How the Supreme Court Got The Duncan Case Wrong and Eliminated Taxpayer Suits - Part 1

by Chuck Douglas, Esq. and Gilles Bissonnette, Esq.

I. Introduction

In *Duncan v. State of New Hampshire*, 166 N.H. 630 (2014) the New Hampshire Supreme Court held that taxpayer standing violates the New Hampshire Constitution. The decision fails to appreciate critical differences between the State and federal constitutions and, in doing so, will negatively impact the long decades of government accountability in our State.

In *Duncan*, nine New Hampshire parents and taxpayers challenged an education tax credit program that allows businesses to receive a tax credit for donations made to scholarship organizations that would then pay for tuition at religious and other K-12 private schools. In arguing they had standing to challenge the program, the plaintiffs relied on a 2012 amendment to New Hampshire's declaratory judgment statute that gave taxpayers standing to bring declaratory judgment lawsuits challenging unlawful government actions. The law was changed after the Supreme Court had impaired taxpayer standing in *Baer v. N.H. Dept. of Education*, 160 N.H. 727 (2010).

When the New Hampshire legislature considered the taxpayer standing amendment in 2012 to ensure that citizens could hold the government accountable, few questioned the amendment's constitutionality under the State Constitution. At the time, the amendment to RSA 491:22 had wide support, and the general counsel to the New Hampshire Supreme Court and Judicial Branch, never raised any constitutional concerns in his testimony before the Senate. To the contrary, Howard Zibel testified that, although the Judicial Branch opposed the amendment on fiscal grounds, "it is dear that the policy here is a matter for the legislature. You will hear at times me say that something is not a matter for the legislature on separation of powers grounds. This is not one of them.... [Y]ou clearly have the authority to [overrule the Baer decision by passing this bill] if you so choose." He added: "[It's] not a question."[1] In short, no one viewed the amendment as raising a constitutional question; instead, the amendment, raised only a policy question that fell squarely within the legislature's purview to amend RSA 491:22.

However, the Supreme Court in *Duncan* struck down the 2012 taxpayer standing amendment as unconstitutional and therefore declined to address the merits of Mr.

Duncan's case. The court held that the amendment violated Part II,. Article 74 of the State Constitution, which requires the court to issue advisory opinions when requested by the legislature, governor, or executive counsel "upon important questions of law and upon solemn occasions." The court for the first time in its history read Article 74 to include "case of controversy" standing requirements similar to those found in Article III of the Federal Constitution.

Under such federal requirements, the court opined that a plaintiff must demonstrate harm beyond his or her injury as a taxpayer. As the court conceded, "although the State Constitution does not contain a provision similar to [Article III of the Federal Constitution]," it proceeded to say that " as a practical matter, Part II, Article 74 imposes standing requirements that are similar to those imposed by Article III of the Federal Constitution."

Under Article Ill, section 2 of the United States Constitution "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and... to controversies to which the United States shall be a party...." The court's decision to superimpose federal standing principles on the State Constitution is incorrect for many reasons discussed below. [2]

II. History of the Taxpayer Standing

As far back as 1863, the New Hampshire Supreme Court held that taxpayers have a legitimate interest in the disposition of their tax dollars. In Merrill v. Plainfield, 45 N.H. 126 (1863), the plaintiffs were taxpayers who objected

to using tax money for the selectmen to pay for defending proceedings concerning election fraud. The court recognized the standing of the taxpayers insofar as they were "residents and tax-payers in said town, and that they fear said money will be paid over according to said vote, unless the town and its present officers are restrained by injunction." Ultimately, the court granted the injunction and enjoined any public money from being spent for defenses of fraud by the officials.

Since the 1800's the Supreme Court expanded the standing of taxpayers so that they no longer had to rely on showing financial loss. For instance, in *Clapp v.Town of Jaffrey*, 97 N.H. 456 (1952), the court considered whether taxpayers had standing to sue despite their inability to show any financial loss to the town, but merely based upon their interest in efficient government. The court held, "it is plain that every taxpayer of a town has a vital interest in and a right to the preservation of an orderly and lawful government regardless of whether his purse is immediately touched."

This principle was echoed in *Green v. Shaw*, 114 N.H. 289,292 (1974), which held: "This right of taxpayers to maintain an equity action for relief is not dependent upon showing that the illegal acts 'result in financial loss to the town' since every taxpayer 'has a vital interest in and a right to the preservation of an orderly and lawful government regardless of whether his purse is immediately touched." The Supreme Court also held that **"it is well settled in this state that plaintiffs, as taxpayers, have standing to seek redress for the unlawful acts of their public officials."** 114 N.H. at 291-92 (1974) (citing *O'Neil v. Thomson*, 114 N.H. 155 (1974)).

In recognition of these principles taxpayer standing cases have often been brought not as requests for injunctive relief, but as petitions for declaratory judgment under RSA 491:22. As the Supreme Court said in *Grinnell v. State of N.H.*, 114 N.H. 289, 290 (1974):

> RSA 491:22 has long been construed to permit challenges to the constitutionality of actions by our government or its branches... We reaffirmed that "[£]or more than half a century pleading and procedure in this jurisdiction has been a means to an end and it should never become more important that the purpose which it seeks to accomplish... We have thus granted taxpayers standing to raise constitutional issues by bringing declaratory judgment petitions.

In 1974 in *O'Neil v. Thomson*, 114 N.H. 155 (1974), the plaintiffs, as legislative leaders (Speaker and President) and as individual taxpayers, sought a declaration that certain executive orders promulgated by the governor were "illegal, unconstitutional and void." "The plaintiffs in their several capacities have sufficient right and interest...

in the preservation of an orderly and lawful government to entitle them to maintain these proceedings." *Id.* at 157. Again the court allowed the case to move forward by reaffirming the right of a taxpayer to have standing. The Supreme Court granted the petition for declaratory judgment in that case against the governor.

III. Change in Reading RSA 491:22

In the case of *Baer v. N.H. Dept of Education*, 160 N.H. 727 (2010), all of these cases allowing taxpayer standing lawsuits to be brought under the declaratory judgment statute were turned aside. Reinterpreting the declaratory judgments statute, the State Supreme Court in *Baer* said in the context of litigation concerning a local school district bond issue that this statute no longer textually authorized such lawsuits:

> The petitioners argue that they have standing as taxpayers of the District. They assert that they will be harmed by the rules because the rules permit their taxpayer dollars to be used to finance schools that do not meet in minimum lot size standards. The petitioners also assert that they will be harmed because these "substandard" schools will be in their community. **Our case law contains two conflicting lines of cases regarding taxpayer standing to bring a declaratory judgment action.** Under one line of cases, we have permitted taxpayers to maintain an equity action seeking redress for the unlawful acts of their public officials, even when the relief sought was not dependent upon showing that the illegal acts of the public officials resulted in a financial loss to the town. *Green v. Shaw,* 114 N.H. 289, 291-92 (1974). We have reasoned that "every taxpayer has a vital interest in and a right to the preservation of an orderly and lawful government regardless of whether his purse is immediately touched." *Id.* at 29.
>
> More recently, however, we have required taxpayers to demonstrate that their rights are impaired or prejudiced in order to maintain a declaratory judgment action.
>
> **We find our more recent analysis of taxpayer standing to be more consistent with the language of RSA 491:22. Id. at 730.** (emphasis added).

The Supreme Court then concluded in *Baer*:

> Accordingly, we hold that taxpayer status, without an injury or an impairment of rights, is not sufficient to confer standing to bring a declaratory judgment action under RSA 491:22 *Id.*

The 2010 *Baer* ruling was based solely on the court's new interpretation of RSA 491:22. However, the legislature was free to amend RSA 491:22 to clarify it to again permit taxpayer suits to challenge governmental actions. Rather than some bold new departure, the 2012 amendment to RSA 491:22 merely returned the law to a state that existed from 1863 to 2010.

After the *Baer* case the New Hampshire legislature amended RSA 491:22, I, in 2012 by adding the emphasized language, as follows:

> Any person claiming a present legal or equitable right of title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive. The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.

Speaking for the House Judiciary Committee, Representative Rick H. Watrous of Concord explained the context and purpose of HB1510 as follows:

> This bill restores the long established right of local taxpayers to file for declaratory judgment, which asks a court what the law is when a governmental action is challenged ... For a century and a half, until a court ruling in 2010, all taxpayers had standing in the state court to seek such relief ... This bill, as amended... clarifies the law to again permit taxpayer suits to challenge governmental action...[3]

However, in the *Duncan* case in 2014 the Supreme Court said the newly amended statute was unconstitutional:

> Because the petitioners fail to identify any personal injury suffered by them as consequence of the alleged constitutional error, they have failed to establish that they have standing to bring their constitutional claim. We hold only that the generalized interest in an efficient and lawful government, upon which the petitioners rely, and the amendment to RSA 491:22 which purports to confer standing, are not sufficient to meet the constitutional requirements necessary for standing to exist. 166 N.H. at 647.

IV. The Duncan Opinion Contradicts the Text and Intent of Articles 4 and 72-A of Part II, Which Permit the Legislature to Broadly define the Jurisdiction of the Courts.

The Duncan court cites a single case, *Harvey v. Harvey*, 73 N.H. 106,107 (1904), for the generic proposition that "[t]he constitutional authority of the court to give advice ... cannot be extended by legislative action." While obviously true, what this ignores is that nothing in the New Hampshire Constitution limits taxpayer lawsuits, and therefore there is no constitutional bar on the legislature permitting such complaints to be adjudicated by the judiciary.

Indeed, the Constitution expressly grants the legislature broad discretion to define the jurisdiction of our courts. In1966, Part II of the State Constitution was amended by adding Article 72-a, which reads, "The judicial power of the state shall be vested in the supreme court, a trial court of general jurisdiction known as the superior court, and such lower courts as the legislature may establish under Article 4th of Part 2." The Constitutional-Convention report that recommended this amendment explained that its purpose was to prevent the legislature from abolishing the courts and recreating them with new judges for political reasons, which the legislature had done five times in the prior century. Report

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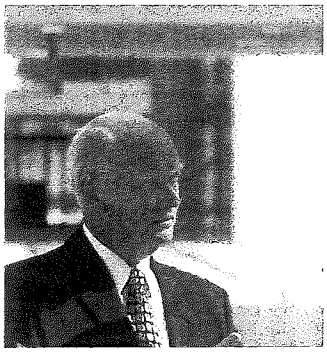
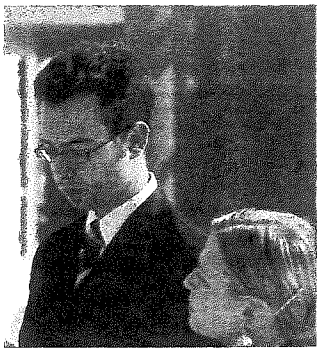
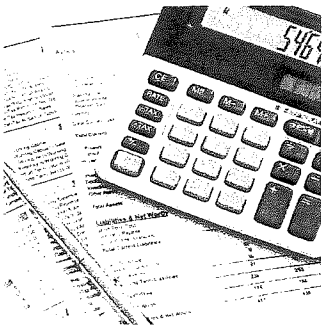
to the Fifteenth Constitutional Convention by the Commission to Study the State Constitution 17-18 (1963) accord State of new Hampshire, Convention to Revise the Constitution ("1964 Convention Journal,;) 75-76 (1964). That report noted, however, that "[u]nder the amendment recommended ... the legislature would still have authority to increase the size and define the jurisdiction of our two higher courts." Report 18 (emphasis added).

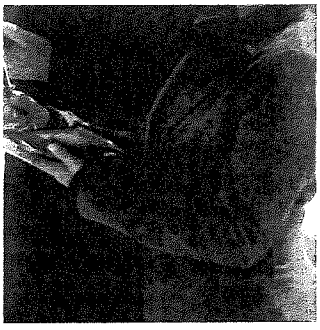
Consistently with the constitutional convention's intent of broadly allowing the legislature to define the jurisdiction of the courts, the 1966 amendment also added the language "(except as otherwise provided by Article 72-a of Part 2)" to Article 4 of Part II, so that it now reads:

> The general court (*except as otherwise provided by Article 72-a of Part 2*) shall forever have *full power and authority to erect and constitute judicatories and courts of record*, or other courts, to beholden, in the name of the state, *for the hearing, trying and determining, all manner* of crimes, offenses, *pleas, processes, plaints, action, causes, matters and things whatsoever* arising or happening within this state, or between or concerning persons inhabiting or residing, or brought, within the same, whether the same be criminal or civil, or whether the crimes be capital or not capital, and whether the said pleas be real, personal, or mixed, and for the awarding and issuing execution thereon.

1964 Convention Journal 277-78, 318-19 (emphasis added).

Thus at least since 1966, the only limit on the legislature's broad power to confer jurisdiction on courts - i.e., to entitle courts to hear "all manner" of "pleas, processes, plaints, action[s], causes, matters and things whatsoever" - has been 72-a. And



nothing in Article 72-a supports a conclusion that RSA 491:22 is unconstitutional.

The Court's nullification of legislatively-conferred jurisdiction in 2012 is also contrary to what voters understood to be a purpose of the 1966 amendments to Part II, Article 72-a -namely to guarantee "[t]he independence and integrity of the[] courts11 so that they can "protect our individual liberties and rights... to provide a check and balance on the powers of legislature and the executive department." Voters' Guide to Proposed Amendments to Constitution of the State of New Hampshire, 1-2 (1966). The 2012 amendment to RSA 491:22 was passed to allow courts to do exactly that so that taxpayers could protect their rights against the executive and legislative branches.

V. The Text and Intent of Part II, Article 74 Do Not Support the Court's Opinion

What is more, neither the text nor the history of Article 74 supports the Court's use of it to strike down the amended RSA 491:22. Article 74 states only, "Each branch of legislature as well as governor and council shall have authority to require the opinions of the justices of the Supreme Court upon important questions of law and upon solemn occasions." It says nothing about the legislature's authority to confer rights upon individuals asserting injury as taxpayers or anyone else to sue. Rather, it simply addresses that either house of the legislature, as well as the governor and executive council, have the ability to request an opinion of the court on legal questions that have come before them. Nothing more.

But even if Article 74 could be read by implication as prohibiting anyone other than the legislature and the governor and council from doing what it authorizes them to do, RSA 491:22 grants no one - including taxpayers - any such power to seek adjudication of" an important question of law" by asking the New Hampshire Supreme Court. Indeed a request for an Article 74 advisory opinion is made directly to the Supreme Court, without the creation of a record, typically without full briefing, and typically only concerning proposed legislation. See, e.g., Op. of the Justices (App't of Chief Justice). 150 N.H. 355,256 (2003).

Conversely, the 2012 amendment to RSA 491:22 permitted taxpayers to do something quite different: challenge already enacted legislation or local ordinances or votes that impact taxes through a lawsuit in the superior court - where they must develop a record and present full briefing - and then present full briefing and argument in any appeal therefrom.

Article 74 was initially adopted in 1784, but was amended in 1972 only to change the word "president" to governor." The conventions that produced the 1784 constitution kept no contemporaneous records (see Susan Marshall, History of New Hampshire Constitution 13n.39 (2011)), and those from 1972 shed little light on the issues at hand. Article 74 was next amended in 1958 by changing "superior court" to Supreme Court", to reflect a change in the name of the state's highest court. See *id.*, Robert B. Dishman, A New Constitution for New Hampshire? 62, 65 (1956). The constitutional convention records show that the 1958 amendment was agreed upon without any

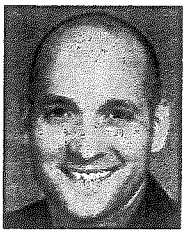
controversy or substantive discussion, and that it was framed as a ministerial change to a clause that simply allowed the issuance of advisory opinions to the other branches of government. See State of New Hampshire, Convention to Revise the Constitution 159, 215, 218-19 (1956).

Significantly, by 1958, this Court had been recognizing the rights of taxpayers to challenge illegal state and local governmental conduct - regardless of whether they could show any injury beyond their status as taxpayer- for more than100 years, including many cases that were recent.[4]

The delegates and voters who adopted the 1958 amendment thus could not have understood Article 74 as somehow barring taxpayers' suits. They reenacted Article 74 at a time when taxpayers' rights to challenge unlawful governmental conduct had been long accepted without question. H anyone in 1958 had thought that Article 74 limited taxpayer lawsuits, surely there would have been a great deal of debate before it was readopted with but a single word change. **Part 2 coming in the Fall 2017 issue**

Endnotes

1. http://www.gencourt.state.nh.us/bill Status/BillStatus Media. aspx?lsr=2452&sy=2012&sortoption=&tx tsessionyear=2012&txttitle=declatory(10:30)
2. Duncan vis-a-vis federal standing rules was discussed in the Asymmetry Problem: Reflections on Calvin Massey's Standing in State Courts, State Law and Federal Review, 15 UNH Law Review 273 (vol. 15, No. 2) 2017.
3. N.H.H.R. Jour.17 887-88 (2012)
4. See N.H Wholesale Beverage Ass'n v. N.H. State liquor Comm'n. 100 N.H. 5, 6 (1955); Clapp v. Town of Jaffrey, 97 N.H. 456, 460-61 (1952); Conway v N.H Water Res. Bd., 89 N.H. 346, 347-48 (1938); Gough v. Verette, 79 N.H. 356,358 (1920); Blood v Manchester Elec. Light Co., 68 N.H. 340, 340-41 (1895); Brown v. Concord, 56 N.H. 375,380, 383-84 (1876); Greenland v. Weeks, 49 N.H. 472,480 (1870); Gates v. Hancock, 45 N.H. 528, 528-30 (1864) Merrill v Plainfield, 45 N.H. 126, 133-34 (1863); Brown v. Marsh, 21 N.H. 81, 84, 92-93 (1850). (Both cases cited in Baer v. New Hampshire Department of Education. 160 N.H. 727, 730 (2010), for the proposition that there was a contrary line of authority, were decided in 2001 or later.)



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VI. THE COURT'S OPINION CONTRADICTS PRIOR RULINGS THAT RECOGNIZED BROAD LEGISLATIVE AUTHORITY TO ENHANCE THE COURT'S JURISDICTION

The one case the Court cites in Duncan for the proposition that the State Constitution prohibits the legislature from statutorily defining an injury or right to sue that is not recognized under the common law - Harvey v. Harvey, 73 N.H. 106, 107 (1904) - was also rejected 27 years later by Faulkner v. City of Keene, 85 N.H. 147, 150 (1931). Faulkner stated that Harvey's "implications that the Constitution forbids granting such jurisdiction, and that if the question were decided the decree would be merely advisory, do not appear to be tenable." Id. The Court explained:

> The advice-giving power of the court is limited by the Constitution, by virtue of the provisions that all interested parties are entitled to be heard, and by unprejudiced judges. Where there is adequate provision for notice and hearing, and those adversely interested are brought before the court, these constitutional limitations do not apply... Beyond this there is no constitutional limitation upon the stage of the controversy at which the courts may be appealed to by the contending parties. Id. at 150-51.

Furthermore, in Wheeler ex rel. Boulanger v. Morin, 93 N.H. 40 (1943), the Court held that the legislature has extremely broad power to grant authority to New Hampshire courts. There, the Court expressly rejected the proposition that judicial power under the State Constitution was intended by its framers to be limited to "the determination of controversies between litigants." Id. at 45. The Court explained that, when the State Constitution was adopted in 1784, state courts had wide-ranging powers, including counting votes and breaking ties in elections, regulating prices, licensing merchants, and fixing tolls. Id. at 47-49.

The broad powers of a state court of general jurisdiction and the difference between what federal courts can decide or do - only cases or controversies - was ignored by the Supreme Court entirely in its federally oriented Duncan decision. The types of court functions set forth in Wheeler above are clearly antithetical to the limited judicial powers of a federal court for good reason: different constitutions should lead to different results.

This salient legal reality was clear to the court that decided the case of Wyman v. DeGregory, 101N.H. 171 (1957), correctly observing in a challenge to a witness immunity statute:

> Defendant argues that this statute is unconstitutional because it violates the doctrine of separation of powers. We fail to see how the doctrine of separation of powers under the Federal Constitution is involved if the statute complies with the provisions of our State Constitution in the matter. Itis also important to bear in mind in considering this argument the significant difference between the Federal and our State Constitution in their provisions granting power to the respective judiciaries as well as the historical background surrounding their adoptions. Thus, the courts created under the Federal Constitution can act only in "cases" and "controversies" and cannot give advisory opinions. *Nowhere in the law of this state is the function of our courts specifically limited to "cases and controversies."* Id. at 176. (emphasis added).

The Wyman court further said: "In view of the historical background in which our Constitution was framed as well the fact that it has no specific provision limiting the function of a Justice of the Superior Court to 'cases' and 'controversies' we are of the opinion that the functions conferred on the

'justice of the superior court' by said chapter 312 do not violate our Constitution." Id. at 178.

The court had earlier observed in Attorney General ex rel Commissioners of Coos County v. Morin, 93N.H. 40, 44 (1943), that:"...it is abundantly clear that the men of 1784 [framers of our Constitution] had lived under a judicial system in which the courts were called upon to exercise a wide variety of functions which were chiefly executive, though sometimes even legislative in character.

In Faulkner v. Keene, 85 N.H.147, 151(1931), the advice-giving power of the court is limited by virtue of provisions that all interested parties are entitled to be heard, and by unprejudiced judges. Where there is adequate provision for notice and hearing, and those adversely interested are brought before the court, the State Constitution does not prohibit the fixation of rights, as between parties who are in court. What it does forbid is a failure to give all interested parties notice and as opportunity to be heard before any decree affecting their rights is made. Beyond this there is no constitutional limitation upon the stage of controversy at which the courts may be appealed to by the contending parties.

In sum, given the broad functions that the above cases held the legislature could constitutionally assign to State courts - including certain authority to oversee governmental taxing and spending - the State Constitution cannot prohibit the legislature from giving courts the right to adjudicate taxpayer lawsuits that might challenge such taxing and spending. Wheeler and Wyman also made clear decades ago that nothing in the State Constitution creates "case or controversy" requirements similar to those restricting standing under Article III of the Constitution.

The Duncan opinion errs in adopting the opposite conclusions and ignores the fundamental difference of a state court of general jurisdiction with the later creation of federal courts of carefully limited jurisdiction. By ignoring the fundamental differences between the two constitutions the court wrongly imposed federal limits on the ability of taxpayers to be empowered to hold their state and local governments accountable.

As recently as 2007 in Babiarz v. Town of Grafton, 155 N.H. 757 (2007), the Court confirmed that the legislature does have the authority to grant taxpayers the right to sue. Babiarz held that a voter had no standing to challenge the results of an election, because he was

not granted that right by a statute governing election disputes. Id. at 759-60. But the Court explained that the "legislature could easily have conferred the right to challenge a recount in superior court upon either 'taxpayers', 'voters' 'candidates', or 'electors,'" but had chosen not to do so. Id. (emphasis added).

Babiarz is consistent with other recent cases in which the Supreme Court has shown great deference to legislative determinations of who has standing to sue. In the same year it decided Duncan the Court earlier acknowledged, "we are not free to ignore the relevant standing distinctions that the legislature has crafted. "O'Brien v. N.H. Democratic Party, 166 N.H. 138 (2014) (emphasis added). The Duncan opinion is an aberration and contrary to the practice of deference to the legislature's constitutional authority to define the scope of court jurisdiction.

Moreover, even where "constitutionality... has never been contested," "{t}he meaning of the Constitution 'is settled by continuous and uninterrupted interpretation placed upon it for over' one hundred and fifty years." Wheeler, 93 N.H. at 49 (quoting Canaan v. Enfield Vill. Fire Dist., 74 N.H.517, 540 (1908)). Taxpayer suits having been allowed for so long, "it is now too late" to claim that the State Constitution prohibits them. See Wheeler. 93 N.H. at 49.

It is one thing to reject taxpayer standing on the ground that it has not been statutorily authorized, as did Baer, 160 N.H. at 730 -31. It is quite another to hold, in the face of 150 years of contrary practice, that the State Constitution somehow prohibits such standing. Indeed, the Court's opinion effectively holds that, for 150 years, this Court's predecessors had been violating the Constitution.

Finally, in Austin v. State Tax Comm'n, 114 N.H. 137, 138 -39 (1974), rev'd on other grounds, 420 U.S. 656 (1975), the Court granted standing to a group of *out of state* taxpayers despite their inability to show financial harm. The Court explained that it has a "policy of providing accessibility to the courts for the settlement of grievances and for challenging the use of power by government." This Court's Duncan opinion creates a cruel irony that while state taxpayers have been denied standing to sue; the Court did not overrule a case giving out-of-state taxpayers standing.

VII. THE DUNCAN COURT OVERLOOKS FEDERAL CASES RECOGNIZING STATE TAXPAYER SUITS

Unlike the Duncan court, the federal courts have long recognized that while they are limited by the "case or controversy" requirement their state analogs are not. The famous case of federal taxpayer standing was the 1923 decision by the United States Supreme Court in Frothingham v. Mellon, 262 U.S. 447. In that seminal case, Mrs.

Frothingham and others challenged the constitutionally of a 1921 act of Congress called the Maternity Act which provided federal funding to the State to reduce maternal and infant mortality. The Supreme Court carefully distinguished the fact that federal taxation is shared by millions of people and the effect on one taxpayer is "comparatively

minute." Id. at 487. However, the Frothingham court recognized a different rule was in effect for local taxpayer suits at the state level:

> the interest of the taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of the Court. Id. at 486, (emphasis added).

The court then cited with approval Crampton v. Zabriskie,101U.S. 601(1879).In the Crampton case some county taxpayers were challenging a bond issue in New Jersey and the Court said:

> Of the right resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. This right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by the municipal corporations, the great danger of their abuse and necessity of prompt action to prevent irremediable injuries, it would seen eminently proper for courts of equity to interfere upon the application of the tax-payers of a county to prevent the consummation of a wrong. Id. at 609.

Since these two cases the next major discussion of taxpayer standing came in Flast v. Cohen, 392 U.S.83 (1968), where the court looked again at Frothingham and Article III and concluded that there was "no absolute bar in Article III to suits by federal taxpayers ." Flast at 101. In Flast the court opened up standing to allow a challenge to congressional action in derogation of the taxing power if it violated the First Amendment's establishment of religion clause. Also see Hinrichs v. Speaker of the House, 506 F 3d 584 (7th Cir. 2008). The more recent cases still reaffirm the distinction between a local and a federal taxpayer ala Frothingham.

In short, the New Hampshire Supreme Court in Duncan used federal concepts to strip taxpayers of the very standing the United States Supreme Court recognized they may enjoy at the State level!

VIII. THE RESULT OF DUNCAN HAS BEEN TO PROTECT LAWLESS CONDUCT AND REDUCE GOVERNMENTAL ACCOUNTABILITY

The impact of the Duncan decision as an impediment to government accountability has been immediate. The Superior Court has already applied Duncan to strike down the standing of a governmental unit plaintiff in the case Town of Sandown v Timberlane Regional School District, 218 -2015-CV-00707 (August 7, 2015). In that case, Sandown brought a lawsuit against Timberlane

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Regional seeking to prevent the old Sandown Elementary School building from being used as the Timberlane Elementary School facility. This Court held that Duncan barred Sandown's lawsuit for lack of standing because Sandown did not have any legal or equitable rights at stake.

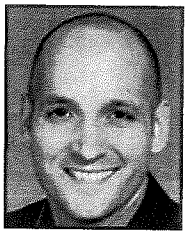
The Court further explained that the Town of Sandown is neither a student, parent, nor the dormant Sandown School District (that has rights to the building) and thus has no authority to stand in the shoes of a proper plaintiff as "a sort of guardian or next of friend" even though its taxpayers are part of the Timberlane Regional School District.

Last year a taxpayer in Manchester challenged a veto override by the alderman of a school collective bargaining agreement where three of the members had a direct conflict of interest under municipal law because family members were teachers. Once again, Duncan took the taxpayer suit away and left no recourse to the plaintiff to correct a clear violation. Swank v. City of Manchester, Hillsborough No. Dt. 15 - CV- 604, Order dated January 29,2016 by Judge Smukler.

Also, last year the Town of Bedford sued the State claiming they were illegally denied certain education funding due to a statutory "cap" imposed by the legislature. When it became clear the Attorney General would not defend the statute and conceded it was unconstitutional, the President of the Senate and the Speaker of the House moved to intervene. They argued they had a "direct interest in ensuring that laws passed by the bodies over which they preside are not set aside, ignored, or overridden by courts without being subject to vigorous defense."

The Superior Court then noted that the intervenors take issue with the decision of the Attorney General to stipulate that the "cap" contained in RSA 198: 41 is unconstitutional. The intervenors argued that, as the legislative branch presiding officers, they should be allowed to intervene and defend the constitutionality of the statute. The Court denied the motion to intervene because the Speaker and President "possess no direct and apparent interest such that intervention is appropriate." Bedford School District v. State of New Hampshire, 216-2016-CV-00396, Order by Ruoff J. (8/5/16). They couldn't even have standing as taxpayers unlike the Speaker and President of the Senate who sued Governor Thompson in 1974. O'Neil v. Thomson, 114 N.H. 155 (1974).

The Duncan decision creates - and has created - grave government accountability issues. As the cases above demonstrate, in many cases concerning credible allegations that the government has violated the law through the usage of its funds, no one will have standing other than taxpayers . Without taxpayer standing, these credible cases will go unadjudicted. After all, what good is a law if no one has the ability to go to court to enforce it?



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