The End of Governmental Exceptionalism

By Michael Lewis and Craig McMahon

In November 2018, the People of the State of New Hampshire altered their relationship to state and local governments and substantially readjusted the balance of policymaking power among the executive, legislative and judicial branches. They did so by ratifying amendments to Part I, Article 8 of the New Hampshire Constitution that address constitutional standing before our courts. By an overwhelming majority vote, the people flipped the script on their governments by rejecting policies underlying judicially developed barriers to relief people previously faced when challenging illegal government conduct in court. As a result, the people have rendered dead-letter doctrinal shields, otherwise known as governmental immunities, that governments have relied upon to prevent merits-based judicial challenges to the legality of their conduct.

By constitutional decree, Part I, Article 8 of the Constitution now guarantees to the entire public "an orderly, lawful and accountable government" and it confers upon taxpayers the right to relief before the judiciary. It goes further, expanding standing to taxpayers generally and recognizing their right to challenge in court decisions previously classified by courts as belonging to the core "discretionary functions" of other branches of government. These functions have included governmental decisions regarding the allocation of public resources — specifically the power to tax and spend.

For prudential reasons, the judiciary has abstained from weighing-in on the legality of the manner in which the executive and legislative branches have exercised these "discretionary functions." *See* Adrian Vermeule, Law's Abegnation (2016) Part I, Article 8 rejects judicial abstention. It mandates that state courts serve as a forum for resolving disputes between citizens and their governments, including for those who are not injured by illegal government action in any traditional sense. *See, e.g.,* Anne Abramowitz, A Remedy for Every Right, 98 CAL. L. REV. 1595, 1599 (2010)

By removing barriers to judicial relief for the public at large, the same amendments conferring standing also must be construed, *a fortiori*, as a rejection of judicial doctrines that have prevented traditionally injured parties from holding their governments accountable through the means of a lawsuit for complete remedies.

This article describes the amendment to Part I, Article 8, the context in which it was passed, and the revolutionary effect it has on New Hampshire law. Indeed, Article 8, as amended, restores to the state constitution a respect for the perspective of the American Revolution that courts have forgotten in recent years. That perspective, so strongly held in New England when New Hampshire adopted the state constitution, rejected the view that a monarchical government may illegally harm its citizens and remain shielded from doing so by theories of law rooted in the divine right of kings.

Amendment & Legislative History

Prior to its amendment, Part I, Article 8 read as follows:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

That provision had been interpreted by courts to guarantee the public's right of access to information from its government. It has played a central role in the very robust litigation over the rights of litigants, and particularly the press, to access information held by public officials or governments, including courts.

On November 7, 2018, over 80 percent of New Hampshire voters approved the following addition to the article:

The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer. However, this right shall not apply when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal by statute or otherwise by the parties to that proceeding.

Prior to its approval by the people, the amendment passed with nearly unanimous, bipartisan approval through the House by a vote of 309-9 and through the Senate 22-2. The amendment was not opposed in the legislature. Neither the state nor local government representatives spoke against its passage.

The text of the new provisions of Part I, Article 8 contains at least three new features:

1. The guarantee of an "orderly, lawful, and accountable government" to all members of the public;
2. The right of any individual taxpayer to petition state courts for relief from taxing and spending decisions of state or municipal governments; and
3. The right of the taxpayer to do so without proving injury beyond the injury shared commonly by taxpayers living within communities afflicted by illegal government decision-making.

The amendment's legislative history includes an article by former NH Supreme Court Justice Charles Douglas, authored with Gilles Bissonnette of ACLU-NH. That article contested a decision of the New Hampshire Supreme Court in *Duncan v. State of New Hampshire*, which limited the rights of citizens to petition New Hampshire Courts for relief where the legality of governmental decision-making had been challenged on the merits by taxpayers in a freedom of religion and establishment clause case. See Calvin Massey, *Standing in State Courts, State Law and Federal Review*, 53 DUQUESNE L. R. 401, 402 (2015) (describing the *Duncan* case).

Government Exceptionalism Skepticism

Douglas, now in private practice, has long been a skeptic of the governmental immunity doctrines deployed by governments and their agents to shield themselves from liability. He voted to abolish sovereign immunity altogether as a justice in *State v. Brousseau*, a 1983 decision addressing the existence of sovereign immunity in "four cases involving mentally ill, mentally retarded and physically disabled patients who allegedly were injured while institutionalized at civil mental health facilities operated by the state." 124 N.H. 187 (1983).

Four of the five justices in that case ruled that sovereign immunity did not bar relief. Chief Justice King and Justice Brock ruled that immunity had been impliedly waived by virtue of heavy involvement by the legislature in protecting the rights of the individual plaintiffs through legislation. Concurring in that decision, Justice Douglas and Justice Batchelder concluded that the doctrine of sovereign immunity had its origins in the feudal system in which no lord could be sued by a vassal in his own court. According to the concurring justices:

The adoption and perpetuation of the sovereign immunity doctrine in the United States is especially curious in light of the fact that this country fought the Revolutionary War to free itself from the tyranny of the British Crown. Id. *at 195.*

Justice Douglas's judicial skepticism was shared by Chief Justice Kenison who had taken a "dim view of governmental immunity" a generation before in *Krzysztalowski v. Fortin*.

The NH Supreme Court followed *Brousseau* with another decision, in 1985, titled *Opinion of the Justices*. There, the Court found that the historic justifications for governmental immunity were "no longer sound."

The Court nevertheless recognized a series of functional, policy considerations, untethered from historic doctrine, that constituted the government's justification sustaining its immunity. Those justifications included the desire to shield the government from having to raise or divert funds to meet the obligations of judgments; the desire to avoid penalizing the state for performing mandatory functions only it can perform; and the desire to shield governments and government actors from having the performance of certain discretionary functions questioned in a manner that would violate the separation of powers.

In a *per curiam* decision, the Court, which included future United States Supreme Court Justice Souter as a voting justice, balanced those interests against the interests of citizens to obtain relief under Part I, Article 14 of the NH Constitution, and found that limitations the legislature sought to impose upon the rights of citizens to obtain relief could not pass constitutional scrutiny.

Exceptionalism Strikes Back

Since the time the NH Supreme Court issued these decisions, New Hampshire courts have approached concepts of immunity with

somewhat less skepticism, permitting immunity to gain greater definition in recent decisions without addressing how those decisions conflict with precedent. Some have misconstrued the holdings of prior decisions and so have given the impression that governmental immunity has greater historic roots than decisional law established. *See, e.g., Frederick v. State HHS*, No. 217-218-CV-255, slip op. at 5 (McNamara, J. Dec. 5, 2018)

In this new era, governmental immunity is now called by different names in an ever-expanding taxonomy. A recent opinion of the NH Supreme Court divided immunities into sovereign immunity, official immunity, or qualified immunity. See *Conrad v. N.H. Dep't of Safety*, 167 N.H. 59, 69-76 (2013). In an era where the government has explicitly acknowledged the rights of citizens to seek monetary relief through legal action, the basic principles underlying the continued existence of governmental immunities have remained the same: the desire to shield governmental actors from lawsuits and the desire to keep the judicial branch out of the discretionary decision-making of other branches of government and their officials.

Indeed, the NH Supreme Court has carved out a so-called "discretionary function" immunity which places certain government decision-making outside the boundaries of judicial review, where those decisions "necessarily involve the most prudent allocation of municipal resources, and those weighting of competing economic, social and political factors." *See, e.g., Hacking v. Town of Belmont*, 143 N.H. 546, 550 (1999) (citations and internal quotations omitted). It has rooted this immunity in "New Hampshire's constitutional separation of powers." *See Maryea v. Velardi,* 168 N.H. 633, 637 (2016) (citations and internal quotations omitted).

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The People Demand Accountability

The amended provisions of Part I, Article 8, by its text and within this context, rejects the more recent protectionist bent of the NH Supreme Court. Far from shielding government from judicial scrutiny, the amended provisions embrace a robust view of judicial involvement in the review of governmental decision-making.

The provisions not only confer upon the public, broadly, the right to a "lawful" government, the provisions further demand that the government be "accountable," and they link accountability to the right to seek relief before state courts. These provisions even expand the right to seek judicial relief to taxpayers who have not suffered the sort of specific injury that previously justified standing before the Court.

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Thus, to the extent courts have relied on a judicial policy of erring on the side of deference, the people have amended the state constitution in a manner that rejects the proffered policy reasons for doing so. To the extent that causes the judicial branch valid concern regarding the judicial involvement in legislative and executive affairs, it may acknowledge that the People and the legislature authorized the judiciary to do so by approving the amendments through overwhelming margins with bipartisan support.

The judicially-created doctrines that previously directed courts to abstain from hearing causes of action or from granting judicial relief must now be assessed in light of this major moment in state constitutional law. There is strong reason to believe that prior, governmental protectionist precedent is now dead-letter. The core justifications supporting decisions to block or limit relief to citizens against their governments now stand in conflict with the state constitution as it now reads and the underlying policies it now reflects.

Thus, citizens who are injured by illegal government conduct now litigate their causes in an altered constitutional setting in which the policy justifications that government actors have relied upon to limit liability have been swept away by constitutional decree.

The result of this new order may be substantial litigation and some disruption to our state and municipal governments. That result may interfere with our governmental operations and increase the expense of running government by exposing governments and officials to lawsuit and liability. Yet that is what the People and the legislature demanded. Having made this demand upon the judiciary through the most democratic means by conferring standing in the most expansive manner to challenge decisions that are deemed the core functions of other branches, the People and legislature will not be well-positioned to object to the judiciary as it performs the very acts the People demanded of it. Thus, dire predictions of governmental paralysis in the face of this altered state of affairs must confront the fact that voters and their representatives called for judicial involvement and relief by overwhelming margins. Experience in this new setting, rather than prejudice against it derived from an affinity for the status quo, should guide how the judiciary shapes the law going forward.

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Letter to the Editor

Editor's Note: To learn more about the proposed amendment to the Professional Conduct Rule, visit: ***www.nhbar.org/professional-conduct-rule-amendment-continuing-conversation.***

Dear Colleagues,

I write in support of the amendment to Rule of Professional Conduct 8.4(g) now pending before our Supreme Court. Like virtually all of us, I am against harassment and discrimination. This is not a controversial position. Yet there are serious parties of all stripes that have voiced objections to amended Rule 8.4(g). Upon reviewing the arguments against the amendment, respectfully, I find them overstated.

Anyone, whether layperson or lawyer, can read the amended rule and see that it is intended to make it an ethical violation to engage in harassing or discriminatory behavior, as it should be. The arguments against the amendment are the result of placing undue weight on how the rule could or might be enforced in the future. They assert that terms must be defined and scope must be drawn or else the rule may capture more conduct than intended.

These arguments are misplaced. The Rules of Professional Conduct, like any text, are at points less clear than they could be. What constitutes "reasonable diligence" (Rule 1.3), when can we reasonably believe it necessary to disclose confidential information (Rule 1.6), and who is a "former client" (Rule 1.9)? These are imponderables we live with every day. Will the adoption of Rule 8.4(g) unduly restrict our professional lives where we already practice under the broad proscriptions in the existing rules? It seems highly unlikely.

Although the limits this amendment would place on our day-to-day practice are fleeting, no one can deny that its adoption would be impactful. We can argue about the degree to which harassment and discrimination exist in the legal profession, but it is undeniable that they exist. It is equally beyond debate that we are living in a cultural moment when recognition of harassment, inequality, and discrimination occupies a significant place in the national conversation. What better time than now to amend Rule 8.4(g)? We as lawyers have always held ourselves to a higher standard than the general public. We should not let fears of what might come cloud our better judgment.

This is a simple amendment that makes a powerful statement. The New Hampshire Supreme Court should adopt it.

Respectfully,
Ned Sackman

Opinions in *Bar News*

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