

HIGH COURT STUDY

NEW HAMPSHIRE: “LIVE FREE OR DIE,” *BUT IN THE MEANTIME . . .*

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I. INTRODUCTION

This High Court Study attempts to create a view of the current New Hampshire Supreme Court that is informative to the practitioner in a tangible way, and indicative of the direction in which the court appears to be headed and the effect that direction will have on both the law of the state and the greater state of the law. The Study will begin by examining the inner workings of the court itself and its relationship to the State of New Hampshire. Then, after explaining the methodology that will be employed, each justice will be examined independently, with consideration given to that justice’s place on the court as a whole. Lastly, the Study will take a close look at the past, present, and future of the “*Claremont* cases,” which entail a series of constitutional challenges to New Hampshire’s system of public education.

Throughout this Study, much heed will be given to the positions and reasoning of individual justices. New Hampshire is a state known for its independent nature, and though it takes a majority to decide a case, that majority is made up of autonomous legal minds. Because the most significant legal questions of the day are adjudicated and decided within this dynamic, this Study assumes that each individual position on the court can be revealing to the

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academic and crucial to the practitioner.

Methodologically, this Study does not concentrate on the outcome of any single case. Instead, the focal point is the manner in which the justice or the court arrived at a given decision. Although cases are at times reversed or overruled, more commonly it is the gentle shifts in reasoning that change future outcomes and thus demand the most sincere contemplation.

II. THE COURT

Sitting in Concord, the Supreme Court of New Hampshire is the highest tribunal and the only appellate-level court in the state. The court consists of one chief justice and four associate justices, each nominated by the governor and confirmed by a five-member executive council.¹ Each justice can serve, on good behavior, until reaching the age of seventy, at which point retirement becomes mandatory.² The office of chief justice is now chosen in the same manner as the associate justices. However, current Chief Justice John Broderick took the office of chief justice under a different statutory provision that has since been declared unconstitutional.³

As with many, if not all courts, one can safely surmise that the method of judicial selection in New Hampshire has a profound effect on the respective behavior of the justices.⁴ The two most salient

¹ N.H. CONST. pt. 2, arts. 46, 60; N.H. REV. STAT. ANN. § 490:1 (Supp. 2004), *invalidated by In re Governor*, 846 A.2d 1148 (N.H. 2004).

² N.H. CONST. pt. 2, arts. 73, 78.

³ *In re Governor*, 846 A.2d at 1149. Chief Justice Broderick was appointed automatically under section 490:1 of the New Hampshire Revised Statutes for a five-year term that would rotate to the next most senior justice at the termination of his tenure as chief justice. Originally, the Governor and Council sought an advisory opinion from the New Hampshire Supreme Court, inviting the court to determine whether the statutory scheme for selecting chief justice was constitutional. *See In re Opinion of the Justices (Appointment of Chief Justice of the Supreme Court)*, 842 A.2d 816, 817 (N.H. 2003). The court declined the invitation, stating that such an advisory opinion was not within the court's power because (1) the legislation was existing, rather than proposed, and (2) the opinion they would have rendered likely would have infringed upon the rights of the very justices issuing the opinion. *Id.* at 818–19. Though the statute has since been held unconstitutional (as beyond legislative authority), Governor Benson left Broderick at the post. *See Holly Ramer, Special Panel Declares Rotating Chief Justice Law Unconstitutional*, BOSTON.COM, Apr. 28, 2004, http://www.boston.com/news/local/new_hampshire/articles/2004/04/28/special_panel_declares_rotating_chief_justice_law_unconstitutional/.

⁴ *See Philip L. Dubois, Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. (SPECIAL ISSUE) 31, 36–37 (1986) (suggesting that the mode of selection may influence a judge's decision-making, such as where judicial election might encourage a judge to "bow to the temporary whims of the public rather than to protect the enduring principles of the law"); *see also* Kimberly C. Petillo, High Court Study, *The Untouchables: The Impact of South Carolina's New Judicial Selection System on the*

factors of New Hampshire's selection system that likely affect the justices' voting patterns are first, that neither the people, nor the legislature, have a direct say in the selection process, and second, that the justices have a pre-determinable and usually lengthy tenure.⁵ It is, of course, anyone's guess as to how these factors will influence any specific justice's voting pattern, much less any specific justice's vote in a particular case; however, the freedom to come down on what often amounts to be a politically unpopular side without fear of political retribution should not be underestimated.⁶

The Supreme Court of New Hampshire's role in the state government is three-fold. The court has the power of appellate, and in rare cases, original jurisdiction,⁷ the power of overall administration of the state court system,⁸ and the obligation to issue advisory opinions at the request of the legislature or the governor.⁹ With an animated mix of precedent,¹⁰ procedural changes,¹¹ ballot measures,¹² and even the occasional scandal,¹³ this court has been particularly active in both the law and the news¹⁴ of New

South Carolina Supreme Court, 1997–2003, 67 ALB. L. REV. 937, 937–38 (2004) (discussing the relatively drastic effects of a change in the method of judicial selection in South Carolina).

⁵ See N.H. CONST. pt. 2, arts. 46, 73, 78.

⁶ See Town of Newington, News, *Courts Divided on Shaheen Statewide Property Tax*, <http://www.newington.nh.us/news.htm> (last visited Dec. 29, 2005) (showing the profound unpopularity that the court's ruling in *Sirrell v. State*, 780 A.2d 494, 496 (N.H. 2001), had in some New Hampshire communities, with this particular town threatening to secede from the state). See *infra* notes 260–66 and accompanying text for further discussion.

⁷ See N.H. CONST. pt. 2, art. 72-a; N.H. REV. STAT. ANN. § 490:4 (1997); N.H. SUP. CT. R. 7; see also *Nelson v. Morse*, 16 A.2d 61, 62 (N.H. 1940).

⁸ N.H. CONST. pt. 2, art. 73-a.

⁹ N.H. CONST. pt. 2, art. 74.

¹⁰ One example of the court's activism in establishing precedent is found in its 2004 decision in *State v. McKeown*. 849 A.2d 127, 130 (N.H. 2004) (holding that an officer's questioning of boaters about their personal flotation devices constitutes a "stop," and must therefore be supported by an articulable suspicion that the boat lacks the required safety equipment).

¹¹ See, e.g., N.H. SUP. CT., ORDER FOR NEW APPELLATE PROCESS (2003), available at <http://www.courts.state.nh.us/supreme/orders/20031112.htm> [hereinafter NEW APPELLATE PROCESS] (enlarging the number of accepted appeals); STATE OF N.H. JUD. BRANCH, 2003–2004 REPORT 8, available at <http://www.courts.state.nh.us/supreme/rpt03.04.pdf> [hereinafter 2004 REPORT].

¹² See, e.g., Kathryn Marchock, *Constitutional Amendment May Come Before Voters Again*, UNION LEADER, Nov. 4, 2004, at A15.

¹³ See, e.g., N.H. ATT'Y GEN., IN RE: W. STEPHEN THAYER, III AND RELATED MATTERS 21 (2000), available at <http://doj.nh.gov/publications/nreleases/pdf/reportonthayer.pdf> [hereinafter ATT'Y GEN. REPORT] (explaining that then-supreme court Justice Thayer had tendered his resignation to the Attorney General in the midst of an investigation into his alleged misconduct on the bench).

¹⁴ See, e.g., Ralph Ranalli, *N.H. Chief Justice Announces Retirement*, BOSTON GLOBE, Dec. 2, 2003, at B3 (reporting the impending retirement of a chief justice and, in doing so, resurrecting some of the court's more controversial moments); Ramer, *supra* note 3 (reporting

Hampshire throughout the past several years.

Amidst all this commotion, it is a wonder that the court can find the time to dispose of 721 cases per year, though that is exactly what it does. Specifically, the court handed down 198 orders after argument and 151 written opinions, in addition to withdrawals, summary affirmances, and dismissals during 2004.¹⁵ That year was especially significant because, on January 1, the court implemented a new appellate review process, making the transition from a largely discretionary system to a practice of accepting nearly all direct appeals from trial-level courts.¹⁶ Under this new process, the court accepts nearly all cases that are decided on the merits from the trial-level courts of the state, in addition to selected appeals from administrative agency decisions and questions of state law transferred from federal courts.¹⁷ Every case that is appealed is first considered on the transcripts and briefs alone; then the court may issue an order or decide to schedule the case for oral argument before either a three-justice panel (3JX), or the full court.¹⁸

This new appellate review process was created by the court after a very large backlog was all but eliminated between 2001 and 2003 and improvements were made in the case management system.¹⁹ As testimony to the character of the present court, four of the current justices took part in both the historical elimination of backlogged cases and the subsequent reform and expansion of the state's appellate review process.²⁰

Also significant about this new process is that the court, through its role as the administrator of the New Hampshire judicial system, was able to create and enact this drastic change in management on

a special panel ruling that restored the power to select the chief justice to the executive branch).

¹⁵ See 2004 REPORT, *supra* note 11, at 8.

¹⁶ NEW APPELLATE PROCESS, *supra* note 11; see also 2004 REPORT, *supra* note 11, at 7.

¹⁷ See 2004 REPORT, *supra* note 11, at 7; N.H. SUP. CT. R. 4, 34; see also Judicial Branch of the State of N.H., *New Hampshire Supreme Court*, <http://www.courts.state.nh.us/supreme/index.htm> (last visited Dec. 29, 2005) [hereinafter *New Hampshire Supreme Court*].

¹⁸ *New Hampshire Supreme Court*, *supra* note 17. If the case is argued before a three-judge panel, the decision must be unanimous. *Id.*

¹⁹ See Press Release, Supreme Court Announces Expansion of Appellate Review, Accepted Cases Expected to Double (Jan. 22, 2003), available at <http://www.courts.state.nh.us/press/apprev.htm> [hereinafter Press Release].

²⁰ Chief Justice Broderick was appointed in 1995, Justices Nadeau and Dalianis in 2000, and Justice Duggan in 2001. See generally Judicial Branch of the State of N.H., *Meet the Supreme Court Justices*, <http://www.courts.state.nh.us/supreme/justices.htm> (last visited Dec. 29, 2005) [hereinafter *Meet the Supreme Court Justices*] (providing links through which one can access information on each of the current justices).

its own volition.²¹ The administrative responsibility of the court has been interpreted broadly and now entails much more than the ability to make procedural rules. The supreme court has a license to oversee the budget for the entire state court system,²² to design rules for professional conduct and admission to the bar, and even to discipline inferior members of the state judiciary.²³

Oddly enough, in the very year that the court used its administrative power to place the colossal burden of enhanced appellate review upon its own back without additional funding, it almost lost the “privilege” to do so.²⁴ In a rather blatant power grab, the legislature forced a measure to be included on the November 2, 2004, ballot that would have amended the state constitution to give the legislature more control over the state judicial system. This was the second time such an amendment was attempted by the legislature, and it failed again despite a fierce public battle between the judiciary and the legislature.²⁵

But the battle over control of the judiciary was not the only controversy this court has faced in the past several years. In 2000, Justice W. Stephen Thayer III²⁶ resigned to avoid a grand jury indictment for apparently:

- (1) argu[ing] an interested party’s position to the Court in . . . a matter in which he had disqualified himself without disclosing to the Court his financial relationship with the

²¹ See N.H. CONST. pt. 2, art. 73-a. Under this article, the Chief Justice has the power to promulgate procedural and administrative rules, but must do so with the concurrence of a majority of the court. *Id.*

²² Judicial Branch of the State of N.H., *Administration of the Court System*, <http://www.courts.state.nh.us/supreme/admin.htm> (last visited Dec. 29, 2005) [hereinafter *Administration of the Court System*]. Often, this budgetary oversight is more of a burden than a privilege. New Hampshire is historically tight with cash, it being the only state in the union that has never had an income or sales tax. See Tom Fahey, *The Lynch Inauguration: Time to Get to Work*, UNION LEADER, Jan. 7, 2005 (reporting that Governor John Lynch has pledged to veto any sales or income tax bill that might cross his desk).

²³ See N.H. CONST. pt. 2, art. 73-a; *Administration of the Court System*, *supra* note 22; N.H. Bar Ass’n, *About NH Courts*, <http://www.nhbar.org/for-the-public/about-nh-courts.asp> (last visited Dec. 29, 2005).

²⁴ See Marchockki, *supra* note 12.

²⁵ See *id.*; Associated Press, *Justices Criticized for E-mail on Ballot Issue*, NASHUA TELEGRAPH, Nov. 1, 2004; Tom Fahey, *NH Justice: I Oppose Amendment*, UNION LEADER, Oct. 27, 2004, at A1.

²⁶ In 2004, after working for a conservative lobbying group, former Justice Thayer was chosen by President George W. Bush to be the deputy chief of the Office of National Risk Assessment at the Transportation Security Administration. The appointment again put Thayer at the center of ethical groups’ bull’s eyes and put the Bush Administration on its heels. See Associated Press, *Security Aide Quit as Judge In a Deal*, N.Y. TIMES, July 29, 2004, at A15.

interested party; (2) misrepresent[ing] his practices as a recused justice in oral statements to the Judicial Conduct Committee; (3) participat[ing] in private conferences on proposed amendments to the procedural rules of the Judicial Conduct Committee while a complaint against him was still pending before that body, and (4) tr[ying] to influence the Chief Justice's selection of judges to hear the appeal in the matter of *Thayer v. Thayer* by objecting to the selection of [a particular] retired Superior Court Justice²⁷

The name of the case cited in the above quoted portion of the New Hampshire Attorney General's Report is not a coincidence; it was Thayer's own divorce proceeding.²⁸ Additionally, then-Chief Justice David Brock was tried by the Senate after four articles of impeachment were brought against him by the New Hampshire House of Representatives in the wake of Justice Thayer's case.²⁹ He won the case before the Senate³⁰ and continued to serve as Chief Justice until he retired at the end of 2003;³¹ similar articles of impeachment alleging improper involvement in Thayer's misdealings that were brought against Justice Sherman Horton and then-Associate Justice John Broderick, also failed to pass.³² Nevertheless, Justice Horton chose to retire before the dust had settled.³³

This "scandal" is also significant because the current makeup of the court is largely built upon a foundation created in place of the void left by these departures. Justices Dalianis and Duggan were appointed by Democratic Governor Jeanne Shaheen to replace Justices Thayer and Horton respectively. With the previous addition of Justice Nadeau to replace retired Justice William Johnson, this brought Governor Shaheen's appointments to three in less than one year. Given that the other two appointments were made by Republican governors, these three appointments to a five-member court make up the court's major bloc; without that kind of

²⁷ ATT'Y GEN. REPORT, *supra* note 13, at 3.

²⁸ *Id.* at 12.

²⁹ See *Impeachment Roll Call Votes*, UNION LEADER, available at <http://www.unionleader.com/pages/rollcall.html> (last visited Dec. 29, 2005).

³⁰ See James Vaznis, *Full Court Press*, BOSTON GLOBE, May 12, 2005, Globe Northwest Section at 1.

³¹ See Press Release, Chief Justice Brock Announces Retirement, Effective Dec. 31 (Dec. 1 2003), available at <http://www.courts.state.nh.us/press/cjbrockretires.htm>.

³² See *Impeachment Roll Call Votes*, *supra* note 29.

³³ See *Professor Could Be Next Justice*, EAGLE TRIB., Dec. 6, 2000, available at http://www.eagletribune.com/news/stories/20001206/NH_006.htm.

shake-up, it is safe to say that the contemporary jurisprudence of the New Hampshire Supreme Court could be drastically different.

The court today is appreciably less tempestuous, one might even say tranquil. Even the politically polar ends of the court can only be characterized as moderate.³⁴ However, many would agree that at least for the state of the law in New Hampshire, this is a positive feature. Moreover, in 2004, the people of the state expressed some level of confidence in the court by voting down a proposal that would have led to more intensive and intrusive legislative oversight.³⁵ The docket is well-maintained,³⁶ and a dissenting opinion is a relatively rare occurrence given the large number of cases annually disposed of by the court (a helpful fact for the purposes of this Study).³⁷ The court is composed of strong legal minds;³⁸ the justices are very conscious of ethics;³⁹ and the direction of the jurisprudence appears to be guided by the cases that come before the court, not by the individual motivations of its members. The modern Supreme Court of New Hampshire is a court to study for the sake of legal progression, not political spectacle.

III. METHODOLOGY

By analyzing a series of indicators and their relationship to one another, this Study aims to produce an accurate snapshot of the New Hampshire Supreme Court that is both practical and academic. As discussed below in greater detail, by limiting the factors that were implemented, this Study aspires to create a

³⁴ For example, despite being appointed by Republican governors, two justices aligned themselves with an argument not typically associated with Republican ideals. The two Republican-appointed justices, Brock and Broderick, dissented in *In re Blanchflower*, arguing that lesbian sex should be recognized as sexual intercourse—and therefore, adultery—for purposes of establishing fault grounds for a divorce. 834 A.2d 1010, 1015 (N.H. 2003) (Brock, C.J. & Broderick, J., dissenting). On the other hand, a justice appointed by a Democrat has taken a position not typically associated with Democratic ideals, opting to interpret a public employee protection statute as not protecting probationary public employees. See *In re Int'l Bhd. of Police Officers*, 804 A.2d 431, 433 (N.H. 2002) (Nadeau, J., dissenting).

³⁵ See Marchocki, *supra* note 12.

³⁶ See Press Release, *supra* note 19 (citing to record numbers of cases being disposed of by the court).

³⁷ The cases listed in appendices A and B, *infra*, represent the large majority of cases since 2000 in which dissenting opinions were filed.

³⁸ See generally *Meet the Supreme Court Justices*, *supra* note 20 (providing links to allow one to view the individual credentials of each of the justices). The justices are discussed in more detail below. See *infra* Part IV.

³⁹ See *infra* apps. A, B (showing that many decisions are made without the full court, often attributable to the recusal of one or more justices).

unique image, which has the ability to challenge formal notions of the court without misrepresenting the positions taken into account.

The main factors taken into account for the purposes of this Study include individual background material about the justices currently serving on the court⁴⁰ and dissents written by current members of the court between 2000 and 2005.⁴¹ A significant series of cases involving the requirements that the New Hampshire Constitution places on state government and school districts to provide an adequate education is analyzed separately both for what it says about the court, and for what impact it has and will have for setting a nationwide trend of court involvement in the politically charged area of taxation and education.⁴²

For the sake of organization, the large number of cases considered in summarizing the recent jurisprudence of the court necessitated division. This organization was largely accomplished by analyzing the dissents of each justice individually, although not necessarily independently from one another. Some cases were considered primarily for the purpose of detecting patterns or providing background, while other cases were analyzed individually for the specific insight that they may impart. Further division was achieved by categorizing cases based on whether they were criminal or civil.

⁴⁰ This material is meant to give readers insight into the decision-making process that goes on behind the bench as the differing approaches of the justices converge.

⁴¹ As a general premise, this Study assumes that dissents can provide a novel mode of observation into the mind of a justice. Although this method leads to results that are by and large academic, this consequence is not an absolute. Knowing that the writing itself will not hold weight as precedent or directly affect or decide the outcome of the case before the court, the author of a dissent is free from the bonds that restrict a majority. The tone of a dissent can be blasé or cavalier; the author can stray from the facts of the case and make broad statements of policy or wade freely through theory. A dissent can focus on one fact or premise in a given case, such as a minor element that the majority has consciously avoided because it is not seen as providing ample substance for a decision. By exposing fragmentation between the justices, a dissent can also open the door for further discussion and expose weaknesses in the argument of the majority. For this reason, a majority opinion written with known and vocal opposition will often be more deliberate and present a more proactive argument in favor of the holding than an opinion written by a high court without such an empowered antagonist. Although not all of the dissents issued from 2000 to 2005 were used in this Study, all were considered, and those that were excluded were excluded because of inconsequentiality or the repetition of a position. For other examples of divided-opinion analysis, see Elizabeth F. Colombo, *The New Southpaws: The Turning of the Nevada Supreme Court's Criminal Decisions*, 66 ALB. L. REV. 907, 912–913 (2003), Laura C. Deitz, *The Shifting of the Supreme Court of Georgia's Death Penalty Decisions From 1998–2003*, 68 ALB. L. REV. 409, 411–413 (2005), and Adam D. Feldman, *A Divided Court In More Ways Than One: The Supreme Court of Delaware and Its Distinctive Model For Judicial Efficacy*, 67 ALB. L. REV. 849, 855–57 (2004).

⁴² See *infra* Part V (discussing the *Claremont* cases).

Although some distinctions can be inferred by ascertaining whether a specific justice was appointed by a Democratic or Republican governor, New Hampshire courts (and the state generally) have a history of independent thinking, and attempts to pigeonhole a particular justice based on party affiliation are notoriously fraught with error.⁴³ Generally, this High Court Study will attempt to refrain from using superficial and politically-charged terms such as “conservative” and “liberal” and instead simply try to use terms that describe the individual position of the justice, such as pro-plaintiff or pro-prosecution.⁴⁴

The jurisprudence of the New Hampshire Supreme Court is among the most independent and apolitical in the country,⁴⁵ and although this Study will make every effort to avoid facile and mistaken characterizations, readers should bear in mind that, in the interest of concision, some overgeneralizations are inevitable.

Throughout the following sections, the text will refer to the appendices that follow this Study. Appendix A charts the civil cases that have been analyzed for this Study, while Appendix B charts the criminal cases.

⁴³ In 1990, President George H.W. Bush appointed Justice David H. Souter, a former member of the Supreme Court of New Hampshire, to the United States Supreme Court; perhaps to the dismay of many conservatives, Justice Souter has since become one of the more left-leaning members of the court on many issues. Appointment of Justice Souter, 498 U.S. XI, XI–XII (1990); U.S. Supreme Court, *The Justices of the Supreme Court*, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Dec. 29, 2005); JOHN J. PATRICK ET AL., *THE OXFORD GUIDE TO THE UNITED STATES GOVERNMENT* 595–96 (2001).

⁴⁴ Cf. Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1165 n.11 (1994) (finding it necessary to define the terms “conservative” and “liberal” in light of the confusion that results from using such terms).

⁴⁵ For some examples of state courts that appear to be a bit more political, see Sarah K. Delaney, *Stare Decisis v. the “New Majority”: The Michigan Supreme Court's Practice of Overruling Precedent, 1998–2002*, 66 ALB. L. REV. 871, 872 (2003) (recognizing that a conservative bloc of justices comprise the Michigan Supreme Court), and Ilana A. Eck, *Liberal Behind the Label?: A Comparative High Court Case Study of the New Mexico Supreme Court from 1997–2002*, 66 ALB. L. REV. 943, 945 (2003) (recognizing that the New Mexico Supreme Court is comprised “exclusively [of] justices who are wholly affiliated with the Democratic Party”).

IV. THE JUSTICES⁴⁶

A. Chief Justice John T. Broderick, Jr.

1. The Person

A graduate of the University of Virginia Law School and the most senior member of the court, Chief Justice Broderick was appointed by Governor Merrill in 1995.⁴⁷ Prior to his appointment, Chief Justice Broderick served as the President of the New Hampshire Bar Association and the New Hampshire Trial Lawyers Association, and as a director of the Legal Services Corporation while maintaining a private practice.⁴⁸

To many court observers, Chief Justice Broderick is something of an enigma. His career with the Supreme Court of New Hampshire has been marked by a curious mixture of politicized scenarios and solid judicial temperament and decision-making.⁴⁹ He often seems to be in the wrong place at the wrong time, but when all is said and done almost everyone agrees that New Hampshire was lucky to have had him on the court.⁵⁰

⁴⁶ Only the five current justices are discussed in depth. However, former Chief Justice Brock (now retired) often sits on the court as a special assignment under N.H. REV. STAT. § 490:3—a statute which allows the appointment of a retired justice to fill in if a current justice is disqualified. For this reason, Justice Brock is included in the appendices.

⁴⁷ Judicial Branch of the State of N. H., *Chief Justice John T. Broderick, Jr.*, <http://www.courts.state.nh.us/supreme/meetbrod.htm> (last visited Dec. 29, 2005) [hereinafter *Meet Broderick*].

⁴⁸ *Id.*

⁴⁹ See, e.g., ATT'Y GEN. REPORT, *supra* note 13, at 19–21 (detailing then-Justice Broderick's entanglement in investigations of another justice's alleged misconduct); Katharine Webster, *Broderick Both Praised, Criticized During Hearing*, PORTSMOUTH HERALD, May 25, 2004, available at <http://www.seacoastonline.com/2004news/05252004/news/17889.htm> (summarizing the politically tense atmosphere surrounding Broderick's ascension to the post of chief justice); Harry R. Weber, *Justice Attacked at Home*, PORTSMOUTH HERALD, Mar. 31, 2002, available at http://www.seacoastonline.com/2002news/3_31c.htm (reviewing Broderick's dramatic career, ranging from his participation in former President Clinton's 1992 campaign, to an investigation into his alleged involvement in judicial misconduct, to a bizarre in-home attack that left him unrecognizable); *Justices Criticized for E-mail on Ballot Issue*, *supra* note 25 (reporting the controversy that erupted as a result of the court speaking out against a proposed constitutional amendment); Ramer, *supra* note 3 (reporting that the statute under which Broderick succeeded to his chief justiceship was ruled unconstitutional).

⁵⁰ See, e.g., Foster's Daily Democrat Editorial, *Broderick Has Set a High Standard*, FOSTER'S ONLINE, June 27, 2004, http://www4.fosters.com/june_2004/june_27_04/comment/ed_0627_04a.asp; Kevin Landrigan, *Court Mum on Justice Decision*, NASHUA TELEGRAPH, Dec. 20, 2003, available at <http://www.nashuatelegraph.com/apps/pbcs.dll/article?AID=/20031220/NEWS01/212200320>.

A close New Hampshire ally of former President Clinton, he was appointed to the court by a Republican governor in 1995.⁵¹ After five years of service to the court, he found himself in the midst of a scandal which eventually led to impeachment charges being brought against him.⁵² The charges were not sustained, and in retrospect, it appears that he was perhaps the only member of the court at that time whose conduct was unquestionably above-board.⁵³ Nevertheless, less than five years later, he once again found himself in the middle of a political tug-of-war between a governor who wanted to appoint him to the vacant chief justice position and a legislature who wanted him to be automatically appointed to the same position under a new statute.⁵⁴ Not long after that, the same legislature that had argued adamantly for his automatic appointment as chief justice, and in turn his placement as the head of the state's system of judicial administration, tried to usurp that power through a constitutional amendment.⁵⁵ Once again, Chief Justice Broderick came away unscathed, and he has since overseen the most significant reform of the state's court system in twenty years, while continuing to take steps toward a more amiable and forthcoming relationship with the public.⁵⁶

2. The Cases

The ten dissenting opinions authored by Chief Justice Broderick that were examined for this Study paint a picture of a justice who is decidedly pro-prosecution in criminal cases and moderate with respect to civil cases. Perhaps the strongest inclination evidenced by Justice Broderick's recent dissents is a general reluctance to overturn the rulings of lower courts.⁵⁷ Also, despite the relatively

⁵¹ *Meet Broderick*, *supra* note 47; *Weber*, *supra* note 49.

⁵² *See Impeachment Roll Call Votes*, *supra* note 29. The charges related to Justice Broderick's passive involvement in the alleged misconduct of a fellow justice.

⁵³ ATT'Y GEN. REPORT, *supra* note 13, at 16–17 (reporting Justice Broderick's mediation attempts and cooperative demeanor).

⁵⁴ *See supra* note 3 and accompanying text.

⁵⁵ *See Marchocki*, *supra* note 12.

⁵⁶ *See Foster's Daily Democrat Editorial*, *supra* note 50; *Press Release*, *supra* note 19.

⁵⁷ *See In re Angley-Cook*, 855 A.2d 431, 437 (N.H. 2004) (Broderick, C.J., dissenting); *State v. McKeown*, 849 A.2d 127, 135 (N.H. 2004) (Broderick, J., dissenting); *State v. Goss*, 834 A.2d 316, 322 (N.H. 2003) (Broderick, J., dissenting); *In re Blanchflower*, 834 A.2d 1010, 1013 (N.H. 2003) (Brock, C.J. & Broderick, J., dissenting); *In re Lockheed Martin Corp.*, 786 A.2d 872, 875 (N.H. 2001) (Brock, C.J. and Broderick, J., dissenting); *KSC Realty Trust v. Town of Freedom*, 772 A.2d 321, 324 (N.H. 2001) (Broderick, J., dissenting); *Sirrell v. State*, 780 A.2d 494, 508–09 (N.H. 2001) (Brock, C.J. & Broderick, J., dissenting).

few dissents written by Justice Broderick, six of these dissents were written in cases where the majority opinion was authored by Justice Nadeau.⁵⁸ This last point must be examined in light of the discussion of Justice Nadeau following this section, as these two justices exhibit qualities of leadership at opposing ends of the court's political and jurisprudential spectrums.

In all of the dissenting opinions written by Chief Justice Broderick, his position would have worked against the defendant; two of these would have either remanded the case or affirmed a lower court's conviction of the defendant where the majority of the court voted to reverse.⁵⁹ These cases all dealt with the manner in which the police conducted investigations—more specifically, the legal restrictions on search and seizure.⁶⁰ Two of these dissenting opinions took issue with the way in which the majority applied the law to the facts; the third argued for an exception to the general prohibition against illegally obtained evidence.⁶¹

In *State v. Goss*, the court held that citizens enjoy a reasonable expectation of privacy with regard to items placed in the trash of their private residence, and therefore a warrantless search of such trash by law enforcement officers violates the constitutional protection against unreasonable searches.⁶² While Chief Justice Broderick joined the majority in adopting the “reasonable expectation of privacy” test,⁶³ he would have held that “a defendant’s

⁵⁸ See *infra* apps. A, B.

⁵⁹ See *State v. Beauchesne*, 868 A.2d 972, 985 (N.H. 2005) (Broderick, C.J., concurring in part and dissenting in part) (arguing that illegally obtained evidence should not automatically be suppressed); *McKeown*, 849 A.2d at 135 (Broderick, J., dissenting) (arguing that a marine patrol officer's initial request to see a kayaker's personal flotation device did not constitute a stop); *Goss*, 834 A.2d at 322 (Broderick, J., dissenting) (arguing that the constitutional protection against unreasonable searches and seizures does not extend to the contents of trash bags placed on a curb for collection).

⁶⁰ See *Beauchesne*, 868 A.2d at 975; *McKeown*, 849 A.2d at 129; *Goss*, 834 A.2d at 317.

⁶¹ *Beauchesne*, 868 A.2d at 985 (Broderick, J., concurring in part and dissenting in part) (arguing that the exclusionary rule should not “automatically be applied in all situations where a defendant is initially seized unlawfully”); *McKeown*, 849 A.2d at 131–32 (Broderick, J., dissenting) (arguing that an officer's actions did not constitute a stop); *Goss*, 834 A.2d at 320 (Broderick, J., dissenting) (arguing that trash placed curbside for pickup should not receive constitutional protection).

⁶² 834 A.2d at 319, 320.

⁶³ *Id.* at 320 (Broderick, J., dissenting); see *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (describing the test as a two-part evaluation of (1) whether the person has “exhibited an actual (subjective) expectation of privacy” and, (2) “that the expectation be one that society is prepared to recognize as ‘reasonable’”); see also *California v. Greenwood*, 486 U.S. 35, 40–41 (1988) (holding that the defendants did not have a reasonable expectation of privacy protected by the Fourth Amendment in garbage which they placed in opaque bags outside their house for collection by a trash collector).

subjective expectation of privacy in the contents of his trash left for pickup adjacent to a public way is not objectively reasonable.”⁶⁴

In *State v. McKeown*, the majority held that a routine but unprovoked stop by a state marine patrol officer to check a boater for a personal flotation device was in violation of the marine patrol’s standard operating procedures, which require “an articulable suspicion” for the stop.⁶⁵ Chief Justice Broderick took the position that the officer’s actions of pulling out a life jacket and pointing to it, then waiting to see if the boater could show one back to him, was not a “stop,” and thus no articulable suspicion was necessary.⁶⁶ These actions did not constitute a stop, Chief Justice Broderick argued, because the defendant was not “seized,” and was free to ignore the marine officer’s request.⁶⁷

On the one hand, these two cases indicate that Chief Justice Broderick was the most prosecution-friendly justice sitting on the court when the cases were heard. On the other hand, these cases, especially *Goss*, illustrate that the court as a whole was very protective of individual rights at that time.⁶⁸ At best, these cases put Chief Justice Broderick slightly to the right of a court that leaned to the left on issues regarding individual liberties.

On the civil side of the docket, Chief Justice Broderick’s dissents draw a different picture. Taken as a whole, no overriding political stance can be clearly deciphered from these opinions. In fact, although the cases find Broderick arguing slightly more for the defense, they also show a justice who reaches his conclusions based on the specific facts before him, rather than on a predetermined agenda.⁶⁹

⁶⁴ *Goss*, 834 A.2d at 320 (Broderick, J., dissenting).

⁶⁵ 849 A.2d at 130.

⁶⁶ *Id.* at 131 (Broderick, J., dissenting).

⁶⁷ *See id.* at 132, 135.

⁶⁸ *Compare Goss*, 834 A.2d at 319 (holding that a person has a reasonable expectation of privacy in garbage placed along a public way for purposes of the New Hampshire constitutional provision governing searches and seizures), *with Greenwood*, 486 U.S. at 40–41 (holding that, for purposes of the Federal Constitution’s provision governing searches and seizures, a person does not have a reasonable expectation of privacy in garbage placed along a public way).

⁶⁹ *See Wilson v. Progressive N. Ins. Co.*, 868 A.2d 268, 277 (N.H. 2005) (Broderick, C.J., dissenting) (favoring defendant); *In re Kosek*, 871 A.2d 1, 7 (N.H. 2005) (Broderick, C.J., dissenting) (favoring wife in a proceeding brought by husband seeking expansion of visitation rights); *In re Angley-Cook*, 855 A.2d 431, 435 (N.H. 2004) (Broderick, C.J., dissenting) (favoring wife in a petition filed by husband seeking a reduction of his child support obligation); *In re Blanchflower*, 834 A.2d 1010, 1015 (N.H. 2003) (Brock, C.J. & Broderick, J., dissenting) (favoring husband in his petition for divorce); *In re Lockheed Martin Corp.*, 786 A.2d 872, 875–76 (N.H. 2001) (Brock, C.J. & Broderick, J., dissenting) (favoring plaintiff);

For those who are ready to label Chief Justice Broderick a staunch conservative after reading some of his criminal dissents, two of his civil dissents in particular offer a stern rebuke.⁷⁰ In *In re Blanchflower*, the two Republican-nominated justices, Broderick and Brock, dissented from the majority, which held that homosexual sex was not “adultery” for the purpose of applying a fault-based divorce statute.⁷¹ The dissenting justices argued for a more elastic and modern standard, saying that “[t]o strictly adhere to the primary definition of adultery in the 1961 edition of *Webster’s Third New International Dictionary* and a corollary definition of sexual intercourse, which on its face does not require coitus, is to avert one’s eyes from the sexual realities of our world.”⁷²

In *In re Lockheed Martin Corp.*, the same two justices found themselves siding with labor against a corporate defendant.⁷³ In this case, Justice Broderick and Chief Justice Brock maintained that an employee was entitled to workers’ compensation even though she had a pre-existing condition (Multiple Chemical Sensitivity Syndrome) because her injury was accidental and unexpected, therefore meeting the statutory requirement.⁷⁴ The dissenters further argued that in deciding whether an employee has met the burden of proving legal causation, the court should “liberally construe[] all reasonable doubts in the Workers’ Compensation Law in a manner that favors the injured employee.”⁷⁵ This position seems to be exceedingly pro-plaintiff for Republican-nominated justices; however, it might also be readily explained by a much more fundamental jurisprudential conviction—namely, a staunch reluctance to overturn lower courts’ decisions.

Only one of Chief Justice Broderick’s dissents considered in this Study argued that a lower court’s ruling should be reversed outright.⁷⁶ Although the dissenters in *Lockheed Martin Corp.* bolstered their position with a seemingly de novo analysis of the

Sirrell v. State, 780 A.2d 494, 522 (N.H. 2001) (Brock, C.J. & Broderick, J., dissenting) (favoring plaintiffs); KSC Realty Trust v. Town of Freedom, 772 A.2d 321, 325–26 (N.H. 2001) (Broderick, J., dissenting) (favoring defendant).

⁷⁰ See *Blanchflower*, 834 A.2d at 1013 (Brock, C.J. & Broderick, J., dissenting); *Lockheed Martin Corp.*, 786 A.2d at 876 (Brock, C.J. & Broderick, J., dissenting).

⁷¹ 834 A.2d at 1011.

⁷² *Id.* at 1013 (Brock, C.J. & Broderick, J., dissenting).

⁷³ 786 A.2d at 876 (Brock, C.J. & Broderick, J., dissenting).

⁷⁴ *Id.* at 875.

⁷⁵ *Id.* at 876.

⁷⁶ See *In re Kosek*, 871 A.2d 1, 7 (N.H. 2005) (Broderick, C.J., dissenting). See generally *infra* apps. A, B (listing the cases that were used in this Study).

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facts and law of the case, the reasoning behind this and many of Chief Justice Broderick's other positions can plausibly be found in the first few lines of the *Lockheed Martin Corp.* dissent.⁷⁷ In *Lockheed Martin Corp.*, as well as in *Sirrell v. State*, Chief Justice Broderick began his dissents by alluding to a genuine respect for the position and findings of the lower court or agency, having stated in both cases that because the "findings in this case are supported by the evidence" and are "not erroneous,"⁷⁸ he would not reverse. As a general premise, reversal is not appropriate unless an appellate court finds that the lower body's findings were contrary to law, erroneous, or unsupported by the evidence, but clearly justices do not often call attention to their own limitations for the sake of educating the readers of the opinion. The suggestion being, of course, that in Chief Justice Broderick's mind, the rest of the court was reversing for reasons that did not meet this fundamental threshold.

Commentators have noted that unelected courts, where the justices have a secured tenure, are more likely to reverse lower court rulings or to overrule precedent.⁷⁹ It appears from these cases that Chief Justice Broderick does not fit within this trend. It must also be noted that however reluctant he is to do it, Chief Justice Broderick is not opposed to reversal in principle. If a given case calls for reversal in his mind, he has shown no qualms about taking such action.⁸⁰

⁷⁷ *Lockheed Martin Corp.*, 786 A.2d at 875 (Brock, C.J. & Broderick, J., dissenting) (suggesting a reluctance to overturn a lower decision). Of course, the review in *Lockheed Martin Corp.* was one of an agency's determination; therefore, the standard of review employed was likely determined by such a procedural posture.

⁷⁸ *Id.*; *Sirrell v. State*, 780 A.2d 494, 508 (N.H. 2001) (Brock, C.J. & Broderick, J., dissenting).

⁷⁹ See Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1127, 1128-29 (2000) (discussing the effects of term length and method of selection on judicial voting patterns); see also Kimberly C. Petillo, *The Untouchables: The Impact of South Carolina's New Judicial Selection System on the South Carolina Supreme Court, 1997-2003*, 67 ALB. L. REV. 937, 937-38 (2004) (discussing the relatively drastic effects of a change in the method of judicial selection in South Carolina).

⁸⁰ See, e.g., *State v. Leonard*, 855 A.2d 531, 532 (N.H. 2004); *In re Bennett*, 855 A.2d 397, 399 (N.H. 2004).

*B. Justice Joseph P. Nadeau*⁸¹

1. The Person

Formerly the most senior associate justice on the New Hampshire Supreme Court, Justice Joseph Nadeau is a graduate of the Boston University School of Law and is a New Hampshire native.⁸² Justice Nadeau started his career as a judge in 1968 by working part-time at a district court while maintaining a private practice.⁸³ In total, he was a member of the state judiciary for over thirty-five years, joining the New Hampshire Superior Court in 1981 and serving as chief justice of that court for eight years prior to joining the supreme court in 2000.⁸⁴

Justice Nadeau was what some might call an activist judge, but with none of the modern political connotations that have attached to that label. Justice Nadeau's career has simply been marked by his unflagging efforts to promote a strong and independent judiciary—and not just in New Hampshire, or even just in the United States.⁸⁵ Justice Nadeau traveled the world working with new and struggling judicial systems in places where an independent judiciary would have been a fantasy just a few years ago.⁸⁶ He is Chair of the International Relations Committee of the National Trial Judges' Conference; he has served as Chair of the ABA's Central and Eastern European Law Initiative and as President of the American

⁸¹ On October 6, 2005, Senior Associate Justice Nadeau announced his retirement, effective on December 31, 2005. Press Release, N.H. Supreme Court Justice Joseph P. Nadeau Announces Retirement, Plans to Continue International Work With Judges, Lawyers (Oct. 6, 2005), available at <http://www.nh.gov/judiciary/press/nadeauretire.htm>.

⁸² Judicial Branch of the State of New Hampshire, *Senior Associate Justice Joseph P. Nadeau*, <http://www.courts.state.nh.us/supreme/meetnadeau.htm> (last visited Dec. 29, 2005) [hereinafter *Meet Nadeau*].

⁸³ *Id.*; AM. BAR ASS'N, CENTRAL AND EAST EUROPEAN LAW INITIATIVE, ANALYSIS OF THE ETHICAL RULES FOR JUDGES IN THE REPUBLIC OF LITHUANIA (1999), available at <http://www.abanet.org/ceeli/publications/assessments/lithuania/ethicsforjudges.html> ("Biographical Statements of Experts Assessing the Rules," "The Honorable Joseph P. Nadeau").

⁸⁴ *Meet Nadeau*, *supra* note 82; *Student Intellectual Property Law Association Symposium Transcript*, 44 IDEA 233, 233 (2003).

⁸⁵ See *Meet Nadeau*, *supra* note 82; see also *Student Intellectual Property Law Association Symposium Transcript*, *supra* note 84.

⁸⁶ As chair of the International Relations Committee of the National Trial Judges Conference, Justice Nadeau has traveled extensively to former Soviet republics and other eastern European countries as they struggle to establish independent judiciaries. See *Student Intellectual Property Law Association Symposium Transcript*, *supra* note 84.

Academy of Judicial Education.⁸⁷

It is not solely in distant forums that Justice Nadeau speaks out and lectures about judicial administration and the importance of a strong and independent judiciary.⁸⁸ In October 2004, at a swearing-in ceremony for newly admitted attorneys, he took the unusual step of removing his robe and stepping out from behind the bench in order to “speak as an individual” to the audience. He proceeded to advocate the present system of court administration in New Hampshire and to argue against an amendment that would appear on the November 2, 2004, ballot. The amendment, had it passed, would have given much of the court’s administrative power to the legislature.⁸⁹ Justice Nadeau also backed-up his strong words on independence by being the most prolific dissent writer on the court.⁹⁰

Unfortunately, shortly before this Study went to publication, Justice Nadeau announced his intention to retire from the bench.⁹¹ However, there is no doubt that Justice Nadeau’s effect on the court will continue to be felt for years to come.

2. The Cases

During the time period examined for this Study, Justice Nadeau was the most prolific dissenter on the New Hampshire Supreme Court; seventeen of his dissenting opinions were analyzed for this Study.⁹²

⁸⁷ *Meet Nadeau*, *supra* note 82; AM. BAR ASS’N, *supra* note 83 (“Biographical Statements of Experts Assessing the Rules,” “The Honorable Joseph P. Nadeau”).

⁸⁸ *See, e.g.*, Hon. Joseph P. Nadeau, *The Supreme Court Looks Ahead*, N.H.B.J., June 2001, at 16, available at <http://nhbar.org/publications/archives/display-journal-issue.asp?id=244>.

⁸⁹ *See* Fahey, *supra* note 25.

⁹⁰ *See generally infra* apps. A, B (illustrating that Justice Nadeau has, in nearly one-third of the cases studied, authored a dissent).

⁹¹ *See supra* note 81.

⁹² *State v. Fischer*, 876 A.2d 232, 240 (N.H. 2005) (Nadeau, J., dissenting); *Shopland v. Town of Enfield*, 855 A.2d 392, 395 (N.H. 2004) (Nadeau, J., dissenting); *Summa Humma Enters. v. Town of Tilton*, 849 A.2d 146, 151 (N.H. 2004) (Nadeau, J., dissenting); *In re Jacobson*, 842 A.2d 77, 81 (N.H. 2004) (Nadeau, J., dissenting); *State v. Turmel*, 838 A.2d 1279, 1287, 1289 (N.H. 2003) (Brock, C.J. & Nadeau, J., dissenting; Nadeau, J., dissenting); *State v. D’Amour*, 834 A.2d 214, 220 (N.H. 2003) (Nadeau, J., concurring in part and dissenting in part); *State v. Macelman*, 834 A.2d 322, 328 (N.H. 2003) (Nadeau, J., dissenting); *In re Nelson*, 825 A.2d 501, 504 (N.H. 2003) (Nadeau, J., dissenting); *In re Estate of Bennett*, 824 A.2d 142, 146 (N.H. 2003) (Nadeau, J., dissenting); *Estate of Libby v. State Farm Mut. Auto. Ins. Co.*, 809 A.2d 768, 771 (N.H. 2002) (Nadeau, J., dissenting); *In re Int’l Bhd. of Police Officers*, 804 A.2d 431, 433 (N.H. 2002) (Nadeau, J., dissenting); *State v. Roache*, 803 A.2d 572, 580 (N.H. 2002) (Dalianis & Nadeau, JJ., dissenting); *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 761 (N.H. 2002) (Nadeau & Dalianis, JJ., dissenting); *Pro*

On the criminal docket, Justice Nadeau can best be described as extremely pro-defense, pro-rights, or even libertarian. In nearly every dissent, Justice Nadeau comes down on the side of individual rights, and he strictly interprets statutes and constitutional provisions invariably to favor the citizen, taxpayer, or landowner.⁹³ In civil matters, Justice Nadeau tends to favor the plaintiff, but he is not as “liberal” or pro-plaintiff as many would suspect after reading his criminal dissents.⁹⁴ That being said, where Justice Nadeau’s criminal dissents interpret the law to strictly protect the defendant, his civil dissents generally prefer policies of recuperation and restoration of the interests of the injured party.⁹⁵

Two dissents exemplify Justice Nadeau’s criminal jurisprudence. The first, *State v. Macelman*,⁹⁶ involved a defendant convicted of marijuana possession who was arrested after his car was searched and evidence was obtained under the emergency aid exception.⁹⁷ Under this exception, evidence that was discovered while an officer was performing duties “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute” is generally admissible.⁹⁸ In *Macelman*, the police responded to an anonymous tip that a car was parked perilously

Con Constr., Inc. v. Acadia Ins. Co., 794 A.2d 108, 111 (N.H. 2002) (Nadeau, J., dissenting); *Matarese v. N.H. Mun. Ass’n Prop.-Liab. Ins. Trust, Inc.*, 791 A.2d 175, 182 (N.H. 2002) (Nadeau, J., dissenting); *In re Morrill*, 784 A.2d 690, 694 (N.H. 2001) (Nadeau, J., dissenting); *Town of Nelson v. N.H. Dep’t of Transp.*, 767 A.2d 435, 439 (N.H. 2001) (Nadeau, J., dissenting).

⁹³ See, e.g., *Macelman*, 834 A.2d at 328 (Nadeau, J., dissenting) (recognizing the importance of the community caretaking exception in the search and seizure context, but reminding that “[c]ommunity caretaking must be balanced with individual rights”); *In re Morrill*, 784 A.2d at 694–95 (Nadeau, J., dissenting) (arguing that a father’s children should have been allowed to testify despite their age because not allowing them to testify might have “significant adverse consequences for the defendant relating to custody, visitation and other individual rights”).

⁹⁴ See, e.g., *In re Int’l Bhd. of Police Officers*, 804 A.2d at 433 (Nadeau, J., dissenting) (arguing that “probationary employees” are not entitled to protection under New Hampshire’s Public Employee Labor Relations Act).

⁹⁵ Compare *Turmel*, 838 A.2d at 1289 (Nadeau, J., dissenting) (questioning the validity of a traffic stop where the officer had witnessed the driver of the vehicle smoking what appeared to be marijuana), with *Estate of Libby*, 809 A.2d at 771 (Nadeau, J., dissenting) (advocating for a policy analysis in determining whether an insurer should be permitted to assert any substantive defense, such as a federal work injury compensation statute, to bar recovery of uninsured motorist benefits).

⁹⁶ 834 A.2d 322.

⁹⁷ *Id.* at 325–26.

⁹⁸ *Id.* at 325 (quoting *People v. Ray*, 981 P.2d 928, 931 (Cal. 1999) (plurality)). “The exception is part of the ‘community caretaking’ function of the police, involving duties such as ‘helping stranded motorists, returning lost children to anxious parents, [and] assisting and protecting citizens in need.’” *Id.* at 326 (alteration in original) (quoting *State v. Denoncourt*, 821 A.2d 997, 999–1000 (N.H. 2003)).

close to an embankment and was possibly in danger of falling.⁹⁹ Upon approaching the car, the police claimed to have realized “all at once” that “while the car was not in danger of going over the embankment, the occupants of the car were smoking marijuana.”¹⁰⁰

One of the elements that the State must prove in order to introduce otherwise inadmissible evidence into the record under the emergency aid exception is that “the search is not ‘primarily motivated by intent to arrest and seize evidence.’”¹⁰¹ This element almost inherently requires a court to draw an inference based on the facts of the case and the actions of the police. Typical of his dissents, Justice Nadeau did not take aim at the legal analysis the majority employed to reach its conclusion; instead, the factual inferences he made tended to controvert those made by the majority.¹⁰² The majority decided that the intrusion “was unrelated to police law enforcement duties and devoid of any motive to investigate criminal activity.”¹⁰³ Justice Nadeau, on the other hand, questioned the officer’s belief that an emergency existed at the time probable cause developed for this warrantless search, and called the “coincidence”—that the officer realized that there was no emergency at the exact moment that he realized illegal activity was being committed—“at best, troubling.”¹⁰⁴

The second case, *State v. Turmel*,¹⁰⁵ is similar to *Macelman* in that Justice Nadeau questioned the validity and legality of the police officer’s actions where the rest of the court seemed to lean inherently toward the State’s view of the situation.¹⁰⁶ In *Turmel*, an experienced police officer observed a driver smoking what the officer described as a “blunt,” or a cigar rolled with marijuana instead of tobacco.¹⁰⁷ The officer monitored the suspect’s car from an unmarked truck for approximately nine miles after making further observations consistent with his initial impression.¹⁰⁸

⁹⁹ *Id.* at 324.

¹⁰⁰ *Id.* at 328.

¹⁰¹ *Id.* at 326 (quoting *People v. Mitchell*, 347 N.E.2d 607, 609 (N.Y. 1976)).

¹⁰² *Id.* at 328–29 (Nadeau, J., dissenting).

¹⁰³ *Id.* at 327 (majority opinion).

¹⁰⁴ *Id.* at 328–29 (Nadeau, J., dissenting).

¹⁰⁵ 838 A.2d 1279 (N.H. 2003).

¹⁰⁶ *Compare id.* at 1289 (Nadeau, J., dissenting) (accepting the officer’s recitation of facts, but nonetheless questioning the validity of the stop), *with id.* at 1283–84 (majority opinion) (accepting the inferences drawn by the officer while witnessing the defendant’s alleged marijuana use as sufficient for reasonable suspicion).

¹⁰⁷ *Id.* at 1282.

¹⁰⁸ *Id.* Other, marked police vehicles accompanied the officer’s truck for a large portion of the nine-mile observation. *Id.*

Turmel shows the outermost extremity of Justice Nadeau's jurisprudence in this area, where his interpretation of the facts intersects with and even alters his interpretation of the law. In many cases, even on high courts, a differing interpretation of the facts of a given case by a justice or justices only affects the isolated case before the court.¹⁰⁹ In other cases, however, the way that a court interprets or applies the facts of a case to the law will have precedential value because the application reveals so much about how a court or justice sees the law.¹¹⁰ In *Turmel*, without restating or reinterpreting a test, definition, or legal concept, Justice Nadeau's application, had it been followed, would have had a profound effect on the way in which police conduct such commonplace criminal investigations.¹¹¹

The type of factual application in *Turmel* shows something about the mettle of Justice Nadeau. If prompted, he is not afraid to challenge a pervasive attitude in favor of one party despite a general trend in the contrary direction. In this case, Justice Nadeau said that the size of the cigar, the manner in which it was being smoked, and the fact that it was being passed between a driver and a passenger is not enough to create a reasonable suspicion and justify a stop.¹¹² Even though the law itself was not being challenged, had the rest of the court followed Justice Nadeau's interpretation, police in New Hampshire would surely have to reconsider some of their operating procedures. Since it is not a rare thing for the court to follow Justice Nadeau's lead, his influence on the court should not be underestimated.¹¹³

Although Justice Nadeau's approach does not change when the subject matter of the case is civil rather than criminal, his disposition on many issues is not what some might expect from a justice who is generally considered pro-defendant in criminal matters. Overall, Justice Nadeau favored the plaintiffs in eight out

¹⁰⁹ See, e.g., *State v. Seavey*, 789 A.2d 621, 624–25 (N.H. 2001) (adhering closely to precedent which had similar—although certainly not identical—facts, in rejecting the State's claim that an warrantless entry was justified under the exigent circumstances exception).

¹¹⁰ See, e.g., *State v. Goss*, 834 A.2d 316, 319 (N.H. 2003) (relying on experience, point of view, and public sensibilities to stray from analogous federal precedent).

¹¹¹ Stops would surely be fewer and farther between if a veteran officer's belief that he sees someone smoking marijuana, by itself, would not meet the test for reasonable suspicion.

¹¹² *Turmel*, 838 A.2d at 1289 (Nadeau, J., dissenting).

¹¹³ See, e.g., *State v. McKeown*, 849 A.2d 127, 130 (N.H. 2004) (applying a reasonable suspicion test to boaters' safety stops, a strict interpretation that likely would not have held water with many courts).

of eleven of the cases considered for this Study;¹¹⁴ but some of the cases where Justice Nadeau sided with the defense may come as a surprise to a reader who is anxious to classify this justice.¹¹⁵ Most of Justice Nadeau's civil case dissents follow his libertarian-leaning approach very closely.¹¹⁶

Justice Nadeau's dissent in *Pro Con Construction, Inc. v. Acadia Insurance Co.*¹¹⁷ presents a good example of a typical fact-based Justice Nadeau dissent and clearly depicts how this approach can lead to different results depending on which way the inferences are stacked. In *Pro Con Construction*, an employee of a subcontractor brought suit against a general contractor's insurance company for injuries sustained while walking toward the break area of a construction project for a cup of coffee.¹¹⁸ The case narrows into a question of causation: specifically, whether the injury bore a "causal connection" to the continuing operations of Pro Con Construction's subcontractor.¹¹⁹ Ultimately, the minute disagreement between the majority and the dissent narrowed to whether a coffee break at work bears a "causal connection" to the employment of the worker.¹²⁰ Justice Nadeau argued that it did; the majority held that it did not.

Another of Justice Nadeau's civil dissents shows a different, although not inconsistent, aspect of his jurisprudence. In *Claremont School District v. Governor*,¹²¹ Justice Nadeau backs-up his extracurricular defenses of an independent judiciary by voting to sever the court's messy ties to New Hampshire's school financing scheme.¹²² Justice Nadeau stated that by further defining the scope

¹¹⁴ For citations to the eleven Nadeau dissenting opinions referenced above, see *infra* app. A.

¹¹⁵ See, e.g., *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 763 (N.H. 2002) (Nadeau & Dalianis, JJ., dissenting) (voting in favor of defendant State and recommending that the court end its continuing oversight and jurisdiction of school funding issues).

¹¹⁶ See, e.g., *Summa Humma Enters. v. Town of Tilton*, 849 A.2d 146, 151–52 (N.H. 2004) (Nadeau, J., dissenting) (siding with a landowner, who sought to install a large flagpole, in a challenge to a planning board's determination that limited the flagpole's size).

¹¹⁷ 794 A.2d 108 (N.H. 2002).

¹¹⁸ *Id.* at 109.

¹¹⁹ *Id.* at 110.

¹²⁰ See *id.* at 111 (Nadeau, J., dissenting).

¹²¹ 794 A.2d 744 (N.H. 2002). This case has a long and tangled history that will be discussed more thoroughly later on in this Study. See *infra* Part V.

¹²² *Claremont Sch. Dist.*, 794 A.2d at 763 (Nadeau & Dalianis, JJ., dissenting). As an advocate for judicial independence, it is important that Justice Nadeau shows that he does not want to have his cake and eat it too. If the courts are to be independent, they must fight for the independence of other respective branches of government as well, rather than simply try to place the judicial branch at the head of the table in every instance.

and nature of steps which the government must take, “the majority moves unnecessarily into the province of the legislative and executive branches.”¹²³

This chapter of *Claremont* also helps illustrate the difference between Justice Nadeau’s legal and philosophical “libertarian” approach to issues with the more politically charged “liberal” approach of some more prominent national figures. Justice Nadeau tends to define the right in question and step back—limiting the involvement of the court in the processes of government—whereas the more “liberal” approach might be to give the court a somewhat heavier hand.

Having been on the court slightly longer than three of the other four justices, and often taking a view which defines one polar end of the court, there is little doubt that Justice Nadeau is a leader in some areas, perhaps moving the chamber’s discussion in one way or another. It is no coincidence then that Chief Justice Broderick’s dissents appear most frequently in cases where Justice Nadeau writes for the majority.¹²⁴ The dissenting opinions of these two justices show a wide disparity in their perspectives, especially with regard to the length of the leash on which the courts should keep law enforcement.¹²⁵ A practitioner would be wise to keep these leaders’ opinions in mind when arguing before this court, even after Justice Nadeau’s retirement.

C. Associate Justice Linda S. Dalianis

1. The Person

Although she is the first woman to be appointed to the Supreme Court of New Hampshire, Justice Dalianis was no political appointment. She served for nearly twenty years on the New Hampshire Superior Court, including time as chief justice prior to

¹²³ *Id.*

¹²⁴ See *infra* apps. A, B (illustrating that, of Chief Justice Broderick’s ten dissenting opinions considered for this Study, six were authored in cases where Justice Nadeau wrote the majority opinion).

¹²⁵ Compare *State v. McKeown*, 849 A.2d 127, 132 (N.H. 2004) (Broderick, J., dissenting) (arguing that a seizure of a kayaker had not occurred until the defendant, in response to the officer’s actions, indicated that the defendant was without a personal flotation device), with *State v. Turmel*, 838 A.2d 1279, 1289 (N.H. 2003) (Nadeau, J., dissenting) (arguing that an officer did not have a reasonable suspicion to stop a defendant despite the officer’s inference—based upon his professional experience and his personal observation of the defendant—that the defendant was smoking marijuana).

her appointment to the supreme court.¹²⁶ A graduate of Suffolk University Law School, Justice Dalianis serves on many statewide committees dealing with the administration of the court system and is an active member in the Rule of Law Partnership, an organization that facilitates the communication and exchange of ideas between United States and Russian jurists.¹²⁷

Appointed by a Democratic governor following the resignation of Justice Thayer, Justice Dalianis stays clear of the public light and shows no inclination toward political forays. Although she is known for being tough on crime and has openly commented that the court should be “conservative,” she was appointed by a Democratic governor, was considered an ally of the left-leaning Justice Nadeau on the superior court, and the buzz that surrounded her appointment was all about the “integrity”—and not the political views or affiliations—that she would bring to the bench.¹²⁸ The few non-judicial viewpoints that do seep out of her all-business demeanor paint a picture of a woman who values hard work, fortitude, and diversity; and she despises “the rampant, strip-mall, commercial sprawl that has . . . spoiled the beauty of so much of the United States.”¹²⁹ Born in New Hampshire, it is safe to say that a stolid New England firmness has remained tightly in the jaw of Justice Dalianis.

2. The Cases

With half of her dissents in favor of the defendant in civil cases and three of four dissents against the defendant in criminal cases, Justice Dalianis might be labeled as one of the more conservative members on the court.¹³⁰ Her dissents are often short and crisp, and she rarely appeals to matters of social policy or highlights factual

¹²⁶ Judicial Branch of the State of N.H., *Associate Justice Linda S. Dalianis*, <http://www.courts.state.nh.us/supreme/meetdalian.htm> (last visited Dec. 29, 2005) [hereinafter *Meet Dalianis*].

¹²⁷ See *id.*; Hon. Linda S. Dalianis, *A Personal Perspective on the Work of the Rule of Law Partnership*, N.H.B.J., June 2003, at 12 (describing, in her own words, Justice Dalianis' personal experiences in her international adventures as a member of the Rule of Law Partnership).

¹²⁸ See Holly Ramer, *Judge One Step Closer*, EAGLE TRIB., Apr. 25, 2000, available at http://www.eagletribune.com/news/stories/20000425/NH_002.htm; *New Justice Known as Tough on Crime*, EAGLE TRIB., Apr. 27, 2000, available at http://www.eagletribune.com/news/stories/20000427/NH_003.htm.

¹²⁹ Dalianis, *supra* note 127, at 12.

¹³⁰ For the cases that were considered for this Study, see *infra* apps. A, B.

nuances.¹³¹

Justice Dalianis' four dissents in criminal cases portray a justice who interprets the statutes strictly and does not delve deeply into factual arguments or the tangles of the common law.¹³² Although her opinions favor the prosecution by the numbers, her strict analysis of statutory law can also work in favor of the defendant, as it did in *Derosia v. Warden*.¹³³

In *Derosia*, the majority increased a sentence because it included a prior conviction of burglary with the purpose to commit theft as a "predicate theft conviction."¹³⁴ Justice Dalianis, on the other hand, interpreted the penalty enhancement statute so that burglary with the purpose to commit theft could not be used as a predicate offense for penalty enhancement absent actual theft. Justice Dalianis emphasized that the statute used the term "theft crime," and burglary with the purpose to commit theft is not a "theft crime" per se.¹³⁵

For more evidence of Justice Dalianis' willingness to adhere strictly to the stark letter of the law, *State v. Ramos*¹³⁶ offers a display of her resolve. In *Ramos*, the defendant was convicted of separate crimes after joinder of unrelated charges. The majority held that defendants have an absolute right to severance of unrelated charges and therefore the case should be remanded because the defendant was denied such a severance.¹³⁷ Justice Dalianis agreed that defendants should have an absolute right to sever unrelated charges; however, because she believed that this right should be granted by means of rulemaking, not by judicial fiat,

¹³¹ See, e.g., *Hooksett Conservation Comm'n v. Hooksett Zoning Bd. of Adjustment*, 816 A.2d 948, 953–54 (N.H. 2003) (Dalianis, J., dissenting) (using a nine-sentence opinion to find it "evident" from the "statute's clarity" that a conservation commission had standing to challenge a decision by a zoning board of adjustment).

¹³² See *Derosia v. Warden*, 826 A.2d 575, 577 (N.H. 2003) (Dalianis, J., dissenting) (adhering closely to the statutory language of a class B felony theft statute); *State v. Ramos*, 818 A.2d 1228, 1236 (N.H. 2003) (Dalianis, J., dissenting) (relying on the current rules concerning joinder in criminal trials, rather than choosing to endorse a recommended standard from a bar association); *State v. Allard*, 813 A.2d 506, 512 (N.H. 2002) (Dalianis, J., dissenting) (accusing the majority of "includ[ing] an element that is otherwise not present in the statute"); *State v. Roache*, 803 A.2d 572, 580 (N.H. 2002) (Dalianis & Nadeau, JJ., dissenting) (challenging the majority's contention that slight textual differences between the state and federal constitutions should lead to a higher standard under the state constitution).

¹³³ See 826 A.2d at 577 (Dalianis, J., dissenting) (interpreting a burglary statute to not be a "theft crime", and therefore to not be sufficient for penalty enhancement).

¹³⁴ *Id.* at 576 (majority opinion).

¹³⁵ *Id.* at 577 (Dalianis, J., dissenting).

¹³⁶ 818 A.2d 1228.

¹³⁷ *Id.* at 1236.

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she would have affirmed the lower court's felony conviction of the defendant and "ask[ed] the Advisory Rules Committee to consider recommending to the court a rule regarding joinder in criminal trials."¹³⁸

This rigid jurisprudence also shows through on the civil side of Justice Dalianis' dissents. In *Graves v. Estabrook*, the majority allowed a claim for negligent infliction of emotional distress by a motorcyclist's fiancée to proceed against the motorist who hit the motorcyclist despite the fact that the claimant was not related to the victim by blood or marriage.¹³⁹ In her dissent, Justice Dalianis argued that such recoveries should be limited to persons related to the victim by blood or marriage.¹⁴⁰ In doing so, she acknowledged "that '[s]uch limitations are indisputably arbitrary since it is foreseeable that in some cases unrelated persons have a relationship to the victim or are so affected by the traumatic event that they suffer equivalent emotional distress."¹⁴¹ However, she went on to justify her position by explaining that "defining the class of 'closely related' bystanders by the depth of their emotional connection to the victim would unreasonably expand the defendant's liability."¹⁴² Undifferentiated pleas for sympathy apparently will not go far with Justice Dalianis.

D. Associate Justice James E. Duggan

1. The Person

Another New Hampshire native, Justice Duggan lived what is best described as a double life before joining the court in 2001. An accomplished academic, Justice Duggan served both as a Professor for twenty-three years and as Interim Dean at Franklin Pierce Law Center.¹⁴³ Then-Professor Duggan managed to argue over three hundred cases before the New Hampshire Supreme Court as the

¹³⁸ *Id.* at 1236–37 (Dalianis, J., dissenting).

¹³⁹ 818 A.2d 1255, 1257 (N.H. 2003).

¹⁴⁰ *Id.* at 1262 (Dalianis, J., dissenting).

¹⁴¹ *Id.* at 1264 (alteration in original) (quoting *Thing v. La Chusa*, 771 P.2d 814, 828 (Cal. 1989)).

¹⁴² *Id.*

¹⁴³ See Press Release, Franklin Pierce Law Ctr., Franklin Pierce Law Center Professor Appointed to New Hampshire's Highest Court (Dec. 20, 2000) (on file with the Albany Law Review); Harry R. Weber, *It's Official: State's Highest Court Has New Judge*, EAGLE TRIB., Dec. 21, 2000, available at http://www.eagletribune.com/news/stories/20001221/NH_002.htm.

head of the state's appellate defender program, which advocates on behalf of poor and indigent clients.¹⁴⁴

At the time of his appointment, the court was attempting to re-emerge from the turmoil that surrounded the resignation of Justice Thayer. Justice Duggan's appointment was clearly intended to add an academic face—that was by all counts beyond reproach—to the court. Justice Duggan was hailed by the governor as a man who “understands the court's strengths and weaknesses” and “possesses all the qualities . . . New Hampshire requires in a judicial candidate—integrity, legal knowledge and ability, dedication, judicial temperament and a deep commitment to ensuring justice for all citizens of New Hampshire.”¹⁴⁵ His nomination was unanimously approved by the independent executive council, which said that he “possesse[d] an unusual combination of scholarliness and pragmatism.”¹⁴⁶

Since his appointment, Justice Duggan has continued to argue for universal access to justice and to advocate responsibility and education as means of improving the legal profession.¹⁴⁷ Some attorneys might consider Justice Duggan's history of defending the indigent and attempt to sway him with sympathy. A careful analysis of Justice Duggan, however, reveals that as a practitioner he had a reputation as a master of the law of every case he tried before the court. It would appear that from the other side of the bench, Justice Duggan demands nothing less than the same mastery of the law from attorneys who now stand where he stood many times before.¹⁴⁸

2. The Cases

Justice Duggan's record as an appellate attorney and as a legal scholar gives him a deep substantive background from which to

¹⁴⁴ See Weber, *supra* note 143.

¹⁴⁵ Professor Could Be Next Justice, *supra* note 33.

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., James E. Duggan & Andrew W. Moeller, *Make Way for the ABA: Smith v. Robbins Clears A Path For Anders Alternatives*, 3 J. APP. PRAC. & PROCESS 65, 106 (2001); N.H. SUP. CT. TASK FORCE ON SELF-REPRESENTATION, N.H. JUDICIAL BRANCH, CHALLENGE TO JUSTICE: A REPORT ON SELF-REPRESENTED LITIGANTS IN NEW HAMPSHIRE COURTS 27 (2004), available at <http://www.courts.state.nh.us/supreme/prosereport.pdf> (reporting the findings of and making suggestions deemed appropriate by a task force on self-representation, which was chaired by Justice Duggan); Justice James E. Duggan, Remarks at the New Hampshire Bar Admission Ceremony (May 19, 2003), available at <http://www.courts.state.nh.us/speeches/dugganlawyers.htm> [hereinafter Duggan Remarks].

¹⁴⁸ See Duggan Remarks, *supra* note 147.

work. The words of the executive council that approved Justice Duggan, saying that he “possesses an unusual combination of scholarliness and pragmatism,”¹⁴⁹ appear to ring true through his opinions. He often seems to strike a subtle balance between the essential motives of policy and meticulous construction of the law. By the numbers, his dissents portray a moderate justice,¹⁵⁰ and in reading his opinions, one could easily conclude that he is unpredictable on most issues.¹⁵¹ But there is also an air of purpose to his words that always aims for fairness without reaching the threshold of political impetus.

All of Justice Duggan’s dissents in criminal cases that were reviewed for this Study dealt with constitutional issues.¹⁵² The arguments that Justice Duggan made in *State v. Dowman*¹⁵³ and *State v. Spencer*¹⁵⁴ were largely based on a differing interpretation of the legal principles to be applied, as are most of Justice Duggan’s dissents. In *Dowman*, Justice Duggan took issue with the way in which a magistrate had issued a search warrant based on the conclusory statements of the defendant regarding the nature of material contained on his computer’s hard drive.¹⁵⁵ Justice Duggan argued that the law required the magistrate to make an informed and independent decision:

Given that courts are wary of accepting conclusory language identifying images as “obscene” or “child pornography” from trained, experienced law enforcement officers as a sufficient basis for probable cause, the defendant’s own, untrained conclusion provides no better basis for the judge to determine whether the pictures contained child pornography. The defendant’s admission is neither informed nor reliable, and does not allow the magistrate to make an independent

¹⁴⁹ *Professor Could Be Next Justice*, *supra* note 33.

¹⁵⁰ For citations to the cases used in this Study, see *infra* apps. A, B.

¹⁵¹ Compare *State v. Dowman*, 855 A.2d 524, 531 (N.H. 2004) (Duggan, J., dissenting) (arguing that an affidavit from defendant admitting that his computer contained a large amount of child pornography did not justify the issuance of a warrant to search the computer), with *State v. Seavey*, 789 A.2d 621, 625 (N.H. 2001) (Duggan, J., dissenting) (arguing that the warrantless entry into the defendant’s apartment by police was justified by either of two theories—exigent circumstances or emergency aid).

¹⁵² See *Dowman*, 855 A.2d at 528 (Duggan, J., dissenting) (discussing First Amendment issues); *State v. Spencer*, 826 A.2d 546, 554–55 (N.H. 2003) (Duggan, J., dissenting) (discussing *Miranda* issues); *Seavey*, 789 A.2d at 625, 627 (Duggan, J., dissenting) (discussing Fourth Amendment issues).

¹⁵³ 855 A.2d at 531 (Duggan, J., dissenting).

¹⁵⁴ 826 A.2d at 554–55 (Duggan, J., dissenting).

¹⁵⁵ See 855 A.2d at 531 (Duggan, J., dissenting).

determination of probable cause regarding the nature of the seized materials.¹⁵⁶

Another notable facet of this dissent was that both the legal analysis and the opinion itself were longer than the majority opinion. This is not an uncommon feature of a Duggan dissent.

In *Spencer*, Justice Duggan took issue with the majority's interpretation of "interrogation" under *Miranda*.¹⁵⁷ According to Justice Duggan's dissent, interrogation should be interpreted broadly to even include instances where the police only show suspects pictures of the alleged crimes in the hopes of eliciting a confession.¹⁵⁸ Duggan said that this type of behavior is as much an interrogation as is direct questioning if it is meant to elicit an incriminating response from the suspect.¹⁵⁹

In Justice Duggan's third dissent in a criminal case, he uncharacteristically focused primarily on a different factual analysis than the majority. *State v. Seavey*¹⁶⁰ involved a warrantless search, and the court addressed what should be admissible under public safety exceptions such as exigent circumstances and emergency aid.¹⁶¹ As noted in Part IV.B.2, this area of the law is very fact-oriented and a slightly different interpretation of a given set of events will often lead to a different result. *Seavey* is also the only criminal case in which Justice Duggan's dissent supported the prosecution; his opinion was based largely on deference to the factual findings and decision of the trial court.¹⁶²

In the civil arena, Justice Duggan is not hesitant to use the court's powers to make factual judgments and achieve equity. Many of Justice Duggan's dissents argue against rigid interpretation of statutory law but stop short of misusing the power of the court to effectively make law.¹⁶³ Instead, his opinions appear to favor a flexibility that interprets statutes based on intent and policy rather than strictly on stark language or semantics. This is not to suggest

¹⁵⁶ *Id.* (citations omitted).

¹⁵⁷ *See* 826 A.2d at 554 (Duggan, J., dissenting).

¹⁵⁸ *See id.* at 554–55.

¹⁵⁹ *See id.*

¹⁶⁰ 789 A.2d 621 (N.H. 2001).

¹⁶¹ *See id.* at 623.

¹⁶² *See id.* at 626 (Duggan, J., dissenting).

¹⁶³ *See, e.g., In re Giacomini*, 868 A.2d 283, 286, 288 (N.H. 2005) (Duggan, J., dissenting); *Conservation Law Found. v. N.H. Wetlands Council*, 834 A.2d 193, 199–200 (N.H. 2003) (Duggan, J., dissenting); *In re Plaisted*, 824 A.2d 148, 152–53 (N.H. 2003) (Duggan, J., dissenting).

that Justice Duggan would wield the power of the court based on his own notions of fairness or social policy; to the contrary, his dissents exhaustively address the full range of legal problems presented by a given issue without relying on the clout of the court as final arbiter.¹⁶⁴

Justice Duggan's willingness to apply statutory law in a flexible manner in order to reach a result that is equitable and consistent with the objective of the law can be seen in his dissent in *New Hampshire Department of Resources and Economic Development v. Dow*.¹⁶⁵ In *Dow*, the majority invalidated a boundary line agreement between two parcels of real property because the parties failed to place monuments along the boundary line as directed by the statute.¹⁶⁶ Thus, the majority strictly interpreted the statute to mean that any incident of noncompliance with the statutory formalities totally invalidated the agreement.¹⁶⁷ Justice Duggan, on the other hand, urged that "when the legislature sets forth a mandatory requirement but does not provide how that mandate is to be enforced, the appropriate mode of enforcement must be judicially determined."¹⁶⁸ According to Justice Duggan, this determination should be made by "consideration of the statutory goals and consideration of whether the party seeking relief has shown prejudice as a result of the statutory violation."¹⁶⁹ Therefore, the boundary line should have been upheld because it would have given force to, rather than defeated, the purpose of the statute.¹⁷⁰

Again, in *In re Plaisted*,¹⁷¹ Justice Duggan advocated for a position in which the court has some room to move by urging that the statute's use of the words "including but not limited to" reflects the legislature's intent to give courts broad discretion" to adjust child support payments based on the circumstances of the case rather than specific calculations alone.¹⁷² He went on to say that "[t]o hold

¹⁶⁴ See, e.g., *In re Estate of Raduazo*, 814 A.2d 147, 156–58 (N.H. 2002) (Duggan, J., dissenting) (discussing exhaustively the implications of tobacco litigation); *Milford Lumber Co. v. RCB Realty, Inc.*, 780 A.2d 1259, 1264–69 (N.H. 2001) (Duggan, J., dissenting) (discussing thoroughly the Consumer Protection Act to argue that the majority unnecessarily opened the door to lawsuits against consumers by sellers, a result not intended by the legislature).

¹⁶⁵ 803 A.2d 581, 585 (N.H. 2002) (Duggan, J., dissenting).

¹⁶⁶ *Id.* at 585 (majority opinion).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 586 (Duggan, J., dissenting).

¹⁶⁹ *Id.* (quoting *In re Martino*, 644 A.2d 546, 548 (N.H. 1994)).

¹⁷⁰ *Id.*

¹⁷¹ 824 A.2d 148 (N.H. 2003).

¹⁷² *Id.* at 153 (Duggan, J., dissenting).

that a court can never consider a parent's assets in determining child support establishes a rigid rule inconsistent with *the court's broad equitable power*."¹⁷³

However, Justice Duggan does not advocate the use of judicial determinations and powers lightly. As is seen in cases such as *In re Estate of Raduazo*,¹⁷⁴ *In re Shelby R.*,¹⁷⁵ and *Milford Lumber Co. v. RCB Realty, Inc.*,¹⁷⁶ Justice Duggan's opinions are habitually comprehensive and carefully fleshed out. In *Raduazo*, a complex case involving everything from estate law to Medicaid to tobacco litigation, Justice Duggan did not simply state why he disagreed with the majority; instead, Justice Duggan thoroughly explained the law that supported his position, plunging deeply into the complexities of the tobacco litigation.¹⁷⁷

Similarly, in *Shelby*, Justice Duggan not only explained virtually every aspect of the substantive law supporting his position, but also pointed out the limited precedential effect that the plurality's holding would have.¹⁷⁸

Illuminating the weaknesses and limitations of a majority's holding is another common feature of a Justice Duggan dissent.¹⁷⁹ For sheer clarity of presentation, comprehensive explanation, and identification of the other side's technical weaknesses, a practitioner who is arguing for a change in law, exception to a rule, or to distinguish a case from precedent would be hard-pressed to find a better intellectual tool than one of Justice Duggan's dissents.

¹⁷³ *Id.* (emphasis added).

¹⁷⁴ 814 A.2d 147 (N.H. 2002).

¹⁷⁵ 804 A.2d 435 (N.H. 2002).

¹⁷⁶ 780 A.2d 1259 (N.H. 2001).

¹⁷⁷ 814 A.2d at 155–57 (Duggan, J., dissenting).

¹⁷⁸ 804 A.2d at 444 (Duggan, J., concurring in part and dissenting in part).

¹⁷⁹ *See, e.g.*, *Conservation Law Found. v. N.H. Wetlands Council*, 834 A.2d 193, 202 (N.H. 2003) (Duggan, J., dissenting) (stating that the majority neither fully addresses nor settles one of the issues raised); *In re Denton*, 786 A.2d 845, 848–49 (N.H. 2001) (Duggan, J., dissenting) (distinguishing the present case from precedent, but pointing out that the broader rule of precedent is still available to justify adhering to it); *Milford Lumber Co.*, 780 A.2d at 1269 (Duggan, J., dissenting) (noting that the majority's holding “represents a substantial departure from our traditional jurisprudence, in which we have never applied [a consumer protection statute] to protect a merchant business from the rascality of one of its customers”).

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E. Associate Justice Richard Galway

1. The Person

Justice Galway authored two books, was a former President of the New Hampshire Bar Association, and was a nine-year veteran on the New Hampshire Superior Court before being nominated to the New Hampshire Supreme Court in 2004.¹⁸⁰ Before his appointment, he was perhaps best known as the superior court judge who struck down the latest state property tax scheme in the continuing struggle to fund New Hampshire's public schools.¹⁸¹ A New Hampshire native, Justice Galway attended Boston University Law School and was a Fulbright scholar at the University of Leeds, England.¹⁸²

Although he seems to be an ally of the more conservative members of the court, many would have thought that a more political appointment would have come from the one-term, polarizing, pro-business Governor Craig Benson.¹⁸³ Instead, those who know Justice Galway best often speak of his sense of fairness and impartiality as well as his sense of humor.¹⁸⁴ Justice Galway received a unanimous vote of confidence from the appointment commission, and former Governor Merrill called him one of the "finest appointments to state office of any kind."¹⁸⁵

2. The Cases

In his first year on the court, Justice Galway authored only one dissenting opinion. In *State v. Cossette*,¹⁸⁶ Justice Galway made his

¹⁸⁰ Judicial Branch of the State of New Hampshire, *Associate Justice Richard E. Galway*, <http://www.courts.state.nh.us/supreme/meetgalway.htm> (last visited Dec. 29, 2005) [hereinafter *Meet Galway*].

¹⁸¹ See Editorial, *Galway a Good Choice for Supreme Court Justice*, PORTSMOUTH HERALD, Jan. 11, 2004, available at <http://www.seacoastonline.com/2004news/01112004/opinion/69824.htm>.

¹⁸² *Meet Galway*, *supra* note 180.

¹⁸³ See Shir Haberman, *Over a Hot Dog, Gov. Benson Chews the Fat*, PORTSMOUTH HERALD, Apr. 22, 2003 (reporting the general discontent with Governor Benson's first 100 days, due largely to his alleged unwavering loyalty to special interests), available at http://www.seacoastonline.com/2003news/04222003/col_capi/24583.htm.

¹⁸⁴ See Chris Markuns, *Meet Judge Richard Galway*, EAGLE TRIB., Jan. 19, 2001, available at http://www.eagletribune.com/news/stories/20010119/NH_002.htm.

¹⁸⁵ Kevin Landrigan, *Chandler to Run Again for House Speaker*, NASHUA TELEGRAPH, Jan. 11, 2004, available at <http://www.nashuatelegraph.com/apps/pbcs.dll/article?AID=/20040111/columnists12/40111049/-1/columnists>; *Justice Richard Galway Sworn In*, POLITICSNH.COM, Feb. 13, 2004, http://www.politicsnh.com/press_releases/2004/February/2_12galway.shtml.

¹⁸⁶ 856 A.2d 732 (N.H. 2004).

first break from the majority over a disagreement as to whether the lower court's failure to sever unrelated charges against the defendant constituted harmless error beyond a reasonable doubt.¹⁸⁷ The majority was confident that the error was harmless, whereas Justice Galway would have remanded the case and given the defendant a second crack after severing the charges.¹⁸⁸ Above all, this case demonstrates that Justice Galway is afraid neither to vote his conscience nor to express his discontent.

For the purpose of this Study, two of the majority opinions that Justice Galway has authored and one significant case that he decided while still on the superior court will also be considered to help complete the picture of this sophomore justice.¹⁸⁹

The opinion that perhaps best predicts what the nature of Justice Galway's place on the Supreme Court of New Hampshire will become is *Boccia v. City of Portsmouth*.¹⁹⁰ In *Boccia*, Justice Galway's unanimous majority opinion¹⁹¹ brought Chief Justice Broderick's holding from *Bacon v. Town of Enfield*¹⁹² together with the concurrence of Justices Duggan and Dalianis¹⁹³ in that case.¹⁹⁴ Galway's opinion held that when deciding whether a zoning variance was properly granted or denied, courts must continue to use the test from *Simplex Technologies, Inc. v. Town of Newington*¹⁹⁵ for the "unnecessary hardship" prong when addressing "use variances" (Chief Justice Broderick's holding in *Bacon*).¹⁹⁶ The opinion went on, however, to hold that a new test must be used to

¹⁸⁷ See *id.* at 734.

¹⁸⁸ *Id.* at 740 (Galway, J., dissenting).

¹⁸⁹ *State v. Sousa*, 855 A.2d 1284 (N.H. 2004); *Boccia v. City of Portsmouth*, 855 A.2d 516 (N.H. 2004); *Sirrell v. State*, No. 99-E-0692, 2001 WL 34013564 (N.H. Super. Ct. Jan. 18, 2001), *rev'd*, 780 A.2d 494 (N.H. 2001).

¹⁹⁰ 855 A.2d 516.

¹⁹¹ Justice Nadeau did not take part in the decision, and there is a strong indication that he would not have signed this opinion. See *Bacon v. Town of Enfield*, 840 A.2d 788, 798–800 (N.H. 2004) (Nadeau, J., dissenting) (criticizing the holding and the concurrence, both of which are given much weight in the majority opinion in *Boccia*).

¹⁹² See *id.* at 793 (majority opinion).

¹⁹³ See *id.* at 794–95 (Duggan, J., concurring).

¹⁹⁴ *Boccia*, 855 A.2d at 521–22.

¹⁹⁵ 766 A.2d 713, 717 (N.H. 2001). According to *Simplex*, applicants seeking a use variance must prove the following:

(1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.

Id.

¹⁹⁶ *Boccia*, 855 A.2d at 522.

decide the unnecessary hardship prong of the variance-granting test for “area variances,” as was advocated by the concurrence in *Bacon*.¹⁹⁷ This carefully composed opinion demonstrates both political savvy, by bringing the respective sides together, and a clear sense of awareness of the court’s position at the top of the judicial branch, as a new and workable test was created for lower courts from what was a confusing and ambiguous zone of precedent.

Once again, in *State v. Sousa*,¹⁹⁸ Justice Galway secured the concurrence of all the voting justices on a topic on which they have rarely agreed—searches and seizures.¹⁹⁹ This was done, in part, by vacating and remanding the case with a new test for the lower court to apply instead of reversing the decision outright.²⁰⁰ By creating a clear “analytical framework,” Justice Galway again used the unanimous court to create a workable test for lower courts to apply when faced with questions of whether an anonymous tip may give rise to reasonable suspicion and justify an investigatory stop—an area of law that was previously ambiguous.²⁰¹

Justice Galway’s opinion specifies four factors to be considered:

First, whether there is a “sufficient quantity of information” such as the vehicle’s make, model, license plate number, location and bearing, and “similar innocent details” so that the officer may be certain that the vehicle stopped is the one the tipster identified. Second, the time interval between the police receiving the tip and the police locating the suspect

¹⁹⁷ See *id.* The test set forth in *Boccia* for area variances includes the following considerations:

(1) whether an area variance is needed to *enable* the applicant’s proposed use of the property given the special conditions of the property; and (2) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance. This second factor includes consideration of whether the variance is necessary to avoid an undue financial burden on the owner.

Id. (citations omitted); see also *Bacon*, 840 A.2d at 795–96 (Duggan, J., concurring) (describing concerns with the *Simplex* test and advocating the need to distinguish between use and area variances).

¹⁹⁸ 855 A.2d 1284 (N.H. 2004).

¹⁹⁹ See, e.g., *State v. McKeown*, 849 A.2d 127, 131 (N.H. 2004) (Broderick, J., dissenting) (disagreeing with the majority’s characterization that a water patrol officer’s actions constituted a “stop”); *State v. Goss*, 834 A.2d 316, 320 (N.H. 2003) (Broderick, J., dissenting) (disagreeing with the majority’s determination that a person has a reasonable expectation of privacy in curbside trash bags); *State v. Seavey*, 789 A.2d 621, 625 (N.H. 2001) (Duggan, J., dissenting) (arguing that the particular circumstances sufficed for applying either the exigent circumstances theory or the emergency aid exception to justify a warrantless entry where the majority held the entry unconstitutional).

²⁰⁰ See *Sousa*, 855 A.2d at 1290–91.

²⁰¹ See *id.* at 1290.

vehicle. Third, whether the tip is based upon contemporaneous eyewitness observations. Fourth, whether the tip is sufficiently detailed to permit the reasonable inference that the tipster has actually witnessed an ongoing motor vehicle offense.²⁰²

These factors, reviewed in light of the totality of the circumstances, give trial courts a clear framework to work from when evaluating police responses to anonymous tips.

Despite his time on the New Hampshire Supreme Court, Justice Galway is perhaps best known for a decision he authored while still serving on the superior court.²⁰³ In *Sirrell v. State*,²⁰⁴ then-Judge Galway declared that an enormously unpopular statewide property tax, which was used to finance a court-mandated educational funding system,²⁰⁵ violated the New Hampshire Constitution.²⁰⁶ Judge Galway decided that the system was in violation of the constitutional provision which states that taxes must be “proportional and reasonable” across all taxpayers in a taxing jurisdiction because municipalities across the state had been performing re-evaluations sporadically, resulting in large discrepancies of market-to-assessed value of individual properties within some taxing jurisdictions.²⁰⁷

Judge Galway’s decision in *Sirrell* was subsequently reversed by a sharply divided New Hampshire Supreme Court.²⁰⁸ In their dissent, Republican-nominated Chief Justice Brock and Justice Broderick called Judge Galway’s decision “analytically sound and thoughtful,”²⁰⁹ whereas the per curiam majority of Democrat-nominated Justices Nadeau, Dalianis, and Duggan acknowledged constitutional errors by the State, but did not deem the entire system unconstitutional and therefore allowed the State to escape with a mere warning.²¹⁰ However, despite this setback, Justice

²⁰² *Id.* (citations omitted).

²⁰³ See Markuns, *supra* note 184 (referring to *Sirrell v. State* as “the most important trial [then-superior court Judge Galway] has ever presided over”).

²⁰⁴ No. 99-E-0692, 2001 WL 34013564 (N.H. Super. Ct. Jan. 18, 2001), *rev'd*, 780 A.2d 494 (N.H. 2001).

²⁰⁵ For an in depth discussion of some of the drama created by New Hampshire’s unique constitutional requirements for education, see *infra* Part V (discussing the *Claremont* litigation).

²⁰⁶ *Sirrell*, 2001 WL 34013564, at *26.

²⁰⁷ *Id.* at *27–*28. See generally N.H. CONST. pt. 2, art. 5.

²⁰⁸ See *Sirrell v. State*, 780 A.2d 494, 496 (N.H. 2001).

²⁰⁹ *Id.* at 508–09 (Brock, C.J. & Broderick, J., dissenting).

²¹⁰ *Id.* at 501, 504, 508 (per curiam) (recognizing that the tax system “raises serious concerns as to whether it is proportional and reasonable,” but also that plaintiffs would be

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Galway's decision was acclaimed by opponents of the statewide property tax, no doubt elevating him in many political circles and possibly adding to his credits during the nomination and evaluation phases of his appointment.²¹¹ The decision also helps illustrate Justice Galway's position on an important issue that will no doubt reappear before the court in the future, and shows him to be a justice who is undaunted by complex and politically volatile issues.

V. THE CLAREMONT CASES²¹²

“Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force of public opinion, it is essential that public opinion be enlightened.”

*George Washington*²¹³

A. Introduction

Together, the *Claremont* cases represent an important and instructive interaction between New Hampshire's high court, the other branches of state government, and the state's citizens. The issue—the state's duty to provide *adequate* public education—has the capacity to profoundly affect almost every citizen of New Hampshire at some point, if not throughout their lifetime. Further, the issue dramatizes the evolving relationship between the branches of state government, both to one another and with respect to the state constitution.

Beginning in 1993, the original plaintiffs were five school districts, five school children, and five taxpayers, all from “property

required to prove a “widespread scheme of intentional discrimination” in order to succeed in defeating the tax).

²¹¹ See Town of Newington, *supra* note 6.

²¹² Claremont Sch. Dist. v. Governor (*Claremont VII*), 794 A.2d 744 (N.H. 2002); Sirrell v. State, 780 A.2d 494 (N.H. 2001); Claremont Sch. Dist. v. Governor (*Claremont VI*), 761 A.2d 389 (N.H. 1999); Claremont Sch. Dist. v. Governor (*Claremont V*), 744 A.2d 1107 (N.H. 1999); Claremont Sch. Dist. v. Governor (*Claremont IV*), 725 A.2d 648 (N.H. 1998); Claremont Sch. Dist. v. Governor (*Claremont III*), 712 A.2d 612 (N.H. 1998); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353 (N.H. 1997); Claremont Sch. Dist. v. Governor (*Claremont I*), 635 A.2d 1375 (N.H. 1993).

²¹³ John Herbert Roth, *Education Funding and the Alabama Example: Another Player on a Crowded Field*, 2003 BYU EDUC. & L.J. 739, 745–46 (quoting Washington in his farewell address to the people of the newly formed United States).

poor” communities.²¹⁴ These plaintiffs filed a petition to have New Hampshire’s educational funding system declared unconstitutional because it failed to provide an equitable level of educational opportunity to all children. The suit was initially dismissed by the trial court for failure to state a claim;²¹⁵ however, the New Hampshire Supreme Court overturned the dismissal and held that the State had a constitutionally-imposed duty to provide an adequate education to all educable citizens.²¹⁶ This holding would provoke an almost continuous stream of cases, forcing the court into the public eye again and again, and raising many critical questions of constitutionality and jurisprudence along the way.²¹⁷

B. Background

The framers of the United States Constitution held public education to be an essential ingredient in the recipe for a successful democracy; however, the founders stopped short of making education a fundamental right.²¹⁸ As with many other democratic necessities, education was held to be structurally subordinate to the greater federalist system.²¹⁹ Thus, public education was left to the states’ respective control, confined only by the protection and guarantee of enumerated rights such as equal protection, freedom of religion, and other fundamental liberties.²²⁰

Few functions of state governments, including the power to tax and provide for the general welfare of the people, are as universally recognized and cherished by citizens as the responsibility to provide public education. The constitution of every state in the union has some sort of clause, article, or section that deals specifically with the state’s education system.²²¹ Why then, some might ask, if

²¹⁴ *Claremont I*, 635 A.2d at 1377.

²¹⁵ *Id.* at 1376.

²¹⁶ *Id.*

²¹⁷ See generally Claremont Coalition, <http://www.claremontlawsuit.org> (last visited Dec. 29, 2005).

²¹⁸ See Martin D. Carcieri, *Democracy and Education in the Thought of Jefferson and Madison*, 26 J.L. & EDUC. 1, 2 (1997).

²¹⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–36, 39, 40 (1973) (reaffirming the notion that education is primarily a matter of state concern).

²²⁰ See *Meyer v. Nebraska*, 262 U.S. 390, 396–97, 399–401, 403 (1923) (holding unconstitutional a Nebraska statute that restrained educators from teaching certain subjects because, although states may use their police powers to supervise education, “[d]etermination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts”).

²²¹ See Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 3 (1997).

educational guarantees are more or less universal, did the end of the twentieth century see a barrage of litigation in state courts over nearly every aspect of public education?²²² The answer, it would seem, is remarkably similar to the question—namely, that it is the abundance of guarantees that led to the abundance of litigation, as litigants piggyback on successes and failures in sister states.²²³

The educational provisions harbored within each state's constitution lay seemingly dormant for years. Then, a few plaintiffs in what have been termed leader-states, revealed the force these commands could marshal.²²⁴ And then, it was not the differences between one state and another, one school and another, or from one document to another that inspired the wellspring of litigation—rather, it was the similarities.²²⁵ These similarities are remarkably influential in the case of New Hampshire, where the state constitutional provisions governing education are exceedingly parallel to those of its sister state, Massachusetts.²²⁶

As was the case with other notable revolutionary and avant-garde events (e.g. pilgrims, tea party, etc.), the “landfall” that most affected New Hampshire's educational scheme was litigation that happened next door, in Massachusetts.²²⁷ The litigation in *Claremont I*²²⁸ was, in truth, well under way by the time the Massachusetts Supreme Judicial Court handed down its opinion in *McDuffy*. Nevertheless, when reading Justice Brock's opinion in *Claremont I*, it is exceedingly apparent that he is interpreting virtually the same language that was interpreted by his colleagues

²²² See Alexandra Natapoff, 1993: *The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 Educ. L. Rep. (West) 755, 757 (1994) (noting that in September of 1994 over half the states in the country were involved in litigation over their education systems).

²²³ See *id.* (“The pervasiveness of the current litigation suggests that litigants and courts are increasingly aware of the rich potential for education claims that has blossomed over the past five years.”).

²²⁴ See *id.* at 755–56 (describing 1993 as a “watershed year” in education litigation).

²²⁵ See Jensen, *supra* note 221, at 3–8 (summarizing the similarities and differences in the various states' education clauses).

²²⁶ Compare, e.g., N.H. CONST. pt. 2, art. 83 (“[I]t shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences . . .”), with MASS. CONST. pt. 2, ch. 5, § 2 (“[I]t shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences . . .”).

²²⁷ See *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 547–48 (Mass. 1993) (holding that Massachusetts' lawmakers are under a constitutional duty to provide an education).

²²⁸ 635 A.2d 1375, 1376 (1993) (holding that the state constitution “imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire”).

to the south just four months earlier.²²⁹ Additionally, because the framers of the New Hampshire Constitution relied heavily on the Massachusetts Constitution as a blueprint from which to work,²³⁰ much of the same historical evidence that was presented to the Massachusetts high court in *McDuffy* was likewise presented to its New Hampshire counterpart in *Claremont I*.

But even if the *McDuffy* decision cleared the legal way for *Claremont I*, the ground in New Hampshire had been fertile long before these seeds of constitutional litigation had ever been sown. As the only state in the union that has never had either an income or a sales tax, New Hampshire relied entirely on property taxes to fund education.²³¹ With the state providing the nation's lowest level of educational support, a total of \$57 million in 1993, that meant that school districts were relying almost entirely on local property taxes.²³² Because property taxes are based on real estate value, districts with comparatively low real estate values had to assess higher tax rates in order to generate education funding levels comparable to those generated in property-rich towns.²³³

When *Claremont I* was decided in favor of the property-poor districts, the mood in New Hampshire was as if the decision had mandated everything "from a statewide income tax to the death penalty."²³⁴ This response was an overreaction, considering that the only ruling that the court in *Claremont I* made was that the State had a duty to ensure an adequate education to all its educable citizens: "We do not define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor."²³⁵ So the scope of what was "adequate," both in terms of educational opportunity and in terms of funding, was still left largely up to the political branches of government to resolve. This deference to the other branches, while perhaps proper in terms judicial restraint, would nonetheless return

²²⁹ See *id.* at 1378 (relying explicitly on *McDuffy*).

²³⁰ *Id.* (noting that "[New Hampshire] modeled much of [its] constitution on one adopted by Massachusetts four years earlier, and that the Massachusetts Constitution contains a nearly identical provision regarding education"); see also Sean F. Heneghan & Gregory J. Messore, *The Claremont Decision: Support Public Education or Die?*, N.H.B.J., Sept. 1994, at 6, 9–10 (explaining the various influences on which the *Claremont I* decision rested).

²³¹ Heneghan & Messore, *supra* note 230, at 7.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 6.

²³⁵ *Claremont I*, 635 A.2d at 1381.

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to haunt the court for many years to come.²³⁶

C. Cases

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences²³⁷

*Encouragement of Literature Clause,
New Hampshire Constitution*

The holding of *Claremont I* amounts to a simple and non-specific interpretation of a constitutional mandate. In fact, a large portion of the holding itself is devoted to interpreting the language and terminology of the Encouragement of Literature Clause into contemporary English.²³⁸ Highlights from these interpretations include: (1) “[l]iterature” is defined as “[l]earning”; (2) “[d]uty” means “any natural or legal obligation”; and (3) “[c]herish” means “[t]o support, to shelter, [or] to nurse up.”²³⁹ Therefore, the duty of the legislature to cherish literature is more than “a statement of aspiration”; it is a commandment “that the State provide an education to all its citizens and that it support all public schools.”²⁴⁰ This commandment, which had been by and large ignored by the State for over 200 years, now imposed a political responsibility of colossal proportions. Unfortunately, in a historically conservative New England state²⁴¹ with no sales or income tax, this responsibility

²³⁶ See Norma Love, *How Much is Enough?*, NASHUA TELEGRAPH, Dec. 20, 2004 (“Eleven years after [New Hampshire’s] Supreme Court ruled that public education is the state’s fiscal responsibility, [its] lawmakers still can’t agree on what that means.”).

²³⁷ N.H. CONST. pt. 2, art. 83.

²³⁸ See *Claremont I*, 635 A.2d at 1378.

²³⁹ *Id.*; see also Ralph N. Sianni, Current Development, *Claremont School District v. Governor*, 635 A.2d 1375 (N.H. Dec. 30, 1993). *State Has a Constitutional Duty to Provide an Adequate Education to Every Educable Child In Public School and to Guarantee Adequate Funding of Public Schools*, 4 B.U. PUB. INT. L.J. 199, 200–01 (1994).

²⁴⁰ *Claremont I*, 635 A.2d at 1378.

²⁴¹ In 1993, New Hampshire had voted for Republican presidential candidates in 10 of the previous 12 national elections, and the state had only one Democrat for governor between 1969 and 1993. See U.S. ELECTORAL COLL., ELECTORAL COLLEGE BOX SCORES 1789–1996, <http://www.archives.gov/federal-register/electoral-college/scores.html> (last visited Dec. 29,

was treated more like an affliction—a political hot potato—than an opportunity.

However, at this point, the political branches of the state government were still operating under the protection of the courts. That is because, upon remand, the superior court basically emasculated *Claremont I* by holding that:

(1) the education provided in the plaintiff school districts is constitutionally adequate; (2) the New Hampshire system of funding public elementary and secondary education guarantees constitutionally adequate funding to each of the plaintiff school districts; (3) the New Hampshire system of school funding does not violate the plaintiffs' right to equal protection under the State Constitution, part I, articles 1, 2 and 12; and (4) the system of school financing does not violate part II, article 5 of the State Constitution.²⁴²

Putting the bite back into its opinion in *Claremont I*, the court held in *Claremont II* that the primary sources of funding for the State's education system, locally-raised property taxes, were wildly "disproportionate and unreasonable [and as such] in violation of part II, article 5 of the New Hampshire Constitution."²⁴³ More specifically, the supreme court found that the trial court had erred by considering the local district itself to be the appropriate taxing entity for measuring proportionality.²⁴⁴ The local district did receive the funds and control the mechanisms of collection; however, the supreme court looked to the purpose of the taxing scheme and found that the funds were being raised to satisfy the *State's* duty to provide adequate public education as identified in *Claremont I*.²⁴⁵ Therefore, since the funds were being raised for the satisfaction of the *State's* duty, the applicable taxing district for purposes of determining compliance with this constitutional duty was the entire state, not the individual local school districts. Although within each local district property taxes were relatively even, rates and the

2005); U.S. ELECTORAL COLL., ELECTORAL VOTES, BY STATE, http://www.archives.gov/federal-register/electoral-college/votes/votes_by_state.html (last visited Dec. 29, 2005) (providing links to electoral college voting statistics by state for each presidential election); LIST OF GOVERNORS OF NEW HAMPSHIRE, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_New_Hampshire_Governors (last visited Dec. 29, 2005).

²⁴² *Claremont II*, 703 A.2d 1353, 1354 (N.H. 1997).

²⁴³ *Id.*; see also Opinion of the Justices, 379 A.2d 782, 786 (1977) (holding that under N.H. CONST., pt. 2, art. 5, all taxes must "be proportionate and reasonable—that is, equal in valuation and uniform in rate" (citation omitted)).

²⁴⁴ *Claremont II*, 703 A.2d at 1355–56.

²⁴⁵ *Id.* at 1356.

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resulting revenues varied widely across the state and were thus found to be disproportionate.²⁴⁶ This finding alone was enough to reverse the superior court.

Perhaps learning a lesson from the trial court's lack of a response to *Claremont I*, the New Hampshire Supreme Court did not stop after merely reversing the lower court this time, but instead issued specific additional findings. The first point of these additional findings was that the legislature could not simply rely on other bodies to define what would constitute an adequate education.²⁴⁷ The court found that part 2, article 83 is one of the only places in the state constitution where a duty is specifically assigned to the legislature, and therefore the mandate is not delegable to other bodies.²⁴⁸ To allow the legislature to avoid a similarly unconstitutional fate for its next definition of "adequate education," the court specified the criteria by which it would be judged, holding that a system of adequate education is not static, but should always reflect the following:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently;
- and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.²⁴⁹

To bolster these considerations, the court reminded the

²⁴⁶ *Id.* at 1356–57 (finding that the rates, in some cases, varied more than 400% from one community to another).

²⁴⁷ *Id.* at 1357–58.

²⁴⁸ *Id.* at 1358.

²⁴⁹ *Id.* at 1359 (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)).

legislature that the right to an adequate education was “fundamental,” and therefore any government action or inaction that resulted in a disparity would be subjected to strict judicial scrutiny.²⁵⁰

Following *Claremont II*, the New Hampshire Supreme Court stuck to its guns, staying further proceedings pending legislative action and denying motions to vacate based on separate constitutional arguments.²⁵¹ Sixteen months later, the legislature enacted a “uniform education property tax” whereby all taxable property would eventually pay a uniform rate on each \$1,000 of value to fund the state education system.²⁵² This system was to be “phased in” over a six-year period, so although *Claremont II* was decided in 1997, and the education tax was passed in 1999, the holding of *Claremont II* would not be fully complied with until 2004.²⁵³

Soon the parties were back in court. The plaintiffs raised six challenges to the new system and two questions of fact for the court. Chief Justice Brock, the author of *Claremont I & II*, addressed only the plaintiff’s first challenge in full.²⁵⁴

While acknowledging that the phase-in plan had the well-intentioned effect of shielding some taxpayers in the “property rich” districts from economic hardship, and noting that it was not the court’s “role nor indeed within [the court’s] authority to second-guess the rationale for tax exemptions articulated by the legislature or to substitute [the court’s] judgment for [the legislature’s],” the court still struck down the phase-in plan as unconstitutional.²⁵⁵ According to the court, the phase-in plan “cast too wide a net at the problem it intended to solve,” and the legislature’s “remedy far exceed[ed] the underlying rationale,” making it “so arbitrary as to serve no useful purpose of a public nature, thereby failing to serve

²⁵⁰ *Id.* Unlike the court’s decision in *Claremont I*, this recognition of education as a fundamental right represents a direct break from the Massachusetts courts. See, e.g., *Doe v. Superintendent of Schs.*, 653 N.E.2d 1088, 1095 (Mass. 1995) (holding that, under the Massachusetts constitution, individuals do not enjoy a fundamental right to an education).

²⁵¹ See *Claremont II*, 703 A.2d at 1360–61 (encouraging the political branches to take remedial action); *Claremont III*, 712 A.2d 612, 612, 615 (N.H. 1998) (denying, in an opinion authored by a dissenter in *Claremont II*, a motion to vacate *Claremont II* that was brought on the basis that the use of a retired justice to sit in the place of a recused justice violated the state constitution).

²⁵² *Claremont V*, 744 A.2d 1107, 1109 (N.H. 1999).

²⁵³ *Id.* at 1109.

²⁵⁴ *Id.* at 1108–09.

²⁵⁵ *Id.* at 1111.

the general welfare.”²⁵⁶ In sum, because the phase-in portion was integral to and not severable from the education property tax, the statewide property tax provision could not stand.²⁵⁷

Two months later, after ruling that sovereign immunity did not bar the plaintiffs’ request for attorney’s fees, the court awarded reasonable fees because it found that the plaintiffs had conferred a substantial benefit upon the public by vindicating important constitutional rights.²⁵⁸

Beginning in 2001, the two latest chapters of the *Claremont* saga tell the most about what the future holds for public education in New Hampshire because all the current members of the court were involved in these cases in one way or another.²⁵⁹

Sirrell v. State involved a challenge to the education property tax as it was re-enacted following *Claremont V* without the phase-in provisions.²⁶⁰ The plaintiffs in *Sirrell* alleged that the State’s education property tax was unconstitutional as applied primarily because of errors in the assessment procedures.²⁶¹ Specifically, the plaintiffs alleged that the system of property assessment, which determined the value of property on which the tax rate would then be applied, was inadequate, neglected, and inevitably resulted in disproportionate taxation.²⁶²

Judge Galway, then on the superior court, agreed with the plaintiffs and directed the State to refund \$880 million in taxes collected under the system.²⁶³ The supreme court reversed, holding for the State for the first time in any of the *Claremont* cases. Specifically, the supreme court found that there were numerous problems with the way in which the property tax was being applied, but that such problems did not amount to such a “widespread scheme of intentional discrimination” as would be required to declare the system unconstitutional.²⁶⁴ Further, although the court found that the plaintiffs had shown that the system of assessment

²⁵⁶ *Id.* (citation omitted).

²⁵⁷ *Id.* at 1112–13.

²⁵⁸ *Claremont VI*, 761 A.2d 389, 392, 394 (N.H. 1999).

²⁵⁹ *See Claremont VII*, 794 A.2d 744 (N.H. 2002); *Sirrell v. State*, 780 A.2d 494 (N.H. 2001); *see also Sirrell v. State*, No. 99-E-0692, 2001 WL 34013564 (N.H. Super. Ct. Jan. 18, 2001). At the time this high court study went to press, no replacement had been appointed to replace the retiring Justice Nadeau.

²⁶⁰ 780 A.2d at 496.

²⁶¹ *Id.*

²⁶² *Id.* at 499–500.

²⁶³ *Id.* at 496.

²⁶⁴ *Id.* at 501, 504 (quoting *Macioci v. Comm’r of Revenue*, 438 N.E.2d 786, 797 (Mass. 1982)).

had not been fully complied with, they failed to carry their burden of proof and to demonstrate that actual harm and disproportionate taxation had resulted from this noncompliance.²⁶⁵

The court then added a measure of finality to this decision with what was not so much an order as an appeal to the integrity of the political branches to bring the system under full compliance and to “take the necessary action, not just because by doing so the State may avoid future successful legal challenges, but because that is the essence of our constitutional form of government.”²⁶⁶

With issues of educational funding and taxation presumably behind it for a time, the court soon was pressed into a more direct challenge to the “adequacy” of the educational system.²⁶⁷ The plaintiffs in *Claremont VII* successfully invoked the supreme court’s continuing jurisdiction on two issues: (1) whether the State’s constitutional duty to provide an adequate education required the State to adopt standards of accountability, and (2) whether the State’s then current statutes, rules, and regulations satisfied this obligation.²⁶⁸

Answering these questions, the court found that the State did have an affirmative obligation to provide standards of accountability because such standards were necessary to ensure satisfaction of the greater duty to provide an adequate education as commanded by *Claremont I*.²⁶⁹ The court went on to clarify that “the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether . . . the State has fulfilled its duty.”²⁷⁰

Meaningful application, in the eyes of the court, meant something more than mere token encouragement to local school districts to aim for adequate education; it meant “a sufficient mechanism to *require* that school districts actually achieve this goal.”²⁷¹ However, this was as far as the court was willing to go towards holding the hand of the legislature in its policy-making role.²⁷²

Addressing the issue of whether the State was satisfying these

²⁶⁵ *Id.* at 508.

²⁶⁶ *Id.*

²⁶⁷ *Claremont VII*, 794 A.2d 744, 745 (N.H. 2002).

²⁶⁸ *Id.* at 750.

²⁶⁹ *Id.* at 751.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 758 (emphasis added).

²⁷² *Id.* at 759–60.

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requirements, the court focused on several exceptions to the State's policies by which the State had attempted to hold schools accountable.²⁷³ These exceptions fell under two general categories: economic and emergency exceptions. The court found that exceptions to the general performance evaluation standards due to emergency situations were acceptable, but exceptions based solely on the "financial condition of the school district" were not.²⁷⁴ Responding to the financial condition exceptions, the court came full circle and repeated its earlier warnings, stating that the State was required to guarantee funding so that every educable citizen received an adequate education.²⁷⁵

D. Future

"Human history becomes more and more a race between education and catastrophe."

*H.G. Wells*²⁷⁶

The position that each justice has taken on this issue in the past is perhaps the best insight available into what the court might decide in the future. From these various positions, taken from *Sirrell*²⁷⁷ and *Claremont VII*,²⁷⁸ the current justices can be divided into three categories:

(1) Justices Nadeau and Dalianis have voted for the State on both occasions.²⁷⁹

(2) Chief Justice Broderick and Justice Galway have voted against the State at every turn: Chief Justice Broderick ruled against the State in *Sirrell* and *Claremont VII*, as well as in every other *Claremont* case that has come before the court since he was appointed in 1995.²⁸⁰ Justice Galway, as a judge on the superior

²⁷³ See *id.* at 754.

²⁷⁴ *Id.*

²⁷⁵ See *id.*

²⁷⁶ H.G. WELLS, THE OUTLINE OF HISTORY 1100 (1920).

²⁷⁷ *Sirrell v. State*, 780 A.2d 494 (N.H. 2001); see also *Sirrell v. State*, No. 99-E-0692, 2001 WL 34013564 (N.H. Super. Ct. Jan. 18, 2001).

²⁷⁸ *Claremont VII*, 794 A.2d 744 (N.H. 2002).

²⁷⁹ See *Claremont VII*, 794 A.2d at 761 (Nadeau & Dalianis, JJ., dissenting); *Sirrell*, 780 A.2d at 504.

²⁸⁰ See *Claremont VII*, 794 A.2d at 745 (holding that the State's educational system was unconstitutional because it did not adequately hold school districts accountable); *Sirrell*, 780 A.2d at 508–09 (Brock, C.J. & Broderick, J., dissenting) (arguing that the State's property tax system was unconstitutional); *Claremont VI*, 761 A.2d 389, 394–95 (N.H. 1999) (awarding attorney's fees to the plaintiffs in their victory over the State); *Claremont V*, 744 A.2d 1107,

court, ruled against the State in *Sirrell*, only to be reversed by the supreme court.²⁸¹

(3) Justice Duggan, always the moderate, has ruled both ways: for the State on the issue of the education property tax,²⁸² and against the State on the issue of accountability;²⁸³ perhaps significantly, Justice Duggan was part of the majority on both occasions.

From these decisions, it appears that Justices Nadeau and Dalianis have taken the most stalwart position for one side—the State. First, these justices joined Justice Duggan in taking the politically unpopular step of reversing Judge Galway in *Sirrell* and holding that the State's education property tax was constitutional despite its many admitted flaws.²⁸⁴ Then, a year later, they dissented from the majority in *Claremont VII*. In this dissent, Justices Nadeau and Dalianis, writing together, made a strong statement suggesting that they would not be disposed to entertain further challenges to the constitutionality of the education system: "The time has come for the supreme court to conclude its jurisdiction over this appeal. In *Claremont I*, the court fulfilled its constitutional responsibility . . . [T]he docket in this appeal should now be closed."²⁸⁵ Clearly, these justices believe the court has overstepped its proper borders.

Although there are no *Claremont* opinions authored by Chief Justice Broderick to give us insight, to date he has formally ruled against the State seven times.²⁸⁶ Since Chief Justice Broderick has been voting to send the State back to the drawing board since 1997, he is likely prepared to continue the quest for constitutional adequacy, if not perfection.

The only glimpse into Justice Galway's position on a *Claremont*

1108, 1111 (N.H. 1999) (holding the phase-in of the State's property tax unconstitutional); *Claremont IV*, 725 A.2d 648, 650 (N.H. 1998) (denying the State's motion to extend the deadline for establishing a constitutionally adequate education system); *Claremont III*, 712 A.2d 612, 615 (N.H. 1998) (denying a board of education member's motion to vacate *Claremont II* that was based on the argument that allowing a retired justice to sit for one particular case was unconstitutional); *Claremont II*, 703 A.2d 1353, 1354 (N.H. 1997) (holding that the State's method of financing the public education system was constitutionally infirm).

²⁸¹ See *Sirrell*, 2001 WL 34013564, at *26 (finding the State's property tax system to be unconstitutional), *rev'd*, 780 A.2d at 508.

²⁸² See *Sirrell*, 780 A.2d at 508.

²⁸³ See *Claremont VII*, 794 A.2d at 745.

²⁸⁴ See *Sirrell*, 780 A.2d at 508.

²⁸⁵ *Claremont VII*, 794 A.2d at 763 (citation omitted).

²⁸⁶ See *supra* note 280 and accompanying text.

issue comes from his superior court opinion in *Sirrell*.²⁸⁷ In that case, he ruled against the State; however, unlike most of the *Claremont* litigation, the plaintiffs in *Sirrell* were from the so-called property-rich school districts.²⁸⁸ This case tells us little about how Justice Galway will rule when it comes to questions about the adequacy of education or similar issues, but it certainly shows that Justice Galway is prepared to rule against the State if he perceives a constitutional violation.

In both of the *Claremont* cases that Justice Duggan has ruled on, he has given indications that he is weary about proceeding too far down the road toward policymaking.²⁸⁹ In *Sirrell*, he took a restrained stance, recognizing the errors in the tax system but stopping short of calling those errors unconstitutional.²⁹⁰ However, in *Claremont VII* he ruled against the State, demonstrating in no uncertain terms that he will not excuse constitutional violations in the interest of an amiable relationship with the political bodies.²⁹¹ Justice Duggan might very well be the link that either pulls the court toward a more even keel or causes it to tip one way or the other.

The court can only decide the cases that come before it. Whether there are further judicially-mandated changes to public education in New Hampshire depends more on the legislature and the Governor than on the court.²⁹²

VI. CONCLUSION

To the practitioner, the New Hampshire Supreme Court offers an opportunity to make largely apolitical legal arguments without the disturbing perception that the odds and attitudes are stacked against a client's position. To the scholar, the court presents an

²⁸⁷ See No. 99-E-0692, 2001 WL 34013564, at *27 (N.H. Super. Ct. Jan. 18, 2001), *rev'd*, 780 A.2d 494 (N.H. 2001).

²⁸⁸ See *id.* at *3.

²⁸⁹ See *Claremont VII*, 794 A.2d at 760 (“We recognize that we are not appointed to establish educational policy and have not done so today.”); *Sirrell*, 780 A.2d at 508 (trusting the legislative and executive branches to fix the patent deficiencies in the statewide property tax system).

²⁹⁰ See *Sirrell*, 780 A.2d at 508.

²⁹¹ See 794 A.2d at 759.

²⁹² See Governor John Lynch, Governor's Inaugural Address (Jan. 6, 2005), *available at* <http://www.nh.gov/governor/speeches/documents/010605inaugural.htm> (promising a “fresh approach . . . that allows us to once again focus on improving quality, directs more state aid to the communities that need it the most, and eliminates the statewide property tax and donor towns”).

opportunity to analyze diverse yet thoughtful judicial decision making. To the state, for better or for worse, the court represents the independence, intelligence, and New England resolve so cherished by the people and history of New Hampshire.

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APPENDIX A

Key: WM = Wrote Majority, JM = Joined Majority, WD = Wrote Dissent,
JD = Joined Dissent

Civil Case	Broderick	Nadeau	Dalianis	Duggan	Galway	Brock
<i>In re</i> Angley-Cook, 855 A.2d 431(N.H. 2004)	WD	JM	WM	JM	JM	
<i>In re</i> Blanchflower, 834 A.2d 1010 (N.H. 2003)	WD	WM	JM	JM		WD
<i>In re</i> Lockheed Martin Corp., 786 A.2d 872 (N.H. 2001)	WD	WM	JM	JM		WD
KSC Realty Trust v. Town of Freedom, 772 A.2d 321 (N.H. 2001)	WD	WM	JM			JD
Sirrell v. State, 780 A.2d 494 (N.H. 2001)	WD	WM	WM	WM		WD
Shopland v. Town of Enfield, 855 A.2d 392 (N.H. 2004)	JM	WD	JM	WM		JD
Summa Humma Enters. V. Town of Tilton, 849 A.2d 146 (N.H. 2004)	JM	WD	JM	WM	JM	
<i>In re</i> Nelson, 825 A.2d 501 (N.H. 2003)	JM	WD	WM	JM		JM
<i>In re</i> Estate of Bennett, 824 A.2d 142 (N.H. 2003)	JM	WD	JM	JM		WM

Civil Case	Broderick	Nadeau	Dalianis	Duggan	Galway	Brock
<i>In re</i> Int'l Bhd. Of Police Officers, 804 A.2d 431 (N.H. 2002)	JM	WD	JD	JM		WM
Estate of Libby v. State Farm Mut. Auto. Ins. Co., 809 A.2d 768 (N.H. 2002)		WD	JM	WM		JM
Pro Con Constr., Inc. v. Acadia Ins. Co., 794 A.2d 108 (N.H. 2002)		WD	JM	WM		
Matarese v. N.H. Mun. Ass'n Prop.-Liab. Ins. Trust, Inc., 791 A.2d 175 (N.H. 2002)	WM	WD	JM			
Town of Nelson v. N.H. Dep't of Transp., 767 A.2d 435 (N.H. 2001)	JM	WD	JM			WM
<i>In re</i> N.H. Bar Ass'n, 855 A.2d 450 (N.H. 2004)	JM	WM	JM	WD	JM	
Conservation Law Found. v. N.H. Wetlands Council, 834 A.2d 193 (N.H. 2003)	JM	WM	JM	WD		
<i>In re</i> Plaisted, 824 A.2d 148 (N.H. 2003)	JD	JM	WM	WD		JM

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Civil Case	Broderick	Nadeau	Dalianis	Duggan	Galway	Brock
Progressive N. Ins. Co. v. Enter. Rent-A-Car Co., 821 A.2d 991 (N.H. 2003)	WM	JD	JM	WD		JM
<i>In re</i> Estate of Raduazo, 814 A.2d 147 (N.H. 2002)		JM	JM	WD		WM
N.H. Dep't of Res. & Econ. Dev. v. Dow, 803 A.2d 581 (N.H. 2002)			WM	WD		JM
<i>In re</i> Denton, 786 A.2d 845 (N.H. 2001)	WM	JM	JM	WD		JM
<i>In re</i> Armaganian, 784 A.2d 1185 (N.H. 2001)	JM	JD	JM	WD		WM
Milford Lumber Co. v. RCB Realty, Inc., 780 A.2d 1259 (N.H. 2001)		WM		WD		
<i>In re</i> Gronvaldt, 842 A.2d 87 (N.H. 2004)	WM	JM	WD	JM		
Norwood Group, Inc. v. Phillips, 828 A.2d 300 (N.H. 2003)		JM	WD	JM		WM
Graves v. Estabrook, 818 A.2d 1255 (N.H. 2003)	JM	JM	WD	WM		JD

Civil Case	Broderick	Nadeau	Dalianis	Duggan	Galway	Brock
Hooksett Conservation Comm'n v. Hooksett Zoning Bd. of Adjustment, 816 A.2d 948 (N.H. 2003)	JM	JD	WD	WM		JM
<i>In re</i> Valence, 798 A.2d 35 (N.H. 2002)		JM	WD	WM		JM
Claremont Sch. Dist. v. Governor, 794 A.2d 744 (N.H. 2002)	JM	WD	WD	WM		JM
<i>In re</i> Shelby R., 804 A.2d 435 (N.H. 2002)		WM		WD		JM
Berry v. Watchtower Bible & Tract Soc'y of N.Y., 879 A.2d 1124 (N.H. 2005)	WM	JM	WD	JM		
<i>In re</i> N.H. Youth Dev. Ctr., 871 A.2d 67 (N.H. 2005)	JM	JM	WD	JD	WM	
Wilson v. Progressive N. Ins. Co., 868 A.2d 268 (N.H. 2005)	WD	JM	JD	WM		JM
<i>In re</i> Giacomini, 868 A.2d 283 (N.H. 2005)	JM	JM	JM	WD	WM	
<i>In re</i> Jacobson, 842 A.2d 77 (N.H. 2004)	JM	WD	JM	JD		WM
<i>In re</i> Kosek, 871 A.2d 1 (N.H. 2005)	WD	JM	WM	JM	JM	

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APPENDIX B

Key: WM = Wrote Majority, JM = Joined Majority, WD = Wrote Dissent,
JD = Joined Dissent

Criminal Cases	Broderick	Nadeau	Dalianis	Duggan	Galway	Brock
State v. McKeown, 849 A.2d 127 (N.H. 2004)	WD	WM	JM	JM		
State v. Goss, 834 A.2d 316 (N.H. 2003)	WD	WM	JM	JM		JM
State v. Macelman, 834 A.2d 322 (N.H. 2003)	JM	WD	JM	WM		JD
State v. Turmel, 838 A.2d 1279 (N.H. 2003)	JM	WD	WM	JM		WD
<i>In re</i> Morrill, 784 A.2d 690 (N.H. 2001)	JM	WD	JM	WM		JD
State v. Dowman, 855 A.2d 524 (N.H. 2004)	JM	JM	WM	WD		
State v. D'Amour, 834 A.2d 214 (N.H. 2003)	WM	WD	JM	JM		JD
State v. Spencer, 826 A.2d 546 (N.H. 2003)	JM	JD	WM	WD		JM
State v. Seavey, 789 A.2d 621 (N.H. 2001)	JM	JM	JD	WD		WM
Derosia v. Warden, 826 A.2d 575 (N.H. 2003)		JM	WD			WM

Criminal Cases	Broderick	Nadeau	Dalianis	Duggan	Galway	Brock
State v. Ramos, 818 A.2d 1228 (N.H. 2003)		JM	WD	JM		WM
State v. Allard, 813 A.2d 506 (N.H. 2002)		JM	WD	WM		JM
State v. Cossette, 856 A.2d 732 (N.H. 2004)			JM	WM	WD	
State v. Roache, 803 A.2d 572 (N.H. 2002)	JM	WD	WD	JM		WM
State v. Beauchesne, 868 A.2d 972 (N.H. 2005)	WD	JM	JM	WM	JD	
State v. Fischer, 876 A.2d 232 (N.H. 2005)		WD	WM	JM	JM	