William & Mary Law Review

Volume 9 (1967-1968)
Issue 1

Article 14

October 1967

Constiutional Law - Free Speech - Judicial Review of Qualifications of Legislators - Bond v. Floyd, 87 S. Ct. 339 (1966)

Karen Atkinson

incident to ownership.[24] The contention is, first, that the 1866 predecessor of the present § 1982[25] was enacted to implement the Thirteenth Amendment, and is arguably not bound, therefore, by a state action requirement. But if reenactment and revision of the statute subsequent to passage of the Fourteenth brought it within the scope of that amendment, it still falls within the broad authority of § 5 as it was characterized in *Guest*. Lastly, the plaintiffs assert the presence of state action by reason of the State's licensing of defendants as real estate brokers and land developers; its "protection" of their operation by state law (e.g., zoning and bank lending laws); and its approval of the project through agencies such as the Highway Department, Building Commission, and the district which will furnish sewer services to the subdivision. It is also stressed that the defendants are acting comparably to a municipality, and should be subject to the same proscription.[26]

The district and circuit courts dismissed the action, delimited, in their view, by the dictates of case law. That the Supreme Court will find itself similarly disposed, however, is seriously questionable. Should it not, the present case will mark the commencement of a critical new phase in the Federal-State balance of power over private acts, and the Court will have done judicially what the Eighty-ninth Congress was unable to accomplish legislatively.

Richard A. Repp

Constitutional Law—Free Speech—Judicial Review of Qualifications of Legislators. Julian Bond, a Negro and a duly elected member of the House of Representatives of Georgia, was deprived of his seat

24. Reitman v. Mulkey, *supra* note 14. One reading of this case is that the power to alienate real property freely is not a right, since it is its "authorization" which is here being condemned. While the amendment to the California constitution prohibited only infringement on the right to sell to whom one pleases, the Court concluded that it "was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is *now* one of the basic policies of the State." *Id.* at 1634 (Italics added.).

25. 42 U.S.C. § 1982.

26. See Reitman v. Mulkey, *supra* note 14 at 1635 (concurring opinion).

"Zoning is a state and municipal function . . . . When the State leaves that function to private agencies or institutions who are licensees and who practice racial discrimination and zone our cities into white and black belts or black and white ghettoes, it suffers a governmental function to be performed under private auspices in a way the state itself may not act . . . . Leaving the zoning function to groups who practice racial discrimination and are licensed by the States constitutes state action in the narrowest sense in which Shelley v. Kraemer can be construed."

after a house investigation into his statements criticizing the policies of the federal government in Viet Nam and the operation of the Selective Service laws.[1] In light of these statements, the House felt that he could not uphold the oath of office which he was required to take by the Georgia Constitution.[2] The plaintiff brought this action for injunctive relief, claiming that the exclusion because of his political statements violated his rights under the First Amendment.[3]

The Supreme Court of the United States, unanimously reversing a lower court decision,[4] held that such exclusion was a violation of the plaintiff's freedom of speech as guaranteed by the First Amendment.[5] The Court rejected the contention that a state could demand a stricter degree of loyalty from elected officials than from ordinary citizens. It reasoned that a legislator, because of his position, must be as free as anyone else to discuss major issues[6] and is entitled to the same Constitutional protections in this area as other citizens.[7]

The United States Constitution provides that "each house shall be the judge of the elections, returns, and qualifications of its own members." [8] The courts have consistently held that Congress alone has the power to determine elections, returns and qualifications of its mem-

1. The plaintiff subscribed to a SNCC policy statement which called United States concern for freedom in foreign countries hypocritical and designed to hide American intentions. It equated the murder of a Negro in Alabama and the killing of peasants in Viet Nam. The plaintiff stated that he was a pacifist and opposed the draft. He stated that, as a second class citizen, he felt no responsibility to support the war.

2. GA. CONST. art. 3, § 4 (1945):

> Oath of members—Each Senator and Representative, before taking his seat, shall take the following oath, or affirmation, to-wit: "I will support the Constitution of this State and of the United States, and on all questions and measures which may come before me, I will so conduct myself, as will, in my judgment, be most conducive to the interests and prosperity of this State."

3. Bond v. Floyd, 87 S.Ct. 339 (1966).

4. The decision was appealed directly from the District Court under 28 U.S.C. 1253.

5. U.S. CONST. amend. I states: "Congress shall make no law . . . abridging the freedom of speech . . ."

6. The Court applied the rule from New York Times v. Sullivan that "debate on public issues should be uninhibited, robust and wide-open.", *supra* note 3, at 349.

7. This is the first time a court has assumed jurisdiction to determine the qualifications of a member-elect of a legislative body when the legislature, by constitution, has been given this power. In addition to the fact that courts have traditionally held that they have no jurisdiction in this area, most of the cases litigated have concerned the election rather than the qualifications of members. Since the power given to the legislatures to judge elections, returns, and qualifications is identical, what the courts say about one is equally applicable to all.

8. U.S. CONST. art. I, § 5. Compare this to the Georgia provision, *infra* note 15.

bers.[9] In *Barry v. United States ex rel. Cunningham*,[10] the Court said that the House of Representatives, in determining the validity of the election of a Representative, had the power to conduct an investigation, get the facts, apply the law and finally to "render a judgment which is beyond the authority of any other tribunal to review." [11] The issue was again raised in *Keogh v. Horner*[12] and the lower court affirmed the earlier decision when it said:

> The many volumes of election contest cases in which every conceivable question has been raised with reference to the right of persons to sit as members of Congress, together with the fact that there are no court decisions to be found, controlling such matters, bear mute but enforcible evidence that this court has no authority to be the judge of the manner in which such members were elected . . .[13]

Similarly, the state courts have also determined that they are without jurisdiction to determine elections, returns, or qualifications of members of Congress.[14] Most state constitutions have provisions similar to art. I, § 5 of the United States Constitution and art. 3, § 7 of the Georgia Constitution providing that the power to judge elections, returns, and qualifications for state legislatures rests in the legislative bodies themselves.[15] The state courts have consistently held that they have no jurisdiction in this area even though the action of the legislature might be arbitrary and in violation of fundamental rights.[16]

---

9. Barry v. United States *ex rel.* Cunningham, 279 U.S. 597 (1929); Application of James, 241 F. Supp. 858 (S.D. N.Y. 1965); Sevilla v. Elizalde, 112 F.2d 29 (D.C. Cir. 1940); Keogh v. Horner, 8 F. Supp. 933 (S.D. Ill. 1934).

10. Barry v. United States *ex rel.* Cunningham, *supra* note 9.

11. *Id.* at 613.

12. Keogh v. Horner, *supra* note 9.

13. *Id.* at 935.

14. State *ex rel.* Fleming v. Crawford, 28 Fla. 441, 10 So. 118 (1891); Belknap v. Board of Canvassers, 94 Mich. 516, 54 N.W. 376 (1893); State *ex rel.* 25 Voters v. Selvig, 170 Minn. 406, 212 N.W. 604 (1927); People *ex rel.* Fitzgerald v. Voorhis, 222 N.Y. 494, 119 N.E. 106 (1918).

15. The Georgia provision as found in the GA. CONST. art. 3, § 7 (1945) is:
> Elections, returns, etc.; disorderly conduct.—Each House shall be the judge of the election, returns, and qualifications of its members and shall have the power to punish them for disorderly behavior, or misconduct, by censure, fine, imprisonment, or expulsion, but no member shall be expelled, except by a vote of two-thirds of the House to which he belongs.

16. Hughes v. Melton 11 Colo. 489, 19 P. 444 (1888); Rainey v. Taylor, 166 Ga. 476, 143 S.E. 383 (1928); Fowler v. Bostick, 99 Ga. App. 428, 108 S.E. 2d 720 (1959); Beatty

The primary basis on which the courts have attributed their refusal to accept jurisdiction lies in the distinction between political and civil rights.[17] Political rights are those involving the establishment and management of the government, including the right to hold elective office.[18] Civil rights have been broadly defined to include all those rights accorded to every member of a district or nation.[19] Civil rights do not encompass political rights. This distinction is significant since traditionally courts have refused to exercise jurisdiction in cases involving political rights, nor will they issue an injunction to protect the enjoyment of such rights or to assist one in acquiring such rights.[20]

Thus, in the case at bar, the Court in acquiring jurisdiction was faced with two conflicting principles, although it did not discuss them. On the one hand, the rule that courts do not intervene in determining elections, returns, or qualifications of members of legislatures because the right to office is a political right which courts will not enforce,[21] and because this traditionally has been a constitutional power attributed to the legislatures.[22] On the other hand, the fact that the First Amendment guarantees that freedom of speech will not be abridged.[23] Here, the plaintiff had a political right to be seated, but a civil right to express his feelings. The states have the right to determine qualifications of legislators, but the federal courts must enforce the provisions of the United States Constitution. The mere fact that the Court assumed jurisdiction in this case, therefore, implied that when civil and political rights are in conflict, the civil rights will prevail.

The Court, in assuming jurisdiction, relied on *Gommillion v. Lightfoot*[24] which states: "When a State exercises power wholly within the dominion of state interest, it is insulated from federal judicial review.

v. Myrick, 218 Ga. 629, 129 S.E. 2d 764 (1963); Reif v. Barrett, 355 Ill. 104, 188 N.E. 889 (1933); State *ex rel.* Gramelspacher v. Marten Circuit Court, 231 Ind. 114, 107 N.E. 2d 666 (1952); Covington v. Buffett, 90 Md. 569, 45 A. 204 (1900); Dinan v. Swing, 223 Mass. 516, 112 N.E. 91 (1916); Attorney General v. Board of Canvassers, 155 Mich. 44, 118 N.W. 584 (1908); State *ex rel.* Ford v. Cutts, 53 Mont. 300, 163 P. 470 (1917); State *ex rel.* Boulware v. Porter, 55 Mont. 471, 178 P. 832 (1919); Re McNeill, 111 P. 235, 2 A. 341 (1886); State *ex rel.* Sullivan v. Schnitger, 16 Wyo. 479, 95 P. 698 (1908).

17. Reif v. Barnett, *supra*, note 16.

18. Blackman v. Stone, 17 F. Supp. 102, 107 (S.D. Ill. 1936).

19. 9 RULING CASE LAW Elections 10 (W. Mckinney & B. Rich ed. 1925).

20. Giles v. Harris, 189 U.S. 475 (1903); Georgia v. Stanton, 73 U.S. 50 (6 Wall. 50) (1867); Blackman v. Stone, *supra*, note 18; Green v. Mills, 69 Fed. 852 (4th Cir. 1895).

21. *Supra*, notes 18 & 20.

22. *Supra*, notes 9, 14 & 16.

23. *Supra*, note 5.

24. 364 U.S. 339 (1960).

But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." [25] The inference being that, while the states have the power to determine the qualifications of its elected representatives, these qualifications may not in any way infringe on a federally guaranteed right. The application of the criteria, as well as the criteria themselves, are subject to review by the courts.[26]

Prior to this decision, the power of judging elections, returns, and qualifications of members rested exclusively with the legislatures. The effect of this ruling is to circumscribe the area within which a legislature may set and apply qualifications for admittance to the elective body. Any qualifications and the applications thereof will be subject to judicial review if they infringe on Constitutional guarantees.

If the legislatures are now limited in this respect, will this limitation carry over into their power to determine elections and returns or to expel a member?[27] If the logic of this case is strictly extended, it would

25. *Id.* at 347.

26. The committee of the Georgia House which conducted the investigation came to the conclusion that the plaintiff's statements

> . . . showed he "does not and will not" support the Constitution of the United States and of Georgia, that he "adheres to the enemies of the State of Georgia" contrary to the State Constitution, that he gives aid and comfort to the enemies of the United States, that his statements violated the Selective Service Act, 50 U.S.C. 462, and that his statements "are reprehensible and are such as tend to bring discredit and disrespect to the House." Bond v. Floyd, *supra*, note 3 at 344.

The Supreme Court concluded that the plaintiff could not have been convicted under federal law.

27. Legislative bodies have traditionally had exclusive and unlimited power to expel its members. In Hiss v. Hartlett, 4 Gray 468, 63 Am. Dec. 768, 770 (1885), the court said:

> The power of expulsion is a necessary and incidental power to enable the house to perform its high functions, and is necessary to the safety of the state. It is a power of protection. A member may be physically, mentally, or morally wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent, and disorderly, or in the habit of using profane, obscene, and abusive language . . . If the power exists, the house must necessarily be the sole judge of the exigency which may justify and require its exercise.

It is well settled in the Senate that "the right to expel exists in all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member." STORY ON THE CONSTITUTION 838 (1840). The earliest example of this power is found in the case of W. Blount who was expelled from the Senate in July 1797, for a "high misdemeanor entirely inconsistent with his public trust and duty as a Senator." SERGEANT, CONSTITUTIONAL LAW 2d 302 (1830). He was declared guilty of this misdemeanor (attempting to prevent a United States agent among the Indians

appear that these powers would be similarly restricted.[28] Cases of this nature have been rare. Perhaps this ruling will provide the foothold on which other related claims will find their bearings, thereby leading to a more explicit definition of the law.

Karen Atkinson

Constitutional Law—SEARCH AND SEIZURE—"FRUIT OF POISONOUS TREE" DOCTRINE. Petitioner Jacobs had been convicted in the state court of armed robbery on a plea of guilty after he and his co-defendants had signed a joint confession acknowledging their respective parts in a holdup. Jacobs originally had been arrested without a warrant for his part in the robbery solely on the basis of a confession of his co-defendant Kelly. In subsequent habeas corpus proceedings the Federal District Court found that since Kelly's arrest without a warrant had been without probable cause, his confession was involuntary; and therefore, inadmissible against him.[1] On the basis of these facts Jacobs

from completing his duties), even though no presentment or indictment was found against him. It appears that there was no law under which he could have been prosecuted.

The Senate during the debates on the admission of Senator Smoot of Utah, found itself in a situation similar to the one the Georgia House faced with the plaintiff. Smoot met all the written qualifications, but because he was one of the Apostles of the Mormon Church, there was strong feeling that he would be unable to fulfil his oath of office as a Senator. (He was a polygamist, but polygamy was not yet against the law.) During the course of debates on his qualifications, it was finally determined to seat him and then discuss the possibility of expelling him. Once seated, however, the Senate refused to expel him. HIND'S PRECEDENTS Vol. I, 481-484 (1907).

A modern counterpart is found in the position of the House of Representatives with regard to seating Adam C. Powell. There is some feeling that he should be seated and then censured by some means, perhaps expulsion.

An important question left unanswered is: if Bond had been a member of the House when the statements were made and the House had then expelled him, would this action be subject to review by the courts?

28. The case is as noteworthy for what it assumes as for what it says. It does not discuss the difference between political and civil rights; it makes the direct statement, supported by the First Amendment, that a state cannot require a higher degree of loyalty from elected officials than from ordinary citizens; and it neglects the line of authority holding that the legislature alone has the power to judge the qualifications, returns, and elections. Because the Court did not include its reasoning, but merely its conclusions on these subjects, the importance of this case as a precedent is questionable.

1. The District Court determined that the arresting officers had made the arrest on the basis of "leads" given them by an informer. When questioned by the court as to the identity of the informer the police were unable either to establish his identity or to vouch for his reliability, and the court ruled that such a "lead" could not be considered sufficient probable cause for arrest.