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New Hampshire Constitutional Convention

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THE NEW HAMPSHIRE CONSTITUTIONAL CONVENTION

NEW HAMPSHIRE'S tenth constitutional convention, upon whose labors the voters will pass judgment in November, 1920, offers a striking contrast to most constitutional conventions of recent years.[1] It met originally in June, 1918, sat for three days, during which it organized, appointed its committees, debated and disposed of an important constitutional question, and then adjourned awaiting the quieter days of peace. Upon reconvening in January, 1920, it concluded its work within seventeen days, at an expense of less than $50,000, and proposed only seven amendments, five of which had been submitted to the voters by previous conventions. For a body of over four hundred men, meeting in the midst of rapidly changing conditions and dealing with a constitution which is today substantially the same document as that adopted in 1784, this may well be said to be an unusual record of brevity and despatch.

This record is emphasized when it is understood that three of the proposed amendments[2] were adopted by the convention after a favorable committee report without a word of debate, that a fourth was discussed only on a motion for reconsideration,[3] and a fifth was debated on the floor not more than twenty minutes.[4] The record of the convention may also be viewed from another angle. The income tax amendment was debated for one day, a proposal to grant broad powers of taxation to the legislature was debated one day and part of a second; the growing timber tax amendment was debated, in both sessions, three days; methods of amending the constitution, one day; the size and basis of apportionment of the House of Representatives, one day; and the pension amendment, part of one day. A day means a period from eleven o'clock in the morning to four o'clock in the afternoon. The contrast with the recent Massachusetts Convention, which spent months on a single proposition, is striking.

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[1] A running account of the work of the convention will be found in 52 GRANITE MONTHLY, 83. The *Manchester Union* and the *Independent Statesman* give good newspaper reports.

[2] Inheritance tax; item veto; non-sectarian amendment.

[3] Pension amendment.

[4] *Re* conscientious objectors.

The fundamental law of New Hampshire belongs to the class of rigid constitutions. The General Court has no power to propose amendments; its constitutional authority is limited to the formal duty, once in seven years,[5] of providing that the sense of the people shall be taken on the question, shall there be a constitutional convention; and, if the popular vote be in the affirmative, to the equally formal duty of providing for the election of delegates. Amendments proposed by this septennial convention are ratified only by an affirmative vote of two-thirds of those voting on the proposition.[6]

The exceptional requirement of a two-thirds affirmative vote for ratification has produced many curious cases. For years it has been agreed that the House of Representatives has been much too large for efficient work. In 1903 an amendment proposing to reduce its numbers was defeated, although 20,295 votes were cast in its favor to 13,069 against. A measure having the same purpose was again presented in 1912 and by the narrow margin of 169 votes was again defeated. The vote this time stood 21,399 to 10,952. In 1912 a proposition for a special tax on growing timber and for an income tax received a vote of 23,108 to 12,636, or 722 too few affirmative votes to secure its adoption. At the same election a graduated inheritance tax amendment received a vote of 18,432 to 9,699, thus lacking 322 of the constitutional majority. A proposed amendment for a tax on public service corporations failed in 1912 by a vote of 19,200 to 10,151, a margin of 368 votes. A proposal to strike the words "Protestant" and "rightly grounded on evangelical principles" from the Bill of Rights has been voted on by the people five times and will appear again this fall; it has never failed to receive a ma-

[5] This seven-year rule has not been observed. From 1820 to 1833 no call was sent to the people; but the legislature exercised this power in 1844, 1846, and 1849; and, following the regular call in 1857, in 1860, 1862, 1864, 1868, and 1869. In 1860 the people voted to hold a convention, but in 1861 the legislature took the unusual step of postponing the whole matter. This procedure was repeated in 1865. (See MANUAL OF THE CONVENTION, 1918, p. 152). The constitution as then, and now, in force provides, "And if it shall appear * * * that in the opinion of the majority of the qualified voters in the state present and voting * * * there is a necessity for a revision of the constitution, it shall be the duty of the General Court to call a convention for that purpose * * *." Since the adoption of biennial elections in 1876, the seven-year period has become practically impossible.

[6] CONSTITUTION, Arts. 98, 99.

jority of the votes cast on the question, and in 1876 won a majority of 11,757; but never have its friends mustered the constitutional two-thirds majority.

On the other hand, the abolition of a religious test for office was carried in 1876 by 28,477 to 14,231, exactly five votes more than were required; and in 1903 a faulty inheritance tax amendment received a vote of 20,917 to 10,306, thus negotiating the constitutional hurdles by the margin of 101 votes.[7]

The recent convention was essentially a war convention. The legislature provided for taking the sense of the people on calling a convention in 1915;[8] the people gave their approval in 1916; the convention was chosen in 1917,[9] and met for the first time in June, 1918, at a most critical stage of military operations. Four of the seven proposed amendments can be traced directly or indirectly to the effects of the war.

After one day's debate in the shadow of the Great War the convention decided to adjourn upon call of the President, acting with a committee of ten members, one representing each county; and from June 7, 1918, to January 13, 1920, the convention existed in a state of suspended animation, from which it emerged for a brief period of activity. Upon reconvening for the adjourned session, the convention went immediately to work upon a few subjects the principles of which were non-contentious. Practically every subject on which there was a fundamental difference of opinion was either avoided entirely or disposed of with the slightest possible consideration. This unwillingness to face many possible subjects of constitutional importance may be attributed to two things; first, the traditional conservatism of New Hampshire conventions;[10] second, the

[7] See MANUAL OF THE CONVENTION, 1918, *passim*, for these and other illustrations of the same situation.

[8] Laws 1915, c. 235.

[9] Laws 1917, c. 121.

[10] The Convention of 1918 was, if anything, more conservative than its predecessors. The discovery and arrest of "reds" in New Hampshire cities, the police strike in Massachusetts, and the unrest prevalent during its adjournment induced a frame of mind which was expressed, with some exaggeration, in the following statement made on the floor of the convention by one of its members: "I do not think that it is any time to monkey with the New Hampshire Constitution very much. The less we bother it the better off it will be for American principles."

limited appropriation with which the legislature provided the convention, which considerably accelerated progress and led to an early adjournment.

In all, the convention proposed seven amendments. Proposition one gives the General Court power to levy a progressive income tax; proposition two amplifies an amendment of 1903, by enlarging the scope of the inheritance tax; proposition three gives the item veto to the governor; proposition four alters the basis of representation in the House of Representatives and reduces its membership; proposition five strikes out an obsolete clause protecting conscientious objectors; proposition six strikes the words "Protestant" and "rightly grounded on evangelical principles" from the Bill of Rights; and proposition seven strikes out the clause forbidding the legislature to grant pensions for more than one year at a time. Of these the taxation amendments and the amendment altering the basis of representation in the House are the most important, and will be briefly discussed in the following paragraphs.

The New Hampshire constitution of 1784 granted power to the legislature "to propose and levy proportional and reasonable assessments, rates, and taxes * * *." This rule of proportion is found in the present constitution, and though originally inserted as a necessary safeguard against discrimination, it has since been construed by the state Supreme Court to prevent forms of taxation required by modern conditions. As early as 1827 the Supreme Court said, "The equality, here intended, is, that the same tax shall be laid, upon the same amount of property, in every part of the state, so that each man's taxable property shall bear its due portion of the tax according to its value. And a tax thus laid—is a proportional tax, within the meaning of the constitution".[11]

This ruling has been followed uniformly ever since. In *State* v. *U. S. and Canada Express Co.* a tax of two percent of the gross receipts of express companies doing business on railroads within the state was held unconstitutional, the court saying, "The idea of proportional—taxation—is wholly destroyed by fixing a tax upon value on one kind of property, and a tax on gross receipts upon another", and again, "This special law puts upon railroad expressmen a tax which is put upon nobody else".[12] In *Curry* v. *Spencer* a tax

[11] 4 N. H. 565, 568.
[12] 60 N. H. 219, 245.

of one percent on collateral inheritances was held to violate the rule of proportion on the ground that it cast the burden on one class of beneficiaries alone.[13]

Recently the rule of proportion has been applied to two matters of considerable importance in New Hampshore taxation. The House of Representatives proposed to levy a tax of one-half of one percent on the fair cash value of stock in public funds not exempt from taxation, and in corporations; and on money on hand or at interest. Doubt was expressed in the House concerning the validity of this law, and the Supreme Court by request gave an opinion that the General Court could not tax such classes of property at a lower proportion of their value, either by diminishing the rate at which they are taxed, or by requiring them to be rated for assessment at a smaller percentage of their real value.[14] A later opinion of the justices disposed of another much discussed topic, the taxation of growing wood and timber at a lower rate than that imposed on other property. The Court held that the legislature had no authority to provide for the taxation of standing wood and timber at a rate less than that imposed upon property in general.[15]

The effect of the rule of proportion was modified insofar as inheritances were affected by an amendment of 1903[16] to which reference will be made below. Even as modified, the rule seriously limited the taxing power of twentieth century New Hampshire. An income tax was thereby made impossible, a proposed graduated tax on growing timber was declared beyond the power of the legislature, classification of property for purposes of taxation was nullified. New Hampshire was and is forced to rely chiefly upon the general property tax, while intangibles escape largely without any burden of taxation whatever.[17]

The convention of 1912 was aware of this situation, and proposed an amendment empowering the legislature to specially assess, rate, and tax growing wood and timber and money at interest, and to im-

[13] 61 N. H. 624.

[14] Opinion of the Justices, 76 N. H. 588 (1911).

[15] Opinion of the Justices, 76 N. H. 609 (1913).

[16] CONSTITUTION, Part Second, Art. 6.

[17] See article by Hon. A. C. Brown, President of the Convention and member of the State Tax Commission, in 52 GRANITE MONTHLY, 3.

pose a graduated income tax. This amendment was rejected by a vote of 23,108 in favor to 12,636 against. In the interval between the conventions of 1912 and 1918 the tax question had become critical. Demands for increased revenue, in part required to meet the expense of the new school policy of the state, and in part to pay for the construction of better roads, were incessant; and the general property tax had nearly reached the limits of its productivity.

A proposal to renew the growing timber classification plan was defeated during the one working day of the first session of the 1918 convention by the combined efforts of the farmers, who feared that any reduction of forest taxation would mean an increased burden upon farm property,[18] and some of the great lumber operators, who feared the weight of the tax proposed on newly cut timber. The friends of this proposition renewed the fight during the adjourned session, but were again defeated.

The second session of this convention adopted with a very brief discussion an amendment authorizing an income tax. The income tax debate was typical of most of the work of the convention. On the second day of the adjourned session, the convention went into committee of the whole on the income tax proposal; the committee was addressed by the President and by other prominent members of the convention, defeated a proposed alteration compelling the General Court to levy the tax, and within the space of three hours reported back to the convention favorably, and saw the convention without further discussion adopt its report. No arguments were made against an income tax, no specific data were presented to the convention to illustrate its probable operation. The successful experience of Massachusetts with the tax, the recommendation of the state tax commission, the vote of the people in 1912, and the admitted failure to reach intangibles under present methods of taxation brought the convention to an immediate agreement on this proposal. In substance the amendment grants to the General Court full power and authority, regardless of the rule of proportion, to impose taxes on incomes, to graduate such taxes according to the amount of the income, and to grant reasonable exemptions.

The effect of the rule of proportion as applied to a classified in-

[18] See JOURNAL OF THE CONVENTION, pp. 76 ff. The Journal for the adjourned session has not yet been printed. (May, 1920.)

heritance tax has been noted above (*Curry* v. *Spencer*). This decision was modified in 1903, when the General Court was given power to impose taxes "upon property when passing by will or inheritance".[19] The State Supreme Court readily construed this clause of the amended constitution to permit the imposition of a tax upon property passing by will or inheritance "which shall be assessed at different rates upon classes standing in different relations to the original owner, or between which there is a reasonable ground for distinction". The Court, however, found itself in disagreement and consequently gave no opinion on the further question whether this amendment validated "an exaction from those in the same class or relation to the testator varying in accordance with the amount of property passing".[20] The doubt concerning the constitutionality of this sort of graduation in inheritance taxation seriously impaired the usefulness of the amendment of 1903, and not until 1919 did the General Court venture to impose such a tax.[21] Its constitutionality has not yet been tested before the court.

In order to remove this uncertainty, the convention of 1912 proposed a further amendment specifically authorizing an inheritance tax graduated according to the amount of property passing. Owing to the two-thirds majority rule, this amendment was defeated by a vote of 18,432 to 9,699. As in the convention of 1912, so in the convention of 1918, there was no opposition to such an amendment; and substantially the same proposition will appear on the ballot for the second time in the November elections of 1920.

The tax amendments were considered the main work of the convention, but one other important matter, the size of the House of Representatives, was pressing for attention. New Hampshire, although one of the smallest and most homogeneous of all the American states, possesses the largest House of Representatives, a body of approximately 405.[22] The present basis of apportionment grants one representative to every town and ward having six hundred in-

[19] MANUAL OF THE CONVENTION, 1918, p. 164; CONSTITUTION, Part Second, Art. 6.

[20] Opinion of the Justices, 76 N. H. 597 (1911).

[21] Laws 1919, c. 37.

[22] It is impossible to give an exact figure for the size of the House, owing to the partial representation of many towns.

habitants, and one additional representative for every 1200 additional inhabitants. If a town or ward has less than 600 inhabitants it is entitled to intermittent representation for a proportional part of each decennial census period.[23] This basis of representation was introduced in 1876 to replace a representation of "ratable polls", and reduced the House from 370 to 280. The increase of population by 1902 had brought the House up to 397 members, and in 1912 to about 405.

The problem of reducing the size of the House has engaged the attention of every convention since 1876 and repeated attempts to solve this question have been presented to the voters, only to fail on account of the jealous opposition of the smaller towns which benefit by the existing rule. Town has been aligned sharply against city, and taking refuge in the two-thirds majority rule for ratification of amendments, the towns have been successful hitherto in staving off any diminution of their constitutional importance.

The Convention of 1918 was presented with the traditional plans for reduction. One provided for districting the state and alloting equal representation to each district. The other, based on town representation, was presented in an ingenious form by Mr. Lyford of Concord, and after considerable discussion was adopted by the convention and will be laid before the people.[24]

By the terms of this proposition, the House of Representatives must consist of not less than 300 nor more than 325 members. The

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[23] CONSTITUTION, Part Second, Art. 9, 10; see Lloyd Jones, in 197 No. AM. REV. 486, for an account of the results of this rule of apportionment.

[24] This amendment reads as follows:

Art. 9. There shall be in the legislature of this state a House of Representatives, biennially elected, in which representation shall be in proportion to the average total number of ballots cast at the last two elections preceding the apportionment at which electors for President and Vice-President of the United States were voted for, except that the apportionment which shall be made by the legislature of 1921 shall be based upon the total number of ballots cast at the election of 1920. The whole number of representatives to be chosen from the several towns and wards shall not be less than 300 nor exceed 325. At the legislative session of 1921 and again at the legislative session of 1925, and every twelve years after 1925, the legislature shall make the apportionment of representatives. In determining the number of ballots required to entitle any town or ward to representatives additional to

geographical basis of representation remains the town and ward. Representation will, however, no longer rest on population; instead of this traditional basis, representatives will be apportioned according to the average total number of ballots cast in each town and ward at the last two presidential elections preceding any apportionment. Owing to incomplete records of the 1916 election, the apportionment of 1921 will be made on the basis of the 1920 balloting alone; a second distribution is required in 1925, and every twelve years thereafter. Obviously it is impossible to know what quota of ballots will entitle a town or ward to one representative until after the fall elections. Whatever number may be fixed, a town or ward becomes entitled to an additional representative for every addition of three times the number of ballots required for one representative; and if a town or ward has less than this required quota, it becomes entitled to representation only for a proportional part of each twelve year period. The amendment allows a latitude of 25 members in the total membership of the House, which latitude will probably be appreciated by the official who calculates the first apportionment. It is estimated that 73 towns will fall under the partial representation rule.[25] The essential features of the amendment are the alteration of the basis of representation from population to ballots cast, and the reduction of the size of the lower House from 405 to a number between 300 and 325.

The object of this unusual method of apportionment is to reduce the House at the expense of the cities so far as possible. In many New Hampshire cities there is a considerable group of aliens who

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the first, there shall be required for each additional representative an addition of three times the number of ballots required for one representative.

(A paragraph dealing with towns or wards whose boundaries may have been altered between apportionments is omitted.)

Art. 10. Whenever any town or ward shall have cast less than the said average number of ballots required by the apportionment to entitle such town or ward to a representative all the time, the legislature shall authorize such town or ward to elect and send a representative such proportional part of the time as its average total number of ballots cast shall bear to the requisite number established in the apportionment for one representative; but the general court shall not authorize any such town or ward to elect and send such representative except as herein provided.

[25] "Tables of Representation," prepared by the order of the convention.

under the present rule help swell the city representation.[26] It is proposed in substance to remove this class from consideration in apportionment, and in addition to penalize any community which displays indifference in the use of the ballot. It will be interesting to observe what effect if any such a plan will have on the numbers of those voting.

The estimated result of this amendment would be to reduce the representation of Manchester by 32, of Nashua by 10, of Concord and Berlin by 6, of Dover by 4, of Keene by 3, of Rochester, Somersworth, Franklin, and Portsmouth by 2 each, and of Laconia by one.[27] This accounts for 70 of an approximate reduction of one hundred. The prospects of success for this amendment are not wholly unclouded. If, however, it fails to commend itself to the voters, the next census will require a House of approximately 425, in which all the faults of the present overgrown chamber will be exaggerated.

The remaining work of the convention may be briefly disposed of. The proposal to give the governor power to veto items of an appropriation bill covers familiar ground; the convention was not conversant with the improved variant recently adopted in Massachusetts by which the governor is given the power to reduce as well as to strike out such items.[28] The proposal to remove the relics of an obsolete sectarianism from the Bill of Rights has been before the people for a half century, and curiously enough, seems to be steadily losing favor. The proposal eliminating a dubious privilege of the conscientious objector is a reflection of war conditions, and if accepted will merely remove an obsolete clause from the constitution.

The proposal to eliminate the one year limit on pensions is more important, and deserves a word of explanation. Article 36 of the Bill of Rights recites, "Economy being a most essential virtue in all states, especially in young ones, no pension should be granted but in consideration of special services; and such pensions ought to be granted with great caution by the legislature, and never for more than one year at a time * * *." It is proposed to strike out the closing words, chiefly in order to enable the state to hold in its serv-

[26] In order to make this plan more acceptable to the representatives of the cities, it was pointed out that the plans for Americanization of aliens now well under way in New Hampshire would soon remove this temporary handicap.

[27] "Tables of Representation," *supra*.

[28] MASS. CONSTITUTION, Art. III (as approved November 4, 1919).

ice a capable force of public school teachers, firemen and police. This amendment, originally assented to without discussion, stirred up a vigorous debate on reconsideration, when it was alleged that it was dangerous procedure to open up to the legislature the possibility of an unlimited pension system. This was not the only occasion when the convention recorded its distrust of the General Court.

It can hardly be said that the convention of 1918-1920 gave a careful consideration even to the important matters of constitutional interest which fell within its jurisdiction. Attendance was poor, and as is usual in New Hampshire political bodies, leadership, organization, and direction were carried on by comparatively few. Among the important matters which failed to secure adequate consideration may be noted first, an easier method of amending the constitution. Five different propositions on this subject were offered to the convention,[29] of which one only reduced the two-thirds majority rule. It may be fairly said that the convention was content to leave the present difficult amending procedure intact, preferring the evils of an antiquated constitution if need be, to the anticipated dangers of a more elastic system. A proposal for a constitutional initiative amendment and a referendum on laws was defeated by a decisive majority. A resolution to abolish the governor's council received scant attention. No action was taken to alter the existing rule of Senate apportionment on the basis of direct taxes, or to enlarge the size of the upper House.[30] Proposals to vest in the legislature power to regulate bill-board advertising, to increase the salaries of various state officials now fixed by the constitution, to create the office of legislative draftsman, to give a favored position on the legislative calendar to governor's bills, and to grant towns and cities power to loan their credit for the purpose of securing the continued operation of an existing public utility, were rejected without debate following an unfavorable committee report. Measures providing for the executive budget, reorganization of the state administration, introduction of greater efficiency in the state government, which have played so prominent a part in recent conventions, were not even presented. Such matters, if thought of at all, were thought of as legislation, not as constitutional law. The greatest failure of the convention was its refusal to propose a more elastic method of constitutional amend-

[29] Resolutions number 3, 8, 10, 13, 15.

[30] At present 24. Thirteen Senators may therefore control legislation.

ment;[31] its greatest success, if popular approval be granted, will lie in the taxation amendments and the reduction of the size of the House.

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[31] The inelasticity of the existing methods of amending the constitution was emphasized by the results of the election of November 2, 1920. Every proposed amendment was defeated at the polls, although all but one received a considerable majority of the votes cast on the proposition. The vote on each question follows:

Question 1 (Income Tax)—Yes, 46,430; No, 30,364.

Question 2 (Inheritance Tax)—Yes, 45,415; No, 24,222.

Question 3 (Item Veto)—Yes, 45,634; No, 26,195.

Question 4 (Reduction in Size of House of Representatives)—Yes, 48,598; No, 28,121.

Question 5 (Conscientious Objectors)—Yes, 35,932; No, 31,509.

Question 6 (Protestant Religion)—Yes, 35,172; No, 42,322.

Question 7 (Pensions)—Yes, 44,456; No, 31,995.

Question two, providing for an inheritance tax graduated according to the amount passing, came nearest to success with a majority which lacked 1,010 of the requisite two-thirds of those voting on the proposition. The income tax amendment lacked 5,736 votes; the proposal for reduction in the size of the House of Representatives lacked 2,481 votes. Question six furnished a surprising result; it received more votes than any other proposition, and was rejected by the most decisive majority. The inference appears to be that the people of New Hampshire are more interested in retaining an eighteenth century privilege for the Protestant religion, "rightly grounded on evangelical principles," than in providing a twentieth century system of taxation.