

What Did They Mean By “Cherish?”

or

New Hampshire's Founding Fathers Put the State in Charge of School Funding and Taxation

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Introduction

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

Part 2, Article 83 of the New Hampshire Constitution

What did the writers mean by “cherish” in 1784?

This question has been debated and old dictionaries have been consulted. For example, in the 1792 edition of the *Dictionary of the English Language* by Samuel Johnson one finds this definition: “to support; to shelter; to nurse up.”

A better way to understand what they meant is to determine what they actually did in regard to public schools at the time the Constitution was adopted and shortly thereafter.

The Transition from Provincial Government to Statehood

In the early 1770s, the province of New Hampshire operated under the laws of Great Britain and the supreme authority of King George as represented by the Royal Governor, John Wentworth. As the War for Independence waged in 1775, Governor Wentworth departed from Portsmouth, leaving the province without an effective government.

In December 1775, a provincial congress in New Hampshire drafted a constitution that took effect on January 5, 1776. This was the first constitution of a free state in America.

Although meant to be temporary in nature, the promulgation of the new constitution led to some confusion about the status and applicability of the old provincial laws. Did the laws of Great Britain still apply? As a free and independent state, what laws, if any, were to be in effect? Was there a clean slate with no laws?

On April 9, 1777, the state legislature decided, in a single act, to settle this question: “Whereas Doubts have arisen whether the several Acts and Laws in force in this State before the Assumption of the present form of Government were not thereby, or by the subsequent

Declaration of Independence, vacated abrogated & disannulled: for the removal whereof all the Acts and Laws in force in the State ... be revived reenacted directed and ordered to abide and remain in full force....”¹

To this continuation of all old laws, only one telling exception was made: “the Fines and Forfeitures thereby appropriated to the King’s Use shall be applied to the Use of the County wherein the same shall be imposed & become due.”²

The pre-existing provincial laws on schools were brought forward unchanged.

By 1783, the victorious colonies had bound themselves together by ratifying the Articles of Confederation and peace was being established with Great Britain. The people of New Hampshire now needed a more complete and permanent constitution.

A state constitutional convention met in Exeter and drafted a proposed constitution. Voters in the towns rejected the first two drafts but approved the third draft, the one with the language quoted above. The new constitution took effect on June 2, 1784.

On June 12, 1784, only ten days after the new constitution went into effect prior laws were again brought forward in full force. On that date the new legislature also appointed a “Committee to revise the Laws of this State and prepare such Bills as they may judge necessary for that purpose.”³ As a result, over the next few years, the legislature reviewed and amended many old provincial laws. In regard to many topics they completely repealed the old laws and created new laws as replacements. This review took some years to complete. The old laws were replaced with entirely new laws regarding the courts and law enforcement in 1785, regarding roads and highways in 1786, in regard to the militia in 1786, and all laws that violated the peace treaty between Great Britain and the United States in 1787.

On June 21, 1788, New Hampshire ratified the Constitution of the United States making that document the law of the land. One year later, on June 18, 1789, the New Hampshire legislature repealed all colonial laws related to schools and replaced them with a new law. ⁴

The School Law of 1789 and Funding for Schools

Under the old colonial era laws, all but the smallest towns were required to have public schools. The provincial legislature had established the tax base that each town must use but it did not set an amount to be spent on schools. ⁵ Each town decided how much to spend on its own.

The new school law of 1789 was entitled "An Act for the Better Regulation of Schools within this State; and for Repealing the Laws Now in Force Respecting Them." It was the first action

¹ *Laws of New Hampshire, Vol. 4, Revolutionary Period, 1776-1784*, Henry Harrison Metcalf, editor, Musgrove Printing House, 1916, Second General Court, Second Session, Chapter 6, p.87

² *Ibid.*

³ Those appointed to this committee were Samuel Livermore, Josiah Bartlett, and John Sullivan.

⁴ *Ibid.*, Sixth General Court, First Session, Chapter 8, p. 449-450.

⁵ The tax was a tax on property, but the definition of property was greatly different from our current property tax.

related to education taken by the legislature of the State of New Hampshire after the constitution of 1784 had taken effect. It is, therefore, an important law to understand in regard to the intent of the founders in regard to schools and their funding.

Importantly, this new law provided that "the Select men of the Several towns & Parishes within the State be, and they hereby are, impowered and required to assess annually the Inhabitants of their respective towns, according to their polls and ratable estates, in a sum to be computed at the rate of five pounds for every twenty shillings of their proportion for public taxes... Which sums, when collected shall be applied to the sole purpose of keeping an English Grammar School or Schools for teaching reading, writing, and arithmetic within the towns and parishes for which the same shall be assessed; except said town be a Shire or half shire town: in which case the School by them kept shall be a grammer school for the purpose of teaching the latin and greek languages as well as reading, writing, and arithmetic."

A key word in this law is "required." The legislature was not willing to leave the funding of schools up to local voter sentiment or to the discretion of town authorities as the previous provincial law had done. In order to make this very clear to any selectman who might doubt the requirement, the law dictated that any selectmen who failed to raise the legislatively mandated funds by taxation "shall forfeit and pay the full sum, which they shall be so found delinquent in assessing ... which sum shall be paid out of the goods and estate of such Select men."⁶

What did the legislature mean by "the rate of five pounds for every twenty shillings of their proportion for public taxes"? State government itself was funded by a property tax. The legislature dictated how much each town was to raise for that purpose by dividing the needed funds among the towns in proportion to their assessed property values: a statewide property tax. For every one pound (20 shillings equals 1 pound) that a town was to raise and contribute to fund the state, it was required to raise five pounds for its schools. This was a uniform statewide property tax to fund the required public schools.

(The 1789 definition of what was to be uniformly taxed as property was considerably different from our current property tax. An explanation and description of that law is contained in my paper "Paying for Schools: The Evolution of the Property Tax.")

By this law, the State legislature set the tax rate and amount to be spent for schools in every town. This new school law, for example, required Newmarket to raise and spend 49 pounds for its schools and Exeter to raise and spend 77.52 pounds for its schools.

The 1789 law was the first on schools under the new constitution and transferred power from the towns to the state legislature over the amount to be spent on each town's schools. How the budget would be spent was still under local control, but the aggregate amount to be raised and spent was dictated by the legislature.

Henceforward, schools were to be funded at a level determined by the legislature using a property tax imposed at a uniform rate, not by local decisions.

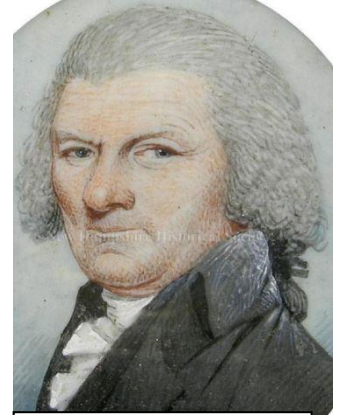
⁶ Although it was unenforced in recent years, this part of the law of 1789 remained the law of New Hampshire (RSA 198:7), until it was repealed in 1999.



John Sullivan

The President⁷ of the state in 1789 was John Sullivan of Durham. Six years earlier he had been the secretary of the Constitutional Convention that drafted the state constitution. He had also been one of the members of the 1784 legislature who had been appointed to the committee to make recommendations to bring old state laws into conformity with the principles of the new constitution.

A number of the legislators of 1789 had also been members of the constitutional convention, including the Senate President, John Pickering of Portsmouth. It seems



John Pickering

probable, therefore, that these men believed that their new law on schools was a concrete expression of the constitutional requirement to “cherish” schools and for taxes to be “proportional and reasonable” These key political figures had participated in writing both the constitution and the first law on schools and school funding enacted under that constitution.⁸

Subsequent Increases in Funding of the Schools

Beginning in 1791 and every few years thereafter, the legislature raised the amount to be raised in each town for support of state government and for support of the required schools.

No “state aid” program existed in the early years⁹. The legislature did not appropriate funds for grants to schools. Doing so would have been illogical as the state’s own revenue was raised in exactly the same proportion from each town and from the same tax base. Instead, the legislature retained considerably more control than granting aid: the legislature, not local authorities, set the school tax for every town.

During this early period, if a citizen believed that the amount directed to be spent on schools in his town was either inadequate or extravagant, he had to appeal to the state legislature for change. And when the legislature made a change, always upward, the proportional change was equal for the schools of all towns.

⁷ The position was renamed “Governor” in a constitutional amendment of 1792.

⁸ A list of delegates to the constitutional convention can be found in *Documents and Records Relating to Towns in New Hampshire with an Appendix Embracing the Constitutional Conventions of 1778-1779 and of 1781-1783 and the State Constitution of 1784*, Volume IX, Nathaniel Bouton, ed., Concord, NH, 1875, p. 842-844. Officers of the State and members of the General Court of 1789 can be found in *Laws of New Hampshire, Volume 5, First Constitutional Period, 1784-1992*, Henry Harrison Metcalf, ed., Concord, NH, 1916, p. 439-441.

⁹ The first state program voted by the legislature to provide resources to the schools in addition to those of the school tax was the Literary Fund. In 1828, the legislature directed that this fund, raised from taxes on bank stock, be paid to the towns “to support the maintenance of common free schools, or to other purposes of education, in addition to the sums which may be required by law to be raised and expended for those purposes.”

Local Option School Taxes

The law of 1789 and the subsequent increases had set the amount to be raised and spent annually on the operation of each town's schools. It set stringent penalties for selectmen who did not raise the decreed sums but it also did not grant any right to the towns to raise more.

The occasional need to build a new school house or renovate an old one in any particular town, however, could not be foreseen or accommodated within the regular amounts voted by the legislature. In 1805, the General Court passed another law, "An Act Empowering School-districts to Build and Repair School Houses and Regulating Schools," which empowered towns to "divide into school districts" and granted districts a power to raise additional money but only for the limited "purposes of erecting, repairing or purchasing a school house." Of import, this law did not grant the local districts the parallel power to raise money for the *operation* of their schools.

Although it was not a widespread practice, some towns occasionally made supplemental appropriations for the operation of schools above those required by the legislature. There was uncertainty, however, whether there was legal authority for such locally voted amounts. Taken together the laws of 1789 and 1805 neither expressly prohibited such action nor provided for it.

The legislature passed a new law on July 6, 1827, "An Act for the Support and Regulation of Primary Schools." It also did not contain authority for local voters to supplement the state-required appropriations for schools.

In 1834 the New Hampshire Supreme Court, in the case of *A. Tucker v. N. Aiken et al*, clarified that the amount each town was to raise for its schools that had been ordered by the legislature could legally be supplemented with an additional amount voluntarily voted by the local voters as part of the town meeting budget process.

The plaintiff in the case was trying to avoid paying taxes levied on him by the town of Derry. He made many different claims to avoid his taxes, including questioning whether the amount voted by the town meeting for Derry schools was meant to include the amount ordered to be raised by the State laws or was in excess of that amount. As part of its decision, the Court stated, "The selectmen are bound to make this assessment [the one ordered by the legislature] if a town should not vote to raise any money for the support of schools; but towns may, if they think proper, vote to raise a larger sum than the selectman are thus bound to assess, and with a commendable zeal in the cause of education this is often done."¹⁰ "Often" may have been an overstatement, but certainly the Court was reflecting the reality that some towns had already decided, even without explicit legal authority, to tax and spend more for schools than the amount dictated by the legislature.

Exactly how and when the legislature subsequently enacted a law authorizing towns to raise and spend additional money on their schools remains obscure. My search of all the acts of the legislature between 1827 and 1842 uncovered no record of such a change, yet a

¹⁰ NH Reports, volume 7, pages 113-141 (1834)

compilation of all of the laws in the state, published in 1842, includes language specifically authorizing towns to supplement the legislatively mandated amount.¹¹

Even with the new authority to do so, many towns did not begin to supplement the legislatively required state tax for schools with additional locally voted appropriations until later in the 19th century. The town of Enfield began to do so in 1852¹² while the town of Hanover did not do so until 1898¹³. As late as 1906, 35 school districts were still not supplementing the amount voted by the state legislature. In that year, \$1,189,689 was raised by taxes for the schools, only \$375,035 of which was by local choice. Two-thirds of the funding for schools was from the required state tax that had been voted by the legislature in 1905.¹⁴

Once voting additional money for schools became a widespread local practice in the early 20th century, the state legislature no longer felt the need to maintain the State tax at a rate high enough to provide for the majority of the schools. A shift from the State property tax to the local property tax then began in earnest.

In 1919, the legislature first restated the required amount to be raised for schools in the terms we use today. "The selectmen in each town shall assess an annual tax of three dollars and fifty cents on each thousand dollars of the value of the ratable estate taxable therein for the support of the public schools."

Importantly, however, they also set a maximum that could be added to that rate of an additional \$1.50. If the school costs in a particular town were to require more than a \$5.00 rate, "the state board [of education] shall provide the balance of the money necessary...."

By 1921, the legislature had required towns that could fund their schools for less than the \$3.50 rate to turn over the difference to the State Treasurer for redistribution to towns where the maximum \$5.00 rate was inadequate.

¹¹ Section 2 of Chapter 72 of *The Revised Statutes of the State of New Hampshire*, as of December 23, 1842, states "The town at any legal meeting for the purpose may raise a sum exceeding the amount aforesaid [designated by the legislature] which shall be assessed in the same manner." The school law of 1827 did not contain such authority and a search of the acts of the legislature in the years between 1827 and 1842 did not turn up a specific act that added this provision. There is further confusion because the publication of the same law in 1853 in *The Compiled Statutes of the State of New Hampshire* (now Chapter 76, Section 2) adds the word "not": "The town at any legal meeting for the purpose may raise a sum *not* exceeding the amount aforesaid, which shall be assessed in the same manner." Given the actions of communities during the period, the 1842 publication appears to be the more reliable text. Evidently the word "not" may have been added by mistake during the printing of 1853.

¹² Walter A. Backofen, "The Distribution of Tax-Generated Support for New Hampshire's Schoolchildren: 1789-1993," *Dartmouth College Library Bulletin*, n.s., 40:2 (April 2000), 75-84.

¹³ Walter A. Backofen, "The Town of Hanover as a Window on Public-School Funding in the State of New Hampshire: 1789-1919," *Dartmouth College Library Bulletin*, n.s., 39:1 (November 1998), 26-43.

¹⁴ Henry C. Morrison, *Report of the Superintendent of Public Instruction being the Fifty-fourth Report upon the Public Schools of New Hampshire*, Concord, NH, 1906. Data taken from the tables in Appendix B; Statistical Tables, 1906. Districts that did not tax more than the state mandated rate in 1906 included Brookfield, Dublin, Pittsburg, Goffstown, Weare, Canterbury, Dunbarton, Candia, Salem, Stratham, Lee, Madbury, and Grantham.

The collar imposed on school tax rates was not long lived. The State never raised enough money to “provide the balance of the money necessary.” The current system of schools being funded primarily by locally set taxes and budgets began to take hold everywhere.

The minimum \$3.50 statewide property tax rate remained in effect throughout most of the 20th century as did the penalty from 1789 that non-compliance would result in the difference being taken from the personal estates of the selectmen. Those provisions of law were only repealed with the enactment of the post-Claremont laws in the 1990’s.

History Not Understood

Many people have erroneously assumed that the way public schools have been funded for the past 100 years is how they must always have been funded. The extent of the misunderstanding is clear in quotes and actions during the debates over how to respond to the Supreme Court’s 1993 *Claremont I* decision.

"The state's duty to provide an adequate education could not have lain unnoticed in the state constitution for more than 200 years."

"The fact that no state aid was provided to fund schools until this century proves the point that the state had no responsibility for education under the constitution."

"Our current education system has worked fine for the last 200 years. Why do we need a change?"

The administrator of one town that withheld its new statewide property tax payments from the State was quoted saying, "... judges all of a sudden decided that a school funding system in place for more than two centuries was unconstitutional."

The preamble of a resolution introduced in the 2001 legislature stated “No state funding was provided for public education for the first 50 years of the state, which conclusively demonstrates that nobody understood the constitution as imposing a duty upon the state to fund public education.”

Those statements reflect widely held misconceptions of New Hampshire’s actual history. What the founders did is not at all what some people today seem to believe they did.

There is a great irony here. The *Claremont I* decision of the New Hampshire Supreme Court can be read as reminding New Hampshire’s leadership that the Court’s own 1834 decision to grant local authority to supplement state funds did not mean that the original State responsibility established in the 1784 constitution had ever been diminished or abolished.

Note: This paper is an edited and shortened version of a paper I researched and prepared as Executive Director of the NH Center for Public Policy Studies in 1998. All papers produced by the Center were placed in the public domain.