

February 28, 2019

To: Rep. Sarah Copeland-Hanzas, Chair, House Government Operations Committee

From: Paul Gillies

RE: H. 207, relating to the Montpelier City charter revisions

Thank you for allowing me to put in my thoughts on the question of non-citizen voting. I have written and taught the Vermont Constitution for many years, and because this issue cropped up last year have been working to figure out a cogent answer to when it happened that voters had to be U.S. citizens to vote in town meeting. This afternoon I found the answer.

It was April 1, 1915 when Act No. 111 took effect, and added the requirement that all voters take the Freeman's oath to qualify to vote at town meeting. Tracing back the predecessors of the first statute to appear in the chapter on town meetings revealed the change. This means that for the first 137 years non-citizens could vote at town meeting, as long as they had resided in Vermont for a year, reached the age of 21, had paid their taxes (and if they had no property then at least the poll tax), and were of the male persuasion. Only citizens, native born or naturalized, can take the Freeman's (now Voter's) oath.

Nineteen fifteen was a bellweather year for the legislature. It was the year the direct primary was adopted, the year Vermont started workman's (now worker's) compensation, the year the entire Supreme Court quit because of a glitch in the transition from the General Election in September to November and the transition from the start of the legislative session from October to January, leaving a void that the Justices believed would lead to a question about their legitimacy for decisions in the end of the year. It was also the year the legislature first made marijuana illegal.

It was the middle of the progressive era, and yet cancelling out the voting status of non-residents doesn't seem very progressive, or very nice. What surprises me is that there doesn't appear to be any objection to the change manifest in newspapers or legislative records. It appears to have happened quietly—the disenfranchisement of people in every town. Nobody carried signs saying “No taxation without representation.”

The committee wants to know if this is constitutional. I've read the scholarly memos of Peter Teachout, BetsyAnn Wrask, and Dan Richardson, and enjoyed them. I think the earliest decision says it best (*Temple v. Mead*, 1832), that the constitution doesn't govern town officials and town meeting voting, but involves rules and rights affecting state elections only. Given that the author of this decision was Vermont's greatest judge (Nathaniel Chipman), I'd expect his credentials would be dispositive. By the way, just because something is old doesn't make it invalid.

There's another constitutional principle best described as “Let it Be.” Whatever has been the practice for many years, as in this case having been reviewed and readopted with each compilation from the first through that of 1906, and then amended in 1915, on statutory history

alone it seems obvious that the legislature regarded non-citizens as voters at town meeting without a whiff of discomfort that it might be violative of the constitution. Those legislators knew that there were different qualifications to vote for state and congressional officials at the September Freeman's meetings than at town meeting.

The 1915 act explains what some have wondered made the Supreme Court so agreeable in *Woodcock v. Bolster* (1861) and how it fit with the 1828 amendment to the Vermont Constitution.

As a matter of constitutional law and historic practice, there should be no reason not to approve Montpelier's proposal on non-citizen voters.