Vanderbilt Law Review

Volume 19
Issue 4 *Issue 4 - A Symposium on Restitution*

Article 12

10-1966

The Legislature's Power To Judge the Qualifications of Its Members

Law Review Staff

LEGISLATION

The Legislature's Power To Judge the Qualifications of Its Members

I. The Constitutional Rules and Their Historical Background

Because federal and state constitutions require members of the legislative branch of the government to meet certain qualifications, the legal existence of a legislative body is dependent upon compliance with those constitutional requirements.[1] However, by express constitutional provisions, and by traditional legislative practice and usage, the legislature itself is deemed to be the final judge of the election and qualifications of its members. Section 5 of article I of the United States Constitution provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." The constitutions of all the states contain provisions to this same effect.[2] In keeping with the fundamental principle prohibiting judicial encroachment upon the functions of the legislature,[3] judicial usurpation of legislative powers,[4] and judicial interference with the exercise of legislative power,[5] it is well settled that such a constitutional provision vests in the legislature the sole and exclusive power to judge the election and qualifications of its own members and deprives the courts of jurisdiction to determine these matters.[6] This view is typically expressed in the following manner:

> In view of this constitutional power vested in the Legislature, it is clear that this court has no jurisdiction to determine the qualifications of the plaintiff as State Senator. This is a matter which rests in the sole and exclusive juris-

1. 1 Sutherland, Statutory Construction § 404 (3d ed. Horack 1943). It should be noticed that the term "qualifications" as used in this immediate context denotes both the standards laid down as prerequisites to election to the legislature, and those requirements relating to serving in the body to which one has already been elected. For a discussion of the term, see Annot., 34 A.L.R.2d 155 (1954).

2. See Appendix *infra* for a listing of state constitutional provisions referring to legislative power to judge elections and qualifications.

3. See, *e.g.*, Schnell v. Peter Eckrich & Sons, 365 U.S. 260 (1961).

4. See, *e.g.*, McCray v. United States, 195 U.S. 27 (1904).

5. See, *e.g.*, Collins v. Hardyman, 341 U.S. 651 (1951).

6. See, *e.g.*, English v. Bryant, 152 So. 2d 167 (Fla. 1963); Reif v. Barrett, 355 Ill. 104, 188 N.E. 889 (1933); Raney v. Stovall, 361 S.W.2d 518 (Ky. 1962); Diman v. Swig, 223 Mass. 516, 112 N.E. 91 (1916); Brown v. Lamprey, 106 N.H. 121, 206 A.2d 493 (1965); Scott v. Thornton, 234 S.C. 19, 106 S.E.2d 446 (1959); Annot., 107 A.L.R. 205 (1937). The courts are held to be deprived of jurisdiction both prior and subsequent to legislative decision or action.

> diction of the State Senate. . . . [T]o pass upon the eligibility of plaintiff to the office . . . would be an encroachment upon the constitutional prerogatives of a coordinate branch of the government.[7]

This power in the legislature has been characterized as a continuous one, running through the entire term and empowering the body to pass on the present qualifications of its members.[8]

The same principle also applies to the legislature's right to control the conduct of its members, including its right to remove them. "From time immemorial it has been deemed the right of legislative bodies to expel members thought unfit."[9] The federal constitution's expulsion clause, very similar to those found in most state constitutions,[10] provides: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[11] The decision of a legislature, acting in pursuance of such a provision, is conclusive and not subject to review or revision by the courts,[12] even to the extent of determining whether notice and hearing were afforded the expelled member.[13]

The time honored concept of legislative prerogative in seating and expelling members was established in the constitutional law of England in the 16th century when the House of Commons decided that it, rather than the Lord Chancellor, should decide a membership controversy.[14] As early as 1619, the Virginia Assembly, after questioning the qualifications of a representative, refused to seat him until he fulfilled certain conditions.[15] The principle appears to have been well established in America in 1692, when the legislative bodies of Massachusetts and Virginia declared that they were the sole judges of the qualifications of their members.[16] Following the pattern of the colonies, the present federal and state constitutional provisions were similarly

7. Lessard v. Snell, 155 Ore. 293, 296, 63 P.2d 893, 894 (1937).
8. State v. Gilmore, 20 Kan. 551 (1878).
9. LUCE, LEGISLATIVE ASSEMBLIES 275 (1924).
10. See Appendix *infra*.
11. U.S. CONST. art. I, § 5.
12. See, *e.g.*, French v. Senate, 146 Cal. 604, 80 Pac. 1031 (1905) (court will not review or revise even a most arbitrary or unfair decision); Hiss v. Bartlett, 69 Mass. (3 Gray) 468 (1855). "[T]here is no chance of appeal. The courts deem themselves powerless." LUCE, *op. cit. supra* note 9, at 288.
13. 1 SUTHERLAND, *op. cit. supra* note 1, § 404.
14. LUCE, *op. cit. supra* note 9, at 192. A committee appointed by the House reported "they had not thought it proper to inquire of the Chancellor what he had done, because they thought it prejudicial to the privilege of the House to have the same determined by others than such as were members thereof."
15. Note, 33 VA. L. REV. 322, 326 (1947). See LUCE, *op. cit. supra* note 9, at 277.
16. LUCE, *op. cit. supra* note 9, at 196-97. For a discussion of the occasional struggles between colonial assemblies and governors for the power to judge qualifications of legislators, see *id.* at 197-98.

framed.[17] This vesting of exclusive jurisdiction in the legislature has been justified as a necessary concomitant to the body's power of self-protection.[18] As Judge Story explained:

> It is obvious, that a power must be lodged somewhere to judge of the elections, returns, and qualifications of the members. . . . The only possible question on such a subject is, as to the body, in which such a power shall be lodged. If lodged in any other, than the legislative body itself, its independence, its purity . . . may be destroyed . . . . No other body, but itself, can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights, and sustain the free choice of its own constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America.[19]

In effect, these constitutional provisions empower the legislatures to say, "We are quite competent to decide these questions ourselves,"[20] without the assistance, review or revision of the courts. The only apparent restraint upon this "remaining stronghold of legislative justice"[21] is the responsibility of the representatives to their constituents.[22]

II. THE EFFECT OF THE FEDERAL SYSTEM

A. *State Courts*

The American federal system complicates this matter to a certain degree. Of course, there is no such complication regarding the jurisdiction of state courts to review determinations of qualifications and elections by a state legislative body. In these matters, the state courts are uniformly held to be without appellate jurisdiction.[23] It should be noted, however, that state courts have assumed jurisdiction in certain ancillary matters. For instance, courts have taken appellate jurisdiction in cases dealing with the appointment of ministerial officers concerned

17. See note 2 *supra*. For an exposition of the arguments in the constitutional debates, see WARREN, THE MAKING OF THE CONSTITUTION 412-26 (1937).

18. See Hiss v. Bartlett, *supra* note 12. "We believe a state legislative body necessarily possesses this . . . inherent power of self-protection if the separation of powers doctrine is to have any real meaning on the state level. And self-protection goes to the process of qualifications as well as expulsion." Bond v. Floyd, 251 F. Supp. 333, 341 (M.D. Ga. 1966).

19. STORY, COMMENTARIES ON THE CONSTITUTION § 416 (abr. ed. 1833).

20. BECK, MAY IT PLEASE THE COURT 295 (McGuire ed. 1930).

21. Note, *supra* note 15, at 333.

22. POMEROY, CONSTITUTIONAL LAW 143 (Bennett ed. 1888). See also Newport & Cincinnati Bridge Co. v. United States, 105 U.S. 470 (1881); Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830).

23. See note 6 *supra*.

with election procedure.[24] Also, state courts have compelled a canvassing board to issue a certificate of election to a candidate.[25] This judicial action was held to be permissible because its sole purpose was to facilitate proving to the legislative body that the candidate had a prima facie right to a seat, rather than to admit the candidate to office.[26] As might be expected, state courts are held to have no jurisdiction to determine the right of a party to hold a seat in the United States Congress.[27]

B. *Federal Courts*

Likewise, it appears that article I, section 5 of the United States Constitution deprives federal courts of jurisdiction in these matters.[28] In a habeas corpus case brought by an individual arrested for failure to appear as a witness in an election contest before the United States Senate, the United States Supreme Court acknowledged that the "Senate . . . [has] sole authority under the Constitution to judge of the elections, returns and qualifications of its members . . . ."[29] The Court held that the exercise of this power involved the ascertainment of facts, the attendance of witnesses, and the examination of such witnesses, together with the power "to render a judgement which is beyond the authority of any other tribunal to review."[30] The warrant in this case was upheld, even though the Court, in a statement apparently contrary to traditional ideas as to the absoluteness of the legislature's power in this regard,[31] said: "[I]f judicial interference can be successfully invoked it can only be upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law."[32]

The question of the jurisdiction of federal courts to review a state

24. See O'Ferrall v. Colby, 2 Minn. 180 (1858); Anderson v. Blackwell, 168 S.C. 137, 167 S.E. 30 (1933). See SUTHERLAND, *op. cit. supra* note 1, at 104-05.

25. See People *ex rel.* Fuller v. Hilliard, 29 Ill. 413 (1862); People *ex rel.* Sherwood v. State Canvassers, 129 N.Y. 360, 29 N.E. 345 (1891).

26. People *ex rel.* Fuller v. Hilliard, *supra* note 25.

27. Burchell v. State Bd. of Election Comm'rs, 252 Ky. 823, 68 S.W.2d 427 (1934); Belknap v. Board of Canvassers, 94 Mich. 516, 54 N.W. 376 (1893); Laxalt v. Cannon, 80 Nev. 588, 397 P.2d 466 (1964). "The question is a federal one exclusively, and the tribunal . . . is . . . the United States Senate." State *ex rel.* McCue v. Blaisdell, 18 N.D. 55, 64, 118 N.W. 141, 145 (1908).

28. See Barry v. United States, 279 U.S. 597 (1929); Keogh v. Horner, 8 F. Supp. 933 (S.D. Ill. 1934) (no jurisdiction to issue a writ of prohibition restraining governor from issuing a certificate of election).

29. Barry v. United States, *supra* note 28, at 619.

30. *Id.* at 613.

31. "[T]he judicial department has no power to revise even the most arbitrary and unfair action of the legislative department . . . taken in pursuance of the power committed exclusively to that department by the Constitution. . . . The senate has power to adopt any procedure and to change it at any time and without notice." French v. Senate, *supra* note 12, at 606, 608, 80 Pac. at 1032-33.

32. Barry v. United States, *supra* note 28, at 620.

legislature's determination of the qualifications and elections of its members presents problem areas which are illuminated by several United States Supreme Court decisions. The first of these, *Taylor v. Beckham*,[33] involved a legislative determination of the outcome of a contested gubernatorial election, such determination being placed in the hands of the General Assembly by the Kentucky state constitution.[34] It was alleged that the Assembly's arbitrary and wrongful action deprived "plaintiffs in error of their offices without due process of law,"[35] and deprived the people of Kentucky of "the right to choose their representatives, secured by the guarantee of the Federal Constitution of a republican form of government to every State."[36] The Court, in upholding the Assembly's determination, decided that there was no denial of a right secured by the fourteenth amendment because a public office is not property as such.[37] Furthermore, the Court held that the guarantee of a republican form of government to the states was the responsibility of the "political department" of the federal government.[38] Therefore, this latter claim, based upon the "guaranty clause," was a nonjusticiable "political question." In *Snowden v. Hughes*,[39] the Court rejected a claim that the State Primary Canvassing Board's wrongful and arbitrary refusal to certify correctly the results of a primary election constituted a denial of equal protection of the laws and an abridgement of the privileges and immunities of a citizen of the

33. 178 U.S. 548 (1900).

34. "Contested elections for Governor and Lieutenant Governor shall be determined by both Houses of the General Assembly, according to sueh regulations as may be established by law." KY. CONST. § 90.

35. Taylor v. Beckham, 178 U.S. at 573-74. It was contended that the General Assembly's administration of statutes enacted pursuant to the constitutional provision amounted to a deprivation of due process of law. *Id.* at 575.

36. *Id.* at 574. "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV, § 4. This clause is commonly called the guaranty clause.

37. Taylor v. Beckham, 178 U.S. at 575-77. See also Wilson v. North Carolina, 169 U.S. 586 (1898). In this case, the Court decided that suspension of a state official by the Governor pursuant to state constitution and laws did not give rise to a federal question even though the official had no opportunity to see the evidence against him, confront his accusers or cross-examine witnesses.

38. Taylor v. Beckham, 178 U.S. at 578-81. The Court relied on Luther v. Borden, 48 U.S. (7 How.) 1 (1849), in which it was held that Congress, not the courts, was to decide which government is the established one of a state, as well as the republican character of the state government. For a discussion and criticism of *Luther v. Borden*, and its progeny, see 1 SCHWARTZ, POWERS OF GOVERNMENT 71-74 (1963). For a discussion of the "political question" doctrine, see notes 47-55 *infra* and accompanying text. The *Taylor* principle was re-affirmed by Cave v. Missouri, 246 U.S. 650 (1918) (per curiam). See also Walton v. House of Representatives, 265 U.S. 487 (1924) (federal courts as courts of equity are without jurisdiction over appointment and removal of state officers); Elder v. Colorado *ex rel.* Badgley, 204 U.S. 85 (1907) (contest over state office dependent upon mere construction of state law involves no federal question).

39. 321 U.S. 1 (1944).

United States, as guaranteed by the fourteenth amendment.[40] The Court said:

> The protection extended . . . by the privileges and immunities clause . . . does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law . . . . The right to become a candidate for state office . . . is a right or privilege of state citizenship . . . .[41]

The Court then reaffirmed the conclusion of *Taylor v. Beckham*,[42] and, in rejecting the contentions of a denial of equal protection, said:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of *intentional or purposeful discrimination* . . . . Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights . . . . (Emphasis added.)[43]

The Court concluded that there were no allegations in the complaint showing such "purposeful" discrimination.[44]

Because of its enunciation and clarification of principles regarding the justiciability of claims involving state governmental organization and the political rights of state citizens, the momentous[45] case of *Baker v. Carr*[46] is of great importance in this area. In its discussion of the problem of "political questions,"[47] the Court noted that a problem

40. The complaint also relied upon three sections of the Civil Rights Act of 1871, REV. STAT. §§ 1977, 1979, 1980(3) (1875), 42 U.S.C. §§ 1981, 1983, 1985(3) (1964).

41. Snowden v. Hughes, 321 U.S. at 6-7.

42. "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. . . . [W]e reaffirm . . . [that conclusion] now." *Id.* at 7.

43. *Id.* at 8, 11.

44. The Court then added, "[I]t is not without significance that we . . . have been unable to find a single instance in which this Court has entertained the notion that an unlawful denial by state authority of the right to state office is without more a denial of any right secured by the Fourteenth Amendment." *Id.* at 12. The dissenting opinion of Mr. Justice Douglas is also instructive. "[A] candidate . . . is not denied . . . equal protection . . . merely because he is the victim of unlawful administration of a state election law. . . . [A] denial of equal protection . . . requires an invidious, purposeful discrimination." *Id.* at 18.

45. "1962 will appear to historians of the Supreme Court as the Year of the *Reapportionment Case*." McClosky, *The Reapportionment Case*, 76 HARV. L. REV. 54, 56 (1962).

46. 369 U.S. 186 (1962).

47. The political question doctrine is built upon the separation of powers principle. In a case involving a "political question," the "expressed view of the political department becomes a rule of decision for the court." The case will not be "decided upon its merits as an independent question by the court." Field, *The Doctrine of Political*

should be recognized as being "political," and hence nonjusticiable, only when it involves a problem of separation of powers — that is, "the relationship between the judiciary and the coordinate branches of the Federal Government"[48] — or, when there is "a lack of judicially discoverable and manageable standards for resolving it."[49] The majority opinion took pains to make clear that the lack of such "judicially discoverable and manageable standards" is the only reason that the Court might label a question involving state governmental arrangements a "political question."[50] As one commentator points out:

> It is simpler to say that the mere fact of involvement in state governmental arrangements is irrelevant to the political question doctrine and go on to the residual inquiries: whether the matter under consideration involves a possible conflict with other branches of the federal government, or whether appropriate judicial standards are lacking.[51]

Furthermore, the Court said that guaranty clause[52] claims have been held to be nonjusticiable political questions, simply because they involve elements which define a "political question," and not because of any relationship to matters of state governmental organization.[53] The Court clearly implied that the guaranty clause will still be regarded as nonjusticiable because it is not "a repository of judicially manageable standards,"[54] but pointed out that a mere coupling of a valid federal

Questions in the Federal Courts, 8 MINN. L. REV. 485 (1924). See also Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925).

48. Baker v. Carr, 369 U.S. at 210.

49. *Id.* at 217. It should be noted that, despite language in Mr. Justice Brennan's opinion indicating that the applicability of the "political question" doctrine is strictly limited to causes concerning the power of the federal judiciary as against the power of the President or Congress, a lack of judicially discoverable standards will stamp a question as "political" even if a state government is involved. This is indicated by his speaking of a possible lack of such standards as a factor to be considered in *Baker v. Carr* itself (equal protection clause applies to a claim of under-representation in the state legislature). *Id.* at 226. See McCloskey, *supra* note 45, at 60. For the Court's formulation of factors indicating the probability of a political question, see Baker v. Carr, 369 U.S. at 217.

50. "Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization." *Id.* at 229.

51. McCloskey, *supra* note 45, at 63.

52. U.S. CONST. art. IV, § 4. See note 36 *supra*.

53. "[I]t is the involvement in Guaranty Clause claims of the elements thought to define 'political questions'; and no other feature, which could render them nonjusticiable. . . . [S]uch claims are not held nonjusticiable because they touch matters of state governmental organization." Baker v. Carr, 369 U.S. at 229. The Court analyzed the prior guaranty clause cases, including Luther v. Borden, *supra* note 38, and Taylor v. Beckham, *supra* note 33. Baker v. Carr, 369 U.S. at 218-23.

54. *Id.* at 223. See *id.* at 218, 222, 227. One commentator has suggested that if the Court's logic is pressed, even this implication is clouded because the guaranty clause's standards "are not any more nebulous than those of the equal protection clause in this context." McCloskey, *supra* note 45, at 63. It has been argued that the courts should not hold that all issues raised under the guaranty clause are nonjusticiable, and

claim with a claim based upon the guaranty clause will not defeat the valid claim, unless it is "so enmeshed with those political question elements which render guaranty clause claims nonjusticiable as actually to present a political question itself."[55] To emphasize further its constant assertion that claims are not nonjusticiable merely because they touch matters of state governmental organization, the Court cited *Gomillion v. Lightfoot*,[56] a case in which the fifteenth amendment was used to strike down a redrafting of municipal boundaries which effected a discriminatory impairment of voting rights. *Gomillion's* answer to an argument based upon the traditional view that the states enjoy unrestricted control over municipal boundaries[57] was:

> Legislative control of municipalities . . . lies within the scope of relevant limitations imposed by the United States Constitution . . . . The opposite conclusion . . . would sanction the achievement by a state of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions.[58]

Speaking of the extent of federal court review of state action, the Court in *Gomillion* observed:

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.[59]

This examination of these important cases suggests several considerations regarding the jurisdiction of federal courts to review a state legislature's determination of the qualifications and elections of its members. The mere unlawful denial by state authority of the right to state office is not a claim coming within federal court jurisdiction. It becomes such if, in addition to the denial to office, there is a claim of constitutional deprivation which is amenable to judicial correction, such as a denial of equal protection of the laws because of intentional or purposeful discrimination. A claim involving state governmental ar-

---

that the upholding by *Baker v. Carr* of this automatic nonjusticiability is incorrect. Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245 (1962); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962). See 1 SCHWARTZ, *op. cit. supra* note 38, at 73.

55. Baker v. Carr, 369 U.S. at 227. See also Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118 (1912) (an essentially guaranty clause claim not made justiciable by addition of insubstantial 14th amendment claims).

56. 364 U.S. 339 (1960).

57. See Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959).

58. Gomillion v. Lightfoot, 364 U.S. at 344-45.

59. *Id.* at 347.

rangements is not rendered nonjusticiable because of the "political question" doctrine; but if the matter involves a conflict with the other branches of the federal government, or if appropriate judicial standards are lacking, it is a "political question" and cannot be considered by the federal courts.[60] Because claims under the guaranty clause involve the elements defining a "political question," the clause cannot be invoked to remedy a denial of right to membership in the state legislature.

C. *A Case in Point*

An important recent case, *Bond v. Floyd*,[61] deals with the question under discussion. Having no direct guiding precedents, a three-man federal court[62] addressed itself to the problem of federal jurisdiction over the refusal of the Georgia House of Representatives to seat a representative-elect because of his endorsement of a statement issued by a militant civil rights organization of which he was a member.[63] The statement was strongly critical of United States foreign policy and offered support to persons unwilling to respond to the military draft.[64] Endorsement of this position, along with similar personal views of Julian Bond,[65] the representative-elect, was viewed by the House of Representatives as justification for disqualifying him from taking the oath to support the United States and Georgia constitutions. The proffered theory was that the oath, required of state representatives by the federal and state constitutions,[66] could not honestly be taken by

60. It appears that the scope of the political question doctrine was significantly narrowed by *Baker v. Carr*. See McCloskey, *supra* note 45, at 59, 61.

61. 251 F. Supp. 333 (N.D. Ga. 1966), *prob. juris, noted*, 384 U.S. 997 (1966).

62. Three-judge district court jurisdiction was premised on 28 U.S.C. § 2281 (1964), primarily by a claim that the Georgia Constitution was unconstitutionally administered to the representative-elect. Bond v. Floyd, 251 F. Supp. at 335.

63. The organization was the Student Nonviolent Coordinating Committee. Julian Bond, the plaintiff in this action, was communications director of the organization.

64. The following are certain relevant portions of the statement: "We believe the United States government has been deceptive in its claims of concern for freedom of the Vietnamese people, just as the government has been deceptive in claiming concern for the freedom of colored people in . . . other countries . . . and in the United States itself. . . . Our work . . . has taught us that the United States government has never guaranteed the freedom of oppressed citizens . . . . Vietnamese are murdered because the United States is pursuing an aggressive policy in violation of international law. . . . We are in sympathy with, and support, the men . . . who are unwilling to respond to a military draft. . . ." *Id.* at 336-37.

65. Bond endorsed the statement in a taped interview with the press. He added that "as a second-class citizen of the United States" he did not think that he had an obligation to support the government's role in Viet Nam. He also told a reporter that he admired the courage of anyone who would burn his draft card. *Id.* at 337.

66. "[T]he Members of the several State Legislatures . . . shall be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI. "Each senator and representative, before taking his seat, shall take the following oath, or affirmation, to wit: 'I will support the Constitution of this State and of the United States, and on

Bond because his expressions of belief were inconsistent with and repugnant to it.[67] The Georgia constitution,[68] as interpreted by state courts, vested the legislature with the sole and exclusive power to judge the election and qualifications of its members.[69] The representative-elect brought an action in federal district court for declaratory and injunctive relief against officers and members of the state House of Representatives,[70] primarily alleging that the House action deprived him of his right of free speech as guaranteed by the first amendment.[71]

The court asserted that the vesting of "sole and exclusive" power in the Georgia House to judge the qualifications of its members does not deprive a federal court of jurisdiction when a denial of first amendment rights has been alleged.[72] The House's exclusive power exists

> only insofar as it does not conflict with the Federal Constitution and must therefore give way to First Amendment rights in view of the vertical application of those rights to the states through the due process clause of the Fourteenth Amendment.[73]

---

all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State.'" GA. CONST. art. III, § 4.

67. Bond v. Floyd, 251 F. Supp. at 338. Petitions challenging the seating of Bond also contained contentions that Bond's statements gave aid and comfort to the enemies of the United States, violated 62 Stat. 622 (1948), as amended, 50 U.S.C. § 462 (1964) (Selective Service), and tended to bring discredit and disrespect on the House of Representatives. *Id.* at 337-38.

68. "Each House shall be the judge of the election, returns, and qualifications of its members . . . ." GA. CONST. art. III, § 7.

69. See Beatty v. Myrick, 218 Ga. 629, 129 S.E.2d 764 (1963); Rainey v. Taylor, 166 Ga. 476, 143 S.E. 383 (1928). See also Fowler v. Bostick, 99 Ga. App. 428, 108 S.E.2d 720 (1959). In fact, the plaintiff's brief admitted, "Relief in Georgia's state courts is . . . precluded." Brief for Plaintiff, p. 18, Bond v. Floyd, *supra* note 61.

70. Jurisdiction for a declaration of the plaintiff's rights and a permanent injunction against the defendants was based on 28 U.S.C. §§ 1331, 1343(3), 1343(4), 2201 (1964); and REV. STAT. §§ 722, 1979 (1875), 42 U.S.C. §§ 1988, 1983 (1964).

71. Plaintiff also contended that article III, section 4 was unconstitutionally vague; that he was barred from membership because he was a Negro; that he was denied both procedural and substantive due process; that the House action constituted an ex post facto law and bill of attainder; that his constituents were deprived of a republican form of government; that there was a denial of equal protection of the law, and a denial of the right of Negroes to vote. Bond v. Floyd, 251 F. Supp. at 335. These contentions were disposed of summarily by the court. This note does not fully explore the validity of the various constitutional objections to the legislature's action but is confined to the question of the right of federal courts to review such action.

72. *Id.* at 338. "It could hardly be argued that the House could refuse to seat a member because of his race or for any other reason amounting to an invidious discrimination under the equal protection clause of the Fourteenth Amendment. . . . We think it follows that the court has jurisdiction over a denial of First Amendment rights by the state. . . ." *Id.* at 338.

73. *Id.* at 340. On the applicability of first amendment freedoms to the states, see De Jonge v. Oregon, 299 U.S. 353 (1937); Gitlow v. New York, 268 U.S. 652 (1925).

Feeling that it should practice "some restraint" when dealing with state "political questions" concerning individual offices,[74] the court said that the House's exclusion of Bond would not conflict with his first amendment rights if he were not denied procedural and substantive due process of law.[75] No denial of procedural due process of law was found, and the court concluded that there would be no denial of substantive due process if there was a "rational evidentiary basis" for the House's action.[76] Branding the endorsed statement as "a call to action based on race,"[77] the court concluded:

> This call to action, and this is what we find to be a rational basis for the decision which denied Mr. Bond his seat, is that language which states that SNCC supports those men in this country who are unwilling to respond to a military draft . . . . [Bond's] statements and affirmation of the SNCC statement as they bore on the functioning of the Selective Service System could reasonably be said to be inconsistent with and repuguant to the oath . . . . This suffices as a rational basis . . . .[78]

III. STATUTORY ALTERATION OF CONSTITUTIONAL QUALIFICATIONS

When a constitution lays down specific eligibility requirements for a particular constitutional office, such as that of legislator, the constitutional specification is generally considered to be exclusive.[79] The legislature is viewed as having no power to require additional or different qualifications for the position. This general rule has been narrowed by some courts when the constitutional provisions in question are negatively worded.[80] The negative wording has been regarded as providing a list of disqualifications, and not precluding the legislature from re-

74. Bond v. Floyd, 251 F. Supp. at 343. The court implied that this same restraint need not be shown when dealing with questions concerning "whole systems," such as malapportionment, or racial discrimination. *Ibid.*

75. *Id.* at 343.

76. The fulfilling of this "test" would insure that the act was not arbitrary. *Id.* at 344.

77. *Ibid.*

78. *Id.* at 344-45. The court insisted that the wisdom of the House's action was not in issue, and that the judgment of the court should not be substituted for that of the House. See note 127 *infra* and accompanying text for an explanation of the dissenting opinion of Judge Elbert P. Tuttle.

79. See, *e.g.*, Whitney v. Bolin, 85 Ariz. 44, 330 P.2d 1003 (1958); Burroughs v. Lyles, 142 Tex. 704, 181 S.W.2d 570 (1944); Annot., 34 A.L.R.2d 155 (1954); COOLEY, CONSTITUTIONAL LIMITATIONS 139 (8th ed. Carrington 1927). It should be noted that the "qualifications" of concern here are those laid down as a prerequisite to election, as distinguished from those requirements relating to serving in a capacity to which one has already been elected. See notes 1 *supra* and 85 *infra*.

80. An example of negative wording is: "No Person shall be a Representative who shall not have attained to the Age of twenty-five years . . . ." U.S. CONST. art. I, § 2. An example of affirmative wording is: "The Representatives shall be citizens of the United States who have attained the age of twenty-one years . . . ." GA. CONST. art. III, § 6.

quiring additional qualifications for the office.[81] Other courts have rejected the validity of this distinction and have held that even a negatively worded constitutional prescription of qualifications is exclusive.[82] Finally, the legislature does not have the power to remove or dispense with an eligibility qualification or disqualification prescribed by the constitution.[83] However, the significance of these interpretive rules is limited because, as will be pointed out, the legislature in judging the qualifications of its members may impose additional qualifications or waive those mentioned in the constitution.[84] Therefore, the practical effect of these rules is to forbid formal, statutory alteration of constitutional qualifications.

IV. Non-Statutory Alterations of Constitutional Qualifications

May the legislative body, as a part of its discretionary judgment of qualifications,[85] refuse to seat a representative-elect for reasons other than his failure to meet those qualifications expressly specified in the constitution?[86] This question, the subject of some dispute in the United States, had its first prototype in the controversy surrounding John Wilkes in mid-eighteenth century England.[87] Because Wilkes, a journalist and pamphleteer, incurred the displeasure of King George III and his followers, he was expelled from the House of Commons. His constituents returned him to the same office four consecutive times,[88] but each time he was refused membership by the House. How-

81. See Boughton v. Price, 70 Idaho 243, 215 P.2d 286 (1950); Annot., 34 A.L.R.2d 155 (1954).

82. See, *e.g.*, Whitney v. Bolin, *supra* note 79; People *ex rel.* Hoyne v. McCormick, 261 Ill. 413, 103 N.E. 1053 (1913). Charles Warren asserts that the negative wording of the United States Constitution does not give eaeh House the power to establish additional qualifications. Warren, The Making of the Constitution 422 n.1 (1937).

83. See, *e.g.*, Morgan v. Vanee, 67 Ky. (4 Bush) 323 (1868) (involving office created by statute, but laying down principle applicable to constitutional office); Ferguson v. Wilcox, 119 Tex. 280, 28 S.W.2d 526 (1930).

84. See 1 Willoughby, The Constitution of the United States 607-08 (2d ed. 1929).

85. The term "qualifieations" as used in this present context denotes those requirements relating to serving in the body to which one has already been elected. See Annot., 34 A.L.R.2d 155 (1954).

86. The United States Constitution furnishes a typieal example of such a specification. "No person shall be a Senator who shall not have attained to the Age of thirty years, and been nine years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen." U.S. Const. art. I, § 3.

87. For accounts of the Wilkes episode, see Beck, The Vanishing Rights of the States (1926); 2 May, Constitutional History 26 (8th ed. 1887); Note, 33 Va. L. Rev. 322, 324 (1947).

88. Wilkes is reported to have goaded his coustituents with this warning: "If ministers can *once* usurp the power of declaring who *shall not* be your representative, the next step is very easy. . . . It is that of telling you whom you *shall* send to Parliament . . . ." Beck, *op. cit. supra* note 87, at 37.

ever, Wilkes was the eventual victor, for in 1782 (thirteen years after the fourth rejection) the House of Commons voted to expunge from the records all resolutions of expulsion. Apparently, a limit to parliamentary power was established because Parliament acknowledged that it can not permanently deny a seat to a member who qualifies according to law.[89] The framers of the federal constitution were aware of the Wilkes case,[90] and were the recipients of a colonial heritage steeped in the idea that the legislature should be the judge of its members' qualifications.[91] However, the proceedings of the Constitutional Convention do not unequivocally answer whether there was an intention to give each House the unrestrained power to deny admittance.[92] It is significant to note that the drafters, under the leadership of Madison, rejected a proposed provision that would have given Congress the discretion to impose property qualifications.[93] In so doing, they also voted down a counter-proposal leaving Congress free to impose whatever qualifications it might choose.[94] The expunging of these provisions from the proposed constitution would seem to infer that the delegates did not intend that Congress be free to place whatever qualifications it desired as a condition to membership.[95] However, it should be noted that James Wilson of Pennsylvania opposed giving Congress the power to prescribe property qualifications because such an affirmative grant might be construed as constructively excluding a general Congres-

89. 24 HALSBURY'S LAWS OF ENGLAND 335 (Hailsham ed. 1937). It has been contended that no such principle was established by the Wilkes case, but that the only result was a grudging admission by the House of Commons that it *ought* to have admitted him. Gooch, Book Review, 13 VA. L. REV. 670 (1927).

90. Wilkes was a hero in the colonies; Pennsylvania named an infant city in his honor (Wilkes-Barre), and South Carolina, through her legislature, contributed to his support. BECK, *op. cit. supra* note 87, at 34-35.

91. See note 15 *supra* and accompanying text. In regard to these pre-Constitutional Convention state constitutions, there appears to be no instance in which a colonial or state legislature undertook to exclude any member for lack of qualifications other than those required by such constitutions. WARREN, *op. cit. supra* note 82, at 423 (1937).

92. The relevant proceedings of the Constitutional Convention are recorded in II FARRAND, RECORDS OF THE FEDERAL CONVENTION 125, 128, 179, 250-51 (1911). See BECK, *op. cit. supra* note 87, at 42; WARREN, *op. cit. supra* note 82, at 412-26; Note, 33 VA. L. REV. 322, 327 (1947).

93. "The legislature of the United States shall have authority to establish such uniform qualifications of the members of each House with regard to property as to the said Legislature shall deem expedient." II FARRAND, *op. cit. supra* note 92, at 179.

94. *Id.* at 251; WARREN, *op. cit. supra* note 82, at 419.

95. Alexander Hamilton wrote: "The qualifications of the persons who may choose or be chosen are defined and fixed by the Constitution and are unalterable by the legislature." THE FEDERALIST No. 60, 394 (Sesquicentennial ed. 1938). See Note, 33 VA. L. REV. 322, 329 (1947). An historian notes: "Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress . . . the right to establish any qualifications for its members, other than those qualificaions established by the Constitution itself . . . ." WARREN, *op. cit. supra* note 82, at 421.

sional power to disqualify "odious and dangerous characters."[96]

The United States Congress and the state legislatures apparently have felt that the power to judge the qualifications of members includes the power to exclude for reasons other than a failure to fulfill constitutional requirements.[97] Analysis of seating disputes in the United States Congress[98] supports one commentator's conclusion:

> [It is] sufficiently clear that the Senate and House have repeatedly held it to be proper that they should consider whether or not persons should be admitted . . . even though possessing all the qualifications prescribed by the Constitution for membership and presenting credentials in due form of their election.[99]

Two cases showing exclusion for matters other than a failure to meet constitutional qualifications are illustrative. In 1900, the House refused to seat Brigham H. Roberts of Utah on the ground that he was a polygamist.[100] In 1870, the House refused to allow B. F. Whittemore of South Carolina to take the oath and occupy his seat when he had been reelected after a previous expulsion on the charge of selling appointments to the military academies.[101] The traditional congressional rationale for the possession of this apparently unlimited power was succinctly expressed by Senator Walter F. George of Georgia:

> There has always been a strong opinion that the prohibitions in the Constitution were exhaustive of the grounds on which the Senate would act in excluding a Senator. But I have never thought that that doctrine would be adhered to, because the occasion might arise when someone who was a moral leper and publicly and notoriously known to be such would come here and would say, 'I have been elected by my State and here is my certificate and I want to sit here.' If this body could not protect its integrity, if it could not preserve itself against that kind of member, then this body would have lost the power to preserve its very life.[102]

96. 93 CONG. REC. 12 (1947) (debate on whether Senator Bilbo of Mississippi was disqualified). See WARREN, *op. cit. supra* note 82, at 422; Note, 33 VA. L. REV. 322, at 329 n.28 (1947).

97. "[T]hough neither House may formally impose qualifications additional to those in the Constitution, or waive those that are mentioned, they may, in practice, do either of these things . . . . [T]here is no judicial means of overruling their action." 1 WILLOUGHBY, *op. cit. supra* note 84.

98. For a presentation of some of these seating disputes, see LUCE, LEGISLATIVE ASSEMBLIES 285 (1924); 1 WILLOUGHBY, *op. cit. supra* note 84, at 608; Note, 33 VA. L. REV. 322, 330 (1947).

99. 1 WILLOUGHBY, *op. cit. supra* note 84, at 610.

100. LUCE, *op. cit. supra* note 98, at 286-87; 1 WILLOUGHBY, *op. cit. supra* note 84, at 608. The House rejected a strenuous argument that Roberts, who possessed all constitutional qualifications, should be admitted and then, if deemed undesirable, expelled (expulsion requiring a two-thirds vote, U.S. CONST. art. I, § 5). LUCE, *op. cit. supra* note 78, at 608.

101. LUCE, *op. cit. supra* note 98, at 287.

102. 88 CONG. REC. 2390 (1942). In essence, this view makes the personal characteristics of each member an additional matter for the Congress to "judge." See POMEROY, CONSTITUTIONAL LAW 143 (Bennett ed. 1886).

Of course, the same general approach applies to state legislatures. There appear to be no reported decisions holding that a legislative body is powerless to bar a member-elect for reasons other than a failure to meet constitutional requirements, and the cases often contain assertions such as this: "The authority to be 'judge of the . . . qualifications of its own members,' does not limit their power; they are judges in other respects, in all respects."[103] An illustrative case involves the expulsion of five Socialist members of the New York Assembly in 1920. Because the New York Constitution does not specifically give the legislature expulsory power, the assembly employed the provision specifying that each House was the judge of the qualifications of its members.[104] A special committee of the Association of the Bar of the City of New York, headed by Charles E. Hughes, argued for the "absolute liberty of electors . . . to choose . . . any person, who is not made ineligible by the Constitution."[105] However, after a long controversy the Socialists were expelled.

Of course, the legislature's power to judge qualifications is to be distinguished from its power to judge elections and to expel members. Obviously, this latter authority does not include the legislative imposition of personal qualifications as a prerequisite for being seated.[106] In exercising the power to judge elections, the legislature merely determines the winner of the election in question, taking into account any irregularity or illegality involved.[107] For instance, the United States Senate excluded from its membership Frank L. Smith of Illinois, and William S. Vare of Pennsylvania on the ground that their 1926 elections had been tinged with fraud because of excessive political donations and expenditures.[108] The power of expulsion, on the other hand, often requiring more than a mere majority vote to be effective,[109]

103. Hiss v. Bartlett, 69 Mass. (3 Gray) 468, 472 (1855) (dictum). See Bond v. Floyd, 251 F. Supp. at 352, where the dissent points out that Georgia court decisions making the assertion that legislatures have the uncontrolled power to deny admittance are actually talking about cases of expulsion or judging elections, which are completely different from judging qualifications.

104. N.Y. CONST. art. 3, § 9. For an account of this series of events, see LUCE, *op. cit. supra* note 98, at 290-92.

105. Brief of Special Committee appointed by the Association of the Bar of the City of New York (1920) (cited in Bond v. Floyd, 251 F. Supp. at 354).

106. This distinction is emphasized because of the constant failure of the courts and legislatures to do so. See Bond v. Floyd, 251 F. Supp. at 355; 1 WILLOUGHBY, *op. cit. supra* note 84, at 610.

107. *Ibid.* See HAYNES, THE UNITED STATES SENATE 126 (1938) (catalogue of contested elections).

108. 1 WILLOUGHBY, *op. cit. supra* note 84 at 610; Note, 33 VA. L. REV. 322, 331 (1947). These were the election contests immediately concerning James M. Beck, when he wrote THE VANISHING RIGHTS OF THE STATES in 1926. Beck argued that the Senate was actually adding another qualification to be met by Smith and Vare.

109. See, *e.g.*, U.S. CONST. art. I, § 5, which reads: "[E]ach House may . . . with the concurrence of two-thirds, expel a member."

primarily concerns character and acts relating to the dignity of the body and the due performance of its functions.[110] Logically speaking, it refers to an act of a legislator during his term of office which adversely affects the discipline, decorum, or functions of the legislature.[111] Therefore, expulsion generally is not a determination as to lack of qualifications, but is a disciplinary device. As an example, in 1797 William Blount of Tennessee was expelled from the Senate for attempting, during his Senate term, to incite certain Indians to act against the best interests of the United States.[112]

Policy arguments favoring an expansive interpretation of the legislature's power to judge the qualifications of its members center around the basic idea of that body's right of self-protection.[113] The legislative body may exclude members for any reason in order "to preserve its very life."[114] As one observor notes: "[T]he weight of common sense is with those who argue for plenary powers. Is it not absurd to suppose that an assembly may not exclude an idiot or a leper?"[115] The judicial branch of government, as an expression of its confidence in the legislature, should not interfere with the legislature's unfettered exercise of discretion.[116] The only restraint should come from the legislator's constituents, who theoretically will react adversely if they feel that legislative judging of qualifications has actually become unauthorized legislative creation of qualifications.[117]

Proponents of a stricter construction of the constitutional provisions involved argue that the framers of those provisions did not intend that the legislature's judging of qualifications would leave it free to disqualify for reasons other than failure to meet constitutionally-enumer-

110. See, 1 WILLOUGHBY, *op. cit. supra* note 84, at 611.

111. See BECK, *op. cit. supra* note 87, at 51. "The power of expulsion . . . is a power of protection. A member may be physically, mentally, or morally wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent and disorderly, or in the habit of using profane, obscene, and abusive language." Hiss v. Bartlett, *supra* note 103, at 473.

112. LUCE, *op. cit. supra* note 98, at 285.

113. "We believe a state legislative body necessarily possesses this same inherent power of self-protection if the separation of powers doctrine is to have any real meaning . . . . The qualifications . . . of legislators in the Georgia Constitution are not all inclusive." Bond v. Floyd, 251 F. Supp. at 341-42.

114. See note 104 *supra.*

115. LUCE, *op. cit. supra* note 98, at 207.

116. Because of the unavailability of overruling of legislative action by courts of the same jurisdiction, a practical statement of the problem might be whether a legislative body *ought* to add personal qualifications for membership, and not whether it *may* add such qualifications. See 1 WILLOUGHBY, *op. cit. supra* note 84, at 608; Gooch, *supra* note 89, at 671. Of course, a different situation arises when a federal court reviews state legislative action. Bond v. Floyd, 251 F. Supp. at 340.

117. See POMEROY, *op. cit. supra* note 102, at 143.

ated qualifications.[118] In regard to the United States Constitution, a scholar asserts:

> [T]he Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship, and race.[119]

This assertion is strengthened by the fact that the power of expulsion, which may be utilized for reasons other than failure to fulfill constitutional qualifications, is functionally distinct from the power to judge qualifications, and generally requires more than a mere majority vote to be effective. Exclusion predicated upon the personal character or acts of the parties results from a failure to distinguish properly the two powers.[120] However, the basic policy reasons for the position that the legislature's judging of the qualifications of its members must be confined to those qualifications enumerated in the constitution, revolve around the idea that the electorate has the untrammeled right to elect whom it pleases. Therefore, the legislative body cannot insist upon the right to disapprove elected members for a non-enumerated reason.[121] In speaking of the United States Congress, one proponent of this restrictive view says:

> To hold that 'qualifications' has a broader meaning, and invests the right in either House to determine whether the chosen representative of the State is in other respects fit to take his seat, would be a nullification of the right of the people in each state to select their representatives . . . . It is preposterous to claim that the word 'qualifications' means intellectual or moral fitness, for if this were so, . . . the States would simply *nominate* a representative in the Senate, and the Senate would pass upon his fitness . . . .[122]

---

118. See BECK, *op. cit. supra* note 87, at 42; Note, 33 VA. L. REV. 322, 329 (1947).

119. WARREN, *op. cit. supra* note 82, at 421. "[T]he maxim *expressio uniusest exclusio alterius* would seem to apply." *Ibid.* See notes 85 and 89 *supra.*

120. See BECK, *op. cit. supra* note 87, at 49-50. Beck also asserts that it required a constitutional amendment, U.S. CONST. amend. XIV, § 3 ("No person shall be a Senator or Representative . . . who, having previously taken an oath, as a member of Congress . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."), to invest the Senate with the right to exclude anyone, even though he had engaged in a war to destroy the United States. *Id.* at 52-53.

121. Bond v. Floyd, 251 F. Supp. at 353-54 (dissent quoting Senator Philander C. Knox of Pennsylvania).

122. BECK, *op. cit. supra* note 87, at 49. "This clause said that each House shall be the 'judge'—not that each House should fix . . . —of the elections, returns and qualifications. . . . To judge a qualification . . . is not to determine whether a man is intellectually of a certain capacity, or whether morally he is so deficient . . . that you do not care to have his companionship in the Senate. To judge . . . is merely to determine whether certain qualifications which have been theretofore made the legal standard of eligibility have been complied with." BECK, MAY IT PLEASE THE COURT 290-91 (McGuire ed. 1930).

The electorate should be the final judge of a candidate's fitness for office, and if the electorate's choice meets those standards enumerated by the constitution, this choice should be binding upon the legislature even though the representative-elect is a racist, socialist, or ne'er-do-well.[123] Any vesting of uncontrollable authority is certainly unwise because it gives the legislature a source of tremendous power. This power "to go at large in a determination of whether Representative-Elect 'A' meets undefined, unknown or even constitntionally questionable standards shocks not only the judicial, but also the lay sense of justice."[124] The ultimate control over the legislature by its constituents can not effectively prevent the legislature, in its exercise of this exclusionary power, from denying representation to certain segments of the popnlace.[125]

This very question was of importance in *Bond v. Floyd.* The majority decided that "the qualifications and the disqualifications of legislators in the Georgia Constitution are not all inclusive."[126] Therefore, the legislature could exclude Julian Bond from membership even though he fulfilled all constitutional qualifications. The dissent did not reach a federal constitutional question because of its belief that the legislature was not empowered to "find a lack of qualifications beyond those *expressly provided* for in the Constitution itself . . . ."[127]

V. Conclusion

The significance of this problem is underscored by the fact that it touches three basic relationships, each of great importance to our governmental system: the relationships of (1) the judiciary to the legislature, (2) the federal government to the state governments, (3) and the electorate to the legislatures. The competing interests in these relationships must be properly balanced. For instance, the legislature, in judging the qualifications of a representative-elect, must maintain a careful balance between its interest in excluding odious characters and the electorate's interest in being represented by the person it chooses. The federal judiciary must balance the right of state

123. In commenting on the attempt to exclude Senator Bilbo of Mississippi from the United States Senate, an observer noted: "No doubt Senator Bilbo's speeches are offensive to many, but the views he expresses are not original. His evident popularity with the people of Mississippi indicates that he to some extent voices their sentiments. He has a right to be their spokesman." Note, 33 Va. L. Rev. 322, 335 (1947).

124. Bond v. Floyd, 251 F. Supp. at 352 (dissent).

125. For a criticism of the Supreme Court's placing all power in an analogous area in non-judicial hands, see 1 Schwartz, Powers of Government 73 (1963). Also, the effectiveness of "legislative justice" has been questioned. Note, 33 Va. L. Rev. 322, 333-34 (1947).

126. Bond v. Floyd, 251 F. Supp. at 342.

127. *Id.* at 352.

governments to maintain their own separation-of-powers concepts against the rights guaranteed to individual citizens by the federal constitution. And, the judiciary must not let its zeal for doing justice lead it into those "political" areas reserved by the constitutions for the other branches of government. Most importantly, all parties should recognize the fundamental purpose of the constitutional provisions enumerating qualifications for legislators: a representative legislature functioning in an orderly manner. It is to this end that all judging of qualifications should be directed.

APPENDIX

ALA. CONST. art. 4, §§ 51, 53; ALASKA CONST. art. II, § 12; ARIZ. CONST. art. 4, pt. 2, § 11; ARK. CONST. art. 5, §§ 11, 12; CAL. CONST. art. 4, §§ 7, 9; COLO. CONST. art. V, §§ 10, 12; CONN. CONST. art. III, §§ 6, 11; DEL. CONST. art. 2, §§ 8, 9; FLA. CONST. art. 3, § 6; GA. CONST. art. III, § 7; HAWAII CONST. art. III, § 13; IDAHO CONST. art. III, §§ 9, 11; ILL. CONST. art. 4, § 9; IND. CONST. art. 4, §§ 10, 14; IOWA CONST. art. 3, §§ 7, 9; KAN. CONST. art. 2, § 8; KY. CONST. §§ 38, 39; LA. CONST. art. 3, § 10; ME. CONST. art. IV, pt. 3, §§ 3, 4; MD. CONST. art. III, § 19; MASS. CONST. pt. 2, §§ 40, 55; MICH. CONST. art. IV, § 16; art. V, § 15; MINN. CONST. art. 4, §§ 3, 4; MISS. CONST. art. 4, §§ 38, 55; MO. CONST. art. 3, § 18; MONT. CONST. art. V, §§ 9, 11; NEB. CONST. art. III, § 10; NEV. CONST. art. IV, § 6; N.H. CONST. pt. II, arts. 22, 36; N.J. CONST. art. IV, §§ 4-2, 4-3; N.M. CONST. art. 4, §§ 7, 11; N.Y. CONST. art. 3, § 9; N.C. CONST. art. II, § 22; N.D. CONST. art. II, §§ 47, 48; OHIO CONST. art. 2, §§ 6, 8; OKLA. CONST. art. 5, § 30; ORE. CONST. art. IV, §§ 11, 15; PA. CONST. art. II, § 11; R.I. CONST. art. 4, §§ 6, 7; S.C. CONST. art. 3, §§ 11, 12; S.D. CONST. art. 3, § 9; TENN. CONST. art. II, §§ 11, 12; TEX. CONST. art. III, §§ 8, 11; UTAH CONST. art. VI, § 10; VT. CONST. ch. II, § 14; VA. CONST. art. IV, § 47; WASH. CONST. art. 2, §§ 8, 9; W. VA. CONST. art. VI, §§ 24, 25; WIS. CONST. art. 4, §§ 7, 8; WYO. CONST. art. 3, §§ 10, 12.