

The Added Protections Of The New Hampshire Constitution Must Be Afforded Meaning

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In *Duncan v. State of New Hampshire*, the New Hampshire Supreme Court recently held that taxpayer standing violates the New Hampshire Constitution—a decision which was recently praised by attorney Eugene M. Van Loan III in the *Bar News*. Respectfully, the Court got it wrong. The decision fails to appreciate critical differences between the State and Federal Constitutions and, in doing so, will negatively impact government accountability.

In *Duncan*, nine New Hampshire parents and taxpayers challenged an education tax credit program that allowed 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.

When the legislature considered this 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 had wide support, and the New Hampshire Supreme Court's general counsel testified before the Senate that, although the judiciary opposed the amendment on fiscal grounds, "it is clear that the policy here is a matter for the legislature [a]nd you clearly have the authority to [pass this bill] if you so choose." He added: "[It's] not a question." In short, the amendment did not raise a constitutional question, but rather raised only a policy question that fell squarely within the legislature's purview.

However, last August, the Supreme Court in *Duncan* struck down the 2012 taxpayer standing amendment as unconstitutional and declined to address the case's merits. 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 council "upon important questions of law and upon solemn occasions." The Court read Article 74 to include "case or controversy" standing requirements similar to those found in Article III of the Federal Constitution.

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

The Court's decision to, for the first time, superimpose federal standing principles on the State Constitution is incorrect.

First, the decision undermines the ability of citizens to challenge certain unlawful governmental actions in state court. For example, it is now unclear how certain provisions of the State Constitution's Bill of

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Rights, including articles restricting the use of public funds for religious schools, will be enforceable in the future. In addition, for those concerned about the fiscal responsibility of municipal governments, few will have the ability to challenge municipal taxes and expenditures that, for example, exceed a local “tax cap” or otherwise violate the law. Taxpayer standing does not, as attorney Van Loan argued, “abuse our political institutions”; rather, it ensures that citizens can seek relief from those political institutions. After all, how strong is a legal right if no one can go to court to enforce it?

Second, the decision is inconsistent with the text and intent of the State Constitution. Article 74 does not contain “case or controversy” standing requirements. To the contrary, the State Constitution indicates that the legislature has broad authority to expand the judiciary’s jurisdiction, just as it did in 2012. For example, in 1966, Article 72-a was added to Part II of the State Constitution to create independent state courts. The constitutional-convention report that recommended the amendment made clear that “the legislature would still have authority to ... *define the jurisdiction* of the courts.” (Emphasis added). Furthermore, consistent with the legislature’s broad authority to expand the jurisdiction of the courts, Article 4 of Part II states that, subject to Article 72-a of Part II, the legislature “shall forever have full power and authority to erect and constitute [courts] ... for the hearing, trying, and determining, all manner of ... causes, matters and things whatsoever”

Third, the New Hampshire Supreme Court has allowed taxpayer lawsuits to proceed for over a century and—until *Duncan*—had made clear that federal standing principles do not apply in New Hampshire. For example, in *Wheeler v. Morin*, 93 N.H. 40 (1943), 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.” Similarly, in *Wyman v. Gregory*, 101 N.H. 171 (1957), the Court explained that, unlike the Federal Constitution, “[n]owhere in the law of this state is the function of our courts specifically limited to ‘cases’ and ‘controversies.’”

Finally, the Court in *Duncan* failed to recognize that federal and state courts have different functions. A litigant’s access to federal court is understandably restricted under the Federal Constitution because federal courts were viewed by the framers as bodies of limited jurisdiction. State courts, on the other hand, are bodies of general jurisdiction designed to host the vast majority of disputes, including those arising out of the state government’s police powers. Our State Constitution, in allowing the legislature to provide broader access to state courts, embodies this important distinction.

In *Duncan*, the Court declined to embrace the uniqueness of our New Hampshire Constitution, which is the second oldest state constitution and the first to use the phrase “Bill of Rights.” Adopted 5 years before the Federal Constitution, the State Constitution provides broader rights than the Federal Constitution, as well as broader access to the courts to defend those rights. If our courts ignore these differences and simply rely on federal principles in interpreting its text, we lose our State Constitution’s added safeguards against government abuse.