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LEGAL OPINION

TO: Representative Jonathan Singer
FROM: Office of Legislative Legal Services
DATE: April 3, 2017
SUBJECT: Voting Age in School District Director Elections¹

Legal Question

Are there any constitutional barriers to amending the Colorado Revised Statutes to enable 16- and 17-year-old persons to vote in school district director elections?

Short Answer

There are no apparent federal constitutional barriers to allowing 16- and 17-year-old persons to participate in school district director elections. The answer is more uncertain with respect to the Colorado Constitution. The language of article VII, section 1 of the Colorado Constitution (Article VII) is susceptible to more than one construction. To the extent Article VII does not absolutely prohibit persons under 18

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the general assembly, in the course of its performance of bill drafting functions for the general assembly. OLLS legal memoranda do not represent an official legal position of the general assembly or the State of Colorado and do not bind the members of the general assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties. Consistent with the OLLS' position as a staff agency of the general assembly, OLLS legal memoranda generally resolve doubts about whether the general assembly has authority to enact a particular piece of legislation in favor of the general assembly's plenary power.

years of age from voting in elections, there is an argument that the general assembly is not precluded under state law from unilaterally² enfranchising 16- and 17-year-old persons. In that case, and in light of state jurisprudence interpreting Article VII, a colorable argument exists that it is within the general assembly's plenary power to expand the franchise to persons under 18 years of age. However, because it may also be asserted that Article VII restricts the right to vote to persons who have not attained the age of 18, the most prudent course of action would be to amend the state constitution, thereby obviating or reducing the potential for any such challenge.

Background

1. That states may impose voter qualifications is well-settled; however, a state's ability to do so is circumscribed by the U.S. Constitution.

It is axiomatic that states have the power to regulate access to the franchise, which power includes the ability to impose voter qualifications.³ At the federal level, a state's authority to prescribe voter qualifications is not unfettered, however, but must comport with constitutionally enumerated or derived limitations.⁴ With this in mind, the establishment of a voter eligibility criterion based on age has been repeatedly upheld as a valid exercise of that authority.

The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns. . . . So while the right of suffrage is established and guaranteed by the Constitution it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. . . . Residence requirements, age, previous criminal record

² That is, by amending the Colorado Revised Statutes as opposed to referring to the electors' proposed amendment to the state constitution.

³ "[T]he states have the power to impose voter qualifications, and to regulate access to the franchise in other ways." *Dunn v. Blumstein*, 405 U.S. 330 (1972) (internal citations omitted).

⁴ "It is obvious that the whole [United States] Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970).

are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.⁵

So, despite the latitude enjoyed by states in promulgating voter qualifications, they are obligated to observe the limits defined in federal anti-discrimination legislation as well as in the federal and state constitutions.⁶

As is germane to the question presented in this memorandum, the Twenty-sixth Amendment to the U.S. Constitution specifically addresses voting age by barring age qualifications over 18 years of age.⁷ However, this amendment is of limited utility to the question presented in this memorandum as it "simply bans age qualifications above 18"⁸ and neither grants a right to vote nor restricts states from extending the franchise to underage persons. While there is little case law on the subject, at least one federal court has noted, in dicta, that the Twenty-sixth Amendment "does not prohibit the states from setting a lower voting age."⁹

2. In Colorado, voter eligibility for school district director elections is set forth in both the Colorado Constitution and Colorado Revised Statutes.

The absence of federal limitations is not dispositive to the question presented, as states are also constrained by their own constitutions. In Colorado, Article VII prescribes voter qualifications for "all elections" as follows:

Section 1. Qualifications of elector. Every citizen of the United States who has attained the age of eighteen years, has resided in this state for such time as may be prescribed by law, and has been duly registered as a voter if required by law shall be qualified to vote at all elections.

⁵*Lassiter v. Northampton Elections Bd.*, 360 U.S. 45, 50-51 (1959) (internal citations omitted) (emphases added).

⁶ See 25 Am. Jur. 2d Elections § 98 (2017).

⁷ "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI, §1.

⁸ *Gaunt v. Brown*, 341 F. Supp. 1187, 1192 (S.D. Ohio 1972).

⁹ *Day v. Robinwood W. Cmty. Improvement Dist.*, 693 F. Supp. 2d 996, 1008 (E.D. Mo 2010). Note that this conclusory comment, which was essentially unrelated to the holding in that case, does not have any bearing on the question of how a state may proceed to accomplish that end (i.e., statutory versus constitutional amendment).

The "Uniform Election Code of 1991"¹⁰ reiterates the United States citizenship and age components of Article VII, and additionally establishes the following specific state residency and registration criteria:

1-2-101. Qualifications for registration - preregistration. (1) Every person who is eighteen years of age or older on the date of the next election and who has the following qualifications is entitled to register to vote at all elections:

- (a) The person is a citizen of the United States; and
- (b) The person has resided in this state twenty-two days immediately prior to the election at which the person intends to vote.

With particular regard to school district director elections,¹¹ the Colorado Revised Statutes requires that voters be registered pursuant to the "Uniform Election Code"¹² and further define an "eligible elector" to mean "a person who is registered to vote in accordance with articles 1 to 13 of title 1, C.R.S., and is a resident of the school district in which the elector intends to vote."¹³

Analysis

1. The general assembly may exercise its plenary power unless it is explicitly or impliedly limited by the federal and state constitutions.

The Colorado Supreme Court has repeatedly held that the general assembly's power is plenary and is limited only by express or implied provisions of the federal and state constitutions.¹⁴ The scope and breadth of legislative power is reflected in the following statement: "Because state legislatures have plenary power for all purposes of civil

¹⁰ Articles 1 through 13 of title 1, C.R.S.

¹¹ "It is within the exclusive power and province of the legislature to fix and determine the qualifications of voters in all public and quasi municipal corporations, and all reasonable provisions with reference thereto will be upheld." *People ex rel. Shaklee v. Milan*, 89 Colo. 556, 559-560 (Colo. 1931).

¹² "No person shall be permitted to vote at any regular biennial school election or special school election without first having been registered in the manner required by the provisions of article 2 of title 1, C.R.S." § 22-31-106 (1), C.R.S.

¹³ § 22-31-101 (1), C.R.S. Because school district residency is not at issue in the question presented in this memorandum, and the constitutional and statutory voter qualifications with respect to age are otherwise coextensive, any legal analysis regarding voting age determined by the general assembly applies to elections governed by state statute generally.

¹⁴ See *People v. Y.D.M.*, 593 P.2d 1356 (Colo. 1979).

government, state constitutions are *limitations* upon that power."¹⁵ The general assembly, therefore, may enact any law not expressly or inferentially prohibited by the constitution of the state or of the nation.¹⁶ As to laws duly enacted, such statutes are presumed constitutional, but a court will override this presumption if the legislation clearly conflicts with a constitutional provision.¹⁷ Legal presumptions are in favor of the integrity and wisdom of legislators, as well as the validity of their enactments.¹⁸

As there is no apparent federal impediment to the general assembly extending the franchise to persons younger than 18 years of age, and Article VII does not explicitly prohibit such extension, the pertinent inquiry is whether an implicit limitation on the general assembly exists. Article VII may be read in one of two ways: Either as creating a mandatory minimum age that a person must attain in order to be eligible to vote, or as merely restricting age limitations above 18 years of age.

In support of the former interpretation that Article VII establishes a minimum age, one reading of Article VII is that the constitution specifically envisages that the other (i.e., non-age) qualifications will be as prescribed by law, but contrastingly makes 18 years of age a bright-line minimum, creating an implicit limitation on the general assembly's ability to act.¹⁹ Under the latter construction (i.e., that only age limitations on persons over 18 years old are prohibited), the general assembly is inhibited from barring persons 18 years of age and older from qualifying to vote based on age, but is not constitutionally prohibited from extending suffrage to 16- and 17-year-olds. In that case, the legislature may exert its plenary power to enfranchise underage persons as it deems appropriate.

¹⁵ *Colorado State Civil Service Employees Ass'n v. Love*, 448 P.2d 624, 628 (Colo. 1968).

¹⁶ See *In re Y.D.M.*, 197 Colo. 403, 407 (1979); *City & County of Denver v. Lewin*, 106 Colo. 331, 105 P.2d 854 (1940).

¹⁷ See, e.g., *Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1267 (Colo. 2001).

¹⁸ *Alexander v. People*, 7 Colo. 155, 166, 2 P. 894, 900 (1883).

¹⁹ In upholding the general assembly's power to enact a statute requiring a two-thirds majority vote to remove a county seat when the state constitution stated that no removal could be effected unless a majority of electors voted in favor of it, the Colorado Supreme Court held that "when the lowest limit only is fixed in the fundamental law, the legislature may act without restraint in the ascending scale..." *Id.* at 165, 899. This would seem to suggest that, to the extent that Article VII presents a "floor" for voter age, the legislature could (but for the Twenty-sixth Amendment) statutorily prescribe another age so long as it exceeded that contained in the constitution.

2. If applicable, *May v. Town of Mountain Village* may be illuminating.

Although the Colorado Supreme Court has yet to consider the precise question of whether the constitution must be construed to impose a minimum voting age, the Colorado Court of Appeals decision in *May v. Town of Mountain Village*²⁰ could be instructive. In that case, the home rule municipality of Mountain Village amended its charter to extend to certain non-resident property owners the right to vote at any town election. Plaintiff residents sued, challenging the constitutionality of expanding voting rights to non-residents by arguing, *inter alia*, that doing so essentially waived what the Plaintiffs claimed was a constitutionally mandated residency requirement.

In affirming the district court's holding that Article VII "is not the exclusive means to qualify voters for local and municipal elections"²¹ and that the Mountain Village charter amendment thus did not run afoul of the constitution, the court of appeals stated that:

Any person meeting the requirements set forth in Colo. Const. art. VII is allowed to vote at all elections in this state, and a home rule municipality such as [Mountain Village] could not deny that right. However, **nothing in that provision prohibits a home rule municipality from exercising its powers under Colo. Const. art. XX, 6, to expand the franchise to non-resident property owners.**²²

In other words, so long as Mountain Village did not deny the right to vote to persons qualified under the terms of Article VII, the municipality was able to expand the franchise to other persons.

May v. Town concerned the ability of a home rule government to determine the franchise with respect to local elections. The court's reasoning could possibly be applied in the state context as well. That is, as home rule municipalities exercise plenary authority over matters of local concern,²³ including qualification of voters, so too does the general assembly. If the general assembly is similarly not curtailing the rights of any constitutionally qualified electors in expanding voting rights to currently underage persons, then that expansion could pass constitutional muster. The *May*

²⁰ 969 P.2d 790 (Colo. App. 1998).

²¹ *Id.* at 794.

²² *Id.*, at 794-795 (emphasis added).

²³ See, e.g., *City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001), *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013).

decision is potentially distinguishable from the question presented in several respects: It concerned a charter amendment (arguably, the municipal analog to a state constitutional amendment) to enlarge the pool of qualified voters, and the holding was premised on, presumably, the additional constitutional source of authority found in article XX, section 6 of the Colorado Constitution. Because it is uncertain how a court would apply the *May* rationale to the question presented, we caution against uncritical reliance on that decision.²⁴

Conclusion

The general assembly could, via concurrent resolution, attempt to amend Article VII to extend, in a manner that makes abundantly clear, voting rights to persons under 18 years of age. Whether a statutory amendment extending the franchise to 16- and 17-year old persons for school district director elections would pass constitutional muster depends on the nature of the qualifications prescribed in Article VII. If the constitutional provision is firmly interpreted as fixing a mandatory minimum age, then a statute permitting voting in school district elections by persons under that minimum age will conflict with the constitution.

²⁴ Although non-binding, consider, too, *In Opinion of the Justices (Voting Age in Primaries I)*, 157 N.H. 265, 274-75, 949 A.2d 670 (2008). In that case, the New Hampshire Supreme Court evaluated the constitutionality of a pending statutory amendment to grant the right to vote in primary elections to 17-year-old persons who would turn 18 years old on or before election day and who were otherwise qualified to register to vote. After researching the history of the applicable state constitutional provision, the court concluded that "the [constitution's] phrase 'every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election' establishes eighteen as the minimum age for voting"; thus, the bill would violate the constitution. While conceding that the legislature had authority to set voter qualifications *beyond* those announced in the state constitution, the court decreed that the legislature could not *contradict* those constitutional qualifications ("We conclude that the legislature has no authority to set a different minimum voting age."). In reaching this decision, the court found persuasive the fact that the legislature historically did not possess the authority to set age qualifications for voters; rather, that authority had always resided in the state constitution. Similar to New Hampshire, the Colorado Constitution has always set forth a voting age. The original (1876) age specification of article VII, section 1 of the Colorado Constitution ("[E]very male person over the age of twenty-one years. . .") was amended in 1988 to conform to the Twenty-sixth Amendment to the U.S. Constitution. [The 1988 Blue Book analysis is unavailing as to the nature of the constitutional provision being either restrictive or permissive, as it states both that the purpose of the amendment was "to correspond with the U.S. Constitution regarding the *requirement* that an elector be 18 years of age to vote" and "to correspond with the U.S. constitutional provision (the Twenty-sixth Amendment) which *grants* eighteen-year-olds the right to vote." See Legislative Council of the Colorado General Assembly, *An Analysis of 1988 Ballot Proposals* (Research Publ'n No. 326, 1988).