Bill as Introduced

HCR 18 – AS INTRODUCED

2011 SESSION

11-0395
09/04

HOUSE CONCURRENT RESOLUTION *18*

A RESOLUTION declaring Merrill versus Sherburne to be void and of no force.

SPONSORS: Rep. Itse, Rock 9

COMMITTEE: Judiciary

ANALYSIS

This house concurrent resolution declares Merrill versus Sherburne (1 N.H. 99) to be void and of no force.

HCR 18 – AS INTRODUCED

11-0395
09/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eleven

A RESOLUTION declaring Merrill versus Sherburne to be void and of no force.

Whereas, the Constitution of New Hampshire, Article 37 states, "In the government of this State, the three essential powers thereof, to wit, the Legislative, Executive, and Judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity;" and

Whereas, the Constitution of New Hampshire, Article 31 states, "The Legislature shall assemble for the redress of public grievances and for making such laws as the public good may require;" and

Whereas, the Constitution of New Hampshire, Article 32 states, "The People have a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their Representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer;" and

Whereas, the people of New Hampshire who wrote, ratified, practiced, and enforced the Constitution of New Hampshire for the first 35 years of the State of New Hampshire understood that those who have been wronged and aggrieved by the Judiciary of New Hampshire are entitled to request of the General Court of New Hampshire redress of those wrongs and grievances by petition or remonstrance; and

Whereas, the hearing of such petitions by the General Court of New Hampshire was a regular practice until the opinion of the Judiciary known as Merrill versus Sherburne (1 N.H. 199); and

Whereas, the opinion of the Superior Court of Judicature of New Hampshire in Merrill versus Sherburne never challenges the positive right of the people expressed in Article 32 Part First of the Constitution of New Hampshire, but only the limits of separation of power expressed in Article 37 Part First of the Constitution of New Hampshire and the definition of public grievance expressed in Article 31 Part First of the Constitution of New Hampshire; and

Whereas, the opinion of the Superior Court of Judicature of New Hampshire in Merrill versus Sherburne quotes only sentence fragments of the fundamental documents referenced "The Spirit of Laws", Charles de Secondat, Baron de Montesquieu, "Federalist Paper 47", James Madison, "Virginia Papers", Thomas Jefferson in a manner so as to intentionally mislead the reader as to the intent of the authors; and

Whereas, reading the documents referenced "The Spirit of Laws", Charles de Secondat, Baron de Montesquieu, "Federalist Paper 47", James Madison, "Virginia Papers", Thomas Jefferson, in particular Federalist Paper 47 which states that the Constitution of New Hampshire was the one Constitution which correctly allowed for partial agency of one power of government in another power

of government actually lead to the opposite conclusion as that found in the opinion of the Judiciary; now, therefore, be it

Resolved by the House of Representatives, the Senate concurring:

That the General Court of New Hampshire finds that the opinion of the Superior Court of Judicature of New Hampshire known as Merrill versus Sherburne is repugnant to the Constitution of New Hampshire; and

That the General Court of New Hampshire finds that the opinion of the Superior Court of Judicature of New Hampshire known as Merrill versus Sherburne is utterly void and of no force.

Speakers

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HCR 18 Date 2-22-11

Committee Judiciary

**** Please Print All Information ****

Name	Address	Phone	Representing	Pro	Con
Rep Paul Fitzpatrick	Grafton 5			X	

Hearing Minutes

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HOUSE CONCURRENT RESOLUTION 18

BILL TITLE: declaring Merrill v. Sherburne to be void and of no force.

DATE: February 22, 2011

LOB ROOM: 208 Time Public Hearing Called to Order: 3:13 pm

Time Adjourned: 3:43 pm

(please circle if present)

Committee Members: Reps. Rowe, Sorg, Souza, Hagan, Silva, Andolina, Giuda, LaCasse, McClarren, Murphy, Palmer, Peterson, Tregenza, Wall, Potter, Weber and Watrous.

Bill Sponsors: Rep. Itse, Rock 9

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

*** Rep. Itse**, sponsor
Decision to deprive "redress and grievances" steals fundamental freedoms from people due to wording. Argument rests on a sentence fragment. One branch of government exercising power over all government. It's tyranny.

Chuck Douglas, Concord, representing self – opposes
Cases cannot be changed by a House Concurrent Resolution (HCR). No one since 1818 has come forward to change the constitution. In a dispute, Supreme Court decides the decision. It must be a Constitutional Amendment, not a HCR.

Respectfully submitted,

Rep. Lenette M. Peterson, Clerk

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HCR 18

BILL TITLE: declaring Merrill v. Sherburne to be void and of no force.

DATE: 2-23-2011

LOB ROOM: 208 Time Public Hearing Called to Order: 3:13

Time Adjourned: 3:43

(please circle if present)

Committee Members: Reps. Rowe, Sorg, Souza, Hagan, Silva, Andolina, Giuda, LaCasse, McClarren, Murphy, Palmer, Peterson, Tregenza, Wheaton, Wall, Potter, Weber and Watrous.

Bill Sponsors: Rep. Itse, Rock 9

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

*Rep. Itse - decision to deprive "redress + grievances" Steals fundamental freedoms from people due to wording. Argument rests on a sentence fragment One branch of govt exercising power over all sort. it tyranny -

Chuck Douglas - (o) Cases cannot be changed by HCR, no one since 1818 has come forward to change the Constitution. In a dispute, Sup. Court decides the decision, must be a Const. Amend - not HCR.

Respectfully Submitted,

Rep. Lenette M. Peterson

Testimony

HCR 18

32. The People have a right, in and orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their Representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and the grievances they suffer.
June 2, 1784

It is a right of the people to assemble to demand action by the Legislature and for a town to meet to give instructions to their Representatives on how to vote on a bill. It also gives instruction on how to address the Legislature for their right to a redress of grievances. For example, if the people believed a law were unconstitutional, this would be the method for them to demand its removal.

Articles 31 and 32 together give the Legislature exclusive jurisdiction over grievances against the government.

The right of redress of grievances was first attacked in 1819 in a lawsuit known as Merrill versus Sherburne. It occurred immediately after the Legislature had changed hands twice (1816 and 1818) and the Legislature had replaced the entire judiciary each time it was replaced. The result was that there was no institutional memory in any branch of government.

Prior to 1819, the most frequent activity of the Legislature was redresses of grievances, and one of the significant classes of grievances was to be restored to one's law. In such a case, the individual might have been denied justice in the judiciary. One specific case concerned an issue of probate where an inheritor was in England as the time of the hearing, and she wasn't notified of the hearing until afterward. She petitioned to the General Court to be restored to her law. She was granted a new hearing and later received her inheritance.

Such petitions were heard regularly by the Legislature for the first 35 years of the republic. The most salient evidence of this is Part 2, Article 7 which prohibits Legislators from acting as Counsel or taking fees or acting as counsel or advocate in any matter before the General Court. This Article was an amendment to the Constitution in 1792 to end the practice of Legislators requiring a fee to submit petitions for redress of grievances.

In the arguments of the decision of Merrill versus Sherburne, the judiciary argued that Article 31 referred to public grievances and that because these typically involved one person, they weren't public. However, Thomas Sheridan's "A Rhetorical Grammar", a dictionary published in 1780, Publick is defined as "Belonging to a State or nation." Does an abuse committed by a State belong to it? In all of the arguments setting the background in Merrill versus Sherburne, the Judiciary makes extensive references to Part 1, Articles 31 the business of the Legislature and Article 37 the Separation of Powers; however, they made not one single reference to Part 1, Article 32 which states the positive right of the people to have the wrongs done them and the grievances they suffer heard before the Legislature..

They further go on to argue from Montesque, "that, indeed there is no liberty, if the power of judging be not separated from the legislative and executive powers", and from Federalist Paper 47, "or as Mr. Madison observes, may be justly pronounced the very definition of tyranny". But if we read Federalist Paper 47, we learn something very different.

The quote from Montesque is a partial sentence from several paragraphs discussing separation of powers in one book of many volumes. In his writings, Montesque was arguing the elegance of the English form of government which provided partial agency of one power of government of the sphere of another. Therefore, he could not have been arguing for absolute separation. In fact, Madison in the referenced Federalist Paper 47 was made exactly this observation.

Madison was writing about England, specifically about what he considered the inappropriate activity of the Judiciary in the business of the Legislature. Madison reported, The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote. From these facts, by which Montesque was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. It is clear that what was being decried was not legislative review of judicial proceedings to see whether or not they followed the law, but the participation of the judiciary in the legislative process.

It is clear that the judiciary meant to impart that the Madison thought the oversight of the judiciary by the Legislature could be termed the definition of tyranny. However, what Madison said was, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." In order to justify denying the people their liberty, they had to deliberately mislead, that is to lie.

Most interesting is that in Federalist Paper 47, Madison went on to acclaim the Constitution of the State of New Hampshire for recognizing that some commingling of the powers of government was necessary to maintain free government. Unlike the Constitutions of the other States which proclaimed the need for absolute separation, and then went on to describe commingling. Madison describes in detail that in New Hampshire at that time the Executive department was entirely a subset of the Legislature: the President being President of the Senate, and a voting Senator; and the Executive Council being three Representatives and two Senators elected by the Legislature. He found no fault in this and this indicates that he was probably well aware of the Legislature hearing petitions of people to be restored to their law. What is even more ludicrous is the idea that the people who wrote and ratified the Constitution, in restoring people to their law, did not understand what they had themselves created.

The Justices also referenced Jefferson's Notes on Virginia. The reference to the Notes on Virginia are as misleading as the reference to Federalist Paper 47. The whole quote is "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government t. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single

one." It is not the Legislature taking exception to one Judicial act that Jefferson objects to, but just as in Federalist Paper 47 the complete combination of all three powers in one set of hands.

Hamilton's arguments in Federalist Paper 81, are complex. He first states, "In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts.'. Hamilton states that this is false reasoning based upon a misconception. However, we know by the Journals of the House in New Hampshire that such rectifations were in fact the practice in New Hampshire when Hamilton made this statement, and therefore, Hamilton was either mistaken or deliberately misleading. It should be noted that New York, Hamilton's State has never had redress of grievances. It should also be noted that the Constitution of the State of Delaware defined the highest Court of Appeals to be comprised of the President, three members of the Legislative Council, three members of the Assembly.

It is interesting in their concluding argument that they relegate the Legislature redressing grievances against the Judiciary to colonial Legislatures where the legislative power was not understood. However, this ignores the Journals of the House under the Constitutions of 1784 and 1792 which document that redresses of grievances against the Judiciary was one of the more frequent if not the most frequent activities of the Legislature. To relegate them to only colonial governments is disingenuous at best.

The power of redress of grievances was further compromised in 1925 in the recodification of laws. In 1921, Title 3 addressed the due process of those who were parties in a redress of grievances. In 1925, those statutes had disappeared from the law, without ever having been repealed.

In 1963 redress of grievances was further impeded by the elimination of any mechanism to introduce them. Prior to 1963, legislators prepared their legislation themselves. In 1963, Legislative Services was created to prepare legislation. Legislative services was empowered to draft bills and resolutions, but not petitions for the redress of grievances. Thus the people have been denied one of their most fundamental liberties, to complain to their representative body that they have been abused by their government.

What is most interesting now is that such cases are heard by the judiciary. Articles 31 and 32 clearly give jurisdiction over these issues to the General Court. No where in the Constitution is jurisdiction given to the Judiciary.

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Superior Court of Judicature of New Hampshire.
DOROTHY MERRILL, ADMINISTRATRIX,
v.
JOSEPH SHERBURNE, AND AL.

September Term, 1818.

*1 An act of the Legislature awarding a new trial in an action, which has been decided in a court of law, is an exercise of judicial power. It is also in its operation retrospective: and for these two reasons is unconstitutional.

West Headnotes

Constitutional Law 52
92k52

Courts 1
106k1
The constitution, declaring the "general court" to be the "supreme legislative power," and empowering it to erect judicatories for determining all matters and causes between or concerning persons within the state, and the thirty-first article of the bill of rights, providing that the legislature shall assemble for the redress of public grievances and for the making of such laws as the public good may require, and the thirty-seventh article, declaring that in the government of this state the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from and independent of each other as the nature of a free government will admit, etc., impliedly exclude the general court from the exercise of any judicial functions.

Constitutional Law 55
92k55

New Trial 0.5
275k0.5
(Formerly 275k1/2)
A private act, enabling a suitor, who had been denied a new trial, to enter his cause anew at the superior court, and directing that it have a day in said court, and be heard, tried, and determined on the pleading had in the former trial, and empowering the court to affirm or reverse the former judgment on appeal, is the exercise of a power which is judicial in its nature.

Constitutional Law 55
92k55

New Trial 0.5
275k0.5
(Formerly 275k1/2)
An act of the legislature granting a new trial is unconstitutional since it is an interference with the judiciary.

Constitutional Law 67
92k67

Courts 1
106k1
It is the province of the judicial power to decide private disputes between or concerning persons, as distinguished from the legislative power to regulate public concerns, and to make laws for the benefit and welfare of the state.

Constitutional Law 95
92k95

Dower and Curtesy 3
136k3
(Formerly 112k2 Curtesy)

Dower and Curtesy 30
136k30
An inchoate right of dower or curtesy is not such a vested right as to forbid the legislature from changing or abolishing it.

Constitutional Law 111
92k111

New Trial 0.5
275k0.5
(Formerly 275k1/2)
A private act enabling a suitor who has been denied a new trial to enter his cause anew at the superior court, and directing that it have a day in said court and be heard, tried, and determined on the pleading had in the former trial, and empowering the court to affirm or reverse the former judgment on appeal, is unconstitutional, as operating to destroy vested rights.

[FNa1]WOODBURY, J. delivered the opinion of

Though no opinions have been published, and though the decisions have been contradictory, yet the following ones appear by the records to have adjudged such acts void. *Gilman* vs. *M'Clary. Rock. Sept.* 1791.-- *Chickering* vs. *Clark. Hills. Butterfield* vs. *Morgan. Ches. May* 1797. *Jenness & al. Exrs.* vs. *Seavey. Rock. Feb* 1799. Nor could it be pretended on any sound principles, that the usage to pass them, if uninterrupted for the last twenty-seven years, would amount to a justification, provided both the letter and spirit of the written charter of our liberties forbid them. That charter is the supreme law of the land to us all; and we know, that the sacred regard to the rights of the people, which our legislative department have ever evinced, will induce them, as readily as ourselves, to conform to the provisions of that supreme law, whenever it is not misapprehended.

But in the passage of the act, granting a new trial to the plaintiff, we are constrained to think, that the constitution was misapprehended. The nature and effect of the act was judicial. It was also retrospective. The legislature cannot pass such an act, and our judgment, therefore, is, that the proceedings in this cause be quashed, and the *parties go without day.*

Mason, for the plaintiff.

J. Smith for the defendants.

1 N.H. 199, 1818 WL 479 (N.H.), 8 Am.Dec. 52

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The Federalist Papers : No. 47

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The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts

From the New York Packet. Friday, February 1, 1788.

MADISON

To the People of the State of New York:

HAVING reviewed the general form of the proposed government and the general mass of power allotted to it, I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts. One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts. No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded.

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a

mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct. The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point. The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote. From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words import, and still more conclusively

as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority.

This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department. The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner. " Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR. Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR. " Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring "that the legislative,

executive, and judiciary powers ought to be kept as separate from, and independent of, each other AS THE NATURE OF A FREE GOVERNMENT WILL ADMIT; OR AS IS CONSISTENT WITH THAT CHAIN OF CONNECTION THAT BINDS THE WHOLE FABRIC OF THE CONSTITUTION IN ONE INDISSOLUBLE BOND OF UNITY AND AMITY. " Her constitution accordingly mixes these departments in several respects. The Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments. The President, who is the head of the executive department, is the presiding member also of the Senate; and, besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department, and his council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department are appointed by the executive department. The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares "that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them. " This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department.

As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the Constitution have, in this last point at least, violated the rule established by themselves. I pass over the constitutions of Rhode Island and Connecticut, because they were formed prior to the Revolution, and even before the principle under examination had become an object of political attention. The constitution of New York contains no declaration on this subject; but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments. It gives, nevertheless, to the executive magistrate, a partial control over the legislative department; and, what is more, gives a like control to the judiciary department; and even blends the executive and judiciary departments in the

exercise of this control. In its council of appointment members of the legislative are associated with the executive authority, in the appointment of officers, both executive and judiciary. And its court for the trial of impeachments and correction of errors is to consist of one branch of the legislature and the principal members of the judiciary department.

The constitution of New Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary, or surrogate of the State; is a member of the Supreme Court of Appeals, and president, with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council of the governor, and with him constitutes the Court of Appeals. The members of the judiciary department are appointed by the legislative department and removable by one branch of it, on the impeachment of the other. According to the constitution of Pennsylvania, the president, who is the head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department, and forms a court of impeachment for trial of all officers, judiciary as well as executive. The judges of the Supreme Court and justices of the peace seem also to be removable by the legislature; and the executive power of pardoning in certain cases, to be referred to the same department. The members of the executive counoil are made EX-OFFICIO justices of peace throughout the State. In Delaware, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The executive chief, with six others, appointed, three by each of the legislative branches constitutes the Supreme Court of Appeals; he is joined with the legislative department in the appointment of the other judges. Throughout the States, it appears that the members of the legislature may at the same time be justices of the peace; in this State, the members of one branch of it are EX-OFFICIO justices of the peace; as are also the members of the executive council. The principal officers of the executive department are appointed by the legislative; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other. Her constitution, notwithstanding, makes the executive magistrate appointable by the legislative department; and the members of the judiciary by the executive department. The language of Virginia is still more pointed on this subject. Her constitution declares, "that the legislative, executive, and

judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of county courts shall be eligible to either House of Assembly. " Yet we find not only this express exception, with respect to the members of the irferior courts, but that the chief magistrate, with his executive council, are appointable by the legislature; that two members of the latter are triennially displaced at the pleasure of the legislature; and that all the principal offices, both executive and judiciary, are filled by the same department. The executive prerogative of pardon, also, is in one case vested in the legislative department.

The constitution of North Carolina, which declares "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other," refers, at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department. In South Carolina, the constitution makes the executive magistracy eligible by the legislative department. It gives to the latter, also, the appointment of the members of the judiciary department, including even justices of the peace and sheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the State. In the constitution of Georgia, where it is declared "that the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other," we find that the executive department is to be filled by appointments of the legislature; and the executive prerogative of pardon to be finally exercised by the same authority. Even justices of the peace are to be appointed by the legislature. In citing these cases, in which the legislative, executive, and judiciary departments have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several State governments. I am fully aware that among the many excellent principles which they exemplify, they carry strong marks of the haste, and still stronger of the inexperience, under which they were framed. It is but too obvious that in some instances the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation, of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is, that the charge brought against the proposed Constitution, of violating the sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper.

Voting Sheets

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on HOUSE CONCURRENT RESOLUTION 18

BILL TITLE: declaring Merrill v. Sherburne to be void and of no force.

DATE: March 1, 2011

LOB ROOM: 208

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Weber

Seconded by Rep. Palmer

Vote: 14-0 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: YES NO

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Lenette Peterson, Clerk

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on HCR 18

BILL TITLE: declaring Merrill v. Sherburne to be void and of no force.

DATE: 3/11/11

LOB ROOM: 208

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Weber

Seconded by Rep. Palmer

Vote: (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: 14-0 (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: YES

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Lenette Peterson, Clerk

JUDICIARY

Bill #: HCR18 Title: _____

PH Date: 2/22/11 Exec Session Date: 3/1/11

Motion: ITL Amendment #: _____

MEMBER	YEAS	NAYS
Rowe, Robert H, Chairman	✓	
Sorg, Gregory M, V Chairman	✓	
Souza, Kathleen F	—	—
Hagan, Joseph M	✓	
Silva, Peter L	✓	
Andolina, Donald C	✓	
Giuda, J. Brandon	—	
LaCasse, Paul D	✓	
McClarren, Donald B	✓	
Murphy, Brian JX	✓	
Palmer, Barry J	✓	
Peterson, Lenette M	✓	
Tregenza, Norman A	✓	
Wheaton, Gary W	—	—
Wall, Janet G	✓	
Potter, Frances D	✓	
Weber, Lucy M	✓	
Watrous, Rick H	—	—
	14-0	

TOTAL VOTE:

Printed: 1/4/2011

Committee Report

CONSENT CALENDAR

March 2, 2011

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Committee on JUDICIARY to which was referred HCR 18,

AN ACT declaring Merrill v. Sherburne to be void and of no force. Having considered the same, report the same with the following Resolution: RESOLVED, That it is INEXPEDIENT TO LEGISLATE.

Rep. Lucy M. Weber

FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

COMMITTEE REPORT

Committee:	JUDICIARY
Bill Number:	HCR 18
Title:	declaring Merrill v. Sherburne to be void and of no force.
Date:	March 2, 2011
Consent Calendar:	YES
Recommendation:	INEXPEDIENT TO LEGISLATE

STATEMENT OF INTENT

Merrill v. Sherburne was decided in 1818, and addresses the separation of powers between the legislature and the judicial branch. The case has been cited with approval over the intervening years. The New Hampshire House cannot, by House Concurrent Resolution, overturn a decision of the New Hampshire Supreme Court. The legislature has the power to overturn this ruling, which has stood for nearly 200 years, by an appropriate Constitutional Amendment

Vote 14-0.

Rep. Lucy M. Weber
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

CONSENT CALENDAR

JUDICIARY

HCR18, declaring Merrill v. Sherburne to be void and of no force. **INEXPEDIENT TO LEGISLATE.** Rep. Lucy M. Weber for JUDICIARY.

Merrill v. Sherburne was decided in 1818, and addresses the separation of powers between the legislature and the judicial branch. The case has been cited with approval over the intervening years. The New Hampshire House cannot, by House Concurrent Resolution, overturn a decision of the New Hampshire Supreme Court. The legislature has the power to overturn this ruling, which has stood for nearly 200 years, by an appropriate Constitutional Amendment **Vote 14-0.**

Original: House Clerk
Cc: Committee Bill File

COMMITTEE REPORT

COMMITTEE: Judiciary

BILL NUMBER: HCR 18

TITLE: declaring Merrill v Sherburne to be void & of no force.

DATE: 3.2.11 CONSENT CALENDAR: YES ☒ NO ☐

☐ OUGHT TO PASS

☐ OUGHT TO PASS W/ AMENDMENT

☑ INEXPEDIENT TO LEGISLATE

☐ INTERIM STUDY (Available only 2nd year of biennium)

Amendment No. _____

STATEMENT OF INTENT:

Blurb—HCR 18
Declaring that Merrill v. Sherburne to be void and of no force.
March 1 ITL 14-0 Consent

Merrill v. Sherburne was decided in 1818, and addresses the separation of powers between the legislature and the judicial branch. The case has been cited with approval over the intervening years. The New Hampshire House cannot, by House Concurrent Resolution, overturn a decision of the New Hampshire Supreme Court. The legislature has the power to overturn this ruling, which has stood for nearly 200 years, by an appropriate Constitutional Amendment.

COMMITTEE VOTE: 14-0

- Copy to Committee Bill File
- Use Another Report for Minority Report

RESPECTFULLY SUBMITTED,

Rep. Peter M. Weber
For the Committee

Rev. 02/01/07 - Yellow