BAW; 3/12/19

Overview of Constitutional Provisions Relating to Adding Incompatible Offices and Prohibiting a Person from Being a Candidate for Multiple Incompatible Offices

I. Overview of Applicable Constitutional Provisions

Vt. Const. Ch. I, Art. 8: " . . . all voters . . . have a right to . . . be elected into office, agreeably to the regulations made in this constitution."[1]

Vt. Const. Ch. II, § 6: " . . . The General Assembly . . . shall have all other powers necessary for the Legislature of a free and sovereign State; but they shall have no power to add to, alter, abolish, or infringe any part of this Constitution."

Vt. Const. Ch. II, § 54: "No person in this State shall be capable of holding or exercising more than one of the following offices at the same time: Governor, Lieutenant-Governor, Justice of the Supreme Court, Treasurer of the State, member of the Senate, member of the House of Representatives, Surveyor-General, or Sheriff. Nor shall any person holding any office of profit or trust under the authority of Congress, other than a member of the commissioned or enlisted personnel in the reserve components of the armed forces of the United States while not on extended active duty, be eligible to any appointment in the Legislature, or to any executive or judiciary office under this State."

II. Legislative Power is Only Restricted by the Constitution

"The Constitution is not a grant of power to the Legislature, but it is a limitation of its general powers. The Legislature's power is practically absolute, except for constitutional limitations."[2]

"'Subject to constitutional limitations, a state Legislature is authorized to pass measures for the general welfare of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.'"[3]

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[1] This provision only relates to "Freemen's Meetings," a.k.a. our general elections. *See* Analysis of the General Assembly's Authority to Control the Qualifications to Vote and Hold Office in Local Elections, BAW, 2/28/19.

[2] Rufus v. Daley, 103 Vt. 426, 154 A. 695, 697 (1931). *See also* City of Burlington v. Central Vermont RY Co., 82 Vt. 5, 71 A. 826, 827 (1909) ("[F]or the law is, by all the cases, that, except where there are constitutional limits upon the Legislature, it is practically absolute.") and Dresden School District v. Norwich Town School District, 124 Vt. 227, 231 (1964) ("Our constitution is, in powers not surrendered to the Federal government, the single great restraint on the autonomy of the Legislature as the repository of the law-making power of the people.").

[3] Sowma v. Parker, 112 Vt. 241, 22 A.2d 513, 517 (1941) (quoting In re Guerra, 94 Vt. 1, 110 A. 224, 227 (1920)).

III. Constitutional Construction

i. *Plain language controls.* Public officers' understanding and administration of constitutional provisions "may be resorted to in aid of interpretation in case of doubtful meaning. But, when the language is unambiguous, its meaning cannot be modified or controlled by practice, however long continued. In ascertaining the import and true interpretation of a written instrument, resort is first had to the obvious meaning of the language adopted, and, if this is explicit and unequivocal, all inference by way of construction is excluded. Should any part of the Constitution furnish answers in terms to the questions for decision, it would be not only unnecessary, but improper, to resort to extraneous aids to interpretation."[4]

ii. *Expressio unius est exclusion alterius.*

- "If the constitution declares that a thing shall be done in a particular manner or way, it is implied necessarily that it shall not be done in any other [way]."[5]

- "'For purposes of constitutional interpretation, the express mention of one thing implies the exclusion of another which might logically have been considered at the same time' . . . 'It is a universally recognized rule of the construction that, where a constitution or statute specifies certain things, the designation of such things excludes all others, a maximum commonly known as *expressio unius est exclusio alterius.*'"[6]

iii. *Specific over general.* "'It is an established axiom of the constitutional law that where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control.'"[7]

iv. *Legislature fills in details.* "The standards for interpreting constitutional language and meaning, though related, are not the same as for ordinary statutes. Canons of construction, if applied, must be used more cautiously and sometimes differently. This is so because a constitutional provision, unlike a statute, usually operates to limit or direct legislative action . . . *It is of great importance to remember that, since the purpose of any constitutional enactment is to delineate the framework of government, the working details are frequently left, as here, for legislative definition.* Interpretation must, therefore, not be so narrow as to present an obstacle to that function. More than one pattern of working details may well be possible and constitutional [emphasis added]."[8]

v. *Judicial power.* Under the separation of powers, "it is the province of the court to decide whether Vermont's laws comply with the State Constitution"[9]; "[i]t is the

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[4] Hartness v. Black, 95 Vt. 190, 114 A. 44, 47 (1921).
[5] Opinion of the Judges of the Supreme Court on the Constitutionality of "An Act Providing for Soldiers Voting", 37 Vt. 665, 672 (1865).
[6] Noble v. Secretary of State, 2010 WL 4567689 (Vt. Super., Civ. Div.) at pgs. 10-11.
[7] Id. at pg. 15 [citing out-of-state caselaw].
[8] Peck v. Douglas, 148 Vt. 128, 132 (1987).
[9] Brigham v. State, 179 Vt. 525, 528 (2005).

function of the courts to maintain constitutional government"[10]; and the Supreme Court of Vermont is the "final interpreter of the Vermont Constitution."[11]

IV. Applicable Caselaw and Opinions

AG Op. No. 29 (1965): In opining whether it's a violation of separation of powers for a legislator to serve in the Executive or Judicial Branches, the AG opined that the question "immediately raises the question of the meaning of Ch. II, § [54 (incompatible offices)]" and noted at FN3 that in 1814, there "was a proposal to broaden the incompatible offices section but it was defeated by the convention." "It must be presumed that the framers of our Constitution were aware of the problem of incompatible offices when drafting the specific provisions of [Ch. II, § 54], as well as when drafting the provisions of [Vt. Const. Ch. II, § 5 (separation of powers)]. If it is assumed, for the moment, that the framers of our Constitution intended to make unconstitutional dual office holding by one person in more than one department of under the provisions of [separation of powers], it is difficult to see why they included in [incompatible offices] the prohibition against the holding of office by one in different departments." "It is therefore our opinion that the holding of an executive [or judicial] office by a member of the legislature is not in contravention of the constitution except where specifically prohibited under the terms of [Vt. Const. Ch. II, § § 54 (incompatible offices)]" After opining that some dual office holding is "unhealthy in the operation of a republican form of government," the AG hoped that elected representatives "will give serious consideration to removing this intermingling of personalities in the three departments. This can be done by statute or amendment to our Constitution."

AG Op. No. 56 (1965): Neither the Vt. Const. nor statutes prohibit a person from being a candidate for both House and Senate, but under Vt. Const. Ch. II, § 54, "if he should be elected to both positions, he would have to resign one since he clearly cannot hold both positions at the same time."

Baker v. Hazen, 133 Vt. 433, 438 (1975): "[Vt. Const. Ch. II, § 54 (incompatible offices)] represents a denial of a right to a citizen. If it cannot be clearly demonstrated that he falls within its proscription, or equally plainly shown that he is in violation of its purpose, he is entitled to be free of its prohibition."

Noble v. Sec. of State, 2010 WL 4567689 (2010). In the 3rd-to-last par. preceding the Order, the Court referenced the Baker v. Hazen case holding that Ch. II, § 54 presents a denial of a right to a citizen, and s/he must be free from it unless it's clearly demonstrated s/he is subject to it . . . but then stated, "The legislature could also prohibit the hypothetical scenario Plaintiff fears [ie., a person being Governor, Sec. of State, State's Attorney, and Assistant Judge]."

[10] C.O. Granai v. Witters, Longmoore, Akley & Brown, 123 Vt. 468, 470 (1963).
[11] State v. Read, 165 Vt. 141, 153 (1996).