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The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members

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The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members

Paul E. Salamanca¹ & James E. Keller²

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¹ James & Mary Lassiter Professor of Law, University of Kentucky, College of Law. I represented David L. Williams, President of the Senate, in *Woodward v. Stephenson*, Jefferson Cir. Ct., No. 04-CI-09261, and *Woodward v. Stephenson*, Franklin Cir. Ct., No. 04-CI-01676, *aff'd in part and rev'd in part*, 182 S.W.3d 162 (Ky. 2005), and I remain on staff as a general counsel to Senator Williams. The opinions expressed herein are my own, however, and not necessarily those of Senator Williams or any other person.

² Special Counsel, Gess Mattingly & Atchison, P.S.C., Associate Justice, Supreme Court of Kentucky, 1999–2005. We are indebted to a number of people who reviewed this article, including Don Cetrulo, John David Dyche, Harland Hatter, Laura Hendrix, Steve Huefner, Robert Ireland, Dan Kelly, Douglas L. McSwain, Lori Ringhand, and Peter Wattson. We are especially indebted to Richard Ausness, who read this article at many iterations.

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INTRODUCTION

In *Stephenson v. Woodward*,³ the Supreme Court of Kentucky functionally affirmed a *quo warranto* against a sitting member of the senate.⁴ Although a respectable argument can be made that the person in question was in fact not qualified to serve,⁵ the senate itself had deliberated on the issue and had reached its own respectable conclusion that she was qualified.⁶ More importantly, the Constitution of Kentucky, like the Constitution of the United States and that of virtually every other state,⁷ authorizes each

3 *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005).

4 *Black's Law Dictionary* defines *quo warranto* as “[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed.” BLACK’S LAW DICTIONARY 1285 (8th ed. 2004). Because *Stephenson* proceeded indirectly from a statute, KRS 118.176, it was not literally a *quo warranto*, but it had much the same effect. The court below (the Franklin Circuit Court) declared that Dana Seum Stephenson could not serve in the Senate and enjoined her from doing so, and the Supreme Court of Kentucky affirmed the declaratory portion of this judgment. See *Stephenson*, 182 S.W.3d at 173 (“[W]e affirm that portion of the [judgment below] declaring that Stephenson is not constitutionally qualified for the office of State Senator and may not be seated.”). Stephenson subsequently resigned. See KY. SEN. JOUR. 1–2 (Jan. 3, 2006). As we explain further below, *quo warranto* has not historically been available against a member of the legislature. See *State ex rel. Attorney Gen. v. Tomlinson*, 20 Kan. 692, 703 (1878) (“We are not cited to a single case in the federal or state courts, where any member of congress, or any member of a state legislature, from the foundation of the government to the present time, has been ousted by *quo warranto*.”). See *infra* notes 740–59 and accompanying text.

5 See *infra* notes 30–34 and accompanying text. The list of legislators who have not met the qualifications for membership is quite long, and indeed quite distinguished. It includes Henry Clay, who served in the Senate of the United States despite being underage, see *infra* note 438, and Ed Baker, who represented Oregon in the same place despite actively serving as a colonel in the Army, see *infra* notes 310–12 and accompanying text. In an oblique sense, it also includes the great Edward Coke, who was elected to Commons in 1625 and who remained a member thereof despite having been made a sheriff by Charles I. See Harold Hulme, *The Sheriff as a Member of the House of Commons From Elizabeth to Cromwell*, 1 J. MOD. HIST. 361, 367–70 (1929). Clay and Baker were never subject to a challenge, but Coke was, although Commons took no action. See *id.* at 368–69. Coke stayed away from Parliament, however, thereby serving the King’s goal of keeping a leader of the opposition out of action. See *id.* at 369.

6 See *infra* notes 55–56 and accompanying text.

7 See U.S. CONST. art. I, § 5, cl. 1; ALA. CONST. art. IV, § 51; ALASKA CONST. art. II, § 12; ARIZ. CONST. art. IV, pt. 2, § 8; ARK. CONST. art. 5, § 11; CAL. CONST. art. IV, § 5; COLO. CONST. art. V, § 10; CONN. CONST. art. III, § 7; DEL. CONST. art. II, § 8; FLA. CONST. art. III, § 2; GA. CONST. art. III, § 7, para. 7; IDAHO CONST. art. III, § 9; ILL. CONST. art. 4, § 6; IND. CONST. art. 4, § 10; IOWA CONST. art. III, § 7; KAN. CONST. art. 2, § 8; KY. CONST. § 38; LA. CONST. art. 3, § 7; ME. CONST. art. IV, pt. 3, § 3; MD. CONST. art. III, § 19; MASS. CONST. pt. 2, Ch. 1, § II, art. IV, X; MICH. CONST. art. IV, § 16; MINN. CONST. art. IV, § 6; MISS. CONST. art. 4, § 38; MO. CONST. art. III, § 18; MONT. CONST. art. V, § 10; NEB. CONST. art. III, § 10; NEV. CONST. art. 4, § 6; N.H. CONST. pt. II, arts. 22, 35; N.J. CONST. art. IV, § 4, para. 2; N.M. CONST. art. IV, § 7; N.Y. CONST. art. 3, § 9; N.C. CONST. art. II, § 20; OHIO CONST. art. II, § 6; OKLA. CONST. art. V, § 30; OR. CONST. art. IV, § 11; PA. CONST. art. 2, § 11; R.I. CONST. art. VI, § 6; S.C. CONST. art. III, § 11; S.D. CONST. art. III, § 9; TENN. CONST. art. II, § 11; TEX. CONST. art. III, § 8; UTAH CONST. art. VI, § 10; VT. CONST.

house of the legislature to be the “judge of” its members’ “qualifications, elections and returns.”⁸ According to the Court, the senate’s authority did not apply because a lower court had found the person unqualified in a separate action litigated before the senate convened.⁹ What the Court never really explained was how this earlier ruling could supersede the senate’s authority without contradicting the language of the constitution.¹⁰ This extraordinary reasoning, which defies longstanding tradition and precedent,¹¹ is inconsistent with legislative independence, which the Court itself has recognized as a critical facet of separation of powers.¹² The decision is also a blow to textualism, which the Court has frequently identified as an important ground for interpreting the constitution.¹³ Because of these apparent

ch. II, § 14; VA. CONST. art. IV, § 7; WASH. CONST. art. II, § 8; W. VA. CONST. art. VI, § 24; WIS. CONST. art. IV, § 7; WYO. CONST. art. 3, § 10. *See generally* Note, *The Legislature’s Power to Judge the Qualifications of Its Members*, 19 VAND. L. REV. 1410, 1410 (1966) [hereinafter *Vanderbilt Note*]; Jack Winsbro, Comment, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 877 & n.112 (1987).

8 KY. CONST. § 38. This section provides in full that “[e]ach House of the General Assembly shall judge of the qualifications, elections and returns of its members, but a contested election shall be determined in such manner as shall be directed by law.” *Id.* For specific consideration of the last clause of section 38 as it might apply to *Stephenson*, see *infra* notes 880–88 and accompanying text.

9 *See Stephenson*, 182 S.W.3d at 167–68.

10 The Court’s analysis on this point is cryptic. After holding that the Jefferson Circuit Court “had jurisdiction to adjudicate the matter and grant relief” before the Senate convened, it went on to state that, “for substantively different reasons, we affirm that portion of the Franklin Circuit Court judgment declaring that Stephenson is not constitutionally qualified for the office of State Senator and may not be seated.” *Id.* at 173. It never fully explained what those “substantively different reasons” were, however.

11 The House of Commons asserted a prerogative to determine its prospective members’ eligibility for service over against the Crown as early as 1586, in correspondence with Elizabeth I. *See infra* notes 71–225 and accompanying text for a general discussion of history underlying development of the privilege; see also 79 CONG. REC. 9770 (June 20, 1935) (Sen. Connally) (“Under the Constitution we have the right to pass upon the qualifications of Senators; and if a 15-year-old boy came up here with a certificate of election, and we seated him, he would be a United States Senator, and there is no power on earth which could take him out except the people at the next election.”); 68 CONG. REC. 987 (Dec. 22, 1926) (article by Sen. Norris) (“[W]hen our forefathers framed the Constitution, they provided . . . that the Senate should be the sole judge of the qualifications and elections of its members From its decree there is no appeal, and no other court or other body of men can withhold its arm by injunction or other process.”); CONG. GLOBE, 37th Cong., 2d Sess. 294 (Jan. 13, 1862) (Sen. Sumner) (“This, at least, I do know: the Senate is the judge, without appeal, with regard to the seats of its members”); 10 REG. DEB. 3 (Dec. 2, 1833) (Sen. Clay) (“It was the right, and the imperative duty of the Senate, to say who were to be the Senators, and who were the individuals to be associated in the performance of the important duties which devolved upon them.”). For examples of legislative exercise of this privilege, see *infra* notes 227–679.

12 *See generally* *Taylor v. Beckham*, 56 S.W. 177, 179 (Ky. 1900) (discussing the importance of protecting the legislature from the executive). *See infra* notes 760–89 and accompanying text for a discussion of the contest that gave rise to this case.

13 *See Fletcher v. Graham*, 192 S.W.3d 350, 358 (Ky. 2006) (noting the importance of

defects, and because the opinion will quite likely produce uncertainty in the areas of elections and separation of powers, the Court should consider limiting or overruling it as precedent at the first opportunity.¹⁴

This Article proceeds in three parts. In Part I, we set forth the factual background for the case.¹⁵ In Part II, we discuss the various historical and legal principles that underlie the legislative privilege at issue in *Stephenson*.¹⁶ In Part III, we examine the case in light of these principles, noting that the Court appears to have reached its holding in error. Our criticism of the Court's analysis takes two specific forms. First, we criticize the Court's implication that the general assembly could delegate to the judiciary irrevocable authority to resolve disputes over the qualifications of legislators-elect.¹⁷ Second, we criticize the Court's indication that the legislative privilege to judge the qualifications, elections, and returns of members applies only to individuals who have already been admitted to service.¹⁸

interpreting the Constitution according to its "clear and unambiguous" meaning); *Williams v. Wilson*, 972 S.W.2d 260, 268 (Ky. 1998) (citing Ky. State Bd. for Elementary and Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979)) ("This Court's [precedent] provides a proper methodology for constitutional analysis. It requires that text be the beginning point . . ."); see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 119 (1993) ("Any system of interpretation that disregards the constitutional text cannot deserve support."); Akhil Reed Amar, *Fidelity in Constitutional Theory: Fidelity Through History: A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 *FORDHAM L. REV.* 1657, 1658 (1997) ("I don't want to affirm the idea of *sola scriptura*, that it's text only, but it seems to me that text does matter in this culture."); Michael W. McConnell, *Fidelity in Constitutional Theory: Fidelity as Integrity: The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1278–79 (1997) ("If the Framers' words have authority for us today, this is because, in Chief Justice Marshall's words, 'the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803))); Frederick Schauer, *Easy Cases*, 58 *S. CAL. L. REV.* 399, 429–30 (1985) ("To the extent that society wishes to influence the direction of law in a conscious fashion, it will do so with language."); Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 *TEX. L. REV.* 343, 346 (1981) (reviewing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)) ("Certainly the justifications for judicial review given by *The Federalist* and *Marbury v. Madison* permit invalidation only for inconsistency with the Constitution itself, and not for inconsistency with judicial notions of fundamental fairness.").

14 See *infra* notes 891–95 and accompanying text.

15 See *infra* notes 19–70 and accompanying text.

16 See *infra* notes 71–797 and accompanying text.

17 See *infra* notes 823–30 and accompanying text.

18 See *infra* notes 831–45 and accompanying text.

I. BACKGROUND

A. *Proceedings in Jefferson Circuit Court*

In the general election of November 2, 2004, Dana Seum Stephenson and Virginia L. Woodward were opposing candidates for the office of Kentucky State Senator from the 37th district, which occupies a fairly narrow strip of land that meanders east from the Ohio River more than halfway across Jefferson County. On November 1, the day before the election, Woodward brought a motion against Stephenson in Jefferson Circuit Court under Kentucky Revised Statute (KRS) 118.176, Kentucky's statute for challenging a candidate's *bona fides*.¹⁹ Specifically, Woodward argued that Stephenson had not "resided in" Kentucky for six years "next preceding" her election, as required by section 32 of the constitution.²⁰ An array of facts gave credibility to Woodward's contention, with particular reference to the period from 1997 to 2001, when Stephenson displayed substantial indicia of having resided in Indiana.²¹ In her motion, Woodward also named the Jefferson County Board of Elections, the Kentucky State Board of Elections, and the secretary of state as respondents.²² The next day, the voters of the district chose Stephenson over Woodward by a substantial margin to represent them in the senate.²³

At a hearing on November 3, Woodward presented evidence in support of her argument that Stephenson had not "resided in" Kentucky during

¹⁹ KRS 118.176(2) provides in part as follows:

The bona fides of any candidate seeking nomination or election in a primary or general election may be questioned by any qualified voter entitled to vote for such candidate or by an opposing candidate by summary proceedings consisting of a motion before the Circuit Court of the judicial circuit in which the candidate whose bona fides is questioned resides. An action regarding the bona fides of any candidate seeking nomination or election in a primary or general election may be commenced at any time prior to the general election.

KY. REV. STAT. ANN. § 118.176(2) (West 2006).

²⁰ Section 32 provides in pertinent part as follows:

No person shall be a Senator who, at the time of his election, is not a citizen of Kentucky, has not attained the age of thirty years, and has not resided in this State six years next preceding his election, and the last year thereof in the district for which he may be chosen.

KY. CONST. § 32.

²¹ See *infra* notes 30–34 and accompanying text.

²² See Motion Pursuant to KRS § 118.176 to Disqualify Candidate at 1–2, Woodward v. Stephenson, No. 04-CI-09261 (Jefferson Cir. Ct., Ky. Nov. 1, 2004).

²³ See Woodward v. Stephenson, No. 04-CI-01676, slip op. at 1 (Franklin Cir. Ct., Ky. June 1, 2005) ("Woodward received 21,750 votes and Stephenson received 22,772 votes.").

the disputed period.²⁴ This included testimony from Stephenson herself.²⁵ Stephenson's response took two basic forms. First, she provided testimony to the effect that she had "resided in" both Kentucky and Indiana during the period in question.²⁶ Second, she presented various legal objections to the proceeding, including in particular the argument that the senate's authority to judge its members' qualifications precluded the court from exercising jurisdiction after the election.²⁷ This argument was also made by David L. Williams, president of the senate, who had intervened as a respondent in the proceedings.²⁸

On November 22, the court held largely, if not entirely, in Woodward's favor, rejecting respondents' jurisdictional arguments and finding Stephenson ineligible to serve.²⁹ In reaching the latter conclusion, the court relied upon various evidence adduced at trial. First, by her own testimony Stephenson and her husband had purchased a house in Jeffersonville, Indiana, and had "lived" there from 1997 until 2001, during most of which time she had been attending graduate school in that state.³⁰ Second, Stephenson had obtained a driver's license from Indiana in 1997, giving Jeffersonville as her place of residence, and had kept this license until after she had moved back to Kentucky.³¹ Third, Stephenson had registered to vote in Indiana shortly after moving to Jeffersonville and had voted in that state.³² Fourth, Stephenson had insured her car in Indiana while residing in Jeffersonville.³³ Fifth, Stephenson had averred in a complaint that she was a resident of Indiana during this period.³⁴ Proceeding then to the question of remedy, the court began by noting the lack of clear direction from the statute as to how it should proceed in the present circumstances.³⁵ This is not

²⁴ See *Woodward*, No. 04-CI-09261, slip op. at 2.

²⁵ *Id.*

²⁶ See Dana Seum Stephenson's Memorandum in Opposition to Movant's Motion for Relief Under KRS § 118.176 at 15–26, *Woodward v. Stephenson*, No. 04-CI-09261 (Jefferson Cir. Ct., Ky. Nov. 22, 2004).

²⁷ See *id.* at 9–10.

²⁸ See Memorandum in Support of Motion to Dismiss at 1, *Woodward v. Stephenson*, No. 04-CI-09261 (Jefferson Cir. Ct., Ky. Nov. 8, 2004). Senator Williams appeared specially. See *id.* at 1 n.1 (reserving rights).

²⁹ See *Woodward*, No. 04-CI-09261, slip op. at 6 ("Clearly, this Court has jurisdiction to hear this case pursuant to this delegation and the plain language from KRS 118.176."); *id.* at 13 ("[T]his Court finds that Ms. Stephenson is not a bona fide candidate for the office of State Senate from the 37th District because she has not met the six-year residency requirement found in Ky. Const. § 32 for the office of State Senate.")

³⁰ See *id.* at 2.

³¹ See *id.* at 3.

³² See *id.*

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.* at 13. KRS 118.176(4) provides in part as follows:

surprising, given the historical role of a statute like KRS 118.176 as a means of regulating elections and access to the ballot. Given that the election had already occurred, the statute could not operate in its customary manner:

The Court must now fashion an appropriate remedy. Ms. Woodward requests that votes cast for Ms. Stephenson not be counted, making her the de facto winner of the election. To do so would be to disregard the votes of over 22,000 people who cast a ballot for Ms. Stephenson in this race, which this Court does not take lightly. Ideally, this Court would like to call a special election to enable each voter in this district an opportunity to cast a ballot again for the candidate of his or her choice—as long as both candidates satisfy the requirements of Ky. Const. § 32. However, the legislature did not provide this as a potential remedy for this situation.³⁶

The court went on to hold that the Jefferson County Board of Elections should not count the votes cast for Stephenson.³⁷ The board complied with this order the following day.

*B. Proceedings in the Senate, Franklin Circuit Court,
and the Supreme Court of Kentucky*

Although no party to the proceeding in Jefferson Circuit Court sought review of that court's order, the matter was far from resolved. On December 7, Stephenson gave notice of a contest in the senate in accordance with chapter 120 of the Kentucky Revised Statutes, the chapter governing contested elections.³⁸ Six days later, on December 13, the state board of elections met to consider the status of the 37th district and unanimously chose not to act on a motion to issue a certificate of election to Woodward.³⁹

If the court finds the candidate is not a bona fide candidate it must so order, and certify the fact to the board of elections, and the candidate's name shall be stricken from the written designation of election officers filed with the board of elections or the court may refuse recognition or relief in a mandatory or injunctive way.

KY. REV. STAT. ANN. § 118.176(4) (West 2006).

36 Woodward, No. 04-CI-09261, slip op. at 13.

37 See *id.* at 14 (“IT IS FURTHER ORDERED that the Jefferson County Board of Elections not count any votes cast for Dana Seum Stephenson for the office of State Senate for the 37th District.”).

38 See *Stephenson v. Woodward*, 182 S.W.3d 162, 165 (Ky. 2005). KRS Chapter 120 sets forth the rules for contesting elections in a variety of contexts. KY. REV. STAT. ANN. ch. 120 (West 2006). KRS 120.195, 120.205, and 120.215 set forth rules specifically applying to contested elections for seats in the General Assembly. *Id.* at §§ 120.195, 120.205, 120.215. (Although KRS 120.205 speaks solely in terms of contested elections for the office of Governor and Lieutenant Governor, KRS 120.215 adopts the procedures and rules set forth in KRS 120.205.)

39 See Al Cross, *Panel Won't Certify Race for Senate; Members Expect Justices to Decide Residency*

Then, on December 15, Woodward brought an original action in Franklin Circuit Court against the state board of elections and the secretary of state, as well as Stephenson and Williams. Among other things, she asked the court to put an end to the contest, prevent Stephenson from taking a seat in the senate, and require Williams, and through him the full senate, to admit Woodward to membership.⁴⁰ She also asked the court to require the state board of elections and the secretary of state to meet and issue her a certificate of election.⁴¹

On December 21, Woodward was heard on two motions for temporary injunctive relief before Special Judge William T. Jennings. First, she asked the court to require the state board of elections and the secretary of state to meet and issue a certificate of election to her.⁴² The court granted this motion. Second, she asked the court to prevent Stephenson from pursuing the contest.⁴³ The court denied this motion, reasoning that resolution of the contest lay solely with the senate.⁴⁴

On December 30, Woodward gave notice of two additional motions for temporary injunctive relief, one against Stephenson and the other against Williams.⁴⁵ The motion for relief against Stephenson was identical to the motion Judge Jennings had denied on December 21.⁴⁶ In her motion

Dispute, COURIER-J. (Louisville, Ky.), Dec. 14, 2004, at A1.

⁴⁰ Verified Petition for Declaratory and Injunctive Relief at 15–17, Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Dec. 15, 2004).

⁴¹ *See id.* at 16.

⁴² *See* Amended Notice for Hearing for Motion for Temporary Injunction Directed at Respondents, Trey Grayson and the State Board of Elections at 1, Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Dec. 17, 2004).

⁴³ *See* Amended Notice for Hearing for Motion for Temporary Injunction Directed at Respondent, Dana Seum Stephenson at 1, Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Dec. 17, 2004).

⁴⁴ *See* Transcript of Hearing at 6:24–7:1, Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Dec. 21, 2004); *see also id.* at 1:19–2:2 (“[T]he General Assembly has delegated certain pre-election challenges to the courts. The courts only get their power through that type of delegation. And while they have delegated the authority for the courts to determine the *bona fides* of potential candidates, they have kept unto themselves all post-election contests for General Assembly members. And those are vested solely in the General Assembly.”)

⁴⁵ *See* Motion for Temporary Injunction Directed at Respondent, Dana Seum Stephenson Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Dec. 30, 2004); Motion for Temporary Injunction Directed at Respondent, David Williams, In his Official Capacity as President of the Kentucky State Senate and Official Representative of all Members of the Kentucky State Senate, Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Dec. 30, 2004).

⁴⁶ *Compare* Amended Notice for Hearing for Motion for Temporary Injunction Directed at Respondent, Dana Seum Stephenson at 1, Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Dec. 17, 2004) (“Please take notice that . . . Petitioner, Virginia L. Woodward, will make a Motion for Temporary Injunction prohibiting Respondent, Dana Seum Stephenson, from pursuing a purported election contest because such contest seeks to

against Williams, Woodward sought to require Williams, and through him the full Senate, to admit her to membership.⁴⁷

Less than a week later, on January 4, 2005, Stephenson and Williams brought separate motions to dismiss.⁴⁸ The court took Woodward's two motions for temporary injunctive relief under advisement pending resolution of the motions to dismiss. That same day, the senate met to organize for its new session. Shortly after it came to order, a motion was made to establish the membership of the body, specifically excluding Woodward on the ground that the voters of the district had not chosen her. This carried by a voice vote.⁴⁹

Later that day, the senate established a board to hear and report on the contest. In accordance with KRS 120.205 and 120.215, the statute governing contests for seats in the legislature, the senate randomly selected nine members to serve on the board, and the board began its hearings and deliberations.⁵⁰ On January 6, the members of the board issued three reports—one by a majority of five, a second by a minority of three, and a third by a minority of one. The majority concluded that Stephenson was not qualified to serve and that the senate should admit Woodward.⁵¹ The minority of three concluded that Stephenson was qualified to serve and that the senate should admit her.⁵² The minority of one concluded that the

overturn a final court order in violation of the separation of powers doctrine . . .”), *with* Motion for Temporary Injunction Directed at Respondent, Dana Seum Stephenson, Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Dec. 30, 2004) (“Petitioner, Virginia L. Woodward, . . . moves this Court to enter a temporary injunction prohibiting [Stephenson] from pursuing a purported election contest because such contest seeks to overturn a final court order in violation of the separation of powers doctrine.”).

47 *See* Motion for Temporary Injunction Directed at Respondent, David Williams, in his Official Capacities as President of the Kentucky State Senate and Official Representative of All Members of the Kentucky State Senate at 1–2, Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Dec. 30, 2004) (“Petitioner, Virginia L. Woodward, moves this Court to enter a temporary injunction ordering [Senator Williams], in his official capacities as President of the Kentucky State Senate and official representative of all members of the Kentucky State Senate, to immediately seat Virginia L. Woodward and permit her to fully participate as the duly-elected Senator from the 37th district in the business and affairs of the [Senate]. . .”).

48 *See* Respondent Dana Seum Stephenson's Memorandum in Support of Her Motion to Dismiss for Lack of Subject-Matter Jurisdiction, Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Jan. 4, 2005); Motion to Dismiss [of David L. Williams], Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Jan. 4, 2005).

49 *See* Stephenson v. Woodward, 182 S.W.3d 162, 165–66 (Ky. 2005).

50 *See id.* at 166. Although Republicans outnumbered Democrats in the Senate, the Board as chosen actually had five Democratic and four Republican members.

51 *See* Report of Determination of the Kentucky State Senate Election Contest Board at 9 (Jan. 6, 2005).

52 *See* Report No. 2 of the Election Contest Board 4 (Jan. 6, 2005) [hereinafter Report No. 2].

senate should declare the seat vacant and that a special election should be called.⁵³

On January 7, the senate rejected the first report and adopted the second.⁵⁴ It then adopted Senate Resolution 35, which reaffirmed the second report's conclusion that Stephenson was qualified to serve.⁵⁵ This rested on a finding that she had resided in Kentucky for six years before her election, including the period before May 2001 when she had substantial indicia of residing in Indiana as well as Kentucky. The specific grounds for this finding were several in number, but they reduced to a conclusion that Stephenson had maintained sufficient contact with Kentucky during the disputed period to establish valid dual residence. First, since 1995 she had continuously owned a home in Louisville. Second, on a typical day during this period she had taught children in one form or another from early in the morning until early evening at Pleasure Ridge Park High School ("PRP") in Louisville. Third, after performing these duties she would often go to her home in Louisville. Fourth, she would often then return to PRP to serve as a coach. Fifth, she would often spend the night in Louisville if she stayed late at PRP. Sixth, she would take part in various educational activities at PRP on Saturdays. Seventh, she worshiped in Louisville on Sundays. Finally, her stepchildren, her husband, and she would often stay at her home in Louisville during days off because it had a pool.⁵⁶ Shortly after the senate adopted this resolution, Stephenson took the oath of office.

That did not quell the controversy, though. On January 14, the Franklin Circuit Court denied Stephenson's and Williams' motions to dismiss and entered an order temporarily enjoining Stephenson from serving in the senate.⁵⁷ The court justified its denial of the motions to dismiss, notwithstanding the language of section 38, on the ground that the final clause of that section—"but a contested election shall be determined in such manner as shall be directed by law"—presented a substantial question as to whether courts could sit in judgment in this context pursuant to such a

53 See Election Contest Board Report No. 3 at 1 (Jan. 6, 2005) [hereinafter Report No. 3].

54 See Minutes, Senate of the Commonwealth of Kentucky 36–37 (Jan. 7, 2005) (motion to adopt Determination of Election Contest Board defeated, 15 voting yea, 22 voting nay); *id.* at 37–38 (motion to adopt Report No. 2 passed, 20 voting yea, 16 voting nay). After the Senate adopted Report No. 2, Senator Bob Leeper moved for the adoption of Report No. 3. Senator Williams, in the chair, ruled that this motion was out of order because the Senate had already adopted Report No. 2. *Id.* at 38.

55 See *id.* at 40 (motion to adopt SR 35 passed).

56 See Report No. 2, *supra* note 52, at 3.

57 See Order Overruling Motion to Dismiss and Granting Temporary Injunction Directed at Respondent, Dana Seum Stephenson [hereinafter Order of Jan. 14, 2005], Woodward v. Stephenson, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Jan. 14, 2005).

statute as KRS 118.176.⁵⁸ Approximately two weeks later, at a hearing on January 26, the court inquired into the status of Woodward's motion of January 4 for a temporary injunction requiring Williams, and through him the full senate, to admit her to membership. Woodward proceeded with this motion and the court heard argument thereon. On January 28, the court denied this motion.⁵⁹

In early February, Stephenson and Williams sought interlocutory relief in the Kentucky Court of Appeals from the Franklin Circuit Court's order of January 14, which temporarily enjoined Stephenson from serving in the senate. On February 5, the Supreme Court of Kentucky transferred these motions to its own docket. On March 17, the Court affirmed the temporary injunction on the ground that it did not constitute an abuse of discretion.⁶⁰ Justices Keller and Scott dissented, reasoning that the judiciary lacks jurisdiction to supervise the senate in the exercise of its authority under section 38.⁶¹

The parties then brought cross-motions for summary judgment. On June 1, 2005, the Franklin Circuit Court entered an order declaring Stephenson ineligible to serve in the senate and incapable of admission to that body.⁶² The court then went on to enjoin Stephenson permanently from serving in the Senate and to deny any relief, equitable or declaratory, that would enable Woodward to lay claim to a seat therein.⁶³ Whereas the court had previously justified its decision against Stephenson and Williams in terms of the final clause of section 38,⁶⁴ in this order it justified its decision to exclude Stephenson from the Senate to a large extent, if not completely, on section 2 of the constitution,⁶⁵ which provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere

⁵⁸ *See id.* at 3-4.

⁵⁹ *See* Order Denying Temporary Injunctive Relief Directed at Respondent, David Williams in his Capacity as President of the Kentucky State Senate and as a Representative of That Body at 4, *Woodward v. Stephenson*, No. 04-CI-01676 (Franklin Cir. Ct., Ky. Jan. 28, 2005). According to the court, mandatory relief could not lie because, in the court's view, the Senate had more than one course of action available to it. *See id.* at 3-4.

⁶⁰ *See* *Stephenson v. Woodward*, Nos. 2005-SC-0096-TG, 2005-SC-0097-TG, slip op. at 1 (Ky. Mar. 17, 2005).

⁶¹ *See Stephenson*, Nos. 2005-SC-0096-TG, 2005-SC-0097-TG, slip op. (Keller, J., dissenting).

⁶² *See* Order at 15, *Woodward v. Stephenson*, No. 04-CI-01676 (Franklin Cir. Ct., Ky. June 1, 2005).

⁶³ *See id.*

⁶⁴ *See supra* notes 57-58 and accompanying text.

⁶⁵ *See* Order at 6, *Woodward v. Stephenson*, No. 04-CI-01676 (Franklin Cir. Ct., Ky. June 1, 2005) ("In Justice Keller's dissent, he admits that courts normally have jurisdiction to review actions of the Legislative Branch. But, he argues, the Kentucky Constitution has removed the power to determine post-election contests from the courts under Section 38 and given it to the Legislative Branch. The dissent does not address the issue of whether the General Assembly is allowed to act arbitrarily and capriciously in violation of Section 2 of the constitution.")

in a republic, not even in the largest majority.”⁶⁶ On July 5, the court denied Woodward’s motion to alter or amend.⁶⁷

Cross-appeals followed, as well as motions for transfer to the Supreme Court of Kentucky, which were granted. On December 22, 2005, the Court affirmed in part and reversed in part.⁶⁸ Although the exact nature of the Court’s analysis is not clear, it upheld the lower court’s declaration that Stephenson was unqualified and therefore could not serve in the senate. In principal part, the Court justified its decision on the ground that the legislature had delegated authority to judge the qualifications of would-be members to the courts pursuant to KRS 118.176, and that such delegation did not interfere with section 38 because the senate’s authority thereunder did not extend to an individual, like Stephenson, who was not a “member” when the Jefferson Circuit Court had found her unqualified to serve.⁶⁹ This interpretation of section 38, we submit, is inconsistent with accepted sources of authority in constitutional interpretation. In particular, this interpretation would render the legislature’s authority to judge “elections” and “returns” meaningless, given that “election” and “return” always precede an individual’s appearance in the chamber for admission. Second, legislatures in the Anglo-American tradition have been adjudicating the “qualifications, elections and returns” of prospective members for centuries. Finally, the Supreme Court of the United States has expressly recognized that the word “member” in this context includes prospective members.⁷⁰

II. HISTORICAL AND LEGAL PRINCIPLES

The basis for a provision like section 38 is not immediately apparent. The Constitution of Kentucky, like the Constitution of the United States and that of every other state, sets forth reasonably precise requirements for membership in the legislature. Along with being elected and returned,⁷¹ a

66 KY. CONST. § 2.

67 Order at 1, *Woodward v. Stephenson*, No. 04-CI-01676 (Franklin Cir. Ct., Ky. July 5, 2005).

68 *See Stephenson v. Woodward*, 182 S.W.3d 162, 164 (Ky. 2005).

69 *See id.* at 167–68 (Ky. 2005). Justices Scott and Roach dissented. *See id.* at 211 (Scott, J., dissenting) (“[T]he acts of the majority of this Court, in this decision, are unconstitutional, as outside the powers granted us. And in doing so, they are as wrong as was the Senate.” (citation omitted)); *id.* at 192 (Roach, J., dissenting) (“[T]he majority’s approach is built on the fundamentally mistaken belief that any entity—including the circuit court, this Court, or the state board of elections—can bind the Senate as to questions related to the qualifications, elections, and returns of its members.”).

70 *See Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 615 (1929). Please see *infra* notes 797–893 for further discussion of *Stephenson*.

71 “Election” pertains literally to the votes cast. A “return,” by contrast, pertains to the indicia of election that administrative and executive officials provide to the apparent winner

would-be member must possess certain qualifications, principally relating to age, citizenship, and residency.⁷² All of these concepts are familiar to the judiciary and are well within the scope of judicial competence. Indeed, the application of a major premise, such as the requirement that a person be "elected," to a disputed minor premise, such as the question of whether one candidate received more votes than another, is the judiciary's stock in trade. As a consequence, numerous courts, including the highest Court of Kentucky, have recognized the authority conferred by a provision like section 38 as judicial in nature.⁷³

But why authorize the legislature to resolve these kinds of disputes at all? Why not allow the judiciary to resolve disputes that appear justiciable in nature? Why not adopt the current approach of Hawaii and North Dakota, where judges *do* resolve these kinds of cases?⁷⁴ The short answer to these questions, of course, is that the constitutions of the other forty-eight states, including Kentucky, and of the United States provide unequivocal

in an election.

⁷² In order to serve in the Senate of Kentucky, a would-be member must be a citizen of the Commonwealth, must be thirty years of age, and must have "resided in this State six years next preceding his election, and the last year thereof in the district for which he may be chosen." KY. CONST. § 32. There are other provisions, however. For example, a would-be member must not have accepted, and must not accept, an incompatible municipal office. *See id.* § 165.

⁷³ *See Pratt v. Breckinridge*, 65 S.W. 136, 137 (Ky. 1901) ("Each house may perform the executive act of electing its own officers (sections 34 and 249), and the judicial acts of judging of the qualifications, elections, and returns of its members (section 38) [and] punishing disorderly behavior and expelling members (section 39)."); *see also Barry*, 279 U.S. at 613 ("Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members"); *Kansas ex rel. Attorney Gen. v. Tomlinson*, 20 Kan. 692, 702-03 (1878).

See generally THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 159 (Boston, Little, Brown, & Co. 5th ed. 1883) ("In determining questions concerning contested seats, the house will exercise judicial power, but generally in accordance with a course of practice which has sprung from precedents in similar cases, and no other authority is at liberty to interfere.").

⁷⁴ *See* HAW. CONST. art. II, § 10 ("Contested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law."); N.D. CONST. art. IV, § 12 ("Each house is the judge of the qualifications of its members, but election contests are subject to judicial review as provided by law."). Hawaii's implementing statute vests final jurisdiction to resolve contests in the Supreme Court of Hawaii. *See* HAW. REV. STAT. § 11-174.5 (1993 & Supp. 2005). North Dakota's implementing statute provides that a legislator's qualifications may be challenged at any time, *see* N.D. CENT. CODE § 16.1-16-04 (1997), and that "[l]egislative election contests must be determined in court as provided in this chapter for other contests. No legislative election may be contested before either house of the legislative assembly." *Id.* § 16.1-1-16-10.

cally to the contrary.⁷⁵ But the more substantive answer lies in three distinct propositions. First, legislative independence and legislative privilege, including the privilege to judge members' eligibility, are conceptually related, and in fact come to us from the same period in English history.⁷⁶ "The history of Parliament . . .," Wallace Notestein wrote, "is an English heritage, with a remainder to Americans. Legislative practice to-day in Nebraska and Minnesota can be traced back to early seventeenth-century or late Tudor usages at Westminster."⁷⁷ Second, as a matter of political theory, the power of appointment and removal is intimately related to the power of control, and a branch of government is less than independent if ultimate control over its membership lies in another branch.⁷⁸ Finally, legislative determination of members' eligibility has often marched to the beat of a very different drummer than analogous judicial determinations.⁷⁹ In other words, legislative bodies have often decided to exalt substance over form, admitting or allowing as members people who most likely did not meet the stated qualifications for service. Often, if not invariably, this had the effect of allowing the individual chosen by the voters to serve, notwithstanding apparent defects in his or her claim to the seat in question. Subjecting this unique process to judicial supervision would eliminate a vital and distinct tradition in our governmental system.

In this part we will consider the historical antecedents for the privilege set forth in section 38 of Kentucky's constitution. We will also consider some of the most notable precedent, both legislative and judicial, that exemplifies this privilege in operation. We begin with the privilege's origin in the English experience of the early modern era. We then continue with the experience of this side of the Atlantic.

A. *The English Experience*

The historical record indicates that the House of Commons first exercised the prerogative underlying section 38 in 1553, during the reign of Mary I, when it excluded a prebendary (minister) on the ground that he was already represented through a separate body—the "Convocation."⁸⁰ Thir-

75 See *supra* note 7 and accompanying text.

76 See *infra* notes 80–161 and accompanying text.

77 WALLACE NOTESTEIN, *THE WINNING OF THE INITIATIVE BY THE HOUSE OF COMMONS* 3 (1924).

78 See *infra* notes 790–96 and accompanying text.

79 See *infra* notes 664–70 and accompanying text.

80 See LINDSAY KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN, 1485–1951* 151 (5th ed. 1957) ("In 1553 [Commons] decided that Dr. Nowell, prebendary of Westminster, was incapable, being a member of Convocation, of sitting for the Borough of Looe which had elected him to the House."); ROBERT LUCE, *LEGISLATIVE ASSEMBLIES: THEIR FRAMEWORK, MAKE-UP, CHARACTER, CHARACTERISTICS, HABITS, AND MANNERS* 192 (1924); 1 EDWARD PORRITT, *THE UNREFORMED HOUSE OF COMMONS: PARLIAMENTARY REPRESENTATION BEFORE 1832*, at

ty-three years later, in 1586, it first asserted this prerogative in adversarial circumstances, in a dispute involving the election of two knights from the county of Norfolk.⁸¹

Before these developments, various agents of the Crown, principally the Court of Chancery, had typically resolved disputes over seats in Commons, most likely on the theory that writs of election, having proceeded from the royal offices, should return there.⁸² Indeed, Parliament's basic origin as an extension of the monarch's retinue would readily account for royal scrutiny of returns.⁸³ Before modern times, membership in Parliament had been largely a matter of royal grace.⁸⁴ As one scholar has noted, when Edward I died in 1307, "Parliament was a good way from being a real or defined institution. Even its membership remained entirely variable, at the pleasure of the Crown . . ."⁸⁵ For that matter, even after the develop-

125-26 (1909); J.R. TANNER, *TUDOR CONSTITUTIONAL DOCUMENTS, A.D. 1485-1603, WITH AN HISTORICAL COMMENTARY* 596 (1930); *see also* Powell v. McCormack, 395 U.S. 486, 522-23 (1969) (discussing *In re Nowell*). Commons resolved a comparable issue in favor of a member in 1559. On February 24 of that year, a certain Mr. Marshe argued that John Smith, returned as a burgess from Camelford, "had come to this House being outlawed, and also had deceived divers merchants in London . . ." SELECT STATUTES AND OTHER CONSTITUTIONAL DOCUMENTS ILLUSTRATIVE OF THE REIGNS OF ELIZABETH AND JAMES I 131 (G.W. Prothero ed., 1894) (quoting 1 H.C. JOUR. 55) [hereinafter PROTHERO]. Although the House determined the allegation to be true, "the question was asked by Mr. Speaker, if [Smith] should have privilege of this House or not [and it was] ordered, That he shall continue a member of this House." *Id.* (quoting 1 H.C. JOUR. 55). Somewhat similarly, in 1576 Commons determined that the heir apparent to the Earl of Bedford could sit in the House despite the fact that peers were not eligible for membership. *See id.* (quoting 1 H.C. JOUR. 104).

81 *See infra* notes 120-37 and accompanying text for a discussion of this case.

82 *See* KEIR, *supra* note 80, at 142 (noting that, in the sixteenth century, the royal Council might occasionally "intervene over a disputed election return"); *id.* at 151 ("The practice had long been to make returns into Chancery and have them scrutinised by Lords or judges."); PORRITT, *supra* note 80, at 7 ("In the early days of the House of Commons, when controverted elections were exceedingly few, because as yet men were not desirous of being of the House, these cases were tried in Chancery."); TANNER, *supra* note 80, at 595 (discussing the practices that existed before Commons claimed the privilege to determine questions connected with its membership).

83 *See* KEIR, *supra* note 80, at 39 ("In its origin, Parliament had been essentially an extension of the royal Council."); G.O. SAYLES, *THE FUNCTIONS OF THE MEDIEVAL PARLIAMENT OF ENGLAND* 12 (1988) (discussing the thirteenth century origins of Parliament) ("It is also during these years that 'parliament' . . . enters into the scheme of government to supervise the departments of state and the courts of law, to settle problems that arose within them and between them, and to consider all complaints that the machinery of government was not working satisfactorily.").

84 *See* 2 G. R. ELTON, *STUDIES IN TUDOR AND STUART POLITICS AND GOVERNMENT: PAPERS AND REVIEWS 1946-1972*, at 21 (1974).

85 *Id.*; *see also id.* ("Of Edward I's fifty-two Parliaments—'afforced' (enlarged) sessions of his Council, summoned by special writs—only thirteen included representatives of shires and boroughs. In session, a full Parliament was unicameral, and it existed even after the better part of those summoned had gone home."). *See generally* Conrad Russell, *A Parliament in Early Stuart England*, in *BEFORE THE ENGLISH CIVIL WAR: ESSAYS ON EARLY STUART POLITICS AND*

ment of more formal criteria for membership, as well as differentiation of Lords and Commons, the monarch's role in supervising entry into Parliament persisted.⁸⁶ In fact, the Crown continued to assert an authority to resolve disputed elections even after 1586, when, as noted above, Commons first articulated its privilege in adversarial circumstances.⁸⁷ Not until the third decade of the seventeenth century was Commons able to look back and describe this privilege as "antient."⁸⁸

The development of the privilege corresponded to the gradual emergence of Parliament, and particularly Commons, as an element of the English political system both conceptually and formally distinct from the Crown. To understand these developments, a brief review of the history of this period may prove helpful.

1. Political Struggles.—During the sixteenth century, England saw a substantial modernization of both its economy and its government, the latter in particular becoming more centralized, powerful, and professional. Two distinct theories seemed to inform this emerging national authority: one of absolute monarchy,⁸⁹ and another of power distributed among the two primary organs of government, the Crown and Parliament.⁹⁰ For much of

GOVERNMENT 123, 127 (Howard Tomlinson ed., 1983) ("Kings called Parliament for their own advantage or not at all.").

86 See KEIR, *supra* note 80, at 42 (noting that, in the late fifteenth and early sixteenth century, "disputed elections were dealt with by the King with the Lords or judges"); *id.* at 113 (noting that, in the early sixteenth century, the Privy Council "managed Parliament, by influencing elections, scrutinizing their results, and directing parliamentary business").

87 See *id.* at 175 (discussing the *Bucks Election Case* of 1604); LUCE, *supra* note 80, at 192–93 (same); see also MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 9 (1943) ("[A]s late as 1604 when the Goodwyn-Fortescue case arose, there was still enough uncertainty that the king could make an enormous amount of trouble.").

88 LUCE, *supra* note 80, at 193 ("By 1624 [Commons] had come to look on it as their 'antient and natural undoubted privilege and power' to examine the validity of elections and returns."); see also J.E. NEALE, *THE ELIZABETHAN HOUSE OF COMMONS* 79 (London, Jonathan Cape 1890) ("The proper remedy [to a claim of fraudulent election] did not come until James I's House of Commons, lacking all historical or constitutional warrant, and yet with sound sense behind its action, usurped jurisdiction over election questions.").

89 See KEIR, *supra* note 80, at 5 ("The position asserted for the Crown during this period came naturally to be expressed in terms which emphasised its monopoly of power, the essentially derivative nature of all other lawful magistracies, the lack of legal restraints on royal action, and the divine sanctions by which it was upheld."); see also CHRISTOPHER HILL, *THE CENTURY OF REVOLUTION, 1603–1714*, at 3 (1980) ("James I preached that kings ruled by Divine Right, and many political writers argued that subjects' property was at the king's disposal.").

90 See KEIR, *supra* note 80, at 161 ("Neither [royal nor parliamentary supremacy] could prove permanent, since each excluded elements without which the constitution could not subsist. It was as hopeless for the King to attempt to govern solely by virtue of Prerogative as it was for his opponents to cast out completely the discretionary element from English government."); Louise Halper, *Measure for Measure: Law, Prerogative, Subversion*, 13 *CARDOZO*

the fifteenth through seventeenth centuries, the monarch had the stronger side of this debate, but several developments in the late sixteenth and seventeenth centuries enhanced Parliament's position. In particular, the Crown needed money,⁹¹ and it needed far more money than it could raise from its usual sources.

As a matter of tradition and practice, the English had generally left the Crown to its own devices, believing the King should "live of his own."⁹² For the monarch, "public" and "private" were not distinct concepts. Certain sources of revenue, such as proceeds from agricultural holdings,⁹³ du-

STUD. L. & LITERATURE 221, 229 (2001) ("On the one hand, the king's powers were divine and thus unlimited On the other was the view that royal power came from an earthly source . . . [; hence,] a monarch could not act without some agreement of those who represented the people or their law."). A third theory, one of parliamentary sovereignty, was slow to take root, and most likely had few if any devotees in the fifteenth and sixteenth centuries. *See id.* at 227 ("[The Stuarts'] claims of royal absolutism were challenged by those who did not yet have a competing theory of sovereignty, but who knew that their own interests, which they saw as both economic and spiritual, demanded something other than submission to the rather uncertain vagaries of royal power."). The idea of parliamentary sovereignty did emerge as a powerful force, of course, in the late seventeenth and eighteenth centuries. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160-61 (2d American ed. 1799); A.W. Bradley, *The Sovereignty of Parliament—in Perpetuity?*, in THE CHANGING CONSTITUTION 25, 30 (Jeffrey Jowell & Dawn Oliver eds., 2d ed. 1989) ("[S]ince 1700 the weight of judicial authority has given support to the doctrine of legislative omnipotence.").

The student of separation of powers will naturally ask how the courts fit into this struggle. The idea of a power in the judiciary not derived from the Crown or Parliament was slow to take root in Great Britain, and even now lacks a widely shared theoretical basis. *See generally* Lori Ringhand, *Fig Leaves, Fairy Tales, and Constitutional Foundations: Debating Judicial Review in Great Britain*, 43 COLUM. J. TRANSNAT'L L. 865 (2005).

91 *See* Halper, *supra* note 90, at 228 (discussing "King and Parliament") ("The *ur*-issue was money, as it so often is."). Religion as well played a major role in these struggles. *See generally* HILL, *supra* note 89, at 63 ("[Q]uestions of religion and Church government loomed large for contemporaries [of the English Civil War], even in spheres which today we should not regard as religious at all.").

92 HILL, *supra* note 89, at 1; KEIR, *supra* note 80, at 158-59, 180; *see also* Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989) (noting that, when the reign of James I began, "the king was expected to 'live on his own,' that is, to fund the government in the manner of an extended household").

93 *See* KEIR, *supra* note 80, at 10-11 (noting that the monarch's "ordinary" revenue was derived in part from "lands belonging to the Crown in its own right, or to the King as Prince of Wales, Duke of Lancaster and of Cornwall, Earl of Chester and of Richmond . . .").

ties from trade,⁹⁴ levies for defense,⁹⁵ and sales of exclusive franchises,⁹⁶ had historically been available, but these proved insufficient for reasons owing both to receipts and expenditures. With respect to receipts, for example, income from agricultural holdings was limited by practical considerations.⁹⁷ Similarly, the universe of trade potentially subject to royal duties was a matter of debate,⁹⁸ as was the scope of the Crown's ability to impose levies for defense.⁹⁹ Finally, Parliament came to resent and oppose extrava-

94 *See id.* at 12 (noting these duties). *See generally id.* at 117 (“It was an indisputable part of the Crown’s prerogative that it could regulate external trade in what it deemed to be the national interest.”).

95 By the early modern era, the Crown’s historical prerogative to call its vassals to defend the realm had become a pecuniary duty. *See id.* at 119 (“The obligation to assume knighthood (the military obligations of which had long been translated into terms of money with other feudal incidents) could be extended by distraint of knighthood.”) In addition, the Crown could require seaports to contribute money to build warships. *See id.*

96 *See id.* at 117–18 (noting that, as an incident to its authority to regulate external trade, the Crown could restrict various activities to an “incorporated group of traders” and forbid “interlopers’ from engaging therein”) (footnote omitted); *id.* at 118 (“Conversely, trade might be stimulated by the grant of exclusive privileges to inventors and *entrepreneurs* engaged in new manufactures at home. By these methods of levying impositions and granting patents and monopolies, financial profit accrued to the Crown.”) (footnote omitted); North & Weingast, *supra* note 92, at 810–11 (noting the royal practice of selling monopolies and its economic impact).

97 *See* HILL, *supra* note 89, at 39 (“Like all conservative landowners the King had difficulty in reorganising estate-management to meet the rise in prices. Nor was it necessarily to his advantage to do so. For crown lands were not only a source of revenue: they were also a source of patronage and influence. Leases on favourable terms were a means of rewarding courtiers and royal servants without cost to the Exchequer.”); *see also* North & Weingast, *supra* note 92, at 809–10 (noting vast sales of royal land during the reigns of Elizabeth, James I and Charles I) (“Sale of a major portion of a revenue-producing asset for annual expenses indicates that the revenue problem was endemic.”).

98 *See* HILL, *supra* note 89, at 40 (noting that “control of the customs was in dispute”). Although the Crown had historically set customs, merchants had become acutely conscious of international economics, and Parliament was understandably anxious that the Crown not acquire a way to support itself without resort to the legislature. *See id.* In addition, the Crown’s authority to exact “duties of tunnage and poundage” on exports and imports was at least technically subject to parliamentary grant. Parliament had historically made this grant effective for a monarch’s entire reign, but it discontinued this practice under Charles I. *See* Harold Hulme, *Charles I and the Constitution*, in *CONFLICT IN STUART ENGLAND: ESSAYS IN HONOUR OF WALLACE NOTESTEIN* 101 (William Appleton Aiken & Basil Duke Henning eds., 1960); KEIR, *supra* note 80, at 12; HILL, *supra* note 89, at 41.

99 Attempts by the Crown to raise additional money from these quasi-feudal sources led to tension with Parliament. The *Five Knights Case* arose from an attempt by Charles I to compel various people to lend money to the Crown in a context where repayment was unlikely. *See* HILL, *supra* note 89, at 8, 44; Hulme, *supra* note 98, at 99; *see also* North & Weingast, *supra* note 92, at 810 (describing the economic reality of these forced loans) (“The Stuarts secured most of their loans under threat Repayment was highly unpredictable and never on the terms of the original agreement.”). This case, which the courts resolved in the King’s favor, provided much of the impetus for the Petition of Right of 1628. *See* HILL, *supra* note 89, at 44. In the *Ship Money Case*, which arose from an attempt by the Crown to

gant sales of monopolies.¹⁰⁰ With respect to expenditures, foreign and particularly military policy had become extraordinarily expensive.¹⁰¹ To raise money outside its traditional "private" sources, the Crown needed taxes, and tradition had definitively established that a grant of taxes was within the prerogative of Parliament.¹⁰²

Under the prevailing political theory of the time, taxes were seen as a voluntary gift from the population to the Crown.¹⁰³ They could only be assented to by the realm as a whole, which entailed the coming together of England's various estates—Crown, church, aristocracy, and bourgeoisie.¹⁰⁴ These four elements were deemed to coalesce in the concept of "King-in-Parliament": monarch, lords spiritual, lords temporal, and commoners.¹⁰⁵ But by the late sixteenth and seventeenth centuries, Parliament as a whole, and Commons in particular, was quite definitely feeling new power.¹⁰⁶ It saw in the concept of King-in-Parliament an opportunity to make assent to taxes dependent upon a distribution of actual governing authority between the Crown and the legislature.¹⁰⁷ To the best of its ability, the Crown both

raise money for the navy from non-maritime areas of the country, the courts also held in the King's favor. *See id.* at 45-46.

¹⁰⁰ *See* KEIR, *supra* note 80, at 193-94.

¹⁰¹ *See* HILL, *supra* note 89, at 39 (discussing James I's difficult financial situation) ("The cost of warfare was increasing: ships were getting larger, cannon heavier, fire-arms were becoming essential for the rank and file of an army.").

¹⁰² *See* KEIR, *supra* note 80, at 37-38 ("It was in Parliament that the [powers of the Crown] attained their zenith. Only in this capacity could the King impose extraordinary taxation on his subjects, or make changes in the law affecting their rights.").

¹⁰³ *See id.* at 117 ("There could be no paltering with the fundamental rule, based on Common Law and frequently reinforced by statute, that no tax could be laid on the subject without his consent, and that Parliament was the only place where such consent could be asked or given."); EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 239-40 (1988) (describing the theory according to which the Crown would ask Parliament to levy taxes against the populace).

¹⁰⁴ *See* KEIR, *supra* note 80, at 39-40 ("In its origin, Parliament had been essentially an extension of the royal Council The conjunction of the estates of the realm with the Council in an assembly possessing plenary authority to legislate, tax, and judge was the essence of a Parliament in the later Middle Ages."); *see also* RUSSELL, *supra* note 85, at 128 ("If a parliament voted a tax, no one could say 'I never agreed to this': every potential protester was legally bound by the act of his representative.").

¹⁰⁵ *See* KEIR, *supra* note 80, at 39-40.

¹⁰⁶ *See id.* at 136 ("[T]he experience [Parliament] gained by being used as the supreme instrument of royal power gradually trained its members in the business of the State, and, combined with their experience in local affairs, converted them into a body capable of asserting a necessary, and ultimately a dominant, place in the constitution.")

¹⁰⁷ *See* HILL, *supra* note 89, at 42 ("[C]ontrol of finance ultimately raised the question of control of the executive"); KEIR, *supra* note 80, at 182-83 (describing broad negotiations about money and power between the Crown and Commons) ("Royal prerogatives seemed to become a saleable commodity. The Commons at once improved their opportunity."); *id.* at 187 (noting that the Parliament of 1621 offered funds to James I provided he "seek a Protestant marriage for his son, break with Spain and declare war on her"); *cf.* North & Weingast, *supra*

worked with and resisted this effort, but certain trends are evident. In particular, Elizabeth I tended to enjoy more success with Commons than her successors James I and Charles I.¹⁰⁸ In any case, over the course of the late sixteenth and early seventeenth centuries, Parliament and particularly Commons emerged as the dominant force in English government, in large measure because of its power to grant or deny taxes.¹⁰⁹

By the third decade of the seventeenth century, tension between the Crown and Parliament had become deadly serious, eventually ripening into a *casus belli* for both sides in the civil wars of the 1640s and 1650s.¹¹⁰ Indeed, Charles I himself was executed in 1649 after wrangling with a legislature increasingly bereft of royal supporters.¹¹¹ Less famously, Parliament impeached several of Charles's senior ministers in the 1620s,¹¹² and both James I and Charles I had members of the parliamentary opposition committed to prison.¹¹³ As the two sides fought for rhetorical advantage in

note 92, at 812 (“Parliamentary interests regularly demanded that in exchange for revenue the Crown respect traditional property rights and institutions: for example, that it cease declaring new monopolies.”).

108 See NOTESTEIN, *supra* note 77, at 13 (“If Elizabeth has her troubles with the Commons and has to cope . . . with a very persistent opposition, she has in most sessions only to put her foot down and measures and policies upon which the Commons have set their hearts are given up.”); *id.* at 32 (“James’s personal relations with Parliament did not a little to put the Commons on the offensive. His want of dignity in carriage was no greater handicap to him than his want of dignity in political conduct.”); ARTHUR E. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA: ORIGIN AND EVOLUTION OF ITS FUNDAMENTAL IDEAS* 34 (1965) (“[A] Queen kept in office by the love of her subjects is a majoritarian ruler. Elizabeth’s successors, less loved, had a difficult time; Parliamentary dominance, obscured by affectionate relations with Elizabeth, became evident as soon as the country had trouble with James and Charles.”).

109 See Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 *MIL. L. REV.* 1, 28–44 (1998) (summarizing the development of Parliament’s power of the purse); see also HILL, *supra* note 89, at 60 (“The reigns of the first two Stuarts . . . taught a number of lessons to those Englishmen who counted in politics. The first was that administration could be carried on, and the royal budget (just) balanced, without Parliamentary taxation, if the government abstained from foreign war A corollary was that no expansionist foreign policy, such as many of the propertied classes conceived to be in the best interests of the country, could be embarked upon without regular sessions of Parliament.”)

110 See CLARKE, *supra* note 87, at 10.

111 See HILL, *supra* note 89, at 96–97; SUTHERLAND, *supra* note 108, at 74.

112 See HILL, *supra* note 89, at 50 (noting the impeachments of the Lord Chancellor, Francis Bacon, the Lord Treasurer, Lionel Cranfield, and the Lord Admiral and Duke of Buckingham, George Villiers); KEIR, *supra* note 80, at 193–94 (same). Buckingham was later assassinated. See HILL, *supra* note 89, at 59.

113 See KEIR, *supra* note 80, at 187 (noting the imprisonment of Southampton of Lords and Sandys of Commons by James I); *id.* at 189–90 (noting the imprisonment of the Earl of Arundel of Lords); SUTHERLAND, *supra* note 108, at 73 (noting the imprisonment by Charles I of nine members of Commons who organized a protest against royal policy on taxation and religion in 1629); *id.* at 74 (“For what they had done in the House, three prominent members, Sir John Eliot and his friends Valentine and Strode, were kept in prison; Eliot, an unselfish

this struggle, each sought to articulate and defend its perceived privileges or prerogatives in the constitutional system.¹¹⁴ One fruit of this effort was vindication of many, if not all, of the privileges with which legislatures are now familiar, including the privilege to determine members' eligibility.¹¹⁵

2. *Emergence of the Privilege.*—The student of history naturally takes notice of such dramatic events as the execution of a monarch,¹¹⁶ but focus on the punctuated events of a civil war should not give rise to the false impression that Commons' privileges emerged fully born in the middle of the seventeenth century.¹¹⁷ In fact, Commons first asserted many of its privileges in the 1500s, during the relatively peaceable reigns of Mary I and Elizabeth I.¹¹⁸ For example, the historical record indicates that Commons first under-

and public-spirited man, died in the Tower, refusing to obtain release by acknowledging submission; his two friends remained in prison eleven years.”).

¹¹⁴ In technical parlance, the Crown asserted “prerogatives” and Parliament tended to refer to its analogous claims as “privileges.” This appears to reflect a *status quo ante bellum* of absolute monarchy, inasmuch as a “privilege” is an exemption to an otherwise applicable power. See generally Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1547 (1995) (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28 (1913)); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710 (1917) (discussing the conceptual relationship between the existence of a “privilege” and the non-existence of a “right”).

¹¹⁵ These privileges were actually several in number. Along with the privilege to judge eligibility for service, they included a privilege from civil arrest, see KEIR, *supra* note 80, at 147–48 (noting various assertions of this privilege during Elizabeth's reign) (“The privilege of both Lords and Commons of immunity from arrest on civil process rested, like that of immunity from jury service and from being called as witnesses, on the principle . . . that attendance in the High Court of Parliament took priority of any obligation owed to any other jurisdiction.”), immunity for legislative acts, see Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 229 (2003) (“Parliament first began to articulate a privilege of free speech in the sixteenth century, in response to repeated skirmishing with Queen Elizabeth over issues of royal succession and religious reform.”), and a privilege to choose officers, see HILL, *supra* note 89, at 51 (“The invention of ‘the committee of the whole House’ enabled the Commons to replace the Speaker by a chairman of their own choosing.”).

¹¹⁶ See, e.g., C.V. WEDGWOOD, *A COFFIN FOR KING CHARLES: THE TRIAL AND EXECUTION OF CHARLES I* (1964).

¹¹⁷ See NOTESTEIN, *supra* note 77, at 4 (“It is, of course, a mistake to suppose that constitutional history proceeds from remonstrance to remonstrance, from charter to bill of rights alone. It is quite as much concerned with changes, often inconspicuous, in the ways of doing business from day to day.”).

¹¹⁸ See ELTON, *supra* note 84, at 51 (“[T]he history of the House in [the sixteenth] century may be summed up by saying that it had finally achieved its ambition to be a court, a self-governing institution. It is in this period that the main precedents were set for the various privileges—freedom from arrest at private suit, the right to determine disputed elections, the power to control members and deal with outsiders—upon which the House rested its self-sufficiency and with which it protected its influence.”); see also KEIR, *supra* note 80, at 149–50 (making similar observations about the House's ascension to a self-governing state).

took to exclude a prospective member for lack of qualification in 1553,¹¹⁹ and that it first asserted the privilege to judge the eligibility of its members in an adversarial context in 1586, in a case involving two seats from the county of Norfolk.

a. The Knights for the County of Norfolk.—According to evidence presented to a committee of Commons, a writ of election for the two “Knights for the County of Norfolk”¹²⁰ had issued on September 15, 1586.¹²¹ For some reason, however, it was not received by the sheriff until Sunday, September 25.¹²² By law, this official was obliged to execute the writ the next day, “County day,”¹²³ and he did his best to announce it. Despite poor notice, the election attracted many voters,¹²⁴ and Farmer and Gresham prevailed. This writ was returned to the royal offices on October 15.¹²⁵ On October 11, however, a second writ had issued from Chancery for the same two seats,¹²⁶ provoking a second election, at which Heydon and the same Gresham prevailed.¹²⁷ When the matter came before Commons, Chancery had already decided that the first writ was valid as returned, that the second was therefore void, and that both Farmer and Gresham should take their seats.¹²⁸ Nevertheless, Commons appointed a committee to examine the matter.¹²⁹ The Queen was not pleased, however, taking the position that Commons should leave the matter to the judges:

On *Thursday* the third day of *November* . . . Mr. Speaker shewed unto the House, that he received Commandment from my Lord Chancellor from her Majesty to signifie unto them, that her Highness was sorry this House was troubled the last sitting thereof with the matter touching the chusing and returning of the Knights for the County of *Norfolk*: a thing in truth impertinent for this House to deal withal, and only belonging to the Charge and

¹¹⁹ See *supra* note 80 and accompanying text.

¹²⁰ SIMONDS D’EWES, A COMPLEAT JOURNAL OF THE VOTES, SPEECHES AND DEBATES BOTH OF THE HOUSE OF LORDS AND HOUSE OF COMMONS THROUGHOUT THE WHOLE REIGN OF QUEEN ELIZABETH, OF GLORIOUS MEMORY 393 (London, Paul Bowes 1693). At that time, counties ordinarily sent both knights and burgesses to Commons, knights representing the county and burgesses representing the boroughs.

¹²¹ *Id.* at 396.

¹²² See *id.*

¹²³ *Id.*

¹²⁴ See *id.* (summarizing the Under-Sheriff’s testimony to the committee) (“The Election was so expected in the Country, that by his Estimation there were three thousand Persons at the same . . .”).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *id.* at 396–97.

¹²⁹ See *id.* at 395–97.

Office of the Lord Chancellor, from whence Writs for the same Elections issued out, and are thither returnable again.¹³⁰

After reviewing the matter, the committee came to the same conclusion as Chancery, that the first writ had been valid, and that both Farmer and Gresham should serve.¹³¹ But the issue remained of which body had final authority to resolve the dispute. On behalf of the committee, Thomas Cromwell (whose father had suffered execution at the hand of Henry VIII¹³²) reported that the privilege in question lay with Commons.¹³³ Although one member of the committee had proposed discussing the matter with the chancellor, the committee as a whole had rejected this idea, first because they felt satisfied with their own conclusion, and second because, in Cromwell's words, "they thought it prejudicial to the priviledge of the House to have the [matter] determined by others than such as were Members thereof."¹³⁴ In short, "though they thought very reverently of the said Lord Chancellor and Judges, and thought them competent Judges in their places; yet in this case they took them not for Judges in Parliament in this House."¹³⁵

In retrospect, Commons' assertion of its privilege in this context was as clever as Chief Justice John Marshall's defense of judicial review in *Marbury v. Madison*.¹³⁶ Here, Commons asserted its privilege with a result indistinguishable from what would have obtained in the absence of such an assertion. There was little, if anything, about which the Queen or chancellor could complain because Commons admitted exactly the two individuals Chancery had deemed admissible. In *Marbury*, quite similarly, Chief Justice Marshall had used judicial review to deny his Court jurisdiction, thus leaving a case against his political enemies undecided.¹³⁷

But as with *Marbury*, so with Commons in 1586. The ultimate vindication of the privilege depended on consistent and persuasive assertion in a

¹³⁰ *Id.* at 392-93.

¹³¹ *Id.* at 396-97.

¹³² See ANNE HOFFMANN, LIVES OF THE TUDOR AGE 118 (1977) (noting the elder Cromwell's execution on charges of high treason).

¹³³ See D'EWES, *supra* note 120, at 396-97.

¹³⁴ *Id.* at 396.

¹³⁵ *Id.* Commons went on to adopt the committee's recommendation:

[I]f it were so thought good to the House, [the Committee proposed that] Mr. *Farmer* and Mr. *Gresham* might take their Oaths and be allowed of by the force of the first Writ, as allowed by the censure of this House, and not as allowed of by the said Lord Chancellor and Judges. Which was agreed to by the whole House, and ordered to be entered accordingly.

Id. at 396-97.

¹³⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹³⁷ See generally *id.*

variety of circumstances and against a succession of monarchs.¹³⁸ The next situation, which involved James I, was somewhat less harmonious and yet is regarded as a critical event in the development of the privilege.

b. The Knight for the County of Buckingham.—When James I called his first Parliament in 1604, he stipulated that the voters should not send any outlaws to Westminster.¹³⁹ He also stipulated that returns from writs of election should be made to Chancery,¹⁴⁰ meaning that Chancery would pass on their sufficiency.¹⁴¹ J.H. Hexter has argued that the chancellor, Lord Ellesmere, had written this language into the proclamation as a “pre-emptive strike” in the ongoing struggle between his office and Commons about the scope of their respective jurisdictions.¹⁴² “For Parliament to accept this,” the scholar Robert Luce observed, “would be the undoing of what had been achieved in the preceding reign. So it took the first chance to assert its privilege by seating, for the county of Buckingham, an outlaw, Sir Francis Goodwin”¹⁴³ Goodwin had prevailed in the election, being elected “first knight” for the shire, but the royal clerk had refused the writ owing to his apparent status as an outlaw.¹⁴⁴ (Apparently the sheriff had

138 See CLARKE, *supra* note 87, at 10 (“Probably not one of [Commons’] powers was so well established when James I came to the throne that no one could question it. In fact in the reign of Queen Elizabeth the degree of privilege actually possessed by parliament at any given time was by no means a matter of settled constitutional right but rather an unknown quantity to be determined by a clash of personalities.”)

139 See PROTHERO, *supra* note 80, at 281; 1 STUART ROYAL PROCLAMATIONS: ROYAL PROCLAMATIONS OF KING JAMES I, 1603–1625, at 68 (James F. Larkin & Paul L. Hughes eds., 1973) [hereinafter STUART ROYAL PROCLAMATIONS] (“Further wee doe command, that an expresse care bee had, that there bee not chosen any persons Banquerupts or Outlawed . . .”).

140 See STUART ROYAL PROCLAMATIONS, *supra* note 139, at 69 (“Furthermore We notifie by these Presents, that all Retournes and Certificats of Knights, Citizens and Burgesses, ought and are to be brought to the Chancery, and there to be filed of Record.”) (footnote omitted).

141 See LUCE, *supra* note 80, at 192–93.

142 J.H. Hexter, *Parliament, Liberty, and Freedom of Elections*, in *PARLIAMENT AND LIBERTY: FROM THE REIGN OF ELIZABETH TO THE ENGLISH CIVIL WAR* 21, 23–24 (J.H. Hexter ed. 1992).

143 LUCE, *supra* note 80, at 193. See generally Hexter, *supra* note 131, at 23 (“The contested Bucks election . . . afforded the king’s lord chancellor, Lord Ellesmere, the opportunity to bring to a head decades of feuding between his office and the House of Commons about jurisdiction over the issue of election writs and the examination of returns.”). Luce’s point perhaps should have been that Commons provoked a confrontation by admitting an apparent outlaw, because more than one historian has explained that Goodwin was in fact not an outlaw at the time of his election, having resolved the underlying legal actions well before. See *id.* at 30 (“The House of Commons discovered that [years before] two plaintiffs had initiated . . . the process of outlawry required as a legal first move against Goodwyn for recovery of a debt It also learned from written releases of two creditors that when, long since, Goodwyn had paid his debt, they had dropped their suit.”); see also WALLACE NOTESTEIN, *THE HOUSE OF COMMONS 1604–1610*, at 67 (1971) (“Two outlawries there had been against him, [but both] had been paid by Goodwin and a discharge received from the creditors.”).

144 See 1 H.C. JOUR. 149 (Mar. 22, 1604).

described Goodwin as an outlaw on the return.)¹⁴⁵ A second writ had then issued, with John Fortescue prevailing in the second election.¹⁴⁶ A contest was thus begun between the two claimants,¹⁴⁷ which Commons proceeded to resolve in Goodwin's favor.¹⁴⁸

This did not sit well with the King, however, who maintained that "[b]y the Law, this House ought not to meddle with Returns, being all made into the Chancery; and are to be corrected or reformed by that Court only, into which they are returned."¹⁴⁹ But Commons was resolved and undertook to reduce its conclusions to writing.¹⁵⁰ With reference to the constitutional issues presented, Commons took the position that its privilege had arisen long before 1586, and was now a matter of well-settled law.¹⁵¹ Once again,

¹⁴⁵ See Hexter, *supra* note 142, at 26 ("The sheriff's return of the writ had alleged no illegality in the [election itself], and so the Commons also decided that: 'the return of the sheriff was void as to the outlawry.' The whole duty of the sheriff was to hold the election and report who had been chosen, and not to make lawyer-like noises about outlawry in an endorsement on an election writ.").

¹⁴⁶ Fortescue almost certainly would have been seen as the King's man. As Hexter has noted, "[b]y 1604 he had been in the English Privy Council for fifteen years and high in the service of the English Crown for thrice that long." *Id.* at 22.

¹⁴⁷ See 1 H.C. JOUR. 149 (Mar. 22, 1604) (noting the motion of Sir William Fleetwood, also of Buckingham, that Fortescue's "Return might be examined, and Sir *Francis Goodwyne* received as a Member of the House").

¹⁴⁸ See *id.* at 151-52 (Mar. 23, 1604):

[A]fter much Dispute, the Question was agreed upon and made:

Quest. Whether Sir *F. Goodwyn* were lawfully elected and returned One of the Knights for *Buck'*, and ought to be admitted, and received as a Member of this House.

Upon this Question, it was resolved in the Affirmative, That he was lawfully elected and returned; and, *de jure*, ought to be received.

Hereupon the Clerk of the Crown was commanded to file the first Indenture of Return: And Order was given that Sir *Francis* should presently take the Oath of Supremacy usual, and his Place in the House; which he did accordingly.

Id.

¹⁴⁹ *Id.* at 158 (Mar. 29, 1604); see also *id.* ("His Majesty answered, he was loth he should be forced to alter his Tune; and that he should now change it into Matter of Grief, by way of Contestation.").

¹⁵⁰ See *id.* at 160 (Mar. 30, 1604); see also Hexter, *supra* note 142, at 28 ("In 1604 the Commons did not rattle.").

¹⁵¹ See *id.* at 163 (Apr. 3, 1604):

Our humble Answer is, That until the Seventh Year of King *Henry IV.* all Parliament Writs were returnable into the Parliament ... [, when] a Statute was made, that thenceforth every Parliament Writ [should include a clause making it returnable to Chancery].

the King was not entirely satisfied, and he invoked the strongest language in support of further discussion on the matter:

His Majesty protested ... [that] he had as great a Desire to maintain [Commons'] Privileges as ever any Prince had, or as they themselves. He had seen and considered of the Manner, and the Matter; he had heard his Judges and Council; and that he was now distracted in Judgment: Therefore, for his further Satisfaction, he desired, and commanded, as an absolute King, that there might be a Conference between the House and the Judges; and that, for that Purpose, there might be a select Committee of grave and learned Persons out of the House; that his Council might be present, not as Umpires to determine, but to report indifferently on both Sides.¹⁵²

Commons took the King's message quite seriously and sent the delegation.¹⁵³ The conference spurred the King to propose a compromise. As one scholar has noted, "the question of law began to appear, in [the King's] eyes, a little more doubtful than he had hitherto imagined it; and in order to extricate himself with some honour, he proposed, that both Goodwin and Fortescue should be set aside, and a writ be issued, by warrant of the house, for a new election."¹⁵⁴ Commons acceded to this arrangement by resolving to issue a writ for a new election and to exclude both Fortescue and Goodwin.¹⁵⁵

By this, although the Form of the Writ be somewhat altered, yet the Power of Parliament, to examine and determine of Elections, remaineth; for so the Statute hath been always expounded . . . to this Day . . .

Id.

¹⁵² *Id.* at 166 (Apr. 5, 1604). According to Representative John B. Alley of Massachusetts, Abraham Lincoln made a similar argument on the basis of magisterial authority in 1865 when his managers for the Thirteenth Amendment told him they were two votes short in the House. "I am president of the United States, clothed with great power," he reportedly said. "The abolition of slavery by constitutional provision settles the fate, for all coming time, not only of the millions now in bondage, but of unborn millions to come—a measure of such importance that *those two votes must be procured.*" REMINISCENCES OF ABRAHAM LINCOLN BY DISTINGUISHED MEN OF HIS TIME 585–86 (New York, N. Am. Rev., Allen Thorndike Rice ed., 1888). Although the historian Michael Vorenberg doubts the "specifics" of Alley's report, he nevertheless agrees that, "by directly confronting specific congressman," among other things, "Lincoln sent a clear signal that he would look kindly on those opposition members who switched their vote." MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 198–99 (2004).

¹⁵³ See 2 DAVID HUME, THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 140 (Philadelphia, M. Pollock 1856) (cross-references omitted) ("This conference, he said, he commanded as an 'absolute' king; an epithet, we are apt to imagine, not very grateful to English ears, but one to which they had already been somewhat accustomed from the mouth of Elizabeth.").

¹⁵⁴ *Id.* (discussing the conference).

¹⁵⁵ See 1 H.C. JOUR. 171 (Apr. 13, 1604); see also CARL WITTKÉ, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 59 (1921) (arguing that James I, rather than Commons, was forced to compromise).

Thus, the matter was resolved. Although Goodwin did not become a member, *Goodwin v. Fortescue* is widely regarded in retrospect as a major victory for Commons. Luce, for example, wrote that “[a]lthough the Commons did not get what they set out to get, they are credited with having won. By 1624 they had come to look on it as their ‘antient and natural undoubted privilege and power’ to examine the validity of elections and returns.”¹⁵⁶ Similarly, David Lindsay Keir noted that “[a]nother [royal] instrument for controlling the Commons was finally lost when in 1604 the House in the *Bucks Election Case* asserted its sole and exclusive jurisdiction over disputed election returns, which by the proclamation summoning the Parliament that year had been conferred upon Chancery.”¹⁵⁷ Although “[t]he King got [from resolution of the contest] the empty satisfaction of a statute disabling outlaws from being elected in future,” Keir continued, “he at once surrendered to the Commons jurisdiction over two other disputed returns, at Shrewsbury and Cardigan.”¹⁵⁸ In sum, he noted, “[a]n authority which would have enabled the Crown to control with effect the composition of the Commons was abandoned.”¹⁵⁹

The mechanical explanation for this appears to lie in the fact that the warrant for the new election came from Commons itself, thus confirming Commons’ view of itself as a court in these circumstances.¹⁶⁰ As Hexter has noted, “[w]hatever ambiguity” may have arisen from the dialogue between Commons and James I, “there was no ambiguity at all in the warrant of the House. Coming freshly from its love feast with James I, the House entered the warrant in the Journal, which it alleged to be, and which thereafter it treated as, the record which sustained its claim to be a court.”¹⁶¹

¹⁵⁶ LUCE, *supra* note 80, at 193.

¹⁵⁷ KEIR, *supra* note 80, at 175.

¹⁵⁸ *Id.* at 175 (footnote omitted).

¹⁵⁹ *Id.*; see also CLARKE, *supra* note 87, at 133 (“[T]he concessions wrung from the king [in this contest] were sufficiently great that this has usually been looked upon, and rightly so, as a victory for the house.”); HILL, *supra* note 89, at 51 (“In 1604 the House successfully opposed James’s attempt to refer to the Court of Chancery a disputed election in Buckinghamshire, and so won the right henceforth to decide election disputes, though James’s action had had good Elizabethan precedent.”); NOTESTEIN, *supra* note 143, at 78 (“In the long run the compromise forced upon [Commons] turned out to be a complete victory. It did not appear so, at the time, but it proved to be the first of many defeats for the Stuarts.”); WITTKE, *supra* note 155, at 60 (“In spite of the form of a compromise, the struggle ended in a clear victory for the Commons.”). See generally HILL, *supra* note 78, at 6 (discussing James’s first Parliament) (“A clash over the right to determine disputed elections led the House of Commons to declare that their privileges were inherited of right, and were not due to the King’s grace.”).

¹⁶⁰ See 1 H.C. JOUR. 171 (Apr. 13, 1604); see also 1 H.C. JOUR. (Apr. 11, 1604) (2d scribe), available at, <http://www.british-history.ac.uk/report.asp?compid=749> (“We lose more at a Parliament, than we gain at a Battle.”).

¹⁶¹ Hexter, *supra* note 142, at 33; see also *id.* at 34 (“Since 1604 no officer of the Crown has effectively by virtue of his office exercised jurisdiction over elections to the House of Commons.”).

This, then, was the legacy of the English experience for purposes of this article: a privilege in Commons to resolve questions about eligibility to serve in that body, justified as “antient” and forged in a sequence of confrontations with the Crown and the Court of Chancery.

B. *The American Experience*

Although the basic scope of the privilege was well established before any government of substance took form in what became the United States, it seemed to acquire an enhanced vitality once transplanted to North America. The reasons for this are perhaps difficult to discern, but one can begin by noting that the early colonists were both aware of and dependent on such precedents as *Goodwin v. Fortescue* for their political fortitude. “The significance of this victory for American history,” wrote Mary Patterson Clarke with reference to the case, “lies in its nearness in time to the beginning of colonization and in the great publicity that was given to this and other disputes with the crown in the early seventeenth century.”¹⁶² “Many of the migrating settlers who came to America,” she went on to note, “must have been well acquainted with this contest and keenly alive to its implications.”¹⁶³ Indeed, not only were they aware of such precedents as *Goodwin v. Fortescue*, but they kept them in mind as they began to assert prerogatives for themselves in the new world.

The colonial legislatures along the eastern seaboard (at least the lower houses) understandably sought to emulate Commons¹⁶⁴ and in fact saw much of the tension of the seventeenth century between Commons and the Crown re-enacted in their relationships with royal governors.¹⁶⁵ Thus,

¹⁶² CLARKE, *supra* note 87, at 133.

¹⁶³ *Id.*

¹⁶⁴ See WILLIAM PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 230 (1980) (“As early as 1640, eight colonies had assemblies that represented the interests of the settlers in their dealing with the companies, the king’s governors, or the proprietors [who stood for the Crown in their respective territories] From the 1690s on, the assemblies regarded themselves more and more as comparable to the House of Commons and followed the rituals of Parliament as closely as they could.”); see also CLARKE, *supra* note 87, at 13 (“The early leaders of America were in touch with affairs in England, and aware of the powers of parliament and the importance of precedent.”); NOTESTEIN, *supra* note 77, at 3 (“When Sir Walter Raleigh looked westward he could hardly have foreseen that the House of Commons, of which he was an active member, would be transported to the new world.”); William C. Morey, *The First State Constitutions*, 4 *ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI.* 201 (1893); William C. Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 *ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI.* 380 (1897).

¹⁶⁵ See CHARLES LEE RAPER, *NORTH CAROLINA: A STUDY IN ENGLISH COLONIAL GOVERNMENT* 93 (1904) (discussing the legislature of colonial North Carolina) (“By virtue of the fact that the lower house had control of the supplies [i.e. money], it compelled the governor not infrequently to assent to its demands, and in so doing it exercised a very considerable

the two departments found themselves in constant dispute over taxes, appropriations, the line between individual rights and executive discretion, and the very issue of which organ of government should dominate.¹⁶⁶

In fact, the colonials' experience of fortifying their legislatures was a substantial proving ground for the coming Revolution.¹⁶⁷ Writing about colonial New York, for example, Alan Tully notes that governors would arrive from England "puffed up with their extravagant prerogative claims, symbolic proximity to royalty, and unbridled greed."¹⁶⁸ According to Tully, the most vigorous response to such developments lay in the legislature, which would seek to "puncture" the "pretensions" of arriving governors by "neutralizing some of their prerogative privileges":

With its ability to draw strength from the House of Commons analogy, and, when that failed or was inappropriate, from the argument that local legislative innovation was justifiable in defense of English rights, the assembly was well equipped to claim a sizable area of political competence for provincials to control.¹⁶⁹

influence over him and his administration."); SUTHERLAND, *supra* note 108, at 72 ("[T]he first comers [to New England] were Puritans whose sympathies had been on the side of Parliament in its struggles with Charles I."); *id.* at 114 ("The colonial assemblies (by whatever name known) are the ancestors of present American legislatures Much constitutional history in the Colonies can be told in annals of controversy between Assemblies and Governors."); ALAN TULLY, FORMING AMERICAN POLITICS: IDEALS, INTERESTS, AND INSTITUTIONS IN COLONIAL NEW YORK AND PENNSYLVANIA 226 (1994) (discussing New York in the eighteenth century) ("Unlike the situation in Britain, where a system of ministerial power and corruption had replaced the prerogative as the main threat to liberty, the royal colonies were confronted with representatives of the Crown whose prerogative claims were reminiscent of seventeenth-century English monarchical powers.").

166 See generally JACK P. GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689-1776, at 71 (1963) (discussing colonial struggles between governors and legislatures) ("No political unit can exist without money, and as long as the lower houses' consent was required to raise money, they were certain to occupy a prominent place in the framework of government. Indeed, it was by an ingenious use of their control over finance that the lower houses were enabled to enlarge their powers so greatly in the years before 1763."); *id.* at 87 ("Power to determine how public taxes should be spent was a natural corollary to the authority to tax, and it became an important element in the lower houses' control over finance.").

167 See GREENE, *supra* note 166, at vii ("Through their lower houses of assembly the colonists achieved a considerable degree of home rule in the eighteenth century; and it was the lower houses that took the lead in defending American rights and liberties when they were challenged by Crown and Parliament after 1763"); TULLY, *supra* note 165, at 91 ("[I]f the proving of popular power through the assemblies [of New York and Pennsylvania] was only one expression of the processes of political self-definition that both colonies undertook in the eighteenth century, it was clearly of fundamental importance."); *id.* at 92 ("[T]he most vocal proponent of colonial rights in the various British North American provinces was the assembly.").

168 TULLY, *supra* note 165, at 55.

169 *Id.*

Similarly, when colonial Pennsylvania learned that Charles II might “repossess” the proprietary powers the Crown had granted to William Penn, it drafted a new document, the Charter of Privileges of 1701. By enhancing the elected nature of the colonial government and the authority of a unicameral legislature, writes Tully, this document gave “unprecedented structural recognition” to Pennsylvanians’ claims for autonomy.¹⁷⁰

Given Commons’ success in asserting itself against Elizabeth I and the early Stuarts, and given the replication of Commons’ political struggles with the Crown on this side of the Atlantic, colonial legislatures were apt to seek and obtain privileges comparable to those enjoyed by Commons.¹⁷¹ For them, these privileges were part of their inheritance as English subjects. Among these privileges, of course, was the privilege to adjudicate the eligibility of prospective members.¹⁷²

A particularly fascinating episode in this regard was *In re Gadsden*, which Jack P. Greene discusses at length in his monograph on lower houses in the colonial South.¹⁷³ In 1762, the voters of the parish of St. Paul in South Carolina elected Christopher Gadsden to represent them in that colony’s house of commons, notwithstanding the fact (presumably unknown to them) that the person who conducted the election (the warden of a church) had not been properly sworn as per a statute of 1721. The defect was real but tech-

¹⁷⁰ *Id.* at 69.

¹⁷¹ See RAPER, *supra* note 165, at 87 (discussing the legislature in colonial North Carolina) (“The lower house during the whole of the royal period claimed that it had some rights, inherent in its own nature and derived from the proprietors, which the crown must allow.”).

¹⁷² See CLARKE, *supra* note 87, at 134 (“[A] set of resolutions, passed in Virginia in April, 1692, declared not only that the house of burgesses was the only judge of its members’ qualifications, but also that any other person who should usurp such authority would be guilty of breach of privilege.”); *id.* at 135 (discussing colonial Pennsylvania) (“When William Penn, after regaining his province, issued a new frame of government in 1696, he specifically reserved to each of his houses the right to be sole judge of its own elections.”); GREENE, *supra* note 166, at 189 (“A third ingredient of control over membership was the power to determine disputed elections. The English House of Commons had won that power in 1604 in the cases of Goodwin and Fortescue, and most American lower houses claimed it early in their history.”); A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 56 (1968) (noting a dispute between the two houses of Maryland’s colonial assembly over “the right of the Speaker to issue warrants for elections to vacant seats”) (“[T]he Proprietor argued that ‘the King had power to dispose of his conquests as he pleased.’ The lower house, irate over this suggestion, insisted on the rights of its members as being those of Englishmen, ‘their birthright by the words of the Charter.’”); RAPER, *supra* note 165, at 89 (discussing the colonial legislature in North Carolina) (“The lower house also claimed the privilege of making inquiries into the election returns of its own members.”); TULLY, *supra* note 165, at 69 (discussing Pennsylvania’s Charter of Privileges of 1701, by which the people of this colony conferred on their legislature customary parliamentary privileges, including “the right to ‘be Judges of the Qualifications and Elections of their own members’ . . .”). Clarke provides a general discussion of exercise of the privilege by colonial legislatures. See CLARKE, *supra* note 87, at 132–72.

¹⁷³ See GREENE, *supra* note 166, at 191–97.

nical.¹⁷⁴ "Although the letter of the law had been violated," Greene wrote, "the spirit obviously had not, for the election had been carried on without any other irregularity, and Gadsden was the overwhelming choice of the St. Paul electors."¹⁷⁵ The house proceeded to declare Gadsden elected, but the governor, Thomas Boone, refused to give him the oath, standing on the statute.¹⁷⁶ This provoked a sharp dispute with the house, which propounded a lengthy remonstrance, resolving that the right to determine the validity of elections for seats in the legislature "belonged 'SOLELY' and 'ABSOLUTELY' to the representatives of the people . . ."¹⁷⁷ The governor did not modify his position, however, and matters grew even more acrimonious. On December 16, 1762, the house resolved not to transact further business with him until he apologized for violating its rights and privileges.¹⁷⁸ It also undertook to express its grievance to its agent in London.¹⁷⁹ By then the controversy had expanded to the papers, with Gadsden himself taking a prominent role.¹⁸⁰ As he put the matter, the legislative privilege to resolve electoral disputes "is so unalienable and inherent in the people, that they can be no longer denominated a free people when it is parted with; because all their *freedom* as British subjects most essentially depends on it."¹⁸¹

The house stuck to its word and refused to work with the governor. In September 1763, after Boone again refused to administer the oath to individuals whose election he had not personally verified, the house asked the Crown to remove him.¹⁸² The board of trade, an instrumentality of the Crown to some extent responsible for the colonies, soon heard the matter and resolved it largely against the governor. "The Board's decision was clearly unsympathetic to Boone's position,"¹⁸³ noted Greene. "Because it did not uphold him in his attempts to usurp the power to determine the validity of elections," Greene continued, "this decision represented a victory for the Commons."¹⁸⁴ "Thereafter," he concluded, "no one questioned its exclusive power to determine the validity of the elections of its own members, and future governors hesitated to revive a dispute which had broken one of their predecessors."¹⁸⁵

174 *See id.* at 192.

175 *Id.*

176 *See id.*

177 *Id.* at 193.

178 *See id.* at 195.

179 *See id.*

180 *See id.*

181 *Id.* (quoting Gadsden).

182 *See id.* at 196.

183 *Id.* at 197.

184 *Id.*

185 *Id.*

As *In re Gadsden* illustrates, the lower houses did not invariably exercise the privilege in the manner established by the English House of Commons in the early seventeenth century, but that was certainly the goal and the ideal, and movement was inexorable in that direction. “[A]ll attempts to interfere with the assembly’s determination of its own membership, no matter from what source those efforts came,” noted Clarke, “were trifling in the face of one all-important fact that the house did, over a wide area and throughout a long period, make such decisions. Election contests were heard and determined by the house itself, usually without protest from the governor or council.”¹⁸⁶

But the American experience added at least one important and interesting wrinkle to the development of this privilege. In particular, the American penchant for written constitutions enabled this privilege to grow in a substantial new direction.¹⁸⁷

The idea of a written constitution was not literally unique to Americans of the founding generation, but it was substantially so.¹⁸⁸ As the legal scholar Philip Bobbitt has noted, this idea gained currency on this side of the Atlantic because of a distinct development in American political theory about the nature of sovereignty.¹⁸⁹ Unlike their English predecessors, Americans of the founding era did not recognize sovereignty and government as fungible concepts. That is, they saw the people, and not any department or level of government, as the true sovereign, and they saw the government itself as a mere agent.¹⁹⁰ Because of this, Americans of this era were almost universally inclined to reduce their constitutional preferences to writing, much as any principal is inclined to reduce a relationship with an agent to writing.¹⁹¹

This inclination, together with a profound solicitude for the legislature that typified the colonial and revolutionary period,¹⁹² produced wide-

186 CLARKE, *supra* note 87, at 170–71.

187 *See id.* at 171 (“This ‘ancient and undoubted right’ did not end with the American Revolution but, with many other governmental provisions, passed out of the realm of unwritten law into that of a written or ‘rigid’ constitution.”).

188 *See* PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 3–4 (1991).

189 *See id.* at 3–5.

190 *See* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 383 (1969) (“[D]evelopments in America since 1776 had infused an extraordinary meaning into the idea of the sovereignty of the people. The Americans were not simply making the people a nebulous and unsubstantial source of all political authority.”).

191 *See* BOBBITT, *supra* note 188, at 4 (“The American innovation was not the writing *per se*, but rather the political theory whereby the state was objectified and made a mere instrument of the sovereign will that lay in the People.”); *see also* HOWARD, *supra* note 172, at 204 (“In reducing the basis of government to a written instrument, the Americans were simply following [the example] of the colonial charters, to which as colonists the Americans had so often . . . pointed as security for their rights and under which they had lived for six generations.”).

192 *See* Webster, *supra* note 164, at 398 (“Under most of the revolutionary constitutions

spread textual recognition of the privilege to determine members' eligibility. Although Pennsylvania adopted such text as early as 1701 in its charter of privileges,¹⁹³ this process truly took off during the revolutionary era when new constitutions abounded.¹⁹⁴ In fact, by the time Kentucky became a state in 1792, twelve of the fourteen existing states—all but Connecticut and Rhode Island—had adopted at least one constitution since the battles of Lexington and Concord, and of these twelve, all but Virginia had adopted a constitution explicitly recognizing the privilege.¹⁹⁵ In the “first wave” of such documents,¹⁹⁶ six states—Delaware,¹⁹⁷ Maryland,¹⁹⁸ New Jersey,¹⁹⁹

the legislature was truly omnipotent and the executive correspondingly weak.”). In time, of course, the people of many states modified their constitutions to reduce the authority of the legislature. Indeed, this was evident after the “first wave” of revolutionary constitutions adopted in 1776 and 1777. Much later, one of the principal modifications to Kentucky's Constitution was to limit or eliminate the ability of the legislature to enact so-called “special legislation.” See generally ROBERT M. IRELAND, *THE KENTUCKY STATE CONSTITUTION: A REFERENCE GUIDE* 11 (1999). Even so, the privilege to which this article pertains has remained a part of almost every state's constitution, including that of Kentucky.

193 See *supra* note 172.

194 See Robert F. Williams, “Experience Must Be Our Only Guide”: *The State Constitutional Experience of the Framers of the Federal Constitution*, 15 *HAST. CONST. L.Q.* 403, 405 (1988) (“By the time the Constitutional Convention met in the summer of 1787, the thirteen independent states had debated, framed, adopted, rejected, and modified at least twenty state constitutions.”).

195 Virginia's Constitution did not contain an express recognition of the privilege until 1830. See VA. CONST. art. III, § 9 (1830), reprinted in 10 *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 62 (William F. Swindler ed., 1979) [hereinafter Swindler] (“Each house shall judge of the election, qualification, and returns of its members . . .”). But the legislature of that state nevertheless exercised such a power in 1780, in the matter of John Breckinridge, “a youth of 19,” whom the House of Delegates excluded on account of his age. 69 *CONG. REC.* 114 (Dec. 6, 1927) (quoting report of Price Wickersham). Although the House of Delegates' exact estimation of its privilege at the time is unknown, the author of the report citing *In re Breckinridge* concluded that “the house of delegates assumed that it had the inherent power to judge of the qualifications of its members, regardless of the absence of a constitutional provision giving it such power.” *Id.* (same).

196 See Williams, *supra* note 194, at 413–14 (“The first wave of state constitutions is generally seen to include those adopted during the first year after Independence.”).

197 See DEL. CONST. art. V (1776), reprinted in 2 Swindler, *supra* note 195, at 200 (“[E]ach house shall . . . judge of the qualifications and elections of its own members . . .”).

198 See MD. CONST. art. IX (1776), reprinted in 4 Swindler, *supra* note 195, at 377 (“[T]he House of Delegates shall judge of the elections and qualifications of Delegates.”); *id.* art. XVII, reprinted in 4 Swindler, *supra*, at 378 (“[T]he electors of Senators shall judge of the qualifications and elections of members of their body; and, on a contested election, shall admit to a seat, as an elector, such qualified person as shall appear to them to have the greatest number of legal votes in his favour.”).

199 See N.J. CONST. art. V (1776), reprinted in 6 Swindler, *supra* note 195, at 450–51 (“[T]he Assembly, when met, shall have power . . . to be judges of the qualifications and elections of their own members . . .”).

New York,²⁰⁰ North Carolina,²⁰¹ and Pennsylvania,²⁰² plus Vermont²⁰³—adopted such provisions. Within short order, four more—Georgia,²⁰⁴ Massachusetts,²⁰⁵ New Hampshire,²⁰⁶ and South Carolina²⁰⁷—followed suit. Connecticut and Rhode Island adopted provisions setting forth the privilege somewhat later, when they finally adopted their first post-revolutionary constitutions.²⁰⁸ Similarly, when the framers met in Philadelphia in 1787,

200 See N.Y. CONST. art. IX (1777), *reprinted in* 7 Swindler, *supra* note 195, at 174 (“[T]he assembly, thus constituted, shall . . . be judges of their own members, and enjoy the same privileges, and proceed in doing business in like manner as the assemblies of the colony of New York of right formerly did . . .”).

201 See N.C. CONST. art. X (1776), *reprinted in* 7 Swindler, *supra* note 195, at 405 (“[T]he Senate and House of Commons, when met, shall each have power to . . . be judges of the qualifications and elections of their members . . .”).

202 See PA. CONST. § 9 (1776), *reprinted in* 8 Swindler, *supra* note 195, at 280 (The members of the house of representatives . . . shall have power to . . . judge of the elections and qualifications of their own members . . .”).

203 Although not a state until 1791, Vermont adopted a constitution in 1777 that explicitly recognized the privilege. See VT. CONST. Ch. II, § 8 (1777), *reprinted in* 9 Swindler, *supra* note 195, at 491 (“The members of the House of Representatives, shall . . . judge of the elections and qualifications of their own members . . .”). Massachusetts, New Hampshire and New York, all of which laid claim to what is now Vermont, refused to recognize this document. See 9 Swindler, *supra* note 195, at 485.

204 Georgia’s Constitution of 1777 did not contain an express recognition of the privilege, but in 1789 it adopted a new organic document intended to reflect the federal Constitution of 1787 that did contain such a provision. See GA. CONST. art. I, § 13 (1789), *reprinted in* 2 Swindler, *supra* note 195, at 452 (“Each house shall be judges of the elections, returns, and qualifications of its own members . . .”).

205 After adopting a relatively short constitution during the revolution, Massachusetts adopted an elaborate document in 1780—still in force today—that includes two express recognitions of the privilege. See MASS. CONST. pt. 2, ch. 1, § 2, art. IV (1780), *reprinted in* 5 Swindler, *supra* note 195, at 98 (“The senate shall be the final judge of the elections, returns, and qualifications of their own members, as pointed out in the constitution; and shall, on the said last Wednesday in May, annually, determine and declare who are elected by each district to be senators by a majority of votes . . .”); *id.* pt. 2, ch. 1, § 3, art. X, *reprinted in* 5 Swindler, *supra* note 195, at 100 (“The house of representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution . . .”).

206 New Hampshire adopted a short document in 1776 that was superseded in 1784. As amended in 1793, this document, which is still in force today, includes two express recognitions of the privilege. See N.H. CONST. art. 22 (amended 1793) (“The house of representatives . . . shall be judge of the returns, elections, and qualifications, of its members, as pointed out in this constitution.”); *id.* art. 35 (“The senate shall be final judges of the elections, returns, and qualifications, of their own members.”).

207 See S.C. CONST. art. I, § 11 (1790), *reprinted in* 8 Swindler, *supra* note 195, at 477 (“Each house shall judge of the elections, returns, and qualifications of its own members . . .”).

208 See CONN. CONST. art. III, § 6 (1818), *reprinted in* 2 Swindler, *supra* note 195, at 146 (“[E]ach house shall be the final judge of the election, returns, and qualifications of its own members.”); R.I. CONST. art. 4, § 6 (1842), *reprinted in* 8 Swindler, *supra* note 195, at 390 (“[E]ach house shall be the judge of the elections and qualifications of its members . . .”). These two states operated under their colonial charters until well after independence.

the Constitution they proposed—and that the states shortly thereafter ratified—contained such a provision.²⁰⁹ Indeed, this aspect of legislative independence was so widely accepted at the time that no one appears to have opposed this clause at the Convention, and criticism in the state ratifying conventions was limited to its exclusion of *state legislatures*, not the judiciary, from the adjudicative process.²¹⁰ Thus, by the end of the founding era the legislative privilege to adjudicate the qualifications, elections, and returns of members was firmly established, having found its way not only into settled custom and practice, but also into virtually every constitution of the period.

Ironically, just as Americans were fortifying the privilege on this side of the Atlantic, giving it an authority it had never enjoyed before, Commons was taking steps in the opposite direction. In 1770, at the instance of George Grenville, it began delegating the resolution of contested elections irrevocably to a select committee of its members.²¹¹ Under this system, rivals for a seat would alternately strike members until they had established a committee of thirteen, to which each would then add a nominee, bringing the total to fifteen. The committee would then resolve the contest without appeal to the full membership.²¹² A century later, Commons took this idea a step further and allocated much of the responsibility for resolving contests to the courts.²¹³

Various scholars have attributed these developments to distaste for what had become a highly politicized process. In 1770, for example, Commons' was wrestling with the recurrent matter of *In re Wilkes*, having expelled John Wilkes from its ranks more than once despite his constituents' ardent

209 See U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .").

210 Then-Circuit Judge Scalia attributed this to the provision's non-controversial nature. See *Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986) (opinion by Scalia, J.) ("As far as we are aware, in none of the discussions of the clause did there appear a trace of suggestion that the power it conferred was not exclusive and final. The fragments of recorded discussion imply that many took for granted the legislative 'right of judging of the return of their members,' and viewed it as necessarily and naturally exclusive." (quoting 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 241 (rev. ed. 1966) (statement of Rufus King in Federal Convention))).

211 See ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 32 (Sir David Lidderdale ed., 19th ed. 1976) [hereinafter ERSKINE MAY]; FRANK O'GORMAN, VOTERS, PATRONS, AND PARTIES: THE UNREFORMED ELECTORAL SYSTEM OF HANOVERIAN ENGLAND 1734-1832, at 165 (1989); .

212 See LUCE, *supra* note 80, at 194 ("[Grenville's] plan was to have thirteen members elected by the sitting members and petitioners from a list of forty-nine who had been chosen by ballot, to whom each party should add a nominee. This tribunal was to decide without appeal.").

213 See ERSKINE MAY, *supra* note 211, at 32-35; LUCE, *supra* note 80, at 195; O'GORMAN, *supra* note 211, at 165.

desire that he represent them in that body.²¹⁴ Before Grenville's act, notes Frank O'Gorman, "election petitions were rarely decided on the merits and even more rarely with reference to the interests of the electors."²¹⁵ The authors of May's treatise on parliamentary practice similarly observe that, before 1770, "controverted elections were tried and determined by the whole House of Commons, as mere party questions, upon which the strength of contending factions might be tested."²¹⁶

But for some reason these adaptations never gained much traction in the United States. Perhaps one explanation for this dramatic divergence lies in Parliament's near pre-eminence in the British political structure, such that delegation of particular responsibilities cannot materially threaten its autonomy.²¹⁷ On the other hand, the distinction might simply be a matter of political culture. In any case, not only has every state other than North Dakota²¹⁸ and Hawaii²¹⁹ preserved the adjudication of members' eligibility as an exclusively legislative privilege, but the states that gave Grenville's procedure a try eventually rejected it in favor of a decision by the full chamber. Although Pennsylvania adopted this approach in its constitution of 1790, as did Kentucky in its first constitution of 1792,²²⁰ it did not last in either state, and in fact had a particularly short tenure in Kentucky, surviving only seven years.²²¹ It survived much longer in Pennsylvania, remaining in force until that state adopted its present constitution in 1873.²²² In Kentucky's case, the removal appears to have been attributable to an intensely populist approach to government. In fact, the same document that saw rejection of Grenville's procedure also saw rejection of an indirectly elected governor

214 See O. A. SHERRARD, *A LIFE OF JOHN WILKES* 200–11 (1930); PETER D.G. THOMAS, *JOHN WILKES: FRIEND TO LIBERTY* 106 (1996). See *infra* notes 578–618 and accompanying text for a discussion of *In re Wilkes*.

215 O'GORMAN, *supra* note 211, at 164.

216 ERSKINE MAY, *supra* note 211, at 31–32 (footnote omitted).

217 See *supra* note 90.

218 See *supra* note 74.

219 See *id.*

220 See KY. CONST. § 18 (1792) ("Each House shall judge of the qualifications of its members; contested elections shall be determined by a committee to be selected, formed, and regulated in such manner as shall be directed by law."); PENN. CONST. art. I, § 12 (1790), *reprinted in* 8 Swindler, *supra* note 195, at 287 ("Each House shall judge of the qualifications of its members. Contested elections shall be determined by a committee, to be selected, formed and regulated in such manner as shall be directed by law."); see also LUCE, *supra* note 80, at 198 (noting Pennsylvania and Kentucky's adoption of Grenville's procedure). See generally IRELAND, *supra* note 192, at 2 (noting the influence of Pennsylvania's Constitution of 1790 on Kentucky's first Constitution).

221 See KY. CONST. art. II, § 19 (1799).

222 See PA. CONST. art. II, § 9 ("Each House shall choose its other officers, and shall judge of the election and qualifications of its members.").

and senate.²²³ The language of Kentucky's recognition of the privilege has not seen a material change since 1799.²²⁴

In the next Subpart, we will discuss some of the more famous exercises of the privilege by legislatures in the United States. After discussing legislative practice, we will then discuss judicial precedent pertaining to the privilege, noting that the overwhelming weight of this authority simply confirms the legislative nature of the prerogative.²²⁵

C. Legislative Precedent

Legislatures in the United States, particularly the two houses of Congress, have resolved questions about their members' eligibility so many times and in so many contexts that an Article of this size can no more than note the basic contours of the practice. For the most part, they have adjudicated the regularity of elections—that is, questions about who received the most votes, who has the proper credentials for admission, and whether so-called “corrupt practices” occurred at the polls or thereabouts. More to the point of this Article, they have also addressed the question of whether people have met the various qualifications for service. In this Subpart, we hope to provide some examples of legislative practices in this area. Many of these examples are from the United States Senate, whose Historical Office has produced an excellent monograph on the subject.²²⁶

1. *In re Gallatin (Senate; United States, 1793–1794)*.—The federal Senate first exercised its privilege in controversial circumstances in the winter

223 Compare KY. CONST. art. I, § 9 (1792) (describing the procedure for determining “electors of the senate”); *id.* art. II, § 2 (“The governor shall be chosen by the electors of the senate, at the same time, at the same place, and in the same manner that they are herein directed to elect senators . . .”), with KY. CONST. art. II, § 14 (1799) (One senator for each district shall be elected by those qualified to vote for representatives therein . . .); *id.* art. III, § 2 (“The governor shall be elected for the term of four years by the citizens entitled to suffrage at the time and places where they shall respectively vote for representatives.”).

224 Compare KY. CONST. art. II, § 19 (1799) (“Each House of the General Assembly shall judge of the qualifications, elections, and returns of its members; but a contested election shall be determined in such manner as shall be directed by law.”) with KY. CONST. art. II, § 20 (1850) (“Each House of the General Assembly shall judge of the qualifications, elections, and returns of its members; but a contested election shall be determined in such manner as shall be directed by law.”), and KY. CONST. § 38 (1891) (“Each House of the General Assembly shall judge of the qualifications, elections and returns of its members, but a contested election shall be determined in such manner as shall be directed by law.”).

225 See *infra* notes 680–796 and accompanying text.

226 See ANNE M. BUTLER & WENDY WOLFF, UNITED STATES SENATE ELECTION: EXPULSION AND CENSURE CASES, 1793–1990 (1995). See generally *id.* at xiii (noting that, over its long history, the Senate has “jealously guarded” its prerogative to determine the eligibility of its members and to punish its members for misconduct).

of 1793–1794, in the case of Albert Gallatin of Pennsylvania,²²⁷ who later served as Thomas Jefferson’s secretary of the treasury.²²⁸ At that time, senators were elected by the state legislatures,²²⁹ but the exact means by which such elections occurred were often subject to confusion or manipulation.²³⁰ Although typically the two houses of a bicameral legislature would vote as one on the question,²³¹ from 1791 to 1793 a handful of Federalists in Pennsylvania’s senate insisted on separate votes, thus preventing the state from agreeing on a second senator.²³² Gallatin, a Jeffersonian (Republican) and a member of Pennsylvania’s house,²³³ was an outspoken critic of this bloc, “decrying the fact that just six men . . . were depriving Pennsylvania of half of its representation in the United States Senate.”²³⁴ Ultimately, the Federalists capitulated and agreed to a joint vote.²³⁵ Although he discouraged his own election,²³⁶ and even speculated out loud about whether he had been a citizen long enough to serve,²³⁷ Gallatin nevertheless prevailed in the vote of February 28, 1793.²³⁸

227 *See id.* at 4–5.

228 *See id.*; RAYMOND WALTERS, JR., ALBERT GALLATIN: JEFFERSONIAN FINANCIER AND DIPLOMAT 143 (1957).

229 Until the Seventeenth Amendment, the Constitution provided that “[t]he Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof” U.S. CONST. art. I, § 3, cl. 1 (amended 1913). The Seventeenth Amendment provides that “[t]he Senate of the United States shall be composed of two Senators from each state, elected by the people thereof” *Id.* at amend. XVII (1913).

230 *See BUTLER & WOLFF, supra* note 226, at xiv.

231 *See WALTERS, supra* note 228, at 50.

232 *See id.*

233 *See id.*

234 *Id.*

235 *See id.*

236 *See HENRY ADAMS, THE LIFE OF ALBERT GALLATIN 95–96 (1879)* (“You will see by the papers that I am elected one of the Senators to represent this State in the Senate of the United States, an appointment . . . which, notwithstanding its importance, I sincerely wish had not taken place It will be enough to say that none of my friends wished it, and that they at last consented to take me up because it was nearly impossible to carry any other person of truly Republican principles.” (quoting Letter from Albert Gallatin to Thomas Clare (Mar. 9, 1793))).

237 *See id.* at 98 (“[W]hen his name was proposed, [Gallatin] made a short speech to the effect that there were many other persons more proper to fill the office, and indeed that it was a question whether he was eligible, owing to the doubt whether he had been nine years a citizen.”); *see also* 4 ANNALS OF CONG. 58 (1794) (affidavit of John Breakbill) (“[L]ast Winter, being a member of the Legislature of Pennsylvania, . . . I heard Mr. Gallatin say his citizenship would not admit his being a Senator . . .”). Gallatin may well have said this while under the false impression that the Constitution required him to have been a citizen of Pennsylvania for nine years. *See id.* at 58–59 (affidavit of Henry Kammerer) (noting that, according to Gallatin, he had expressed doubts about the duration of his citizenship “under a mistaken idea that it was necessary for him to have been nine years a citizen of Pennsylvania . . .”).

238 *See WALTERS, supra* note 228, at 51. In addition to the obstacles set forth in the text,

Apparently the duration of his citizenship was more than a matter of idle speculation. The federal Constitution requires nine years of prior citizenship for service in the Senate.²³⁹ A native of Switzerland,²⁴⁰ Gallatin had left Europe in 1780,²⁴¹ and presumably had established citizenship on this side of the Atlantic at some point thereafter. Although the Senate admitted him to membership and allowed him to take the oath of office when it convened on December 2, 1793,²⁴² that same day it noted a petition regarding his eligibility to serve.²⁴³

Thus began the notable, and notably short, career of Albert Gallatin in the Senate. Although he remained in the chamber less than three months,²⁴⁴ in that short time he succeeded in establishing himself as the chief burr under the saddle of Alexander Hamilton, George Washington's secretary of the treasury.²⁴⁵ As Raymond Walters, one of Gallatin's biographers, has suggested, with his "Genevan heritage" and fiscal experience from serving in Pennsylvania's legislature,²⁴⁶ Gallatin was uniquely fit to subject Hamilton's work to scrutiny.

And so he did. Although the provenance of the Senate's resolutions during Gallatin's brief tenure is not entirely clear, Walters is confident in ascribing them to Gallatin's influence.²⁴⁷ Thus, on January 8, 1794, a motion

Gallatin's party was also in the minority in the legislature as a whole. In his autobiography, he attributed his success to hard work in that branch of government:

In the session of 1791-92 . . . I was put on 35 Committees, prepared all the reports and drew all their bills It was my constant assiduity to business and the assistance derived from it by many members, which enabled the republican party in the Legislature, then a minority on the joint ballot, to elect me and no other but me of that party, Senator of the United States.

EDWIN G. BURROWS, *ALBERT GALLATIN AND THE POLITICAL ECONOMY OF REPUBLICANISM, 1761-1800*, at 293 (1974) (citation omitted).

239 See U.S. CONST. art. I, § 3, cl. 3 ("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.").

240 See WALTERS, *supra* note 228, at 1.

241 See *id.* at 11.

242 See 4 ANNALS OF CONG. I (1793) ("This being the day fixed by the Constitution for the annual meeting of Congress, the following members of the Senate appeared, produced their credentials, and took their seats: . . . ALBERT GALLATIN, from Pennsylvania . . ."); *id.* ("The VICE PRESIDENT administered the oath required by law to Mr. BUTLER, Mr. GALLATIN, and Mr. MARTIN, respectively, and they took their seats.").

243 See *id.* ("The VICE PRESIDENT laid before the Senate the petition of Conrad Laub and others, relative to the appointment of Mr. GALLATIN, a Senator of the United States; which was read, and ordered to lie on the table.").

244 See *infra* note 265 and accompanying text.

245 See *infra* note 251 and accompanying text.

246 WALTERS, *supra* note 228, at 60.

247 See *id.*

was made in the Senate to require Hamilton to lay before that body various accounts, including “the Domestic Debt of the United States, . . . the Domestic Debt redeemed since the commencement of the present Government, . . . the Foreign Debt of the United States, . . . the application of the moneys obtained upon Foreign Loans contracted since the commencement of the present Government, . . . [and the] actual receipts and expenditures . . . of the present Government [for various periods of time].”²⁴⁸ With a few changes, this motion carried just a few days later on January 20.²⁴⁹ Needless to say, Hamilton was not well disposed to these requests.²⁵⁰ As the historian Edwin Burrows has noted, Gallatin “ultimately emerged as the Republicans’ first line of defense against Hamiltonian finance.”²⁵¹

Given this forensic assault, one should not be astonished that the Federalists, who dominated the Senate, were less than solicitous of Gallatin’s fate as the subject of a petition.²⁵² On December 11, 1793, the Senate referred the petition to a committee of five Federalists,²⁵³ who somewhat predictably reported on the last day of the year that he was not qualified to serve.²⁵⁴ The committee justified its conclusion in terms of his foreign birth and extensive ties to people overseas.²⁵⁵ On January 13, 1794, the Senate referred the petition to another committee, this time a “Committee on Elections” comprising seven members, four of whom were Federalists.²⁵⁶ On February 10, this committee made a report favorable to the petitioners, although it articulated its conclusions in terms of Gallatin’s need to make his case.²⁵⁷

248 4 ANNALS OF CONG. 26–27 (1794).

249 *See id.* at 34–36.

250 *See* WALTERS, *supra* note 228, at 60.

251 BURROWS, *supra* note 238, at 420.

252 *See* BUTLER & WOLFF, *supra* note 226, at 4 (“Faced with some confusion over a technical point of citizenship, Federalists saw no reason to rescue a dangerous foe.”).

253 *See* 4 ANNALS OF CONG. 19 (Dec. 11, 1793) (“*Ordered*, That Messrs. RUTHERFURD, CABOT, ELLSWORTH, LIVERMORE, and MITCHELL, be a committee to take into consideration the petition of Conrad Laub and others, stating that the Hon. Albert Gallatin, at the time he was elected a Senator of the United States, had not been nine years a citizen of the said United States, as is required by the Constitution, and report thereon to the Senate.”).

254 *See id.* at 24 (Dec. 31, 1793) (“Mr. RUTHERFURD reported, from the committee to whom was referred the petition of Conrad Laub and others, stating that the Hon. ALBERT GALLATIN, at the time he was elected a Senator of the United States, had not been nine years a citizen of the said United States, as is required by the Constitution . . .”)

255 *See* BUTLER & WOLFF, *supra* note 226, at 3.

256 *See* 4 ANNALS OF CONG. 29 (Jan. 13, 1794); BUTLER & WOLFF, *supra* note 226, at 4 (noting the composition of the committee).

257 *See* 4 ANNALS OF CONG. 61 (Feb. 10, 1794) (“[I]n the opinion of the Committee, it is now incumbent upon Mr. Gallatin to show that he has become a citizen of the United States, and when.”); *see also* BUTLER & WOLFF, *supra* note 226, at 4 (noting that the report “again supported the Pennsylvania petitioners”).

Gallatin's chief difficulty lay in his inability to establish to the satisfaction of the Senate that he had become a citizen of one state or another early enough to qualify for membership in that body. As David Currie has observed, questions of citizenship were difficult to resolve at that time,²⁵⁸ owing to technicalities arising from the transfer of sovereignty from the British Crown to entities on this side of the ocean. Quite understandably, Gallatin emphasized his various ties to the Union since he had arrived in 1780, noting that he had contributed money and services to the Revolution, that he had bought land in what is now Maine, and that he had taken oaths of loyalty to both Massachusetts and Virginia.²⁵⁹ He also took the abstract position that the common experience of immigration and Revolution had swept away technical notions of citizenship in one state or another.²⁶⁰ "Every man who took an active part in the American Revolution," he argued, "was a citizen according to the great laws of reason and nature"²⁶¹ But he was ultimately unable to establish persuasively that he had actually assumed citizenship in any one state.²⁶² As William Lewis, counsel for the petitioners, summarized the case against him, "the difficulties which stood between Mr. GALLATIN and his seat, were insurmountable and could not be removed without showing a law of Massachusetts, Virginia, &c., repealing those laws in regard to the qualification of citizens, which he had mentioned, but which repeal he was certain did not exist."²⁶³ Ironically, Gallatin's case might have been stronger had he immigrated before the Declaration of Independence, for in that case he might first have become a British subject and thus somewhat automatically a citizen of his state of residence upon independence.²⁶⁴

On February 28, the full Senate determined that Gallatin was not eligible to serve.²⁶⁵ The *et tu Brute* perhaps came from Gallatin's fellow Penn-

258 See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 197 n.185 (1997) ("Like the case of William Smith, . . . Gallatin's exclusion raised difficult questions of defining citizenship before the new Constitution took effect.")

259 See 4 ANNALS OF CONG. 47-48 (Feb. 20, 1794) (describing the "written statement" of "Mr. G.").

260 See *id.* at 49 (noting that Gallatin "conceived himself a citizen in common with the other citizens of the United States, from the time of his first qualifying after his arrival and attachment to the country").

261 *Id.* at 52 (Feb. 21, 1794).

262 See WALTERS, *supra* note 228, at 61 (describing the argument of William Lewis, who presented the case against Gallatin in the Senate) ("His chief tactic was to place the burden of proof squarely on Gallatin, insisting that he show he had been a citizen of Massachusetts or Virginia or some state at least nine years before his election as a senator.")

263 4 ANNALS OF CONG. 50 (Feb. 20, 1794).

264 Cf. *id.* at 49 (remarks of William Lewis, counsel for petitioners) ("[S]urely the gentleman was not one of the mass of citizens at the accomplishment of Independence.")

265 See *id.* at 57 (Feb. 28, 1794) ("*Resolved*, That the election of ALBERT GALLATIN to be a Senator of the United States was void, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States."); see also CURRIE,

sylvanian in the Senate, Robert Morris. Although a Federalist, Morris had initially told Gallatin that he would remain neutral.²⁶⁶ In the end, however, he voted against him.²⁶⁷

In re Gallatin displayed many of the characteristics of contests, protests, and petitions to come. Although argued in substantially legalistic terms, those terms included a significant admixture of hortatory claims, and politics quite likely exerted some influence on the process.²⁶⁸ In addition, and as with virtually every exercise of the privilege to follow, *In re Gallatin* pertained to an alleged infirmity that existed at the time the would-be member presented himself for membership. That is, the basis for the petition against Gallatin—the possibility that he had not been a citizen for a sufficient number of years—preceded his appearance in the Senate for admission on December 2, 1793.

2. *Stanton v. Lane (Senate, United States, 1861–1862)*.—Civil War and Reconstruction naturally subjected the American political system to severe strains, and the two houses of Congress were no strangers to this phenomenon. One of the most fascinating parties to a contest during this period was James H. Lane of Kansas, a fiery orator with a powerful personality.²⁶⁹ Although a Democrat and (at least ostensibly) a supporter of slavery when he entered the territory of Kansas,²⁷⁰ Lane eventually transferred his alle-

supra note 258, at 197 n.185.

266 See BUTLER & WOLFF, *supra* note 226, at 4; WALTERS, *supra* note 228, at 59

267 See BUTLER & WOLFF, *supra* note 226, at 4; WALTERS, *supra* note 228, at 63.

268 See CURRIE, *supra* note 258, at 197 n.185 (noting that “Gallatin lost by an unexplained vote of 14 to 12 that appeared to be on what we would now call party lines”). In hindsight, we can see that the issue left somewhat unresolved in *In re Gallatin* was whether the Senate thought Gallatin had to have been a citizen nine years at the time of his election or when the term for which he had been elected began. In the later case of *In re Shields*, the Senate excluded James Shields on the express ground that he had not been nine years a citizen when his putative term began. See *infra* notes 461–63 and accompanying text. Even later, the Senate looked back at *In re Gallatin* through the lens of *In re Shields* and noted the lack of clarity in the earlier case. See 79 CONG. REC. 9838 (June 21, 1935) (Sen. Bulkley) (debates on the contest of *Hatfield v. Holt*) (“The resolution adopted in the Gallatin case in its fair meaning holds that the election was void because the claimant did not possess the necessary qualifications as of the time of election. Whether it meant that or not, those who discussed and debated the Shields case . . . thought it meant that . . .”).

269 See ALLAN G. BOGUE, *THE EARNEST MEN: REPUBLICANS OF THE CIVIL WAR SENATE* 42 (1981) (“Jim Lane was a volatile man, and capable of violence in both word and deed.”); *id.* at 42–43 (“[Although Lane] called for draconian war, [he] was capable of surprising flashes of sentiment and was extolled by many as a real ‘live’ one.”). He committed suicide in 1866. See KENDALL E. BAILES, *RIDER ON THE WIND: JIM LANE AND KANSAS* 208–09 (1962); BOGUE, *supra*, at 340.

270 See BAILES, *supra* note 269, at 45 (noting Lane’s election as President of the “National Democratic party in Kansas” on June 27, 1855); *id.* at 44 (“Arriving in the border town of Westport, Lane made a speech in which he said he would as soon buy a slave as a mule.”). There is some evidence that this ignoble remark was a ruse. See *id.* at 40 (describing a

giance to the Republican Party and succeeded in being elected one of that state's first senators when it joined the Union in early 1861.²⁷¹

Soon after his election, Lane made his way to Washington to attend a special session President Lincoln had called for July 4. Upon arrival, he found matters somewhat in disarray. In particular, what troops the North could muster were at some distance from the capital,²⁷² and Maryland had made deployment of additional troops to the city difficult.²⁷³ Indeed, there was some concern that the president himself was in danger.²⁷⁴ Upon learning this, Lane organized a "Frontier Guard" that actually took stations in the East Room of the White House.²⁷⁵ After this crisis abated, Lane went back to Kansas, despite the imminent special session, to organize an army of volunteers in support of the Union.²⁷⁶ On June 20, after he returned to Washington, Lincoln made Lane a brigadier general in this unit²⁷⁷—or at least extended to him an appointment in this regard.²⁷⁸

suspected bargain between Lane and Senator Stephen A. Douglas) ("Now it will be necessary for you to mislead the South with regard to your plans on the slavery question. This you can do on your way to [Kansas] and trying to buy some slaves.").

271 *See id.* at 54 (noting Lane's political affiliations); *id.* at 148 (noting Lane's election to the Senate on April 4, 1861); *see also* BUTLER & WOLFF, *supra* note 226, at 92 (noting Lane's switch to the Republican party and his election to the Senate).

272 *See* DAVID HERBERT DONALD, LINCOLN 298 (1995) ("After the firing on Fort Sumter the capital seemed almost deserted because of a steady exodus of pro-Confederate officials, including high-ranking army and navy officers."). Lincoln had called for 75,000 militia, *see id.* at 296 (noting the President's proclamation of April 15, 1861), but they did not arrive for several days. *See id.* at 299 (noting the arrival of New York's Seventh Regiment on April 25).

273 *See* DONALD, *supra* note 272, at 298 ("For nearly a week Washington was virtually under siege. Marylanders destroyed the railroad bridges linking Baltimore with the North and cut the telegraph lines.").

274 *See* BAILES, *supra* note 269, at 151.

275 *See* BAILES, *supra* note 269, at 151–52; BUTLER & WOLFF, *supra* note 226, at 92; DONALD, *supra* note 272, at 298 ("To preserve some semblance of order in the national capital, Cassius M. Clay, wearing three pistols and an 'Arkansas toothpick' (a sharp dagger), organized the Clay Guards, and Senator-elect James H. Lane of Kansas recruited the Frontier Guards from fellow Kansans who were in Washington looking for jobs. Lane's group was quartered in the East Room of the White House.").

276 In his biography of Lane, Kendall E. Bailes suggested that Lane sought to organize this force so that he, and not his chief political rival Governor Charles Robinson, could control patronage in Kansas. *See* BAILES, *supra* note 269, at 154 ("Unless Lane could recruit several [regiments] of his own, his downfall would be assured. In Lane's mind, there was only one solution. He had to be both a Senator and a general."); *cf. id.* at 171 ("[Lane's] power was such that Kansas was the only state in the Union where a Senator controlled military patronage instead of the Governor.").

277 *See* BUTLER & WOLFF, *supra* note 226, at 92.

278 Lane and his supporters later took the position that the President lacked authority to make the appointment, or that Lane had not accepted it. *See infra* notes 300–01 and accompanying text.

On July 4, Senator James W. Grimes of Iowa presented Lane's credentials for the special session.²⁷⁹ The Senate promptly admitted him as a member, and he took the oath,²⁸⁰ but trouble soon arose. On July 12, Frederick P. Stanton arrived at the Senate with credentials signed by the governor of Kansas.²⁸¹ Although the legislature had elected Lane, Governor Charles Robinson, who was also one of Lane's political opponents, took the position that Lane had forfeited his seat by accepting the incompatible office of brigadier general, and had appointed Stanton in his stead.²⁸² Lane promptly described Stanton's credentials and a supporting memorial as "an attempt to bury a man before he is dead," adding that he did not intend to "surrender [his] certificate" to serve in the Senate until after the brigade had filled and had chosen him as its commanding officer.²⁸³

As had become its practice, the Senate referred the matter to the Committee on the Judiciary.²⁸⁴ On August 2, the committee reported against Lane, finding that he had been "appointed a brigadier general in the volunteer forces of the United States," that he had "accepted said appointment," and that, in its opinion, "the office of brigadier general under the United States is incompatible with that of member of either house of Congress."²⁸⁵ In connection with this report, the committee also offered the following two resolutions:

1. *Resolved*, That JAMES H. LANE is not entitled to a seat in this body.
2. *Resolved*, That Frederick P. Stanton is entitled to a seat in this body.²⁸⁶

The evidence against Lane was quite strong, although not perfect. Among other things, he had referred to himself as a "duly appointed . . . brigadier general in the volunteer force of the United States" in a letter to the editor of the *Daily Times* of Leavenworth, and he had gone on to solicit recruits for the new brigades in the same correspondence.²⁸⁷ He also ap-

279 *See* CONG. GLOBE, 37th Cong., 1st Sess. 1 (July 4, 1861).

280 *See id.*

281 *See id.* at 82 (July 12, 1861).

282 *See* BUTLER & WOLFF, *supra* note 226, at 93. *See generally* BAILES, *supra* note 269, at 154 (describing the confusion in Kansas arising from Lane's actions) ("When [Lane] returned to Kansas in August [1861], people there had no idea what his real status was."). The federal Constitution provides that "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2.

283 CONG. GLOBE, 37th Cong., 1st Sess. 82 (July 12, 1861).

284 *Id.*

285 S. REP. NO. 37-1, at 1 (1861); *see also* BUTLER & WOLFF, *supra* note 226, at 93.

286 CONG. GLOBE, 37th Cong., 2d Sess. 127 (Dec. 18, 1861).

287 S. REP. NO. 37-1, at 4–5 (1861). The solicitation—described in the debates as a "proclamation"—bore the words "*Brigadier General*" under James H. Lane's name. Lane, however, took the position that someone else had added the title. *See* CONG. GLOBE, 37th

peared to have taken an oath in support of his apparent appointment the day that the president had made it.²⁸⁸ Lane remained adamant in his defense, however, arguing that he had never formally accepted the appointment, that he would not consider doing so until the regiments in question had fully formed, and that the evidence against him suffered from various infirmities.²⁸⁹

On August 6, the president *pro tempore* of the senate laid before the body a letter from President Lincoln to the effect that Lane's appointment had been anticipatory to the formation of a regiment of volunteers from Kansas.²⁹⁰ "It was my intention, as shown by my letter of June 20, 1861," the President wrote, "to appoint the Hon. JAMES H. LANE, of Kansas, a brigadier general of United States volunteers, in anticipation of the act of Congress, since passed, for raising such volunteers . . ."²⁹¹ Although this letter was obviously helpful to Lane's position, it was certainly not an elixir, at least not yet. The matter was then passed over to the next session, with further information requested from the president.²⁹²

Between the Senate's two sessions in 1861, Lane returned to Kansas and kept up his military or quasi-military activities.²⁹³ On December 2, the Thirty-seventh Congress's second session began.²⁹⁴ Shortly thereafter, the Senate resumed its consideration of the contest, sending it back to committee to take into account additional information that the Senate had received.²⁹⁵ But Lane fared no better the second time around, the committee again reporting against him on January 6, 1862.²⁹⁶ Although it was able to produce further evidence that he had acted in a manner consistent with acceptance of a military appointment,²⁹⁷ perhaps the most telling argument

Cong., 2d Sess. 223 (Jan. 8, 1862).

288 See S. REP. NO. 37-1, at 4 (1861).

289 See CONG. GLOBE, 37th Cong., 1st Sess. 440-41 (Aug. 5, 1861).

290 See *id.* at 450 (Aug. 6, 1861).

291 *Id.*

292 See *id.* at 452.

293 See BUTLER & WOLFF, *supra* note 226, at 93 ("From September to November 1861, Lane skirmished around the Kansas countryside with an army that became infamous for its depredations."). In later debates on the contest, Lane conceded that he led forces during this period, but took the position that Kansas had been under threat and that his leadership had been informal. See CONG. GLOBE, 37th Cong., 2d Sess. 341 (Jan. 15, 1862) ("I put the case to any Senator upon this floor. Kansas was about being invaded by the army of Price, over ten thousand strong."); *id.* ("Look at the orders and proclamations issued from that army. How are they signed? 'J.H. Lane, commanding Kansas brigade.'"); see also BAILES, *supra* note 269, at 156 ("Lane's Brigade was the only protection Kansas had against a possible attack from Missouri, and to the misfortune of everyone it turned out to be little more than a band of thieves . . .").

294 See CONG. GLOBE, 37th Cong., 2d Sess. 1 (Dec. 2, 1861).

295 See *id.* at 130 (Dec. 18, 1861).

296 See *id.* at 185 (Jan. 6, 1862); see also BUTLER & WOLFF, *supra* note 226, at 93.

297 Apparently Lane had put in a request for uniforms for his troops. See CONG. GLOBE,

against him was one that proceeded from the spirit of the constitutional provision forbidding dual office. “To ascertain, then, what the construction of this clause in the Constitution should be,” asked Senator Lafayette S. Foster of Connecticut, “we should ask, of course, what mischief the makers of the Constitution had in view when they [adopted the clause] . . . Manifestly this—this and nothing more—executive influence,” he answered.²⁹⁸ According to this view, the evil lay in the president’s *de facto* influence on a member of the Senate, without regard to the regularity of Lane’s appointment.

Ten days later, however, the Senate resolved the contest in Lane’s favor, deciding for unclear reasons to uphold his tenure.²⁹⁹ It may have acceded to arguments that Lane had not actually joined the military—for example that the president had lacked authority to appoint Lane when he purported to do so,³⁰⁰ or that Lane had never accepted the appointment.³⁰¹ Or it may have determined that Lane had accepted but resigned the position before serving in the Senate.³⁰² The Senate’s historians, however, argue that the body held for Lane in a spirit of patriotism.³⁰³ Although they conclude that his activities “clearly violated” the Constitution,³⁰⁴ they go on to suggest

37th Cong., 2d Sess. 224 (Jan. 8, 1862); see also *id.* at 296 (Jan. 13, 1862) (Sen. Davis) (“That [Lane] did attempt to do various acts which nobody but a brigadier general could have done; and that he performed those acts under this appointment by the President of the United States to this identical brigadier generalship, I think admits of no reasonable doubt.”).

298 *Id.* at 226 (Jan. 8, 1862); see also *id.* at 296 (Jan. 13, 1862) (Sen. Davis). The contestant himself, who had been permitted to speak, made an interesting point in this regard:

Why, sir, here is a member of the Senate of the United States with an appointment in the Army held over his head for six months for his acceptance, and he voting upon his own pay, voting upon every measure connected with the organization of the Army into which he may at any time step and occupy a high and honorable command.

Id. at 339 (Jan. 15, 1862) (Frederick P. Stanton). In making this point, Stanton appears to have assumed, at least *arguendo*, that Lane had not accepted his appointment.

299 See *id.* at 363 (Jan. 16, 1862).

300 See, e.g., *id.* at 129 (Dec. 18, 1861) (Sen. Bright) (“[W]hen [Senator Lane] was appointed a brigadier general there was in reality no such office for him to accept.”). At least one Senator also suggested that a President may not appoint a brigadier general absent senatorial confirmation. See *id.* at 292 (Jan. 13, 1862) (Sen. Clark). See generally BUTLER & WOLFF, *supra* note 226, at 93–94.

301 See, e.g., CONG. GLOBE, 37th Cong., 2d Sess. 292 (Jan. 13, 1862) (Sen. Clark) (“I now come to the acceptance of [the] appointment, and I say that the Senator from Kansas, in no well-considered sense, in no sense which ought to bind him, accepted that office.”). See generally BUTLER & WOLFF, *supra* note 226, at 94.

302 See CONG. GLOBE, 37th Cong., 2d Sess. 291 (Jan. 13, 1862) (Sen. Clark).

303 See BUTLER & WOLFF, *supra* note 226, at xxi.

304 *Id.* at 94. On January 18, 1862, during the debates on *Stanton v. Lane*, Senator Foster noted a similar matter adjudicated by the House of Representatives against the individual in question on January 17, 1803. This matter, *In re Van Ness*, involved a member from New York

that the senators may have felt uncomfortable excluding Lane after another of their members, Edward D. Baker of Oregon, had died at the Battle of Ball's Bluff.³⁰⁵ Even more broadly, they may have felt uncomfortable excluding military officers from Congress in the middle of a difficult war. Not long before, for example, the House had taken no action when Clement L. Vallandigham of Ohio had offered a resolution finding certain members of the body ineligible because of simultaneous service in the military.³⁰⁶

There is certainly some evidence to support these interpretations. For example, although Senator Daniel Clark of New Hampshire, one of Lane's supporters, conceded that Lane had "attempted to call around him the choice spirits of Kansas," and that Lane's "heart was in the war," he went on to chide his colleagues for seeking to "hang him up on the tenter hooks of condemnation, a spectacle to the nation!"³⁰⁷ Similarly, Senator James R. Doolittle of Wisconsin, another of Lane's supporters, noted that "I do regret most sincerely that the honorable member from Kansas had not been in the field from the very beginning of the war in Missouri."³⁰⁸

Without doubt, Senator Baker's death had exerted a powerful effect on Washington, for he had been much admired, by both his fellow senators and by President Lincoln.³⁰⁹ Baker, about as much as Lane, had carried on

who, while serving in Congress, accepted appointment as a "major of militia" in the District of Columbia. See CONG. GLOBE, 37th Cong., 2d Sess. 222 (Jan. 8, 1862) (Foster's reference to *In re Van Ness*); see also 12 ANNALS OF CONG. 292 (1802) (*In re Van Ness* begins); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, at 71-75 (2001) (discussing *In re Van Ness*). For a similar matter, see H.R. Rep. No. 38-110 (1864) (*In re Blair*) (Blair excluded for holding military office after the House went into session.).

305 See BUTLER & WOLFF, *supra* note 226, at 94. Oliver Wendell Holmes, Jr., later a member of the Supreme Court of the United States, was also wounded at this battle. See CATHERINE DRINKER BOWEN, YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY 155 (1944) ("Holmes had not fired twice when a spent ball hit him in the stomach. When he got his wind he struggled up Over by the grove they were fighting hand-to-hand now. Going down on one knee, Holmes aimed The blow came again, in the chest this time.")

306 See CONG. GLOBE, 37th Cong., 1st Sess. 44 (July 4, 1861) (Rep. Vallandigham); see also HARRY C. BLAIR & REBECCA TARSHIS, LINCOLN'S CONSTANT ALLY: THE LIFE OF EDWARD D. BAKER 132 (1960).

307 CONG. GLOBE, 37th Cong., 2d Sess. 292 (Jan. 13, 1862). Clark also noted with irony that many of his colleagues had helped with enlistment. "If you are going to turn from the Senate all those gentlemen who have been raising troops," he asked, "what becomes of my friend the Senator from New York . . . who, I believe, has raised three regiments? If Lane loses a seat for two, he ought to lose a seat and a half." *Id.* at 293. Clark was referring to Senator Ira Harris, who also supported Lane.

308 *Id.* at 344 (Jan. 15, 1862).

309 See DONALD, *supra* note 272, at 318-19 ("On October 21, [General George] McClellan's critics were infuriated when, after long inaction, an element of his army ventured across the Potomac at Ball's Bluff (or Leesburg), ran into fierce Confederate opposition, and was thrown back with heavy losses. Colonel Edward D. Baker, Lincoln's longtime friend and a senator from Oregon, was killed. The Lincolns were devastated by the news and received no White House visitors the next day. In Congress grief over the fallen senator exploded into wrath

as both a military officer and a member of the Senate.³¹⁰ Indeed, the historian Elijah Kennedy even suggested that Baker spoke in the Senate wearing full uniform. According to Kennedy, when Republicans in the Senate were seeking someone to respond to an anticipated speech from Senator John C. Breckinridge of Kentucky, they chose Baker, who at that moment was “drilling with his regiment”:

[Baker] was told he was wanted in the Senate. He sprang into his saddle and rode to the Capitol. He was met on his arrival at the Senate Chamber by some of his colleagues, who explained the situation. There was no time to change his apparel, so he sat down at his desk. And that is how Colonel Baker chanced to speak in his colonel’s uniform in the Senate³¹¹

And, like Lane, Baker took pains to deny dual service. Specifically, he argued that, by rejecting a brigadier-generalship from the president, yet accepting a colonelcy from a governor (in his case the governor of Pennsylvania), he was staying within the letter of the Constitution.³¹² Unlike Lane, however, Baker was never the subject of a contest.

at McClellan for having allowed such an ill-planned, poorly supported expedition.”); *see also* BLAIR & TARSHIS, *supra* note 305, at 137 (“Lincoln was grateful for Baker’s continued service to the country and to him in particular. Furthermore, he had high regard for Baker’s judgment, and sought his counsel more than he did that of some of his cabinet officers.”); DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 380–81 (2005) (discussing the impact of Baker’s death on Lincoln and his family).

³¹⁰ *See* CONG. GLOBE, 37th Cong., 2d Sess. 294 (Jan. 13, 1862) (Sen. Sumner) (noting the similarity between Lane’s and Baker’s situations).

³¹¹ ELIJAH R. KENNEDY, *THE CONTEST FOR CALIFORNIA IN 1861: HOW COLONEL E.D. BAKER SAVED THE PACIFIC STATES TO THE UNION* 238–39 (1912). According to Kennedy, “[t]he circumstances relating to Senator Baker’s reply to Senator Breckenridge were narrated to [him] by a senator who was one of those who sent for the Colonel. *Id.* at 239 n.1. Blair and Tarshis, however, note “conflicting reports about the time of Baker’s presence in the Senate chambers that day,” *see* BLAIR & TARSHIS, *supra* note 305, at 135, suggesting that he might have been there all along, and therefore not in uniform. If Kennedy is correct, it appears that Baker made something of a habit of addressing Congress in military uniform:

After a few months [near the Rio Grande during the Mexican War, Baker] was chosen by General Taylor as bearer of dispatches to the War Department, and proceeded to Washington. Congress was in session, and as he had not resigned his seat in the House he availed himself of his privilege, as a member, to speak Having brought no civilian clothes with him he spoke in his military uniform

KENNEDY, *supra*, at 101–02.

³¹² *See* BLAIR & TARSHIS, *supra* note 305, at 137 (quoting letter from Baker to Lincoln of August 31, 1861, declining the office of brigadier general) (“The opinion manifested by the Senate of the United States as to the incompatibility of the office of a senator of the United States with the office of General compels me to decline the commission.”); KENNEDY, *supra* note 311, at 287 n.1 (“It was considered practicable to accept a commission as colonel from the governor of a state . . . and still retain the senatorship; but it was held that the acceptance of an

Like *In re Gallatin*, *Stanton v. Lane* was argued in a lawyerly way, with resort to constitutional text and theory, as well as legislative and judicial precedent, even while politics provided the mortar between the stones. And, as with *In re Gallatin*, the contest arose from an infirmity in Lane's qualifications that, if it existed at all, existed at the time he presented himself for membership. Unlike *In re Gallatin*, however, the Senate entertained the possibility not only of excluding Lane, but also of admitting the contestant, Frederick P. Stanton.³¹³ Although it did not reach the second question, resolving the first in Lane's favor, no senator expressed doubt that the body could have admitted Stanton in Lane's stead—which was obviously the hope of Lane's opponent in Kansas, Governor Robinson.

3. *In re Ames (Senate, United States, 1870)*.—One of the Senate's many exercises of the privilege during Reconstruction pertained to Adelbert Ames, whom the legislature of Mississippi sent to the Senate in 1870. A Brevet major general in the Army of the United States at the time of his election,³¹⁴ Ames had led a distinguished military career. He was born in Maine and joined the army in 1856,³¹⁵ graduating from West Point in 1861³¹⁶ and receiving the congressional Medal of Honor for his service at Bull Run and promotion on the field of battle at Gettysburg.³¹⁷ After the war, and after Congress returned the Confederate states to military jurisdiction, he became provisional governor of Mississippi.³¹⁸ In 1869, President Ulysses Grant made him commander of the Fourth Military District, which included that state.³¹⁹ Ames thus found himself in the middle of some of the most divisive events of Reconstruction.³²⁰

appointment from the President of the United States would invalidate Colonel Baker's place in the Senate."); *id.* at 287 (quoting letter from Baker to General McClellan of September 22, 1861) ("[T]he President was pleased to appoint me a brigadier-general, an office which my duty to the State of Oregon . . . compelled me to decline. Yesterday I had conferred upon me the appointment of major-general. Actuated by the same motive, I shall decline that also.");

313 See *supra* note 286 and accompanying text.

314 See CONG. GLOBE, 41st Cong., 2d Sess. 2125 (Mar. 22, 1861).

315 See WILLIAM S. McFEELY, GRANT: A BIOGRAPHY 360 (1981).

316 See *id.*

317 See *id.* According to one historian, although Ames was "shot in the thigh" at Bull Run, he would not leave the field and continued "giving fire commands until he collapsed from loss of blood." RICHARD N. CURRENT, THREE CARPETBAG GOVERNORS 67-68 (1967).

318 See S. REP. NO. 41-75, at 1 (1870); see also BUTLER & WOLFF, *supra* note 226, at 150; CURRENT, *supra* note 317, at 71 (describing the circumstances of Ames' appointment); WILLIAM C. HARRIS, THE DAY OF THE CARPETBAGGER: REPUBLICAN RECONSTRUCTION IN MISSISSIPPI 180-81 (1979) (noting that a "squad of men in blue" was required to evict Ames' predecessor in office).

319 See S. REP. NO. 41-75, at 1 (1870); CURRENT, *supra* note 317, at 71-72.

320 See, e.g., HARRIS, *supra* note 318, at 53 (noting that, following Congress's instructions, "Ames . . . dismissed more than two thousand local and state officers who could not take the ironclad oath, replacing them with so-called 'loyal men'"). People taking this oath attested

An intricate series of events pertaining to both Mississippi and Ames then unfolded. On November 30 and December 1, 1869, the voters of the state adopted a new constitution and elected a new legislature.³²¹ One of this legislature's first duties was to elect people to represent the state in the Senate. On January 18, 1870, while he was still serving as military governor, the legislature chose Ames for one of these seats.³²² Indeed, as governor, he signed his own credentials.³²³ Although his election was not literally irregular, some members of the legislature did find fault with the atmosphere in which he was chosen. As the historian William C. Harris notes, Ames "appeared hat in hand (some said sword in hand) to claim the senatorship as a reward for his service."³²⁴ "Although grateful to Ames for his contributions to the party's success," adds Harris, "many Republicans objected to his candidacy while he was still the military commander of the state"³²⁵

Some time thereafter, Ames resigned from the army to take his seat. On February 25, two days after Mississippi had regained its right to representation in Congress,³²⁶ Senator Thomas J. Robertson of South Carolina presented his credentials to the chamber.³²⁷ The Senate immediately referred them to the Committee on the Judiciary without first admitting Ames to membership.³²⁸ The sticking point in Ames's case was whether he had been an "inhabitant" of the state at the time of his election, as the Constitution requires.³²⁹ Although literally present at the time, the question remained whether Ames had chosen to make Mississippi his state of residence.

that "they had never given any aid or comfort to the Confederacy. *Id.* at 7. Ames' active participation in local politics no doubt ruffled feathers. *See id.* at 235 (noting that Ames justified his political activity on the grounds that "it was absolutely necessary for him to enter the political arena on the Republican side in order to prevent the 'rebels' from regaining power").

321 *See* HARRIS, *supra* note 318, at 256–57. According to Harris, Ames extended the election to two days. *See id.* at 256 n.83.

322 *See* CONG. GLOBE, 41st Cong., 2d Sess. 2125 (Mar. 22, 1870) (receiving credentials of Adelbert Ames).

323 *See id.*

324 HARRIS, *supra* note 318, at 265.

325 *Id.* That legislature also elected Hiram Rhoades Revels to serve in the Senate, the first African American to do so. *See id.* at 266.

326 *See* HARRIS, *supra* note 318, at 268.

327 *See* CONG. GLOBE, 41st Cong., 2d Sess. 1557 (Feb. 25, 1870).

328 *See id.*

329 The federal Constitution provides that "No Person shall be a Senator . . . who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." U.S. CONST. art. I, § 3, cl. 3.

On March 18, the committee reported against him.³³⁰ Although most, if not all, members of the Senate were willing to acknowledge that a soldier could become an inhabitant of a state by deciding to remain there, at least some argued that the soldier must somehow make that decision manifest through an overt act.³³¹ Ames had not really done so. In addition, he provided what appeared to be contradictory statements to the committee as to his decision to stay in Mississippi, indicating at least to some that this decision was not complete. On the one hand, he suggested that he had decided to stay in the state and buy property there before the election:

Upon the success of the Republican ticket in Mississippi I was repeatedly approached to become a candidate for the United States Senate. For a long time I declined I hesitated because it would necessitate the abandonment of my whole military life. Finally, for personal and public reasons, I decided to become a candidate and leave the Army. My intentions were publicly declared and sincere. (The intentions thus declared were not only to become a candidate for the Senate, but to remain and reside in Mississippi.) I even made arrangements, almost final and permanent, with a person to manage property I intended to buy.³³²

On the other hand, he made a statement to the committee that indicated a lack of commitment to remain in the state should he have lost the election. According to Senator Roscoe Conkling of New York, who spoke for the committee, when asked "whether he could say that it was his intention to remain in Mississippi if not elected to the Senate," Ames replied "that he could not so say."³³³ Another member of the committee recorded his answer to this question as: "Doubtful if I should have become a citizen if I had not been elected: but I felt certain of being elected."³³⁴ This statement

330 *See* S. REP. NO. 41-75, at 2 (1870); CONG. GLOBE, 41st Cong., 2d Sess. 2052 (Mar. 18, 1870).

331 *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 2129 (Mar. 22, 1870) (Sen. Conkling) ("[A] man in the military service does not establish a residence by obeying an order which takes him from one place to another and by remaining under orders in that place. In order in such circumstances to establish a residence two things must occur: first, he must do some act or acts independent of the mere fact that he remains in the place to which he has been ordered; and second, he must do those act with the . . . intention absolute on his part to become and remain a resident . . ."); *see also id.* at 2135 (Sen. Thurman). At least some Senators took the position that overt acts were not required. *See id.* at 2130 (Sen. Rice) ("He was not obliged to buy a house unless he wanted one, nor a horse, nor a cow.").

332 *Id.* at 2125. According to Senator Charles Buckalew of Pennsylvania, the parenthetical language in this statement was actually the committee's interpolation. *See id.* at 2128. Also with respect to this statement, Senator Roscoe Conkling of New York argued that the "property" to which Ames referred could not have been a dwelling, given that it required a manager. *See id.* at 2127.

333 *See id.* at 2128.

334 *Id.* (noting the transcription of Sen. Edmunds of Vermont).

destroyed Ames' position, at least in Conkling's mind. "[A]lthough General Ames might have put an end to his former residence and established a new one," he argued, "he had not done it, first, because the fact was absent [*i.e.*, he took no overt steps], and second, because the intention as far as it existed was merely contingent, and therefore incomplete."³³⁵

Responding to Conkling, Senator Benjamin F. Rice of Arkansas argued that, even assuming Ames's intention to remain was briefly in doubt, that intention became complete the moment he was elected, thus satisfying the Constitution.³³⁶ Others, proceeding along essentially the same lines as Rice, took the position that Ames's expectation of success was so strong that his intentions were clear.³³⁷

Ames certainly did not help himself with his answers, although perhaps he deserves credit for candor.³³⁸ But *In re Ames* was also subject to political considerations, which indeed cut both ways. Because Ames had exercised military authority in Mississippi, numerous senators suspected that his election had not been entirely voluntary, although they could point to no technical defect.³³⁹ Indeed, Senator Conkling made oblique reference to

335 *Id.* at 2129; *see also id.* at 2135 (Sen. Thurman) ("[T]here is nothing in this case to make General Ames an inhabitant of Mississippi at the time he was elected, but his doubtful declared intention, his conditional, contingent, lame, and impotent intention to become a citizen there in case he should be elected a member of the United States Senate."). Although Conkling argued against Ames on the question of eligibility, he otherwise spoke highly of him, noting his bravery in war, and indicating as well that the legislature could ensure Ames' admission in the Senate by electing him anew, now that his choice of Mississippi as his state of inhabitation was beyond refute. *See id.* at 2125.

336 *See id.* at 2130 (Sen. Rice) ("But allowing that he had a doubt, coming down to close questions of reasoning, if it did depend on whether he was elected Senator or not, the very moment that he was elected that very moment the doubt was resolved, and they were concurrent acts . . .").

337 *See, e.g., id.* at 2311 (Mar. 31, 1870) (Sen. Sawyer). Several Senators also took the oblique (or not-so-oblique) position that Ames had to be an "inhabitant" of Mississippi because otherwise he lacked a state to call home. *See, e.g., id.* at 2340 (Apr. 1, 1870) (Sen. Sherman) (noting that Ames "had no residence elsewhere, and no property or family to indicate a residence elsewhere.").

338 *See HARRIS, supra* note 318, at 269 (citing CONG. GLOBE, 41st Cong., 2d Sess. 2125–26, 2130, 2334–38 (Mar. 22, 1870)) ("Asked by the judiciary committee to explain his intentions in Mississippi, Ames botched his answer to such an extent that the Republican majority had no choice but to delay action on his case. Although he insisted to the committee that he was in the process of purchasing property in the state, he admitted, in all candor, that he probably would not have done so had the legislature rejected his candidacy for the Senate.").

339 *See id.* at 269 (noting that "Republican members, even of the Radical persuasion, were sharply divided on the wisdom of accepting [Ames] into their fellowship"). The strongest statement in this regard was made by Senator Garrett Davis, a Democrat from Kentucky. *See CONG. GLOBE*, 41st Cong., 2d Sess. 2169 (Mar. 23, 1870) ("What, then, is the case presented to us? General Ames is sent here by a Legislature elected or chosen by his own absolute will . . .").

this concern,³⁴⁰ as did Senator Allen G. Thurman of Ohio.³⁴¹ On the other hand, Ames had been a hero in the war, and had known no home other than his billet since before West Point. In addition, requiring the legislature in Mississippi to elect him again might have struck some members as unnecessarily exalting form over substance.³⁴² In fact, that legislature remained adamant in its choice of Ames, passing a resolution on March 24 urging the Senate to admit him as a member.³⁴³ On April 1, the Senate voted 40-12 that Ames was eligible to serve, and he took the oath.³⁴⁴

Like the earlier proceedings we have discussed, *In re Ames* was argued almost entirely in legalistic terms, with elaborate reliance upon constitutional text, dictionaries, judicial precedent, and other legislative contests. Despite this focus, however, the senators were clearly aware of political considerations as they proceeded, and one cannot know the exact reasons for their votes. Perhaps the majority concluded, in a straightforward way, that Ames in fact had determined to make Mississippi his home before his election, and that the law of the Senate required nothing more. On the other hand, perhaps some Republicans in the Senate were embarrassed to admit as a colleague someone who had wielded military authority in Mississippi at the very moment that the legislature of that state had chosen him to serve. Others, by contrast, might have resented the entire proceeding as a purely theoretical exercise, given the state's apparent continuing desire to send Ames to Washington.

In re Ames also resembles the earlier proceedings we have discussed with regard to sequence. As with Gallatin and Lane, the alleged infirmity in Ames's qualifications—his failure to be an "inhabitant" of Mississippi at the time of election—accompanied him to the Senate instead of arising afterward. But *In re Ames* differs from *In re Gallatin* and *Stanton v. Lane* in one important respect. Whereas the Senate admitted Gallatin and Lane and then proceeded to adjudicate challenges to their qualifications, the Senate did not admit Ames until after it had determined that he was qualified to

340 See CONG. GLOBE, 41st Cong., 2d Sess. 2126 (Mar. 22, 1870) ("[Ames] held relationships and wielded powers among the people and the representatives by whom his election was conferred I say that in popular estimation this circumstance gives hue to the question.").

341 See *id.* at 2315 (Mar. 31, 1870) (describing as "a spectacle unworthy of a free government, to see [a] military commander, with his epaulets still on his shoulder, his sword still by his side, elevated to the great office of Senator of the United States by men elected through his agency and under his will . . .").

342 See, e.g., *id.* at 2158 (Mar. 23, 1870) (Sen. Williams) ("Of course there is no question involved except the mere question of law and fact; because it is admitted on all hands that if he is not now received, he will be reelected."). At least one Senator opined that the legislature could not immediately elect Ames, however. See *id.* at 2310 (Mar. 31, 1870) (Sen. Pomeroy).

343 See *id.* at 2313-14 (joint resolution from the legislature of Mississippi); see also HARRIS, *supra* note 318, at 270.

344 See CONG. GLOBE, 41st Cong., 2d Sess. 2349 (Apr. 1, 1870).

serve. Given the plenary nature of the Senate's authority, no one sequence is mandatory, but the sequence to which the Senate adhered in Ames' case is the exception and not the rule.³⁴⁵

4. *McChord v. Lewis (Constitutional Convention, Kentucky, 1890)*.—Even legislatures convened for extraordinary purposes have been known to assert and exercise the privilege. For example, the delegates to Kentucky's constitutional convention of 1890 had a contest of their own to resolve.³⁴⁶

345 The Senate's historians explain this practice as follows:

Generally, a senator with the proper credentials against whom a challenge has been filed would be seated "without prejudice." Under this arrangement, if a committee investigation later determined that for some reason the individual was not entitled to a seat, he could be "excluded" from the Senate by a simple majority vote, as opposed to having to be expelled, which required a two-thirds majority. On six occasions, the Senate excluded by majority vote as member who had originally been seated.

BUTLER & WOLFF, *supra* note 226, at xviii (footnote omitted). The historians go on to note that Albert Gallatin was one of the individuals excluded after admission by a simple majority vote. *See id.* at 217 n.13; *see also* 99 CONG. REC. 7 (1953) (Sen. Taft) (debates on the contest of *Hurley v. Chavez*) ("If a Senator takes the oath, I do not believe that that fact changes the basis of the vote, or the percentage of the vote required, which is determined by the character of the case, rather than by anything done at the time the oath is administered."); 68 CONG. REC. 989 (Dec. 22, 1927) (article by Senator George W. Norris of Nebraska) ("It is true that in other cases Senators elect who for one reason or another had their right to sit in the Senate contested, have, upon the presentation of the certificate of election, been sworn into the Senate and the question involved then submitted to a committee, and the final issue determined upon the report of this committee. But when thus determined it had reference to the beginning of the term and not to anything that had happened subsequent thereto, and the vote, when it finally came, was not a vote of expulsion but a vote as to the right that the Senator had at the beginning of his term to occupy his seat, and hence no question of a two-thirds vote was involved."); GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS §§ 268–71, at 180–81 (Chicago, Callaghan & Co., 3d ed. 1887) (describing the process of admitting individuals presenting prima facie evidence of election).

346 Kentucky's constitution of 1850 included an express articulation of the privilege for such delegates. *See* KY. CONST. art. XII, § 2 (1850) ("The convention, when assembled, shall judge of the election of its members, and decide contested elections, but the General Assembly shall, in calling a convention, provide for taking testimony in such cases, and for issuing a writ of election in case of a tie."). A similar provision can be found in Kentucky's current constitution. *See* KY. CONST. § 262 ("The Convention, when assembled, shall be the judge of the election and qualification of its members, and shall determine contested elections. But the General Assembly shall, in the act calling the Convention, provide for taking testimony in such cases, and for issuing a writ of election in case of a tie."). Although article XII, section 2, of the constitution of 1850 and section 262 of the constitution of 1890 differ in that only the latter refers explicitly to "qualifications," the delegates of 1890 took no apparent notice of the distinction. In fact, the only apparent remark in 1890 pertaining to what became section 262 went to whether the word "judge" should be singular or plural. *See* 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION 1634, 1719 (1890) [hereinafter OFFICIAL REPORT]. Indeed, legislatures have been known to assert the privilege in the complete

The issue was whether W.C. McChord or John W. Lewis was the rightful delegate from Washington County.³⁴⁷ On September 8, 1890, the secretary of state transmitted to the convention certificates of the various delegates' election, including one that suggested on its face that Lewis had a rightful claim to a seat.³⁴⁸ The delegates were aware, however, that McChord denied the regularity of Lewis's election, contending that the voters had chosen him and not Lewis to represent them at the convention.³⁴⁹ The issue then arose as to whether Lewis should be admitted on a provisional basis, pending resolution of the contest, or whether he should stand aside for the time being.³⁵⁰ After considerable debate, the temporary chairman, George Washington of Campbell County, determined that the certificates "ought to be accepted at present as *prima facie* evidence" of Lewis's election, and that "[t]he Convention can do hereafter as it pleases in the matter."³⁵¹ As noted above, legislatures do not invariably adhere to this practice, but it is more the rule than the exception.³⁵²

The convention then referred the contest to a special committee,³⁵³ which reported unanimously against Lewis some three weeks later, on October 4.³⁵⁴ In the committee's estimation, the only real issue in the case was whether the general assembly had moved the boundaries of Washington County in such a way as to re-assign certain voters to Anderson and Mercer Counties.³⁵⁵ Because many of the affected individuals had cast their ballots

absence of textual authority. Virginia's House of Burgesses exercised the privilege under such circumstances in 1780, see *supra* note 195, and Kentucky's constitutional convention of 1849 exercised the privilege with respect to at least two matters, notwithstanding an absence of textual authority in the constitution of 1799. See REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY 36 (1849) (*In re Coffey* referred to in committee); *id.* at 1071 (committee discharged from further consideration of *In re Coffey*); *id.* at 56 (*Lecompte v. Nuttall* referred to in committee); *id.* at 191 (*Lecompte v. Nuttall* resolved in Nuttall's favor).

347 See I OFFICIAL REPORT, *supra* note 346, at 378.

348 See *id.* at 8 ("Washington—J.W. Lewis").

349 See *id.* at 6 (Mr. L.T. Moore) (noting the impending contest); *id.* at 10 (Mr. Straus) ("I move that the oath be administered to all Delegates except where there is a contest.").

350 Compare *id.* at 10 (Mr. Straus), with *id.* at 11 (Mr. Burnam) ("Whatever may be the result hereafter of any contest, I suppose that the oath ought to be administered now to every man who has been . . . reported.").

351 *Id.* at 19.

352 See *supra* note 345 and accompanying text. The organization of a constitutional convention is complicated by the fact that it lacks a predecessor. See generally McCRARY, *supra* note 345, § 587, at 385 (discussing a legislature's first organization) ("Of course the first organization must be temporary, and if the law does not designate the person who shall preside over such temporary organization, the persons assembled and claiming to be members may select one of their number for that purpose.").

353 See I OFFICIAL REPORT, *supra* note 346, at 47-48.

354 See *id.* at 378-80.

355 See *id.*

for Lewis, if the re-assignment were valid, McChord had won the election.³⁵⁶ If not, Lewis had won.³⁵⁷

Lewis's argument was two-fold. First, he argued that the statute purporting to move the boundaries was unconstitutional.³⁵⁸ Second, he argued that it had been repealed by subsequent legislation.³⁵⁹ But the committee rejected both of these claims, concluding that the earlier act was valid and that the alleged repealing acts were not.³⁶⁰ In Lewis's mind, however, neither the committee nor the convention as a whole had power to declare a statute unconstitutional, such authority lying only in a "court of competent jurisdiction."³⁶¹ The committee did not concur in this argument, however, noting the plenary nature of the privilege of a legislative body to determine the eligibility of its members:

This Convention, as a deliberative body, by all sound parliamentary law, has a right to decide upon the election and qualification of its members. The Committee of the Convention act judicially. They are a quas[i]-court. They were sworn in the presence of the Convention to decide this case according to the law and facts; that is, according to their truest conceptions of what the law and facts require; and the Committee, in this view, are sustained by authorities so many and positive as to admit no argument to the contrary. The parliamentary history of England and America afford numberless decisions to this end, all concurring.³⁶²

The convention then adopted the committee's resolution, excluding Lewis and admitting McChord.³⁶³ The latter took the oath that same day.³⁶⁴

McChord v. Lewis illustrates the sweep of the privilege we have been discussing. In addition to authorizing legislatures to find facts,³⁶⁵ it also contemplates that they will engage in "judicial" review for the purpose of resolving contests. In addition, it empowers legislatures both to exclude a previously admitted member and to admit a contestant in that person's place. Of course, this substitution was exactly what Stanton had sought

³⁵⁶ *See id.* at 379

³⁵⁷ *See id.*

³⁵⁸ *See id.*

³⁵⁹ *See id.*

³⁶⁰ *See id.* at 379–80.

³⁶¹ *Id.* at 379.

³⁶² *Id.* at 379–80.

³⁶³ *See id.* at 380.

³⁶⁴ *See id.* at 381 (McChord takes the oath.).

³⁶⁵ In *Stanton v. Lane*, for example, the Senate of the United States considered the question of whether Lane had in fact accepted appointment to an incompatible military position. See *supra* notes 269–313 for a discussion of this contest.

against Lane, but the Senate of the United States in that instance had confirmed Lane's entitlement to the seat.³⁶⁶

5. *In re Vare and Wilson v. Vare (Senate, United States, 1926-1929)*.—The twentieth century saw ratification of the Seventeenth Amendment, which brought to an end the election of senators by state legislatures. Although these elections were subject to manipulation and claims of improper influence,³⁶⁷ popular elections were not themselves a guarantee of good conduct. Particularly exasperating for the amendment's proponents was Pennsylvania's Republican primary of May 18, 1926, in which William S. Vare defeated incumbent Senator George Wharton Pepper and Gifford Pinchot.³⁶⁸

This election saw expenditures by political machines that many considered outrageous,³⁶⁹ with Prohibition perhaps being the biggest point of contention.³⁷⁰ The day after the election, the Senate appointed a special committee to investigate these expenditures and related allegations of corrupt practices.³⁷¹ Although Congress had little, if any, authority at the time to regulate primaries directly,³⁷² the houses could nevertheless examine

³⁶⁶ See *supra* notes 281-313 and accompanying text.

³⁶⁷ See 67 CONG. REC. 9679 (May 19, 1926) (Sen. Reed of Missouri) ("One of the great arguments advanced in support of the [Seventeenth Amendment] was that men of great wealth were gaining seats in the Senate by corrupt methods practiced upon the general assemblies of the States It was . . . hoped to render corruption impossible, for it was believed the masses were incorruptible."); BUTLER & WOLFF, *supra* note 226, at xiv ("One frequent stalling tactic was for the upper chamber of a legislature to block a U.S. Senate election by refusing to send a quorum of its members to a joint assembly of the two houses.").

³⁶⁸ Perhaps the purplest prose came from Senator M.M. Neely of West Virginia. See 67 CONG. REC. 12,473 (July 1, 1926) ("[T]here is nothing else to be found in all the voluminous record of the political weakness and wickedness of mankind to equal the admitted debauchery, the revealed infamy, and the proved iniquity of the Republican primary election in the State of Pennsylvania on the 18th day of May, 1926.").

³⁶⁹ See, e.g., *id.* at 9673 (May 19, 1926) (Sen. Harrison) ("Reputable correspondents of reputable newspapers have been visiting Pennsylvania and have been writing stories as to the great outlay of money being poured out for each of the candidates for the Republican nomination in Pennsylvania."); BUTLER & WOLFF, *supra* note 226, at 324 (describing expenditures in the primary). At least one Senator was willing to defend the role of money in campaigns, however. "We have 4,000,000 persons of voting age in Pennsylvania," noted Senator David A. Reed of Pennsylvania on Vare's behalf. "You can not send a printed letter to them for less than 6 cents per letter. There in one item is \$240,000." 67 CONG. REC. 12,475 (July 1, 1926). Although Reed took Vare's side in the Senate, he had opposed him in the election. See *id.* at 81 (Dec. 4, 1929) (Sen. Reed) ("I fought him all over the State as vigorously as I knew how to do . . ."); Samuel J. Astorino, *The Contested Senate Election of William Scott Vare*, 28 PA. HIST. 187, 194 (1961) ("Republican Senator David A. Reed of Pennsylvania was able to swallow his personal contempt for Vare and to defend the expenditures in the Senate's debate on the ground that they were an unavoidable evil of the primary system of nomination.").

³⁷⁰ See RICHARD LOWITT, *GEORGE W. NORRIS: THE PERSISTENCE OF A PROGRESSIVE, 1913-1933*, at 386 (1971).

³⁷¹ See 67 CONG. REC. 9678 (May 19, 1926).

³⁷² See *Newberry v. United States*, 256 U.S. 232, 257 (1921); see also BUTLER & WOLFF,

such elections with an eye toward exercise of their authority to judge the elections and returns of incoming members.³⁷³ Despite the investigation, and despite the dogged efforts of Senator George W. Norris of Nebraska, who actually took the stump against his fellow Republican,³⁷⁴ Vare easily defeated Democrat William B. Wilson in the general election of November 2, 1926.³⁷⁵ A month later, the special committee presented an interim report that described the enormous expenditures in the primary but made no specific recommendations.³⁷⁶ This was not surprising, given the lack of regulatory authority.

On January 8, 1927, the Senate took notice of a petition from Wilson alleging gross irregularities in his loss to Vare.³⁷⁷ Indeed, he asserted that the Republican machine in Philadelphia, which Vare controlled,³⁷⁸ had made a “grotesque and fantastic travesty”³⁷⁹ of the election, complete with dead and imaginary voters, misuse of funds, and intimidation.³⁸⁰ Three days later, the Senate referred the petition to the special committee and authorized it to examine ballots and other records from the general election.³⁸¹ Procuring these records was more easily said than done, however, in part because the Senate adjourned in March 1927 without giving the committee much authority to proceed before the next session.³⁸² After much

supra note 226, at 324 (noting that the Supreme Court ruled in *Newberry* “that the Senate had not power to judge primary elections, and the amended Corrupt Practices Act specifically did not apply to primary elections”). For developments on this point after *Newberry*, see *Smith v. Allwright*, 321 U.S. 649 (1947); *United States v. Classic*, 313 U.S. 299 (1941).

373 See *Newberry*, 256 U.S. at 258 (“As ‘each house shall be the judge of the elections, qualifications and returns of its own members,’ and as Congress may by law regulate the times, places and manner of holding elections, the national government is not without power to protect itself against corruption, fraud or other malign influences.”); see also 67 CONG. REC. 9678 (May 19, 1926) (Sen. Reed of Missouri) (“For even though we can not enact a statute under which [a candidate in a primary] may be sent to jail, we do undoubtedly have the right to inquire into his right to a seat in the councils of the Nation.”).

374 See LOWITT, *supra* note 370, at 387–90.

375 See BUTLER & WOLFF, *supra* note 226, at 324.

376 See 68 CONG. REC. 914 (Dec. 22, 1926). See generally S. REP. NO. 69-1197 (1926).

377 See 68 CONG. REC. 1260 (Jan. 8, 1927) (petition of William B. Wilson) (“Notwithstanding the apparent majority given Mr. VARE your petitioner avers on information and belief that the said WILLIAM S. VARE was not legally elected United States Senator from Pennsylvania, but that on the contrary your petitioner was by an honest majority of the legally cast votes elected United States Senator at the said election held November 2, 1926.”).

378 See Astorino, *supra* note 369, at 187 (“William Scott Vare was the youngest of a trio of brothers who had intermittently ruled Philadelphia in the name of the Republican Party since the turn of the century.”).

379 68 CONG. REC. 1261 (Jan. 8, 1927) (petition of William B. Wilson).

380 See BUTLER & WOLFF, *supra* note 226, at 324–25.

381 See 68 CONG. REC. 1414 (Jan. 11, 1927).

382 See 70 *id.* at 4211 (Feb. 25, 1929) (Sen. Reed of Missouri) (decrying a filibuster by Senator Reed of Pennsylvania and other obstacles to the committee’s progress); 68 *id.* at 173–74 (Dec. 7, 1927) (same); see also BUTLER & WOLFF, *supra* note 226, at 325 (noting that Senator

procedural wrangling and litigation, including an unsuccessful trip to the Supreme Court of the United States,³⁸³ the committee finally obtained this material on February 20, 1928.³⁸⁴

Meanwhile, the matter was proceeding on other fronts. On January 8, 1927, the day the Senate took notice of Wilson's petition, outgoing Governor Gifford Pinchot of Pennsylvania, whom Vare had defeated in the primary,³⁸⁵ provided cryptic credentials, saying only that Vare "appears to have been chosen."³⁸⁶ Later, Pinchot's successor, John S. Fisher, gave Vare a conventional set of credentials.³⁸⁷ On March 3, just before Vare's term was to begin,³⁸⁸ Senator David A. Reed of Pennsylvania attempted to present both sets of papers to the Senate.³⁸⁹ After much debate, the Senate referred them to the Committee on Privileges and Elections.³⁹⁰ Ignoring the set of credentials from Pinchot, on March 4 that committee advised that the credentials from Fisher were in order.³⁹¹ On the same day, the Senate also received a new document from Wilson, this one entitled a "complaint," which it promptly referred to the Committee on Privileges and Elections.³⁹²

On December 5, as the Senate began its new session, the chief clerk called Vare forward to take the oath. His opponents quickly objected, however, offering a resolution that he be excluded and asking that he step aside for the time being. Noting no objections, the vice president asked Vare to step aside.³⁹³ On December 9, the Senate authorized the special committee to continue its investigation.³⁹⁴ By this time, this committee and the

Reed of Pennsylvania filibustered to block a resolution continuing the special committee into the Seventieth Congress, which left the committee powerless for nine months).

383 See *Reed v. County Comm'rs*, 277 U.S. 376, 388-89 (1928).

384 See 70 CONG. REC. 4211 (Feb. 25, 1929) (Sen. Reed of Missouri); see also BUTLER & WOLFF, *supra* note 226, at 325.

385 See LOWITT, *supra* note 370, at 386.

386 See 68 CONG. REC. 1338 (Jan. 10, 1927).

387 See *id.* at 5520 (Mar. 3, 1927).

388 See *id.* at 5518 (Sen. Shipstead) ("[I]t seems to me the only possible disposition the Senate can make of these credentials is to receive them . . . and file them for presentation to the United States Senate. Mr. VARE is not a Member of this Congress.").

389 See *id.* at 5513.

390 See *id.* at 5531.

391 See *id.* at 5914 (Mar. 4, 1927).

392 See *id.* at 5895. Wilson's hope of serving in the Senate depended on this complaint, not the earlier petition, which the Senate had referred to the special committee.

393 See 69 *id.* at 4 (Dec. 5, 1927). Eventually there were objections, on the ground that the Senate should admit Vare and then resolve the contest. See, e.g., *id.* at 298 (Dec. 9, 1927) (resolution of Sen. Reed of Pennsylvania). As noted above, standard legislative practice is to admit individuals who present the proper credentials for membership without prejudice pending resolution of a contest, but the Senate of the United States has not invariably adhered to this practice. See *supra* note 345 and accompanying text.

394 See 69 CONG. REC. 337-38 (Dec. 9, 1927).

Committee on Privileges and Elections were working somewhat in tandem.³⁹⁵

Over the next few months, the special committee amassed considerable evidence of corrupt practices by Vare's campaign in the general election.³⁹⁶ When the committee gave Vare a chance to respond to the evidence it had gathered against him, he was slow to provide much by way of a defense, his primary tactic appearing to be delay,³⁹⁷ although he did in fact suffer a stroke in the summer of 1928.³⁹⁸ On February 22, 1929, after waiting for what it considered to be a sufficient period of time, the committee submitted its report, concluding that Vare was not entitled to the seat.³⁹⁹ The Senate took no action, however, owing to Vare's poor health.⁴⁰⁰

On September 9, 1929, during a special session of Congress, Norris introduced a resolution to exclude Vare on the ground that his conduct had been "harmful to the dignity and honor of the Senate."⁴⁰¹ On December 4,⁴⁰² Vare (attended by his physician⁴⁰³) described the allegations of fraud against him as politically motivated. "I do not believe there is one man here to-day," he said, "who could conscientiously vote against me if he knew the facts, and realized how unfair and unjust my accusers have been in attempting to twist mere clerical irregularities and technicalities into acts of political fraud and conspiracy."⁴⁰⁴ He also defended his ex-

³⁹⁵ See *id.* at 782 (Dec. 17, 1927) (S. Res. 68); see also BUTLER & WOLFF, *supra* note 226, at 326.

³⁹⁶ See BUTLER & WOLFF, *supra* note 226, at 326; Astorino, *supra* note 369, at 192–93.

³⁹⁷ See 70 CONG. REC. 4212–13 (Feb. 25, 1929) (Sen. Reed of Missouri).

³⁹⁸ See BUTLER & WOLFF, *supra* note 226, at 327; Astorino, *supra* note 369, at 197.

³⁹⁹ See 70 CONG. REC. 4214 (Feb. 25, 1929) (Sen. Reed of Missouri) (precise statement of the recommendation); *id.* at 4007 (Feb. 22, 1929) (Sen. Reed of Missouri) (submission of report for printing); see also S. REP. NO. 70-1858 (1929).

⁴⁰⁰ See 70 CONG. REC. 4331–32 (Feb. 26, 1929); see also BUTLER & WOLFF, *supra* note 226, at 327.

⁴⁰¹ 71 CONG. REC. 3413 (Sept. 9, 1929). The basis for Norris's resolution evolved somewhat. At first, he justified it almost entirely in terms of the primary. See *id.* at 3505 (Sept. 10, 1929) (Sen. Norris) ("[The resolution] simply says that upon the expenditure of money shown and admitted to have been made in behalf of Mr. VARE in the primary and, perhaps, for some other incidental things, he is not entitled to a seat in the United States Senate."). He later expanded his remarks to include the general election. See 72 *id.* at 75 (Dec. 4, 1929) (Sen. Norris) ("Mr. President, the primary was bad—that is true. But if anyone will read the evidence in regard to the election which followed it in Philadelphia, and in Pittsburgh to some extent, it will make him blush . . ."). As debate proceeded, however, he offered to delete the portions of the preamble not pertaining to the primary. See *id.* at 93; see also *id.* at 132 (Dec. 5, 1929) ("They do not want a vote on this resolution, because [it] lays before the country the proposition that a man who spends an exorbitant sum of money for his nomination is disqualified, even though he be afterward elected at the general election.").

⁴⁰² The Senate had continued Norris's resolution to its regular session, which began in December 1929. See 71 *id.* at 3531 (Sept. 11, 1929).

⁴⁰³ See 72 *id.* at 75 (Dec. 4, 1929); Astorino, *supra* note 369, at 198–99.

⁴⁰⁴ *Id.* at 80 (Mr. Vare).

penditures as necessary to establish an organization across the state. "Am I to be condemned," he asked, "because without a newspaper, with the State organization and county organizations against me and my friends, we were compelled to spend one-third of what our principal opponents spent in bringing the issues of the campaign to the 4,000,000 voters of the State?"⁴⁰⁵

Not long after Vare's speech, the Committee on Privileges and Elections submitted its report, concluding that Vare had received enough legal votes in the general election to overcome any evidence of irregularity.⁴⁰⁶ This report put the senators in somewhat of a bind, although not an unexpected one. If Wilson had not defeated Vare, the Senate's only remaining choices were to admit Vare or exclude him for not being qualified. But he was obviously thirty years old, nine years a citizen of the United States, and an inhabitant of Pennsylvania. The matter thus implicated the vexing question of whether the houses of Congress could exclude a prospective member for not meeting an unstated qualification. Senator Norris, who led the charge against Vare, certainly took the position that they could,⁴⁰⁷ and indeed argued that his resolution was logically distinct from Wilson's contest. Much later, the Supreme Court of the United States held that the houses of Congress lack the authority that Norris was asserting,⁴⁰⁸ but as of 1929 this rationale remained available.

⁴⁰⁵ *Id.*

⁴⁰⁶ See S. REP. NO. 71-47, at 48 (1929); see also 72 CONG. REC. 140 (Dec. 5, 1929) (Sen. Waterman, presenting the committee's conclusions) ("It is fair, in my judgment, to say that Mr. VARE did actually receive a plurality of the legal votes cast in the election . . .").

⁴⁰⁷ See 69 CONG. REC. 122 (Dec. 6, 1927) ("It is argued . . . that the word 'qualifications' . . . refers only to the technical validity of the credentials of a Senator elect. If 'qualifications' does not mean qualifications except in a limited sense, and if that limited sense and meaning is to be defined by those who desire to have Mr. SMITH and Mr. VARE admitted, then the Senate is helpless. Unfortunately for those who thus argue, there is no legal or justifiable reason for putting this limitation on the word.") McCrary took the opposite position. See McCRARY, *supra* note 345, § 590, at 387 ("[The privilege] does not authorize an inquiry into the moral character of a person elected and returned as a member. Such an inquiry can only be made, if at all, in the prosecution of proceedings for expulsion.").

⁴⁰⁸ See *Powell v. McCormack*, 395 U.S. 486, 550 (1969) ("[I]n judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution."). *Powell* might not have helped Vare, however, because with *Powell* as precedent the Senate perhaps could have excluded him as not having been "elected." Although the Senate's resolution of the matter was not quite consistent with this theory, because surely the voters of Pennsylvania had elected either Wilson or Vare, the Senate has never felt entirely bound to such logical presuppositions in the exercise of the privilege. In the later contest of *Durkin v. Wyman*, for example, the issue was who had received more votes, and the voters of New Hampshire appeared to have chosen one or the other. Nevertheless, the Senate ultimately concluded that neither was eligible to serve and a special election ensued. See 121 CONG. REC. 25,954-55, 25,960 (July 30, 1975); BUTLER & WOLFE, *supra* note 226, at 424; DONN TIBBETTS, *THE CLOSEST U.S. SENATE RACE IN HISTORY: DURKIN V. WYMAN* 159 (1976).

Meanwhile, other senators advised that they would vote against Vare on the ground that his election had been irregular. “[A]lthough the contestee has a plurality of 19,000 votes plus,” argued Senator Sam G. Bratton of New Mexico, “he, or others, acting in his behalf, have engaged in practices which taint his title to a seat in this body.”⁴⁰⁹ “[T]herefore,” Bratton noted, “he must be rejected, not because he failed to get a plurality, but because his title is tainted with fraud.”⁴¹⁰ Bratton’s colleague from New Mexico, Bronson M. Cutting, similarly observed that he would “deny Mr. VARE a seat on the ground of fraud and corruption, and when I say ‘fraud and corruption,’ I am not particularly concerned with whether that fraud committed in a general election or in a primary election”⁴¹¹ Rejecting at least part of Norris’s analysis, Cutting added that he was “not going to vote for the resolution on the ground that the amount of money spent by Mr. VARE was ipso facto a ground for reversing the decision made at the polls”⁴¹² On December 6, the Senate voted fifty-eight to twenty-two to deny Vare a seat, after which it voted sixty-six to fifteen that Wilson had not been elected.⁴¹³

Without doubt, *In re Vare* and *Wilson v. Vare* implicated legal principles, such as the scope of the Senate’s privilege and the attributes of a “regular” election. But much of the energy in the debates arose from such volcanic political forces as “Progressivism,” “machines,” and the virtues of federalism. On the one hand, the Senate did have before it an abundance of evidence, albeit of uncertain quality, that Vare had won his election by improper means. On the other hand, one could readily conclude that the Senate’s actual basis for excluding Vare had not been corrupt practices per se, but distaste for how much money he and his supporters had spent in the primary, even if no one could connect this spending inexorably to Vare’s victory. Indeed, this was the rationale for Norris’s resolution excluding Vare, which the Senate expressly adopted.⁴¹⁴

⁴⁰⁹ 72 CONG. REC. 156 (Dec. 5, 1929).

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 190 (Dec. 6, 1929).

⁴¹² *Id.*

⁴¹³ *Id.* at 197 (Vare denied a seat); *id.* at 198 (Wilson not elected). The Governor of Pennsylvania promptly appointed Joseph R. Grundy to the vacancy. *See id.* at 525 (Dec. 12, 1929). Grundy was heavily implicated in the same matters that had perplexed the Senate with respect to Vare. *See id.* at 536 (Sen. Blease) (“What is the difference between buying a seat in the Senate and openly stating that you bought a governor and having that governor appoint you Senator?”). The Senate promptly referred Grundy’s credentials to the Committee on Privileges and Elections, but allowed him to take the oath. *See id.* at 539–40. The committee eventually reported in Grundy’s favor, and the Senate took no further action. *See S. REP. NO. 71-147*, at 2 (1930); 72 CONG. REC. 2762 (Jan. 31, 1930); *see also* BUTLER & WOLFF, *supra* note 226, at 340.

⁴¹⁴ *See* 72 CONG. REC. 197 (Dec. 6, 1929).

But the full implications of this rationale are somewhat staggering to behold. "Suppose," asked Senator S.D. Fess of Ohio, that every candidate in the primary had spent "an inordinate amount . . . so that it mattered not whether it was VARE or Pepper or Pinchot; all of them [had done so] Could we deny in toto the representation of Pennsylvania because we did not like the manner in which the election was held?"⁴¹⁵ Ironically, Vare's opponents in the primary had spent at least as much as he had, yet had lost.⁴¹⁶ "What was Mr. VARE up against in the State of Pennsylvania?"⁴¹⁷ asked Senator Thomas D. Schall of Minnesota. "He was up against the Grundy machine, backed by Mellon's millions," he said, answering his own question. Moreover, noted Schall, "while it is charged that the nomination went to 'the highest bidder,' the fact is that it did not go to the highest bidder. The Grundy machine in the primaries spent three times as much as VARE"⁴¹⁸

The sequence of events in *In re Vare* and *Wilson v. Vare* was similar to that of the other contests we have discussed, in the sense that the infirmity in Vare's claim to a seat, whatever it was, arose before he presented himself for membership and served as the basis for the Senate's refusal to admit him. In fact, the Senate's refusal to do so, even on a provisional basis, led to an interesting wrinkle in the contest. As noted above, the special committee encountered substantial difficulty in procuring testimony and records in support of its investigation.⁴¹⁹ Ultimately, this gave rise to extensive litigation, including two separate trips to the Supreme Court of the United States. One in particular, *Barry v. United States ex rel. Cunningham*, bears further mention.⁴²⁰ While the committee was gathering evidence, it called as

415 *Id.* at 88 (Dec. 4, 1929) (Sen. S.D. Fess of Ohio); *see also* 69 *id.* at 171 (Dec. 7, 1927) (Sen. Reed of Pennsylvania) ("Is it not a striking thing, Mr. President, that if this resolution [finding Vare not eligible to serve] passes in the form in which it is, a vacancy will be created in the Senatorship the appointment to fill which will belong to a governor elected on a ticket that spent three times as much as did Mr. VARE?").

416 *See* BUTLER & WOLFF, *supra* note 226, at 324.

417 72 CONG. REC. 194 (Dec. 6, 1929).

418 *Id.* at 194-95; *see also id.* at 195 (Sen. Schall) ("It seems to me that this kind of progressivism, this idealism that we western Senators have been priding ourselves upon, is being strained when we vote to disfranchise the people of a State."). In fact, the political scientist John T. Salter later argued that the Senate's distaste for Vare arose as much from socioeconomics as political morality. *See* Astorino, *supra* note 369, at 200 ("[The] Senate refused Vare admission, not for any illegal act, but for general reasons similar to those that closed the portals of the Union League to him—he was a ward politician without any social background; in addition to that, his campaign expenditures had been excessive." (quoting John T. Salter, *The End of Vare*, 50 POL. SCI. Q. 218 (June 1935))). Schall himself had been the subject of a contest in the Senate, and would later be the subject of a second. *See* BUTLER & WOLFF, *supra* note 226, at 316-17 (discussing *Johnson v. Schall*); *id.* at 349-50 (discussing *Hoidale v. Schall*).

419 *See supra* notes 381-84 and accompanying text.

420 *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929). The other was *Reed v.*

a witness Thomas W. Cunningham, a public official with a salary of \$8,000 per year.⁴²¹ Although Cunningham had contributed \$50,000 to Vare's campaign, he refused to answer several of the committee's questions in this regard, describing the subject as "personal" and outside the committee's jurisdiction.⁴²²

This recalcitrance led to a resolution to "take the body of Cunningham into custody, and . . . bring him before the bar of the Senate,"⁴²³ whereupon he sought habeas.⁴²⁴ The district court denied relief,⁴²⁵ but the court of appeals thought habeas was appropriate.⁴²⁶ Reversing, the Supreme Court

County Commissioners, 277 U.S. 376 (1928). See *supra* note 383 and accompanying text.

⁴²¹ See *Barry*, 279 U.S. at 609 ("He had been clerk of a court for 21 years and was then receiving a salary of \$8,000 a year.").

⁴²² 72 CONG. REC. 46–47 (Dec. 3, 1929) (excerpt from a report of the special committee):

The CHAIRMAN. Very well. To whom did you give any money?

Mr. CUNNINGHAM. I handed money to Thomas F. Watson [treasurer for Vare's campaign], \$25,000, on the 10th day of April, 1926.

* * *

[The CHAIRMAN.] Was any money given to you for use in that campaign?

[Mr. CUNNINGHAM.] Not one cent —

* * *

The CHAIRMAN. Where did you get that money?

Mr. CUNNINGHAM. I got that money out of my own private funds.

* * *

Mr. GOLDER [counsel to Cunningham]. I have advised Mr. Cunningham that, in my judgment, this committee has no jurisdiction —

* * *

[The CHAIRMAN.] What was my last question?

* * *

Mr. CUNNINGHAM. I refuse to answer that question, Senator, as a personal question. It is my own private business.

⁴²³ *Barry*, 279 U.S. at 610–11.

⁴²⁴ *Id.* at 611

⁴²⁵ See *id.* at 611–12 (citing *United States ex rel. Cunningham v. Barry*, 25 F.2d 733 (E.D. Pa. 1928), *rev'd*, 29 F.2d 817 (3d Cir. 1928), *rev'd*, 279 U.S. 597 (1929)).

⁴²⁶ See *id.* at 612 (citing *United States ex rel. Cunningham v. Barry*, 29 F.2d 817 (3d Cir. 1928), *rev'd*, 279 U.S. 597 (1929)).

began its analysis by noting that the Senate has power to take appropriate steps to judge the eligibility of its members, including the power to call witnesses before the chamber as a whole, without regard to limits it has set on a particular committee's jurisdiction.⁴²⁷ The Court then proceeded to Cunningham's broader argument that the Senate lacked jurisdiction over *In re Vare* because it had yet to admit Vare as a member.⁴²⁸ Rejecting this contention, the Court noted that the word "member" in this context embraces individuals who present themselves to the chamber for admission:

When a candidate is elected to either House, he of course is elected a member of the body; and when that body determines, upon presentation of his credentials, without first giving him his seat, that the election is void, there would seem to be no real substance in a claim that the election of a "member" has not been adjudged. To hold otherwise would be to interpret the word "member" with a strictness in no way required by the obvious purpose of the constitutional provision, or necessary to its effective enforcement in accordance with such purpose, which, so far as the present case is concerned, was to vest the Senate with authority to exclude persons asserting membership, who either had not been elected or, what amounts to the same thing, had been elected by resort to fraud, bribery, corruption, or other sinister methods having the effect of vitiating the election.⁴²⁹

6. *Hatfield v. Holt (Senate, United States, 1935)*.—The Great Depression effected a dramatic shift in American electoral politics.⁴³⁰ Although Democrats had held the White House only four terms between 1861 and 1933, a period of seventy-two years, they served five consecutive terms as president immediately thereafter. As a result, many people born circa 1930 would have been in high school before being aware of a sitting President of the United States other than Franklin Delano Roosevelt. Whereas before the Depression Republicans tended to dominate the legislative branch of the federal government, after the crash, control fell decisively to the other side of the aisle.⁴³¹ But exercise of the privilege we have been discussing does not appear to depend on partisan developments. This makes sense, given that the privilege inheres in a branch, not a party.

⁴²⁷ See *id.* at 613–14.

⁴²⁸ See *id.* at 614.

⁴²⁹ *Id.* at 615.

⁴³⁰ See TOM CONNALLY & ALFRED STEINBERG, *MY NAME IS TOM CONNALLY* 138 (1954) ("The year 1932 was to be the year for the Democratic return to national power. I had no doubt of it when the names of dozens of Democrats popped into the newspapers as willing candidates for the presidency.").

⁴³¹ See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 286 (1998) ("The 1932 landslide swept an unprecedented 310 Democrats into the House, leaving only 117 Republicans; the Senate, on a six-year cycle, saw the number of Republicans shrink to 35 from 56 four years earlier.").

On November 7, 1934, the voters of West Virginia elected Democrat Rush D. Holt over former Republican Senator Henry D. Hatfield.⁴³² Unfortunately for Holt, his thirtieth birthday would not occur until more than seven months later, on June 19, 1935,⁴³³ and the federal Constitution explicitly requires senators to be thirty years of age.⁴³⁴ His proposed resolution of this dilemma was to not present himself for membership until his birthday arrived.⁴³⁵

On January 3, 1935, the Senate received his credentials,⁴³⁶ but as noted, Holt had promised not to take his seat until June 19. On April 18, Hatfield brought a petition arguing that the Senate should admit him instead of Holt on the ground that Holt was not qualified and Hatfield had received the second most votes.⁴³⁷ Hatfield also strongly intimated that Holt had misled the voters by telling them that he was qualified to serve. “Throughout his campaign,” noted Hatfield, Holt “proclaimed to the voters [that] he was eligible for the said office because of the fact that Henry Clay, of Kentucky, was permitted to take his seat in the Senate of the United States before he was 30 years old”⁴³⁸ “This misled innumerable people to cast their ballot for him,” he continued, “believing they were voting for an eligible candidate and one who could represent them for the full term of the office for which they voted.”⁴³⁹ To add to Holt’s troubles, in May numerous citizens of West Virginia submitted a memorial asking the Senate to declare the seat vacant so the governor could appoint someone pending the next regular election.⁴⁴⁰ The Senate referred the entire matter to the Committee on Privileges and Elections.⁴⁴¹

When Holt arrived at the Senate on June 19 to take his oath, the committee asked that he stand aside until it could deliver its report, and Holt agreed.⁴⁴² The same day, a majority of the committee reported in his fa-

432 See BUTLER & WOLFF, *supra* note 226, at 359.

433 See *id.*

434 See U.S. CONST. art. I, § 3, cl. 3 (“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.”).

435 See BUTLER & WOLFF, *supra* note 226, at 359.

436 See 79 CONG. REC. 4 (Jan. 3, 1935).

437 See *id.* at 5915–17.

438 *Id.* at 5916 (petition of Henry D. Hatfield). The Senators generally recognized, however, that the Senate had never taken up the question of Clay’s eligibility. Indeed, Clay himself might not have been aware of the issue. See *id.* at 9652 (1935) (report recommending Holt’s admission) (“No objection was made to the seating of Henry Clay, and it appears that he himself was probably unaware of the age qualification.”).

439 *Id.* at 5916 (Apr. 18, 1935) (petition of Henry D. Hatfield).

440 See *id.* at 7547 (May 15, 1935).

441 See *id.* (citizens’ petition referred to Committee on Privileges and Elections); *id.* at 5917 (Apr. 18, 1935) (Hatfield’s petition referred to Committee on Privileges and Elections).

442 See *id.* at 9650–51 (June 19, 1935); see also BUTLER & WOLFF, *supra* note 226, at 359.

vor.⁴⁴³ After considering a variety of authorities, including text and legislative precedent, they concluded that the rule most consistent with the Framers' intentions was that a person should be thirty years of age when he or she assumes office, not at the time of election or at the beginning of the term for which he or she was elected.⁴⁴⁴ Holt could take his seat under this rule because he did not present himself to the Senate before his thirtieth birthday.

In reaching this conclusion, the majority relied heavily on the lawyerly argument that, whereas the authors of the Constitution had added the words "when elected" to the requirement of inhabitancy, they had added no such language to the requirements of age and length of citizenship.⁴⁴⁵ *Expressio unius est exclusio alterius*—to say the one is to exclude the other. In a more theoretical vein, the majority argued that the framers had specified a minimum age of thirty to keep "immature" people out of the Senate, and that Holt had met this specification by waiting until his thirtieth birthday.⁴⁴⁶ Last, they could rely on the precedent of John Young Brown of Kentucky, who had been elected to the House of Representatives at the age of twenty-four, and who had still been that age when the term for which he had been elected began, but who had waited until after his twenty-fifth birthday to take the oath of office.⁴⁴⁷

For Holt's detractors, all of this proved too much. If the voters could elect Holt at twenty-nine, they could elect him at twenty-five. "While in the case of Mr. HOLT the age requirement lacked a little less than 6 months in time, the principle involved would be the same if he lacked 5 years and 6 months,"⁴⁴⁸ the minority wrote. This construction, they said, "would establish a principle which might readily result in greatly diminishing the number of Senators provided for by the Constitution."⁴⁴⁹ From the perspective of those who argued against Holt, one became a "senator" for purposes of the requirements of age and citizenship when one's term began; otherwise, states might lack proper representation and the nation might lack adequate leadership. As Senator Tom Connally of Texas asked, could the "Constitution makers ever [have] intended that the Senate should be composed of

443 See 79 CONG. REC. 9651-53 (June 19, 1935).

444 See *id.* at 9653; see also *id.* at 9752 (June 20, 1935) (Sen. George); BUTLER & WOLFE, *supra* note 226, at 359-60.

445 See 79 CONG. REC. 9652-53 (June 19, 1935).

446 See *id.*

447 See *id.* at 9754 (June 20, 1935) (Sen. George discussing the *Brown* case). The federal Constitution requires members of the House to be twenty-five years of age. See U.S. CONST. art. I, § 2, cl. 2; see also CONG. GLOBE, 36th Cong., 2d Sess. 2 (Dec. 3, 1860) (Brown takes the oath); *id.*, 1st Sess. 2 (Dec. 5, 1859) (Brown appears in the House).

448 79 CONG. REC. 9653 (June 19, 1935) (minority report).

449 *Id.*

men who were not eligible to meet at any moment and to discharge their functions?"⁴⁵⁰

The majority's response to this provocative argument was provocative in its own way. Speaking for the committee, Senator Walter F. George of Georgia noted that history itself, and the modest manner in which the people of the United States had exercised their electoral privileges, responded to the horrors depicted by Holt's detractors:

The answer, Mr. President, is in the reaction of the American people to the precedent set by the House of Representatives in the John Young Brown case more than 75 years ago. In that case the House, by its action, did exactly what we are asked to do here today and no more; and yet immature men under 25 years of age have not been elected in sufficient number to prevent the orderly functioning of government.⁴⁵¹

Holt's defenders were also able to turn the tables and suggest that the main argument against him proved too much. If the nation requires a full complement of senators at all times, they said, then a governor (or a legislature, before ratification of the Seventeenth Amendment) may not deliberate over a vacancy. In Andrew Jackson's case, noted George, "the very commission which he brought to the Senate contained the language that he was elected for the term which began months before his actual election."⁴⁵² In a slightly different vein, Senator Huey P. Long of Louisiana observed that many governors elected to serve in the Senate, including himself, had continued to serve in the former capacity until well into their term as senators, even though one could not constitutionally hold both offices. Because only actual incompatibility made a difference, Long argued, Holt's service

⁴⁵⁰ *Id.* at 9777 (June 20, 1935) (Sen. Connally); *see also id.* at 9776 (Sen. Connally) ("It was the conception of the founders of the Government, those who shaped and molded the Constitution, and it was their expectation and their hope that every State should have two Senators here at all times."). Connally did not appear to enjoy opposing Holt:

I get no pleasure out of taking the position which I take here today. I should much prefer to vote to seat the gentleman from West Virginia . . . He belongs to my party. He sits on my side of the aisle . . . [E]very impulse of my carnal nature calls for a vote for Mr. Holt. On the other hand, every impulse of my intellectual nature tells me that I cannot do it.

Id. at 9775. Indeed, Connally's relations with the Democratic leader in the Senate suffered somewhat because of his position in *Hatfield v. Holt*. *See* CONNALLY, & STEINBERG, *supra* note 430, at 166 (noting that Senator Joe Robinson of Arkansas was "irascible toward me in 1934 when I opposed the seating of youthful Rush Holt . . .").

⁴⁵¹ 79 CONG. REC. 9754 (June 20, 1935).

⁴⁵² *Id.* at 9753.

would only violate the Constitution if he attempted to exercise the functions of senator before reaching his thirtieth birthday.⁴⁵³

The majority also rejected Hatfield's second, largely implicit, ground for exclusion: that Holt had falsely certified and represented that he was eligible to serve in the Senate. As George noted on behalf of the committee, Holt was "merely stating his view."⁴⁵⁴ "[E]ven if he had drawn an erroneous conclusion," he continued, "no imputation of bad faith could be drawn in the case, and certainly no such implication of bad faith as would justify the Senate in saying that he should not for that reason be entitled to take his seat."⁴⁵⁵

Finally, the majority rejected Hatfield's claim that he should serve in Holt's stead, assuming the latter's disqualification. "The rule is well settled," they wrote, "that in election cases the ineligibility of a majority candidate for a seat in the Congress gives no title to the minority candidate or to the candidate receiving the next highest number of votes."⁴⁵⁶ No one took issue with this conclusion.⁴⁵⁷ On June 21, the Senate admitted Holt by a vote of sixty-two to seventeen, and he took the oath of office.⁴⁵⁸

Hatfield v. Holt is fairly easy to defend, given the various lawyerly arguments and sources of authority on which the majority could rely. This is not to say, however, that Holt's opponents were at a loss for arguments and authority of their own. In fact, these senators were able to rely on two

453 See *id.* at 9763 (Sen. Long) ("A number of us, Mr. President, have come here to this body a few months—and in my case a year and 3 months—after our terms began. To argue that the lack of 5 months of requisite age is such a terrific disability that one would be disqualified is so contrary to what we have done in these other cases that I do not understand how it can have much application.")

454 *Id.* at 9751.

455 *Id.*

456 *Id.* at 9652 (June 19, 1935) (majority report); see also McCrary, *supra* note 345, §§ 293–94, at 199 (noting that this country has never adopted the British rule that the second highest vote getter is returned as elected when the majority vote getter is disqualified); *id.* § 295, at 200 ("[T]he weight of authority is decidedly against the adoption here of the English doctrine. And we think that sound policy, as well as reason and authority, forbid the adoption of that doctrine in this country.")

457 Although the determination that Hatfield could not sit reflects standard practice, on occasion legislative bodies have admitted the runner-up after finding the winner not qualified. In *Brown v. Lamprey*, for example, the Senate of New Hampshire refused to admit two people on the ground that they had not been inhabitants of their district at the time of election and went on to admit the two people who had received the next highest number of votes. See *Brown v. Lamprey*, 206 A.2d 493, 494–95 (1965). When asked to review this action, the Supreme Court of the state declined. "For this court to interfere," it said, "would be a usurpation of the authority of the Senate granted to it by the Constitution." *Id.* at 495.

458 79 CONG. REC. 9842 (June 21, 1935); *id.* at 9841 (S. Res. 155, 74th Cong. (1935)) ("Resolved, That RUSH D. HOLT is entitled to his seat in the Senate of the United States as a Senator from the State of West Virginia, it appearing that he was 30 years of age at the time when he presented himself to the Senate to take the oath and to assume the duties of the office.")

senatorial precedents, *In re Gallatin* and *In re Shields*, to great effect.⁴⁵⁹ In these cases, much as in *Hatfield v. Holt*, the Senate had judged the qualifications of people who had not been nine years a citizen at the time of their election, or at the beginning of the term for which they had been elected, but who would have reached that point during their term. Unlike Holt, however, they had been excluded from the chamber.⁴⁶⁰ Even more telling for Holt, the Senate had amended the resolution excluding James Shields to specify that his election was “void” because he had not been nine years a citizen “at the commencement of the term for which he was elected,”⁴⁶¹ thereby precluding him from returning when he had been a citizen long enough.⁴⁶² The Senate had adopted this amendment at the instance of Senator John C. Calhoun of South Carolina.⁴⁶³ Although the majority was able to distinguish *In re Gallatin* and *In re Shields* on the ground that Gallatin and Shields had actually taken their oaths before having been citizens nine years,⁴⁶⁴ they could not easily avoid the Senate’s rationale for Shields’ exclusion.⁴⁶⁵ Nor, for that matter, could they readily explain why, if Holt could serve, Gallatin and Shields could not simply have gone away and returned when they had been citizens long enough—i.e., why their act of taking the oath before their tenth year of citizenship precluded them from returning when they had reached that milestone.⁴⁶⁶

7. *In re Raney (Senate, Kentucky, 1962)*.—The houses of Kentucky’s general assembly have also seen a variety of contests and petitions implicating the privilege of which we have been speaking, and their approach to these matters has resembled that of the two houses of Congress. One famous

459 See *id.* at 9773 (June 20, 1935) (Sen. Connally) (describing *In re Shields* as “an absolute precedent for this case, because age and alienage are in the same clause . . .”); *id.* at 9655–57 (June 19, 1935) (Sen. Johnson’s report); *id.* at 9653 (minority report); see also BUTLER & WOLFF, *supra* note 226, at 360.

460 See *supra* notes 227–68 and accompanying text for a discussion of *In re Gallatin*.

461 79 CONG. REC. 9760 (June 20, 1935) (Sen. Johnson) (quoting the resolution excluding Shields).

462 *Id.* at 9827 (June 21, 1935) (Sen. Austin) (“There was offered in the Senate a resolution to postpone action until sufficient time had elapsed, and then to have the Senate consider the matter after the defect of time in the title had been cured, and the Senate voted not to allow that continuance or postponement to take place on the grounds stated in the debate; that it could not change the facts . . .”)

463 *Id.* at 9653 (June 19, 1935) (majority report).

464 See *id.* (majority report).

465 Senator (later Justice) Sherman Minton of Indiana argued that Calhoun’s rationale for *Shields* was “dictum.” *Id.* at 9762 (June 20, 1935) (Sen. Minton). Somewhat similarly, Senator F. Ryan Duffy of Wisconsin candidly argued that the Senate should “overrule” *Shields*.” *Id.* at 9764.

466 See *id.* at 9773 (Sen. Tydings) (describing this as “a dilemma”); *id.* at 9773–74 (Sens. Tydings and Connally speculating in this area); *id.* at 9767–69 (Sens. Tydings, Barkley, Connally, Robinson, and Logan similarly speculating).

example is the case of *In re Raney*. In November 1959, the voters of Kentucky's thirty-first senatorial district chose Tom Raney to represent them in the state's senate, and he began serving there on January 5 of the following year.⁴⁶⁷ On April 1, 1960, after the senate adjourned, Raney was appointed a deputy sheriff in Pike County and served in that capacity until the last day of 1961.⁴⁶⁸ As the Kentucky's court of appeals later noted, under the state's constitution, as with many such documents, these two positions are "incompatible" and acceptance of the second office vacates the first.⁴⁶⁹

When the senate came back into session in 1962, Senator Rex A. Logan of Allen, Edmonson, and Warren Counties introduced a resolution "to investigate the charge that the office of State Senator of the Thirty-First District is vacant."⁴⁷⁰ After some procedural wrangling, the senate referred Logan's resolution to the joint committee on state government operations.⁴⁷¹ According to Senator J.D. Buckman, Jr., of Bullitt, Hardin, Larue, Meade, and Spencer Counties, sometime thereafter the committee "returned the resolution to the Senate without action."⁴⁷² In any case, on February 13, eleven days after Logan had introduced his resolution, Buckman introduced another resolution to recognize Raney as the "legally qualified" senator from the thirty-first district.⁴⁷³ This resolution included the following as its final paragraph:

[T]he Senate hereby expresses its full confidence in the authority and ability of Senator Raney to perform the duties of Senator in full compliance with the Constitution and Statutes of the Commonwealth of Kentucky.⁴⁷⁴

The senate proceeded to adopt the resolution by a vote of twenty-five to six.⁴⁷⁵

Matters did not come to an end with this vote, however. Shortly thereafter the treasurer, Thelma Stovall, refused to pay Raney on the ground

467 See KY. SEN. JOUR., Session of 1960, at 4 (Jan. 5, 1960); see also *Raney v. Stovall*, 361 S.W.2d 518, 519 (Ky. 1962).

468 See *Raney*, 361 S.W.2d at 519.

469 *Id.*; see also KY. CONST. § 165 ("No person shall, at the same time, be a State officer or a deputy officer or member of the General Assembly, and an officer of any county, city, town, or other municipality, or an employee thereof . . .").

470 See KY. SEN. JOUR., Session of 1962, at 158 (Feb. 2, 1962).

471 Logan moved that the Senate refer his resolution to the "regularly selected and acting investigating committee . . ." see *id.*, but the President of the Senate ruled the motion out of order and "stated that the resolution would be referred to the Committee on Committees." *Id.* at 158-59. Three days later, on February 5, the Senate referred Logan's resolution to the joint committee. See *id.* at 195 (Feb. 5, 1962).

472 *Id.* at 472 (Feb. 13, 1962) (Sen. Buckman).

473 *Id.* (S. Res. 35).

474 *Id.* at 473.

475 *Id.*; see also *Raney v. Stovall*, 361 S.W.2d 518, 519 (Ky. 1962).

that he was ineligible to serve, and Raney and the commissioner of finance brought suit against Stovall in response to her refusal.⁴⁷⁶ The lower court upheld the treasurer's determination that Raney was ineligible, but the court of appeals reversed on this point. Although the Court was willing to assume that "from a judicial standpoint the acceptance of an incompatible office would create a vacancy," it nevertheless refused to intervene in the senate's determination.⁴⁷⁷ "[T]he fact that the legislature may make a wrong decision," wrote the Court:

is no reason why the judiciary should invade what has been designated as the exclusive domain of another department of government. We must assume the Senate in good faith will not knowingly permit violations of other constitutional provisions. With respect to this subject matter, the people have reposed that responsibility in the legislature. The courts are without jurisdiction to review its solemn determination.⁴⁷⁸

In re Raney illustrates the minimalist approach to exercise of the privilege that is perhaps common at the local level. Although the evidence of Raney's acceptance of an incompatible office was virtually unassailable, the senate chose to recognize him as "duly qualified" nevertheless. The senate ultimately justified its determination on the simple statement that he was "authori[z]ed and [able] . . . to perform the duties of Senator in full compliance with the Constitution and Statutes of the Commonwealth of Kentucky."⁴⁷⁹ Because the decision to retain Raney lacked an express rationale, one must speculate on the senate's actual basis. Given the virtual if not literal impossibility of discerning a lawyerly ground for the decision, one is left to conclude that the senate chose to exalt substance over form, and to take the position that Raney's two offices presented no real danger of a conflict of interest.

Although *In re Raney* does not stand alone among the contests we have discussed in exalting substance over form, it does stand alone with respect to sequence. In these other contests, as well as the vast majority of those we have not discussed, the basis for the contest arose before the would-be member appeared in the chamber for admission. But this was not true of Raney. In his case, as with very few exercises of the privilege, the basis for the investigation actually arose after the senate had admitted him to membership.

8. *In re Powell (House of Representatives, United States, 1967–1969)*.—In 1967, the House of Representatives of the United States took up anew an

⁴⁷⁶ See *Raney*, 361 S.W.2d at 520.

⁴⁷⁷ *Id.* at 521.

⁴⁷⁸ *Id.* at 523–24 (citation omitted).

⁴⁷⁹ See *supra* note 482 and accompanying text.

issue that had often perplexed members of Congress—whether the houses may exclude a prospective member for failing to satisfy a qualification not set forth in the Constitution. As noted earlier, one of the grounds for excluding William S. Vare in 1929 had been that he had spent so much money in the primary that he had disqualified himself from serving in the Senate.⁴⁸⁰ Although some in the chamber had denied the Senate's authority to exclude Vare on these grounds, others had defended it, including Vare's chief antagonist, Senator George W. Norris of Nebraska.⁴⁸¹

The matter at hand in 1967 was *In re Powell*. On November 8, 1966, the voters of New York's 18th congressional district had overwhelmingly elected the Reverend Adam Clayton Powell, Jr., to the Ninetieth Congress, which would convene the following January. This would be his twelfth term as a member of the House.

Although Powell was quite popular in his district,⁴⁸² his putative re-entry into the House was no simple matter. His problems fell into two categories. The first involved alleged misdeeds on his part as chairman of the powerful Committee on Education and Labor. During the Eighty-ninth Congress, a special subcommittee had investigated this committee's affairs.⁴⁸³ On January 3, 1967, just before the new Congress convened, this subcommittee had submitted a report, in which it had concluded that Powell and others had deceived the House regarding outlays for travel.⁴⁸⁴ It had also presented evidence suggesting that he had improperly caused a salary to be paid to his wife.⁴⁸⁵ Although these alleged misdeeds were hard-

480 See *supra* notes 367-429 and accompanying text.

481 See *id.*

482 See 113 CONG. REC. 15-16 (Jan. 10, 1967) (Rep. Udall) (noting that Powell had won reelection in 1966 by a 3-to-1 majority); see also CHARLES V. HAMILTON, ADAM CLAYTON POWELL, JR.: THE POLITICAL BIOGRAPHY OF AN AMERICAN DILEMMA 447 (1991) ("[Powell] was a proud, defiant black congressman, and his constituents loved him for it").

483 See *Powell v. McCormack*, 395 U.S. 486, 489-90 (1969).

484 See H.R. REP. NO. 89-2349, at 6 (1966) ("The deceptive practice of using the names of staff employees on airline tickets which were not used by the named employees appears to be a scheme devised to conceal the actual travel of Representative Powell, Miss Huff [a member of Powell's staff], and others, in some instances at least, so as to prevent questions being raised by the Committee on House Administration as to the official character of the travel performed."); see also *Powell*, 395 U.S. at 490; HAMILTON, *supra* note 482, at 447 ("Subpoenaed records indicated that scores of tickets were purchased—all authorized by Powell—through the use of committee credit cards of some staffers, but those particular persons never took the trips.").

485 See H.R. REP. NO. 89-2349, at 7 (1966) ("The record of the hearings raises a strong presumption that Y. Marjorie Flores (Mrs. Adam C. Powell) is receiving compensation, as a clerk for Representative Powell, in the sum of \$20,578 per year in violation of Public Law 89-90, 89th Congress, in that she is not performing the services for which she is compensated in the offices of Representative Powell in the District of Columbia or in the State or the district which he represents, as required by said statute."); see also *Powell*, 395 U.S. at 490; HAMILTON, *supra* note 482, at 448.

ly unique in the annals of Congress,⁴⁸⁶ the desire for action was nevertheless strong. On January 9, on the eve of the new Congress, the Democratic members-elect met in caucus and removed Powell from his chair, replacing him with Representative Carl Perkins of Kentucky.⁴⁸⁷ But few if any appeared to deem this removal an adequate response to the report.

Powell's second set of problems arose from litigation in New York, in which a judgment had been entered against him for defamation, and in which he was asserting legislative immunity as a ground for avoiding process.⁴⁸⁸ Many considered this assertion unfounded, and the entire matter had become quite notorious.⁴⁸⁹

On January 10, as the members-elect prepared to take the oath, Representative Lionel Van Deerlin of California asked that Powell stand aside. "I intend at the proper time," he said, "to offer a resolution providing that the question of eligibility of Mr. POWELL to a seat in this House be referred to a special committee . . ."⁴⁹⁰ The House acceded to this request.⁴⁹¹ Debate then proceeded along several axes. Some members, such as Representative Mo Udall of Arizona, argued that the House should admit Powell provisionally, pending resolution of the investigation.⁴⁹² "We do not have the

486 See HAMILTON, *supra* note 482, at 18 ("Surely, [Powell] was not the only committee chairman who had held up legislation . . . and he was hardly the only congressman to have a spouse or relative on the payroll in a questionable capacity. And how many would seriously claim that his was the only face on European junkets at taxpayers' expense?").

487 See *id.* at 451; see also H.R. Rep. No. 90-27, at 1–2 (1967); 113 CONG. REC. 16 (Jan. 10, 1967) (Rep. Udall) ("Let me make it clear that the ax has fallen, the ax has come down, the story of ADAM POWELL free-wheeling chairman is ended . . .").

488 See HAMILTON, *supra* note 482, at 441 (noting that Powell considered "his New York legal problems [as] more than personal, but also rais[ing] issues about the constitutional rights of congressman to speak off the floor"). According to a jury in New York, Powell had defamed a woman by describing her on television as a "bag woman" for the police. Powell had made the same point previously on the floor. See *id.* at 434 (speech on the floor); *id.* at 435 (statement on television); *id.* at 436 (verdict).

489 See HAMILTON, *supra* note 482, at 15–16 (describing the "Powell matter" that had developed over the years) ("[Powell] had been embroiled in a protracted, complex, five-year court battle in New York, defending against a defamation-of-character lawsuit brought by a Harlem resident he had accused on television of being a 'bag woman' (handler of payoff money from gamblers to the police). After several judgments against him he had been charged with criminal contempt of the New York courts for failing to cooperate with the state courts or to appear when subpoenaed."); see also *id.* at 36 ("The two civil contempt citations against Powell meant that he could not appear in New York City except on Sunday without running the risk of being arrested."); *id.* at 435–44 (discussing the litigation).

The special subcommittee that met during the 89th Congress did not take up the litigation in New York. See 113 CONG. REC. 25 (Jan. 10, 1967) (Rep. Hays).

490 113 CONG. REC. 14 (Jan. 10, 1967).

491 See *id.*

492 See *id.* at 16.

facts,"⁴⁹³ he said. "We have had no judicial hearing."⁴⁹⁴ His resolution to admit Powell on this basis drew some support,⁴⁹⁵ including an inadvertent remark from Majority Leader Carl Albert of Oklahoma (at least according to one historian) that "[t]he American way is first give a man a trial and then convict him."⁴⁹⁶ But others argued against provisional admission, citing legislative precedent,⁴⁹⁷ or suggesting that the evidence against Powell was reliable enough to deny him a seat for the time being.⁴⁹⁸ "Certain diversions have been made in the argument . . . today," contended Van Deerlin, "and among these is that the gentleman from New York has somehow or other not had his day in court."⁴⁹⁹ "This may be technically true," he said, "but I would point out that there are nearly a dozen judges in the State of New York who will tell you where the fault lies."⁵⁰⁰ In a similar vein, Representative Glenard P. Lipscomb of California argued that "Congressman [Wayne L.] Hays [of Ohio, chairman of the special subcommittee,] gave everyone an opportunity to be heard But Mr. POWELL did not choose for one reason or another to appear before that committee even though he was given ample opportunity."⁵⁰¹ Finally, several members argued, or at least implied, that even provisional admission would preclude expulsion under the House's own precedent, leaving the body virtually powerless to act.⁵⁰² "[E]xcept in contests involving the outcome of an election," said Van Deerlin, "there is no precedent . . . in which the House of Representatives has

493 *Id.*

494 *Id.*

495 *See id.* at 21 (Rep. Conyers) ("I plead with and urge each of you . . . to join with those who would not leave the 18th District of a great State without a Representative in Congress."); *id.* at 19 (Rep. Thompson of New Jersey) ("The people of the 18th Congressional District of New York I feel are entitled to a Representative, beginning today, and to representation beginning today."); *see also* HAMILTON, *supra* note 482, at 15 ("[Udall's] motion had the support of the leadership of the Majority Party, Powell's party . . .").

496 HAMILTON, *supra* note 482, at 14. The Congressional Record, however, quotes Rep. Albert as saying that "the American way is first to give a man a trial and then to *pass judgment on him.*" 113 CONG. REC. 18 (Jan. 10, 1967) (emphasis added).

497 *See* 113 CONG. REC. 18 (Jan. 10, 1967) (Rep. Goodell) ("[W]e have had gentlemen sitting as Members of the House in two of the election contests in the last 4 years where neither party member was seated when there was a certificate of election from the duly elected and proper officials of the State."). Goodell's reference to "gentlemen sitting as Members of the House" would have to mean individuals appearing on the floor for admission; otherwise this statement would contradict itself.

498 *See id.* at 19 (Rep. Van Deerlin).

499 *Id.*

500 *Id.*

501 *Id.*

502 *Id.* (Rep. Van Deerlin); *see also id.* at 21 (Rep. Goodell) (noting that there were no precedents for "seating a member and putting him in limbo pending investigation" and that provisionally seating Powell might leave the House without "the freedom to make a final judgment").

expelled a Member, once seated, for matters having to do with his conduct in a previous Congress”⁵⁰³ In other words, they contended that refusing to admit Powell was the only possible way to separate him from the chamber and that even provisional admission would preclude this option.

Meanwhile, on another axis, some members denied that the House could refuse to admit Powell on the grounds in question. One such person was Representative Emanuel Celler of New York, chairman of the Committee on the Judiciary and a widely-respected member. “I heard nothing from the minority side,” he said, overlooking that Van Deerlin was actually a Democrat, “which indicates anything that could successfully challenge the qualifications constitutionally of the gentleman from New York”⁵⁰⁴ Another member taking this position was Representative Abraham J. Multer, also of New York, who maintained that “[o]nce the voters of a congressional district have chosen their Representative, his fitness to serve is determined beyond question by us, his colleagues, providing only that he meets the three qualifications set forth.”⁵⁰⁵ On the other hand, many appeared to assume not only that exclusion on the grounds presented was *an* option, but that it was the *only* option. They opposed provisional admission for this reason.⁵⁰⁶ To complicate matters further, at least two representatives from New York, Samuel S. Stratton and Samuel Kupferman, suggested that Powell might not meet the constitutional requirement of being an “inhabitant” of the state because he was avoiding process there,⁵⁰⁷ or because he had been away from Congress during an important vote.⁵⁰⁸ Stratton’s point seemed to be, however, that Powell could cure this problem by accepting process.⁵⁰⁹ Powell himself denied these allegations, noting that he paid taxes in New York and had gone there regularly to preach.⁵¹⁰

503 *Id.* at 19.

504 *Id.* at 20.

505 *Id.*

506 *See supra* notes 502–03 and accompanying text.

507 *See* 113 CONG. REC. 20 (Jan. 10, 1967) (Rep. Stratton) (“If a Representative-elect chooses to remain outside of his State rather than comply with the duly constituted orders of the courts of his own State, then I believe there is a very real question of whether he is in fact still a resident of the State he purports to represent . . .”).

508 *See id.* at 21 (Rep. Kupferman) (“Anyone who was a resident of New York and believed in civil rights would have been present to vote [on the Civil Rights Bill of 1966] at that time unless unavoidably detained. The gentleman from the 18th District of New York was reported to be in Bimini.”).

509 *See* 113 CONG. REC. 5002 (Mar. 1, 1967) (debate on a later resolution to admit Powell) (“I propose . . . to offer an amendment to this resolution, that the oath shall not be administered to Mr. POWELL until he has first purged himself of all contempt and thereby made it clear that he is an inhabitant of the State of New York within the meaning of the precedents of this House.”) The idea of a cure “nunc pro tunc” would not have satisfied Adelbert Ames’ detractors in 1870. *See supra* notes 314–345 and accompanying text.

510 *See* 113 CONG. REC. 23 (Jan. 10, 1967). Representative William L. Dickinson of Alabama had briefly objected to Powell being permitted to speak, but he did not persist in

At the conclusion of debate, the House rejected Udall's proposal to admit Powell *pendente lite* by a vote of 305-126.⁵¹¹ Adopting a substitute offered by Minority Leader Gerald R. Ford of Michigan, it then referred the matter to a select committee by a vote of 363-65.⁵¹²

With Celler in the chair, the committee proceeded to hold hearings, at which it invited Powell to testify. The invitation referred not only to the stated qualifications for service in the House, *i.e.*, age, citizenship, and inhabitancy, but also to Powell's "alleged official misconduct since January 3, 1961."⁵¹³ On February 8, Powell appeared before the committee but on the advice of counsel answered only questions relating to the stated qualifications.⁵¹⁴ Two days later, the committee sent another invitation to Powell, this time informing him that, under its charge, it would report not only on the question of exclusion *vel non* but also on the question of expulsion *vel non*.⁵¹⁵ Although Powell did not reappear before the committee, his attorneys argued for him that only the stated qualifications were relevant to the question of exclusion and that expulsion could not be a question before the House had admitted him to membership.⁵¹⁶

On February 23, the committee submitted its unanimous report. Finding that Powell met the stated qualifications, it recommended admission.⁵¹⁷ Also finding, however, that he had committed various acts of misconduct, it also recommended censure, a fine of \$40,000, and loss of seniority.⁵¹⁸ The House received this report on March 1 and debate began.

Although the committee had reported largely in Powell's favor, the tide was against him. As one of the committee's members, Representative Charles M. Teague of California, noted during debate, representatives "on both sides of the aisle" had received mail "100 to 1" to "throw the rascal

this objection. *See id.* at 15; *see also* HAMILTON, *supra* note 482, at 18 ("[Dickinson] ... quickly withdrew his objection when his Republican colleagues quietly but audibly murmured 'no' to his move.").

511 *See* 113 CONG. REC. 24 (Jan. 10, 1967).

512 *See id.* at 26-27; *see also* HAMILTON, *supra* note 482, at 20 (At this point, "[t]he second telephone call was made to the White House ...").

513 *See In re Adam Clayton Powell: Hearing on H.R. 1 Before the H. Select Comm. to Investigate Rep. Adam Clayton Powell, Jr.*, 90th Cong. 5 (1967).

514 *Powell v. McCormack*, 395 U.S. 486, 491 (1969).

515 *See In re Adam Clayton Powell: Hearing on H.R. 1 Before the H. Select Comm. to Investigate Rep. Adam Clayton Powell, Jr.*, 90th Cong. 110 (1967); *see also Powell*, 395 U.S. at 491. Under the federal Constitution, "[e]ach House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member." U.S. CONST. art. I, § 5, cl. 2.

516 *See Powell*, 395 U.S. at 491-92.

517 *See* H.R. REP. NO. 90-27, at 32-34 (1967); *see also* 113 CONG. REC. 4997 (Mar. 1, 1967) (Rep. Celler).

518 *See* H.R. REP. NO. 90-27, at 32-33 (1967); *see also* 113 CONG. REC. 4997 (Mar. 1, 1967) (Rep. Celler).

out.” “[U]nder this kind of pressure,” he observed, “it would be most difficult for them to vote to seat ADAM CLAYTON POWELL even with the severe punishment we have suggested.”⁵¹⁹ But the committee tried.

Celler spoke first. He began by defending the proposed punishment as harsh enough. “[W]e went beyond censure,” he said, emphasizing the impact of that punishment alone.⁵²⁰ But exclusion was not a constitutional option in his estimation. “Some may demand exclusion—ouster at the threshold by majority vote. The Constitution lays down three qualifications for one to enter Congress—age, inhabitancy, citizenship. Mr. POWELL satisfies all three. The House cannot add to these qualifications.”⁵²¹ Later in the debate, Representative Arch A. Moore of West Virginia reiterated Celler’s basic points, arguing as well that the House had never before excluded or expelled a member for the grounds at issue in *In re Powell*. “Some Members may . . . say, ‘But there have been other instances of which individuals for far less indiscretion and far less misconduct have been excluded or expelled.’ I only say to those Members that a clear reading of the cases will show that some third force always intervened.”⁵²² The majority leader also expressed support for the committee’s recommendation.⁵²³

After Celler spoke, the floor went to the first of Powell’s detractors, Representative Alton A. Lennon of North Carolina. Lennon, like many others, could not abide Powell’s financial misdeeds. “How can you say to me,” he asked, “that the Members of the House, in conscience and in morality, can say to the world and to the people of America, that the gentleman from New York should be seated?”⁵²⁴ In a similar vein, Representative Louis C. Wyman of New Hampshire, himself later a contestee in the Senate,⁵²⁵ argued that “when a former Member who asks to be seated, refuses to answer questions about his own collateral embezzlements, conversions and possible thefts of moneys entrusted to him by this House, surely we are not compelled to seat him until at least he explains to this House.”⁵²⁶

Powell’s detractors also defended exclusion on the grounds presented. The House could constitutionally deny him a seat, contended Representa-

⁵¹⁹ 113 CONG. REC. 5002 (Mar. 1, 1967); cf. HAMILTON, *supra* note 482, at 457 (discussing public sentiment when the 90th Congress first met) (“In 1967, as the House of Representatives prepared to decide his fate, ‘Powell’s People’ had to contend with representatives who were listening to ‘their own people’ as well. The mail *was* running heavily against him.”).

⁵²⁰ 113 CONG. REC. 4998 (Mar. 1, 1967).

⁵²¹ *Id.*; see also *id.* at 5005 (Rep. Conyers) (noting that Powell had been elected and returned, and that he had satisfied the stated qualifications) (“The committee felt, quite definitely, that if those criteria were satisfied that the Constitution and the burden of the precedents allows the House no option but to seat such a duly qualified Member-elect.”).

⁵²² *Id.* at 4999.

⁵²³ *Id.* at 4998 (Rep. Albert).

⁵²⁴ *Id.* at 4999.

⁵²⁵ See *supra* note 408.

⁵²⁶ 113 CONG. REC. 5010 (Mar. 1, 1967).

tive Clarence Long of Maryland, because the stated qualifications were not exhaustive. "In the language of mathematics," he said, "these are necessary but not sufficient conditions. They say that a man must meet these conditions to be seated, but they do not say that he must be seated if he does meet them."⁵²⁷ Long went on to argue that legislative precedent as well permitted exclusion on the grounds in question. On four occasions, he said, the House had excluded someone for failing to meet an unstated qualification, and "[n]o court has ever considered or reversed any of these decisions . . ."⁵²⁸ Although the minority leader did not embrace this argument, he did not reject it either, expressing a desire to adopt the committee's recommendation and to pretermitt the question of the House's authority to exclude on the grounds presented. "[A]fter seeing what they have proposed," said Ford, "I am going to vote for the resolution without any hesitation, qualification, or reservation."⁵²⁹ Nevertheless, he would reserve the abstract question of the House's authority to exclude a would-be member for failing to meet an unstated qualification. "I do not admit that we do not have the authority to exclude the gentleman from New York."⁵³⁰

Adding a third perspective to the debate, Representative Stratton of New York renewed his argument that Powell had not satisfied the requirement that he be an inhabitant of that state at the time of his election, although he took the somewhat improbable position that Powell could cure this deficiency by accepting process from the courts of New York.⁵³¹ In Stratton's view, Powell avoidance of process raised "a very grave cloud . . . over the question of his inhabitancy . . ."⁵³² "Surely," he argued, "obeying the orders of the courts is one of the duties and responsibilities of a Member from New York State. Yet Mr. Powell has . . . defied this duty and has deliberately moved out of [the] State to avoid his responsibility."⁵³³ The problem with Stratton's argument was that, if his premises were accurate, Powell had not been an "inhabitant" of New York at the time of his election, and a cure after the fact would not appear to suffice. In any case, Celler was quick to respond that, in the committee's estimation, Powell had satisfied the constitutional requirement of inhabitancy.⁵³⁴

527 *Id.* at 5001.

528 *Id.*

529 *Id.* at 5018.

530 *Id.*

531 *Id.* at 5002.

532 *Id.* at 5001.

533 *Id.* at 5002.

534 *See id.* at 5002 (Rep. Celler) ("Applying established criteria to the facts in this case, the committee concluded that Mr. POWELL was an inhabitant of the State of New York on the day of his election within the spirit of the [C]onstitution.").

On March 1, the House refused by a vote of 222-202 to bring the committee's recommendation to a vote.⁵³⁵ Representative Thomas B. Curtis of Missouri then offered an amendment to exclude Powell and declare his seat vacant:

Resolved, That said ADAM CLAYTON POWELL, Member-elect from the 18th District of the State of New York, be and the same hereby is excluded from Membership in the 90th Congress and that the Speaker shall notify the Governor of the State of New York of the existing vacancy.⁵³⁶

On the question of whether the House required a majority or two thirds to sustain this amendment, the speaker had stated throughout the proceedings, and repeated here, that a simple majority would suffice,⁵³⁷ although Curtis himself took the position that “exclusion” in this context was actually an exercise of the power to expel, and therefore required two thirds:

[T]his is a motion of exclusion During the debate on the resolution, for which this is a substitute, I advanced my own theory on what power was derived from the power of expulsion. I said that I felt the power of expulsion very clearly implied the right of exclusion [I]f this is true, then in my own judgment exclusion would require a two-thirds vote.⁵³⁸

By taking this position, Curtis evaded, or at least sought to evade, the question of the House's power to exclude for alleged misconduct during a previous term.⁵³⁹

Familiar arguments were then made, with Long and others defending the House's power to exclude on the grounds presented, and Celler and others taking the opposite position. Celler also spoke at some length on precedent, acknowledging that the House had excluded individuals in the past for failing to meet unstated qualifications, but urging his colleagues to reject these precedents as ignoble. “Despite a laudable record of faithful obedience to the constitutional mandate,” he noted, “the Congress has in rare instances of extreme political tension waived from its usual adherence to constitutional principle and precedent”:

These deviations occurred in three categories of cases reflecting anti-Mormon—case of Brigham Roberts—anti-Confederate—cases of Kentucky members—and antiradical—case of Victor Berger—feeling. I urge the repudiation of such precedents which reflect the prejudices of prior eras.⁵⁴⁰

535 *See id.* at 5020.

536 *See id.*

537 *See id.* at 5020 (Speaker McCormack); *id.* at 17 (Jan. 10, 1967) (same); .

538 *Id.* at 5020 (Mar. 1, 1967) (Rep. Curtis).

539 *See id.* at 5020–21 (Rep. Curtis).

540 *Id.* at 5023 (Rep. Celler).

Another familiar argument was Stratton's point that the House should exclude Powell until he accepted process from the courts of New York.⁵⁴¹ Indeed, Representative Kenneth W. Hechler of West Virginia took the similar but less complicated position that the House should simply exclude Powell for this reason, if not for others as well.⁵⁴²

Then came something of an unfamiliar argument, one proceeding as much from game theory as from constitutional law.⁵⁴³ An uncertain number of members opposed excluding Powell, perhaps for constitutional reasons, instead preferring that he be admitted and then expelled. If, however, they voted against excluding him, both their consciences and their constituents would hold them responsible for opposing the only action against Powell likely to come before the body. Given this "dilemma," as Representative Charles S. Gubser of California described the situation, their only politically feasible option was to support Curtis's amendment, even if they opposed it in principle.⁵⁴⁴ "Mr. Speaker," he said, "I want to expel ADAM CLAYTON POWELL, by seating him first, but that will not be my choice when the Curtis amendment is before us. I will be forced to vote for exclusion, about which I have great constitutional doubts, or to vote for no punishment at all."⁵⁴⁵

After additional debate, the House adopted Curtis's amendment by a vote of 307-116.⁵⁴⁶ Finally, it adopted the preamble supporting the resolution in a separate vote of 310-9.⁵⁴⁷ This preamble, which the committee had written, referred only to Powell's alleged misconduct, and made no reference to inhabitancy or any stated qualification for service in the House.⁵⁴⁸

In Powell's case, as in Raney's,⁵⁴⁹ this was not the final chapter of the story. On March 8, Powell and several voters from his district brought suit

541 *See id.* Stratton's argument was not a formal amendment, however. *See id.*

542 *See id.* at 5025.

543 *See generally* Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 989 (1989) ("[W]hen preferences are not . . . conveniently arrayed, rules of order *are* likely to determine outcomes—and no expert in choice theory can make it otherwise.") (emphasis added).

544 113 CONG. REC. 5031 (Mar. 1, 1967) (Rep. Gubser).

545 *Id.*

546 *See id.* at 5037-38 (adopting H.R. Res. No. 278, as amended). This was a vote of over seventy-two percent. *See also* HAMILTON, *supra* note 482, at 462-63.

As Representative Phillip Burton of California noted during these votes, this amendment purported to exclude Powell even if the voters sent him back from a special election, and even if the voters from the whole state sent him to the Senate while the 90th Congress continued to exist. *See* 113 CONG. REC. 5037 (Mar. 1, 1967).

547 *See* 113 CONG. REC. 5039 (Mar. 1, 1967).

548 *See id.*

549 *See supra* notes 467-79 and accompanying text.

in federal court for various forms of declaratory and injunctive relief intended to compel Powell's admission to the chamber.⁵⁵⁰ Called upon to defend the suit were the speaker, John W. McCormack of Massachusetts, and several members of the House, as well as several of the House's employees, including the clerk, the sergeant at arms, and the doorkeeper.⁵⁵¹ The district court dismissed the action for lack of jurisdiction,⁵⁵² and the court of appeals affirmed, on the slightly different rationale that the case presented a non-justiciable political question.⁵⁵³

Meanwhile, the voters of the eighteenth district re-elected Powell at a special election on April 11, 1967,⁵⁵⁴ even though Curtis had written his resolution excluding Powell in such a way as to apply for the duration of the Ninetieth Congress.⁵⁵⁵ Powell chose not to present his new certificate of election to the House, however, preferring to await the decision of the courts. The historian Charles Hamilton describes this decision as strategic. If Powell had presented his certificate to the Ninetieth Congress and the House had admitted him, Hamilton notes, Powell might have lost his seniority. "For the moment, then, the constitutional challenge was more important."⁵⁵⁶

On November 5, 1968, just before the Supreme Court granted the writ of certiorari in the case, the voters of the district re-elected Powell to represent them in Ninety-First Congress. Again, Powell won by an overwhelming margin,⁵⁵⁷ although his victory in the Democratic primary the previous June had been less decisive than had been the custom.⁵⁵⁸ On January 3, 1969, after some debate, the House admitted Powell to membership, imposing a fine of \$25,000 upon him in the process.⁵⁵⁹

As the Supreme Court took up the case, then, it confronted several issues. Was it moot, given that Powell was now serving in the House? Were the legislative defendants immune, given the Speech or Debate Clause of the Constitution and the precedent arising thereunder?⁵⁶⁰ Should the Court evaluate the House's act as an expulsion, notwithstanding the actual

550 See *Powell v. McCormack*, 395 U.S. 486, 493–94 (1969); see also HAMILTON, *supra* note 482, at 463.

551 See *Powell*, 395 U.S. at 493.

552 See *Powell v. McCormack*, 266 F. Supp. 354, 359–60 (D.D.C. 1967).

553 See *Powell v. McCormack*, 395 F.2d 577, 603 (D.C. Cir. 1968).

554 See HAMILTON, *supra* note 482, at 463. Powell took 86.1 percent of the vote. See *id.*

555 See *supra* note 536 and accompanying text.

556 HAMILTON, *supra* note 482, at 463.

557 See *id.* at 467. Powell took 80.6 percent of the vote. See *id.*

558 See *id.* at 466–67. Turnout was low, and Powell defeated John H. Young, a former aide, by a margin of 3–2. See *id.*

559 See 115 CONG. REC. 33–34 (Jan. 3, 1969) (adopting H.R. Res. 2); see also HAMILTON, *supra* note 482, at 468.

560 See U.S. CONST. art. I, § 6, cl. 1 (“[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.”).

circumstances of March 1, 1967?⁵⁶¹ Did the Court lack jurisdiction to hear the case, or, as the court of appeals had held, did the case present a non-justiciable political issue?

On June 16, 1969, the Court resolved these questions almost uniformly in Powell's favor. The case was not moot, it noted, because he retained a claim for back pay.⁵⁶² Nor was the Speech or Debate Clause a bar, it said, because he could proceed against the non-legislative defendants, even if the Constitution protected members of the chamber.⁵⁶³

Next, the Court held that it should evaluate the House's act as an exclusion, not an expulsion.⁵⁶⁴ This holding proceeded from several considerations. First, by its own resolution the House had "excluded" Powell.⁵⁶⁵ It had not expelled him, even if the resolution's sponsor, Representative Curtis, had understood the exclusion as a form of expulsion. Second, the Court refused to see the difference between exclusion and expulsion as "merely one of form," observing that both houses had historically "distrusted their power" to expel someone for conduct during a prior Congress.⁵⁶⁶ Finally, the Court noted evidence in the record that some members voting to exclude might instead have voted to admit Powell and then punish or expel him, if given an option.⁵⁶⁷ In making this observation, the Court relied heavily on an article by Congressman Robert C. Eckhardt of Texas. "On this last vote, as a practical matter," Eckhardt had written, "members who would not have denied Powell a seat if they were given the choice to punish him had to cast an aye vote or else record themselves as opposed to the only punishment that was likely to come before the House."⁵⁶⁸ "Had the matter come up through the processes of expulsion," he went on to say, "it appears that the two-thirds vote would have failed, and then members would have been able to apply a lesser penalty."⁵⁶⁹ Moving to the fourth issue, the Court denied that it lacked jurisdiction, noting that the case "arose under" the Constitution, thus providing both a constitutional and a statutory basis for it to proceed.⁵⁷⁰

⁵⁶¹ Under the federal Constitution, the House may expel a member, but only upon a vote of two thirds. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.").

⁵⁶² *See* *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

⁵⁶³ *See id.* at 504; *see also id.* at 549-50 (affirming dismissal of the action against the legislative defendants).

⁵⁶⁴ *See id.* at 550.

⁵⁶⁵ *See id.* at 508 n.28 (quoting 113 CONG. REC. 5020 (Mar. 1, 1967)).

⁵⁶⁶ *Id.* at 508.

⁵⁶⁷ *See id.* at 510-11.

⁵⁶⁸ *Id.* at 511 (quoting Robert C. Eckhardt, *The Adam Clayton Powell Case*, 45 TEX. L. REV. 1205, 1209 (1967)).

⁵⁶⁹ *Id.* at 511 (quoting Eckhardt, *supra* note 568, at 1209).

⁵⁷⁰ *See id.* at 514 (constitutional basis for jurisdiction); *id.* at 516 (statutory basis for

Finally, and perhaps most notably, the Court held that the case did not present a non-justiciable political question.⁵⁷¹ Respondents' main argument on this point was that the House's authority to "be the Judge of the . . . Qualifications of its own Members" was a "textually demonstrable constitutional commitment of the issue to a coordinate political department."⁵⁷² A more "textually demonstrable" commitment of an issue would be hard to find, given the Framers' use of the words "be the Judge of."⁵⁷³ But the Court plausibly avoided some of the thornier aspects of the case by noting that the precise issue presented was not whether the House could determine conclusively if Powell met the qualifications to serve, but instead what those qualifications were. As the Court noted, the existence *vel non* of a "textually demonstrable constitutional commitment of the issue to a coordinate political department" and the scope of any such commitment were themselves questions the Court could resolve.⁵⁷⁴ After extensive review of the historical record, which the Court acknowledged was not univocal,⁵⁷⁵ the Court concluded that the houses of Congress lacked authority to exclude prospective members for failing to meet a qualification not set forth in the Constitution, such as moral fitness.⁵⁷⁶

In its historical analysis, the Court devoted considerable attention to the case of John Wilkes, a member of Parliament of the late eighteenth century, as well as the history of the founding era, both of which it cited for the proposition that legislatures may not scrutinize voters' choices except insofar as a prospective member is alleged not to have met a fixed qualification.⁵⁷⁷ Given their significance for the Court's analysis in *Powell*, these two subjects merit close consideration.

* * * *

jurisdiction).

⁵⁷¹ *See id.* at 549.

⁵⁷² *Id.* at 518 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

⁵⁷³ *See* William W. Van Alstyne, *Foreword: The Constitution in Exile: Is It Time to Bring It in From the Cold?*, 51 DUKE L.J. 1, 9–10 (2001); Ronald A. Parsons, Jr., *Pierre Pressure: Legislative Elections, the State Constitution, and the Supreme Court of South Dakota*, 50 S.D. L. REV. 218, 220 (2005) (discussing a "non-binding judicial opinion" on a legislative contest) ("The idea of judicial intrusion into this legislative process has traditionally been considered unthinkable, both because the legislature's resolution of such matters was itself deemed to be a judicial process and because, from the plain language of the constitutional text, the exclusion of others—and in particular of others who are judges—could not be more evident.") (internal quotations omitted).

⁵⁷⁴ *Powell*, 395 U.S. at 521.

⁵⁷⁵ *See id.* at 541–42 ("Unquestionably, both the House and the Senate have excluded members-elect for reasons other than their failure to meet the Constitution's standing qualifications."); *id.* at 543–44 (discussing precedents from the Civil War).

⁵⁷⁶ *See id.* at 548.

⁵⁷⁷ *See id.* at 528.

In re Wilkes was certainly not without its human interest. Wilkes was a radical for his time, and perhaps for any time,⁵⁷⁸ and Commons learned an important lesson after denying him a seat on numerous consecutive occasions. On April 23, 1763, while serving in Commons, Wilkes published a scathing attack against the ministers of George III in the circular *North Briton* No. 45, using a recent speech by the King as a hook for his remarks.⁵⁷⁹ “As a propaganda piece,” notes historian Arthur Cash, this article “was outrageous—page after page of invectives and sarcasms against the ministers.”⁵⁸⁰ In fact, Wilkes succeeded not only in offending the King’s ministers, but the King himself, by implying that he had been duped.⁵⁸¹ Shortly thereafter, the secretaries of state had him arrested and put in the Tower of London,⁵⁸² but the Court of Common Pleas granted habeas on the ground of legislative privilege.⁵⁸³

On November 15, at the instance of George Grenville, the King’s first minister, and Lord North, at that time junior lord of the treasury, the House declared the piece a “false, scandalous, and seditious Libel.”⁵⁸⁴ The same day, Wilkes’s opponents laid before the Lords a parody of Alexander Pope’s “Essay on Man” entitled “Essay on Woman” whose “publication,” such as it was, could be attributed to Wilkes by various imperfect means.⁵⁸⁵ Along

578 See ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 1 (2006) (“[Wilkes] never hid his libertine indulgences and went to prison for printing the dirtiest poem in the English language.”).

579 See KEIR, *supra* note 80, at 310 (“Among a number of scurrilous attacks on the government in various papers, particular scandal was caused by an article in No. 45 of the *North Briton*, offensively criticising the King’s speech at the close of the preceding session of Parliament.”); THOMAS, *supra* note 214, at 27–28; see also Powell, 395 U.S. at 527. The chief purpose of the *North Briton* was to criticize the foreign policy of Lord Bute (John Stuart) and George Grenville, George III’s first ministers from 1762 to 1763 and from 1763 to 1765, respectively. See R.W. POSTGATE, THAT DEVIL WILKES 35 (1929) (Bute); *id.* at 51 (Grenville).

580 CASH, *supra* note 578, at 100.

581 See *id.* at 99–100; THOMAS, *supra* note 214, at 27–28.

582 See CASH, *supra* note 578, at 107–09; THOMAS, *supra* note 214, at 29–30.

583 See E. NEVILLE WILLIAMS, THE EIGHTEENTH-CENTURY CONSTITUTION, 1688–1815: DOCUMENTS AND COMMENTARY 232 (1965) (“The third matter insisted upon for Mr. Wilkes is, that he is a member of parliament . . . and intitled to privilege to be free from arrests in all cases except treason, felony, and actual breach of the peace . . . and we are all of the opinion that he is intitled to that privilege, and must be discharged without bail . . .” (quoting 19 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS, 1809–1826, at 989 (London, T.C. Hansard 1813)); see also CASH, *supra* note 578, at 116; THOMAS, *supra* note 214, at 31.

584 WILLIAMS, *supra* note 583, at 234 (quoting 29 H.C. JOUR. 667 (Nov. 15, 1763)); see also CASH, *supra* note 578, at 150–51; THOMAS, *supra* note 214, at 40–42. Wilkes tried to assert privilege at the beginning of this session, but the King’s ministers beat him to the punch. See POSTGATE, *supra* note 579, at 79–80.

585 See CASH, *supra* note 578, at 151–53 (proceedings in Lords); *id.* at 144 (discussing the status of the writings, including *An Essay on Woman*) (“The many notes of the ministers and printers, the legal records of the House of Lords, and the judgments of the Court of the

with being bawdy, the poem made uncharitable reference to the bishop of Gloucester, the Reverend Dr. William Warburton, who as heir to Pope's copyright had published the original on a routine basis along with his own footnotes.⁵⁸⁶ Like Commons, the Lords adopted a resolution declaring it "a most scandalous, obscene, and impious libel."⁵⁸⁷ Nine days later, the House declared that the privilege did not extend to libels such as *North Briton* No. 45,⁵⁸⁸ a decision in which the Lords concurred,⁵⁸⁹ leaving Wilkes defenseless against further prosecution.⁵⁹⁰ He soon left the country.⁵⁹¹

To add insult to injury, on January 19, 1764, Commons expelled Wilkes from its ranks.⁵⁹² Although Commons cited *North Briton* No. 45 as grounds for its action, Wilkes had yet to be convicted of any crime.⁵⁹³ A month later, his woes accumulating, Wilkes was tried in absentia on two separate charges of libel, one for *North Briton* No. 45, the other for "An Essay on Woman." This was before the King's Bench, Lord Mansfield presiding.⁵⁹⁴ Two different juries sat, and each brought in a verdict of guilty.⁵⁹⁵ On November 1, having failed to appear for his sentence, Wilkes was declared an outlaw.⁵⁹⁶

In 1768, after his return, and after dissolution of the Parliament from which he had been expelled, Wilkes sought and obtained re-election to

King's Bench never use the word *book* and never indicate that these papers were intended to be unified in one work."); THOMAS, *supra* note 214, at 42 ("Simultaneously with this expected attack on Wilkes in the Commons the ministry exploded the *Essay on Woman* bombshell in the House of Lords.").

586 See CASH, *supra* note 578, at 31 ("An Essay on Woman" has been called the dirtiest poem in the English language, but it is not pornographic in the modern sense; rather, it reaches the extreme of indecorum, boundlessly bawdy, using every indecent word, yet in couplets that are astonishingly close to those of Pope. The mock footnotes imitate the turgid notes of Warburton.")

587 POSTGATE, *supra* note 579, at 81–82.

588 See WILLIAMS, *supra* note 583, at 234 (quoting 29 H.C. JOUR. 675 (Nov. 24, 1763)); see also THOMAS, *supra* note 214, at 44–45.

589 Although the Lords agreed with Commons on this point, there was a lengthy and impassioned dissent from seventeen members. See WILLIAMS, *supra* note 583 at 235–38 (quoting 30 H.L. JOUR. 426 (Nov. 29, 1763); *id.* at 237 ("It is not to be conceived that our Ancestors, when they framed the Law of Privilege, would have left the Case of a Seditious Libel (as it is called) the only unprivileged Misdemeanor: Whatever else they had given up to the Crown, they would have guarded the Case of supposed Libels, above all others, with Privilege, as being the most likely to be abused by outrageous and vindictive Prosecutions." (quoting 30 H.L. JOUR. 426 (Nov. 29, 1763)); see also THOMAS, *supra* note 214, at 45.

590 See CASH, *supra* note 578, at 162–63.

591 See *id.* at 163–64; see also *Powell v. McCormack*, 395 U.S. 486, 527 (1969).

592 See CASH, *supra* note 578, at 169–70; THOMAS, *supra* note 214, at 49; WILLIAMS, *supra* note 583, at 234–35 (quoting 29 H.C. JOUR. 723 (Jan. 19, 1764).

593 See POSTGATE, *supra* note 579, at 89.

594 See CASH, *supra* note 578, at 170–71.

595 See *id.* at 171–72. Both trials took place on February 21, 1764. See *id.* at 170–71.

596 See *id.* at 178; THOMAS, *supra* note 214, at 54.

Commons from the county of Middlesex.⁵⁹⁷ He then presented himself to the courts, eventually receiving a sentence of twenty-two months.⁵⁹⁸ On February 3, 1769, while he was still in prison, Commons again expelled him, citing not only *North Briton* No. 45 and the "Essay on Woman," but also an allegedly libelous preface to a published letter that he had written.⁵⁹⁹

But Wilkes was hardly through with Commons. On February 16, a by-election was held to fill the seat made vacant by his expulsion, and Wilkes prevailed without dissent and without being able to appear.⁶⁰⁰ The next day, however, at the instigation of the administration, Commons resolved that he was "incapable" of serving in "this present Parliament."⁶⁰¹ Attendance for this vote was poor, and this decision was regretted by many, even at the time.⁶⁰² To Edmund Burke, for example, holding someone "incapable" of service had the flavor of making law, which, he posited, Commons could not do alone.⁶⁰³ Moreover, this artifice, if resorted to without scruple, could fundamentally alter the nature of representative government, be-

597 See CASH, *supra* note 578, at 200 ("By the end of 1767 Wilkes had decided on an incredibly bold and unusual step that would address both his weakness and his strength. He would go to England and offer himself as a candidate for a seat in Parliament . . ."); THOMAS, *supra* note 214, at 75. Wilkes's first idea was to earn election from London, but in this endeavor he was not successful. See CASH, *supra* note 578, at 208; POSTGATE, *supra* note 579, at 124-26. He went on, however, to prevail in a subsequent election in Middlesex. See *id.* at 211.

598 See *Powell v. McCormack*, 395 U.S. 486, 527 (1969); CASH, *supra* note 578, at 227; KEIR, *supra* note 80, at 340-41; THOMAS, *supra* note 214, at 87.

599 See WILLIAMS, *supra* note 583, at 239-40 (quoting 32 H.C. JOUR. 178 (Feb. 3, 1769)); see also CASH, *supra* note 578, at 246-47; POSTGATE, *supra* note 579, at 146 ("This triple charge was intended to assure the government's majority, for it was calculated that members who would not vote to expel him because he had libeled the government might yet do so because he had libeled the king, and those who resisted both those arguments might reject him as an obscene writer."); THOMAS, *supra* note 214, at 96-98.

600 See CASH, *supra* note 578, at 248; THOMAS, *supra* note 214, at 98-99.

601 WILLIAMS, *supra* note 583, at 240 (quoting 32 H.C. JOUR. 228 (Feb. 17, 1769)):

Then the Main Question being put, That *John Wilkes*, Esquire, having been, in this Session of Parliament, expelled this House, was, and is, incapable of being elected a Member to serve in this present Parliament;

The House divided . . . [235-89]

So it was resolved in the Affirmative.

Id.; see also THOMAS, *supra* note 214, at 99.

602 See FRANK O'GORMAN, *THE RISE OF PARTY IN ENGLAND: THE ROCKINGHAM WHIGS, 1760-82*, at 241 (1975) ("The expulsion of Wilkes and the seating of Luttrell appeared not only to violate the independence of Parliament from the executive but also to violate the rights of electors.").

603 See CASH, *supra* note 578, at 249.

cause it would enable the party in control of the body to declare members of the opposition incapable of service.⁶⁰⁴

On March 16, Wilkes prevailed without opposition at the second by-election,⁶⁰⁵ but again failed to obtain recognition in Commons.⁶⁰⁶ Indeed, he went on to prevail at yet a third by-election on April 13, this time however with opposition from Colonel Henry Lawes Luttrell and William Whitaker, an attorney.⁶⁰⁷ Although his count (1,143 votes) was overwhelming, Luttrell did earn 296 votes and Whitaker five.⁶⁰⁸ Two days later, Commons took the unusual step of requiring the clerk to amend the return to identify Luttrell as the winner.⁶⁰⁹

This left Wilkes without apparent recourse, but sentiment in London, as well as on this side of the Atlantic, ran very much in his favor and against the decision to admit Luttrell.⁶¹⁰ Although the latter had some support, including a pamphlet by Samuel Johnson entitled *The False Alarm*,⁶¹¹ the mood in the capital as well as in the colonies was decidedly in the opposite direction. Indeed the government fell in January 1770 in part because of *l'affaire Wilkes*.⁶¹²

On April 17 Wilkes left prison.⁶¹³ He then immersed himself in municipal politics in London, becoming an alderman, a sheriff, and eventually mayor.⁶¹⁴ Then, on October 20, 1774, the Parliament from which he had been expelled having been dissolved by George III, Wilkes stood for and obtained a seat in Commons from Middlesex.⁶¹⁵ On December 2, he took his seat,⁶¹⁶ shortly thereafter beginning his campaign to cleanse his records

604 *See id.*

605 *See id.* at 250–51; THOMAS, *supra* note 214, at 99–100.

606 *See* CASH, *supra* note 578, at 251; *see also* THOMAS, *supra* note 214, at 100 (“Next day in the Commons Richard Rigby moved to void the return. No MP directly opposed this, although Dowdeswell did enquire whether it was prudent to have a Middlesex election every month . . .”).

607 *See* CASH, *supra* note 578, at 252–53; THOMAS, *supra* note 214, at 100–01.

608 *See* Powell v. McCormack, 395 U.S. 486, 528 (1969); CASH, *supra* note 578, at 254; KEIR, *supra* note 80, at 341; WILLIAMS, *supra* note 583, at 222.

609 *See* CASH, *supra* note 578, at 254; THOMAS, *supra* note 214, at 101–02; WILLIAMS, *supra* note 583, at 241–42 (quoting 32 H.C. JOUR. 387 (April 15, 1769)).

610 *See* CASH, *supra* note 578, at 254–55 (“All London was on edge. The streets were full of soldiers, and people hesitated to go out unless they had footmen to protect them. Luttrell was assaulted as he left St. Stephen’s Chapel and began to go about armed.”).

611 *See id.* at 255.

612 *See id.* at 261–62; THOMAS, *supra* note 214, at 104–05.

613 *See* CASH, *supra* note 578, at 265; THOMAS, *supra* note 214, at 115.

614 *See* CASH, *supra* note 578, at 267 (Wilkes invested as alderman); *id.* at 309 (Wilkes elected mayor); POSTGATE, *supra* note 579, at 192 (Wilkes elected sheriff); THOMAS, *supra* note 214, at 116 (Wilkes elected alderman while still in prison); *id.* at 145 (Wilkes elected sheriff); *id.* at 152 (Wilkes elected mayor).

615 *See* CASH, *supra* note 578, at 309–10; THOMAS, *supra* note 214, at 153.

616 *See* CASH, *supra* note 578, at 315.

in the House.⁶¹⁷ In 1782, after eight years of effort, Commons agreed to expunge the various resolutions expelling him and to denounce its prior actions as "subversive of the Rights of the whole Body of Electors of this Kingdom."⁶¹⁸

* * * *

The impact of *In re Wilkes* on American history would be difficult to overstate. As various historians have noted, leaders of the Revolution were devoted to Wilkes and indeed corresponded with him. "Wilkes's every move was followed in the American press, and his victories over government celebrated in the colonies,"⁶¹⁹ writes Cash. "He corresponded with Samuel Adams, John Hancock, and other of the founding fathers and was among the foremost supporters of American causes through essays, petitions, and speeches in Parliament."⁶²⁰ "The treatment accorded to [Wilkes] by the ministries of Grenville and Grafton," observes Peter Thomas, "seemed to colonists confirmatory evidence that the government of George III threatened the liberty of his subjects in both Britain and America, thereby stiffening colonial resistance to administration policies."⁶²¹ Although many on this side of the Atlantic might have seen Wilkes as simply a champion of liberty, others saw in his experience the more precise lesson that "popular sovereignty," not the criteria of prospective colleagues, should determine abstract qualifications for membership in the legislature.⁶²² This was certainly the lesson that Adam Clayton Powell's supporters in the House drew from *In re Wilkes*,⁶²³ and the Supreme Court reiterated their point in its decision holding largely in Powell's favor:

617 See *id.* at 316-17; THOMAS, *supra* note 214, at 177 ("Wilkes . . . had his annual motion to make: to rescind the resolution of 17 February 1769, declaring him incapable of election after his expulsion.").

618 WILLIAMS, *supra* note 583, at 244 (quoting 38 H.C. JOUR. 977 (May 3, 1782)); see also CASH, *supra* note 578, at 369-70. Just one month earlier the Government of Lord North had fallen, and just one month before that Commons had advised the King, by a vote of 234-215, that the war with the former colonies in North America should no longer be prosecuted. See *id.* at 369; see also POSTGATE, *supra* note 579, at 237 (noting that Commons "revolted" after Yorktown and "Lord North flung up his office in despair").

619 CASH, *supra* note 578, at 2.

620 *Id.*; see also POSTGATE, *supra* note 579, at 173-74 ("Names like Quincy, Hancock, and Adams now bulk enormous in American history; Wilkes is forgotten. But here they are small men patiently soliciting the attention of a great man . . .").

621 THOMAS, *supra* note 214, at 159.

622 Cf. KEIR, *supra* note 80, at 341 (evaluating *In re Wilkes* from the perspective of British constitutional law) ("Whatever be the correct legal view regarding this difficult case, the line taken by the Commons was an affront to the notion of popular sovereignty, and it engendered an agitation for radical constitutional reform.").

623 See 113 Cong. Rec. 5034 (Mar. 1, 1967) (Rep. Celler) (discussing *In re Wilkes*); *id.* at 5017-18 (Rep. Jacobs) (same).

With the successful resolution of Wilkes' long and bitter struggle for the right of the British electorate to be represented by men of their own choice, it is evident that, on the eve of the Constitutional Convention, English precedent stood for the proposition that "the law of the land had regulated the qualifications of members to serve in parliament" and those qualifications were "not occasional but fixed."⁶²⁴

Indeed, the *Powell* Court went on to note that the delegates in Philadelphia were sufficiently anxious to protect popular sovereignty that they rejected not only a requirement that members of Congress possess a certain amount of property, but also proposals that would have vested discretion in the legislature to determine what the criteria for service might be.⁶²⁵ As the Court noted, on August 10, 1787, the Committee on Detail proposed that 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 seem expedient."⁶²⁶ Gouverneur Morris then moved that the words "with regard to property" be struck, so that the legislature might be left "entirely at large" in the setting of uniform qualifications.⁶²⁷ Using words that bore the imprint of *In re Wilkes*, Madison spoke in opposition to the committee's proposal, implicitly taking issue with Morris's motion as well:

Mr Madison was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of a weaker faction.⁶²⁸

624 *Powell v. McCormack*, 395 U.S. 486, 528 (1969) (quoting 16 WILLIAM COBBETT, PARLIAMENTARY HISTORY OF ENGLAND 589–90 (London, T.C. Hansard 1806–20)).

625 *See id.* at 535–36 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 250, 254 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand]).

626 *Id.* at 533 (quoting 2 Farrand, *supra* note 625, at 179).

627 *Id.* at 535 (quoting 2 Farrand, *supra* note 625, at 250).

628 2 Farrand, *supra* note 625, at 249–50 (quoted in *Powell*, 395 U.S. at 533–34); *see also Powell*, 395 U.S. at 532–33 (quoting 2 Farrand, *supra* note 625, at 123) (noting a proposal similar to Morris's motion by John Dickenson of Delaware, on which the delegates did not act); 2 Farrand, *supra* note 625, at 123 ("Mr Dickenson. was agst. any recital of qualifications in the Constitution," believing that "[i]t was impossible to make a compleat one, and a partial one would by implication tie up the hands of the Legislature from supplying the omissions . . .").

In light of this history, the *Powell* Court could take the position that the presumptively correct interpretation of the clause authorizing the houses of Congress to “be the Judge of” their members’ qualifications extended only to the criteria set forth by the Constitution, and therefore to reject legislative precedent that cut in the opposite direction.⁶²⁹ There being no “textually demonstrable constitutional commitment” to the House of Powell’s moral fitness to serve, and there being no other ground for holding the case non-justiciable,⁶³⁰ the Court determined that it could render judgment in Powell’s favor.⁶³¹ It then remanded the case for further consideration on the question of remedy.⁶³²

Considering the historical record and the need to protect popular sovereignty, the Court reached a defensible holding in *Powell*. To be sure, such legislative precedent as *In re Vare* clearly cut in the opposite direction, and the Court could plausibly have interpreted the words “be the Judge of” to permit exclusion on any ground. Nevertheless, the decision was arguably within our constitutional tradition, particularly in light of the applicable constitutional text, which confers on the houses of Congress authority to resolve questions about members’ “Elections, Returns and Qualifications,”⁶³³ but which elsewhere sets forth qualifications.⁶³⁴

Evaluating the House’s handling of *In re Powell* is more complicated. Given the Court’s later decision, one could simply say that the House was acting out of bounds, but of course such famous lights as Senator George W. Norris of Nebraska had very definitely taken up cudgels in the opposite direction.⁶³⁵ Without doubt, politics played a role in *In re Powell*,⁶³⁶ and of course the entire matter was fraught with racial overtones. As Representative Elmer J. Holland of Pennsylvania argued in Powell’s defense, “ADAM POWELL is being judged not for his sins alone. He is being punished for the statements of Stokely Carmichael and the bad poetry of Cassius Clay and the sins of every other [person of his race] in the country”⁶³⁷ Indeed,

629 See *Powell*, 395 U.S. at 546–48.

630 See *id.* at 548–49.

631 See *id.* at 550.

632 See *id.*

633 U.S. CONST. art. I, § 5, cl. 1.

634 See *id.* § 2, cl. 1 (representatives); *id.* § 3, cl. 3 (senators).

635 Cf. John C. Eastman, *Open to Merit of Every Description? An Historical Assessment of the Constitution’s Qualifications Clauses* 73 DENV. U. L. REV. 89, 136 (1995) (arguing that states may impose qualifications for service in Congress in addition to those set forth in the Constitution) (“[T]he arguments against the exclusive interpretation of the Qualifications Clauses, and in favor of the power of states to superadd to the qualifications listed in them, are stronger and more consistent, both logically and with the historical record and the nature of the American regime.”)

636 See HAMILTON, *supra* note 482, at 16.

637 113 CONG. REC. 5028 (Mar. 1, 1967); see also HAMILTON, *supra* note 482, at 462

as Hamilton has noted, Powell's alleged misdeeds were not unique,⁶³⁸ although they may have been overwhelming in the aggregate.⁶³⁹

* * * *

Before we proceed to discuss the next contest, we should note two decisions that sound in the same general area as *Powell*, one an opinion of the Supreme Court of the United States, another an opinion by the United States District Court for the District of Puerto Rico.

A case quite similar to *Powell*, and for that reason similarly defensible, is *Bond v. Floyd*.⁶⁴⁰ In this case, the Court held that Julian Bond could challenge the decision of the House of Representatives of Georgia not to admit him because of things he had said about the war in Vietnam.⁶⁴¹ Much as the House of Representatives could not exclude Powell for his failure to meet a qualification not set forth in the Constitution, so too the lower house in Georgia could not exclude Bond because of his vocal opposition to the war. As a matter of mechanics, of course, *Bond* differed from *Powell* in that *Powell* turned on the scope of the House's power to "be the Judge of" its members' qualifications, whereas *Bond* turned on the First Amendment, which applies to the states via the Due Process Clause of the Fourteenth Amendment.⁶⁴²

A case somewhat similar to *Bond* is *Mundo-Rios v. Vizcarrondo-Irizarry*,⁶⁴³ which Justice Cooper cited in his separate opinion in *Stephenson v. Woodward*.⁶⁴⁴ In this case, the House of Representatives of Puerto Rico refused to admit Mundo to membership, even though Mundo had a certificate of election, on the ground that criminal charges were pending against him. Mundo brought an action in federal court to compel his admission, which the court granted in the form of a temporary restraining order requiring the defendants (members of the legislature) to administer the oath by noon the following day. Although the defendants gave Mundo the oath the fol-

(discussing Rep. Holland's speech).

638 See HAMILTON, *supra* note 482, at 18.

639 See *id.* at 16 ("Many of [Powell's colleagues in the House] were beginning to say out loud what they had been muttering softly for years: enough is enough.")

640 *Bond v. Floyd*, 385 U.S. 116 (1966), *rev'g* 251 F. Supp. 333 (N.D.Ga. 1966).

641 See *id.* at 131–32.

642 See *id.* (noting as the "central question" in the case "whether Bond's disqualification because of his statements violated the free speech provisions of the First Amendment as applied to the States through the Fourteenth Amendment").

643 *Mundo-Rios v. Vizcarrondo-Irizarry*, 228 F. Supp. 2d 18 (D.P.R. 2002).

644 See *Stephenson v. Woodward*, 182 S.W.3d 162, 177 (Ky. 2005) (Cooper, J., concurring in part and dissenting in part) (citing *Mundo-Rios*, 228 F. Supp. 2d at 30).

lowing day, they did not do so by the deadline, provoking a motion for contempt on Mundo's part.⁶⁴⁵

Although the court declined to hold the defendants in contempt,⁶⁴⁶ it was quite emphatic in stating that the house had been wrong to exclude Mundo and that the privilege is not "absolute."⁶⁴⁷ "The Legislature cannot refuse to seat an elected member," it noted, "who has been provided an electoral certification of election, even if there are irregularities alleged in the election . . ."⁶⁴⁸ The conclusion that Puerto Rico's house was acting beyond its authority in refusing to admit Mundo was both uncontroversial and unobjectionable. The house had refused to admit him because of his possible failure to satisfy a qualification—lack of pending criminal charges—not set forth in the constitution. Thus, its action was conceptually indistinguishable from the House's exclusion of Powell or Commons' treatment of Wilkes, and merited comparable treatment.

But the court's language, taken in the abstract, raises disturbing implications about the scope of the privilege that courts should not endeavor to pursue. If the mere presentation of prima facie evidence of admission suffices to bind the legislature, then the power to "judge" qualifications, elections, and returns is meaningless, and the real "judge" on these issues will be the administrative or judicial officials who determine whether to grant a certificate of election. This has not been the law in the overwhelming majority of cases sounding in this area, nor should it be.⁶⁴⁹ Holding up the admission of a prospective member when the legislature has questions about the regularity of an election lies at the heart of the privilege's purpose. As the House of Commons of Georgia noted in correspondence with the royal governor in 1756, inquiry into such matters "is not only the first step in point of form, but also the surest Method of securing to the Subject the essential Privilege of being fairly represented which it is our proper Business to take care of."⁶⁵⁰ In addition, the Supreme Court of the United

645 See *Mundo-Rios*, 228 F.Supp. 2d at 20–21.

646 See *id.* at 30.

647 See *id.* at 28 ("[T]he 'absolute power' of legislatures to judge the qualification of its members 'was pierced by the Supreme Court more than [thirty] years ago in . . . *Bond* and . . . *Powell*.'" (quoting *Legislature of Virgin Islands v. Mapp*, Civ. No. 1989-129, 1989 WL 53841 (D.V.I. 1989))).

648 *Id.* (citing *Santa Aponte v. Secretario del Senado*, 5 P.R. Offic. Trans. 1050 (1977)).

649 It also appears that the defendants in *Mundo-Rios* did not raise any textual equivalent of the privilege, asserting only the Speech or Debate Clause by way of defense. See *id.* at 21. Puerto Rico's Constitution does contain an express recognition of the privilege, however. See P.R. CONST. art. III, § 9 ("Each house shall be the sole judge of the election, returns and qualifications of its members . . ."). The court's willingness to grant a temporary restraining order against members of the legislature is also somewhat troubling, particularly where the House may have been on its way to admitting Mundo anyway. See *Mundo-Rios*, 228 F. Supp. 2d at 20.

650 GREENE, *supra* note 166, at 191 (quoting GA. H.C. JOUR. (Feb. 13, 1756) in 13 COLONIAL

States almost certainly precluded the broad implications of *Mundo-Rios* in 1972, only three years after *Powell*. In *Roudebush v. Hartke*, a lower federal court had enjoined a recount in a race for the federal Senate on the ground that the recount would interfere with the Senate's authority under the federal version of the privilege.⁶⁵¹ Reversing, the Court held that the recount could proceed because it could not constitutionally bind the Senate. “[A] recount can be said to ‘usurp’ the Senate’s function,” it said, “only if it frustrates the Senate’s ability to make an independent final judgment.”⁶⁵² In the eyes of the *Roudebush* Court, the privilege obviously included a power to exclude a candidate notwithstanding an earlier judicial finding that the person had procured the most votes in the election. The *Mundo-Rios* court did not cite *Roudebush*.⁶⁵³

9. *Humble v. Hoover (House of Representatives, Kentucky, 1987)*.—A recent exercise of the privilege in Kentucky was *Humble v. Hoover*. Mae Hoover and Donald Humble were opposing candidates in a special election for the fifty-third legislative district in January 1987. This election had been made necessary by the death of Hoover’s husband, who had held the seat until December 16, 1986. Effective with the election of Hoover’s deceased husband, the boundaries of the district had been changed to exclude the part of Russell County in which she had been living.⁶⁵⁴ Seeking to comply as best she could with the requirement that she live in the district that she hoped to represent, Hoover moved to Clinton County on December 29. By doing so, she became a resident of the district, but of course she nevertheless failed to satisfy the constitutional requirement that she live in the district for a full year preceding the election.⁶⁵⁵ She went on to defeat Humble, who brought a contest against her admission.

RECORDS OF GA. 95–98 (1904–1937)).

651 *Roudebush v. Hartke*, 495 U.S. 15, 25 (1972).

652 *Id.* at 25

653 The *Mundo-Rios* court also suggested that the House’s refusal to admit Mundo may have implicated equal protection, because a similarly situated individual of the majority party had received disparate treatment. *See Mundo-Rios*, 228 F. Supp. 2d. at 27. This suggestion is vulnerable to criticism because it indicates that the exercise of the privilege is subject to a legislative equivalent of *stare decisis* which is then enforceable in a court of law. If this were the case, then the distinctive nature of the privilege as it has come to be exercised in Congress and in the legislatures of the states would be destroyed, and exercise of the privilege would merely be a prelude to judicial review.

654 *See KY. HOUSE JOUR.*, Extraordinary Session of 1987, at 91 (Oct. 19, 1987).

655 *See KY. CONST.* § 32 (“No person shall be a Representative who, at the time of his election, . . . has not resided in this State two years next preceding his election, and the last year thereof in the county, town or city for which he may be chosen.”).

Hoover presented a prima facie claim to the seat,⁶⁵⁶ but as we have seen, this does not conclude the legislature.⁶⁵⁷ During a special session in October 1987, the house took up the contest, referring it to a special committee.⁶⁵⁸ On October 16, the committee completed its report, which it presented on October 19.⁶⁵⁹ The committee began this report by reciting the facts of the case and setting forth what it thought were the applicable legal principles. After noting that the house is "sole judge of the qualifications of its members,"⁶⁶⁰ it continued by recognizing both the precedential and the theoretical basis for the requirement that Hoover reside in the district she sought to represent.⁶⁶¹ Although the committee acknowledged that she did not meet the constitutional requirements for service, it nevertheless recommended that the house admit her as a member, emphasizing among other things her familiarity with the district, her success at the polls, and the unusual nature of the situation:

A technical reading of the case law would compel the conclusion that Mae Hoover was not a resident of the geographical area she was elected to represent and, therefore, should not be seated.

However, she certainly is familiar with the district and its people. She did all that was possible to adjust her residency, and she won the election.

The situation as far as the change in district boundaries is concerned is certainly a unique factual circumstance, the like of which has apparently never been the subject of an official determination.

This Board unanimously recommends to the House of Representatives as the sole judge of the qualifications of its members that Mae Hoover be seated as the Representative of the 53rd Legislative District.⁶⁶²

Although *Humble v. Hoover* was itself "humble," in the sense that it occupied no more than a page or two in the *Kentucky House Journal*, it nevertheless captured much of the flavor of the protracted proceedings we have discussed. It saw reference to constitutional text, constitutional theory,

656 See KY. HOUSE JOUR., Extraordinary Session of 1987, at 1 (Oct. 14, 1987) ("Representative Stumbo moved that the Journal show that members elected by Special Election, Representative Mae Turner Hoover and Representative Jack Will, have produced certificates of election and that these certificates be confirmed. Agreed.").

657 See MCCRARY, *supra* note 345, § 383 at 255 (noting that a certificate of election, even if granted pursuant to mandamus, "is only *prima facie* evidence of the title to the office, and may be attacked and overthrown by other proof").

658 See KY. HOUSE JOUR., Extraordinary Session of 1987, at 10 (Oct. 14, 1987).

659 See *id.* at 91 (Oct. 19, 1987).

660 See *id.*

661 See *id.* at 91-92.

662 *Id.* at 92.

and judicial precedent. But it ultimately proceeded on a form of analysis that exalted substance over form, noting Hoover's substantial requirement with the constitutional provision, the voters' preference for her, and the unique nature of the situation presented. Moreover, as in almost all of the proceedings considered in this Subpart, the infirmity in Hoover's qualifications, which was not only alleged but real, existed when she was still a prospective member, and did not arise after she was admitted. Indeed, the *Journal* is unclear as to the exact moment of her admission. Although the house's "membership" was described as "duly sworn" after her certificate of election had been "confirmed" on October 14,⁶⁶³ the committee recommended that Hoover "be seated" in the report that it presented on October 19.

10. Concluding Observations.—In this Subpart, we have examined nine exercises of the legislative privilege to judge the qualifications, elections, and returns of members. As we have seen, these cases have arisen in every epoch of our nation's history and in every imaginable context, both controversial and mundane. Although their study yields few, if any, absolutes, we believe we can make a few general observations about practice in the area.

For one thing, legislators are quite lawyerly in discharging this function, declaiming text, citing precedent, and seeking to justify their positions in terms of theoretical principles—in other words, resorting to conventional legal analysis. Indeed, as they moot these issues, they appear to combine the functions of an attorney making an oral argument with those of a judge asking questions of counsel. In *Hatfield v. Holt*, for example, Holt's opponents relied heavily on the senatorial precedents of *In re Gallatin* and *In re Shields*, and his supporters tried to distinguish these precedents, classify their most difficult language as "dictum," or candidly call for their repudiation.⁶⁶⁴ Similarly, in *In re Ames* the senators found themselves quite elaborately parsing the word "[i]nhabitant" and trying to determine how a soldier transitorily present in a state can manifest a decision to remain there.⁶⁶⁵

Nevertheless, legislatures often reach conclusions that a court of law almost certainly could not reach. We have noted this phenomenon in various ways, observing that they sometimes march to the beat of a different drummer or exalt substance over form. Whatever the formulation, the point is that exercise of the privilege is not and never has been a purely legalistic process, instead lying somewhere at the intersection of law and politics. Examples of this phenomenon abound, and we have seen many in this

663 *Id.* at 1 (Oct. 14, 1987).

664 *See supra* notes 459–66 and accompanying text.

665 *See supra* notes 329–45 and accompanying text.

Subpart. Although Lane was almost surely a general when he entered the Senate of the United States, thus violating the rule against dual service, the body nevertheless retained him as a member, perhaps because he had acquitted himself with his legal arguments, but most likely because a difficult war was in progress and the game of excluding him was not worth the candle.⁶⁶⁶ Similarly, although Raney in fact took up the incompatible office of deputy while serving in the Senate of Kentucky, the body nevertheless recognized him as qualified, not because of any lawyerly argument he made, but (presumably) because it saw no real conflict of interest.⁶⁶⁷ Hoover likewise had not resided in her district long enough to satisfy the relevant provision of the constitution, but as her case was extraordinary and as she satisfied the spirit of the provision, the House of Representatives of Kentucky was willing to admit or retain her as a member.⁶⁶⁸

In a slightly different vein, a legislature might conclude that no candidate has prevailed in an election, even though neither a tie nor corrupt practices *per se* has occurred. This appears to have been the conclusion of the Senate of the United States in *Durkin v. Wyman*, a contest that took place not long ago. In this case, which one journalist described as "the closest U.S. Senate race in history,"⁶⁶⁹ the Senate decided that it could not satisfactorily determine whether John A. Durkin or Louis C. Wyman had prevailed, yet no one had established that the two had received the same number of votes. Instead, the Senate took the pragmatic step of declaring the seat vacant and notifying the governor of New Hampshire to that effect.⁶⁷⁰

Before we leave the general subject of law and politics, we should also note that, although exercise of the privilege generally redounds to the benefit of the party in power, this is not always true. A Senate dominated by Republicans excluded Vare, a Republican, and a House dominated by Democrats expelled Powell, a Democrat. Republican George W. Norris successfully led the fight against Vare, and Democrat Lionel Van Deerlin first asked Powell to stand aside and not take the oath of office. James H. Lane's "prosecutor," so to speak, was Republican Lafayette Foster of Connecticut; Adelbert Ames' chief opponent was Republican Roscoe Conkling of New York; and Rush Holt's most effective opponent was Democrat Tom Connally of Texas. Similarly, Kentucky's house of representatives, dominated by Democrats, recognized Mae Hoover, a Republican, as satisfying the requirements for service.

666 See *supra* notes 269-313 and accompanying text.

667 See *supra* notes 467-79 and accompanying text.

668 See *supra* notes 654-63 and accompanying text.

669 See DONN TIBBETTS, *THE CLOSEST U.S. SENATE RACE IN HISTORY: DURKIN V. WYMAN* (1976).

670 See 121 CONG. REC. 25,960-61 (July 30, 1975).

The examples we have set forth in this Subpart also help demonstrate the breadth and scope of the privilege. Although as per *Powell v. McCormack* and *Bond v. Floyd* the privilege does not readily run to unstated qualifications, it is plenary with regard to stated qualifications, elections, and returns, and it arises inexorably with the gathering of the body. That is, it operates as a basis for admission or exclusion *both* at the threshold of service and after an individual has become a member. Indeed, any other formulation would render the privilege in large measure absurd, given that infirmities relating to “elections” and “returns” would *never* arise after an individual became a member.

As we have seen, in the vast majority of cases the basis for a contest or challenge arises before a would-be member appears in the chamber for admission, thus providing the grounds for exercise of the privilege either before the person is admitted or excluded, or after the person has been admitted, either provisionally or *simpliciter*. This was true of Gallatin, who was excluded after being admitted *simpliciter*,⁶⁷¹ of Lane and (apparently) Hoover,⁶⁷² who were retained after being admitted *simpliciter*,⁶⁷³ of Lewis, who was excluded after being admitted provisionally,⁶⁷⁴ of Ames⁶⁷⁵ and Holt,⁶⁷⁶ who were admitted upon resolution of a contest, and of Lewis,⁶⁷⁷ Vare,⁶⁷⁸ and Fortescue,⁶⁷⁹ who were excluded after resolution of a contest. And, needless to say, it was also true of every contestant we have discussed, who by definition would not be admitted provisionally, inasmuch as they lack *prima facie* evidence of election.

We have also seen that the privilege operates at the threshold of service without regard to the distinction between “qualifications,” “elections,” and “returns.” This makes perfect sense, given that the various constitutional provisions recognizing the privilege refer to these three items in series without chronological distinctions. Thus, Gallatin’s alleged infirmity (insufficient length of citizenship) preceded his appearance in the Senate, as did that of Lane (dual service), Ames and Hoover (insufficient length of residence), Lewis (lack of election), and Holt (insufficient age). The privilege has arisen in each of these contexts without regard to whether qualifications, elections, or returns were at issue.

The privilege, then, is broad indeed. And in keeping with this plenary nature, courts throughout the United States have almost invariably refused

671 See *supra* notes 227–68 and accompanying text.

672 See *supra* notes 269–313, 654–63 and accompanying text.

673 See *supra* notes 269–313, 654–63 and accompanying text.

674 See *supra* notes 346–66 and accompanying text.

675 See *supra* notes 314–45 and accompanying text.

676 See *supra* notes 430–66 and accompanying text.

677 See *supra* notes 346–66 and accompanying text.

678 See *supra* notes 367–429 and accompanying text.

679 See *supra* notes 139–61 and accompanying text.

to intervene in such matters, holding either that they lacked jurisdiction or that the case presented a non-justiciable political question. In the next Subpart, we consider some cases in this area.

D. Judicial Precedent

Given the unequivocal language of such provisions as section 38, the long history they reflect, and the theory that supports them, courts in the United States almost invariably refuse to interfere with the legislative privilege of determining members' eligibility. The list of cases standing for this proposition is quite long, and we do not purport to be making an exhaustive study. For purposes of analysis, we have divided these cases into two basic categories: (1) cases in which someone seeks to invoke or preclude a judicial or administrative proceeding in advance of a legislative contest; and (2) cases in which someone seeks by *quo warranto* or an equivalent to exclude an individual from the legislature for lack of eligibility. Although these categories do not account for every judicial treatment of the subject, they account for most.⁶⁸⁰ Without respect to category, however, the theme that runs through practically every case is that the privilege is plenary. "The courts will not undertake to decide upon the right of a party to hold a seat in the legislature," notes McCrary, "where by the constitution each house is made the judge of the election and qualifications of its own members."⁶⁸¹ "[I]t is well settled," writes the author of a note in the *Vanderbilt Law Review*, that a constitutional articulation of the privilege "vests in the legislature the sole and exclusive power to judge the election and qualifications

680 For an example of a court taking note of the privilege in another context, see *Reif v. Barrett*, 188 N.E. 889, 898 (Ill. 1933) (upholding a law that would not have passed without the vote of someone whom the House had admitted but who was alleged to be ineligible because of indebtedness to the state) ("No court has the right to review the decision of the House or command it to take action or nonaction upon the qualifications of its own members."), *overruled in part on other grounds*, *Thorpe v. Mahin*, 250 N.E.2d 633, 637 (Ill. 1969). See also McCrary, *supra* note 345, § 595, at 396 ("The cases in which the official acts or votes of members of a legislative body who are such *de facto* only, and not *de jure*, have been held valid . . .").

A further example of the breadth of the privilege is found in municipal practice. Although few if any constitutions recognize a privilege for municipal councils to judge the qualifications, elections, and returns of members, see generally McCrary, *supra* note 345, § 350, at 239, state legislatures have been known to confer such privileges by statute, and courts have been known to defer to such arrangements. In *Witten v. Sternberg*, 475 S.W.2d 496 (Ky. 1971), for example, the highest Court of Kentucky rejected a challenge to an election for the office of alderman in the City of Louisville, where the legislature had specifically authorized the board itself to resolve such disputes. See *id.* at 497. "[I]t is plain," the Court noted, "that the board of aldermen . . . is the sole judge of the election of its members (where the offices of less than a majority of the board are in question), and contests of elections for such office are excluded from the jurisdiction of the courts." *Id.* (citation omitted).

681 McCrary, *supra* note 345, § 350, at 239. The courts of Kentucky have cited McCrary's treatise on forty-six separate occasions, according to an electronic search.

of its own members and deprives the courts of jurisdiction to determine these matters.”⁶⁸² Although there is language in a very small number of cases that calls into question the broad scope of the privilege, this language is uniformly unnecessary to the resolution of the case, and also tends to reflect a profound lack of appreciation for the history and theory underlying the privilege.⁶⁸³

1. Actions Regarding a Proceeding in Advance of a Contest.—Although ultimate authority to judge the qualifications, elections, and returns of members lies with the legislature, courts and administrators often play an important complementary role with regard to exercise of the privilege. As McCrary observes, courts will often require electoral officials to “discharge their duties” and “arm the parties elected to [a] legislative body with the credentials necessary to enable them to assert their rights before the proper tribunal.” Such judicial relief does not threaten the privilege because it does not bind the legislature. “[T]he award of a certificate of election under such mandate,” McCrary notes, “will not conclude the legislative body in determining the election.”⁶⁸⁴ These actions do not derogate from the privilege, observes the author of the *Vanderbilt* note, because their “sole purpose [is] to facilitate proving to the legislative body that the candidate [has] a prime facie right to a seat, rather than to admit the candidate to office.”⁶⁸⁵ In this portion of the article, we discuss a few cases in this area.

a. People ex rel. Fuller v. Hilliard.—One of the earliest cases in this vein was *People ex rel. Fuller v. Hilliard*.⁶⁸⁶ In this case, Fuller sought by mandamus to compel a clerk to provide him with a certificate of election to the House of Representatives of Illinois. Hilliard, the clerk, argued that such relief would fall within the house’s exclusive province, and that therefore the courts should deny relief. Rejecting this contention, the Supreme Court of Illinois emphasized the distinction between an order requiring an

682 *Vanderbilt Note*, *supra* note 7, at 1410. See also JAMES HAMILTON LEWIS & ALBERT H. PUTNEY, *HANDBOOK ON ELECTION LAWS* § 54, at 196–97 (1912) (citing cases); PAUL MASON, *MASON’S MANUAL OF LEGISLATIVE PROCEDURE FOR LEGISLATIVE AND OTHER GOVERNMENTAL BODIES* § 560, ¶ 30, at 400 (1953) (citing cases) (“When a legislative body is made the sole judge of the election and qualifications of its members, its determination is conclusive and not subject to review even by the Supreme Court.”).

683 See *infra* notes 717–39 and accompanying text.

684 McCRARY, *supra* note 345, § 350, at 239; see also *Vanderbilt Note*, *supra* note 7, at 1412–13 (“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 with election procedure. Also, state courts have compelled a canvassing board to issue a certificate of election to a candidate.” (footnotes omitted))

685 *Vanderbilt Note*, *supra* note 7, at 1413.

686 *People ex rel. Fuller v. Hilliard*, 29 Ill. 413 (1862).

official to perform a purely ministerial act, which would not bind the legislature, and an order requiring the legislature to accept Fuller as a member. Whereas the courts could provide the former kind of relief, they could not provide the latter. "The relator asks not to be admitted to an office," said the Court, "but that evidence of his having been elected to an office shall be furnished him."

It is not to turn one man out and put the relator in office, that this proceeding is had. A mandamus will not lie for such purpose, and a decision in this case cannot affect the right of another claiming the office. That is for the House of Representatives to determine.⁶⁸⁷

In other words, because the certificate would simply give Fuller a *prima facie* claim to the seat, its issuance would not interfere with the house's final authority to resolve the dispute:

Though the House of Representatives is the sole and exclusive judge of the qualifications of its members, this application [for mandamus] has no reference whatever to the point of qualifications. Its sole purpose is to procure the requisite evidence, to present to that body, of a *prima facie* right to a seat in it, independent wholly of the question of qualification.⁶⁸⁸

b. Roudebush v. Hartke.—A recent and famous case in this vein is *Roudebush v. Hartke*, which the Supreme Court of the United States decided in 1972.⁶⁸⁹ Although, unlike *Fuller*, *Roudebush* involved a judicial rather than an administrative proceeding in advance of a legislative contest, the principle recognized by the Court was the same—that the non-legislative matter could proceed because it would not bind the legislature.

On November 3, 1970, the voters of Indiana appeared by a slight margin to re-elect incumbent Senator R. Vance Hartke, an outspoken critic of the war in Vietnam, over Richard L. Roudebush, whom President Nixon had persuaded to give up a safe seat in the House to run against Hartke. The election was bitter.⁶⁹⁰ On November 17, Roudebush asked the Indiana courts for a recount, as authorized by the laws of that state,⁶⁹¹ but Hartke succeeded in obtaining a federal interlocutory injunction to prevent this process from beginning.⁶⁹² Roudebush and the attorney general of Indiana,

687 *Id.* at 419.

688 *Id.*

689 *Roudebush v. Hartke*, 405 U.S. 15 (1972).

690 *See BUTLER & WOLFF, supra* note 226, at 419.

691 *See id.*

692 *See Hartke v. Roudebush*, 321 F. Supp. 1370 (S.D. Ind. 1970), *rev'd*, 405 U.S. 15 (1972).

who had intervened as a defendant, then sought review of this decision in the Supreme Court.⁶⁹³

On January 21, 1971, while Roudebush's appeal was pending, the Senate admitted Hartke "without prejudice" to the lawsuit pending in the U.S. Supreme Court.⁶⁹⁴ The exact meaning of this phrase is hard to discern, given that Roudebush was seeking review of the injunction, not Hartke's claim to the seat. As the Supreme Court later noted in its opinion reversing the district court, "[w]hich candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even before the Senate acted."⁶⁹⁵ But, the Court continued, "[t]he actual question before us . . . is a different one. It is whether an Indiana recount of votes in the 1970 election is a valid exercise of the State's power"⁶⁹⁶

On February 23, 1972, the Court handed down its opinion. It began by rejecting Hartke's claim that the appeal was moot, given that the Senate had already admitted him provisionally. Because the Senate had "postponed" its final decision on this issue, the Court had little difficulty recognizing a live controversy.⁶⁹⁷ After holding that the Anti-Injunction Act did not preclude the relief granted below,⁶⁹⁸ it proceeded to the merits of the case.

The district court had justified the injunction on two distinct grounds. First, it had concluded that those who undertook the recount "would be judging the qualifications of a member of the Senate," describing this as "a usurpation of the power that only the Senate could exercise."⁶⁹⁹ Second, it had found that the recount presented a sufficient danger of degradation of the ballots that it would "hinder[] the Senate's exercise" of its power.⁷⁰⁰

The Court rejected both of these grounds for the injunction. States have broad authority to regulate elections, the Court said, subject only to such regulations as Congress may adopt.⁷⁰¹ Although the Court acknowledged that a recount and the Senate's exercise of its privilege were "not totally inseparable," it nevertheless recognized—much like the Court in

⁶⁹³ See *Roudebush*, 405 U.S. at 18; see also BUTLER & WOLFF, *supra* note 226, at 419. Roudebush and the Attorney General were able to take an appeal directly to the Supreme Court because a three-judge district court had convened to hear the case. See *Roudebush*, 405 U.S. at 18 n.4 (citing 28 U.S.C.A. § 1253 (West 1970)).

⁶⁹⁴ 118 CONG. REC. 7 (Jan. 21, 1971) (Senator Bayh); see also BUTLER & WOLFF, *supra* note 226, at 419.

⁶⁹⁵ *Roudebush*, 405 U.S. at 19.

⁶⁹⁶ *Id.*

⁶⁹⁷ *Id.*

⁶⁹⁸ *Id.* at 23.

⁶⁹⁹ *Id.* at 23–24.

⁷⁰⁰ *Id.* at 24.

⁷⁰¹ See *id.* (citing U.S. CONST. art. I, § 4, cl. 1).

Fuller—that “a recount can be said to ‘usurp’ the Senate’s function only if it frustrates the Senate’s ability to make an independent final judgment.”⁷⁰² In other words, the recount would only have to stop if it would somehow prevent the Senate from deciding for itself. This not being the case, the recount could continue and the injunction was improper. As the Court went on to note, “[t]he Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount.”⁷⁰³ The Court concluded its analysis by refusing to assume that the recount *Roudebush* had requested would somehow impair the Senate’s determinations.⁷⁰⁴

The recount sustained Hartke’s victory. On June 12, Hartke acted to “terminate” the matter, and on July 24, Senator Howard W. Cannon of Nevada, chairman of the Subcommittee on Privileges and Elections, which by then took jurisdiction over such matters, announced that Hartke was “the duly elected Senator from the State of Indiana and [was] entitled without reservation or qualification to his seat in the Senate.”⁷⁰⁵

Like *Fuller*, *Roudebush* turned on the distinction between a proceeding in advance of a legislative determination and the legislative determination itself. Because the earlier proceeding simply yields prima facie evidence of election, it does not interfere with exercise of the privilege.

c. O’Hara v. Powell.—Another interesting case in this category is *O’Hara v. Powell*.⁷⁰⁶ In this case, O’Hara sought a seat in the United States House of Representatives from North Carolina. Believing that electoral officials had improperly excluded certain favorable precincts from their canvass, causing the certificate to issue to the wrong person, O’Hara sought mandamus to compel them to reconvene and perform their count anew.⁷⁰⁷ The Supreme Court of North Carolina refused relief, however, justifying its decision on two distinct grounds. First, the Court observed that mandamus was an inadequate and clumsy remedy for the alleged errors, particularly given the amount of time that had transpired since the election. Were the Court to award mandamus, it observed, local returns might change, but local officials lacked authority to grant certificates of election. In other words, O’Hara would have to seek mandamus yet again against officials at a higher level of government.⁷⁰⁸

Second, the Court emphasized that nothing the administrative or executive officials of North Carolina could do or fail to do could prevent the

⁷⁰² *Id.* at 25.

⁷⁰³ *Id.* at 25–26 (footnotes omitted).

⁷⁰⁴ *See id.* at 26.

⁷⁰⁵ *See* 118 CONG. REC. 25,022 (July 21, 1972); *see also* BUTLER & WOLFE, *supra* note 226, at 420; Rowland L. Young, *Supreme Court Report*, 58 A.B.A. J. 510, 514 (May 1972).

⁷⁰⁶ *O’Hara v. Powell*, 80 N.C. 103 (1879).

⁷⁰⁷ *See id.* at 106.

⁷⁰⁸ *See id.* at 106–07.

House of Representatives from entertaining a contest. “In the election of a member of the general assembly, or a representative in congress,” it noted, “contesting claims to a seat must be tried before the body to which the certificate of election or commission accredits the person holding it, and the decision there made is final and irreversible.”

If [O’Hara’s opponent in the election], to whom we must assume the commission has been given in accordance with the count and determination of the board, should take his seat as a member of the house of representatives, can he be disturbed or the relator assisted in his efforts to displace him by any action which the court is competent to take? The power to do this resides exclusively in the house, and in our opinion not less so after the case has passed beyond further control of the state and its officers by the issuing of the commission.⁷⁰⁹

At bottom, the Court’s refusal to provide relief on these grounds reflects the rule against advisory opinions. If a court perceived the awarding of prima facie evidence of election as inherently preliminary—and therefore incompetent to readjust the rights of the parties—because of the legislature’s ultimate authority, it might deny jurisdiction and leave the plaintiff to his or her legislative remedy. On the other hand, prima facie evidence of

⁷⁰⁹ See *id.* at 108. For other cases in this general vein, see *O’Ferrall v. Colby*, 2 Minn. 180, 188–89 (1858) (“Another position urged by the defense is, that, as by the constitution the senate is made the judge of the election and eligibility of its members, no other tribunal can or ought to take jurisdiction of this case. This position, we think, is sufficiently answered by the fact that this is not a proceeding to try the right of any party to the office of senator, but simply to determine whether the plaintiffs are entitled, at the hands of the defendant, to certificates of election to that office. Nor can our decision in the least affect the question of the election of either of the candidates. That question can be definitely settled by the senate alone. The aid of this court is sought to prevent the consequences of an usurpation of authority on the part of this board of canvassers, and to compel the defendant to do his duty. All that we can do is to arm the parties entitled, with the credentials necessary to enable them properly to assert their rights before the proper tribunal. Whether they, or either of them, were legally elected is not a question here. One candidate may be entitled to a certificate of election, while his opponent may have a clear right to the office.”); *State ex rel. McDill v. Bd. of State Canvassers*, 36 Wis. 498, 505 (1874) (“We cannot determine the right to the office, but only the duty of the board of state canvassers in respect to the canvass. The power to determine the right is, by the constitution of the United States, vested exclusively in the house of representatives. Hence we cannot go behind the returns and investigate and correct frauds and mistakes, and adjudge which of the candidates was elected, but can only determine whether the board of state canvassers ought to include in its canvass and statement of the votes cast for representative in congress those returned from Wood county. This proposition is not controverted.” (citation omitted)).

election is hardly meaningless,⁷¹⁰ nor can courts ever know with certainty that their decisions will have operative effect.⁷¹¹

d. Missouri ex rel. Carrington v. Human.—*Missouri ex rel. Carrington v. Human* falls into the same general category as *O'Hara*, in that in this case as well the Court refused to reach the merits due to the preliminary nature of the relief it was asked to provide.⁷¹² In this case, Carrington and Whitmore were Democrats running for the same seat in Missouri's house of representatives. After Whitmore defeated Carrington in the primary, Carrington established in court that Whitmore did not reside in the district and obtained an order excluding him from the ballot for the general election. Because Carrington's name as well was not on the ballot, and because no Republican had thrown a hat into the ring, the general election depended entirely on write-in votes, in which Whitmore again defeated Carrington. After the general election, Carrington obtained a preliminary writ of prohibition from a lower court to prevent the boards of election in the district from transmitting Whitmore's totals to the secretary of state. Before the writ became absolute, the Supreme Court of Missouri took up the case.⁷¹³

To Carrington, the issue presented was whether the boards could inform the secretary of state of Whitmore's votes when their members knew, both constructively and actually, that a court had found Whitmore ineligible to serve.⁷¹⁴ The Court, however, looked at the proceeding from a very different perspective, ultimately predicated on Missouri's version of the privilege. To the Court, the real issue in the case was not whether Carrington deserved to have his totals transmitted, but whether a judicial officer could award relief that would prevent the ultimate tribunal from having a particular category of information at its disposal.⁷¹⁵ Given the scope of the legislative privilege, the Court observed, no form of judicial relief could readjust the rights of the parties in a permanent way.

⁷¹⁰ See Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, FLA. L. REV. 541, 571 (2004) ("That the governor's certificate of election was not conclusive did not mean that it was of no value.").

⁷¹¹ See Gordon C. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189, 1247 ("[T]he hypothesis that the Constitution prohibits federal courts from issuing opinions which *may prove* unnecessary is clearly false. Any opinion ultimately may prove to have been unnecessary as a result of a wide variety of circumstances including the winning party's decision to ignore it.").

⁷¹² *Missouri ex rel. Carrington v. Human*, 544 S.W.2d 538 (Mo. 1976).

⁷¹³ See *id.* at 539.

⁷¹⁴ See *id.*

⁷¹⁵ See *id.* ("Relator's formulation fails to recognize the more crucial threshold question of our power and right to pass upon the issue presented—that is, whether, in the face of [Missouri's version of the privilege], we should interfere with the forwarding of the write-in vote totals received by the candidates, including intervenor, from the election boards to the Secretary of State.")

There is nothing a court can do to prevent the general election from bringing [Missouri's version of the privilege] into effect The passage of time and occurrence of events often render undecidable causes of action at various stages of the judicial process, and courts recognize this process by various names such as mootness, nonjusticiability, political question, or lack of jurisdiction. In any of these cases, the court is powerless to regain its ability to decide.⁷¹⁶

e. Hayes v. Gill.—As the foregoing cases illustrate, courts asked to resolve an electoral dispute pertaining to a seat in the legislature have two basic options consistent with separation of powers. One is to proceed to judgment, recognizing that the decision, although competent to furnish a candidate with prima facie evidence of election, will not bind the legislature. The other is to refuse jurisdiction on the ground that courts should not render decisions that may not be fully implemented. But a small number of courts, in fact perhaps as few as two, have suggested a third alternative, under which a court exercises jurisdiction on the premise that the legislature will not act inconsistently with its earlier conclusion. Although this alternative has obvious appeal, given courts' customary expectation that their decisions will be fully implemented, it fails to appreciate the text, history, theory, and precedent supporting the privilege.

Hayes v. Gill falls in this third category.⁷¹⁷ Hayes, who sought a seat in Hawaii's house of representatives, expected to complete her third year as a resident of the state on January 10, 1971,⁷¹⁸ three years being the length of residence required for service in that body.⁷¹⁹ The regular session for the term for which she sought election would begin ten days later, on January 20,⁷²⁰ but a statute appeared to require her to certify, as a condition for access to the ballot, that she would be eligible to serve as of the general election, which would take place on November 3, 1970.⁷²¹ Because she could not so certify, the lieutenant governor of the state, Gill, refused to put her name on the ballot.⁷²²

In proceedings before the Supreme Court of Hawaii, Hayes raised two points of relevance to this article. First, she argued that the constitution

⁷¹⁶ *Id.* at 540. For another case in this vein, see *Indiana ex rel. Wheeler v. Shelby Circuit Court*, 362 N.E.2d 477, 480 (Ind. 1977) (“[The privilege] effectively prevents the courts of this state from engaging in cooperative efforts together with the Legislature to determine the correct outcome of elections for legislative offices . . .”).

⁷¹⁷ *Hayes v. Gill*, 473 P.2d 872 (1970), *appeal dismissed sub nom. Hayes v. Lieutenant Governor of Haw.*, 401 U.S. 968 (1971).

⁷¹⁸ *See id.* at 874.

⁷¹⁹ *See id.* (quoting HAW. CONST. art. III, § 6).

⁷²⁰ *See id.*

⁷²¹ *See id.* (quoting HAW. REV. STAT. ANN. § 12-3(6) (LexisNexis 1970)).

⁷²² *See id.* at 875.

required three years' residence before the beginning of the legislature's regular session, not before the general election.⁷²³ Second, she argued that excluding her from the ballot would interfere with the house's authority to determine the eligibility of its members. Although the Court could have rejected both arguments without deviating from the pattern established by other courts, it did not do so.

Rejecting Hayes's first argument, the Court construed the statute to do nothing more than reflect the constitutional requirement for residency and expressed concern that an emergency might require her to attend a session before she was eligible to serve.⁷²⁴ "Petitioner's argument ignores the possibility," it noted, "that there may be an emergency which requires the calling of a special session between the date of the general election and the convening of the first regular session . . ." "It may well be," it went on to note, "that the emergency which requires the convening of such special session will involve a situation where the need of the constituents to be effectively represented is the greatest."⁷²⁵ Rush Holt's detractors could not have put the matter more succinctly in the Senate of the United States in 1935.⁷²⁶

Rejecting Hayes's second argument, the Court took the position that the house's power to judge its members' qualifications did not include a power to construe those qualifications contrary to a prior judicial construction. Although the Court acknowledged that the houses of Congress had in the past assumed such an authority, it went on to state that "such actions do not establish that each house in fact has such power." Taking *Powell v. McCormack* as its cue, the Court concluded that, were the question presented to the Supreme Court of the United States, it would hold that "the power of each house to judge the qualifications of its members does not include the power to construe the constitutional provision on qualifications contrary to the construction of the court."⁷²⁷

This conclusion is acutely vulnerable to criticism. First, as a matter of judicial practice, the Court should not have reached a constitutional issue of such magnitude where the circumstances did not so require. Like virtually every other court to address an issue of this type, the Court could have, and should have, emphasized the distinction between denying access to the ballot, on the one hand, and determining the eligibility of would-be members to serve in the legislature, on the other, and concluded its analysis at this point. In fact, not only should it have taken this step as a matter of judicial practice, in the process of doing so it might also have taken note of the fact that no legislature in the history of the United States appears ever

⁷²³ *See id.*

⁷²⁴ *See id.* at 876.

⁷²⁵ *Id.*

⁷²⁶ *See supra* notes 430-66 and accompanying text.

⁷²⁷ *Hayes*, 473 P.2d at 876.

to have admitted as a member an individual who has not stood for election.

Second, the Court's analysis is exceedingly light, and indeed practically nonexistent, apart from speculation as to how the Supreme Court of the United States might extend *Powell v. McCormack*. The Court can surely take the position that mere construction of the qualifications for office does not translate into a legitimate power to do so, but it still must explain why such a practice is wrong. This is particularly true where the houses of Congress have not only on occasion assumed a power to construe the qualifications for service set forth in the federal Constitution but have in fact made such construction the warp and woof of their debates. *In re Gallatin*, for example, would have made no sense if the Senate lacked authority to determine how one becomes a "Citizen of the United States,"⁷²⁸ and *In re Ames* would have been an exercise in the fantastic if the Senate could not decide for itself what constituted becoming an "[i]nhabitant" of a state for purposes of service in that body.⁷²⁹ And this was true most of all for such proceedings as *In re Shields* and *Hatfield v. Holt* (as well as, somewhat obliquely, *In re Gallatin*), in which the precise issue presented was when the would-be member had to possess the prerequisites for membership. The degree of ahistoricism and inattentiveness to legislative practice displayed by the Supreme Court of Hawaii in *Hayes v. Gill* was thus more than slight and more than a little objectionable. "[O]ne of the striking peculiarities of our history . . .," James Boyd White once observed, is that "our constitutional discourse has been most fully developed by the courts."⁷³⁰ In writing this, White's point of emphasis instead might have been that courts, at least in cases like *Hayes v. Gill*, have a tendency to overlook constitutional discourse that is not their own. In doing this, their degree of solicitousness for the other branches of government is open to criticism.

To be sure, the Court in *Hayes v. Gill* limited its observations to situations in which a court has previously held a particular individual ineligible to serve, but this limitation appears to float in mid-air. If the legislature lacks authority to construe the qualifications for service, that absence of authority would apply in the presence or absence of a prior judicial determination. In any case, the Supreme Court of Hawaii's rationale on this point appears to mistake comity—a voluntary principle—for separation of powers, and in fact appears to stand separation of powers on its head, preserving it as a rule of decision except where another branch deems its prior determination preclusive. "[T]he necessary date for the fulfillment of the

728 U.S. CONST. art. I, § 3, cl. 3. See *supra* notes 227–68 and accompanying text for a discussion of *In re Gallatin*.

729 U.S. CONST. art. I, § 3, cl. 3. See *supra* notes 314–45 and accompanying text for a discussion of *In re Ames*.

730 JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 247 (1984).

residency requirement set forth in [Hawaii's Constitution]," noted Justice Levinson in his dissent in *Hayes*, "is open to conflicting interpretations." "In the light of the [privilege's] clear language," he argued, "I think it is apparent that the State constitution has delegated to the house of representatives the right to make a final determination as to when the residency requirement . . . must be met by its members."⁷³¹

Contrary to the view taken in *Hayes*, courts working in this area have almost universally recognized that, due to its plenary nature, exercise of the privilege will sometimes yield inconsistent legislative and judicial determinations. In *People ex rel. Drake v. Mahaney*,⁷³² for example, Mahaney argued that the exercise of the privilege could not be exclusive because otherwise legislatures might reach conclusions of law inconsistent with those of courts.⁷³³ Without denying this possibility, the Supreme Court of Michigan nevertheless confirmed the privilege's exclusive nature. "It may happen," it noted, "that with each house, not only deciding for itself questions of fact, but also construing for itself the law, we may sometimes witness the extraordinary spectacle of the two bodies construing and enforcing the law differently, while a third construction is enforced by the courts upon the public at large." "But with this possibility in view," it went on to state, "the evils of allowing the courts a supervisory power over the decisions of the houses upon the admission of members, are so great and so obvious that it is not surprising that the framers of the constitution refrained from conferring the power."⁷³⁴ Continuing, the Court observed that "[i]t can make no difference that in this case, according to the pleas, the question passed upon by the house was purely a question of law. The question of the legal election of a member is usually a question compounded of law and fact, and the house must necessarily pass upon both."⁷³⁵ "In [*Mahaney*]," the highest court of Kentucky noted some 100 years later, "it was pointed out that the legislature and the courts might have conflicting views as to the qualifications of a member of that body but that the exclusive power to make the final determination had been lodged in the legislature by the Constitution."⁷³⁶

⁷³¹ *Hayes*, 473 P.2d at 880 (Levinson, J., dissenting); see also *id.* ("The residency requirement is one of the constitutionally listed qualifications for membership in the house of representatives, and the constitution plainly states that each house shall judge the qualifications of its own members. To sit in judgment necessarily implies the power to interpret the law affecting the case . . ."). Justice Levinson discussed *In re Gallatin*, *In re Shields*, and *Hatfield v. Holt* at some length. See *id.* at 880-81.

⁷³² *People ex rel. Drake v. Mahaney*, 13 Mich. 481 (1865).

⁷³³ See *id.* at 493-94. Mahaney's precise argument was that the House of Representatives would have lacked authority to make a statute adverse to him operate immediately without the votes of several members who, he argued, were not eligible to serve. See *id.* at 491-92.

⁷³⁴ *Id.* at 493-94.

⁷³⁵ *Id.* at 494.

⁷³⁶ *Raney v. Stovall*, 361 S.W.2d 518, 522 (Ky. 1962); see also *id.* at 523 ("[T]he fact that

Finally, the Supreme Court of Hawaii's purported extrapolation from *Powell* was essentially repudiated by the Supreme Court of the United States in *Roudebush v. Hartke*.⁷³⁷ In *Roudebush*, the Court recognized the authority of the houses of Congress to adjudicate questions pertaining to the eligibility of prospective members as plenary and exclusive, apart from the power to impose unstated qualifications. As may be recalled, the *Roudebush* Court permitted a recount to proceed in the courts of Indiana, notwithstanding the federal Senate's authority to judge the "elections" and "returns" of its members, because the Senate was "free to accept or reject the apparent winner" and even "to conduct its own recount" if it so chose.⁷³⁸ This would entail, one would have to conclude, defining the terms "election" and "return," including such concepts internal to these words as "ballot" and "valid ballot."⁷³⁹

2. *Actions to Exclude People from the Legislature*.—*Black's Law Dictionary* defines *quo warranto* as "[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed."⁷⁴⁰ Although this writ evolved as a means to contest virtually any claim to public office, it never has extended to seats in the legislature. "Following English practice," writes Stephen A. Siegel, "the only exception [to the broad scope of *quo warranto*] was legislative office because, by common-law tradition, the legislature itself was the appropriate tribunal for determining the elections and qualifications of its own members."⁷⁴¹ The cases reflect this principle, even when litigants do not resort to *quo warranto* by name.

a. *Kansas ex rel. Attorney General v. Tomlinson*.—Perhaps the most powerful example of a court refusing to exclude someone from the legis-

the legislature may make a wrong decision is no reason why the judiciary should invade what has been designated as the exclusive domain of another department of government.").

737 *Roudebush v. Hartke*, 495 U.S. 15, 25–26 (1972).

738 *Id.* at 25.

739 Only one court appears to have reiterated the dictum of *Hayes v. Gill*, and courts typically cite *Hayes* for the uncontroversial proposition that the judiciary may entertain cases in advance of an election. In *Comer v. Ashe*, 514 S.W.2d 730 (Tenn. 1974), the Supreme Court of Tennessee held that Comer's name could not appear on the ballot because of his age. *See id.* at 741 ("We do not hold that [Ashe] is ineligible to sit in the Senate on or after January 1, 1975; merely that he is ineligible prior to that time and, being ineligible, is not qualified to have his name appear upon the ballot."). Taking up the question of the privilege, the Court then went on to observe that the Senate should not "nullify, abrogate or alter any prior determination made by the courts." *Id.* As in *Hayes*, the Court could have, and should have, relied on its authority to govern access to the ballot and pretermitted the delicate question of the extent of the Senate's authority. Moreover, in adopting the language of *Hayes* as its own, the Supreme Court of Tennessee overlooked the history, precedent, and theory underlying the privilege as much as the Supreme Court of Hawaii had in *Hayes*.

740 BLACK'S LAW DICTIONARY 1285 (8th ed. 2004).

741 Siegel, *supra* note 710, at 570.

lature is *Kansas ex rel. Attorney General v. Tomlinson*.⁷⁴² In this case, Kansas's expanding population had put its house of representatives in something of a quandary. As new counties organized and voters took to the polls, people arrived at the capital with indicia of election but without a clear seat to occupy. Although the constitution authorized and in fact required the house to "admit one member from each county in which at least [250] legal votes were cast at the next preceding general election,"⁷⁴³ it also limited the house to 125 members.⁷⁴⁴ In addition, it provided that "each organized county in which less than [200] votes were cast at the next preceding general election shall be attached to [the district to the east]."⁷⁴⁵

These provisions were clumsy, to say the least. For one thing, once 250 people had cast legal votes in enough new counties, the house would have to choose between discharging its duty to admit new members and its duty to observe the upper limit of 125. Second, the constitution appeared to overlook counties in which more than 199 but fewer than 250 legal votes had been cast. Did they attach? Did they wait in limbo until they amassed 250 voters?⁷⁴⁶ Third, the document did not specify how counties with small populations "attached," and the legislature had enacted no enabling statute in that regard.⁷⁴⁷ Finally, even if attachment were a simple matter, it presumably would not occur until electoral officials saw that fewer than 250 legal votes had been cast in a particular county, and thus the voters of the attaching county would have had no role in choosing the representative from the more heavily populated county to the east who in theory represents them.

Some of these concerns played out in the elections of 1876. When the house convened in 1877, 127 people appeared seeking admission, including 123 representatives-elect from established districts and from four new counties—Rooks, Barbour, Edwards, and Rush.⁷⁴⁸ The number of legal votes cast in these four counties at the preceding general election had been, respectively, 161, 199, 336, and 143.⁷⁴⁹ Arguably, the house should have admitted only the member-elect from Edwards County, but this option presumably would have left the voters of the other three counties without having had a direct role in the election of any member of the house. No solution being perfect, the house decided to admit all four, including W.P. Tomlinson, member-elect from Rush County.⁷⁵⁰

742 *Kansas ex rel. Attorney Gen. v. Tomlinson*, 20 Kan. 692, 1878 WL *1 (1878).

743 *Id.* at *1 (quoting KAN. CONST. art. II, § 2 (as amended in 1873)).

744 *See id.* (citing KAN. CONST. art. II, § 2 (as amended in 1873)).

745 *Id.* (quoting KAN. CONST. art. II, § 2 (as amended in 1873)).

746 *See id.* (reporter's footnote).

747 *See id.* (reporter's footnote).

748 *See id.* at *3.

749 *See id.* at *2.

750 *See id.* at *3.

Aware that its actions implicated the constitution, the house, along with the senate, authorized a joint committee to “inquire into the constitutionality of the present legislature” and, if necessary, to “prepare a case for the supreme court [so] that this question may be settled.” In particular, the committee was charged to “ask the supreme court to decide what members are not entitled to their seats”⁷⁵¹ Unable to prepare a case before adjournment, the committee asked the attorney general of the state to do so.⁷⁵² That officer then sought *quo warranto*, alleging that Tomlinson unlawfully held office.⁷⁵³ Although the Supreme Court of Kansas acknowledged both the deplorable nature of the situation and the legislature’s decision to seek its advice, it nevertheless held that it could not provide relief given the scope and exclusivity of the legislative privilege at issue:

That our decision . . . may not be misunderstood, or misconstrued, we desire to say, that we do not decide that the house of representatives can consist of more than [125] members . . . but our decision is, that whether the house does or does not admit a greater number of persons as members than [125], this court has no jurisdiction to inquire by *quo warranto*, or otherwise, as to the right of any person to a seat as a member with a view of ousting him from his seat.⁷⁵⁴

The Court also emphasized the absence of contrary authority:

We are not cited to a single case in the federal or state courts, where any member of congress, or any member of a state legislature, from the foundation of the government to the present time, has been ousted by *quo warranto*. And the admission of this fact of itself, after the extensive investigation of this subject by the learned attorney-general, is almost conclusive that none can be found, and that the exercise of such power is not only unwarranted, but unknown.⁷⁵⁵

⁷⁵¹ *Id.* at *4 (quoting 1877 KAN. SEN. JOUR. 265 (Sen. Res. No. 25)).

⁷⁵² *See id.*

⁷⁵³ *See id.*

⁷⁵⁴ *Id.* at *9; *see also id.* at *8 (“This power is exclusively vested in each house, and cannot by its own consent, or by legislative action, be vested in any other tribunal or officer.”).

Although the Attorney General made a credible argument that the Court should distinguish a determination whether someone is eligible to serve from a determination whether a seat exists in which to serve, *see id.* at *5, counsel for Tomlinson noted that the House of Representatives of the United States had in the past decided whether a district existed for the purposes of electing a member. *See id.* at *6–7.

⁷⁵⁵ *Id.* at *8. The *Tomlinson* Court distinguished the case of *Prouty v. Stover*, 11 Kan. 235 (1873), on the ground that, in that case, the legislature had been acting in a non-legislative, electoral capacity. *See Tomlinson*, 1878 WL 986, at *9.

b. Heller v. Legislature of Nevada.—The situation presented in *Tomlinson* was obviously extreme, and most likely would not occur in an era such as ours when legislatures do not expand in size. But the trope on which the Court relied—the complete absence of contrary precedent—is a staple of holdings in this area. A recent example with less striking facts is *Heller v. Legislature of the State of Nevada*.⁷⁵⁶ In *Heller*, the secretary of state of Nevada sought mandamus to challenge certain people's service in both the legislative and executive branches of state government.⁷⁵⁷ Construing the action as a *quo warranto*, and assuming arguendo the absence of other flaws in the petition, the Supreme Court of Nevada nevertheless denied relief on the basis of separation of powers. As the Court noted, "any attempt through a judicial proceeding to exclude or oust executive branch employees from the legislature is barred by the separation of powers."⁷⁵⁸ Like the Court in *Tomlinson*, the Court in *Heller* noted the complete absence of contrary precedent: "The Secretary has not identified, nor are we aware of, any case in which the separation-of-powers barrier was breached to oust a member of the legislature for any reason, including dual service."⁷⁵⁹

c. Taylor v. Beckham.—Given that *Stephenson v. Woodward* arose in Kentucky, we would be remiss to conclude this portion of the article without mentioning *Taylor v. Beckham*,⁷⁶⁰ a famous case in which Kentucky's highest court denied relief to an aggrieved contestee, albeit one who had been excluded from the office of governor. Although the case was not technically a *quo warranto*, it was an attempt to overturn the legislature's resolution of a contested election and thus approximated such an action. Moreover, even though the case does not concern a legislature's authority to decide contested elections among its own members, *Taylor v. Beckham* does demonstrate that courts have tended to view legislatures' constitutionally delegated powers to decide election contests in the most sacrosanct of lights.

Kentucky is one of many states in which contests arising from gubernatorial elections go to the legislature. Although resolving such contests does not literally partake of the privilege we have been discussing, it implicates many of the same principles of majoritarian democracy and separation of powers, in that it empowers an otherwise political body to sit in a judicial capacity. Indeed, the constitutional provision that authorizes this proce-

756 *Heller v. Legislature of the State of Nevada*, 93 P.3d 746 (Nev. 2004).

757 *See id.* at 748.

758 *Id.* at 756–57.

759 *Id.* at 754. Although the *Heller* Court preliminarily concluded that *quo warranto* may lie against a legislator, *see id.* at 751–52, it went on to hold that separation of powers would not permit a court to exclude or oust individuals from a legislature. *See id.* at 756–57.

760 *Taylor v. Beckham*, 56 S.W. 177 (Ky.), *appeal dismissed*, 178 U.S. 548 (1900).

ture is functionally identical to the provision that recognizes the legislative privilege to decide whether members are eligible to serve.⁷⁶¹

The gubernatorial election of November 7, 1899, between incumbent State Senator William Goebel, a Democrat, and Attorney General William S. Taylor, a Republican, was bitter and close.⁷⁶² When the official count was in, Taylor appeared to have prevailed.⁷⁶³ “[T]his was the signal,” noted Thomas D. Clark, “for Democrats to start challenging votes”:

It was claimed that [incumbent] Governor Bradley’s troops had prevented an honest election in Louisville. Most outrageous of all, however, was the fact that by political chicanery or “oversight,” votes of many eastern Republican counties were registered on “tissue paper” ballots, which, it was claimed, were not printed on legal weight paper. This charge, a fine piece of Kentucky chicanery, was trumped up to throw out the election.⁷⁶⁴

The matter then went to a special board that the legislature had recently established on Goebel’s initiative. Although believed by many to be predisposed to find for Goebel,⁷⁶⁵ on December 9 the board determined by a split vote that Taylor in fact had won by more than 2000 votes.⁷⁶⁶ Three days later, Taylor assumed office, with John Marshall as his lieutenant governor.⁷⁶⁷

On January 3, 1900, just after the legislature convened, Representative G.W. Hickman and Senator L.H. Carter laid the contest of *Goebel v. Taylor* before the house and senate respectively.⁷⁶⁸ As specific grounds for the

⁷⁶¹ Compare KY. CONST. § 38 (“Each House of the General Assembly shall judge of the qualifications, elections and returns of its members, but a contested election shall be determined in such manner as shall be directed by law.”) with *id.* § 90 (“Contested elections for Governor and Lieutenant Governor shall be determined by both Houses of the General Assembly, according to such regulations as may be established by law.”).

⁷⁶² See THOMAS D. CLARK, A HISTORY OF KENTUCKY 431–32 (1954); KENTUCKY’S GOVERNORS, 1792–1985, at 111 (Lowell H. Harrison ed., 1985) [hereinafter Harrison]; 2 SAMUEL M. WILSON, HISTORY OF KENTUCKY 547 (1928) (“It was a fight to the finish and the campaign lasted right up to the last minute.”).

⁷⁶³ See WILSON, *supra* note 762, at 547.

⁷⁶⁴ CLARK, *supra* note 762, at 432.

⁷⁶⁵ See CLARK, *supra* note 762, at 429 (“Senator Goebel virtually had the Kentucky electorate in his power, since he was entrusted, as a reward for his activities, with the selection of the first state election board.”); Harrison, *supra* note 762, at 114 (describing the “so-called Goebel election law”) (“Designed as a reform measure to insure fair elections, it centralized powers under an election commission, which was manned by three allies of Goebel.”)

⁷⁶⁶ See CLARK, *supra* note 762, at 433; Harrison, *supra* note 762, at 111; WILSON, *supra* note 762, at 547; see also Taylor v. Beckham, 56 S.W. 177, 184 (Ky.), *appeal dismissed*, 178 U.S. 548 (1900).

⁷⁶⁷ See CLARK, *supra* note 762, at 433; Harrison, *supra* note 762, at 111.

⁷⁶⁸ KY. HOUSE JOUR. 45 (Jan. 3, 1900); KY. SEN. JOUR. 60 (Jan. 3, 1900). Goebel’s running mate, J.C.W. Beckham, brought a similar contest against John Marshall for the office of Lieutenant Governor. See KY. HOUSE JOUR. at 52 (Jan. 3, 1900). Given the similarity of the

contest, Goebel alleged various electoral irregularities and corrupt practices, including the use of "transparent" ballots and the unlawful calling out of the militia.⁷⁶⁹ The next day, a committee of eight representatives and three senators was chosen and began deliberating.⁷⁷⁰ For a variety of reasons, Taylor and his supporters objected to the composition and proceedings of the board and anticipated an adverse report.⁷⁷¹

Matters then took a turn very much for the worse. On January 30, Goebel was shot while walking toward the capitol.⁷⁷² Taylor promptly called out the militia, which prevented legislators from entering the capitol.⁷⁷³ Later that day, he also declared a state of insurrection and required the legislature to meet in London, Kentucky, quite a distance away.⁷⁷⁴ Undaunted, the Democrats met in a nearby hotel, adopted the board's report, which had been favorable to Goebel, and resolved the contest accordingly.⁷⁷⁵

Whether this occurred in a regular manner is not entirely clear. On that question, noted Samuel M. Wilson in 1928, "there has never been any

contests, however, we will refer only to *Goebel v. Taylor*.

769 KY. HOUSE JOUR. 46-48 (Jan. 3, 1900); KY. SEN. JOUR. 61-62 (Jan. 3, 1900).

770 See KY. HOUSE JOUR. 71-72 (Jan. 4, 1900); KY. SEN. JOUR. 105-06 (Jan. 4, 1900).

771 See CLARK, *supra* note 762, at 433 (noting the board was chosen by lot) ("Only fate could have defeated the Democrats in this drawing, since they dominated the legislature. One Republican and one Populist were chosen. The other members were Democrats."); LOWELL H. HARRISON & JAMES C. KLOTTER, *A NEW HISTORY OF KENTUCKY* 271 (1997) ("An investigating committee was formed, and in what was likely a prearranged drawing, ten of the eleven names picked were Democrats. Republicans expected the committee to recommend removal of enough ballots so Goebel would have a majority . . ."); see also HARRISON, *supra* note 762, at 111; WILSON, *supra* note 762, at 550 ("[T]he outlook for the republicans . . . before the contest board . . . was gloomy and discouraging."). On January 15, Senator N. T. Howard introduced a resolution in the Senate to discharge the three senators from the board, producing an affidavit from Taylor to the effect that the drawing of names for the board had been fraudulent, that several of the board's members were partial to Goebel, and that the board was improperly preventing him from making his case. See KY. SEN. JOUR. 189-92 (Jan. 15, 1900). After Howard spoke, Senator Carter proposed to refer Howard's motion, along with Taylor's affidavit, to the Committee on the Judiciary. Howard acceded to this substitute with some changes, and the Senate adopted the substitute, as amended, with only one dissenting vote. See *id.* at 192. On January 16, the matter came back to the floor but then returned to committee. See *id.* at 200-01.

772 See CLARK, *supra* note 762, at 434 (noting that Goebel was "shot through the abdomen by a rifleman concealed somewhere in the capitol office building"); HARRISON, *supra* note 762, at 115; WILSON, *supra* note 762, at 551-52 ("As soon as the wounded man could receive attention, it was discovered that his injuries were serious and little hope of his recovery was entertained by the physicians in attendance.").

773 See KY. SEN. JOUR. 295 (Jan. 31, 1900) ("At 10:30 o'clock the senators proceeded to the senate chamber but were refused admission thereto by D. R. Collier, Adjutant-General of Kentucky, accompanied by armed men. The senators then proceeded to the Capitol Hotel in Frankfort, Kentucky."); see also HARRISON, *supra* note 762, at 115; WILSON, *supra* note 762, at 552.

774 See WILSON, *supra* note 762, at 553.

775 See CLARK, *supra* note 762, at 434; WILSON, *supra* note 762, at 554.

agreement among the rival political parties or among historians of the period.” “But in their practical effect,” he observed, “the meetings so held were as effectual as if they had been called and held in the regular way under the roof of the Capitol building itself.”⁷⁷⁶ Writing more recently, James C. Klotter has concluded unequivocally that the proceedings were in fact clandestine.⁷⁷⁷ The *Journals* themselves suggest no irregularity, however, noting that the speaker called a joint session on January 31,⁷⁷⁸ that the members came to order,⁷⁷⁹ that the report was received,⁷⁸⁰ and that it was adopted without dissent.⁷⁸¹

Goebel quickly took office,⁷⁸² but died just a few days later, Beckham taking his place.⁷⁸³ Taking issue with alleged irregularities in the resolution of the contest, Taylor took his case to court but was unsuccessful. Despite claims that the legislature had failed to conduct the contest according to established principles of law,⁷⁸⁴ the Court refused to reach the merits, not-

776 WILSON, *supra* note 762, at 554.

777 See HARRISON & KLOTTER, *supra* note 771, at 272 (chapter written by Klotter) (“Gathering secretly in the hotel [where Goebel had been taken], with no Republicans present, they accepted the contest committee’s report regarding the disputed election, threw out enough votes to reverse the results, and on January 31, 1900, declared Goebel governor.”); HARRISON, *supra* note 762, at 115 (entry written by Klotter); JAMES C. KLOTTER, WILLIAM GOEBEL: THE POLITICS OF WRATH 104 (1977) (“[W]ord came privately to each Democratic member to meet in the Capitol Hotel that evening. The instructions asked them to assemble separately, not in groups, and then to come one by one to a second floor room.”); *id.* (“A quorum of nineteen senate Democrats and fifty-three from the house was announced as present, though those attending were not certain of the numbers.”).

778 See KY. HOUSE JOUR. 296–97 (Jan. 31, 1900); KY. SEN. JOUR. 296 (Jan. 31, 1900).

779 See KY. HOUSE JOUR. 297 (Jan. 31, 1900); KY. SEN. JOUR. 296 (Jan. 31, 1900).

780 See KY. HOUSE JOUR. 297 (Jan. 31, 1900) (“[W]e have heard all the evidence offered by both parties, and we now respectfully report . . . that in our opinion William Goebel was legally elected Governor . . .”); KY. SEN. JOUR. 296–97 (Jan. 31, 1900).

781 See KY. HOUSE JOUR. 298–99 (Jan. 31, 1900); *id.* at 299 (House vote) (“In the negative—none.”); KY. SEN. JOUR. 297–98 (Jan. 31, 1900); *id.* at 298 (Senate vote) (“In the negative—none.”). Although the *Journals* appear regular on their faces, they do contain much by way of belt and suspenders, suggesting at least some anxiety on members’ parts. See, e.g., KY. HOUSE JOUR. 307 (Feb. 2, 1900) (House adopts report and recognizes Goebel as Governor); *id.* at 311 (House concurs with Senate in adopting report and recognizing Goebel as Governor); *id.* at 313 (House adopts report); *id.* at 377 (Feb. 20, 1900) (House ratifies the actions of January 31); *id.* at 386 (House and Senate ratify the actions of January 31 in joint session). All these votes in the House were unanimous or nearly so, except the vote of February 20 to ratify the actions of January 31. This passed by a margin of 55–40. See *id.* at 377–78.

782 See WILSON, *supra* note 762, at 554.

783 See HARRISON, *supra* note 762, at 115; JAMES C. KLOTTER, KENTUCKY: PORTRAIT IN PARADOX, 1900–1950, at 203 (1996) (noting that Beckham “found himself at Goebel’s death the governor of the state, barely old enough to serve at the age of thirty”).

784 See, e.g., Taylor v. Beckham, 56 S.W. 177, 183 (Ky.), *appeal dismissed*, 178 U.S. 548 (1900). (“It is also argued that the contest board was not fairly drawn by lot; that certain of the board were liable to objection on the score of partiality, and that, therefore, this board was not properly constituted.”).

ing that "these were matters to be determined by the legislature, which the constitution has made the sole tribunal to determine such a contest. Whether their decision in these matters was right or wrong we have no power to inquire."⁷⁸⁵ Indeed, the Court justified its refusal to scrutinize the general assembly's action in terms of the privilege recognized in section 38. "Suppose these suits had been brought by two members of the general assembly," it wrote, "alleging, in effect, the same facts as are alleged in this case." "[W]ould anybody suppose that the judiciary of the state would have the power to go behind the legislative journals," the Court asked, "or to supervise the propriety of the legislative action, in determining the election of its members?":

Could a member of the general assembly, who had received a certificate from the canvassing board, and been afterwards ousted from the house to which he belonged on a contest, allege and show that the house had acted arbitrarily, depriving him of a pre-existing right, and denying to him the emoluments of the office for the term?⁷⁸⁶

The Supreme Court of the United States dismissed the appeal.⁷⁸⁷

Given the historical record, one could plausibly argue that the only real heroes in *Goebel v. Taylor* (the contest) and *Taylor v. Beckham* (the action in court) were the members of the Court who kept in mind the limits of their office. The governor had no business adjourning the legislature,⁷⁸⁸ or excluding it from its chambers by force of arms, and the legislature might well have made a mistake in meeting and resolving the contest as it did. But although the constitution does not authorize the governor to prevent the legislature from meeting, it does authorize the legislature to resolve contested gubernatorial elections. The Court's decision to stay its hand was respectful of both the text and purpose of section 90 of the constitution, notwithstanding what might have been a natural urge to revisit the entire affair.⁷⁸⁹

⁷⁸⁵ *Id.* at 182.

⁷⁸⁶ *Id.* at 184; *see also id.* at 181 ("We have no more right to supervise the decision of the general assembly in determining the result of this election than we have to supervise the action of the governor in calling a special session of the legislature, or in pardoning a criminal, or the action of the legislature in contracting debts, or determining upon the election of its members, or doing any other act authorized by the constitution.")

⁷⁸⁷ *See Taylor*, 178 U.S. 548.

⁷⁸⁸ The Court in fact so held. *See Taylor*, 56 S.W. at 179.

⁷⁸⁹ *See WILSON, supra* note 762, at 557 ("There can be little doubt now that the position taken by the courts, both state and Federal, throughout all the litigation which arose, with respect to the question of jurisdiction was correct and, in a legal and constitutional point of view, unassailable, but there can be no question that to many of those at the time concerned, the rulings seemed harsh and to amount to a practical denial of justice.")

For other examples of a court refusing to entertain an action in the nature of *quo warranto*

E. Conclusion

The privilege we set out to explain in this part of the Article is indeed broad, arising inexorably with the meeting of the body and operating to the exclusion of other tribunals within its scope. And this is as it should be. This is not simply a matter of text, although text matters. Nor is it simply a matter of overwhelming historical practice, recognized by legislators and judges alike, although that too matters. It is also a matter of theory.

On this point, we can begin with James Madison, who wrote many of the *Federalist Papers*. One of Madison's great insights into political theory was his recognition that true separation of powers depends acutely on independence in matters of personnel. As he noted in *Federalist No. 51*, to establish a "due foundation" for the "separate and distinct exercise of the different powers of government, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others."⁷⁹⁰ In making this observation, Madison took the simple and quite reasonable position that, in hopes of acquiring a position, people will tend to be solicitous of the appointing authority—eager to please, and careful not to antagonize. To this Madison might well have added that, after they obtain their positions, people tend to be solicitous toward those with authority to remove them. As the Supreme Court of the United States later noted in *Bowsher v. Synar*, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."⁷⁹¹

against a member of the legislature, see *State ex rel. Rigby v. Junkin*, 1 So.2d 177, 177 (Fla. 1941) ("This Court is without jurisdiction to determine the rights of one who has been elected a member of the Legislature to hold such office. That question is one which only the Legislature may determine."); *State ex rel. Turner v. Scott*, 269 N.W.2d 828, 832 (Iowa 1978) ("This action in quo warranto must eventually rest on a judicial determination that the defendant was not qualified for the office to which he was elected. The Iowa Constitution clearly leaves to the Senate the determination as to whether a member is qualified. We therefore find the controversy to be nonjusticiable and improper for judicial resolution . . ."); cf. *English v. Bryant*, 152 So.2d 167 (Fla. 1963) (denying mandamus where petitioner challenged the right of an incumbent Senator to serve in the legislature); *Raney v. Stovall*, 361 S.W.2d 518, 521 (Ky. 1962) (requiring the Treasurer of Kentucky to pay a person whom the Senate of the state had found qualified to serve as a member, although the Treasurer took the position that the person was not qualified); *State v. Evans*, 735 P.2d 29, 32 (Utah 1987) (denying an extraordinary writ sought by the Attorney General of Utah against two members of the legislature who were employees of the executive branch and a third who had a contract with that branch after the House had rejected challenges to the qualifications of two of these members) ("Constitutional procedures have been followed, and we decline to interfere with or second-guess the action of the House of Representatives.").

⁷⁹⁰ THE FEDERALIST NO. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987).

⁷⁹¹ See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (quoting *Synar v. United States*,

In fact, Madison's insight is especially apt for the legislature, which serves the additional and perhaps unique function of reconstituting and speaking for the polity. The legislature is the attorney for the people, competent to give their assent to otherwise unpopular measures, such as the levying of taxes or the declaration of war. As Conrad Russell wrote, "[i]f a parliament voted a tax, no one could say 'I never agreed to this': every potential protester was legally bound by the act of his representative."⁷⁹² The cry of "[n]o taxation without representation" fails if there is representation. For the legislature to perform this role, however, the people must perceive it as their creature, not that of another branch of government. This was one of the lessons Commons drew from *In re Wilkes*, and it was one of the points Adam Clayton Powell's supporters emphasized in *In re Powell*. Because the people control their legislature without an intermediary, they are by posit bound by its decisions.⁷⁹³ To the extent they perceive this not to be true, they are that much less bound.⁷⁹⁴

Nor is this principle evaded by the easy answer that only a member made subject to litigation in a court of law will feel threatened by or beholden to the courts. If one member's seat can become vulnerable any member's can,⁷⁹⁵ and if one member's seat is made vulnerable every member of the chamber, or at least every member of the vulnerable member's party, will become vulnerable to some extent. After all, the legislature and the courts do not relate to each other in narrow, discrete ways. They interact along a broad range, in matters pertaining to, among other things, legislative privilege, pensions, redistricting, rules of evidence, rules of civil procedure, allocation of jurisdiction, substantive elements of crimes and

626 F. Supp. 1374, 1401 (D.D.C. 1986)).

⁷⁹² See, e.g., RUSSELL, *supra* note 85, at 128.

⁷⁹³ See Hexter, *supra* note 142, at 31 (discussing the contest of *Goodwin v. Fortescue*) (noting that Commons defended its privilege by arguing that "[a]ny other order of things would make it easy to take from Englishmen a freedom that they valued most highly, freedom through a free Parliament freely to consent to the laws by which they were ruled").

⁷⁹⁴ See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 833, at 585 (5th ed. 1905) ("If [the power to judge elections] is lodged in any other than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed or put into imminent danger. No other body but [the legislature] 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 constituents."); see also AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 211 (2005) ("[In the] unusual situations involving an individual's right to serve as an officer or congressman—where routine interference by Article III courts risked inverting the document's grand democratic pyramid—the Constitution gave legislators power to "try" and "Judge" sundry issues of law and fact.").

⁷⁹⁵ See *People ex rel. Drake v. Mahaney*, 13 Mich. 481, 494 (1865) ("If we have the power to review the decision in one case, we have in all."). *Mahaney* is discussed at length *supra* notes 732–36 and accompanying text.

related defenses, educational finance, standards for liability, judicial appropriations, and a wide variety of other phenomena. Allowing the courts to sit in judgment on the qualifications, elections, and returns of members, particularly where the Constitution explicitly vests this authority in the legislature, undermines⁷⁹⁶ not only text but also legislative independence and separation of powers.

III. *STEPHENSON V. WOODWARD*

A. *Introduction*

Given the various authorities and historical principles discussed in Part II of this Article, the decision in *Stephenson v. Woodward* has simply nowhere to stand.⁷⁹⁷ It departs not only from text, but also from precedent, including precedent from within Kentucky, from tradition, and from basic notions of separation of powers.

As may be recalled, two distinct judicial matters preceded this decision. The first was Woodward's motion under KRS 118.176 in Jefferson Circuit Court, which she brought on November 1, 2004, the day before the general election. In this action, Woodward alleged that Stephenson could not serve in the senate because she had not "resided in" Kentucky for "six years next preceding" the election.⁷⁹⁸ On November 22, the court agreed, declaring Stephenson ineligible and prohibiting the local electoral officials from reporting votes in her favor. No party sought review of this decision.⁷⁹⁹ Not long thereafter, Stephenson initiated a contest in the senate.

The second matter, and in fact the matter on appeal in *Stephenson*, was Woodward's separate action for declaratory and injunctive relief in Franklin Circuit Court. In this action, Woodward sought to obtain a certificate of election, to terminate the contest, to prevent the senate from admitting Stephenson, and to compel the senate to admit her. Woodward achieved substantial but not complete success in the lower court in this action, obtaining a certificate and also obtaining both a declaration and an injunction preventing Stephenson from serving. She did not, however, obtain any relief that would entitle her to a seat in the senate.

⁷⁹⁶ See generally Gerald T. McLaughlin, *Congressional Self-Discipline: The Power to Expel, to Exclude and to Punish*, 41 *FORDHAM L. REV.* 43, 43 (1972) (internal quotation marks omitted) (noting that the Houses of Congress need the power to expel, exclude, and punish to "maintain their own institutional integrity and the proper functioning of the legislative process," and also to "guarantee Congress' existence as a separate but equal branch of government").

⁷⁹⁷ See *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005). See *supra* notes 19–67 and accompanying text for a discussion of this decision's factual and procedural background.

⁷⁹⁸ KY. CONST. § 32.

⁷⁹⁹ See *infra* note 889 and accompanying text for a discussion of this point.

The issues before the Supreme Court on appeal were essentially five in number: (1) whether the Jefferson Circuit Court had jurisdiction to proceed under the statute after the general election; (2) if so, whether it had authority under the statute to grant relief in the form of an injunction suppressing Stephenson's votes; (3) whether such jurisdiction and relief, if valid under the statute, impaired the senate's authority under the constitution; (4) whether, notwithstanding the decision of the Jefferson Circuit Court, the senate retained power under the constitution to reach an independent judgment regarding Stephenson's qualifications; and (5) whether Woodward was entitled to a seat in the senate. The Court, with Justice Johnstone writing for the majority, resolved the first two of these issues in the affirmative and last three in the negative.⁸⁰⁰

The Court began its analysis by acknowledging the judiciary's ordinarily limited role in electoral matters, noting that whatever jurisdiction it has in this area arises from legislative delegation or from the customary operation of *quo warranto*.⁸⁰¹ It then went on to classify KRS 118.176 as a delegation consistent with this scheme, reasoning that by this statute the general assembly had conferred "sole authority" on the courts to judge the *bona fides* of candidates, provided the motion is brought before the election.⁸⁰²

This provoked the question of whether such "sole authority" would impair the senate's prerogative under the constitution. The Court addressed this issue by construing this prerogative not to extend to matters resolved by a court of law before the legislature comes into session. In reaching this conclusion, the Court laid great stress on the fact that Stephenson was not literally a "member" of the senate when the Jefferson Circuit Court rendered its decision:

[T]he delegation of authority in KRS 118.176 in no way infringes upon the constitutional authority of the General Assembly to judge the qualifications of its members pursuant to Section 38. Stephenson's and Williams' arguments are predicated upon the fundamentally flawed belief that Stephenson was actually a *member* of the Senate [But] a Senator-elect only becomes a member of the Senate when his or her term commences "upon the first day of January of the year succeeding [the] election." This proscription exists for an obvious reason: so that the terms of the departing Senator and the Senator-elect do not overlap.

Here, though, when the Jefferson Circuit Court rendered its order finding that Stephenson was not a bona fide candidate and therefore ineligible

⁸⁰⁰ See *Stephenson*, 182 S.W.3d at 163. Justice Johnstone was joined in this opinion by Chief Justice Lambert and by Justices Graves and Wintersheimer. Justice Cooper wrote separately, concurring in part and dissenting in part. See *id.* at 175 (Cooper, J., concurring in part and dissenting in part).

⁸⁰¹ See *id.* at 167 (quoting *Noble v. Meagher*, 686 S.W.2d 458, 460 (Ky. 1985)).

⁸⁰² *Id.*

to appear on the ballot, she lost all rights to that office. This determination was made on November 22, 2004 . . . before the term of office which she sought commenced on January 1, 2005. There is simply no legal or logical authority for the proposition that Stephenson was a member of the Senate when the Jefferson Circuit Court rendered its decision, a point conceded by all parties. Because she was not a member, the Jefferson Circuit Court's order in no manner violated Section 38 of the Kentucky Constitution. It is also for this reason that Appellants', as well as the dissenting opinions', reliance on cases dealing with this Court's refusal to interfere with the General Assembly's exclusive authority to pass on the qualifications of its *members* is clearly misplaced.⁸⁰³

In other words, because Stephenson was not a “member” of the body in the full sense of the word when the Jefferson Circuit Court rendered its decision, that decision did not implicate the senate's authority under the constitution.

The Court then took up the scope of the statute. Between Stephenson and Williams, three basic arguments had been raised in this area, two pertaining to timing and one to relief. With regard to timing, Stephenson had argued that a motion under the statute had to be brought long enough before the election to be resolved prior thereto,⁸⁰⁴ and both Stephenson and Williams had taken the position that a court could not exercise jurisdiction under the statute once the election had occurred.⁸⁰⁵ With respect to relief, Stephenson had argued that a court's options under the statute were limited, and did not include authority to grant relief after an election.⁸⁰⁶

The Court addressed the first of these arguments in strictly textual terms. Because the statute provided that a motion thereunder could be brought “at any time prior to the general election,”⁸⁰⁷ it refused to accede to any other deadline. “This language is clear and free of any ambiguity or uncertainty,”⁸⁰⁸ the Court reasoned.

⁸⁰³ *Id.* at 167–68 (citations omitted).

⁸⁰⁴ See Brief for Appellant Dana Seum Stephenson at 16 (quoting the record), *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005) (Nos. 2005-SC-603-TG (2005-CA-1601-MR), 2005-SC-604-TG (2005-CA-1602-MR), & 2005-SC-645-TG (2005-CA-1643-MR)).

⁸⁰⁵ See *id.* at 15; Brief for Appellant David L. Williams, in His Official Capacity as President of the Senate at 11, *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005) (Nos. 2005-SC-603-TG (2005-CA-1601-MR), 2005-SC-604-TG (2005-CA-1602-MR), & 2005-SC-645-TG (2005-CA-1643-MR)); see also *Stephenson*, 182 S.W.3d at 190 (Roach, J., dissenting) (“[A]n action . . . under KRS 118.176 ‘evaporates’ once the election begins. The clear intent of the statute is to prevent voters from casting their votes for non-bona-fide candidates, not to nullify those votes after the fact of their casting.”).

⁸⁰⁶ See Brief for Appellant Dana Seum Stephenson at 2, 20, *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005).

⁸⁰⁷ KY. REV. STAT. ANN. § 118.176(2) (West 2005).

⁸⁰⁸ *Stephenson*, 182 S.W.3d at 169–70 (majority opinion).

The second argument regarding timing provoked a more elaborate analysis. Before the general assembly amended KRS 118.176 in 2001, a motion thereunder could only be brought before a primary election.⁸⁰⁹ As a consequence, the idea that a court could proceed under the statute after the general election was at least somewhat problematic. For two distinct reasons, however, the Court concluded that the Jefferson Circuit Court was correct in retaining the case after the general election. First, it reasoned, jurisdiction ordinarily does not dissipate once it attaches.⁸¹⁰ Second, a statute that sets a deadline for the bringing of a motion but not for its ultimate resolution implicitly rejects any such second deadline.⁸¹¹

The Court's analysis regarding relief was embedded in its discussion of the statute's general scope. Under KRS 118.176(4), if a court finds that a candidate is not qualified, it must "certify the fact to the board of elections, and the candidate's name shall be stricken from the written designation of election officers filed with the board of elections or the court may refuse recognition or relief in a mandatory or injunctive way."⁸¹² Although the Court recognized that "striking a candidate's name from the ballot is a pre-election remedy," it was not willing to construe the statute to allow only such forms of relief, emphasizing the phrase "*may refuse recognition or relief in a mandatory or injunctive way.*"⁸¹³ "By enjoining the Jefferson County Board of Elections from counting votes cast for Stephenson," it reasoned, "the court refused recognition of Stephenson by means of an injunction, which is expressly authorized by the statute."⁸¹⁴

809 *See id.* at 172 (citing *Noble v. Meagher*, 686 S.W.2d 458 (1985)).

810 *See id.* at 170 (quoting 21 C.J.S. *Courts* § 72 (2005)).

811 *See id.* at 171.

812 KY. REV. STAT. ANN. § 118.176(4) (West 2006).

813 *See Stephenson*, 182 S.W.3d at 171 (quoting KY. REV. STAT. ANN. § 118.176 (West 2006)).

814 *Id.* The scope of this article does not permit close examination of whether KRS 118.176 authorizes a court to proceed after the general election, or whether it authorizes a court to grant relief in the form of an injunction suppressing a particular candidate's votes. It suffices to note, however, that no statute can supersede the Constitution, and in fact the Court itself saw fit in another context to interpret KRS 118.176 narrowly so as to avoid a constitutional question. As enacted, KRS 118.176 does not provide for review at any point by the Supreme Court. It simply authorizes a motion to set aside in the Court of Appeals, the decision of which is then final. *See* KY. REV. STAT. ANN. § 118.176(4) (West 2006). In *Thomas v. Lyons*, however, the Court held that no statute could prevent it from performing its constitutional duty to exercise appellate jurisdiction. *See* *Thomas v. Lyons*, 586 S.W.2d 711, 716 (1979) (citing KY. CONST. § 110(2)(b)). One wonders why the Court was willing to interpret the statute narrowly so as to preserve judicial prerogatives in *Thomas*, but could not take a comparable step vis-à-vis a legislative prerogative in *Stephenson*. *See Stephenson*, 182 S.W.3d at 211 (Scott, J., dissenting) ("Never before has this Court hesitated in finding the application of KRS 118.176 to be unconstitutional when it invades constitutionally protected areas."). In addition, the Court's construction of the language in the statute bearing on relief is somewhat curious. This language—"may refuse recognition or relief in a mandatory or injunctive way"—almost certainly refers only to the movant, which would have been Woodward, not

This brought the Court to the end of its analysis regarding Stephenson. Having upheld the Jefferson Circuit Court's decision against both statutory and constitutional challenge, and noting that neither Stephenson nor Williams had sought review of that decision, it proceeded to deem it "binding on the parties."⁸¹⁵ "Though for substantively different reasons," it then concluded, "we affirm that portion of the Franklin Circuit Court judgment declaring that Stephenson is not constitutionally qualified for the office of State Senator and may not be seated."⁸¹⁶ Although the Court did not really explain what these "substantively different reasons" were, perhaps it was referring back to its earlier statement that KRS 118.176 conferred "sole authority" to resolve certain disputes on the courts. The unanswered question, however, was how any statute could grant "sole authority" to the courts in derogation of a constitutional provision.

Finally, the Court took up and rejected Woodward's argument that she was entitled to a seat in the senate. In various cases the courts of Kentucky had previously held that the runner-up in an election does not accede to office if the person who wins the most votes is later found unqualified to serve.⁸¹⁷ Woodward's claim, the Court reasoned, ran counter to this principle.⁸¹⁸

Chief Justice Lambert wrote a brief concurring opinion expressing hope that the decision would be peacefully heeded by the senate.⁸¹⁹ Justice Cooper also wrote a separate opinion, concurring on Stephenson's inability to serve but dissenting on the Court's refusal to grant relief that would entitle Woodward to a seat in the legislature.⁸²⁰ Justice Cooper's argument proceeded from the premise that, because Woodward brought her motion before the election, the Jefferson Circuit Court's finding that Stephenson was not qualified related back to that point in time, thus converting the votes cast for Stephenson into non-votes. "Thus," he contended, "the re-

Stephenson. Only a movant seeks "relief," and one would reasonably construe the words "recognition" and "relief," being joined only by the disjunctive "or," to apply to the same party. As a consequence, one wonders why the Court adopted a strained construction of this language to limit the Senate's prerogative under the Constitution, yet simply invalidated clear language in the same statute to vindicate a judicial prerogative.

815 *See Stephenson*, 182 S.W.3d at 173 (majority opinion).

816 *Id.*

817 *See id.* (citing *Woods v. Mills*, 503 S.W.2d 706 (Ky. 1974); *Bogie v. Hill*, 151 S.W.2d 765 (Ky. 1941); *McKinney v. Barker*, 203 S.W. 303 (Ky. 1918)).

818 *See id.* ("[T]he effect of the disqualification of a candidate subsequent to the election is that no election has occurred and the true and legitimate will of the people has not yet been expressed.").

819 *See id.* at 175 (Lambert, C.J., concurring) ("Responsible officials will reject any notion of defiance or retaliation against the judiciary, for such action would be an attack upon the Constitution itself.").

820 *See id.* at 176 (Cooper, J., concurring in part and dissenting in part).

sult [here] is the same as if Woodward ran unopposed.”⁸²¹ Justices Scott and Roach wrote lengthy dissents, raising a wide variety of issues, both statutory and constitutional.⁸²²

B. Discussion

The most salient conclusion of *Stephenson v. Woodward*—that the Jefferson Circuit Court’s decision under KRS 118.176 could somehow supersede the senate’s authority under section 38 of the constitution—simply cannot withstand scrutiny. Its infirmity takes two specific forms. First, whatever the legislature said or meant to say when it enacted and subsequently amended the statute, it lacked power to delegate the senate’s authority under the constitution irrevocably to the courts. Second, that authority, unimpaired, could not be superseded by statute.

No legislature may bind another, as courts have recognized for centuries,⁸²³ including the highest Court of Kentucky.⁸²⁴ Even in the United Kingdom, which in theory has no formal constitution, the rule is recognized that no one Parliament is subject to another.⁸²⁵ Indeed, not long before

⁸²¹ *Id.* at 177.

⁸²² *See id.* at 204 (Scott, J., dissenting) (“[T]he founders of our Constitution did not give us (only one of the three branches of the government) the power to interfere with ‘the qualifications, elections and returns’ of our sister branch, the General Assembly.”); *id.* at 178 (Roach, J., dissenting) (“The plain words and historical meaning of Section 38 are clear . . .”).

One important issue that Justices Scott and Roach raised was how the majority could reconcile its decision with the Speech or Debate Clause of Kentucky’s Constitution, which provides that “for any speech or debate in either House [the members of the General Assembly] shall not be questioned in any other place.” KY. CONST. § 43. As Justice Roach noted in his dissent, however, “[s]urely the act of continuing to hold a legislative seat,” which Stephenson was hoping to do, “is the quintessence of legislative function.” *See Stephenson*, 182 S.W.3d at 199 (applying language from *Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2001)). Indeed, Justice Scott in his dissent wondered what the courts would do, in light of section 43, if Stephenson refused to accede to its judgment. “[I]f the Appellant, Ms. Stephenson, disregards the injunction,” he wrote, “then we will again be called upon to decide whether or not the contempt powers of the Courts to enforce an injunction would themselves, be in violation of Section 43 of the Kentucky Constitution . . .” *Id.* at 212 (Scott, J., dissenting). In fact, the majority did not affirm the Franklin Circuit Court’s injunction against Stephenson, instead affirming only its declaration that she could not serve. *See id.* at 173 (majority opinion). Justice Scott was presumably construing the Court’s judgment as the functional equivalent of an injunction.

⁸²³ *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (“[O]ne legislature cannot abridge the powers of a succeeding legislature.”).

⁸²⁴ *See Swift & Co. v. City of Newport*, 70 Ky. (7 Bush) 37, 41 (1869) (“One legislature can not control the conduct or limit the power of its successor except by an act operating as a binding contract.”); *cf. City of Mt. Sterling v. King*, 104 S.W. 322, 322 (Ky. 1907) (“In business so important as state legislation, one Legislature cannot put any limitation in the matter of ordinary legislation upon its successor, control its conduct, or prescribe its method of procedure in the enactment of laws.”).

⁸²⁵ *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 90 (George Tucker, ed. 1965) (“Acts of parliament derogatory from the power of subsequent parliaments

Stephenson the Supreme Court of Kentucky itself recognized the “ancient principle that each legislature is a free and independent body and cannot control the conduct of its successor except by acts in the form of binding contracts.”⁸²⁶ And as much as this is true in the abstract, it is still more true in this particular context. “It is not within the constitutional power of Congress,” wrote McCrary, “by legislative enactment or otherwise, to control either house in the exercise of its exclusive right to be the judge of the election, returns, and qualifications of its own members.”⁸²⁷ As the Supreme Judicial Court of Massachusetts similarly noted in *Dinan v. Swig*:⁸²⁸

General phrases elsewhere in the Constitution, which in the absence of an explicit imposition of power and duty would permit the enactment of laws to govern the subject, cannot narrow or impair the positive declaration of the people’s will that this power is vested solely in the Senate and House respectively. It is a prerogative belonging to each House, which each alone can exercise. It is not susceptible of being deputed.⁸²⁹

Not only is this an axiom of constitutional law and legislative practice, it also makes eminent sense. A contrary rule would permit today’s majority to adopt rules that would preclude tomorrow’s majority from acting. Such

bind not . . .”).

826 *Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.3d 852, 868 (Ky. 2005) (citing *Bd. of Trs. v. Attorney Gen.*, 132 S.W.3d 770, 789 (Ky. 2003)). There is also the general rule that the legislature may not delegate its basic powers. Although the line between the making of laws and the exercise of executive or administrative discretion is not always easy to discern, Kentucky adheres to a fairly strict version of this rule. *See* Legislative Research Comm’n v. Brown, 664 S.W.2d 907, 914–15 (Ky. 1984).

827 MCCRARY, *supra* note 345, § 338, at 232; *see also* MASON, *supra* note 682, § 560, ¶ 5, at 400 (citing cases) (“The exclusive power to judge of the qualifications and elections of its members is fixed in each house and cannot by its own consent or by legislative action be vested in any other tribunal or office.”); *cf.* Parsons, *supra* note 573, at 220 (referring to South Dakota’s version of the privilege) (“[I]t is clear from the specification that ‘each house’ shall be the judge ‘of its own members’ that neither house of the Legislature may interfere with the seating of the other’s members.”).

828 *Dinan v. Swig*, 112 N.E. 91 (Mass. 1916).

829 *Id.* at 92–93; *see also* *Kansas ex rel. Attorney Gen. v. Tomlinson*, 20 Kan. 692, 1878 WL 986, at *8 (1878) (“While the constitution has conferred the general judicial power of the state upon the courts and certain officers specified, there are certain powers of a judicial nature which, by the same instrument, are expressly conferred upon other bodies or officers, and among them is the power to judge of the elections, returns, and qualifications of members of the legislature. This power is exclusively vested in each house, and cannot by its own consent, or by legislative action, be vested in any other tribunal or officer.”); 68 CONG. REC. 119 (1926) (Sen. Dill) (“The present membership of the Senate has no authority to decide whether or not Mr. VARE is qualified to sit in the new Senate. This Senate can not prevent the presentation of credentials in the Senate of the next Congress.”); BUTLER & WOLFF, *supra* note 226, at 40 (“In response to Webster’s protest, the chair ruled that, because one Congress could not judge the qualifications for a future Congress, the matter could not be reviewed until March 4, 1837.”); COOLEY, *supra* note 73, at 149.

rules require a formal amendment to the constitution. Thus, the general assembly that met in 2001 and that amended KRS 118.176 to allow an action to proceed “at any time prior to the general election” was not competent to delegate to the courts the authority of the senate that met in January 2005, even assuming that it meant to accomplish any such thing.⁸³⁰ In other words, if KRS 118.176 could be interpreted to effect such delegation, it would to that extent be unconstitutional.

Equally vulnerable to criticism is the conclusion that the decision of the Jefferson Circuit Court could somehow supersede the senate’s constitutional authority because Stephenson was not a “member” of the chamber in every sense of the word on November 22, 2004, when the court rendered its judgment. First, this rationale would appear to classify the vast majority of exercises of the privilege since the Revolution as patently unconstitutional. As we have noted, almost all such exercises have pertained to individuals presenting themselves for membership—in other words, people who were not “members,” as per the Court’s analysis, at the time that their alleged infirmity first arose. Indeed, of the legislative precedents we discuss in Subpart II-C, only *In re Raney* pertained to a ground for exclusion that arose after the member’s admission.⁸³¹

Second, the very language of the privilege as articulated in section 38, and as articulated in every other constitution that recognizes it, would be absurd if the Court’s interpretation were accurate. This is because a would-be member’s “election” and “return” would never arise after the legislature came into session.⁸³² Thus the Court’s interpretation would appear to reduce the privilege to a power to adjudicate claims of disqualification arising after the body meets, but not before. Imagine a department of the government being told that it may “judge of” its members’ “qualifications, elections and returns,” only to learn that this language in fact requires it to accept as members those that other public officials deem eligible, unless someone allegedly becomes ineligible after coming on board.⁸³³ Later in

830 KY. REV. STAT. ANN. § 118.176(2) (West 2006).

831 See *supra* notes 467–79 and accompanying text for a discussion of legislative precedent, including *In re Raney*; see also *Stephenson v. Woodward*, 182 S.W.3d 162, 198 (Ky. 2005) (Roach, J., dissenting) (describing the majority’s position as “against the great weight of authority and reason”) (“The Senate’s power under Section 38 is not limited to the narrow circumstances that arose in *Raney*. The vast majority of the [applicable cases] contemplate that the power conferred by Section 38, and its federal analog, is plenary and comes into play whenever a legislator elect presents himself or herself to a legislative body for acceptance as a member.”).

832 Cf. *Lexington Fayette County Food & Bev. Ass’n v. Lexington-Fayette Urban County Gov’t*, 131 S.W.3d 745, 750 (Ky. 2004) (citing *County of Harlan v. Appalachian Reg’l Healthcare, Inc.*, 85 S.W.3d 607 (Ky. 2002)) (discussing statutory construction) (“It is a primary rule of statutory construction that no single word or sentence determines the meaning of a statute. Rather, the statute as a whole must be considered.”).

833 See generally *Officemax Inc. v. United States*, 428 F.3d 583, 600 (6th Cir. 2005) (Rogers, J., dissenting) (“A host separately asked two prospective guests what they liked to drink. One

its opinion, the Court perhaps recognizes this problem and suggests that the privilege might apply to questions of election and return arising before the legislature convenes, without attempting to reconcile this suggestion with its earlier language, and without attempting to explain how two items in a series of three can be subject to one temporal regime, but the third can be subject to another.⁸³⁴ “Cases dealing with election contests—that is, disputes involving not the qualifications of a candidate but the validity of the election itself,” the Court states, citing *Taylor v. Beckham*, “are inapplicable to this matter.”⁸³⁵ But the Court never explains why exercise of the privilege at the threshold of service is limited to contests, where it never has been before,⁸³⁶ nor why a “contest” cannot pertain to qualifications, even though quite a few have, including *Goodwin v. Fortescue* (outlawry),⁸³⁷

said, ‘I like bourbon and water.’ The other said, ‘I like beer and wine.’ When the second guest arrived at the event, the host served the guest a glass of beer mixed with wine. ‘What’s that awful drink?’ said the guest, to which the host answered, ‘You said you liked beer and wine.’ Replied the guest: ‘Pfui! You know what I meant. Quit playing word games and get me something I can drink.’); *Shamburger v. Duncan*, 253 S.W.2d 388, 390–91 (Ky. 1952) (“[C]ourts in construing constitutional provisions will look to the history of the times and the state of existing things to ascertain the intention of the framers of the Constitution and the people adopting it, and a practical interpretation will be given to the end that the plainly manifested purpose of those who created the Constitution, or its amendments, may be carried out.” (quoting *Keck v. Manning*, 231 S.W.2d 604, 607 (Ky. 1950))).

834 See *Stephenson*, 182 S.W.3d at 197 (Roach, J., dissenting) (“Each of those questions, which appear in the same constitutional provision, is on equal footing, and the analysis as to each is identical.”); see also *Parsons*, *supra* note 573, at 221 (“As is apparent from the language employed, constitutional provisions of this nature contain at least two distinct elements: (1) the constitutional duty of each legislative body to judge the “elections,” “returns,” or “election returns” of its own members; and (2) the constitutional duty of each legislative body to judge the “qualifications” of its own members. Because these two separate responsibilities are contained within a single sentence of the constitution, framed by the same grammatical structure, and supported by the same constitutional history, one would expect the scope of those responsibilities to be construed in the same manner by the courts that have been called upon to do so.” (footnote omitted)).

835 See *Stephenson*, 182 S.W.3d at 168 (citing *Taylor v. Beckham*, 56 S.W. 177 (Ky. 1900)).

836 See *McCrary*, *supra* note 345, § 283, at 189–90 (“[T]here are questions which may be raised, touching the *qualifications* of a person elected, which may be investigated and decided as a part of the *prima facie* case, and as preliminary to swearing in the claimant It is necessary, however, that such allegation should be made by a responsible party; it is usually made, or vouched for at least, by some member or member elect of the House.”); *id.* § 336, at 230 (“The House of Representatives of the United States, may in its discretion proceed to inquire into the validity of one of its members, without any formal contest having been instituted. A contestant is not absolutely necessary.”). In both *In re Gallatin* and *In re Ames*, which we have discussed, the Senate of the United States exercised the privilege on a question of qualifications at the threshold of service and in the absence of a contestant. See *supra* notes 227–68 and accompanying text for a discussion of *In re Gallatin* and *supra* notes 314–45 and accompanying text for a discussion of *In re Ames*.

837 See *supra* notes 139–61 and accompanying text.

Stanton v. Lane (dual office),⁸³⁸ *Hatfield v. Holt* (age),⁸³⁹ and *Humble v. Hoover* (residence),⁸⁴⁰ the last of which actually took place in Kentucky.⁸⁴¹

Finally, the Court's interpretation of the scope of the privilege was expressly rejected, and in fact described as lacking "real substance," by the Supreme Court of the United States some seventy-seven years ago. As may be recalled, in *Barry v. United States ex rel. Cunningham*, the Court was called upon to decide whether Cunningham could be brought before the Senate for investigation about his refusal to answer questions about where he had obtained money that he had later contributed to the campaign of William S. Vare.⁸⁴² One of Cunningham's arguments was that the Senate lacked jurisdiction over *In re Vare* because it had yet to admit him as a member.⁸⁴³ Given the obvious purpose of the privilege, the Court had little difficulty rejecting this objection:

When a candidate is elected to either House, he of course is elected a member of the body; and when that body determines, upon presentation of his credentials, without first giving him his seat, that the election is void, there would seem to be no real substance in a claim that the election of a "member" has not been adjudged. To hold otherwise would be to interpret the word "member" with a strictness in no way required by the obvious purpose of the constitutional provision, or necessary to its effective enforcement in accordance with such purpose, which, so far as the present case is concerned, was to vest the Senate with authority to exclude persons asserting membership, who either had not been elected or, what amounts to the same thing, had been elected by resort to fraud, bribery, corruption, or other sinister methods having the effect of vitiating the election.⁸⁴⁴

It is possible, of course, that the *Stephenson* Court meant only to observe that, because Stephenson was not literally a member of the senate when

⁸³⁸ See *supra* notes 269-313 and accompanying text.

⁸³⁹ See *supra* notes 430-66 and accompanying text.

⁸⁴⁰ See *supra* notes 654-63 and accompanying text.

⁸⁴¹ For other contests in Kentucky involving qualifications, see, for example, *McKinney v. Taylor*, KY. HOUSE JOUR. 220-21 (Jan. 23, 1900) (dual office re both parties); *Callon v. Rardin*, KY. HOUSE JOUR. 186-88 (Jan. 14, 1888) (dual office); *Oldham v. Daniel*, KY. HOUSE JOUR. 64 (Nov. 11, 1825) (age); cf. *Thomas v. Hurst*, KY. HOUSE JOUR. 90-92 (Dec. 16, 1869) (claim of dual office not reached because presented too late). For other contests at the federal level involving qualifications, see *Lawson v. Owen*, 72 CONG. REC. 10193 (June 6, 1930); *McGraw v. Scott*, 32 CONG. REC. 2691-92 (Mar. 2, 1899); *Lowry v. White*, 19 CONG. REC. 915 (Feb. 2, 1888); *Ramsay v. Smith*, 1 ANNALS OF CONG. 143 (Joseph Gales ed., 1834) (Apr. 15, 1789).

⁸⁴² See *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 614 (1929). See *supra* notes 367-429 and accompanying text for a discussion of the legislative precedents of *In re Vare* and *Wilson v. Vare*.

⁸⁴³ See *Barry*, 279 U.S. at 614.

⁸⁴⁴ *Id.* at 615. See generally Schauer, *supra* note 13, at 419 ("[L]anguage cannot be divorced from its context, because meanings become clear if and only if certain understandings are presupposed.").

the Jefferson Circuit Court rendered its decision, that decision, standing alone, did not implicate the senate's authority. If this was the Court's entire point, it knocked on an open door. Obviously Stephenson was not a "member" of the senate in every sense of the word before the chamber admitted her to membership. That is what section 38 means. But the observation that Stephenson was not literally a member on November 22 accomplishes nothing, for the real issue in the case was not whether Stephenson was a member of the senate on that date but instead whether the senate was empowered under the constitution to find her qualified after it came into session on January 4, 2005. On this point the Court provided little if anything by way of analysis, except perhaps the untenable suggestion that the general assembly could somehow delegate a single house's authority under section 38 irrevocably to the Courts.⁸⁴⁵

Indeed, a similar set of observations explains why the Court misapprehended the issues regarding Woodward as well. As noted, the Court also held that Woodward was not entitled a seat in the senate because she did not prevail in the election.⁸⁴⁶ Although this is true, it is also beside the point. The reason Woodward had no valid claim to the seat was not because she received fewer votes in the election but because the senate excluded her on January 4, 2005. The senate's *reason for doing so* was Woodward's lack of election, but the plenary nature of the privilege would have permitted the senate to make the contrary determination, and judicial review of such a determination would not have been available.⁸⁴⁷

In light of the foregoing, the Court in *Stephenson* appears to have reached its holding in error. Evaluating the senate's resolution of the contest is more complicated, however. Given Stephenson's substantial indicia of having "resided in" Indiana from 1997 to 2001,⁸⁴⁸ one could reasonably conclude that she failed to satisfy the requirements for service, and that the senate's decision was therefore wrong on the merits. On the other hand, the senate did assemble a substantial record in support of its conclusion that Stephenson "resided in" both Kentucky and Indiana during the disputed period,⁸⁴⁹ and the constitution does not foreclose construing the phrase to encompass

845 In addition to lacking a persuasive basis for superseding the senate's authority under section 38 of the constitution, *Stephenson* also lacks a persuasive basis for overcoming section 43 of that document, which protects a member of the legislature, such as Stephenson, from judicial process in her official capacity. See KY. CONST. § 43 ("[F]or any speech or debate in either House [the members of the General Assembly] shall not be questioned in any other place."); *Wiggins v. Stuart*, 671 S.W.2d 262, 264 (Ky. Ct. App. 1984). This point falls well within the scope of this article, but space does not permit its full consideration. Justices Scott and Roach, dissenting in *Stephenson*, took up this point. See *supra* note 822.

846 See *Stephenson v. Woodward*, 182 S.W.3d 162, 173–74 (Ky. 2005).

847 See *Brown v. Lamprey*, 206 A.2d 493, 495 (N.H. 1965).

848 See *supra* note 30–34 and accompanying text.

849 See *supra* note 56 and accompanying text.

dual residence.⁸⁵⁰ In fact, *Black's Law Dictionary* recognizes in its second definition of "residence" that "[a] person . . . may have more than one residence at a time but only one domicile."⁸⁵¹ And beyond these lawyerly arguments lie arguments sounding more in substance than form. For example, Stephenson was as familiar with the thirty-seventh district as Mae Hoover had been with hers.⁸⁵² In addition, the voters clearly chose Stephenson in the general election, and the tradition of giving as much weight as possible to the wishes of voters is at least as old as *In re Wilkes*.⁸⁵³

C. Grounds Not Adduced

Given the significance of the issues presented in *Stephenson v. Woodward*, there may be some interest in ascertaining whether some unstated rationale could sustain the Court's decision. Such a rationale might arise from section 2 of Kentucky's constitution, which provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."⁸⁵⁴ This section bears a close analytical resemblance to the federal guarantees of due process and equal protection. A second alternative might arise from the last clause of section 38, which provides that "a contested election shall be determined in such manner as shall be directed by law."⁸⁵⁵ A third might sound in "waiver" or a related concept. Close examination of these potential grounds, however, suggests that they cannot sustain the Court's decision.

1. *Section 2, Due Process, and Equal Protection.*—In theory, one could seek to justify *Stephenson* in terms of section 2 of Kentucky's constitution, which

850 See KY. CONST. § 32 ("No person shall be a Senator who, at the time of his election, is not a citizen of Kentucky, has not attained the age of thirty years, and has not resided in this State six years next preceding his election, and the last year thereof in the district for which he may be chosen.").

851 BLACK'S LAW DICTIONARY 1335 (8th ed. 2004); see also *id.* (defining "resident" secondarily as "[a] person who has a home in a particular place," and noting that, "[i]n [this] sense, a resident is not necessarily either a citizen or a domiciliary"). In this regard, we also note that, although section 32 of the constitution requires a senator to have "resided in" Kentucky six years prior to his or her election, it only requires citizenship in the commonwealth "at the time of" the election. KY. CONST. § 32. Some of the indicia of Stephenson's "resid[ence] in" Indiana during the disputed period, such as her casting of votes, pertained more to citizenship than to "resid[ence]."

852 See *supra* notes 654–63 and accompanying text for a discussion of *Humble v. Hoover*, and see *supra* notes 467–79 and accompanying text for a discussion of *In re Raney*, which involved similar considerations.

853 See *supra* notes 578–618 and accompanying text for a discussion of *In re Wilkes*.

854 KY. CONST. § 2.

855 KY. CONST. § 38. This section provides in full that "[e]ach House of the General Assembly shall judge of the qualifications, elections and returns of its members, but a contested election shall be determined in such manner as shall be directed by law."

provides that “[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.”⁸⁵⁶ Although originally adopted with the principal goal of protecting slavery,⁸⁵⁷ section 2 was retained in the current constitution and now operates much like a guarantee of due process or equal protection.⁸⁵⁸ The defense of *Stephenson* under section 2 would posit that the senate’s finding that Stephenson was qualified to serve was “arbitrary” and therefore an abuse of its authority under section 38.

Although this argument has the virtue of standing on text,⁸⁵⁹ it does go beyond the principal understanding of section 2 as a guarantor of individual rights.⁸⁶⁰ More significantly, however, it would also eliminate the entire concept of “non-justiciable political questions” as a category of constitutional law. After all, if the resolution of such questions were subject to judicial review, they would no longer be “non-justiciable.”

Take, for example, the question of impeachment. Imagine that a constitutional officer were indicted for a crime, tried, and subsequently exonerated on a directed verdict. Imagine further that a member of the house then introduced articles of impeachment against the officer for precisely the conduct at issue at trial. If section 2 applied to non-justiciable political questions, the officer could seek equitable relief against the pending impeachment on the ground that a court of law had already rejected its factual basis, despite the provision of the constitution that gives the house “the sole power of impeachment.”⁸⁶¹

This power and others expressly assigned by the constitution to branches of the government other than the courts would be implicated were section 2 amenable to judicial enforcement in such matters. Indeed, the list of non-justiciable political questions arising from a “textually demonstrable constitutional commitment of [an] issue to a coordinate political department”⁸⁶² is quite long. It includes the house’s power to impeach, the sen-

856 KY. CONST. § 2.

857 See John D. Dyche, *Section 2 of the Kentucky Constitution—Where Did it Come From and What Does it Mean?*, 18 N. KY. L. REV. 503, 503, 505–07 (1990).

858 See *Ky. Milk Mktg. & Antimonopoly Comm’n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985). See generally Dyche, *supra* note 857, at 517–18.

859 Section 26 of the Kentucky Constitution makes the “general powers of government” subject to the bill of rights, of which section 2 is a part. Of course, section 26 goes on to make these powers subject to the entire constitution, so section 26 does not appear to make the bill of rights uniquely fit for judicial review. See KY. CONST. § 26 (“To guard against transgression of the high powers which we have delegated, We Declare that every thing in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.”).

860 See Dyche, *supra* note 857, at 518.

861 KY. CONST. § 66.

862 *Philpot v. Haviland*, 880 S.W.2d 550, 553 (Ky. 1994) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

ate's power to try after an impeachment, the executive's power to call or not call a special session,⁸⁶³ a legislator's power to introduce or not introduce a bill, a legislator's power to vote yea or nay, the executive's power to approve or veto legislation, the executive's power to fill vacancies, and the executive's power to call out the militia.⁸⁶⁴ In theory, all these powers can be exercised "arbitrarily." We should be loathe to adopt a rule that would eliminate such a broad category of constitutional practice. Moreover, leaving non-justiciable political questions to the legislature or the executive, as the case may be, promotes important values associated with majoritarian political theory. In any political system worthy of the name, ultimate power to resolve particular issues will reside somewhere, and exercise of that power will potentially give rise to controversy. But the people, through their written constitution, have chosen to allocate certain forms of authority to the various branches of government, subject only to the ultimate authority of the citizenry. As Senator George W. Norris of Nebraska noted in *In re Vare*:

I presume our forefathers . . . knew that to whatever tribunal they gave this authority, there was a possibility of its being abused, and inasmuch as that possibility would necessarily exist wherever the responsibility was placed, they thought it best to let the Senate settle its own difficulties and be the judge of the qualifications of its own members.⁸⁶⁵

Indeed, as powerful as the concept of non-justiciable political questions might be in the abstract, its power rises to its zenith with regard to the privilege we have been discussing because of its strong textual basis. In fact, in a famous speech on the general subject of non-justiciable political questions, the noted constitutional scholar Herbert Wechsler, who on the

863 See *Royster v. Brock*, 79 S.W.2d 707, 711 (Ky. 1935) ("The Governor . . . need not issue the proclamation until, after reasonable deliberation, he has determined it is absolutely necessary."); *Geveden v. Commonwealth ex rel. Fletcher*, 142 S.W.3d 170, 172 (Ky. Ct. App. 2004).

864 See *Franks v. Smith*, 134 S.W. 484, 487 (Ky. 1911).

865 69 CONG. REC. 988 (Dec. 22, 1927). For a general discussion of non-justiciable political questions, see *Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.3d 852, 860 (Ky. 2005). See also REX E. LEE, A LAWYER LOOKS AT THE CONSTITUTION 196 (1981) ("In a sense, the political-question doctrine constitutes an exception to *Marbury v. Madison*. *Marbury v. Madison* held that it is the province of the courts to say what the law is, including constitutional law. From that basic premise, the political-question doctrine carves out a few substantive areas of constitutional law that are not for judicial decision but are left for ultimate decision by one of the judiciary's sister branches."); Neil K. Komisar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 408 (1984) ("[A]lthough the Constitution is concerned with the policing of governmental processes, it does not make the judiciary the sole or even the dominant institution to carry out this function."); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1706 (2004) ("[O]ur Structural Constitution confers the priceless values of self-governance upon many different entities.").

whole opposed the recognition of such questions, acknowledged the existence of at least two—the legislative power to impeach (and try thereafter) and the legislative privilege to adjudicate members' eligibility. “[A]ll [this] doctrine can defensibly imply,” he said, “is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation”:

Who, for example, would contend that the civil courts may properly review a judgment of impeachment when article I, section 3 declares that the ‘sole Power to try’ is in the Senate? . . . What is explicit in the trial of an impeachment, or, to take another case, the *seating* or expulsion of a Senator or Representative may well be found to be implicit in others.⁸⁶⁶

For the same reasons, the basic operation of the privilege cannot be subject to judicial review vis-à-vis the federal guarantees of due process and equal protection without depriving it of significance. Various courts have recognized this. As we have noted, the two houses of Congress have the same authority to judge the “[e]lections, [r]eturns and [q]ualifications” of their members as the two houses of the general assembly,⁸⁶⁷ and the claim has been made and rejected that an allegedly improper determination pursuant to this power is actionable in a court of law. Although the court in *Morgan v. United States*⁸⁶⁸ acknowledged that some actions tangentially related to the privilege, such as the compelling of witnesses to appear, might be subject to judicial scrutiny, it went on to conclude that review cannot be available with respect to the legislature’s substantive determina-

866 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–8 (1959) (footnote omitted) (emphasis added); see also Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbra*, 77 B.U. L. REV. 1089, 1102 (1997) (“The text of the Constitution thus gives the representatives of all the people the final say in judging the qualifications of the representatives of any one State”); Van Alstyne, *supra* note 573, at 9–10 (“Of course, it is a nice question how many clauses of this kind, if any, the Constitution contains. Very few come labeled as justiciable or nonjusticiable as such—actually none do. Still, it may not be difficult to propose an example or two of a sort that [Chief Justice] Marshall himself might have approved. So, as one such plausible example, consider a provision in Section 5 of Article I. The pertinent section provides that: “*Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members*” (emphasis added)); Wechsler, *supra*, at 9 (footnote omitted) (“If I may put my point again, I submit that in cases of the kind that I have mentioned . . . the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts.”). See generally Allan Ides, *Judicial Supremacy and the Law of the Constitution*, 47 UCLA L. REV. 491, 506 (1999) (discussing the privilege at the federal level) (“This placement of the judging function in the legislative branch, however, does not alter the fact that the subject rules are enforceable. It merely defines the location for that enforcement.”).

867 U.S. CONST. art. I, § 5, cl. 1.

868 *Morgan v. United States*, 801 F.2d 445 (D.C. Cir. 1986).

tion.⁸⁶⁹ As the court put the matter, an alleged deprivation of due process or denial of equal protection arising from the privilege “must rest on violation of some individual interest beyond the failure to seat an individual or to recognize that person as the winner of an election. That substantive determination, which is the issue in the present case, resides entirely with the House.”⁸⁷⁰ This approach is correct, for any other application of these two clauses would render the privilege meaningless.

Another serious deficiency to the argument under section 2 is that it fails to engage the history and precedent of the privilege. As we have noted elsewhere in this Article, legislatures resolving contests, protests, and petitions under the privilege have often come to a conclusion that a court of law almost certainly could not reach, exalting substance over form or marching to the beat of a different drummer.⁸⁷¹ The problem with subjecting the privilege to judicial review for “abuse” is therefore both fundamental and definitional. If abuse were defined as deviation from settled law, then the legislatures have arguably abused their privilege on numerous and perhaps innumerable occasions since the Revolution, including in such matters as *Stanton v. Lane*, *In re Vare*, *In re Raney*, *Durkin v. Wyman*, and *Humble v. Hoover*. Defining these precedents as somehow invalid would not only undermine the text of the privilege and disserve the concept of legislative independence, it would also effect a dramatic departure from historical practice.

Indeed, if actionable “abuse” of the privilege constituted coming to a conclusion that a court would avoid, then the privilege means almost nothing, converting the legislature into the equivalent of a lower court. This is because virtually any resolution of a contest will sustain an argument in good faith that the chamber has reached a conclusion contrary to law. This judicial device would be resorted to in almost every instance, and legislative contests would become merely the first step in the process.⁸⁷² If, by contrast, “abuse” of the privilege were somehow defined as “gross

⁸⁶⁹ See *id.* at 451.

⁸⁷⁰ *Id.* Indeed, the highest Court of Kentucky made the same observation in *Taylor v. Beckham*:

The congress of the United States has, by the constitution, the power to judge of the qualifications, elections, and returns of its members. In not a few cases it has been supposed to have acted arbitrarily in such matters, but it was never maintained that one who was ousted of his seat in congress on a contest could take the matter into the courts to supervise the action of congress on such grounds as are alleged in this case.

Taylor v. Beckham, 56 S.W. 177, 184 (Ky. 1900), *appeal dismissed*, 178 U.S. 548 (1900).

⁸⁷¹ See *supra* notes 664–70 and accompanying text.

⁸⁷² See *Morgan*, 801 F.2d at 450 (“Adding a layer of judicial review . . . would undoubtedly be resorted to on a regular basis . . .”).

deviation” from settled principles of law, the perplexing and unanswerable question would arise of exactly what constitutes such deviation. At the end of the day, judicial resolution of a process that has historically lain at the intersection of law and politics is a contradiction in terms. From the point of view of any one judge at any one time, the “law” is an objectively cognizable concept, and a rule either conforms to it or does not. Though judges may disagree, and although a judge’s opinion on an issue may vary over time, the concept of law does not presuppose alternative rules for one judge at one time. There being no undistributed middle, neither a judge nor a collegial court operating by majority could meaningfully distinguish “acceptable” from “unacceptable” quasi-political resolutions of a contest.

In addition, the presupposition that the privilege will be used primarily for ill is not well supported by the facts. As Senator Walter F. George noted long ago in defense of Rush Holt, the House of Representatives had allowed John Young Brown of Kentucky to take his seat, although he had lacked the requisite age at the beginning of the session for which he had been elected, “and yet immature men under 25 years of age [were not] elected in sufficient number to prevent the orderly functioning of government.”⁸⁷³ For whatever reason, legislatures have tended to be modest in their exercise of the privilege.

Finally, although this point is most important within Kentucky, the highest court of the commonwealth long ago held that legislative resolution of a contested gubernatorial election, closely analogous to exercise of the privilege, is not actionable under section 2. Over a century ago, in *Taylor v. Beckham*, the Kentucky Court of Appeals rejected a challenge to the legislature’s determination that the voters had chosen Goebel instead of Taylor to serve as governor. Much of the Court’s analysis proceeded from the provision of the constitution that authorizes the legislature to resolve such contests, which as noted earlier is functionally identical to Kentucky’s articulation of the privilege.⁸⁷⁴ But portions of the Court’s analysis also touched on section 2, and the Court held that legislative resolutions of contested gubernatorial elections are not subject to judicial review under that provision.

First, counsel for appellants in *Taylor* clearly raised the section in their arguments. For example, Bradley, representing Taylor, presented a hybrid argument predicated on both section 2 and the Fourteenth Amendment to the federal Constitution: “The Legislature,” he said, “having violated

⁸⁷³ 74 CONG. REC. 9754 (June 20, 1935) (Sen. George); *see supra* note 451 and accompanying text.

⁸⁷⁴ Compare KY. CONST. § 38 (“Each House of the General Assembly shall judge of the qualifications, elections and returns of its members, but a contested election shall be determined in such manner as shall be directed by law.”), *with id.* § 90 (“Contested elections for Governor and Lieutenant Governor shall be determined by both Houses of the General Assembly, according to such regulations as may be established by law.”).

every rule of procedure governing the trial, has attempted to exercise arbitrary and absolute power and has in this way deprived the appellants of their privileges and immunities under the Constitution"⁸⁷⁵ Similarly, the firm of Helm, Bruce and Helm, representing appellants, argued that "[a]rbitrary power exists nowhere in a republic."⁸⁷⁶ And Phelps, representing appellees, responded in kind, noting that "[a]bsolute and arbitrary power' must lie somewhere in determining these matters, and it is within the domain of the Legislature to so place it."⁸⁷⁷ The references to section 2 are unmistakable.

And in its opinion the Court took up and rejected appellants' arguments: "It is averred," the Court noted, "that the general assembly acted without evidence, and arbitrarily."⁸⁷⁸ The Court further added that:

It is also argued that the contest board was not fairly drawn by lot; that certain of the board were liable to objection on the score of partiality, and that, therefore, this board was not properly constituted. If any of these objections were well founded, the general assembly had full power to take such action as was proper in the premises. It does not appear that any of the objections urged were presented to the general assembly, but, if they were, and it refused to make a correction, if must be presumed that it had sufficient reasons for its action.⁸⁷⁹

Given this language, one cannot say that the courts of Kentucky have left open the question of whether section 2 applies to a non-justiciable political question such as the exercise of legislative authority under section 38.

2. *The Last Clause of Section 38.*—Because section 38 includes a second, conjunctive clause, Kentucky's articulation of the privilege is slightly more complicated than that of many other states. Although the section recognizes, in customary fashion, that "[e]ach House of the General Assembly shall judge of the qualifications, elections and returns of its members," it goes on to say "but a contested election shall be determined in such manner as shall be directed by law."⁸⁸⁰ In the abstract, this language might permit judicial review of the "manner" in which a contest is resolved,⁸⁸¹ but such an

⁸⁷⁵ *Taylor v. Beckham*, 56 S.W. 177, 108 Ky. 278, 281 (1900) (Bradley, for appellant).

⁸⁷⁶ *Id.* at 282 (Helm, Bruce and Helm, for appellants).

⁸⁷⁷ *Id.* at 283 (Phelps, for appellees).

⁸⁷⁸ *Taylor*, 56 S.W. at 179.

⁸⁷⁹ *Id.* at 183.

⁸⁸⁰ KY. CONST. § 38.

⁸⁸¹ Given the plenary nature of the privilege, however, a strong argument can be made that even the "manner" of resolving a contested election is to be interpreted and enforced solely by the legislature. In somewhat analogous circumstances, the Supreme Court of the United States held that the manner by which the Senate undertakes to "try" impeachments itself presents a non-justiciable political question. See *Nixon v. United States*, 506 U.S. 224,

action, in fact, would have been unfounded in Stephenson’s contest against Woodward because, in resolving the contest, the senate adhered to the procedures laid down in the applicable statutes.

These procedures are codified at KRS 120.215 and 120.205. KRS 120.215, for example, provides that:

When the election of a member of the General Assembly is contested, the branch to which he belongs shall, within three (3) days after its organization, and in the manner provided in KRS 120.205, select a board of not more than nine (9) nor less than five (5) of its members to determine the contest. Such board shall be governed by the same rules, have the same power, and be subject to the same penalties as a board to determine the contested election of Governor. It shall report its decision to the branch of the General Assembly by which it was appointed, for its further action.⁸⁸²

Review of the senate’s *procedure* in resolving the contest will show that it observed this and other applicable statutes,⁸⁸³ and that therefore an action under the last clause of section 38 would not have been tenable.

Although Woodward presented the argument in *Stephenson* that KRS 118.176 sets forth the “manner” of resolving a contested election,⁸⁸⁴ the Court properly did not take this position, emphasizing instead the statute’s role as a regulation of elections.⁸⁸⁵ “[T]his Court has specifically determined,” it noted, “that pre-election challenges pursuant to KRS 118.176 are not election contests.” Indeed, it defies credulity to argue that a statute, such as KRS 120.215, that begins with the words “[w]hen the election of

236 (1993) (“[O]pening the door of judicial review to the procedures used by the Senate in trying impeachments would ‘expose the political life of the country to months, or perhaps years, of chaos.’”).

882 KY. REV. STAT. ANN. § 120.215 (West 2006).

883 See *supra* notes 49–55 and accompanying text.

884 See Brief for Appellee/Cross-Appellant Virginia L. Woodward in Response to Briefs Filed by Appellants Dana Seum Stephenson and David L. Williams at 37, *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005) (Nos. 2005-SC-603-TG (2005-CA-1601-MR), 2005-SC-604-TG (2005-CA-1602-MR), & 2005-SC-645-TG (2005-CA-1643-MR) (“In accordance with Section 38, the General Assembly has created a statutory scheme found in KRS Chapters 116 through 121A to regulate the outcome of elections.”).

885 *Stephenson v. Woodward*, 182 S.W.3d 162, 168 (Ky. 2006); see also *id.* at 202 (Scott, J., dissenting) (“‘Pre-election proceedings’ are regulated by KRS Chapter 118 and are not an approved means of determining the ‘qualifications, elections, and returns’ of the members of the General Assembly under Ky. Const. Sec. 38.”); *Noble v. Meagher*, 686 S.W.2d 458, 461 (Ky. 1985) (noting that an action under KRS 118.176 “is technically not an election contest”); *id.* at 460 (“It is important to distinguish between an election contest and a pre-election lawsuit.”); *Fletcher v. Wilson*, 495 S.W.2d 787, 791 (Ky. 1973) (“An election *contest* obviously is a *post*-election procedure, involving an election that has been held, as distinguished from a pre-election suit to determine whether a person may be voted on as a candidate.”) (emphasis added).

a member of the General Assembly is contested" does not set forth the "manner" in which such contests should proceed.

Even though legislators on at least one occasion have construed the last clause of section 38 to make substantive provisions of law apply to contests,⁸⁸⁶ the validity of such a construction is subject to serious doubt. To be sure, legislators are on solid ground when they resolve contests in accordance with such provisions, but the clause does not mandate such accordance. In fact several principles suggest strongly to the contrary. First of all, ascribing a substantive meaning to the word "manner" would be quite unorthodox, particularly where the tradition and theory underlying the privilege cut decidedly in the opposite direction. Second, such a construction is far from universal, as *Humble v. Hoover* attests. Section 32 of the constitution requires members of the house to have "resided in this State two years next preceding [their] election, and the last year thereof in the county, town or city for which [they] may be chosen."⁸⁸⁷ Although Hoover had "resided in" her district less than a month before her election, the house nevertheless found her qualified, choosing to emphasize her familiarity with the district, the unusual circumstances presented in the contest (the district's lines had recently changed), and the voters' expressed desire that Hoover represent them instead of the substantive requirements of section 32.⁸⁸⁸ If a chamber of the general assembly could exalt the substance of section 32, a constitutional provision, over its form, *a fortiori* it could exalt the substance of a statute over its form.

Third, interpreting the clause to require adherence to the entire electoral code and supporting precedent would allow judicial review of virtually every exercise of the privilege (assuming such review was available under the last clause of section 38 at all), because an argument can almost always be made in good faith that resolution of a contest has departed from an established principle of substantive law. In addition to seriously undermining separation of powers, this would also eliminate exercise of the privilege as a distinct aspect of our legal and political culture, preventing the legislature from overlooking technical defects in pursuit of a broader goal, such as vindication of the expressed interests of the voters.

In light of the foregoing considerations, the proper construction of the last clause of section 38 is that, at most, it subjects the procedures by which the legislature exercises the privilege to judicial review.

3. "Waiver".—A third possible justification for *Stephenson*, apart from the rationale adopted by the Court, lies in the idea of "waiver" or a related concept. According to this justification, the holding in the case was ap-

886 See Gilliam v. Follis, Ky. HOUSE JOUR. 95-97 (Jan. 12, 1894) (majority report).

887 KY. CONST. § 32.

888 See *supra* notes 654-63 and accompanying text for a discussion of this contest.

appropriate because the Jefferson Circuit Court found Stephenson ineligible to serve, and neither Stephenson nor Williams sought review of that finding. Although the Court noted this choice on Stephenson and Williams's part at various points in its opinion, it never indicated that this was itself a ground for its disposition of the case. This was appropriate, for a contrary indication would have mistaken politeness for separation of powers. If the judiciary as a whole lacked authority to supersede the senate's determination, then *a fortiori* the Jefferson Circuit Court lacked such authority. In this regard, one should also note that Stephenson never asked to be a party to the action in Jefferson Circuit Court, and Williams made no arguments to that court respecting Stephenson's putative qualifications.⁸⁸⁹

D. Glitches

In addition to trivializing a privilege central to legislative independence, the decision in *Stephenson* will also quite likely engender uncertainty in the area of elections. For example, the Court quite clearly takes the position early in the case that the senate's authority under section 38—and presumably therefore also the House's authority under the same provision—does not operate with respect to individuals who present themselves to the chamber for membership.⁸⁹⁰ As noted above, this is not a sensible interpretation of the language, and it departs radically from precedent, history, and theory. Nevertheless, any person made subject to a contest, protest, or petition at the threshold of service will undoubtedly rely on this language to suggest that the chamber in question is acting beyond its authority, and the court to which this person takes his or her case will be confronted with *Stephenson* as precedent. The court may, of course, rely on the Court's later observation in *Stephenson* that the authority of the two houses under section 38 in fact *does* extend to questions pertaining to election and return,⁸⁹¹ but even then the would-be member will argue that the latter observation does not control the earlier, broader one. Quite certainly, then, a protracted legal action will proceed, even though under a proper interpretation of the law an outright dismissal would have been the proper resolution of the matter. Moreover, the foregoing supposition assumes a question of election or return is presented. If, on the other hand, a question of qualifications were presented at the threshold of service, as with *Stanton v. Lane*, *Hatfield v. Holt*, or *Humble v. Hoover*, the Court's later quasi-reversal of itself would have no application, and the courts would find themselves in something of a quandary.

889 See Memorandum in Support of Motion to Dismiss, *Woodward v. Stephenson*, No. 04-CI-09261 (Jefferson Cir. Ct., Ky. Nov. 8, 2004).

890 See *Stephenson*, 182 S.W.3d at 167–68.

891 See *id.* at 167.

Stephenson also casts doubt upon the constitutionality of the statutes that set forth the procedures for legislative contests. These were the procedures according to which the senate conducted the contest of *Stephenson v. Woodward*. These procedures contemplate contests at the threshold of membership, and indeed make elaborate provision for the taking of evidence before the chamber comes into session.⁸⁹² Presumably these procedures are now unconstitutional to the extent they purport to pertain to qualifications, elections, and returns at the threshold of membership. In addition, even if the Court's second observation on the scope of section 38 is correct, and not its inconsistent first one, then these provisions are still unconstitutional to the extent they contemplate a contest regarding qualifications at the onset of service, as was the case in *Humble v. Hoover*.⁸⁹³

Finally, *Stephenson* also leaves us in a quandary regarding grounds for disqualification that arise after the general election but before the general assembly comes into session. This can happen, for example if a member-elect simply moves to another country, yet *Stephenson* appears to eliminate the exclusive historical means of adjudicating a challenge to such a member-elect's qualifications upon the convention of the legislature. In this regard, one must bear in mind that the Court purported to justify its decision on the scope of KRS 118.176, but that statute clearly will not permit an action to be initiated after the general election, nor will the improbable analysis of *Stephenson* permit a house of the general assembly to adjudicate such an issue, given that the issue regarding qualification arose before the body came into session.

There are quite likely other anomalies that the decision in *Stephenson* will create, given its deviation from well-settled and coherent principles of separation of powers and legislative practice, but these should suffice to demonstrate the need for attention to the potential problems created by this decision.

CONCLUSION

The practices and privileges of legislatures have long histories, often grounded in constitutional text, and it is unfortunate when legal academics, attorneys, and judges overlook or trivialize such history. "People will not look forward to posterity," wrote Edmund Burke, "who never look backward to their ancestors." "By a constitutional policy," he went on to ob-

892 See KY. REV. STAT. ANN. § 120.195(2) (West 2006) ("In the case of a member of the General Assembly, the notice shall be given within fifteen (15) days after the final action of the county board of elections or the State Board of Elections, whichever canvasses the returns."); *id.* § 120.195(3) ("The taking of depositions to be used before a board or branch of the General Assembly shall close ten (10) days before the next meeting of the General Assembly, or, if in session when notice is given, when the taking is ordered to close.").

893 See *supra* notes 654-63 and accompanying text for a discussion of this contest.

serve, “working after the pattern of nature, we receive, we hold, we transmit our government and our privileges, in the same manner in which we enjoy and transmit our property and our lives.”⁸⁹⁴ Repairing the apparent damage from *Stephenson v. Woodward* would be part of this salutary process.

Stephenson v. Woodward reflects a profound lack of appreciation for the history and theory underlying the legislative privilege to “judge of” the “qualifications, elections and returns” of its members.⁸⁹⁵ It also departs dramatically from text and from the overwhelming weight of applicable precedent, both legislative and judicial. For these reasons, we earnestly hope that the Supreme Court of Kentucky will have occasion to revisit this decision and unwind its questionable reasoning.

⁸⁹⁴ EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE AND ON THE PROCEEDINGS IN CERTAIN SOCIETIES IN LONDON RELATIVE TO THAT EVENT 119 (Conor Cruise O’Brien ed., 1968) (1790); see also Fouad Ajami, *A Sage in Christendom*, WALL ST. J., May 1, 2006, at A14 (“In the normal course of things, America is not a country given to excessive deference to historians and to the claims of history, for the past is truly a foreign country here.”).

⁸⁹⁵ KY. CONST. § 38.