

May the Vermont Legislature Authorize the City of Montpelier to Allow Non U.S. Citizens to Vote in Municipal Elections? Constitutional Aspects of H. 207

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I. Introduction

My name is Peter Teachout. I am a Professor of Law at Vermont Law School where I have been a member of the faculty since 1975. My special areas of interest and expertise are U.S. constitutional law and history and Vermont constitutional law and history. I appreciate the opportunity to testify before the House Government Operations Committee this afternoon on the question of whether the Vermont legislature may, consistent with Vermont constitutional requirements, authorize the City of Montpelier to allow non U.S. citizens to vote in municipal elections.

The basic thrust of my testimony will be that, under the Vermont constitution, the legislature has discretion to authorize the City of Montpelier to allow non U.S. citizens to vote in purely local elections. That is true notwithstanding the requirement in Section 42 of Chapter II of the Vermont constitution that, in order to vote in state elections, voters must be U.S. citizens. To those who have become accustomed to thinking that qualifications for voting in municipal elections must necessarily be the same as for voting in state elections, this must seem like something of an odd claim. But the fact is, in the field of state constitutional law, courts have long drawn a constitutional distinction between voting in state elections and voting in municipal elections, and have consistently held that the constitutional requirements for voting in state elections do not limit legislative discretion in setting the qualifications for voting in purely local elections. See Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional And Theoretical Meanings of Alien Suffrage, 141 U. Penn. L. Rev. 1391 (1993).

As my testimony will show, that distinction has deep roots in the Vermont constitutional tradition going back to the earliest days in the republic. Although there have been no recent Vermont Supreme Court decisions in this area, every decision in which the Court has directly addressed the question has upheld the view that establishing qualifications for voting in local or municipal elections is not governed by the state constitution but a matter left to legislative discretion.

II. To Vote in State Elections One Must be a U.S. Citizen: Section 42 of Chapter II

The place to begin is with Section 42 of Chapter II which provides as follows:

§ 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.

This makes clear that at least to participate in state elections (“to be entitled to all the privileges of a voter of this state”)(to vote on “any matter that concerns the State of Vermont”), a voter must be “a citizen of the United States,” but that leaves open the question of whether the Vermont legislature might authorize a municipal corporation to allow non-U.S. citizens who are legally resident to vote in purely local or municipal elections.

III. Legislature Has Discretion to Authorize Non-U.S. Citizens to Vote or be Elected to Office in Purely Local Elections: *Woodcock v. Bolster* (1863)

That question was directly addressed by the Vermont Supreme Court in *Woodcock v. Bolster*, 35 Vt. 632 (1863) in which the court held that, notwithstanding the constitutional requirement that one had to be a U.S. citizen to be eligible to vote in state elections, the legislature had discretion to authorize non U.S. citizens to vote and be elected to office in purely local elections.

In that case, a town resident who was not a U.S. citizen had been elected to act as a school district tax collector under a state statute that authorized residents to vote and hold office in local elections notwithstanding lack of citizenship. The defendant’s attachment of property for tax purposes was challenged on grounds that, under the Vermont constitution, the defendant could not legally serve as a school district tax collector since he was not a U.S. citizen. The Court upheld the statute finding it did not violate the state constitution.

The Court acknowledged that the Vermont constitution had been amended in 1828 to require “freeman” (voters in state elections) to be U.S. citizens, but went on to say “this requirement was by no means synonymous with that of a voter in town or school meeting . . . [W]e fail to see how it would follow that a change of the constitution in relation to the qualifications of freemen should work a corresponding change in the statutes regulating voting in town and school meetings . . . It has not been questioned but *that it is actually within the power of the legislature to regulate the right of voting in such meetings, and the right of holding office, according to their pleasure, and that there is nothing in the constitution restraining this exercise.*” *Id.* at 639 (emphasis supplied).

The court then went on to explain why it thought the state statute reflected “wise policy in the Legislature.” Although the court’s explanation proceeds in terms reflective of eighteenth and nineteenth century conditions in Vermont, the underlying policy considerations apply with equal force, it would seem, to the situation of legally resident non-citizens living in Vermont communities today:

“It has been the policy of our government to encourage emigration from abroad, and, at as early a period as may be, to extend to such emigrants all the rights of citizenship, that their feelings and interests may become identified with the government and the country. While awaiting the time when they are to become entitled to the full rights of citizenship, it seems to us a wise policy in the Legislature to allow them to participate in the affairs of these minor municipal corporations, as in some degree a preparatory fitting and training for the exercise of the more important and extensive rights and duties of citizens. It is of the greatest importance that the children of such persons should be educated, at least to the extent for which opportunity is afforded by our common schools, and that the parents should be induced to send their children to school, and it seems to us that they would be much more likely to do so, and to take interest in their attendance and improvement, if allowed to participate in their regulation and management, than if wholly excluded. We cannot see the threatened danger to our institutions from the allowance of this right, while they are excluded from all influence and participation in the law-making power of the government, or in the general elections, or the general public administration of the laws of the country. So far as we have had personal knowledge of the practical construction of these statutes, it has been entirely in accord with the view we have taken, and if we have mistaken the intent of the Legislature, we have the satisfaction of knowing that it can be easily and speedily corrected.” *Id.* at 641, 42.

The significance of *Woodcock* is two-fold: First, it establishes that there is an important distinction in Vermont constitutional law between voting in state elections and voting in purely local elections. Second, it establishes that the legislature has discretion to authorize non U.S. citizens to vote in purely local elections if it so chooses without violating the provision in the Vermont constitution making U.S. citizenship a requirement for voting in state elections.

IV. Other Vermont Supreme Court Decisions Upholding Legislative Discretion to Establish Qualifications for Voting in Local Elections

If the *Woodcock* decision were the only decision of the Vermont Supreme Court upholding legislative discretion to establish qualifications for participating in local elections in ways that depart from constitutionally established qualifications for participating in state elections, it might be dismissed as an anomaly. But it is not the only such decision.

A. *State v. Marsh* (1789)

The first such case is *State v. Marsh* (1789), decided just 12 years after adoption of the first Vermont constitution, in which the Court determined that the term “elections” wherever used in the Vermont Constitution did not apply to local town elections.¹ The case dealt with a provision in the Vermont constitution requiring “elections” to be conducted by ballot. At that time, local elections were held by voice vote. The plaintiff challenged the results of such an election as unconstitutional because the election was not conducted by ballot. The Court disagreed. Chief Justice Chipman explained that provisions in the state constitution dealing with elections only governed “the mode of electing the officers to the general government:”

“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.”

“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.

“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).

¹ I am grateful to Attorney Dan Richardson for calling my attention to this decision.

B. *Rowell v. Horton* (1886)

To the same effect is the Vermont Supreme Court decision in *Rowell v. Horton*, 58 Vt. 1 (1886), in which the Court held that the Vermont constitutional requirement that officers take oaths did not apply to municipal offices.² The frame of government established by Chapter II of the Vermont constitution, the Court stated, “has no reference to the plan or frame of town governments, nor to the election and qualification of the officers thereof. *Towns are not creations of the constitution; they exist either by virtue of charters granted by the sovereign before the adoption of the constitution, or by acts of the legislature since its adoption, and derive their powers, not from constitutional provisions, but from legislative enactments*” (emphasis supplied).

C. *State v. Foley* (1915)

And in *State v. Foley*, 89 Vt. 193 (1915), in upholding the election of a woman to a school district office before women were given the right to vote in state elections, the Court cited with approval legislative acts going back to the 1870’s permitting women to hold school district offices.

These four decisions are the only decisions in which the Vermont Court has addressed the issue. I realize that, since these cases were decided, the prevailing legislative attitude toward allowing non U.S. citizens to vote in local elections may have shifted in Vermont although I do not know that is necessarily the case, but that does not alter the core constitutional principle established by these cases: under the Vermont constitution, the qualifications for voting or being elected to office in local elections is a matter left to the discretion of the legislature to be established by statute and is not controlled by constitutionally established qualifications for voting in or hold elective office at the state level.

That is solidly established Vermont constitutional law.

Suffice it to add that, in this respect, Vermont state constitutional law is consistent with state constitutional jurisprudence in this country generally. See Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional And Theoretical Meanings of Alien Suffrage, 141 U. Penn. L. Rev. 1391 (1993): “During the long history of alien suffrage, neither the Supreme Court nor any lower federal court or state court ever found the practice unconstitutional. On the contrary, numerous state courts explicitly or implicitly endorsed noncitizen voting. Although the

² I am grateful to BetsyAnn Wrask of the Vermont Legislative Council for calling my attention to this case and also to the *State v. Foley* case discussed below.

Supreme Court was never forced to decide the issue directly, it explicitly and repeatedly signaled its acceptance of the practice.” *Id.* at 1417.

V. Additional Support for Legislative Discretion Found in Section 6 of Chapter II of the Vermont Constitution

Additional support for granting the state legislature authority to establish qualifications for voting in local or municipal elections can be found in Section 6 of Chapter II of the Vermont constitution which gives broad power to the General Assembly to “grant charters of incorporation [and] constitute towns, boroughs, cities and counties.” This has been interpreted by the Court to give the General Assembly constitutional authority to establish, modify, and limit the powers of municipal corporations, including powers related to the conduct of elections, as the legislature deems appropriate, subject only to constitutional limitations. This too then supports the conclusion that, unless the conditions established by the Vermont constitution for voting in state elections also apply to voting in purely local elections – a view squarely rejected by the Vermont Supreme Court in the cases cited above - the state legislature may authorize municipal corporations to allow voting by non U.S. citizens in purely local elections.