MEMORANDUM

From: Daniel Richardson, Esq.
Date: March 1, 2019
Re: Non-Citizen Voting Right Provisions

Introduction

This memorandum was originally drafted to address legal issues concerning a proposed charter change that would allow non-citizen residents of Montpelier to vote in municipal elections.

This proposal raises several policy questions that are not the subject of this memorandum. Rather, this memorandum is intended to discuss some of the legal implications that such a proposal would constitute and to put the proposal into a historic perspective with a brief overview of voting rights, and their popular conception.

Historic Precedent

There is a historic precedent for allowing non-citizens to vote. In Vermont, the Constitution did not, prior to 1828, require United States citizenship as a criterion for voter eligibility. The practice appears to have been widespread in the 19th century and reflected a policy decision on the part of states trying to encourage immigration and settlement. This began with states in the northwestern territory (such as Ohio, Michigan, and Illinois) and spread westward with the frontier. *Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1402 (1993). But such rights were not the mere by products of westward expansion. They appear to be part of a larger allowance for alien suffrage shared by several states. In this light, it was not unusual for Vermont's Constitution at the time of its admission to the Union to explicitly allow for alien suffrage so long as the putative voter established residency in the state for a year, owned property, and took the freeman's oath. *Id.* at 1400.

In part, this widespread acceptance of alien suffrage was a byproduct of the country's population growth, its youth, and its lack of standards. *Id.* What it meant to be a citizen of the United States, a citizen of Vermont, and a citizen of a municipality were all evolving concepts that were developing over time. Still, it was not a universally accepted concept, and the right of non-citizens to vote in elections while accepted in some quarters was fairly controversial to others. *Gerald L. Neuman, We are the People: Alien Suffrage in German and American Perspective*, 13 Mich. J. Int'l L. 259, 294 n. 225 (1992).

By 1828, things began to change. In that year, the Vermont Council of Censors voted to propose an amendment to the Vermont Constitution to remove any right of alien suffrage and require all voters to be United States citizens. The Council found the idea of alien suffrage to be a "gross impropriety," "a danger," and a "repugnancy to the provisions of the constitution of the United States." *Journal of the Council of Censors*, at their Sessions at Montpelier and Burlington in June, October, and November 1827, at 5-6, 21-22, 31-32, 45-46 (1828) (the Council was an

elected body that served until 1870 as the body that recommended constitutional amendments and changes). At the Council's behest, the Constitutional Convention of 1828 voted to require all freemen to be citizens of the United States.

Around the time of the Civil War, a second way of alien suffrage emerged. Directly after the war, several states adopted alien suffrage laws and expanded the rights of non-voting citizens. *Raskin*, 141 U. Pa. L. Rev. at 1415. Vermont was not part of this second wave and no changes of record were proposed to the Constitution.

This period of revival lasted until the First World War when almost every state amended its constitution or adopted a statutory structure tying voter eligibility to citizenship. *Id.* at 1415, 1416. This uniform citizen-based suffrage standard has lasted to the current day. According to the Immigrant Voting Project, alien suffrage in the United States has only been extended to six municipalities, or parts thereof, in Maryland.[1] There is also information to indicate that school boards in New York City and Chicago allow, or have in the past allowed, non-citizens to vote.

Despite recent efforts in eight other states, no other municipality in Vermont or state has extended this right within the past twelve years.

Vermont's Constitution

Since 1828, the Vermont Constitution has made citizenship a requirement for voter eligibility. In its current form, the Constitution states:

> 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

Vt. Const. ch. 2, § 42.

The plain language of this provision appears to tie voter eligibility to four elements:

1) Age of 18 or older;
2) United States Citizenship;
3) Vermont Residency; and
4) Taking the Freeman's Oath.

This is mirrored closely by the corresponding voter eligibility statute, 17 V.S.A. § 2121, which list the exact same four elements as the basis for statutory voter eligibility. The language in both

[1] Maryland's Constitution requires citizenship for eligibility to vote in state and federal elections, but it also recognizes the right of its municipalities to establish its own voting eligibility standards. Maryland Const., Art. 1, Sec. 2.

the Constitution and § 2121 requires United States citizenship as a pre-requisite to voter eligibility in Vermont.

Woodcock v. Bolster

At the same time, Vermont has long distinguished between freeman voting on the state level and municipal voting on the local level. This is embodied in the Supreme Court's case of *Woodcock v. Bolster*, 35 Vt. 652 (1863), which stands for the proposition that Vermont once allowed non-citizens such local voting rights even when the Constitution required United States citizenship.

Here are the facts behind *Woodcock v. Bolster*. In 1861, the Winhall School District elected a new collector of delinquent taxes and a prudential committee. The sole member of the prudential committee was an unnaturalized Irishman named Patrick Duane who was a resident of the town and owned real estate. Duane assessed a tax on all property owners in the town, and when plaintiff did not pay his share, the collector of delinquent taxes went to Plaintiff's house and seized several items.

Plaintiff sued to recover his property and put forth a number of arguments. The most relevant for our present purposes challenged Duane's eligibility to hold office as a resident alien. Plaintiff argued that Duane, as a non-citizen was ineligible to vote and could not hold office, which made his assessment void.

The Court rejected Plaintiff's arguments. The crux of the rejection lies in the relevant statute. It said, "And any man of the age of twenty-one years, who, at the time, shall reside, and be liable to pay taxes in such district, shall be a legal voter in the same." Sec. 23, chap. 20, Com. Stat. p. 146.

In other words, the relevant criteria to vote or run for office in the school district in 1863 Vermont was as follows:

1) 21 years or more;
2) Residency in the town; and
3) ownership of property.

Since Duane fit all three, his election and any votes were perfectly valid. In this respect, *Woodcock* is simply a case of statutory interpretation that reflects the application of a late 19th statute that put more weight on ownership than national citizenship.

Yet, there is a nagging question in *Woodcock*. The Vermont Constitution of the time stated:

> No person, who is not already a freeman of this state, shall be entitled to exercise the privileges of a freeman, unless he is a natural born citizen of this, or some one of the United States or until he shall have been naturalized agreeably to the acts of Congress.

(Article 1, Articles of Amendment to the Vermont Constitution 1828).

Under this requirement, how can a resident alien vote in an election or serve as an officer? The Court in *Woodcock* has an answer. The difference is simple. State-wide elections are for freeman (Vermont residents and citizens) while town and school elections are for property holders. As the Court writes:

> A man could be a freeman without being a tax payer, but must have resided in the state a year, while no man could vote in town or district meetings without being a tax payer, but might, though his residence in the state had been less than a year.

35 Vt. at 639. Thus, *Woodcock* stands for the proposition that municipal and school board elections are different from other elections and that property ownership, rather than citizenship was the dominant factor.

This is consistent with the limited, corporate nature of municipalities in Vermont.

Two things have changed since *Woodcock*. First, the property requirement to vote in local elections has been struck down. Second, changes to the state's statutory voting laws in the modern era have largely eliminated the distinction drawn by the Court in *Woodcock*.[2] Property requirements have been eliminated; poll taxes have been eliminated;[3] Australian ballots and elections have taken the place of town meetings in many towns and cities, and eligibility statutes have been drawn to define voters without distinguishing between local stakeholders and freeman.[4] Yet, none of these changes affect the constitutional premise of *Woodcock*. It reflects, as Paul Gillies states in his testimony, changes to the statutory structure of voting. As such, it is my analysis that *Woodcock* remains good law on Constitutional grounds. This is because nothing in the changes either to the Vermont Constitution or to the statutory structure has changed the fundamental power of this legislature to modify the power it holds to alter, contract, or expand the powers and structures of a municipal corporation.

Other States

In Maryland, which has a similar constitutional provision, the courts have long-held that the constitutional requirements apply only to state and not local elections.

The Maryland Constitution states at Article I, Section One:

> All elections shall be by ballot; and every citizen of the United States, of the age of twenty-one years, or upwards, who has been a resident of the State for six

[2] In the latest amendment to Constitution's Section 42, the term "Freeman" was dropped in favor of the broader term "voter."

[3] The poll tax was repealed by legislation in 1978. Laws of 1977, Adj. Sess., No. 118. The Vermont Supreme Court had approved it in *Bieling v. Malloy*, 133 Vt. 522 (1975), saying it didn't violate either the state or federal constitution (to make driver's licenses contingent on paying your poll tax). That decision no doubt spurred the legislation.

[4] As an example, town clerks used to produce two checklists, one for the Freeman's Meeting in the fall (September, originally, then November) and another for town meeting (in the spring), because of the poll tax.

> months, and of the Legislative District of Baltimore city, or of the county, in which he may offer to vote, as of the time for the closing of registration next preceding the election, shall be entitled to vote, in the ward or election district, in which he resides . . .

The Maryland Supreme Court in *Smith v. Stephan*, 7 A. 561, 562 (Md. 1887) explained the meaning and applicability of this provision:

> This section of the constitution denies the right to vote at federal and state elections, and municipal elections in the city of Baltimore, to all persons whose names do not appear in the list of registered voters. It makes no allusion to municipal elections in any other town or city. The distinction is clearly made in the constitution between federal and state elections on one side and municipal elections on the other. It is impossible to mistake the meaning of the terms employed. An election held for the purpose of regulating the local affairs of a town or city, under the provisions of its charter, would never be mistaken for a state election. It is sufficient to say that no municipal elections except those held in the city of Baltimore are within the terms or meaning of the constitution.

This is consistent with the Vermont case of *State v. Marsh*, from 1789, which opines on the Vermont Constitution's applicability to municipal government and specifically excludes application of the term "elections" as used in the Vermont Constitution from applying to local town elections. The case dealt with the constitutional provision (Ch. 2, Sec. 29 in the 1777 version and Ch. 2, Sec. 31 in the 1786 version) requiring elections to be conducted by ballot. At that time (as it remains in some towns), local elections were held by voice vote. The plaintiff challenged such an election as unconstitutional. The Court disagreed, and Chief Justice Chipman wrote:

> The framers of the constitution were forming a plan for the general government of the State. They do not appear to have had an eye to the internal regulation of lesser corporations. In this section they point out the mode of electing the officers to the general government, and in this view they confine it to elections by the people and General Assembly. "The People," here means the collective body of the people, who have a right to vote in such elections—and is used as synonymous to "Freemen.
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> The word "Election," when the choice is to be by the people or freemen, is, in every part of the Constitution, used in the same appropriate sense; as in the 7th section, "In order that the Freemen of this State may enjoy the benefit of elections as equally as may be, each town within this State may hold elections therein"—For what purpose? for the choice of Representatives.—In the 10th section, "On the day of election for choosing Representatives," &c.
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> I am, therefore, clearly of opinion, that the 31st section of the Constitution does not extend to the choice of town officers, and is to be laid wholly out of the case under your consideration.

State v. Marsh, 1789 WL 103 (1789). This is consistent with the holding of *Rowell v. Horton*, 58 Vt. 1 (1886) and *Martin v. Fullam*, 90 Vt. 163 (1916), which Legislative Counsel cites in its memorandum in support of the principle that the Vermont Constitutional provisions defining voters and elections are intended to apply to state and not to local elections.

In my research, I also found a New York case, of a more recent vintage, which enunciates the same principle. In *Lane v. Town of Oyster Bay*, 149 Misc.2d 237 (NY Sup. Ct. 1990), the New York court found that local elections were not obligated to strictly follow state election laws, in part because of a New York statute, but also in part because the legislature has the power to modify the standards and terms of local elections ("lesser corporations" in Justice Chipman's phrasing).

The Legislature's Ability to Modify Municipal Powers

As a Dillon's Rule state, Vermont municipalities are creatures of the legislature.[5] All powers enjoyed by the municipality must be granted expressly by the legislature, and the legislature has the power to cancel, modify, expand, or re-define a municipality. See, e.g., *City of Montpelier v. Barnett*, 2012 VT 32; *Hunters, Anglers & Trappers Ass'n of Vt., Inc. v. Winooski Valley Park Dist*., 2006 VT 82. In other words, municipalities do not have inherent sovereign powers but only those powers granted by the legislature, which may define them as it sees fit. These powers include, as *Woodcock* and *Marsh*, notes the right to define who in a particular town is eligible to vote.

On a broader point, the US Supreme Court in the case, *Hunter v. City of Pittsburgh*, 207 US 161, 178–79 (1907), articulated a broad view of the power of a state legislature when came to modifying or expanding the powers or structure of a municipal corporation. This analysis is consistent with the substantive provisions of *Woodcock*. The Court in *Hunter* wrote:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its

[5] Dillon's Rule comes from an Iowa Supreme Court Justice who articulated the principle that municipalities are creatures of the state and therefore lack any inherent or implied powers apart from what is granted to them by the legislature. In contrast, some states have "Home Rule" built into their constitution, which gives a duly created municipality certain inherent powers apart from any legislative grant. *See, e.g., City of Montpelier v. Barnett*, 2012 VT 32, ¶¶ 20, 21, 60.

> pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

Id.

We usually think of Dillon's Rule as a restrictive power (municipalities can only do what the legislature expressly empowers them to do), but the caselaw is actually broader. The key is not necessarily the power but where the grant of power comes. See, e.g., *First Nat. Bank of St. Johnsbury v. Town of Concord*, 50 Vt. 257 (1877) (legislature could give towns authority to issue bonds to promote railroad development); *City of Montpelier v. Barnett*, 2012 VT 32 (recognizing that the city once had the power from the legislature to regulate beyond its municipal boundaries); *Hunters, Anglers & Trappers Assoc. of Vt., Inc. v. Winooski Valley Park Dist.*, 2006 VT 82 (municipal corporation had authority from legislature to limit and ban hunting and trapping in its parklands). As these cases illustrate, the Legislature can expand and contract a municipalities power (usually through charters) as it sees fit and re-define the elements and roles of the municipality.

Conclusion

Based on the research that I have done in both Vermont and to survey other jurisdictions, my conclusion is that the proposed charter amendments are consistent with the Vermont Constitution and would be sustained if challenged. I was unable to find a single instance where a court struck down a legislatively approved voting provision for a municipality where the constitutional language mirrored Vermont's. To the contrary, as the Maryland and New York examples show, courts have been willing to allow legislatures to modify municipal voting standards in both the early years as well as modern times. This is consistent with the well-acknowledged view that legislatures have a free hand in crafting or altering municipal powers. As demonstrated in Paul Gillies and Peter Teachout's testimony, and in Legislative Counsel BetsyAnn Wrask's extremely thorough memorandum, there is a long-standing tradition in Vermont of modifying voting criteria at the local municipal level. While recent history has been more uniform, there is nothing in the provisions that would prevent this legislature from accepting the proposed charter changes and allowing Montpelier to have non-citizen voting within the municipality.