

S.234 (An Act Relating to a Candidate’s Constitutional Qualifications for Office)

*I. Legislating Within Constitutional Parameters Under
the Separation of Powers Doctrine*

- Vt. Const. Ch. II, § 5 (Departments to be Distinct):
“The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers belonging to the others.”
- In re D.L., 164 Vt. 223, 228-229 (1995):
 - “The logic of [the SoP requirement in Vt. Const. Ch. II, § 5] is deceptively simple. To apply it, we must determine the powers of each of the branches and ensure no one exercises powers belonging to another.
 - “Briefly stated, the legislative power is the power that formulates and enacts the laws; the executive power enforces them; and the judicial power interprets and applies them . . .
 - “The focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that in some way pertain to another branch, *but whether the power exercised so encroaches upon another branch’s power as to usurp from that branch its constitutionally defined function* [emphasis added].”
- The Judicial Branch will not give advisory opinions due to the separation of powers doctrine. In re Opinion of the Justices, 115 Vt. 524 (1949):
 - 1949 General Assembly enacted H. 88, An Act to Provide for Opinions by the Supreme Court on the Constitutionality of Pending or Proposed Bills or Resolutions and on the Construction of Constitutional Provisions.
 - Gov. Gibson expressed “grave doubts” as to the constitutionality of H.88 under Vt. Const. Ch. II, § 5, and requested that the SCOV give an opinion as to that constitutional provision and whether H.88 is constitutional. (And if it is found to be constitutional, to further give an opinion on the constitutionality of a separate bill passed by the General Assembly.) Id. at 524-525.
 - The SCOV respectfully declined the request for such opinions. Id. at 526, 530.
 - “[I]n the absence of a specific constitutional authorization and where the fundamental law distinguishes between the functions of the executive, legislative[,] and judiciary departments,” the Judicial Branch is “limited to cases and controversies” with real parties or cases. Id. at 527-528.
 - “The judicial power, as conferred by the Constitution of this State upon this Court, is the same as that given to the Federal Supreme Court by the United States Constitution; that is, the ‘right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.’” Id. at 529 (other citations omitted).

- “[A]n advisory opinion is not a judicial act, and may not be required of the court under purely statutory authority.” *Id.* at 528.
 - “By no possible construction of the Constitution of this State can this power be enlarged to include the giving of an opinion upon a question of law not involved in actual and bona fide litigation brought before the Court in the course of appropriate procedure. Organically, courts are not instituted to render advisory opinions.” *Id.* at 529.
- The Judicial Branch has explicitly interpreted some constitutional provisions and the General Assembly must comply with those caselaw holdings, but other constitutional provisions have not been so interpreted. For example, under campaign finance caselaw:
 - **The Legislative Branch cannot restrict corporate independent expenditures.** There is no sufficient governmental interest to justify limits on a corporation’s political independent expenditures. *Citizens United v. FEC*, 130 S.Ct. 876, 913 (2010).
 - In *Randall v. Sorrell*, 548 U.S. 230 (2006), the U.S. S.Ct. held that Vermont’s contribution limits were so low that they unconstitutionally violated the First Am. *Id.* at 262. However, the Court also acknowledged that it was recognizing “the existence of some lower bound” **but that it “cannot determine with any degree of exactitude the precise restriction necessary” to carry out the legislative objectives of preventing corruption or its appearance.** *Id.* at 248.

II. Registered Voters and Residence Requirements

- Vt. Const. Ch. II, § 15 (Residence of Representatives and Senators):
No person shall be elected a Representative or a Senator until the person has resided in this State two years, the last year of which shall be in the legislative district for which the person is elected.
- Vt. Const. Ch. II, § 23 (Residence of Governor and Lieutenant-Governor):
No person shall be eligible to the office of Governor or Lieutenant-Governor until the person shall have resided in this State four years next preceding the day of election.
- Vt. Const. Ch. II, § 66 (Citizenship):
Every person of good character, who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold and transfer land or other real estate; and after one year's residence shall be deemed a free denizen thereof, and entitled to all rights of a natural born subject of this State, except those privileges, the right to which is herein elsewhere determined, and except also that such person shall not be capable of being elected Treasurer, or Representative in Assembly, until after two years' residence, nor be eligible to the office of Governor or Lieutenant-Governor until the person shall have resided in this State as required by section 23 of this Constitution.

- Vt. Const. Ch. I, Art. 8 (Elections to be free and pure; rights of voters therein):
 “[A]ll voters, having a sufficient, evident, common interest with, and attachment to the community, **have a right to** elect officers, and **be elected into office**, agreeably to the regulations made in this constitution.

- Vt. Const. Ch. II, § 42 (Voter’s qualifications and oath):
 Every person of the full age of eighteen years who is a citizen of the United States, **having resided in this State for the period established by the General Assembly** and who is of a quiet and peaceable behavior, and will take the following oath or affirmation, **shall be entitled to all the privileges of a voter of this state:**
 You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the State of Vermont, you will do it so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any person.
 Every person who will attain the full age of eighteen years by the date of the general election who is a citizen of the United States, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior, and will take the oath or affirmation set forth in this section, shall be entitled to vote in the primary election.

- 17 V.S.A. § 2121:
 § 2121. ELIGIBILITY OF VOTERS
 (a) Any person may register to vote in the town of his or her residence in any election held in a political subdivision of this state in which he or she resides who, on election day:
 - (1) is a citizen of the United States;
 - (2) is a resident of the state of Vermont;
 - (3) has taken the voter's oath; and
 - (4) is 18 years of age or more.
 (b) Any person meeting the requirements of subdivisions (a)(1)-(3) of this section who will be 18 years of age on or before the date of a general election may register and vote in the primary election immediately preceding that general election.

- 17 V.S.A. § 2122:
 § 2122. RESIDENCE; SPECIAL CASES; CHECKLIST
 (a) A person shall not gain or lose a residence solely by reason of presence or absence while in the service of the state or of the United States; nor while engaged in the navigation of the waters of the state or of the United States or on the high seas; nor while in a hospital, nursing home, or other health care facility; nor while confined in a prison or correctional institution; nor while a member of a veterans' home; nor while a student at any educational institution; nor while living outside the United States; nor while certified as a participant in the address confidentiality program under 15 V.S.A. chapter 21, subchapter 3.
 (b) A person may have his or her name on the checklist only in the town of which the person is a resident. For the purpose of this chapter, "resident" shall mean a person who is

domiciled in the town as evidenced by an intent to maintain a principal dwelling place in the town indefinitely and to return there if temporarily absent, coupled with an act or acts consistent with that intent. If a person removes to another town with the intention of remaining there indefinitely, that person shall be considered to have lost residence in the town in which the person originally resided even though the person intends to return at some future time. However, a person shall retain the ability to vote in a town of former residence for a period of 17 days after becoming a resident of a new town. A person may have only one residence at a given time.