UIC Law Review

Volume 14 | Issue 3 Article 9

Summer 1981

The Ineligibility Clause: An Historical Approach to Its Interpretation and Application, 14 J. Marshall L. Rev. 819 (1981)

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THE INELIGIBILITY CLAUSE: AN HISTORICAL APPROACH TO ITS INTERPRETATION AND APPLICATION

INTRODUCTION

The position of trust and confidence which a public servant occupies imposes upon him the obligation to act solely for the benefit of the public.[1] While this obligation does not appear overly burdensome, man's historic lust for wealth and power[2] has fostered a cynicism in the public-at-large—a wariness of people in high places.[3] The conventions which draft the laws of our states share this inherent distrust of public officials.[4] As a result, state constitutions often appear as patch-work designs with threads of mistrust interwoven throughout the fabrics of political organization.

Concern over the effect which undesirable influences exert on the elected official's execution of his office surfaced prominantly at the Sixth Illinois Constitutional Convention in 1970.[5] This concern was particularly evident in the Convention's delib-

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1. *See generally* Note, *Conflict of Interests: State Government Employees*, 47 VA. L. REV. 1034 (1961).

2. Benjamin Franklin noted that "[t]here are two passions which have a powerful influence on the affairs of men . . . ambition and avarice; the love of power and the love of money." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 82 (1911) [hereinafter cited as M. FARRAND].

3. *See* S. GOVE & T. KITSOS, REVISION SUCCESS: THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 13 (1974) [hereinafter cited as S. GOVE & T. KITSOS]; ("[T]he frequent scandals, in state and local governments, . . . have tended . . . to foster a cynical attitude toward government."); *see also* Tomasek, *A Responsive and Responsible Twentieth Century Legislature*, 48 N.D.L. REV. 258 (1972).

4. Omadhl, *The Case for Constitutional Revision in North Dakota*, 48 N.D.L. REV. 197, 199 (1972) [hereinafter cited as Omadhl] (the basic philosophy which underlies state constitutions is a suspicion of all government employees as being greedy, dishonest individuals who must be carefully watched to protect the public from their selfish, corrupt motives); *accord*, Miller, *Dead Hand of the Past*, 53 NAT'L CIVIC REV. 183 (1968). "The basic fact to appreciate about state constitutions is that they are designed not to help government officials govern but to prevent them from picking the taxpayer's pockets."

5. S. GOVE & T. KITSOS, *supra* note 3, at 13. For additional in-depth analysis of the 1970 Illinois Constitutional Convention, see J. CORNELIUS, CONSTITUTION MAKING IN ILLINOIS 1818-1970, at 121 (1972) [hereinafter cited as J. CORNEILUS]; E. GERTZ & J. PISCIOTTE, CHARTER FOR A NEW AGE: AN INSIDE VIEW OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION (1980) [hereinafter cited as E. GERTZ & J. PISCIOTTE].

erations over the manner in which individuals are chosen for appointive office.[6] Recognizing that a major flaw in the previous state constitutions was the unequal balance between the executive and legislative branches,[7] the delegates wished to strengthen the governor's office.[8] This goal may be achieved by granting the governor greater input into the selection of those who would serve under him.[9] However, incidents such as the patronage Cabinet of Andrew Jackson have instilled a desire to place limitations on the executive's power to fill vacancies. With these considerations before them, the Convention delegates pursued its task of adding vigor to the governor's office without giving him unbridled power in filling executive posts.[10]

After vesting the appointive power in the governor,[11] the Illinois Convention changed two previously elective offices into appointive positions.[12] The delegates then considered what

6. *See generally* E. GERTZ & J. PISCIOTTE, *supra* note 5, at 218-27; 3 RECORD OF THE PROCEEDINGS SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1253-59 (1969-70) [hereinafter cited as PROCEEDINGS].

7. S. GOVE & T. KITSOS, *supra* note 3, at 3.

8. E. GERTZ & J. PISCIOTTE, *supra* note 5, at 216-19; *see also* J. CORNELIUS, *supra* note 5, at 158-60.

9. *See generally* J. CORNELIUS, *supra* note 5, at 158-61. The two most controversial measures examined by the Committee on the Executive Article during the 1970 Convention were (1) shortening the ballot, and (2) expanding the governor's veto power. E. GERTZ & J. PISCIOTTE, *supra* note 5, at 218-19. The first measure, the "short-ballot," was proposed in an effort to create greater cohesion in the administration of government. Advocates of this proposal cited "the evils of voter cynicism, confusion, and ignorance; unresponsive government; and control of elective offices by political bosses . . . ." as additional reasons for reducing the number of elective offices. *Id.* at 220. The Convention considered removal of seven executive offices. *See* 3 PROCEEDINGS, *supra* note 6, at 1525-50.

The second measure was proposed by William Hanley, then legislative counsel to Governor Ogilvie. Hanley noted that the veto power was an inherent attribute of a strong executive and suggested that this power be increased. His recommendation consisted to two "special vetoes": an amendatory veto and a reduction veto. The amendatory veto gave the governor the power to partially veto or "amend" legislation rather than rejecting the bill *in toto*. The reduction veto allowed the governor to reduce appropriations made by the General Assembly. Both vetoes could be overridden by a simple majority. E. GERTZ & J. PISCIOTTE, *supra* note 5, at 218-19.

10. The Committee on the Executive Article was leary of granting too much power to the governor. E. GERTZ & J. PISCIOTTE, *supra* note 5, at 219. Their skepticism reflected the belief held by many that the governor's office could become the repository of too much patronage. Those delegates who feared abuse of power by the [governor] were unwilling to accept the legislature as a sufficient check . . . ." *Id.* at 220.

11. *See* ILL. CONST. art. V, § 9.

12. *See* J. CORNELIUS, *supra* note 5, at 158-61. The 1970 Convention eliminated the elective office of superintendent of public instruction and replaced it with a state board of education with two appointive offices: chief state school officer and executive officer for the board. In addition, the Convention also provided for the election of the governor and lieutenant gover-

limitations should be placed on the governor's discretion in filling vacancies, keeping in mind that too many restrictions hinder the efficient operation of state government.[13] After extensive deliberation, the Convention adopted tempered limitations designed to prevent abuses of the appointive power, while still allowing the governor flexibility in selecting the occupants of important offices.[14] One such tempered restriction on the governor's appointive power was imposed by the adoption of a less restrictive ineligibility clause.[15]

The ineligibility clause limits the availability of elected state legislators for appointive offices. In sister states, this clause appears in two forms. Some state constitutions absolutely exclude a legislator from civil appointments during his elected term.[16] In most states, however, the ineligibility clause imposes only a qualified restriction on civil appointments. These states disqualify a legislator from receiving appointment for the remainder of his elected term when (1) that office is created during his term, or (2) the salary of that office is increased during his term.[17] Both forms of the ineligibility clause have some disad-

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nor as a team, thereby giving the governor more input in the selection of that position's occupant.

13. *See* Omadhl, *supra* note 4, at 199; *see also* notes 44-45 and accompanying text *infra*.

14. In the long run, the Committee on the Executive Article really did not make any revolutionary changes in the governor's power to fill vacancies. The most pronounced change was the greater selection from which the governor could make appointments by lowering the age and residency requirements, S. GOVE & T. KITSOS, *supra* note 3, at 115, and by narrowing the scope of the dual office holding and ineligibility clauses. *See* 6 PROCEEDINGS, *Committee on the Legislative Article Proposal #1, supra* note 6, at 1346.

15. *See* ILL. CONST. art. IV, § 2(e), ¶ 2 which provides that "[n]o member of the general Assembly during the term for which he was elected or appointed shall be appointed to a public office which shall have been created or the compensation for which shall have been increased by the General Assembly during that term."

16. Sixteen states have an ineligiblity clause which absolutely forbids legislators from receiving appointment to public office during their elected term. They are: Arizona, Arkansas, California, Connecticut, Colorado, Georgia, Michigan, Minnesota, Montana, New Mexico, Oklahoma, Oregon, Pennsylvania, Vermont, Virginia, and Wyoming.

New Mexico also excludes legislators from appointment one year after the expiration of their term, but only to an office which was created or the salary of which was increased during the legislator's term. *See* N.M. CONST. art. IV, § 28.

17. Twenty-six constitutions have qualified restrictions, as does the Federal Constitution. *See* U.S. CONST. art. 1, § 6, cl. 2. The twenty-six states are: Alabama, Alaska, Deleware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Jersey, New York, North Dakota, Ohio, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin. A dozen of these state constitutions extend the provision's coverage to elective office as well. *See* ALASKA CONST. art. II, § 5; KY. CONST. § 44; MD. CONST. art. III, § 17; N.J. CONST. art. IV, § 5, ¶ 1; N.Y. CONST. art III, § 7; OKLA. CONST. art. V, § 23; S.D.

vantages. The absolute disqualification of legislators broadly eliminates experienced public servants from executive offices.[18] The "qualified restriction" form is narrower in scope, leaving legislators and the governor susceptible to outside influences in all but a few situations.[19] In addition, the "qualified restriction" form is more difficult to apply and hence more easily evaded.[20]

At the Sixth Illinois Constitutional Convention, the delegates adopted the "qualified" ineligibility clause over its more restrictive counterpart. The Committee on the Legislative Article, the drafters of this provision, stated that the narrower form was preferred for two reasons. First, the qualified restriction conformed to the Convention's over-all desire to temper restrictions on the governor's powers. Second, and more important, this form of ineligibility clause made the widest scope of talented individuals available for appointive offices.[21] The Committee believed that these factors outweighed the disadvantages inherent in the "qualified restriction" form.

The Committee was nonetheless concerned over the manner in which the narrower form of the ineligibility clause would be applied. Court cases from other jurisdictions revealed that potential gray areas abounded.[22] A comparative analysis prepared for the Committee had likewise labeled the area of ineligibility "murky" at best.[23] Therefore, in drafting the ineligibility clause into the Illinois Constitution, the Committee resolved to present a simple, straightforward provision which would give

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CONST. art III, § 12; TEX. CONST. art. III, § 18; UTAH CONST. art. VI, § 7; WASH. CONST. art. II, § 13; W. VA. CONST. art IV, § 5; WIS. CONST. art IV, § 12.

Washington's ineligibility clause was recently revised by amendment 69 which allows a legislator's appointment to an office, the salary of which was increased during his term. The legislator, however, is restricted to the pre-existing level of compensation for his initial term of office. *See* WASH. CONST. art. II, § 13 (amended 1979); *see also* note 124 *infra*.

18. G. BRADEN & R. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS 176-78 (1969) [hereinafter cited as G. BRADEN & R. COHN]. This was the argument presented by many of the delegates to the Federal Constitutional Convention of 1787 against adopting an absolute disqualification as the federal ineligibility clause. *See* notes 43-45 and accompanying text *infra*.

19. *See* notes 44-46 and accompanying text *infra*.

20. Despite its disadvantages, the Committee on the Legislative Article preferred an ineligibility clause in its qualified form to absolute disqualification of legislators from appointive office as had existed under the 1870 Constitution. *See* 6 PROCEEDINGS, *Committee on the Legislative Article Proposal #1*, *supra* note 6, at 1346.

21. 6 PROCEEDINGS, *Committee on the Legislative Article Proposal # 1*, *supra* note 6, at 1346.

22. *See* Warwick v. State *ex rel.* Chance, 548 P.2d 384, 389 n.17 (Alaska 1976); *see also* note 26 *infra*.

23. G. BRADEN & R. COHN, *supra* note 18, at 177-78.

the courts both certainty and flexibility in applying its mandate.[24]

On its face, the ineligibility clause hardly seems murky. The provision states that: "[n]o member of the General Assembly, during the term for which he was elected or appointed, shall be appointed to a public office which shall have been created or the compensation and allowances of which shall have been increased by the General Assembly during that term."[25] Despite the apparent clarity of this provision, case law illustrates the difficulty which many courts have experienced in applying its terms.[26] This difficulty stems, in part, from the purported need to balance the objectives of the ineligibility clause against three

24. *See* 4 PROCEEDINGS, *supra* note 6, at 2670, 2827.

25. ILL. CONST. art. IV, § 2(e), ¶ 2.

26. The difficulty which the courts have had in construing the qualified restriction can be seen by examining the exhaustive list of cases compiled in Warwick v. State *ex rel.* Chance, 548 P.2d 384, 389 n.17 (Alaska 1976), *reprinted in* Vreeland v. Byrne, 72 N.J. 292, 313 n.4, 370 A.2d 825, 836 n.4 (1977) (Hughes, C.J., dissenting). These cases can be grouped into five categories.

Group I consists of cases which have addressed the issue of whether the position to which the legislator was appointed is a public office within the meaning of the clause. *Compare* cases upholding eligibility: *In re* Advisory Opinion to the Governor, 132 So. 2d 1 (Fla. 1961) (director of the Board of Conservation); Golding v. Armstrong, 231 Miss. 889, 97 So. 2d 379 (1957) (executive director of State Sovereignty Commission) *with* cases invalidating the appointment or election under the clause: *In re* Advisory Opinion to the Governor, 225 So. 2d 512 (Fla. 1969) (Secretary of Administration); Romney v. Barlow, 24 Utah 2d 226, 469 P.2d 497 (1970) (position on Legislative Council).

Group II consists of cases which have attempted to define what constitutes an increase in the emoluments or compensation of an office. *Compare* those cases finding no such increase: State *ex rel.* Lyons v. Guy, 107 N.W.2d 211 (N.D. 1961) (expenses, purchase of an automobile and increase in social security coverage); Shields v. Toronto, 16 Utah 2d 61, 395 P.2d 829 (1964) (seven percent across-the-board increase is a cost-of-living adjustment) *with* cases finding that the emoluments of the office were increased: State *ex rel.* Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975) (cost-of-living adjustment was not de minimus and therefore constituted increase in the emoluments); Hall v. Baum, 452 S.W.2d 699 (Tex. 1970), *appeal dismissed*, 397 U.S. 93 (1970) (substantial raise in compensation for office of Governor).

Group III includes cases concerning the legislator's term of office. The issue varies from whether the resignation has any effect on the appointment to whether the ineligibility extends to an office the term of which will not begin until after expiration of his elected term. *See* Meredith v. Kaufmann, 293 Ky. 395, 169 S.W.2d 37 (1943) (appointee to office became a member of the legislature after passage of the salary increase); Spears v. Davis, 298 S.W.2d 921 (Tex. 1966) (ineligibilty clause does not prevent legislator from seeking office the term of which will not begin until after expiration of legislative term).

Group IV consists of cases which have been presented with the question of whether subsequent events can validate an otherwise unconstitutional appointment. *See* State *ex rel.* Hawthorne v. Wiseheart, 158 Fla. 267, 28 So. 2d 589 (1946) (appointee retained his office because challenge was not brought within the time in which the constitutional provision barred his appointment). *But see* Warwick v. State *ex rel.* Chance, 548 P.2d 384 (Alaska

competing considerations. These considerations include: the preference of our political system for participation in and eligiblity to public office;[27] the appropriateness of using legislative service to nurture leadership qualities;[28] and the desirability of having an experienced person continue in public service.[29] As a result of these policy arguments, many courts prefer a narrow construction of the ineligibility clause in favor of eligibility.[30]

The true source of difficulty in applying the ineligibility clause is the marked tendency of the courts to look solely at the language of the provision without resort to the debates which spawned those words. Viewed in this narrow light, the ineligibility clause appears merely to seek removal of any expectation of personal gain from a legislator's consideration in voting to proliferate government or increase its cost.[31] Thus, the provi-

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1976) (additional increase in the salary of an office after appointment of a legislator thereto does not render the issue moot).

Group V consists of cases which do not fit neatly in the other four categories. *See* Opinion of the Justices, 279 Ala. 38, 181 So. 2d 105 (1965) (appointment valid because office was elective and appointment thereto fit within constitutional exception of offices which are filled by vote of the people.); Mayor v. Green, 144 Md. 85, 124 A. 403 (1923) (statute changing city clerk from elective to appointive office did not create an office); Vreeland v. Byrne, 72 N.J. 292, 370 A.2d 825 (1977) (appointment invalid despite statutory provision preventing legislator from receiving increase in salary during the balance of his intended term).

27. Warwick v. State *ex rel.* Chance, 548 P.2d at 388-89; *accord*, Shields v. Toronto, 16 Utah 2d 61, 395 P.2d 829 (1964); State *ex rel.* O'Connell v. Dubuque, 68 Wash. 2d 553, 413 P.2d 972 (1966).

28. *E.g.*, Shields v. Toronto, 16 Utah 2d 61, 395 P.2d 829 (1964).

29. *Id.*; *accord*, State *ex rel.* Lyons v. Guy, 107 N.W.2d 211 (N.D. 1961); State *ex rel.* Grigsby v. Ostroot, 75 S.D. 319, 64 N.W.2d 62 (1954). *But see* Pollitt, *Senator/Attorney General Saxbe and the Ineligibility Clause of the Constitution: An Encroachment Upon the Separation of Powers*, 53 N.C.L. REV. 111 (1974) [hereinafter cited as Pollit].

30. *See In re* Advisory Opinion to the Governor, 132 So. 2d 1 (Fla. 1961); *accord*, Redmond v. Carter, 247 N.W. 2d 268 (Iowa 1976).

31. As a result, the courts have uniformly viewed the provision from the standpoint of its effect of securing disinterestedness in a legislator's vote. *See* Warwick v. State *ex rel.* Chance, 548 P.2d at 388 n.5 (Alaska 1976). In doing so, they have cited to the comments of Mr. Justice Story:

> The reasons for excluding persons from office who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure . . . some solemn pledge of his disinterestedness.

2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 864 (1833). There was more behind the thinking of the drafters, however, when they incorporated this clause into the Federal Constitution. In Reservists Comm. to Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971), *rev'd on other grounds*, 418 U.S. 208 (1974), the Court traced the origin of the ineligibility and incompatibility clauses of the Federal Constitution. There, the Court noted that the Framers were sincerely concerned with the use of political appointments to subvert the independence of legislative action. *Id.* at 835. Thus, the reason for destroying any expectation of personal aggrandizement from the legislator's consideration was to prevent the execu-

sion seemingly expresses a fear that legislators would otherwise seek to profit from their votes,[32] and is apparently designed only to protect against such selfish motivation.[33] This superficial analysis, however, ignores the deeper concerns which gave birth to the restriction.

This article will suggest an alternative analytical approach toward construction of the "qualified restriction" form of the ineligiblity clause—one which finds its interpretations in the history of the clause. The first part of the article examines the evolution of the ineligibility clause in state constitutions, lending insight into its original purposes and intended objectives. In part two, problems with present-day application of the clause will be analyzed and a resolution through the lessons of history will be offered.

HISTORICAL ANALYSIS OF THE INELIGIBILITY CLAUSE

In *Gompers v. United States*,[34] Mr. Justice Holmes explained why an historical analysis of a constitutional provision is essential to its present-day interpretation:

> [T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance . . . is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth.[35]

Although his words referred directly to the United States Constitution conceived in response to the misgivings witnessed in England, their relevance to state constitutions is evident. The thirteen original colonies, in drafting their respective constitutions, were likewise influenced by the abuses of the colonial governors.[36] As additional states joined the Union, their constitutional conventions borrowed generously from these "ex-

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tive from using political appointments as an inducement to secure favorable legislative votes. Pollitt, *supra* note 29, at 113-14.

32. *See, e.g.*, Warwick v. State *ex rel.* Chance, 548 P.2d 384, 388 (Alaska 1976) ("This type of constitutional provision is designed not only to stop overt trafficking in offices, but also to prevent less obvious influences on a legislator's actions . . . .").

33. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 867 (1833).

34. 233 U.S. 604 (1914).

35. *Id.* at 610.

36. *See* Tomasek, *A Responsive and Responsible Twentieth Century Legislature*, 48 N.D.L. REV. 258, 261 (1971) ("[The constitutions of the thirteen original colonies] were for the most part modifications of their colonial charters. The modifications were in the direction of curbing the powers of the . . . governor. The Royal Governors . . . as symbols of the hated King George III were on the minds of the men who drafted [them].").

isting models."[37] Thus, state constitutions, like their federal counterpart, have evolved from the same origin.

Origin of the Ineligibility Clause

Limitations on eligibility to appointive office originated in England in response to political corruption in that country.[38] The English monarchy had substantially increased its power by "purchasing" favorable parliamentary votes in exchange for prized political appointments. In an effort to reform the appointive process in England, limitations on eligibility to appointive offices were imposed.[39] Our Founding Fathers were also concerned with the influence which the English monarchy exerted over Parliament through its power to fill vacancies.[40] Therefore, they continued this reform movement in framing the fundamental law of the Union and included the country's first ineligibility clause as part of article I, section 6 of the United States Constitution.[41]

During the United States Constitutional Convention of 1787, the drafters of the Virginia Plan recommended that legislators be completely excluded from appointive office during their elected term.[42] This proposal was not popular, however, be-

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37. *Id.* at 262-63. The first Illinois Constitution of 1818 borrowed wholesale from the Federal Constitution and those of the thirteen original states. *See* J. CORNELIUS, *supra* note 5, at 32.

38. *See* Note, *Dual Office Holding and Conflicts in Appointive Powers*, 31 ST. JOHN'S L. REV. 254, 256 (1957). The beginnings of an ineligibility clause were the dual office holding provisions. In England, these provisions are traced back to the Act of Settlement, 12 & 13 Will., ch. 2 (1700), which precluded officers of the King from serving in the House of Commons.

39. The attempt to reform the abuses in appointive power started at the turn of the century in England. *See* Note, *Dual Office Holding and Conflicts in Appointive Powers*, *supra* note 38, at 256. In the Constitutional Convention of 1787, the Framers were merely continuing this reform ethic in America. The movement to reform the appointive process did not end there, however, as most state constitutions written during this time period engaged in similar efforts. *See* Omdahl, *supra* note 4, at 199.

40. Professor Pollitt, quoting in part from 2 G. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 242-43 (1858), observed:

> The generation of men who framed and established our Constitution was well aware that "the votes of members of Parliament had been bought, with money *or office* by nearly every minister who had been at the head of affairs"; and that this practice of "parliamentary corruption was freely and sometimes shamefully applied throughout the American war."

Pollitt, *supra* note 29, at 111 (emphasis in original).

41. U.S. CONST. art. I, § 6, cl. 2; *see* text accompanying note 47 *infra*.

42. The Virginia Plan was more or less the blueprint from which the Constitution was eventually written. The fourth resolution of the Virginia Plan proposed:

> 4. Res'd. that the members of the first branch of the National Legisla-

cause it disqualified capable people from executive offices.[43] Those who opposed disqualification feared that it would result in a figurehead unable to augment his branch with expertise learned in the legislature.[44] After much heated debate, James Madison suggested that a qualified restriction on civil appointments be adopted as a compromise.[45] Madison noted that the most frequent abuses under the British system occurred in two situations: when appointive offices were either needlessly created or uselessly enhanced for the sole purpose of appointing legislators thereto and quieting parliamentary opposition.[46] A qualified restriction would restrain these abuses, while preserving a legislator's eligibility to office in many instances. As eventually adopted, the ineligibility clause provided that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the

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ture . . . be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the time service, and for [a period of time] . . . after its expiration.

1 M. FARRAND, *supra* note 2, at 17-20. The fifth resolution contained a similar provision for the second house of Congress. *Id.* at 21.

The authors of the Virginia Plan believed that a fixed period of disqualification was needed after the term expired to prevent abuses at the end of the legislator's term. They were not alone in this belief. *See* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 864-68 (1833).

43. Pollitt, supra note 29, at 114-16. A motion was made to strike the fourth and fifth resolutions as "unnecessary and injurious" immediately upon their introduction. *Id.* at 115. Alexander Hamilton, who supported this motion, was particularly concerned with the detrimental effects that these resolutions would have on the executive. *Id.* The motion, however, was voted upon and narrowly defeated.

44. Pollitt, *supra* note 29, at 115. Charles Pinkney of South Carolina pictured the Senate, in particular, as the groomer of potential leaders. *Id.* He, therefore, opposed any clause which placed a restriction on the President's ability to draw on these men when their services were most desired. *Id.* at 118.

45. *Id.* at 116. When it was first proposed, the Madison compromise was soundly defeated. In response to Madison's proposal, Elbridge Gerry of Massachusetts remarked:

> [It] appears to me, that we have constantly endeavored to keep distant the three branches of government; but if we agree to this motion, it must be destroyed by admitting the legislators to share in the executive, or to be too much influenced by the executive in looking up to him for offices.

1 M. FARRAND, *supra* note 2, at 393.

46. *See* Pollitt, *supra* note 29, at 116. Madison's compromise was eventually adopted in a back-handed way. After a series of proposals were rejected, a suggestion was made to limit eligibility only to offices created by the legislature. This suggestion was subsequently amended to include offices, the salary of which had been increased. The final vote was far from a landslide: five states in favor, four opposed and one divided.

Emoluments whereof shall have been encreased during such time. . . ."[47]

The debates of the 1787 Convention elucidate those concerns which prompted the adoption of the ineligibility clause and should be considered in determining its application. First, the primary concern of the clause is the elimination of undue executive influence over legislative votes.[48] Second, the provision is indifferent to the actual motivation of either the legislator or the executive; the restriction operates merely because of the possibility that such influence could be used for improper motives.[49] Third, the ineligibility clause embodies three major contra-policy considerations: the preference for eligibility for office; the nurturing of leadership qualities through legislative service; and the continuation of experienced persons in office.[50] Thus, the provision is a compromise between the evils of abuses in filling public offices and the harms of excluding capable legislators from appointment to executive posts.

This compromise is the most important aspect of the clause in resolving questions arising under its provisions. When a court narrowly construes the clause in favor of eligibility, it is disturbing the balance between preventing abuses in the appointive process and allowing experienced legislators to continue in public service. The qualified restriction on civil appointments *is narrowly written in favor of eligibility*. To apply a narrow construction, in addition to its inherent bias toward eligibility, unduly limits the scope of the ineligibility clause.[51]

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47. U.S. CONST. art. I, § 6, cl. 2.

48. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 229 (1974) (Douglas, J., dissenting); *see also* Vreeland v. Byrne, 72 N.J. 292, 311, 370 A.2d 825, 836 (1977) (Hughes, C.J., dissenting).

49. Alexander Hamilton was convinced that despite the possible evils for which the appointive power could be used, optimism should be shown because of the potential good ends toward which legislators could be motivated. *See* note 140 *infra*. Hamilton's positive view was not accepted, however, in fear that likelihood of corrupt abuse far outweighed the possible benefits. Pollitt, *supra* note 29, at 114. Thus, in examining the validity of an appointment under the ineligibility clause, the actual motives of the executive and the legislator are irrelevant. *See, e.g.*, Warwick v. State *ex rel.* Chance, 548 P.2d 384, 390 (Alaska 1976).

50. *See* notes 27-29 and accompanying text *supra*. The arguments raised by those who opposed the fourth and fifth resolutions of the Virginia Plan are these contra-policy considerations. Alexander Hamilton expressed concern over disqualifying anyone from office, but especially the experienced legislator who could add to the effectiveness of the executive. Pollitt, *supra* note 29, at 115-121. In addition, Charles Pinkney recognized the function of the legislature, particularly the Senate, in nurturing potential leaders. *Id.* at 118.

51. *See* Pollitt, *supra* note 29, at 113.

Development of the Clause in State Constitutions

After the 1787 Convention, many state constitutions adopted the qualified restriction form of the ineligibility clause as part of their legislative articles.[52] Today, more than half of the states have retained a provision patterned after the federal ineligibility clause.[53] The debates in many state constitutional conventions have paralleled the arguments raised by the Founding Fathers.[54] New Jersey's Constitutional Convention in 1844 was a prime example. During the Convention, a proposal similar to the one suggested by the Virginia Plan was rejected by a two-to-one margin.[55] In the debate over this provision, careful consideration was given to the dangers of undue executive influence and the need to prevent corruption, as well as to the desirability of safeguarding a legislator's eligibility to appointive office.[56] Madison's compromise proposal was ultimately adopted in New Jersey with one modification; New Jersey's ineligibility clause additionally applied to elective offices.[57]

Other states, such as Illinois, never gave express recognition to these concerns. The First Illinois Constitutional Convention in 1818 copied the clause verbatim from the United States Constitution.[58] In doing so, the delegates followed the prevailing habit of incorporating provisions from existing constitutions without debating the policies behind those provisions.[59] The result of this procedure was often a discordant mix of miscellaneous provisions. Thus, while the Illinois Constitution of 1818 contained an ineligibility clause, Illinois also vested the power to fill vacancies in the state legislature.[60]

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52. *E.g.*, CAL. CONST. art. IV, § 5 (1844). The ineligibility clause was also included in the Organic Acts that established the territorial governments. *See, e.g.*, Alaska Organic Act, Act of Aug. 24, 1912, § 11, 37 Stat. 512; Kansas Organic Act, Act of May 30, 1854, § 26, 37 Stat. 286.

53. *See* note 16 *supra*.

54. *See, e.g.*, 3 ALASKA CONSTITUTIONAL CONVENTION PROCEEDINGS 144-49 (1956); PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 510-19 (1942).

55. *See* PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 518 (1942).

56. *Id.*

57. N.J. CONST. art. IV, § 5, ¶ 2 (1844).

58. *See generally* J. CORNELIUS, *supra* note 5, at 3-24.

59. The 1818 Constitution was written in one week and debated for only two. There were two dominant reasons for this haste. The first was the desire to become a state before Missouri did. The other was "that . . . Illinois constitution makers were typical of the writers of frontier constitutions in their impatience with the time and effort [needed] to formulate a . . . coherent statement of the principles of state government. . . . [They] borrowed provisions wholesale from other constitutions and made innovations only when [necessary]." J. CORNELIUS, *supra* note 5, at 10-11.

60. The governor was actually given an extensive appointive power. *See*

The Second Illinois Constitutional Convention in 1848 confronted public dissatisfaction with the appointive process.[61] This dissatisfaction prompted three major constitutional revisions: (1) the power to fill vacancies was vested exclusively in the governor, (2) many previously appointive posts were changed to elective offices, and (3) the absolute disqualification form of the ineligibility clause was adopted.[62] The appointive power remained structured in this manner until 1970 when the Sixth Illinois Constitutional Convention again reversed the cycle.

The 1970 Convention acknowledged the need for a strong executive. As a result, the governor retained his appointive power,[63] two elective posts were re-established as appointive offices,[64] and in drafting the ineligibility clause, the Committee on the Legislative Article returned once again to a qualified restriction on civil appointments.[65] This reform gave the executive the benefits of drawing on legislative expertise in filling offices while protecting the appointive process from the major areas of abuse.[66] Thus, over the course of one-hundred and fifty years, Illinois has implicitly acknowledged the arguments raised by the Founding Fathers in adopting the qualified restriction on civil appointments.[67]

THE INELIGIBILITY CLAUSE TODAY

Over its approximately two-hundred year history, the ineligibility clause has caused a "surfeit of litigation."[68] While a vari-

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ILL. CONST. art. III, § 22 (1818). The schedule adopted after this article, however, gave the legislature a concurrent appointing power over state officers. J. CORNELIUS, *supra* note 5, at 13. In the end, the legislature made most of the appointments.

61. S. GOVE & T. KITSOS, *supra* note 3, at 3.

62. J. CORNELIUS, *supra* note 5, at 34-35; *see also* BRADEN & COHN, *supra* note 18, at 176-78.

63. ILL. CONST. art. V, § 9.

64. *See* E. GERTZ & J. PISCIOTTE, *supra* note 5, at 216-21; *see also* notes 10 & 15 *supra*.

65. *Compare* ILL. CONST. art. IV, § 2(e), ¶ 2 *with* ILL. CONST. art. IV, § 15 (1870).

66. *See* notes 10 & 15 *supra*.

67. 6 PROCEEDINGS, *Committee on the Legislative Article Proposal #1*, *supra* note 6, at 1346.

68. *See* note 26 *supra*. Litigation over article 1, section 6 of the Federal Constitution has been severely limited because of the Supreme Court's holding in *Ex parte* Levitt, 302 U.S. 633 (1937), and Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). In *Levitt*, the appointment of Hugo Black to the Supreme Court was challenged on the basis of the ineligibilty clause. Justice Black had been a member of the Senate in March, 1937 when Congress passed the Judges Retirement Act, Act of March 1, 1937, ch. 21, §§ 1-2, 54 Stat. 24 (codified as amended, 28 U.S. C. § 371 (1970)),

ety of questions have been raised in these cases, a central problem has been common to nearly all of them. This basic dispute has involved whether a literal application or historical analysis approach should be adopted in construing the provision. The remainder of this article addresses three major areas of difficulty in construing the ineligibility clause. These are: (1) defining what is a public office, (2) determining whether a cost-of-living adjustment is an increase in salary within the meaning of the clause, and (3) determining the effect of a legislator's resignation upon his eligibility for public office.

Defining a Public Office

Perhaps the most perplexing problem raised by cases involving the ineligibility clause is determining whether a legislator has received appointment to a public office. This problem arises from the concerted effort of the courts to distinguish a *public office* from mere *public employment*.[69] The fine line which distinguishes these two categories of government service is often difficult to discern. Virtually all cases construing the words "public office" within the purview of the clause apply the traditional tests developed in other areas of the law for determining a public office without regard to whether these tests are consistent with the purpose of the ineligibilty clause.[70] This lit-

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which allowed a Justice of the Supreme Court to *retire*, rather than resign at age 70, with a pension equal to their then-existing salary. Retirement enabled a Justice to avoid paying income tax. *See* Note, *Legality of Justice Black's Appointment to the Supreme Court*, 37 COLUM. L. REV. 1212 (1937). The Supreme Court dismissed Levitt's action on the basis of insufficient standing. 302 U.S. at 634. *Ex parte Levitt* was reaffirmed in *Schlesinger*, 418 U.S. at 216-23.

There have been, however, four Attorneys' General Opinions issued concerning the validity of an appointment under the ineligibility clause. *See* 42 OP. ATT'Y GEN. No 36 (Jan. 3, 1969) (ban does not apply to an increase in compensation subsequent to the appointment, although during the legislator's elected term); 33 OP. ATT'Y GEN. 88 (1922) clause inapplicable where increase is enacted during first term and appointment is made during subsequent term); 21 OP. ATT'Y GEN. 211 (1895) (ban applies upon nomination and confirmation of appointment, not upon the commission of office); 17 OP. ATT'Y GEN. 365 (1882) (legislator's resignation before his appointment to an office which was created during his elected term, but after his resignation, does not render his appointment valid).

69. *See generally* Glasser, *A New Jersey Municipal Law Mystery: What Is A "Public Office?"*, 6 RUTGERS L. REV. 503 (1952) [hereinafter cited as Glasser]; Waldby, *The Public Officer—Public Employee Distinction in Florida*, 9 U. Fla. L. Rev. 47 (1956) [hereinafter cited as Waldby].

70. *E.g.*, Kederich v. Heintzleman, 132 F. Supp. 582 (D.C. Alaska 1955); *In re* Advisory Opinion to the Governor, 225 So. 2d 512 (Fla. 1969); Golding v. Armstrong, 231 Miss. 889, 97 So. 2d 379 (1957); Romney v. Barlow, 24 Utah 2d 226, 469 P.2d 479 (1970). The traditional test for determining whether the post involved constitutes a public office revolves around the presence of six criteria: (1) compensation; (2) creation by constitution or statute; (3) du-

eral application results in a technical, formalistic distinction without any real utility in applying the ineligibility clause.

Prior cases illustrate this point. For example, in *Romney v. Barlow*,[71] a statute created a "legislative council" consisting of sixteen legislators.[72] The legislators were appointed by the leadership of their respective houses and parties.[73] The council's duties involved predominantly legislative functions,[74] and its powers were similar to those granted to other legislative committees.[75] The Utah Supreme Court, applying the traditional tests, found that these legislators were appointed to a "public office" within the meaning and in violation of the ineligibility clause.[76] In reaching this conclusion, the court looked solely to the presence of six criteria delineating a public office. These were that the post was: (1) compensated; (2) created by statute; (3) permanent and continuous in nature; (4) given duties defined by law; (5) delegated some portion of the sovereign power; and (6) independent of supervision or control.[77]

More detailed analysis, however, reveals that membership on a legislative council, such as the one involved in *Romney*, is not the type of appointment which the clause is intended to prohibit. Indeed, the striking similarity between the council and a typical legislative committee demonstrates that membership on

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ties defined by law; (4) exercise of some delegated portion of the sovereign power; (5) permanence; and (6) independence from supervision or control. *See generally* Glasser, *supra* note 69, at 505; Walby, *supra* note 69, at 52-53.

71. 24 Utah 2d 226, 469 P.2d 497 (1970).

72. The action actually arose because of an amendment to the statute providing for remuneration to the council members of a twenty-five dollar per day salary plus expenses. 24 Utah 2d at 227, 469 P.2d at 497-98 (1970).

73. The act provided, in part, that:

> There is created a legislative council of sixteen members of the legislature. Four members shall be appointed from each major political party by each house upon recommendation of each party caucus. The president of the senate . . . and the speaker of the house of representatives shall each be one of the four appointees from the political party with which he is affiliated.

74. The council's duties included: (1) assisting the legislature by collecting information on the general needs of the state; (2) examining the benefits and disadvantages of existing legislation; (3) investigating into state expenditures; and (4) acting as "reference attorney" to the legislative houses. *Id.* at 230, 469 P.2d at 498-99.

75. The council's powers involved administering oaths, issuing subpoenas and deposing witnesses. While the council performed its work according to its own guidelines, it was still responsible to the legislature as a whole. *Id.* at 229, 469 P.2d at 498.

76. *Id.* at 230, 469 P.2d at 499. "We think and hold that membership on the Legislative Council constitutes the holding of a civil office; and since the salary is $25 per day, it is certainly a civil office of profit." *See* UTAH CONST. art. IV, § 7 ("No member . . . shall be appointed . . . to any civil office of profit. . . .").

77. 24 Utah 2d at 229-30, 469 P.2d at 498-99 (1970).

the council does not constitute a public office within the meaning and purpose of the clause. Although the council position is permanent in nature, each legislator's occupancy of that position is co-terminous with his tenure in office. In addition, the powers and responsibilities of the council, including the power to subpoena, swear in and depose witnesses, are neither greater nor different than those enjoyed by other legislative committees. Moreover, the council assists in the formulation of better legislation by performing in depth analysis of the state's needs, the effects of existing statutes and the dispersal of state funds. Thus, the council, utilizing the benefits of specialization and division of labor, acts in the same manner as all legislative committees.

It should be noted that there were two features which distinguished the council from other legislative committees. One feature was the inclusion, in a single committee, of members from both houses of the legislature representing both political parties.[78] There was nothing in the history of the ineligibility clause, however, which indicated that its language was intended to disqualify legislators from a bi-partisan, bi-cameral legislative council. In fact, historical analysis of the ineligibility clause would clearly have demonstrated the contrary.[79] The other distinguishing feature of the council in *Romney* concerned the renumeration to its members of a per diem salary. Although this argument constituted a valid ground for objection, the court exceeded the bounds of judicial restraint and deference to legislative action by not simply striking the compensation provision and leaving the remainder of the statute intact.[80]

Another instance where the court literally applied the traditional tests for determining public offices and reached a result equally inconsistent with the purpose of the ineligibility clause occurred in *Golding v. Armstrong*.[81] In *Golding*, the Mississippi legislature created the Sovereignty Commission, a supervisory committee over governmental affairs, chaired by the state executive.[82] The Commission was authorized to "employ all neces-

78. *See* note 69 *supra*.

79. In this regard, the Legislative Council bears a striking similarity to the Conference Committee of the Federal Congress. Surely one would not argue that a Congressman may not be constitutionally appointed to the Conference Committee because of the federal ineligibility clause.

80. *Cf.* Vreeland v. Byrne, 72 N.J. 292, 311, 370 A.2d 825, 836 (1977) (Hughes, C.J., dissenting) (where an alternative to completely invalidating a statute exists, the courts, out of deference to the legislature and in recognition of their proper role, should not "wantonly assail" an act of the legislature).

81. 231 Miss. 889, 97 So. 2d 379 (1957).

82. 3 MISS. CODE ANN. ch. 1, §§ 1-35.

sary personnel."[83] Pursuant to this authorization, the Commission established an Executive Director post which was invested with the responsibility of managing the Commission's affairs. This post directed and supervised the entire work of the Commission. The Mississippi Supreme Court found that the post was not a public office within the meaning of the ineligibility clause.[84] The court based its decision primarily on the fact that the Executive Director worked "at the pleasure and under the direction of the State Sovereignty Commission."[85]

Yet, unlike the council in *Romney*, the post in *Golding* exercised executive rather than legislative authority. Although the appointment was made by the Commission as a whole, and not the governor acting individually, the governor was nonetheless given the wherewithal to influence legislative action. Furthermore, the appointee, while still a member of the legislature, was no more immune from the inducements of office than he would have been if appointed Commissioner.[86] Despite the difference in prestige and pay between Commissioner and Executive Director, the power and position of the latter post presented the same potential influences which the ineligibility clause was designed to protect against. Thus, *Golding* exhibited the common ineligibility clause situation, and demonstrated the incompatibility of the traditional tests for determining a public office and the purposes of the ineligibility clause.[87]

An idealistic approach to resolving this incompatibility might be to simply abolish the distinction between public office and public employment on public policy grounds in cases involving the ineligibility clause.[88] However, the categorization is

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83. *Id.*

84. 231 Miss. at 897, 97 So. 2d at 383.

85. *Id.*

86. When the person making the appointment is a member of the executive branch, the legislator is susceptible to the very evils which the clause was designed to protect against. The fact that an executive officer other than the governor makes the appointment is irrelevant. *See* Pollitt, *supra* note 29, at 115 n.18 (many of the abuses of appointments in England were attributed not to the King himself, but to his ministers).

87. As one critic of the public office/employment distinction stated in a related context:

> it seems unrealistic to hold that a rule against holding incompatible posts is inapplicable merely because the post of counsel is a "position" and the rule only applies to "offices." If the two jobs are "incompatible" in any realistic sense of the word, the fact that one is called a "position" rather than an "office" has little perceptible relevancy.

Glasser, *supra* note 69, at 504.

88. The argument is simply that any appointment of a legislator made by the governor or one of his officers presents sufficient potential for abuse to warrant abolition of these distinctions. This is the approach in California. *See* CAL. CONST. art. IV, § 19.

firmly imbedded in legal thinking,[89] and important legal consequences attach to each classification.[90] The appropriate solution is to develop a standard which defines public office consistent with the purposes of the clause.

As previously indicated, the purpose of the ineligibility clause is to prevent the executive from using the appointive power to influence legislative action. The clause prohibits appointments to certain offices under the belief that these appointments present the most frequent instances of abuse, and that a provision which completely disqualifies all legislators from appointment is excessively burdensome.

The Illinois Supreme Court proferred a standard which encompassed these concerns in *Gillespie v. Barrett*.[91] In *Gillespie*, the court was called upon to interpret the words "civil appointment" as used in the ineligibility clause of the 1870 Illinois Constitution.[92] The action challenged the validity of a statute creating three special "exhibition " commissions staffed by members of the legislature.[93] The court found the words "civil appointment" synonymous with "public office" and concluded that the act did not violate the ineligibility clause since the positions were not "civil appointments."[94] The court stated that "to come within the [clause's] proscription, an appointment must [have been] of a permanent nature and *must [have lent] itself to personal aggrandizement with the opportunity for personal gain* . . . ."[95]

Although the court's interpretation involved the "absolute disqualification" form of the clause, its rationale is applicable to the "qualified" ineligibility clause.[96] The court's definition recognizes that offices of a permanent nature with the potential for personal aggrandizement are the type which an executive might try to manipulate through his appointing powers. Moreover,

89. Glasser, *supra* note 69, at 504-05.

90. *Id.* at 503.

91. 368 Ill. 612, 15 N.E.2d 513 (1870).

92. ILL. CONST. art. IV, § 15. This provision provided in pertinent part that "[n]o person elected to the General Assembly shall receive any civil appointment within this State from the Governor . . . during the term for which he shall have been elected . . . ."

93. In *Gillespie*, the taxpayer filed suit to enjoin the State Treasurer from drawing against the appropriations made by three legislative acts. These acts created the Gettysburg Memorial Commission, the Golden Gate Exhibition Commission, and the New York World's Fair Commission. 368 Ill. at 614, 15 N.E.2d at 514.

94. *Id.* at 617, 15 N.E.2d at 516.

95. *Id.* (emphasis added).

96. Both clauses have the same general purpose though the scope of their proscription is different. *See* notes 42-51 and accompanying text *supra*.

limiting offices to those positions with the potential for personal gain conforms with the underlying assumption of the qualified ineligibility clause that such positions present the most frequent instances of abuse.

Another standard for defining public office, equally consistent with the purposes of the ineligibility clause, was adopted by the Sixth Illinois Constitutional Convention in 1970. During their debates, the delegates expressed a great deal of concern over which positions fell within the proscription of the clause.[97] The Committee on the Legislative Article proposed a single standard: " 'Does the public office in question primarily possess substantive policy-making functions?' If a public office is primarily administrative in character, it would not come within the scope of the definition."[98]

This standard, like the one espoused in *Gillespie*, rejects the traditional indica of a public office,[99] and instead concentrates more on the particular objective of the constitutional provision.[100] In addition, both standards allow the courts greater flexibility in judging the validity of an appointment. This eliminates the need for strained reasoning by the courts in effectuating the provision's purpose. Both offer an attractive alternative to literal application of the traditional tests for public office and the discordant outcome that can result in cases involving the ineligibility clause.

Are Cost-of-Living Adjustments an Increase in Salary?

Several cases challenging the validity of a legislator's appointment under the ineligibility clause have required the courts to define what constituted an increase in the compensation[101] or emoluments[102] of an office. The first cases presenting

97. *See* 4 PROCEEDINGS, *supra* note 6, at 2827.

98. 6 PROCEEDINGS, *Committee on Legislative Article Proposal #1, supra* note 6, at 1346.

99. *See* note 70 *supra*.

100. The standard proposed by the Sixth Illinois Constitutional Convention originated in People v. Capuzi, 20 Ill. 2d 486, 170 N.E.2d 625 (1960). In *Capuzi*, the Illinois Supreme Court was called upon to interpret the words "other lucrative offices" as used in the dual office holding provision of the 1870 Constitution. In adopting the distinction between administerial and policy-making functions, the Court applied the maxim *ejusdem generis*, looking at the enumerated list of offices to delineate the catch-all phrase. *See* ILL. CONST. art. IV, § 3 (1870).

101. *See* State *ex rel.* Anaya v. McBride, 89 N.M. 244, 539 P.2d 1006 (1975) (cost-of-living adjustment was not de minimus and therefore constituted an increase in the emoluments of office); State *ex rel.* Lyons v. Guy, 107 N.W.2d 211 (N.D. 1961) (expenses, purchase of an automobile, and increase in social security coverage); Hall v. Baum, 452 S.W.2d 699 (Tex. 1970), *appeal dismissed*, 397 U.S. 93 (1970) (substantial raise in compensation of the office of

this issue involved offices which received newly created pensions or retirement benefits prior to the legislator's appointment.[103] Courts have uniformly found that these benefits are not an increase in the compensation of the office.[104] The analytical approach adopted by these courts have not, however, shown a similar uniformity. Some courts applied an historical analysis approach in defining public office, while others merely applied the definition found in legal dictionaries.[105]

This issue has again been raised to the forefront by the inflationary spiral of recent years. Inflation has forced legislatures to increase the salaries paid to public officials on an across-the-board basis. In some states, these "cost-of-living" adjustments[106] have become virtually an annual event.[107] The frequency with which these adjustments have become necessary

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Governor); Shields v. Toronto, 16 Utah 2d 61, 395 P.2d 829 (1964) (seven percent across-the-board increase in salaries is a cost-of-living adjustment); State *ex rel.* Todd v. Reeves, 196 Wash. 145, 82 P.2d 173 (1938) (retirement benefits).

102. Although the literal meaning of the word "emoluments" encompasses more than solely the compensation of an office, *see* BLACK'S LAW DICTIONARY 616 (rev. 4th ed. 1968), courts generally construe these words as synonymous. Shields v. Toronto, 16 Utah 2d 61, 65, 395 P.2d 829, 834 (1964). This interpretation seems to conform with the intention of the drafters. See State *ex rel.* Lyons v. Guy, 107 N.W.2d 211, 218 (N.D. 1961) (recognizing that the drafters used this word in its ordinary sense, which at the time, was as a synonym for compensation); *see also* 1 M. FARRAND, *supra* note 2, at 390-99.

103. *See* Bulgo v. Enomoto, 50 Hawaii 61, 430 P.2d 327 (1967) (social security and workmen compensation benefits are not an increase in the emoluments of office); State *ex rel.* Lyons v. Guy, 107 N.W.2d 211 (N.D. 1961) (increase in social security coverage did not raise compensation of office within the purview of the clause); State *ex rel.* Todd v. Reeves, 196 Wash. 145, 82 P.2d 173 (1938) (judge's retirement benefits are not increase in the emoluments of office).

104. The U.S. Supreme Court was faced with, but never reached, this issue in *Ex parte* Levitt, 302 U.S. 633 (1937). *See* note 85 *supra*.

105. *Compare* State *ex rel.* Lyons v. Guy, 107 N.W.2d 211 (N.D. 1961) (applying a somewhat "faulty" historical analysis approach) *with* State *ex rel.* Todd v. Reeves, 196 Wash. 145, 82 P.2d 173 (1938) (applying the definition of the word "emolument" found in BLACK'S LAW DICTIONARY, supra note 102, without looking to its constitutional history).

106. Cost-of-living adjustments are increases in salary, wages, etc. designed to return an officer/employee to the compensation needed to cover those goods and services purchased at accepted standards of consumption. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 515 (16th ed. 1971).

107. In New Jersey, for instance, the legislature passed eight general salary increases over the ten year period from 1966-1976 which raised the salaries of state offices by less than 8%. Vreeland v. Byrne, 72 N.J. at 317, 370 A.2d at 845 n.10 (1977). In addition, an appropriation bill (S-1309 passed June 26, 1980) recently increased the salary of state offices by another 7%: 3.5% effective July 1, 1980, and 3.5% effective April 1, 1981. Plaintiff's Brief in Support of Order to Show Cause, Student Pub. Interest Research Group v. Byrne, No. A-4384-79 (N.J. App. Div., filed July 5, 1980).

has raised the issue of whether they are an "increase in salary" within the meaning of the ineligibility clause.

In *State ex rel. Anaya v. McBride*,[108] the Supreme Court of New Mexico addressed this issue in dictum.[109] The court adopted a literal interpretation of the ineligibiilty clause and found no reason to differentiate between cost-of-living adjustments and other increases.[110] The court stated that since the clause made no express exclusion for cost-of-living adjustments, it was beyond the scope of judicial review to imply such an exemption.[111] If the public wished to exclude these small percentage raises from the ineligibility clause, the proper mechanism was a constitutional, not judical, amendment.[112]

Silence in constitutional provisions is, however, ambiguous and may express either the drafters' intention not to overly define an issue or their unintentional failure to foresee future events.[113] Thus, the *McBride* court is incorrect in deeming a construction of "increase in salary" which excludes cost-of-liv-

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108. 88 N.M. 244, 539 P.2d 1006 (1975). In *McBride*, a legislator was appointed to the office of district judge, the salary of which was increased by the legislature during the appointee's term. Although the appointment was made after the legislator's term had expired, his appointment was still challenged under the New Mexico ineligibility clause which forbids appointment for one year after the expiration of the legislator's term. *See* N.M. CONST. art. IV, § 28. After finding that it had jurisdiction over the cause, the New Mexico Supreme Court rejected the respondent's contention that the clause was not meant to apply to constitutional offices. 88 N.M. at 259, 539 P.2d at 1014. *Contra*, State *ex rel.* Grigsby v. Ostroot, 75 S.D. 319, 64 N.W.2d 62 (1954).

109. The issue of whether the raise was a cost-of-living adjustment not within the purview of the clause was not raised by the respondent but by the dissenting opinion of Chief Justice McManus, 88 N.M. at 260, 539 P.2d at 1014, which quoted extensively from Shields v. Toronto, 16 Utah 2d 61, 395 P.2d 829 (1964). *Shields* had raised the issue of whether cost-of-living adjustments increased the compensation of an office, and had decided that they did not. *See* notes 115-24 and accompanying text *infra*.

110. 88 N.M. at 259, 539 P.2d at 1014. "We are bound to apply the Constitution as it plainly reads [and] to leave to the people the decision as to whether it should be changed." 88 N.M. at 255, 539 P.2d at 1012.

111. 88 N.M. at 259, 539 P.2d at 1014. In responding to the arguments of the dissenting justice the court stated:

> We doubt that when the people adopted art. IV, § 28 in 1911 they were thinking in terms of cost of living adjustments or that they intended to except such increases from the operation of that clause. Certainly they did not say so . . . Clearly the emoluments were more after the increase than they were before—$7,000 more.

Id.; *accord*, Vreeland v. Byrne, 72 N.J. at 305, 370 A.2d at 833 (Sullivan, J., concurring).

112. *See* Note, *Survey of Constitutional Law, Part I: Special Legislation—Strict Construction of Ineligibility Clause*, 31 RUTGERS L. REV. 388 (1978).

113. In order for a constitution not to be obsolete before it is adopted, the document must "state not rules for the passing hour, but principals for an expanding future." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 24

ing adjustments as "judicial amendment." The issue is one of interpretation. Moreover, the ramifications of holding that cost-of-living adjustments are "increases in salary" within the meaning of ineligibility clause are far-reaching. If cost-of-living adjustments are enacted in each new term,[114] legislators would, in effect, be completely ineligible for any other public office during their term. Thus, the "qualified restriction" becomes an "absolute disqualification" the very occurrence rejected at the constitutional conventions. However, exempting these adjustments from the terms "increase in salary" emasculates the restriction against a legislator's appointment to an office, the salary of which was increased during his term. This result is equally inconsistent with the drafters' intentions. Faced with this dilemma, the court must look beyond the language of the ineligibility clause in order to reach a decision which effectuates its purpose.

The Utah Supreme Court did exactly that in *Shields v. Toronto*.[115] In *Shields*, the candidacy of three legislators was challenged under the Utah ineligibility clause which prohibited elections as well as appointments of legislators to public of-

(1921). This proposition was emphasized in New Jersey Sports & Exposition Auth. v. McCraine, 119 N.J. Super. 457, 292 A.2d 580 (1971):

> [I]t is no answer to say that this public need was not constitutionally envisioned 50 years ago. That Constitution, with which the law measures "public purposes" was created to endure for ages and was intended therefore to be adapted for the many crises of human affairs generated by changing social needs and demands for sensitivity towards them.

114. The possibility of successive increases is not a far-fetched idea. For example, under the Federal Salary Act of 1967, 2 U.S.C. §§ 351-61 (1970), a special Commission meets once every four years to determine whether adjustments are needed in federal salaries. The provisions of this statute call for transmission of the Commission's recommendations to the President, who in turn either adopts them as part of the Budget Message, modifies or rejects them. Congress is given 30 days in which to "veto" the measure by passage of a simple resolution in either House; otherwise, the President's recommendations automatically take effect. *Id.*

During its second meeting in 1973, the Commission recommended a 25% increase in those salaries under its jurisdiction. President Nixon, however, in his Budget Message of January 1974, modified this suggestion to provide for successive increases in these salaries of 7.5% in the years 1974, 1975, and 1976. Under the literal interpretation approach adopted by *McBride*, these increases would have disqualified every legislator, who was or became a member of either House during these years, from appointments to those offices within the Commission's jurisdiction.

115. 16 Utah 2d 61, 395 P.2d 829 (1964). In *Shields*, the Utah legislature overhauled the salaries of 74 state offices by enacting a general salary increase bill. 16 Utah 2d at 63, 395 P.2d at 830. The following year, but before their terms had expired, three members of the legislature became candidates for Governor and Secretary of State the offices of which had been enhanced *inter alia* by the general salary increase.

fice.[116] In holding that cost-of-living adjustments were not an increase in the compensation of an office,[117] the court found three factors to be persuasive. First, the small increases, granted as they were to adjust salary ranges, did not lend themselves to improperly influencing a legislator's action.[118] Second, the countervailing policy considerations embodied within the clause would be seriously infringed upon by literal application of the provision's language.[119] Finally, the elective nature of the office and the open forum of the campaign gave adequate assurances that the public's intention would prevail.[120]

While the *Shields* court's factual findings were open to dispute, its analytical approach was exemplary. The court recognized the need to look beyond the language of constitutional

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116. The Utah ineligibility clause, UTAH CONST. art. VI, § 7 provides:

> No member of the Legislature, during the term for which he was elected, shall be appointed or elected to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.

117. 16 Utah 2d at 70, 395 P.2d at 835.

118. In reaching this first conclusion, the court stated that:

> [t]hese relatively small increases . . . should properly be regarded as just what they were, a moderate cost of living adjustment . . . in keeping with the steadily rising cost of living. Accordingly, it can be said with assurance that this is not a situation which would lend itself to any ulterior scheme by a legislator to set up a high paying sinecure to take advantage of [that] which section 7 was designed to prevent. Nor is there any reasonable likelihood that such raises would have induced anyone to run for the offices in question who would not have otherwise done so.

Id. at 64, 395 P.2d at 831 (footnotes omitted). What is most interesting about the court's conclusion is its statement that the candidacy of these legislators was merely "coincidental." *Id.* The dissent was highly critical of this finding. *Id.* at 72, 395 P.2d at 836 (Henroid, C.J., dissenting).

119. 16 Utah 2d at 70, 395 P.2d at 835. The first policy consideration examined by the *Shields* court was the infringement upon the right of the people to exercise their vote in a meaningful manner by disqualifying candidates for office. *Id.* at 67, 395 P.2d at 832-33. The court likewise expressed concern over the hampering of the historical function of the legislature "as a proving ground in which our citizens obtain experience in government service and the public learns of their qualifications for other public offices." *Id.* In addition, the ability of legislators to deal objectively with a proposed increase was found to be jeopardized if the fear of disqualification was hung over their heads. *Id.* at 71, 395 P.2d at 835. Ironically, the court failed to perceive the same jeopardy to legislative objectivity if legislators were eligible to office which were benefited, despite its recognition of the purpose of the provision. *See* note 153 and accompanying text *infra*.

120. 16 Utah 2d 61, 64, 395 P.2d 829, 831-32 (1964). According to George Mason, a delegate from Virginia to the 1787 Convention, this consideration should not be over-emphasized:

> [i]f such a restriction should abridge the right of election, it is still necessary, as it will prevent the people from ruining themselves; and will not the same causes here produce the same effects? I consider this clause as the cornerstone on which our liberties depend . . . .

1 M. FARRAND, *supra* note 2, at 380-81.

clauses in order to discern a provision's purpose,[121] and rejected a literal application of the clause.[122] Moreover, the factors which the court found determinative were the same concerns expressed by the drafters of the clause.

Shields, however, involved disqualification from elective office, and it is not altogether clear whether the court would have reached the same conclusion if the office were appointive. At least one subsequent case has highlighted this distinction.[123] What *Shields* does make clear is that each case must be handled on an individual basis. The facts of each case should be examined in light of the concerns which gave rise to the ineligibility clause. Whether a legislator should be eligible for appointment should depend on whether the purposes which the clause seeks to promote would be served.[124]

Effect of a Legislator's Resignation

Another issue which illuminates the difference between literal application of the ineligibility clause and the historical analysis approach advocated herein centers on whether a legislator's resignation from the legislature would validate his appointment to a newly created or enriched public office. Under either approach resignation *after* the office is created or enriched does

121. Shields v. Toronto, 16 Utah 2d at 63, 395 P.2d at 830. The court begins its analysis by stating that "[a constitutional] provision cannot properly be regarded as something isolated and absolute but must be considered in light of its background and the purpose it was designed to serve. . . ." It then cited to an earlier Utah Supreme Court opinion which analyzed the provision in full, State *ex rel.* Jugler v. Grove, 102 Utah 41, 125 P.2d 807 (1942), and concluded that the provision's purpose is to prevent legislator's from being unduly influenced.

122. 16 Utah 2d at 68, 395 P.2d at 833.

123. *See* Warwick v. State *ex rel.* Chance, 548 P.2d 384 (Alaska 1976) (rejecting the cost-of-living adjustment argument partly because the office was appointive).

124. In hypothesizing the issue of whether the *Shields* decision should apply to appointive offices, a number of similarities between elections and appointments must be considered. For example, Governors, like Presidents on the national level, have usually become their party's leader upon election and as such wield a great deal of influence in the election process. *See generally* V.O. KEY, AMERICAN STATE POLITICS (2d ed. 1965). In addition, confirmation proceedings have never been mere formalistic proceedings and have therefore secured the same guarantees as the open forum of the campaign. *See, e.g.*, N.Y. Times, Dec. 18, 1973, at 35, cols. 4-8 (discussing the appointment and confirmation of William Saxbe as Attorney General). Furthermore, public outrage at a particular government action has in the past served the same function as its vote at the ballot box. *See* WASH. CONST. amend. 69 (passed as a result of public dissatisfaction with the holding of the Washington Supreme Court in State *ex rel.* Anderson v. Chapman, 86 Wash. 2d 89, 543 P.2d 229 (1975) and allowing a legislator to receive appointment to office despite a salary increase during his term); *see also* note 17 *supra*.

not alter the invalidity of the appointment.[125] In this factual situation, the appointment violates both the letter and the spirit of the clause.

A much more difficult question arises when a legislator resigns his seat just prior to the creation or enrichment of an office, the so-called "evasions by resignation."[126] In its strictest grammatical sense, the ineligibility clause appears to permit an appointment under these circumstances.[127] It forbids appointments only to offices *which have been created or favored during the legislator's elected term*. The words "during the legislator's elected term" are seen as simply fixing the period of the legislator's disqualification once an appointive office is created or its salary increased,[128] and not as referring to the entire term fixed by law.[129] Thus, under literal application of the provision's language, as long as the legislator has resigned his office prior to creation or enrichment of the office, his appointment is valid.[130]

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125. *See* State *ex rel.* Ryan v. Boyd, 21 Wis. 210 (1866); *accord*, 42 OP. ATT'Y GEN. No. 36 (Jan. 3, 1969).

126. 2 M. FARRAND, *supra* note 2, at 755; *see* note 133 *infra*. *See, e.g.*, Student Public Interest Research Group v. Byrne, No. A-165-80 (N.J., July 20, 1981) *rev'g* No. A-4384-79 (N.J. App. Div., March 25, 1981).

127. *See* State *ex rel.* Ryan v. Boyd, 21 Wis. 210 (1866). In *Boyd*, a legislator was elected to the office of county judge. Six days after the election, the legislature, of which he was still a member, increased the salary of that office. In resolving the question of whether the increase in the emoluments to the election subsequent but during the legislator's term disqualified him from office, the court stated:

> the increase of the emoluments of the office was during the time the relator was a member of the legislature, but subsequent to his election to the office of county judge. Does such a case come within the prohibition of the Constitution? *It is not within the language of the provision, according to its most natural grammatical construction*.

Id. at 212-13 (emphasis added).

128. *See* State *ex rel.* Ryan v. Boyd, 21 Wis. 210, 213 (1866) ("[T]he creation of the new office, or the increase in the emoluments of an old age, must have taken place prior to the appointment or election of a [legislator] . . . to bring the case within the prohibition.").

129. *See* Vreeland v. Byrne, 72 N.J. 292, 370 A.2d 825 (1977). The majority opinion stated that the phrase "during the term for which he shall have been elected" was relevant in only two ways:

> [i]t fixes and limits the time span within which legislative action must be taken if it is to be inhibiting, and similarly fixes and limits the time span during which the resulting ineligibility shall persist . . . . Specifically, it is clearly not related to the time of receipt or non-receipt of an increase in emoluments.

130. State *ex rel.* Ryan v. Boyd, 21 Wis. at 213. *Cf.* Warwick v. State *ex rel.* Chance, 548 P.2d 384 (Alaska 1976) (additional increase in the salary of an office after the appointment of a legislator thereto does not render the issue moot); Opinion of the Justices, 348 Mass. 803, 202 N.E.2d 234 (1964) (decrease in salary, after the appointment was made, to pre-existing level is without significance in determining the validity of the appointment). This was the position taken by the legislator-appointee in Student Pub. Interest Research Group v. Byrne, No. A-165-80 (N.J., July 20, 1981). The facts ap-

This was the holding of the New Jersey Supreme Court in *Student Public Interest Research Group v. Byrne*.[131] In *Byrne*, the plaintiffs challenged the appointment of Assemblywoman Barbara Curran under the ineligibility clause. Ms. Curran had resigned her seat in the Assembly on June 23, 1980, and that same day was nominated and confirmed as Commissioner of the New Jersey Board of Public Utilities.[132] Eleven days prior to her appointment, a bill was introduced in the legislature to increase, *inter alia*, the salary of that office. One week after her appointment, Governor Byrne signed this bill into law.[133]

Justice Clifford, writing for a unanimous court, relied on two factors in upholding the appointment. First, the provision was written in the future perfect tense, which, *grammatically*, required that the salary increase occur prior to the appointment.[134] Second, the court reasoned that if a subsequent enactment could invalidate this appointment, then all appointments could be later invalidated at the whim of the legislature.[135] On the basis of such superficial analysis, the appointment was upheld.

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pear to demonstrate, however, the very abuses which the clause is designed to prevent. *See* notes 135-39 and accompanying text *infra*.

131. No. A-165-80 (N.J., July 20, 1981) *rev'g* No. A-4384-79 (N.J. App. Div., March 25, 1981).

132. *Id.* at 3.

133. 1980 N.J. Laws ch. 73, § 1.

134. The court briefly discussed the history of the ineligibility clause, and the debates surrounding its adoption, but proceeded to ignore these considerations in rendering its decision. Student Pub. Interest Research Group, No. A-165-80, slip op. at 5-7 (N.J. July 20, 1981). Instead, the court focused on the literal wording of the provision:

> The future perfect tense identifies that which must occur before the future event. In the instant context this means the salary increase must have been voted upon by the Assembly *before* Mrs. Curran's resignation from that body . . . . That the disqualifying event must have occurred "during such term" means only that it must also take place during the legislator's current term of office.

Id. at 9-10 (emphasis in original).

135. *Id.* at 10-11. Rather than concentrate on the particular time sequence before it, the court focused on a hypothetical totally opposite to the facts *sub judice*: "Suppose that an individual resigned from the Senate only a few months after taking office . . . and promptly accepted appointment . . . . Suppose further that three and a half years later, the Legislature increased the emoluments of [that] office . . . ." The defendant had raised that same argument before the appellate court, but was unsuccessful in diverting that court's attention from the facts before it. Student Pub. Interest Research Group v. Byrne, No. A-4384-79 (N.J. App. Div., March 25, 1981) "But we do not decide here whether such result [referring to the hypothetical above] would inevitably follow from our ruling in this case . . . . We only determine the matter before us in its factual context." The appellate court had found the appointment violative of the ineligibility clause. *Id.* at 3.

Historical analysis, however, has indicated that the drafters were primarily concerned with the ability of the executive to manipulate appointments and influence legislative action, not with the actual passage of statutes creating an office or increasing the salary of an existent one.[136] The attractiveness of public appointments as inducements with which to corrupt legislators caused the drafters to limit a legislator's eligibility to office.[137] Yet, their desire not to unduly restrict the executive's ability to fill vacancies prodded them to disqualify legislators only from appointments to certain offices because these presented the most frequent abuses.[138] Moreover, the drafters were concerned that legislators might try to evade the prohibition by resigning their seats prior to passage of the disqualifying statute. In order to prevent this occurrence, the drafters included the phrase "during his elected term."[139]

The potential for abuse illustrated by the facts in *Byrne* requires that appointments such as Commissioner Curran's be invalidated under the ineligibility clause. The appearance of impropriety, created by a legislator's resignation one week before passage of the disqualifying salary increase, runs counter to the spirit of the provision.[140] Moreover, if legislators are allowed to resign their seats after a salary increase is proposed but prior to its enactment, they become susceptible to the same abuses which gave rise to the ineligibility clause. This permits the executive to manipulate the appointive process and thereby influence legislative action.

Moreover, invalidating an appointment made under facts such as those in *Byrne*, does not imply that all appointments are susceptible to challenge because of later salary increases. Where the resignation occurs prior to the introduction of a bill to create or favor an office, or where the time sequence does not

136. *See* Pollitt, *supra* note 36, at 132. The limitation on offices created or enriched by the legislature during that term served as a compromise between those who favored disqualification in all cases, and those who preferred eligibility at all times.

137. *See* notes 49-56 and accompanying text *supra*.

138. *See* Pollitt, *supra* note 36, at 132.

139. 21 OP. ATT'Y GEN. 211 (1895). *Contra*, 42 OP. ATT'Y GEN. No. 36 (Jan. 3, 1969). George Mason of Virginia stressed the need for language precluding an appointment during the entire elected term in order to "guard against evasion by resignation." 2 M. FARRAND, *supra* note 2, at 755.

140. The appellate court in *Byrne*, which unanimously invalidated the appointment, found the appearance of impropriety especially influential. While that court did not completely adopt the thesis presented herein, it was sensitive to the problems that result from allowing legislatures to evade the clause's proscription by resigning just prior to passage of the salary increase. Student Pub. Interest Research Group v. Byrne, No. A-4384-79, slip op. at 507 (N.J. App. Div., March 25, 1981).

cast the suspicious cloud existent in Byrne, the purpose of the provision would not be served by invalidating the appointment. Moreover, the New Jersey Supreme Court was incorrect in extending the precise factual issue to the point of absurdity by hypothesizing a situation in which the subsequent salary increase occurs three and one half years later.[141] The principles of constitutional interpretation dictate that each case should be decided as it appears, and the court should not reach out to decide issues not presently before it. While invalidating an appointment on the basis of a salary increase may seem harsh, any other result in a case such as *Byrne* would clearly contravene the purpose of the provision.

CONCLUSION

The ineligibility clause, as it first appeared, was a compromise. It was aimed at protecting the independence of legislative action from being subverted by abuses of the appointive power, without absolutely disqualifying legislators from appointive office. In many states, the need to balance these considerations was expressly recognized when the provision was adopted. In others, however, this realization came only after dissatisfaction with various attempts to curb the undesirable influences of avarice and ambition through alternative measures.

In determining the validity of an appointment under the ineligibility clause, the court must remember that more than an appointment is at stake; the independence of legislative action and the separation of powers are being challenged. Because of the integral part these doctrines play in our governmental organization, an historical analysis of the provision's purpose must be preferred over a literal application of its words. As explained by Mr. Justice Frankfurter, this is the essence of judicial review.[142]

To simply apply the dictionary meaning of the provision's language, without reference to the abuses which spawned those words, enforces the form of the ineligibility clause without re-

141. The inappropriateness of the court's hypothesizing beyond the instant facts is further demonstrated by considering the other disqualifying event delineated in the clause. It is impossible for a subsequent enactment to affect the appointment of a legislator to a newly created office except in a situation similar to *Byrne*. The court's opinion, however, is now binding authority in New Jersey to permit a legislator to resign his seat in anticipation of (e.g. subsequent to the introduction of a bill for) the creation of an office, and accept the appointment to that office. Thus, both proscriptions of the ineligibility clause now can be evaded by resignation in New Jersey. *See* Trenton Times, July 24, 1981, at 5, col. 2.

142. F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

gard to its substance. It ignores the compromise between the countervailing public policies which the clause embodies.[143] Moreover, such literal application of the clause can serve to limit its scope, or extend it beyond the intentions of the drafters. In a judicial system such as ours, which operates under the rule of stare decisis and depends so heavily on the full airing of all arguments surrounding an issue, such superficial analysis would surely be anomalous.

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143. Madison, whose proposal ultimately became the ineligibility clause, *see* notes 54-56 and accompanying text *supra*, described the clause as "a middle ground between eligibility in all cases and an absolute disqualification in all cases." Pollitt, *supra* note 29, at 116. This position balanced, on the one hand, the fears of George Mason that ". . . by the sole power of appointing the increased officers of government, corruption [would pervade] every village in the [Union]," 1 M. FARRAND, *supra* note 2, at 380-81, and on the other, the optimism of Alexander Hamilton that the "prevailing passions [of] ambition and interest. . . ." will be used for the public benefit. *Id.* at 381-82.