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The Judge of the Qualifications of its Members

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Abstract:

New York State Constitution Article III, Section 9 provides that “Each house shall... be the judge of the elections, returns and qualifications of its own members.” Recently, the case of Senator Hiram Monserrate has brought renewed attention to this provision. His case involved a conviction in 2009 for criminal assault. He was elected in November of 2008, and the assault occurred in December of 2008. Thus, the act took place after his election but before his term began. Nevertheless, the Senate voted to remove Monserrate from office.
This article reviews the history of the Constitutional provision, review its usage in New York history, review the history of similar provisions in other states and the federal government, and try to identify some of the potential problem raised by the Monserrate case.

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The Judge of the Qualifications of Its Members

By Bennett Liebman

The recent case of State Senator Hiram Monserrate has brought renewed attention on a provision of the State Constitution that had largely been forgotten. The provision is the second clause of the second sentence of Article III, Section 9 of the Constitution. The provision states "Each house shall… be the judge of the elections, returns and qualifications of its own members."[1]

The issue concerning Senator Monserrate involves his conviction in October of 2009 for criminal assault. While Senator Monserrate was found innocent of two more serious felony charges, he was found guilty of "dragging his companion Karla Giraldo down the hallway of his apartment building in December of 2008."[2] Monserrate had been elected to the Senate for the first time in November of 2008. Thus, the assault took place after his electoral victory but before his term in the State Senate commenced. A special committee formed in the Senate[3] after the trial recommended that Senate sanction Senator Monserrate and vote on whether to censure or remove Monserrate.[4] On February 9, 2010, the full Senate voted to expel Monserrate by a vote of 53 to 8.

This article will review the history of Constitutional provision, review its usage in New York history, review the history of similar provisions in other states and the federal government, and try to identify some of the potential problems raised by the Monserrate case.

Judging the Qualifications of the Members of the New York State Legislature

The original State Constitution in 1777 stated that the Assembly shall "be judges of their own members."[5] This was altered slightly by Constitutional Convention of 1821 which provided that each house shall "be the judge of the qualifications of its own members."[6] At the 1846 Convention, the language was changed to its current form that each house is "the judge of the elections, returns, and qualifications of its own members."[7] The language has remained unchanged since 1846.[8]

There have been relatively few efforts made to amend the provision. The basic problem with the provision developed in the second half of the 19th century as the majority party in particular would use its power to judge the elections of its members to seat members of its own party in contested elections.[9] In 1883, an amendment was introduced authorizing that contested legislative elections be tried by the courts. In 1890, this amendment was suggested by Governor David Hill who "thought that the power vested in each house to determine the election, returns and qualifications of its members had been abused frequently and that the only remedy was a transfer of jurisdiction from the Legislature to the courts."[10]

The impetus to change the provision began in earnest after the election results in 1890. At the election, the Democrats took control over the Assembly. With their numerical advantage in the Assembly, minus the Republican majority in the Senate, the Democrats would have a very slim majority in the event there was a joint session of the legislature, and a joint session would be called in 1891 to determine, in the days before the 17th Amendment, the next United States Senator from New York State. With only a slim overall majority, it was assumed that Governor Hill would prevail on the Assembly leadership to make certain that the Democrats would win any contested races for the Assembly thereby ensuring that a Democrat would be named the next United States Senator from New York.[11]

In response to this possibility, Republican Senator Saxton submitted a concurrent resolution under which the legislature could enact laws under which the determination of contested elections would be made by the courts.[12] As it turned out in January of 1891, Governor Hill did not need to oust any putative Republican members of the Assembly. Governor Hill had sufficient backing that the joint legislative session ended up voting for Governor Hill, himself, as the next United States Senator from New York.[13] Governor Hill then proposed a concurrent resolution similar to that of Senator Saxton. He proposed that the courts, rather than the houses of the legislature determine contested elections for the legislature. He stated, "Legislative bodies are often loath to relinquish any of their privileges but the determination of contested elections of their members has become so much a matter of partisanship that wise statesmanship and a sense of justice would demand its transfer to a fairer tribunal."[14]

The wording of the proposal was as follows:

> The election, return and qualifications of any member of either house of the legislature, when disputed or contested, shall be determined by the courts in such manner as the legislature shall prescribe, and such determination, when made shall be conclusive upon the legislature. Either house of the legislature may expel

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> any of its members for misconduct; but every person who receives a certificate of election as a member of either house, according to law, shall be entitled to a seat therein unless expelled for misconduct, or ousted pursuant to a judgment of a court of competent jurisdiction.[15]

The resolution was passed by both houses in 1891. It was endorsed in 1892 by incoming Governor Roswell Flower,[16] and it was passed a second time by both houses of the legislature in 1892. Nonetheless, at the general election in 1892, it was rejected by the people by a margin of 5, 352 votes.[17] There was speculation that the resolution's electoral difficulties were affected by the fact that it was the creation of the very controversial Senator Hill, and that people believed that the amendment would accomplish little since courts would ultimately act in the same partisan manner as the legislature.[18]

The 1892 vote was the last time that a serious effort was made to change the Constitutional provision making each house the judge of the returns and qualifications of its members.

Statutory Provisions

It can be seen from the express language of the Constitution that its language does not explicitly speak of the power of each house to expel or punish the behavior of its members. There has, however, been legislation to cover this issue. Section 3 of the Legislative Law states, "Each house has the power to expel any of its members, after the report of a committee to inquire into the charges against him shall have been made." This language has been unchanged since 1892.[19]

In turn, this language is derived from the original Revised Statues of the State. The language read,

> [e]ach house has the power to expel any of its members and to punish its members and officers for disorderly behavior, by imprisonment; but no member shall be expelled until the report of a committee, appointed to inquire into the facts alleged as to the grounds of his expulsion, shall have been made.[20]

One of the major questions involved in looking at possible expulsions of members is whether: (a) the statutory language on expulsions is simply a procedural mechanism under which each house of the legislature utilizes its power to judge the qualifications of its members, (b) whether the statutory language is a procedural mechanism to implement the inherent right of legislative bodies to discipline and expel members of their bodies,[21] and/or (c) the statutory language on expulsions stands on its own as a substantive grant of power to each house of the legislature. In the case of the New York State legislature there is the additional issue of whether the houses of the legislature even have any power to expel members.[22]

Historical Review of Legislative Expulsions in New York

Over the past ninety years, legislative expulsions in New York have been non-existent. In part, this has been due to the fact that individual legislators who have been guilty of felonies have left the legislature without much fuss. But, another major issue has been that New York State has largely avoided the issue of legislative expulsion since the expulsion of five members of the Assembly who were excluded from the Assembly in 1920 because of their membership in the Socialist Party. While seemingly a popular act at that time immediately after World War I, the Russian Revolution, and the Palmer Raids,[23] the removal of the Socialists has come to be viewed as a gross overreaction to a minimal threat that seriously undermined the free speech rights of Americans. Since the 1920 expulsion, only one member has been expelled. That came in 1921 when Assembly member Henry Jaeger was removed from office. Jaeger was a Socialist, but the stated basis of his expulsion was that he was not a resident of the district that he was elected from.[24] The other Socialists who were elected to the Assembly in 1921 were not removed from office.[25]

A number of the efforts to remove members from the New York State legislature were not successful. In the case of Assemblyman Lucas Decker, who had been accused of avoiding the draft and obtaining his election through fraudulent means, the Assembly found that "some question involving the election or returns is necessary before the Assembly has jurisdiction in the premises, or further that the person so elected must be entirely disqualified under the constitution, or by his conduct in the house disqualify himself."[26] In short, in the Decker case, the Assembly took a restrictive view of its powers and limited itself to an assessment of whether Decker met the constitutional qualifications for his office and whether he had engaged in heinous conduct before the house.

In the case of Senator James Wood, the effort to remove the Senator for accepting bribes was ultimately unsuccessful. The senator had not been found guilty of any offenses against the current Senate. Any offenses he committed were offenses against the prior meeting of the Senate.[27] This would lead to the belief that a legislator could only be removed for misconduct committed during the current legislative session.

On the other hand, in the case of Senator Jotham Allds, the Senate looked at misconduct that occurred at prior session when Allds had served as a member of the Assembly. Allds, who was the temporary president of the Senate in 1910, was accused that year of accepting a bribe in 1901. After a long hearing, Allds resigned just before a vote was to be taken on his removal. The Senate proceed-

ed to take a vote on his removal and voted 38-8 to remove him.[28] While Allds had resigned, his case can be viewed as one where the legislature considered misconduct which occurred before the legislative term.

In the case of the five Socialists in 1920, the essence of the case was that the Socialists had given an oath to the tenets of the Socialist Party of America. Those tenets clearly were inimical to the oaths required of a legislator in New York. They could not legitimately be supporting the Constitution of the United States and the Constitution of New York State. If they took the New York oath, they could only be taking a false oath.[29] They were, by definition, disloyal. The Assembly voted overwhelmingly to disqualify the five Socialists from holding seats in its body.[30]

In earlier cases, the Senate removed members in 1779[31] and 1781.[32] The Assembly removed member Jay Gibbons in 1861 for misconduct by a vote of 99-8. Gibbons' attorney argued that the Assembly lacked the power to expel a member, but the argument was unsuccessful. Efforts to reduce Gibbons' penalty to a censure or to a request for him to resign were rejected by the Assembly.[33]

There are no cases like the Monserrate case where either house of the legislature brought charges against a member who had been convicted of a misdemeanor. There are no cases where a member was removed after being found guilty of a felony. Rather, after a felony conviction, the member has normally resigned from his or her position because under the Public Officers Law, conviction of a felony creates a vacancy in the office.[34] From the limited number of removal cases, there really are few clear precedents. The legislative decisions seem to have been made on an ad hoc basis, and it is difficult to extract authoritative benchmarks from these decisions.

Qualifications in Other Jurisdictions

Nearly all states, and the federal government, are like New York State in making the members of each house the judges of the qualifications of their members.

The United States Constitution provides in language that is most similar to New York's constitution "each house shall be the judge of the elections, returns and qualifications of its own members."[35]

In 1915, the Constitutions of 46 states explicitly made each house the judge of the elections and qualifications of its members.[36]

An even more recent survey confirmed that 48 states still made each house the judge of the qualifications of its members.[37] The only two exceptions were Hawaii and North Dakota where judges make the decision on the qualifications of members in contested election cases.[38] Hawaii retains a provision that each house is to judge the qualifications of its members,[39] but in contested elections, that power is reserved for the courts under a separate provision of the Hawaiian constitution.[40] North Dakota makes each house "the judge of the qualifications of its members, but election contests are subject to judicial review as provided by law."[41]

Unlike New York, almost all states and the federal government provide for expulsion of members by each house. The United States Constitution authorizes each house with the "concurrence of two-thirds,"[42] to expel a member. Almost all states explicitly provide that each house can expel its members, and the vast majority require a two-thirds vote. Many states also place a restriction on expulsions so that a house may only expel a member once for the same offense.[43] Vermont restricts expulsions for conduct that only became known during the current term of the house.[44] Some states, including New York, New Hampshire, North Carolina, South Dakota, and Massachusetts lack any provision authorizing houses to expel their members. Kansas simply authorizes each house of the legislature to provide for expulsion or censure of the members in appropriate cases.[45] Others provide that certain expelled members are ineligible to serve in either house of the legislature,[46] and other states make persons convicted of certain crimes ineligible to serve as legislators.[47]

States without an explicit provision authorizing a house to expel a member of the legislature have not refused to take action to remove individual legislators. Instead acting on the authority of the inherent right of legislative bodies to discipline and expel members,[48] there have been removals in these states.[49] In the absence of any Constitutional language on the removal of legislators, it would be assumed that expulsion would be authorized pursuant to a majority vote.[50]

Traditionally, the power of each house to judge and/or expel its members was considered an absolutely exclusive power.[51] That remains basically the case today.[52] Nonetheless, over the past half century, there have been more judicial encroachments into what had been the exclusive legislative domain.[53] Courts have begun to take baby steps to enter the political thicket.

Potential New York Issues

Felonies and State Legislators—A first issue that needs to be reviewed is whether the provision of the Public Officers Law providing that conviction of "a felony or a crime involving a violation of his oath of office"[54] can constitutionally be applied to members of the legislature. If each house is truly the judge of the qualifications of its members, how can it legitimately cede its jurisdiction to another branch of government? This issue was raised in the lower courts in the case of *Ruiz v. Regan*.[55] Israel Ruiz had been convicted of a federal felony. The State Comptroller removed him from the State payroll, and Ruiz was seeking reinstatement as a member of the Senate. He raised the issue that the State Constitution required the

full Senate to remove him. The court quickly disagreed finding that by enacting the applicable portion of the Public Officers Law, the "State Legislature itself declared petitioner's office vacant."[56]

Nonetheless, the issue should have merited far greater scrutiny. The Court of Errors dealt with this issue in the major 19th century case of *Barker v. People*.[57] Barker involved a constitutional test of the state's anti-dueling law that had been passed in 1816. The portion of the law that was in question was the provision that a person convicted of the crime was made ineligible to hold public office. The statute was upheld by the court based on the power of the legislature to establish penalties for violations of the criminal law. Nonetheless, as to applying this law to members of the legislature, the court demurred and left the issue up to the houses of the legislature.

The court found, "The power of each house of the Legislature to judge the qualifications of its own members, does not determine or illustrate what is, or is not a qualification; the statute to suppress dueling does not propose to deprive, nor can any law deprive, the several houses of the legislature of their exclusive jurisdiction; and this part of the constitution, is therefore not infringed by the judgment of disqualification now in question."[58] In short, a law, providing that a person would lose his or her right to office if convicted of a certain crime, could not be applied to members of the state legislature. The power to judge the qualification of the members is not one that can be delegated. "The legislature cannot transfer its power to judge of the election of its members to the courts."[59] In short, this is a significant issue that needs to be handled in far greater depth than it received in the *Ruiz* case.

What are Qualifications?—If the power to expel a member from a house of the New York State legislature is premised on the ability of each to judge the qualifications of its members, then there may be little basis for expelling any members except for violations of the Constitution. In *Powell v. McCormack*,[60] the House of Representatives refused to seat longtime Harlem Congressman Adam Clayton Powell for a number of issues involving his personal misconduct. The court found that the refusal to seat Congressman Powell was improper. While the House was the judge of the qualifications of its members, those qualifications referred solely to qualifications contained in the Constitution. The House lacked the power to add non-Constitutional qualifications as a test of membership.

In the State Constitution, the only qualifications for membership in the legislature are a residency requirement and an oath requirement. A member has to be a citizen of the United States, a resident of the state for five years, and a resident of the district for the 12 months preceding his or her election.[61] The member must also take the prescribed oath authorized by the Constitution.[62] The New York State Constitution does not contain any age requirements or character requirements for legislators. As such, under the Powell case, if the legislature is trying to expel or exclude a member based solely on its power to judge qualifications, this power may be a minimal one.

Judicial Review of Legislative Seating Decisions—During the pendency of the removal actions against the Socialists in the Assembly in 1920, Governor Alfred Smith stated, "It is true that the Assembly has arbitrary power to determine the qualifications of its membership, but where arbitrary power exists it should be exercised with care and discretion because from it there is no appeal."[63] The attorney for the ousted Socialists said, "We regard the expulsion of our Assemblymen primarily a question for the people and not for the court to decide."[64] Justice Douglas in *Powell* added, "And if this were an expulsion case I would think that no justiciable controversy would be presented."[65]

Yet decisions over the past five decades have challenged this view of no role for the courts.[66] In the case of Powell, the Supreme Court overturned a decision of the House of Representatives not to seat a Congressman, finding that judging the qualifications of a Congressman involved a limited power to judge only those qualifications established by the Constitution.[67] In *Bond v. Floyd*, the Supreme Court determined that the First Amendment prevented the Georgia House of Representatives from excluding an electoral winner who had been severely critical of United States policy in Vietnam.[68] A state legislative body could not exclude an individual for exercising his or her First Amendment rights.[69] Additionally, courts have found that state legislators, subject to removal, have the due process rights of notice, a hearing, and a right to defend themselves.[70] Thus, legislators who are the subjects of a removal proceeding appear now to be able to have a limited judicial review of the constitutionality of their ouster.

The Statutory Authority—If the only source of authority that each legislative house has to remove a member is derived from § 3 of the Legislative Law, then it might be argued that this deprives each house of the ability to impose a lesser penalty than removal. The only power that the legislature has under § 3 is to expel members.

The Time of the Misconduct—In the case of Senator Monserrate, his misconduct occurred in December of 2008 after his election in November but before his term of office in the Senate began. In the case of James Wood, the Senate limited actionable misconduct to acts that occurred during the present term of office.[71] Other non-legislative sources suggesting that only acts that took place during the term of the member are actionable include the brief that former Supreme Court Justice Charles Evans Hughes filed on behalf of the Association of the Bar in support of the Socialists in the Assembly. Hughes argued that absent a constitutional disqualification on the part of the members "or of any misconduct in office" the members were entitled

to be restored to the privilege of their seats.[72] This issue is further complicated by the Senate review in the Allds case and the fact that the voters in the Monserrate case could not have passed judgment on his criminal action.

In short, the Monserrate case is likely to bring to the surface numerous issues presented under a Constitutional provision which has been somnolent for many decades.

Endnotes

1. N.Y. Const. art. III, § 9.
2. Jeremy W. Peters & Fernanda Santos, *A Call for a Monserrate Expulsion Vote*, N.Y. Times, Jan, 15, 2010, at 23. He was also found innocent of a second misdemeanor charge "of intending to cause physical injury to Ms. Giraldo by cutting her with a glass."
3. The committee was formed pursuant to § 3 of the Legislative Law which states, "Each house shall have the power to expel any of its members, after the report of a committee to inquire into the charges against him shall have been made." N.Y. Legis. Law § 3 (McKinney 1991).
4. Peters & Santos *supra* note 2; *see also* Joseph Spector, *Senate Panel Urges Vote on Monserrate*, Rochester Democrat & Chronicle, Jan. 15, 2010; State of N.Y. Select Committee to Investigate the Facts and Circumstances Surrounding the Conviction of Hiram Monserrate, Report (Oct. 15, 2009), *available at* http://www.nysenate.gov/files/pdfs/Final%20Monserrate%20Report.pdf.
5. N.Y. Const. of 1777, art. IX.
6. N.Y. Const. of 1821, art. I, § 3.
7. N.Y. Const. of 1846, art. 3, § 10.
8. N.Y. State Constitutional Convention Comm., Problems Relating to Legislative Organization and Powers 42 (1938).
9. *See, e.g.*, *The Twombley-Carey Case Settled in Accordance with the Desires of the Ring*, N.Y. Times, Feb. 1, 1871 (regarding the seating of a Democrat as an Assembly member). *See also* 189 N.Y. Red Book, 381–398, 418–507 (including the numerous times where the legislature determined the winner of a contested election).
10. *See* State Constitutional Convention, *supra* note 8, at 43.
11. *See Hill Will Imitate Reed*, N.Y. Times, Nov. 6, 1890, at 5 (arguing that the Governor would have the Assembly leadership "bundle out of the House every Republican whose majority is narrow enough to justify a contest."). *See also Hill's Policy of Eviction*, N.Y. Times, Dec. 31, 1890, at 1 ("Gov. Hill has been planning to oust a sufficient number of Republican Assemblymen to enable him to name the successor of Senator Evarts.").
12. *To Improve the Ballot Law*, N.Y. Times, Jan. 19, 1891.
13. Governor Hill was elected the next United States Senator from New York by a vote of 81–79. While the term began in March of 1891, Hill served out his entire term as governor, finally taking his seat in the Senate at the beginning of the 1892 calendar year.
14. *Governor Hill's Message*, N.Y. Sun, Jan. 7, 1891 at 5; Charles Z. Lincoln, Messages from the Governors VIII 1074 -1076 (1909).
15. Concurrent Resolution, Mar. 6, 1891, 1891 N.Y. Sess. Laws 749 (amending N.Y. Const. art. 3, § 10).
16. Governor Flower in his annual message noted, "Jurisdiction over the determination of such cases properly belongs to the courts, and I am satisfied that the proposed transfer of it will give general satisfaction when effected." Charles Z. Lincoln, Messages from the Governors IX 35 (1909).
17. The vote was 174,678 for the amendment and 180,030 opposed. Downstate New Yorkers supported the amendment, and it was opposed by upstate New York voters. 1893 N.Y. Legis. Manual 791 (1893).
18. *The Three Amendments*, New York Daily Tribune, Nov. 7, at 2. ("But did Mr. Hill make that suggestion having in mind the fact that the Court of Appeals which will have the final disposition of the contested legislative election cases has a majority of Democratic judges and is likely to have such a majority for many years to come?").
19. N.Y. Legis. Law § 3 (2009).
20. 1 Rev. Stat., pt. 1, ch. VII, title II, § 12, at 154 (1st ed., 1829). The Select Committee to Investigate Senator Monserrate reviews the origins of this statute in its report. *See supra* note 4, at 36–37.
21. *See generally* Thomas Cooley, Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union 133 (1868) ("This power is sometimes conferred by the constitution, but it exists whether expressly conferred or not. It is 'a necessary and incidental power, to enable the house to perform its high functions and is necessary to the State. It is a power of protection.'" (*quoting* Hiss v. Bartlett, 69 Mass. 468, 473 (1855) (Shaw, C.J.))).
22. In 1987, the Assembly Committee on Ethics and Guidance concluded that the houses of the legislature lacked the authority to expel members. Assembly of the State of N.Y. Comm. on Ethics and Guidance, Findings After Investigation Concerning Charges Against Assemblywoman Gerdi E. Lipschutz (1987). Not only does this conclusion seem to against the force of legislative precedent, but it seems in clear contradiction of *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 481 (1885) (mentioning the issue of expelling members and concluding that "the necessity of the powers mentioned is apparent, and is conceded in all the authorities."). *See also* People ex rel. Hatzel v. Hall, 80 N.Y. 117, 126 (1880).
23. An action of Congress to remove Socialist Representative Henry Berger in 1920 passed by a vote of 311-1. *See* Zechariah Chafee, Free Speech in the United States 247 (1948); Thomas E. Vadney, *The Politics of Repression, A Case Study of the Red Scare in New York*, 49 N.Y. Hist. 56 (1968).
24. *Assembly Ousts Henry Jaeger, Socialist; Finds He Was a Jerseyman When Elected*, N.Y. Times, Mar. 31, 1921, at 1.
25. *Assembly Refuses to Oust Socialists*, N.Y. Times, Apr, 5, 1921 at 21.
26. 1 Assembly J. 105 (1918).
27. Senate J. 639 (1872).
28. 16 Senate Documents (1910). Similarly, misconduct before the beginning of his term was used as the basis for impeaching New York Governor William Sulzer in 1913. *See* Proceedings in the Court of Impeachments: The People of the State of New York by the Assembly Thereof against William Sulzer as Governor 1686 (1913).
29. The required oath is now in N.Y. Const. art. XIII, § 1.
30. Two were disqualified by votes of 116-28, one's vote was 115-28, and votes against two were 10-40. *See* 3 Proceedings of the Judiciary Committee of the Assembly in the Matter of the Investigation by the Assembly of the State of New York as to the Qualification of Louis Waldman, August Claessens, Samuel A. De Witt, Samuel Orr and Charles Solomon to Retain their Seats in Said Body 2805-2807 (1920).
31. Senator John Williams, Journal of the Senate of the State of New York 166 (1778).
32. Senator Ephraim Paine, Journal of the Senate of the State of New York 78 (1781).
33. Journal of the Assembly of the State of New York 793– 96 (1861).
34. N.Y. Pub. Officers Law § 30(1)(e) (McKinney 2006). *See also* Ruiz v. Regan, 143 Misc. 2d 773 (Sup. Ct. Albany Co. 1989).
35. U.S. Const., art. I, § 5.
36. H. W. Dodds, Procedures in State Legislatures 3 (1918) *citing* Legis. Drafting Research Fund of Columbia University Prepared for the N.Y. State Constitutional Convention Commission, Index Digest of State Constitutions 925–926 (1915).

37. Paul E. Salamanca & James E. Keller, *The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members*, 95 KY. L.J. 244, 254 -255 (2006-2007).

38. *Id.* at 254.

39. HRS CONST. art. III, § 12.

40. *See* HRS CONST. art. II, § 10. *See* Akizaki v. Fong, 461 P.2d 221 (Ha. 1969).

41. N.D. CONST. art. IV, § 12.

42. U.S. CONST. art. I, § 5.

43. *See*, *e.g.*, ALA. CONST. art. IV, § 53; CONN. CONST. art. III, § 13; IND. CONST. art. 4, § 14; OR. CONST. art. IV, § 15. Mississippi has the unique provision that each house can only expel a person once for the same offense, except in the cases of "theft, bribery, or corruption." MISS. CONST. art. IV, § 55.

44. VERMONT CONST. § 14—expulsion "not for causes known to their constituents antecedent to their election."

45. KAN. CONST. art. II, § 8.

46. ARK. CONST. art. V, § 12. WYO. CONST. art. III, § 12 and OKLA. CONST. art. V, § 19 bar a member expelled for corruption for serving in either house in the future.

47. *See*, *e.g.*, COLO. CONST. art. 12, § 4 making persons "convicted of embezzlement of public moneys, bribery, perjury, solicitation of bribery, or subornation of perjury" ineligible for service in the general assembly. *See similarly* ALA. CONST. art. IV, § 60; ARK. CONST. art. V, § 9; DELAWARE CONST. art. II, § 21; MISS. CONST. art. IV, § 44; N.D. CONST. art. IV, § 9; PENN. CONST. art. II, § 7, and S.D. CONST. art III, § 4.

48. *See supra* note 21. "In the states of Massachusetts, New Hampshire, New York and North Carolina, there being no constitutional provision on this subject, the power to expel exists, as a necessary incident to every deliberative body and may be exercised at the discretion of the assembly, and in the usual way of proceeding." Luther Stearns Cushing, *Lex Parliamentaria Americana: Elements of the Law and Practice of Legislative Assemblies in the United States*, § 685, 269 (1874).

49. *See* Hiss v. Bartlett, 69 Mass. 468, 473 (1855). *See also* State v. Gilmore, 20 Kan. 551 (1878).

50. French v. Senate of California, 80, 1031, 1032 (Cal. Sup. Ct., 1905).

51. *See Gilmore*, 20 Kan. at 554.

52. Wheatley v. Sec'y of the Commonwealth, 792 N.E.2d 645 (Mass. 2003); *see also* Heller v. Legislature of Nevada, 93 P.3d 746, 754 (Nev. 2004) (stating that "a legislative body's decision to admit or expel a member is almost unreviewable in the courts"); State v. Evans, 735 P.2d 29 (Utah 1997); Salamanca and Keller, *supra* note 38; Ronald A. Parsons, *Pierre Pressure: Legislative Elections, the State Constitution and the Supreme Court of South Dakota*, 50 S.D. L. REV. 218 (2005). "The courts have uniformly denied that they have any power to review either legislative expulsions or legislative decisions on the qualifications of members." ZECHARIAH CHAFEE, FREEDOM OF SPEECH 340 (1920).

53. Powell v. McCormack, 395 U.S. 486 (1969); Bond v. Floyd, 385 U.S. 116 (1966); Stephenson v. Woodward, 182 S.W.3d 162 (Ky. 2005).

54. PUB. OFFICERS LAW § 30.1(e).

55. 143 Misc. 2d 773 (Sup. Ct. Albany Co. 1989).

56. *Id.* at 775. *See also* 1989 N.Y. Op. Att'y. Gen 1 (1989). A more substantial defense of the power of a legislative act to declare a State legislative position to be vacant can be found in Erichetti v. Merlino, 457 A.2d 476, 486 (N.J. Super. 1982) finding that a vacancy was qualitatively different than an expulsion.

57. 3 Cow 686 (1824).

58. *Id.* at 708.

59. Thomas M. Cooley and Victor H. Lane, *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* 189 n.1 (7th ed., 1903). *See also* 1977 Iowa AG: "You point out that mere statutes such as Chapter 57 and 59 of the Code, cannot limit the power of a house of the General Assembly. Of course, you are correct."

60. *See supra* note 54. Justice Douglas in a concurring opinion noted the views of Alexander Hamilton who wrote, "The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature." 395 U.S. at 552.

61. CONST. art. III, § 7. The local residential requirement is altered slightly after readjustments or alterations of legislative districts.

62. CONST. art. XIII, § 1.

63. *Smith Assails Assembly,* N.Y. TIMES, Jan. 11, 1920, at 1. *See generally* David Colburn, *Governor Alfred E. Smith and the Red Scare, 1919-20,* 88 POL. SCI. Q. 423 (1973).

64. *Socialists Seek Special Election*, N.Y. TIMES, Apr. 7, 1920, at 8.

65. *Powell*, 395 U.S. at 553.

66. *See supra* note 53.

67. *Id.*

68. Bond v. Floyd, 385 U.S. 116 (1966).

69. Under the Bond case, arguably the exclusion of the five Socialists in New York in 1920 could be viewed as a violation of their First Amendment rights. It would also make it unlikely that a house could expel a member who engaged in speech that could be considered biased against any gender, religion, race, or sexual orientation.

70. McCarley v. Sanders, 309 F. Supp. 8, 11 -12 (M.D. Ala. 1970); Gerald v. Louisiana State Senate, 408 So.2d 426 (La. App. 1 Cir. 1981); c.f. Gordon v. Leatherman, 325 F. Supp 494, 498 (S.D. Fla. 1971) *rev'd on other grounds* 450 U.S. 562 (5th Cir. 1971); Sweeney v. Tucker, 375 A.2d 698 (Pa. 1977).

71. *See supra* note 26.

72. Hughes' brief quoted in FREEDOM OF SPEECH, *supra* note 52, at 339.

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