

Constitutional Aspects of Proposition 1: Amending the Vermont Constitution to give General Assembly Authority to Add to Qualifications for Election to, and Establish Requirements for Holding, Certain County Constitutional Offices

Senate Committee on Government Operations

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April 6, 2023

I. Introduction

My name is Peter Teachout. I am a professor at Vermont Law School, where I have been on the faculty since 1975. My areas of interest are U.S. and Vermont constitutional law and history. I have published articles on topics in these areas and have testified before various committees of the Vermont legislature on bills under consideration involving issues of federal and state constitutional law. I appreciate the opportunity to testify this afternoon on constitutional aspects of Proposition 1.

In my oral testimony, I am prepared to address the following six questions:

- (1) Why is amendment of the Vermont constitution as proposed by Proposition 1 being considered? Why is it thought to be necessary?
- (2) If the legislature wants authority to add to the qualifications for election to offices listed in Section 50, what sort of provision would give the legislature authority to do so?
Amendments in other states.
- (3) Does the General Assembly already have authority to add to the qualifications for election to the offices of assistant judge, sheriff, state's attorney, and probate judge without amendment?
- (4) Is it possible to amend Section 50 to give the General Assembly the authority it wants without repeating the authorization under each of the covered constitutional offices?
- (5) If amendment is required to authorize the General Assembly to add to the qualifications for election to office, is amendment also required to authorize the imposition of sanctions for malfeasance in office?
- (6) If authorization to add to the qualifications for election to office is wanted, how specific or how broad (or how possibly "bounded") should the amendment be? Experience of other states.

My tentative general conclusions are as follows:

- (1) If the legislature wants authority to add to the qualifications of one or more of the constitutional offices listed in Section 50, Section 50 should be amended to so provide.
- (2) Section 50 can be amended in a more efficient way than as currently proposed. I suggest language that will do the work.

(3) I am not sure that the amendment also needs to provide the legislature with authority to impose sanctions on office holders for malfeasance or neglect of duty. That is a separate issue. On the basis of less than complete research, I have not been able to find any cases supporting the need to do so by constitutional amendment. It is my impression that mechanisms are already in place in Vermont for imposing sanctions. If not required, I recommend eliminating that part of the proposed amendment.

My oral testimony will track the outline set forth below.

II. Proposed Amendment

Proposition 1 would amend Sections 50 and 51 of Chapter II of the Vermont Constitution to give the General Assembly authority to add to the qualifications for election to certain county offices and to establish requirements for holding office subject to possible sanction or removal for failure to meet those requirements.

The proposed amendment in current form reads as follows [amended language underlined]

§ 50. ELECTION OF ASSISTANT JUDGES, SHERIFFS, AND STATE'S ATTORNEYS

The Assistant Judges shall be elected by the voters of their respective districts as established by law. Their judicial functions shall be established by law. Their term of office shall be four years and shall commence on the first day of February next after their election. The General Assembly may establish by law qualifications for the election to and holding of such office and procedures for removal from such office for failure to meet or to maintain the required qualifications.

Sheriffs shall be elected by the voters of their respective districts as established by law. Their term of office shall be four years and shall commence on the first day of February next after their election. The General Assembly may establish by law qualifications for the election to and holding of such office and procedures for removal from such office for failure to meet or to maintain the required qualifications.

State's Attorneys shall be elected by the voters of their respective districts as established by law. Their term of office shall be four years and shall commence on the first day of February next after their election. The General Assembly may establish by law qualifications for the election to and holding of such office and procedures for removal from such office for failure to meet or to maintain the required qualifications.

§ 51. ELECTION OF JUDGES OF PROBATE

Judges of Probate shall be elected by the voters of their respective districts as established by law. The General Assembly may establish by law qualifications for the election to and holding of such office and procedures for removal from such office for failure to meet or to maintain the required qualifications. Their term of office shall be four years and shall commence on the first day of February next after their election.

Sec. 4. EFFECTIVE DATE

The amendments set forth in Secs. 2 and 3 shall become a part of the Constitution of the State of Vermont on the first Tuesday after the first Monday of November 2026 when ratified and adopted by the people of this State in accordance with the provisions of 17 V.S.A. chapter 32.

III. Analysis

(1) Why is amendment of the Vermont constitution as proposed by Proposition 1 thought to be necessary? The generally-applicable constitutional rule

The best way to approach this question is to start with concrete examples. Can the state add to the qualifications for election to the office of state's attorney the requirement that one has to be a lawyer licensed to practice in the state? Can it do so without constitutional amendment? Could the state require that to be elected to the office of county sheriff, one has to have attended at least 16 weeks at the police academy and hold a level 3 certification? Could it do so without constitutional amendment?

The answer I think is no to both questions – amendment would be required - but there are two parts to the answer: one a matter of general constitutional law, the other, an examination of what the state constitution currently provides.

The primary motivation for amending Section 50 lies in the generally accepted constitutional rule that a state legislature cannot add to the qualifications for election to “constitutional office” unless authorized to do so by the state constitution itself.¹

This is the rule adopted by the vast majority of state courts that have addressed this question and likely to be the rule adopted by the Vermont Supreme Court if faced with the question. So if the question were to be raised in Vermont, Can the state legislature add to the qualifications for election to any one of the three constitutional offices listed in Section 50 of Chapter II, the likely

¹ See *Reale v. Board of Real Estate Appraisers*, 880 P.2d 1205 (Colo); *Jackson v. State*, 966 P.2d 1046 (Colo); *State ex rel. Childs, v. Holman*, 59 N.S. 1006 (Minn); *Cathcart v. Meyer*, 88 P.3d 1050 (Wyo); *Gerberding v. Munro*, 949 P.2d 1366 (Wash); *State ex rel. Powers v. Welch*, 259 P.2d 112 (Ore).

answer would be no, that it cannot do so without specific authorization in the text of the constitution itself.

(2) What sort of amendment language would give the legislature the power to add to the qualifications for election to constitutional office?

Drawing upon the experience of other states that have amended their constitutions to give the legislature the needed authority, the answer is simple. All that is required is to attach to the existing list of qualifications in the text of the constitution the phrase “or as may be provided by law.”

(3) In that light, and light of the language in Section 50, does the General Assembly already have authority to add to the qualifications for election to the offices of assistant judge, sheriff, state’s attorney, and probate judge without the need for amendment?

If you read Section 50, you will see that under each of the offices listed there, the first sentence provides that holders of the relevant county office (assistant judges, state’s attorneys, sheriffs) “shall be elected by the voters of their respective districts as established by law.”

One way to read that provision is to say that the phrase “as established by law” means that the General Assembly may “establish by law” – may add to - the qualifications for election to the particular office. The problem with relying on that interpretation however is that the same phrase might also be read to provide only that the General Assembly may regulate the procedures for electing candidates to those constitutional offices. We don’t know how the Vermont Supreme Court would interpret that phrase, but given the context, and given the fact these are constitutional offices, there is a good chance that the Court would conclude the phrase means only the latter: that it only authorizes the legislature to regulate election procedures.

If the phrase were to be interpreted that way, that would mean the General Assembly does not currently have the authority to add to the qualifications for election to these offices. Given the uncertainty, it probably makes sense to make clear by constitutional amendment, if that is what the legislature wants, that the legislature has authority to add to the qualifications for election to the constitutional offices covered by Section 50.

(4) Is it possible to amend Section 50 to give the General Assembly the authority to add to qualifications for election to the particular offices involved without repeating the authorization under each of the covered constitutional offices? A “Vermont” version of Proposition 1:

It seems to me the proposed amendment in current form is unnecessarily redundant. I think it is possible to frame an amendment that does not require repeating the authorization requested under each of the constitutional offices. The same constitutional end could be accomplished by inserting the following sentence, or something like it, at the start of Section 50 [new language underlined]:

§ 50. ELECTION OF ASSISTANT JUDGES, SHERIFFS, AND STATE'S ATTORNEYS

“Except as otherwise provided by law setting out qualifications for election to the offices listed below [and establishing requirements for holding office], the following provisions apply:

“The Assistant Judges shall be . . . etc.

That is all you need. It does the work that needs to be done. For reasons set out below, I do not think the language in brackets is required, but I frame this version with the bracketed language included to make it cover the same ground as covered in the proposed version set out above.

(5) If amendment is required to authorize the General Assembly to add to the qualifications for election to office, is amendment also required to authorize the imposition of sanctions for malfeasance in office?

I do not know what I am missing here, but I am not sure that the amendment also needs to provide the legislature with authority to impose sanctions on office holders for malfeasance or neglect of duty. That is a separate issue. On the basis of less than complete research, I have not been able to find any cases supporting the need to do so by constitutional amendment. It is my impression that mechanisms are already in place in Vermont for imposing sanctions.

Assistant and Probate Judges are already subject to disciplinary action and possible removal by the Judicial Conduct Board and the Vermont Supreme Court.

If the State's Attorney were to practice law without being licensed to practice law in the state, he or she would be subject to disciplinary action by the Professional Conduct Board and the Vermont Supreme Court.

If the Sheriff were to be guilty of malfeasance or neglect of duty, my understanding is that he or she would be subject to sanction and possible removal from office by the Criminal Justice Council.

All these mechanisms are currently in place. If there are deficiencies I do not see why they cannot be corrected by simple legislation without the need for constitutional amendment.

If constitutional amendment is not needed, I would recommend dropping those parts of the proposed amendment in Proposition I dealing with the imposition of sanctions and removal.

(6) If authorization to add to the qualifications for election to office is what the legislature wants, how specific or how broad (or how possibly “bounded”) should the amendment be? Experience of other states.

The legislature has considerable discretion in deciding whether to add specific qualifications for particular offices in the amendment itself or to rely instead on a general authorization to the legislature to add whatever additional qualifications are deemed desirable in the future.

Constitutional law has no great wisdom to offer with respect to how that decision is made.

However, I would be inclined to follow the prevailing practice in other states which is to go with a general authorization. I know there are concerns about possible abuse of that authorization by some future legislature, invoking what we call in constitutional law “a parade of horrors,” but I think future Vermont legislatures have to be trusted to exercise their authority to add qualifications responsibly.

Of course, the option is not just to go with a highly specific qualifications set out in the text of the constitution itself or alternatively a grant of unfettered discretion to the legislature. One could provide in the text of the amendment that the legislature is authorized to add only “performance-related” qualifications. That might not be an iron-clad guarantee against possible abuse, but it would provide a check in legislative consideration of possible additional qualifications for office and a possible basis for challenging a particular added qualification on grounds that it has nothing to do with performing the functions of the relevant office.

IV. Conclusion

There may be issues I am not seeing but these are my tentative conclusions based on what I have seen so far:

(1) If the legislature wants authority to add to the qualifications of one or more of the constitutional offices listed in Section 50, Section 50 should be amended to so provide.

(2) Section 50 can be amended in a more efficient way than as currently proposed. I suggest above language that will do the work.

(2) I am not sure that the amendment also needs to provide the legislature with authority to impose sanctions on office holders for malfeasance or neglect of duty. That is a separate issue. On the basis of less than complete research, I have not been able to find any cases supporting the need to do so by constitutional amendment. It is my impression that mechanisms are already in place in Vermont for imposing sanctions. If not constitutionally required, I recommend eliminating that part of the proposed amendment.

Thank you for your consideration.