues of cost, accountability, and taxation because "the definition of a constitutionally adequate education is essential to all other issues."<sup>295</sup>

The legislature responded by enacting a statute defining a constitutionally "adequate" education.<sup>296</sup> Before the supreme court in 2008, the *Londonderry II* petitioners did not challenge the constitutional sufficiency of the new definition of a constitutionally adequate education.<sup>297</sup> Moreover, while they did claim there were several infirmities in the new statutes, they nonetheless informed the court that they would assent to a dismissal of this case without prejudice "if the State [would] commit to making a good faith effort to fulfill, by June 30, 2008, the remaining three mandates of its constitutional duty to provide an adequate education to every child in the state."<sup>298</sup>

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290. *Id.* at 751.

291. *Id.* at 763 (Nadeau & Dalianis, JJ., dissenting).

292. *Londonderry Sch. Dist. v. State (Londonderry I)*, 907 A.2d 988, 989–90 (N.H. 2006).

293. *Id.* at 996.

294. *See id.* at 995–96.

295. *Id.* at 995.

296. N.H. REV. STAT. ANN. § 193-E:2 (2007).

297. *Londonderry Sch. Dist. v. State (Londonderry II)*, 958 A.2d 930 (N.H. 2008).

298. *Id.* at 931.

In response, the state claimed the action was now moot. They maintained that, with the enactment of the new laws in 2007 and 2008, the state had now taken sufficient steps toward satisfying its constitutional duty to render the issue moot by establishing state education costing and funding legislation and creating a legislative oversight committee as an affirmative first step toward ensuring accountability.<sup>299</sup> In a majority opinion written by Justice Hicks, with Justices Dalianis and Galway concurring, the court agreed with the respondents, finding that the action was now moot. On that basis, it dismissed the case.<sup>300</sup>

#### *F. Judicial Review of Legislative Actions in General*

Another critical consideration in terms of perceived “judicial arrogance” has to do with judicial decisions involving challenges to the constitutionality of legislative actions. Despite a history of populist concern about the exercise of judicial power, it appears that no effort was ever made in New Hampshire before 2000 to impose limits on the power of the judiciary to review the constitutionality of legislation in New Hampshire.<sup>301</sup> Even after the Brock impeachment, and despite the continued incidence of court rulings invalidating legislation on constitutional grounds at a much higher rate than before 1966, there has still been no strong effort to constrain the power of judicial review in general. Although legislators filed four bills between 2003 and 2012, proposing constitutional limits on judicial review in general, each of them was rather summarily disposed as “inexpedient to legislate.”<sup>302</sup>

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299. *Id.* at 932.

300. *Id.* at 933. Chief Justice Broderick and Justice Duggan each filed separate dissenting opinions, however. As the last remaining member of the pre-impeachment *Claremont* court, Justice Broderick expressed disagreement that the action was now moot, writing that the State had still not met its acknowledged obligation, “despite its near decade long assurances that our public education system would contain the requisite controls to ensure the delivery of a constitutionally adequate education.” *Id.* at 935 (Broderick, C.J., dissenting). In Justice Duggan’s dissent, he noted that the parties’ memoranda showed considerable factual disagreements best addressed by a trial court, so the appeal should be dismissed without prejudice and the case remanded to superior court. *Id.* at 939 (Duggan, J., dissenting).

301. See MARSHALL, *supra* note 8, at 233.

302. These bills were: H.R. Constitutional Amendment Con. Res. 11, 158th Gen. Court, 2003 Sess. (N.H. 2003), <http://www.gencourt.state.nh.us/legislation/2003/CACR0011.html>; H.R. Constitutional Amendment Con. Res. 16, 159th Gen. Court, 2005 Sess. (N.H. 2005), <http://www.gencourt.state.nh.us/legislation/2005/CACR0016.html>; H.R. Constitutional Amendment Con. Res. 2, 160th Gen. Court, 2008 Sess. (N.H. 2008), <http://www.gencourt.state.nh.us/legislation/2008/CACR0002.html>; and H.R. Constitutional Amendment Con. Res. 28, 162d Gen. Court, 2012 Sess. (N.H. 2012), <http://www.gencourt.state.nh.us/legislation/2012/CACR0028.html>.

Table 3 shows trends over the 200 years from 1817 through 2016 in terms of New Hampshire Supreme Court decisions finding legislation unconstitutional.

**Table 3. Comparison of New Hampshire Judicial Review Outcomes, 2001–2016, with Outcomes in the Nineteenth and Twentieth Centuries<sup>303</sup>**

| <b>Time Period</b> | <b>Total Judicial Review Cases</b> | <b>Legislation Found Un-constitutional</b> | <b>Percent Uncon-stitutional</b> |
|--------------------|------------------------------------|--|----------------------------------|
| <b>1817-1900</b>   | 74                                 | 16   | 21.6%                            |
| <b>1901-1966</b>   | 108                                | 17   | 15.7%                            |
| <b>1967-2000</b>   | 69                                 | 31   | 44.9%                            |
| <b>2001-2010</b>   | 24                                 | 9  | 37.5%                            |
| <b>2011-2016</b>   | 18                                 | 5  | 27.8%                            |
| <b>Overall</b>     | <b>293</b>                         | <b>78</b>                                  | <b>26.6%</b>                     |

It is striking to see what happened in supreme court constitutional decisions after the 1966 adoption of an amendment freeing the supreme and superior courts from the power of the legislature to create and abolish courts. Among cases decided by a constitutionally empowered court from 1967 until after the conclusion of the Brock impeachment in 2000, the high court invalidated statutes in 45% of those with constitutional challenges.

After the conclusion of the impeachment proceedings, the percentage of cases with statutes found unconstitutional was lower during the period from 2001 to 2010, when David Brock returned as chief justice and was then succeeded by John Broderick. Under Brock and Broderick, however, the incidence of supreme court rulings adverse to the legislature remained higher than it had been before 1966. Perhaps the outcomes of judicial review cases after Linda Dalianis became chief justice in 2011 are every bit as striking as those in the three decades right after the supreme court was granted constitutional status in 1966. There were eighteen judicial review cases decided between 2011 and the

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303. This table reflects data taken from a case-by-case analysis, on file with the authors, of 293 New Hampshire Supreme Court decisions involving judicial review of the constitutionality of legislative actions, as published from 1817 through the end of December 2016.

end of December 2016, and the percentage of them ruling legislative action unconstitutional (28%) fell back from the high-water mark (45%) during the last third of the twentieth century to approach the overall total incidence (27%) for the entire historical period from 1817 through 2016.

## VI. CONCLUSION

Any compelling explanation for the lower incidence of New Hampshire Supreme Court decisions rejecting the constitutionality of legislative enactments since the retirement of Chief Justices Brock and Broderick must await the passage of time and further analysis. Whatever its cause, the reduced number of clashes between the judiciary and the legislature seems to suggest that each has attained both clearer understanding and fuller acceptance of both its own and the other's powers and privileges in the new era of judicial independence that New Hampshire entered after 1966.

That *rapprochement*, such as it is, was not easily attained. In New Hampshire, judicial independence did mean a break with the state's original arrangement of governing powers, and in fact with the state's civic tradition. Opposition to the new direction may or may not have been inevitable. In any case, in a state without judicial elections or reappointment processes, that opposition had, unfortunately, no outlets other than the dramatic and dangerous act of impeachment. But David Brock's ordeal does not seem to have been in vain. It prompted an extended, multi-front reconsideration of legislative-judicial relations, which eventually produced reasoned compromises. Those compromises were particularly important in New Hampshire in that they served to marginalize the state's formidable populist element, which was and remains hostile not only to judicial independence, but to the very idea of legal professionalism.

In this way, the structural disjunction (modernized judiciary, traditionalist legislature and executive) that had created the problem was structurally resolved. Other states experiencing backlash of this sort may well find value in considering New Hampshire's experience.