

The Conscientious Objector Amendments of 1877 to the State Militia Act

BY

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On February 20, 1877, the Minnesota Legislature amended the state Militia Act to create an exemption for conscientious objectors. Why? The nation was at peace, though economically at the bottom of a business cycle that began with the Panic of 1873. The Civil War ended twelve years earlier. Under the Compromise of 1877, following the disputed presidential election of 1876, federal troops would be withdrawn from Confederate states. The brief Dakota War was a memory. The Battle of the Big Horn was fought the previous year, but native tribes had been subdued. Curiously, in 1866, the entire chapter on the state militia was repealed by the legislature, and not reinstated until four years later.¹

In 1858, the first state legislature established the state militia. The law required all men between 18 and 45 to enroll in the state militia but provided that volunteers would be first ordered into active duty in “cases of war, invasion, riot, or insurrection.”²

¹ Stat. ch. 122, §1, at p. 677 (1866) repealed the chapter on the state militia (see also Stat. ch. 12, at p. 189 (1866)). In 1866, commissioners appointed to revise the statutes recommended a chapter on the militia but it was rejected by the legislature. Whether this was deliberate or by inadvertence and carelessness is not known.

² The 1858 law provided:

Section 1. All able-bodied, white male citizens residing in this State being eighteen years of age and under the age of forty-five years, excepting persons exempt by law, shall be enrolled in the militia and perform military duty in such manner—not incompatible with the Constitution and laws of the United States—as hereinafter prescribed.

...

Sec. 8. That it shall be the duty of the township assessors of the several townships, and the assessors of the several wards of the several cities, to prepare a list of all persons liable to be enrolled as

Enrollment, while mandatory, was not yet conscription. It also required all assessors “to prepare a list of all persons liable to be enrolled in their respective wards, townships or districts” and file it with the county auditor. It imposed modest sex and age requirements for volunteers—men could not be less than eighteen, unless they had the permission of a parent or guardian, or more than forty-five. Conscientious objectors were not exempt from enrolling, nor, obviously, from the “active militia,” which was composed of volunteers.

After the 1866-1869 hiatus, the legislature reinstated the militia. By the 1870 militia act, “all able-bodied male residents of the state” were enrolled in the militia, and only “Indians not taxed, idiots, lunatics,” and certain felons were exempt. Like the 1858 law, it required all assessors of personal property “to enroll all persons in their respective districts liable to do military duty [on] forms to be prescribed by the adjutant general” and return

aforesaid, in their respective wards, townships or districts, save and except members of uniform volunteer companies. Township, ward or district assessors aforesaid shall annually, at the time of assessing taxable property, make out a roll or list of all names of persons enrolled as aforesaid, and place it at the Auditor's office of the proper county; and it shall be the duty of such Auditor, annually on or before the first day of November, to return an accurate copy of records of enrollment to the Adjutant-General of the State....

Sec. 9. That the militia thus enrolled shall be subject to no active military duty save and except in case of invasion, or to prevent invasion, riot or insurrection; in such case the Commander-in-Chief is hereby authorized to order out from time to time, for actual service, as many of the militia thus enrolled as necessity may require, and to provide for their organization in the manner hereinafter prescribed for the organization of volunteer militia: *Provided*, That in all such cases the enrolled volunteer militia shall first be ordered into service.

Sec. 10. That the active militia of this State shall be composed of volunteer companies, raised by order of the Commander-in-Chief within the limits of the several brigade districts. The volunteer militia shall in all cases of war, invasion, riot, or insurrection, be the first military force ordered into the field (sic). Volunteers shall consist of men between the ages of eighteen and forty-five; provided that no minor shall be enrolled as a member of any such volunteer company, without the consent of his parent or guardian.

1858 Laws, ch. 77, §§1, 8, 9, 10, at p. 231-5 (August 12, 1858).

them to the county auditor.³ By an amendment the following year, the legislature returned to a volunteer militia, now called the **National Guard**, while retaining the requirement that automatically enrolled most all males in the militia.⁴

³ The 1870 law on “enrolling and organizing the militia” provided:

Section 1. All able-bodied male persons residing in the state of Minnesota, between the ages of eighteen and forty-five years, excepting only Indians not taxed, idiots, lunatics, and persons who have been convicted of infamous crimes, shall constitute the militia of this state, and be liable to perform military duty in case of war, invasion, rebellion, or to maintain the public peace and enforce the laws.

Sec. 2. It shall be the duty of all assessors of personal property for taxation in [1870], and every second year thereafter, in their respective districts of townships, villages, or cities to enroll all persons in their respective districts liable to do military duty, according to the provisions of this act, which enrollment shall be made according to the forms to be prescribed by the adjutant general, and return the same under oath to the county auditor, at the same time the return of personal property in his district is made, and no pay or compensation shall be allowed by any township, city, or village for any services performed by any assessor who shall fail to make and return the enrollment herein provided for, which enrollment when made shall be filed in the office of the county auditor and safely preserved, an abstract or statement of which shall be made and duly certified by said auditor on or before [October 1, 1870], and every two years thereafter, or when required to be made...

1870 Laws, ch. 22, at p. 36; Stat. ch. 23, Title I, at p. 531 (effective March 2, 1870).

⁴ The 1871 law provided:

Sec. 3. The active militia shall be composed of volunteers, and in case of war, invasion, the prevention a invasion, the suppression of riots, and to aid civil officers in the execution of the laws of the commonwealth, shall be first ordered into service, and shall be known and designated as the **National Guard of the State of Minnesota. The governor is commander-in-chief of the militia of the state, and shall appoint his staff officers....**

1871 Laws, ch. 11, §1, at p. 31; Stat. ch. 23, Title I, at p. 532 (effective March 1, 1871). The careless use of the word “commonwealth” rather than “state”

As matters stood when the Nineteenth Legislature convened in January 1877, all men in the state between 18 and 45 who were not mentally or physically disabled, infamous felons or Indians residing on a reservation, were members in the militia, required to sign enrollment forms, and “liable to perform military duty”; however, actual duty was not likely because the first militiamen to be “ordered into service” in case of war, invasion, to suppress riots, and to aid civil authorities enforce the laws were the volunteers, who formed an “active militia.”

The 1877 amendments permitting exemptions for conscientious objectors were substantively profound and procedurally modest. For the first time, certain conscientious objectors could become exempt from service in the state militia. To claim exemption, he simply filed an affidavit every five years with the clerk of district court in the county he resided in. The law provided:

All able-bodied male persons residing in the State of Minnesota, between the ages of eighteen (18) and forty-five (45) years, shall constitute the militia of this State, and be liable to perform military-duty in case of war, invasion, rebellion, or to maintain the public peace and enforce the laws, excepting—

***First.* — All persons who shall make and file with the clerk of the district court of their respective counties an affidavit that they are members of any religious society or organization by whose creed or discipline the bearing of arms is forbidden, and which affidavits shall be renewed every five (5) years.**

***Second.* — Indians not taxed, idiots, lunatics, and persons who have been convicted of infamous crimes.⁵**

When the legislature enacted this exemption, the state was at rest only in a military sense. In others it was undergoing dramatic upheaval. Through immigration, its population was

suggests that the language was borrowed verbatim from the code of an East Coast state.

⁵ 1877 Laws, ch. 16, §1, at p. 54 (effective February 20, 1877).

exploding.⁶ States in the Middle West and Great Plains vied for immigrants to settle and till the vast expanses of land available under the 1862 Homestead Act.⁷ Railroads, flush with federal land grants, also promoted European emigration to regions

⁶ The state's population increased from 172,023 in 1860, to 439,706 in 1870, to 780,773 in 1880.

Immigration to Minnesota and elsewhere in the 1870s did not occur at a steady, even rate; it fluctuated with the condition of the economy. In 1877, the country was at the nadir of a depression that curtailed immigration. Professor Aristide Zolberg describes the relationship:

[I]t is evident that the volume of immigration was highly responsive to variations in the American business cycle. Atlantic immigration quickly recovered from the sharp drop of 1868, reaching approximately the same level in 1873 as in the record year 1854, but the "panic" of 1873 once again awakened concern over a sudden labor surplus and precipitated an outcry over the "dumping" of convicts and paupers by European states, leading to renewed congressional calls for remedial action. In 1877, when the United States experienced its worst depression as well as its largest strike wave to date, business misgivings extended to the intrusion of a new breed of labor "agitators." However, matters appeared to take care of themselves, as annual entries declined rapidly to about 130,000 in 1878, the lowest level since 1863. Economic recovery once again fostered talk of a labor shortage, but immigration quickly escalated, exceeding the previously established record in 1880 and reaching 749,363 in 1882, a number that would turn out to be the century's maximum.

Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* 186 (Harvard Univ. Press, 2006) (citing sources).

⁷ In his annual message to the legislature on January 11, 1877, Governor Pillsbury noted that other states sought immigrants by touting their "recent bountiful harvest" and he urged Minnesota to take similar steps:

Can Minnesota, with such fruits as she has to exhibit, and with such need of people upon her vacant prairies, afford to remain idle while her competitors are active? Whatever else is necessary to build up a prosperous state, the first requisite for such purpose is unquestionably to people its vacant places and cultivate its idle soil. However rich its natural resources, if nothing be done toward their development, prosperity cannot follow. I commend the matter to your favorable action.

John S. Pillsbury, "Annual Message" in 1 *Minnesota Executive Documents for 1877* 5, 42 (1878). One means of self-promotion was a pamphlet, "Minnesota Its Resources and Progress," which the state mailed to potential settlers. "Annual Report of the Secretary of State" in 1 *Minnesota Executive Documents for 1876* 49, 56 (1877).

where settlers could work on construction crews or establish homesteads and use the roads to ship their crops, produce and livestock to markets.⁸

Typifying the stereotypical thinking of this period, promoters believed that certain nationalities produced better farmers than others.⁹ And so they directed their efforts to attract select groups, one being Russian Mennonites. This sect was described by President Grant in his message to Congress in 1873 as “an industrious, intelligent, and wealthy people, desirous of enjoying civil and religious liberty.”¹⁰ The Mennonites did not participate

⁸ Walter Nugent, *Crossings: The Great Transatlantic Migrations, 1870-1914* 34 (Indiana Univ. Press, 1992) (“In North America, railroad companies whose governments had given them public domain land to help pay for (and provide users for) their lines actively recruited European migrants from the 1870s to the 1920s.”); Carl Wittke, *We Who Built America: The Saga of the Immigrant* 308 (Case Western Reserve Press, 1939) (“In Kansas, settlements were similarly determined in many cases by the opportunity to find jobs in railroad construction gangs, and the Santa Fe Railroad was largely responsible for bringing the Russian Mennonites to the state.”).

⁹ David M. Emmons, *Garden in the Wilderness: Boomer Literature of the Central Great Plains* 111-2 (Univ. of Nebraska Press, 1971) (“The conventional wisdom held that certain European nationalities were better adapted to agriculture than others, either through training, disposition, or racial characteristics. The English were included among this select group; so too were Welsh, Scots, and Scandinavians. But of all the Europeans the Germans were unanimously adjudged the finest farming people anywhere. The state or railroad able to coax a German family to its borders was considered fortunate indeed. Most of the other Europeans suffered by comparison, though some were poor agriculturalists by any standard.”). For a study of pernicious national stereotyping in a different period (the 1920s) and different context (a murder trial), see Douglas A. Hedin, “Strangers Within the Gates: Ethnic and National Stereotyping in the Sacco-Vanzetti Case” (SSRN Paper No. 953056, 2008).

¹⁰ Ulysses S. Grant, “Fifth Annual Message” (December 1, 1873), in James D. Richardson ed., *7 Messages and Papers of the Presidents* 235, 253 (1897) (“The expressed desire of the representatives of a large colony of citizens of Russia to emigrate to this country, as is understood, with the consent of their Government, if certain concessions can be made to enable them to settle in a compact colony, is of great interest, as going to show the light in which our institutions are regarded by an industrious, intelligent, and wealthy people, desirous of enjoying civil and religious liberty; and the acquisition of so large an immigration of citizens of a superior class would without doubt be of substantial benefit to the country. I invite attention to the suggestion of the Secretary of the Interior in this behalf.”). The President preceded this “invitation” with a reference to the impact of the railroads on western settlement: “The increased and steadily increasing facilities for reaching our unoccupied public domain and for the transportation of surplus

in the affairs of civil government, and refused to take oaths or bear arms. In 1873, the Czar revoked their exemption from military service and gave them five years to relocate; this precipitated their search for lands where they could practice their religion without state interference.¹¹ Realizing that the Mennonites needed to emigrate and believing that they were practically born to succeed at farming, state and railroad promoters targeted them. Professor David M. Emmons describes the negotiations between the promoters and the Mennonites, who eschewed politics, but wanted official action guaranteeing their freedom from military service:

Nowhere is this [the promoters' belief that some nationalities produced superior farmers] better shown than in the promotional campaign launched by the western states to secure the immigration of the Russian Mennonites—in spite of the fact that the Mennonites made some rather stiff demands as conditions of that immigration. They wanted the right to live in closed communities with their own local government, plus the right to use the German language in all matters, public and private. In addition, they insisted upon complete religious freedom, exemption from all military service, and land of good quality at a moderate price and on easy terms. They also reminded the Plains states that Canada had offered to pay all transportation costs, and although this was not an essential condition, it would be greatly appreciated. (Usually immigrants were less demanding. The Homestead bill to most of them was an act of such overwhelming generosity that

products enlarge the available field for desirable homestead locations, thus stimulating settlement and extending year by year in a gradually increasing ratio the area of occupation and cultivation.” Id.

¹¹ Walter Nugent, *supra* note 8, at 34 (“Changes in legal status sometimes provoked migration; examples are the withdrawal in the early 1870s of German-Russian Mennonites’ exemption from czarist military conscription, and the pogroms against Jews in the Russian Pale and Congress Poland after Czar Alexander II was assassinated in 1881. Few members of those groups ever repatriated. Such cases aside, the pervasive motive for migration was economic improvement rather than religion, politics, or persecution.”).

little else was needed to secure both their gratitude and their allegiance.) The promoters, however, were undeterred by the Mennonite demands.¹²

An early historian of Mennonite migration describes the results of the competition between the states:

In as much as war seemed but a remote possibility, and all western states were engaged in a keen rivalry to secure settlers for their vacant lands, these guarantees, urged by railroad companies and eager land departments, were not difficult to secure from the legislature.

The Minnesota law, passed [in 1877] provided that affidavits [attesting to religious scruples against bearing arms] needed to be renewed only every five years instead of annually as in the Kansas and Nebraska statutes.¹³

With a more liberal or extended filing requirement than its competitors, Minnesota aimed to attract more Mennonites. Did it work? While the evidence is sparse, incomplete and

¹² David M. Emmons, *supra* note 9, at 113 (citing sources).

¹³ Charles H. Smith, *The Coming of the Russian Mennonites: An Episode in the Settling of the Last Frontier, 1874-1884* 265-7 (Mennonite Book Concern, 1927).
Kansas' legislation provided:

Exemption §2. That the following persons are exempted from enrollment in the militia of the State: First, All persons employed in or about the State prison or houses of correction; second, all persons exempted by the laws of the United States; third, all persons who shall, on or before the first day of May of each year, make and file with the county clerk of their county an affidavit that they are members of any religious society or organization by whose creed or discipline the bearing of arms is forbidden.

Kansas Stat. ch. 64, §2, at p. 527 (1876). It was first enacted in 1874.

I have not found Nebraska's law. Both Charles Smith and David Emmons write that Nebraska required a religious objector to file an affidavit claiming exemption annually but Smith does not give a citation to the statute while Emmons cites Smith and the Annual Message of Nebraska Governor Thomas A. Osborne, dated January 11, 1874. See Emmons, *supra* note 9, at 114 n. 45.

unreliable, it seems that most Mennonites settled in Minnesota before 1877, and were attracted by the availability of fertile land which railroad and state land agents promoted.¹⁴

In the 1870s, Minnesota's Commissioner of Statistics identified foreign-born inhabitants by their nationality in his annual reports. Most immigrants came from the British Isles, Ireland, and Central European nations, each of which was named. So few came from other countries that they were lumped together under that heading. Russia, the home of Mennonites, fell into this category. In 1870, 2,671 Minnesota residents had been born in "other countries" and in 1875, only 3,938.¹⁵ Some "others" were Russian Mennonites but not all. Ten years later, the Secretary of State counted only 2,486 native Russians residing in the state.¹⁶

In 1877 and 1878, the Commissioner of Statistics tabulated membership in various religious bodies in the state. In 1877,

¹⁴ Carl Wittke points out that Mennonites emigrated from Russia for multiple reasons; these included the Czar's edict as well as the availability and richness of land in America, touted in booster literature:

The immediate cause of the Russian-German immigration was the cancellation of their exemption from military service by the Russian government. But if this was the immediate cause, other factors—such as religious controversy and the propaganda of American railroad companies—were also effective in stimulating emigration. Advertisements in the German language issued by the Burlington and Quincy and the Union Pacific Railroads, and immigration agents of the Santa Fe Railroad, were well known in the German settlements along the Volga and in other Russian colonies. Economic discontent and the hunger for land brought most of this group to America.

Wittke, *supra* note 8, at 308. See also Aristide R. Zolberg, *supra* note 6, where he noted the correlation between numbers of immigrants and the condition of the American economy. In 1877, the country was in a depression and immigration lower than in more prosperous years.

¹⁵ "Annual Report of the Commissioner of Statistics" in *1 Minnesota Executive Documents for 1875* 1, 117 (1876). The table lists "Foreign born by countries."

¹⁶ "Annual Report of the Secretary of State to the Legislature," *1 Minnesota Executive Documents for 1886* 512, 513 (1887). The table is titled "Nativities of the residents of Minnesota according to the enumeration taken by the Secretary of State, May 1, 1885."

1,400 Mennonites resided in the state, and in 1878 about the same number.¹⁷ It is probable that most of them had established homesteads before 1877 or, to put it another way, it is likely that few families rushed to the state in response to the passage of the militia exemption on February 20, 1877. Support for this conclusion can be found in a letter dated “November 1877” from S. H. Soule, an early settler in Cottonwood County, appended to the Commissioner’s 1877 Report.¹⁸ Soule’s description of the Mennonites was a faint echo of President Grant’s:

They are a very economical, temperate, and industrious people, fairly educated, who have very little patriotic spirit, and very little to say in public affairs, which does not redound to their own immediate benefit.¹⁹

¹⁷ “Annual Report of the Commissioner of Statistics” in 3 *Minnesota Executive Documents for 1877* 232 (1878). The table is titled “Statistics of Religion.” Another table lists 195 Mennonite families, comprising 1,348 individuals, residing in Cottonwood, Watonwan, Jackson, Redwood and Brown Counties in 1877. *Id.* at 235.

The “Statistics of Religion” table for 1878 can be found in the “Annual Report of the Commissioner of Statistics” in 3 *Minnesota Executive Documents for 1878* 260 (1879). The same denominations listed in the 1877 report are listed in the table for 1878. The membership totals for several denominations differ from 1877 □ some are higher, others lower, a few unchanged. The last digit for the Mennonite membership is smudged □ it is either 1,400 or 1,403.

¹⁸ S. H. Soule to Commissioner T. M. Metcalf, November 1877, in “Annual Report of the Commissioner of Statistics” for 1878, *supra* note 17, at 233. Soule was an early settler and organizer of Mountain Lake Township in Cottonwood County. John A. Brown ed., *History of Cottonwood and Watonwan Counties, Minnesota* 164 (B. F. Bowen & Co., 1916).

¹⁹ Soule to Metcalf, *supra* note 18, at 234. Commissioner Metcalf also attached a less favorable assessment of James A. Brown, an agent in the Land Department of the Northern Pacific Railroad Company. In his letter Brown replied to several questions from Metcalf:

Q.—What are the prospects of further immigration?

A.—5. Little prospect of any great increase by further immigration. This department is not offering any inducements, or making any effort to secure them, yet the richness of the country renders it so attractive to those now here that they are trying to induce their friends to settle near them, and no doubt many more will come.

Q.—Their social condition and form of domestic government?

He provided an account of the Mennonite community in Cottonwood County that included rudimentary statistics:

The Czar, in 1873, issued an order requiring military service from all subjects alike, but allowing five years' time to those who so desired in which to remove. Morally and religiously believing in peace, they determined to seek homes in a country whose laws did not compel servitude to war. Acting on strong convictions, they at once informed themselves of the constitution, laws, and political relations of church and state in the different countries of America. Delegations were sent out to make examinations, and a decision was made in favor of the United States. Though several hundred families emigrated to Brazil, the largest emigration has been to this country, where they have found homes on the prairies of Kansas, Nebraska, Dakota, Minnesota, and in Canada and the valley of the Red River.

During the first year after the issue of the order of the Czar, the nucleus of a colony was formed at Mountain Lake, Cottonwood county, through the influence of Hon. Wm. Seeger. This settlement has gradually assumed proportions, extending into neighboring counties until its population is now over 1300, controlling 27,000 acres of land. The years of 1873, 1874, and 1875 were more favorable for immigration than the past two years...²⁰

A.—6. No progressive ideas; quiet and orderly in their habits; social only among themselves. Their form of internal government I know nothing of.

Q —Do they readily assimilate with our people, and promise to make good citizens?

A.—7. If those with us are good illustrations of the masses, they are far from being first-class citizens....

Power to Metcalf, August 9, 1877, supra note 18, at 236.

²⁰ **S. H. Soule to Metcalf, supra note 18, at 233.**

According to Soule, most of the 1,300 Mennonites residing in the county in late 1877 had arrived in 1873-1875. He notes their objection to military service but does not mention the state law exempting them from the militia enacted only nine months earlier.²¹ He shrewdly predicts that because the Czar's five year grace period was about to end, future Mennonite immigration would decline.²² There is no hard evidence that he was wrong.

Viewing the 1877 conscientious objector amendment to the state militia act, many twenty-first century observers will see an early example of civil liberties legislation.²³

To contemporary railroad and land promoters, however, the amendment was an economic measure, intended to attract to the state a religious sect that was naturally endowed with skills to be successful homesteaders and productive farmers. The

²¹ Soule writes that some Mennonites believed that if they did not vote they would be exempt from military service, which suggests that they were unaware of the recently-enacted exemption law. *Id.* at 234-5 (“A division of opinion exists between the leaders of the different parishes as to the use of the ballot; some abstain from its use, believing that they will be exempted from military duty in case of war. Others, who have purchased deeded land which did require the use of citizen’s papers, have not procured them, thereby depriving themselves of suffrage.”).

²² *Id.* at 234 (“The forced sales of lands and the decline of the Russian circulating medium, which they are obliged to receive in payment, has brought many to this country in a comparatively impoverished condition, who were in easy circumstances in Russia. The early emigration worked greatly to the pecuniary disadvantage of those who remained, since the large amount of land thrown on the market reduced the price, and the customers for land became scarce. These causes, with the expiration of the five year limit, will doubtless reduce future immigration very much, though large numbers will doubtless arrive from year to year.”).

²³ Minnesota’s current law provides:

Exemptions from military duty. . . . all persons who because of religious beliefs shall claim exemption from military service if the conscientious holding of such belief by such person shall be established under such regulations as the President of the United States shall prescribe, shall be exempt from militia service in a combatant capacity; but no person so exempted shall be exempt from militia service in any capacity that the President of the United States shall declare to be noncombatant.

Stat. ch. 190, §190.06, subd. 4 (2011).

legislature knew that it would have no effect on the operations of the militia.

The amendment's effect on Russian Mennonite immigration is open to conjecture. It probably did not motivate many families to come to Minnesota, but it may have influenced those who had already arrived and begun homesteading, to remain rather than relocate to another state or province.

It is reasonable to conclude that its effect on the families of Mennonite men who claimed exemption was immediate and positive: it gave them the religious security and personal respect they needed. ■

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