Qualifications to be an Elected Representative

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Qualifications: Democracy and Diversity

In its most open form, electoral democracy would let electors choose their representatives from amongst any of their fellow electors. This principle erects a neat symmetry, and would involve no disqualifications. To be elected as a representative, whether as a legislator or a directly elected executive, one would simply have to be qualified for the franchise. Aside from a few, explicit barriers (typically limited to present imprisonment or severe mental illness) the franchise is almost universally built on two, positive requirements. One is minimum age, as a proxy for maturity. The other is sufficient connection to the polity, whether as a citizen or permanent resident.

Letting 'electors choose any other elector' has appeal in principle, and in practice. In principle, it seems to capture the essence of representation, of making present what would otherwise be absent.[1] It would keep choice expansive, emblemising full faith in the electorate, an idea espoused by thorough-going democrats. In practice, mirroring the franchise also offers bright-line rules. If the electoral register is reliable then electoral officials can easily police would-be candidates by simply referring to that register. Candidates who are not on the register may even be permitted to prove they are nonetheless qualified,[2] with proof of age and citizenship in the jurisdiction being relatively easily obtainable.

But, happily for electoral lawyers, things are not so simple in most democracies. Some jurisdictions erect a thicket of extra barriers or disqualifications to candidature, above and beyond the franchise. At one level, a few extra rules seem inevitable. Most obviously, would anyone really want candidates standing for more than one elective office simultaneously, with the risk of a charismatic individual 'hogging' several seats at a time? In fact, as we shall see, the hurdles go much broader and deeper. Some seem rooted in republican principles, particularly those which seek to weed out representatives with conflicts of pecuniary interest. Others feel like historical accretions from different and indeed less democratic times.[3]

Besides invoking republican versus popular models of electoral democracy, the question of candidate qualifications also raises significant practical considerations and challenges. Chief amongst these are *who* enforces the law, *when* and by *what process*. The difficulty of disproving a negative, well-known in the philosophy of science, raises its head here. How can budding candidates assure themselves they are not tainted by, say, a dual citizenship of one of the 200 odd other nations on earth, or prove they do not possess any dealings with any arm of government

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1 Pitkin, *Representation*.

2 Eg Commonwealth Electoral Act 1918 (Australia), s 163(1)(c).

3 The Australian Constitution does not explicitly guarantee a right to vote. Yet it does, in some arcane detail, prescribe who electors cannot vote for: Orr, "Fertilising a Thicket," 17.

that might pose an ethical risk? Even where a reliable register may exist (say of current convictions or bankruptcies) expecting electoral officials to screen every candidate risks delaying balloting, in an era when early voting is becoming a right. In a worst case, where the rule is fuzzy or where evidence is hard to come by, if electoral officials are required to police disqualifications they risk accusations of partisanship. As a result, there is long-standing common law precedent that electoral officials are not to go behind the face of a nomination form to question whether a candidate is disqualified,[4] short of an explicit statutory requirement to do so.[5] Instead, enforcement of the law in this area is typically left to court action (with attendant costs in time and money), usually after the election has otherwise concluded.[6]

Qualifications for elections have an international as well as domestic legal dimension. The International Covenant on Civil and Political Rights seeks to guarantee a 'right to stand for election', subject to 'reasonable' exceptions provided by law. This right sits directly alongside the right to vote in article 25(b) of that Covenant. The ability to stand has 'always been seen as closely linked to the right to vote',[7] such that they are often treated as two sides of the same coin. That said, there have been instances where a group has won the right to vote, but had to wait for the right to stand for election. Most notable, in some jurisdictions, was the fight to allow female candidates.[8]

Candidature rights can be understood simultaneously as a pragmatic emanation of the franchise – to ensure free electoral choice – as well as a part of a broader freedom to advance electoral causes. Being a liberty they are often discussed as rights attached to individuals as potential candidates. But since politics is an inherently collective endeavour they must also be understood in terms of political parties and movements, especially where party names appear on ballots or party-list voting prevails.

Diversity in Representation and Practice

From the perspective of electoral integrity, with its concern to deliver 'free and fair' elections, the integrity of balloting is all-important. But the integrity of an electoral system can also be profoundly influenced by entry rules for appearing on the ballot. Systems that greatly restrict who may stand can exhibit scrupulously clean electoral machinery, yet not attract the label 'truly democratic'. Prominent examples are Iran and Hong Kong. In the former, the President is popularly elected, but to make the ballot candidates must first be screened by a Council of Guardians consisting of senior clerics and lawyers. For Hong Kong's indirectly elected Chief Executive a nominating committee is similarly interposed between candidates and the selectorate. The grounds employed by such screening bodies can be broad character assessments, such as honesty and piety,[9] or integrity.[10] Or they can be overtly political criteria, such as commitment to foundational principles of the Islamic Republic in the case of Iran, and to unity with China in the case of Hong Kong. Such criteria are not confined to quasi-electoral democracies however. Under the precept of

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[4] *Pritchard v Bangor Corporation* (1881) 13 App Cas 241 and *R v Taylor* (1895) 59 JP 393.
[5] So in the UK, returning officers are to check prison records: Parliamentary Election Rules, s 12(2)(c).
[6] To avoid court action delaying the election itself. Thus, in the UK at least, the acceptance of a nomination cannot be challenged through judicial review prior to polling: *Sanders v Chichester* [1994] Sol Jnl 225. Even where nomination decisions are reviewable, the case must be clear and timely: *Courtice v Australian Electoral Commission* (1990) 21 FCR 554.
[7] Bosc and Gagnon, *House of Commons Procedure and Practice*, ch 4.
[8] Eg *Edwards v Canada (A-G)* (1929) 1 DLR 98, aka the "Persons Case".
[9] Constitution of the Islamic Republic of Iran, art 115.
[10] Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art 47.

'militant democracy' parties and by extension candidates that espouse platforms judge terrorist, extremist or seditious are subject to bans in some systems.[11]

Qualification rules of this ilk can also express aspirations. For instance, the Iraqi Constitution provides not only that the President must be 'over forty years age' but be 'of good reputation and political experience, known for his integrity, uprightness, fairness and loyalty to the homeland.'[12] The initial draft of that document considered mandating tertiary education requirements.[13] Some educational attainment may seem desirable in the abstract; but such rules can easily be used as exclusionary tools. Under Australian colonial rule, province-wide seats in the Papua New Guinea Assembly were effectively restricted to white candidates, through a nomination rule based on educational requirements.[14] Under international law, the imposition of language tests for candidates is also suspect.[15]

Diversity in representation, on the other hand, may call for regulation restricting the bald idea of unrestrained competition for legislative positions. Increasingly common are gender quotas, whether through reserved seats or requirements that parties meet a candidate quota for women.[16] Prominent examples to promote ethnic diversity include the reservation of seats for religious minorities in Iran's Majiles and for the indigenous Māori in New Zealand's Legislative Assembly. In each case, an extra positive qualification, in the form of membership of the relevant group, is required. It is important, here, to distinguish genuine affirmative action measures from measures to corral and limit such groups.[17]

Related to diversity are legislative chambers which divide representation sectorally, usually for indirect election. For example, more than two-thirds of the Irish Seanad, and half of the Hong Kong Legislative Council, is reserved for functional or sectoral representation.[18] In theory, such positions need not mandate extra substantive qualifications for candidates. But in practice, and often in law, such qualifications are inherent. (Thus, candidates for sectoral seats in Ireland have to have 'knowledge and practical experience' of the sector).[19] These innovations form a pluralist gloss on the otherwise more common principles of open election where representation is carved up by geographic region rather than group or sector.

Distinguishing Other Limitations on Candidates and Elected Officials

Before diving into a categorisation of qualification rules, it is necessary to distinguish other legal requirements which act as restrictions on an absolute freedom of candidature, in particular ballot access rules and party selection processes. Ideally these constitute orderly rationing mechanisms, as opposed to qualification rules aimed at restricting candidacies based on personal qualities. We

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[11] Bourne, "Militant Democracy and the Banning of Political Parties in Democratic States" and Maley, "Candidates".
[12] Iraqi Constitution 2005, art 68.
[13] In a constitution whose preamble opens 'We, the people of Mesopotamia, the homeland of the apostles and prophets, resting place of the virtuous imams, cradle of civilization, crafters of writing, and home of numeration. Upon our land the first law made by man was passed … philosophers and scientists theorized, and writers and poets excelled.'
[14] Papua and New Guinea (Election Qualifications) Regulations 1967 (Australia).
[15] *Ignatāne v Latvia* Communication No 884/1999, UN Doc CCPR/C/72/D/884/1999 (UNHRC, 2001).
[16] International IDEA, *Gender Quotas Database*.
[17] Geddis, *Electoral Law in New Zealand*, 99–103.
[18] Eg, Irish Constitution, art 18, including seats for the universities as well as broad sectors such as labour and agriculture.
[19] ibid art 18(7).

also need to compare disqualification rules that only apply to officials once elected, and rules that restrict candidacies and choice at the ballot box.

Ballot access rules are best understood as procedural requirements to nominate. Some, like strict rules about the timeliness of nominations, are trivial in principle yet essential in practice. Others embody more substantive goals. Most notable here are monetary deposits, refundable only where the candidate attracts a minimum quota of votes, and requirements that a budding candidate be nominated by a registered party or supported by a petition of nominators. Either type of rule is designed to ensure that candidates are sincere and that ballots are not so long as to confuse voters or so unwieldy as to cause logistical problems. Properly drafted, ballot access hurdles are facially neutral. (Although high deposit requirements can in effect screen by wealth, and high party registration or candidate nominator rules can exclude new parties and voices).[20] In contrast, qualification rules do not aim at rationing access to the ballot, but target candidate attributes.

Parties in practice act as gatekeepers in most elections. Their endorsement and hence label on the ballot can be critical to a candidate's chance of success. Party selection procedures may be left to party constitutions (as in the common law approach stressing freedom of association) or be subject to laws dictating a certain level of public involvement (as in the US primary system). Again, mandating candidate attributes is not the purpose of party selection rules. Rather, nomination by a recognised party becomes a token of community support, supplanting any requirement for nominators. Further, as the existence of independent candidacies attests, party nomination need not be a formal legal pre-requisite. Where party nomination is mandated, there is a risk of rules unduly favouring incumbents or rationing electoral choice. An example is the current, controversial requirement that Indonesian Presidential candidates garner the support of parties representing around a quarter of the national legislature.[21]

For electoral law, a question of great practical significance is whether qualification rules apply at the point of candidature or, more liberally, at the formal declaration of election or investiture. Application at the point of candidature can be harsh, as Australian constitutional experience has shown.[22] It may restrict democratic choice by deterring candidates, especially those with limited prospects or limited resources to research, pre-empt and accommodate what are often fuzzy rules. The more liberal approach allows successful candidates to get their affairs in order, knowing their candidacy was successful but prior to any conflict or incapacity actually biting into their representative role. US constitutional law illustrates this approach. The boundary-line between pre-candidature and post-election rules however is often porous, with many requirements for candidacy carrying across a term of office. An obvious example is residency requirements.

Conversely, it is important to note that some laws with disqualifying effect only apply during the life of an elected official. An obvious example is a parliamentary rule creating a vacancy for non-attendance.[23] Since actions-in-office carry greater ethical charge, an elected official may be unseated for doing something when the same action, prior to candidature, is treated as unexceptionable. An example involves legislators consciously taking out foreign citizenship, in jurisdictions that do not

[20] Eg *Figueroa* v Canada (A-G) [2003] 1 SCR 912.
[21] 20 percent of the vote share at the previous election or 25 percent of legislators.
[22] *Sykes v Cleary* (1992) HCA 60 (holding that 'election' encompassed the entire process and not just the outcome).
[23] Eg Australian Constitution, ss 20, 38 (automatic vacancy after two months non-attendance without leave). In contrast parliaments can have lax or even no attendance requirements: notably the UK, where members of Sinn Féin (republicans from Ulster) do not take their seats in the House of Commons but remain constituency MPs.

otherwise mind dual-citizen MPs.[24] Barriers that only apply during the life of an official may also be intimately connected to the electoral system. Anti party-hopping laws forfeit the seat of any MP who defects, or is expelled from, the party under whose banner they were elected. [25] Such laws are not necessarily confined to systems of proportional representation, as the Indian example shows. In that country, merely voting against the direction of one's party may imperil the seat.[26]

The Substantive Rules, Categorised

It is not possible to give a definitive account of all possible types of qualifications for executive or legislative office. Caligula is said to have threatened to appoint his favourite horse, Incitatus, to be a Roman Consul and hence Senator. Apocryphal or not, that anecdote is not just a wry comment on the quality of the incumbents in classical times or a reflection on the sanity of that particular Emperor. The principle that only humans can represent humans, or make decisions on our collective behalf, may soon come to be challenged by artificial intelligence. More down-to-earth are questions about whether a dead person can be elected.[27]

If we confine ourselves to existing rules drawn from established electoral democracies, we can discern a functional typology that has some descriptive and normative value. What follows draws mostly on examples from Anglophonic systems. This is not to pretend that those systems are coterminous with democracy, but to use them as an exemplar of relatively open electoral systems. (Omitted from this categorisation, therefore, are rules designed to select particular types of representatives, whether in the form of illiberal or elite screening methods, or the reservation of positions reserved for particular sectors or social groups, of the sort mentioned earlier.)

The typology offered here is as follows:

1. Term Limits
2. Maturity and Capacity.
3. Convictions.
4. Connection to Jurisdiction.
5. Incompatible Offices.
6. Pecuniary Interests.

These categories are listed roughly in order of complexity. The first, term limits, is unique. Maturity and capacity, and convictions, all go to personal qualities. The last three are directed to potential conflicts of interest, loyalty and duty.[28] None of these categories are silos: a rule about foreign emoluments says something about pecuniary interests as well jurisdictional connections, for

[24] Eg Indian Constitution, art 102 and Electoral Act 1993 (NZ), s 55(1)(c). On the latter see Morris, "On Becoming (and Remaining) a Member of Parliament".
[25] Eg Electoral Act 1993 (NZ), s 55A.
[26] Indian Constitution, sch 10.
[27] The short answer is death after nomination is not a disqualifying factor. The pragmatic problem is ensuring the deceased's party and supporters are not disenfranchised. Candidate deaths before polling day may invalidate an election: Orr, *The Law of Politics*, 88. In the US deceased candidates have been elected (ensuring a fresh election) or, in Greeley's case, had electoral college votes attributed to them: Muller, "Scrutinizing Federal Electoral Qualifications", 586.
[28] Compare Gay, "Disqualification for Membership of the House of Commons," 2. She identifies an overarching category of role-oriented ('House-based') disqualifications, and divides these into personal characteristics versus concerns of conflicts due to 'undue' pressure from outside.

instance. Each is outlined below, together with illustrative examples and reflections on their practical effect.

Besides the substantive focus and aim of the rules, another way to typify the rules depends on how sticky or insuperable they are. A minimum age limit may just require a young political hopeful to bide their time for a few years. But not even a time machine can help someone facing a 'born in the jurisdiction' requirement to undo the place of their birth. In practical terms, the question of insuperability is less whether a rule has an absolute effect or strict wording, but whether there are remedial steps – or a not unreasonable sacrifice – that would-be candidates can take to become qualified.[29]

1. Term Limits

Term limits are a barrier to serving more than a fixed number of years or periods in office. The idea is to help refresh the representative pool, by preventing someone from re-contesting an office after occupying it for a significant length of time. Such rules are most associated with certain offices in the US. Most notable is the presidency, since the passage of the 22nd amendment limiting any holder of that office to two, four-year electoral terms.[30] This occurred in the wake of Franklin Roosevelt, who served as president for just over 12 years and who may well have been elected a 5th time (given victory in world war two) had he not died in office. The concept of term limits had been around since the founding of the republic, reflecting concerns that a president in perpetuity risked becoming a de facto emperor. It has also been criticised as artificially restraining the freedom of both electors and parties.[31]

Superficially, term limits can feel like rules inversely related to maturity or experience. But they do not necessarily work that way. Barack Obama left the US presidency, term-limited, after just 12 years in political office. Yet Bob Dole could have been a first-term president, in 1996, with over 35 years of congressional experience. Term limits are rarely found in parliamentary systems. In a formal sense, prime ministers do not stand for re-election, they seek a parliamentary majority for their party or coalition. More substantively, prime ministers do not have a fixed-mandate and are liable to be removed by their party mid-term, or lent upon to ensure an orderly succession and party renewal.[32]

Even in presidential systems, term limits do not always prevent a revolving door. Popular incumbents may engineer ad hoc constitutional amendments to let themselves stand again. The term limit may only apply to consecutive terms, permitting a leader to reappear at a later electoral cycle. Or the person in question may simply transfer into a similarly influential role. Russian President Putin illustrates the last two work-arounds. He was barred from recontesting the presidency after two consecutive terms, immediately transferred to the national premiership for one term, then re-contested the presidency and is currently serving his fourth presidential term.

2. Maturity and Capacity

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[29] Gardner and Charles, "Election Law in the American Political System," 420. See also *Re Gallagher* [2018] HCA 17 (interpreting 'irremediability' narrowly).

[30] Or ten years if that person assumed the presidency as vice-president, then was elected in their own right.

[31] See Lowenstein, "Are Congressional Term Limits Constitutional?"

[32] Where this does not happen, the party often experiences leadership turmoil. For example, after each of the long-lasting prime ministerships of Robert Menzies (over 18 years in two stints) and John Howard (11 and a half years), the Liberal Party of Australia cycled through five leaders in barely a decade.

Age is classically used as a marker of maturity, for various rights and obligations. In electoral law, as elsewhere, the setting of minimum age limits is a conventional rather than arbitrary question. This is most obvious in debates about lowering the voting age.[33] That 'infants' should neither vote nor be elected is a rule traceable to at least 1695 in the UK.[34] In many jurisdictions, the minimum candidature age mirrors the minimum voting age, now typically 18 years.[35] Very young candidates are not common anyway – suggesting either bias against them in party selection processes or the fact that it is rare for such candidates to be successful.

The traditional notion that politicians should possess greater maturity than electors has remained influential. The age of 21 was set for service in the UK Parliament in 1695, and remains so for appointment to the House of Lords despite the voting age being lowered in 1969. The US Constitution still mandates minimum ages of 25 for the House, 30 for the Senate and 35 for the presidency.[36] That gradation reflects the status of each role, with the singular powers of a directly elected president calling for a greater maturity than the shared power of legislators. The Indian Constitution borrowed those ages.[37] Ireland also mirrors the '35 year' rule for its merely titular presidency. A referendum to reduce that age to 21 was decisively rejected in 2016; as it is, the average age of Irish presidents on assuming office for first time is close to 63.

Capacity is a more fraught matter. Conceptions and expectations of representatives are so diverse that neither organisational psychologists, nor political scientists, could agree on a 'job description' let alone a comprehensive list of necessary aptitudes and attitudes. That choice is largely left to the electorate. There remains, for the law, issues of medical incapacity. Mental or other illness is usually left to the individual, party and electorate to assess. Mental illness as a disqualification was recently abolished in the UK;[38] and it is doubted that an ancient common law rule against the return of a 'sick and diseased' or even 'deafe and dumbe, or blinde' MP has survived the centuries, let alone contemporary anti-discrimination principles.[39]

In India, a court declaration of 'unsound mind' is however a barrier to election or service.[40] In New Zealand an MP can also lose their seat due to mental disorder, but only after a six month process triggered by a compulsory treatment order.[41] As part of a qualification to enrol to vote, candidates may also face a mental capacity barrier, but this is usually set low. Thus in Australia 'unsound mind' means one who is incapable of understanding 'the nature and significance of enrolment and voting'. There is no test; the rule mostly permits relatives to produce a doctor's certificate to avoid someone in their care being fined for not enrolling or voting. By way of contrast is the 25th amendment, governing mid-term transitions of the US presidency, which was introduced in the wake of the Kennedy assassination. Whilst it does not apply to elections, it allows a president's sub-ordinates to declare him/her 'unable to discharge' that office, and for Congress to ratify that if the president objects.[42]

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[33] Lau, "Two Arguments for Child Enfranchisement".
[34] Parliamentary Elections Act 1695, s 7.
[35] Compare Electoral Administration Act 2006 (UK), s 17(1) and Canada Elections Act 2000 (Can), ss 3, 65(a).
[36] US Constitution, arts I–II.
[37] Indian Constitution, arts 58, 84. Curiously the language of 'completed' the relevant age is used for the presidency, yet 'not less' than for the Parliament. The US equivalents use the language of 'attained'.
[38] Mental Health (Discrimination) Act 2013 (UK), s 1.
[39] Morris, *Parliamentary Elections*, 44.
[40] Indian Constitution, art 102.
[41] Electoral Act 1993 (NZ), s 56.
[42] US Constitution, 25th ad, ss 3–4.

3. Convictions

In one sense, criminal conviction will represent a capacity issue where it involves detention, although in theory this is less of an issue in an age of electronic communications.[43] Regardless of whether detention physically incapacitates a politician, disqualification upon conviction is best understood as a moral question. Proponents of disqualification for prior or current convictions argue that, at a certain level of severity and recency, a conviction embodies a breach of the 'social contract' inconsistent with exercising governmental power. Similar arguments arise in relation to prisoner voting rights, although they are less compelling in relation to the franchise as voters do not occupy public office.[44]

As a result, it seems unusual for a system to deny the vote to someone but let them stand for office.[45] The UK parliament disenfranchises prisoners, but only current imprisonment in excess of one year is a formal barrier to standing for the Commons.[46] The UK barrier was only enacted in response to the election in Ulster (and death, on hunger strike) of Bobby Sands, an imprisoned member of the IRA. To his supporters Sands was a political prisoner, to others a criminal insurgent. The question of political prisoners thus can raise acute problems for electoral law, especially in jurisdictions with limited respect for the rule of law. Much more common – even in systems that let prisoners vote – is to deny them candidature rights.

Conviction for specific offences may generate disqualifications well beyond any sentence for that offence. Typically these are offences involving a political element, such as campaign corruption or serious breaches of parliamentary ethics.[47] In the US, such disqualifications extend to venal corruption in exercising public duties.[48] Where disqualifications (including court ordered ones flowing from findings in criminal cases or electoral challenges) extend beyond the length of any actual sentence, international law requires them to be reasonable. A good example is a proportionate ban, where the offence is a breach of public trust, particularly of electoral norms or against the administration of justice.[49] Though of little application in modern times, offences of treason, insurrection or rebellion against the state may carry a lifetime ban.[50] Barriers to candidacy can even be used to reinforce requirements to abide by political finance regulation.[51]

The ancient privilege of a legislative chamber to discipline its own members, to the point of expulsion, survives in a few jurisdictions. In the UK, it has been used to expel MPs who have been convicted in office or have been evading justice. The question for electoral law is whether an expelled MP can recontest their seat: the answer in the Commons is 'yes'.[52] A similar question

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[43] Julian Assange ran for the Senate of his native Australia in 2013, whilst confined in the Ecuadorean Embassy in London. It was speculated that, if elected, he would seek to attend parliamentary debates by Skype.
[44] Damaška, "Adverse Legal Consequences of Conviction and their Removal," 357–59.
[45] See *Roach v Electoral Commissioner* [2007] HCA 33, implying a right for short-term prisoners to vote in Australia, where *Constitution* s 44(ii) only disqualifies a candidate or MP who is under sentence for an offence punishable by at least one year's gaol.
[46] Representation of the People Act 1981 (UK), ss 1–2.
[47] Eg Canada Elections Act 2000 (Can), s 65(b).
[48] 18 US Code, s 201(4).
[49] Compare *Crippa v France* (2005) UN Doc. CCPR/C/85/D/993-995/2001 (UNHRC) (one year disqualification on findings of electoral malpractice reasonable) and *Dissanayake v Sri Lanka* (2008) UN Doc. CCPR/C/93 (UNHRC) (seven year electoral disqualification for contempt of court unreasonable).
[50] Compare Forfeiture Act 1870 (UK), s 2 and US Constitution, 14th ad, 14, s 3,
[51] Eg Canada Elections Act 2000 (Can), s 65(i).
[52] McKay, *Erskine May*, 232–33. This principle dates to the battle over the seat of John Wilkes, the Commons concluding in 1782 that to do otherwise would subvert the rights of electors.

arises where a legislature has the power to impeach elected officials. In the US model impeachment leads to an ongoing disqualification 'to hold and enjoy any office of honor, trust, or profit'.[53]

Bankruptcy, in time past, was a moral taint, paralleled by potential imprisonment for not repaying debts or consignment to a workhouse. Unsurprisingly then, bankruptcy was a disqualification for election and service in Westminster in centuries past. More surprising is that it has survived, as a disqualification, through eras when borrowing and entrepreneurial risk has been encouraged. This historical accretion remains in jurisdictions like India and Australia.[54] In the UK the taint even lasts for five years beyond discharge from bankruptcy.[55] Lest it be thought that the rule protects against pecuniary abuses, a would-be candidate or serving politician keen to keep their political career alive is probably more, not less likely, to take corrupting donations or misuse public funds to stave off bankruptcy.

4. Connection to Jurisdiction

Citizenship is an important legal status, representing binding acceptance into a jurisdiction. Even where permanent residents may vote, they are not necessarily entitled to be elected until they obtain citizenship.[56] To be elected to the US Congress, one must have been a citizen for a significant period (7 years for the House, 9 for the Senate).[57] The presidency goes two steps beyond, requiring that one be a 'natural born citizen' of at least 14 years residence.[58] Citizenship may not be enough either, if divided loyalties are feared. Australia – remarkably for an immigrant nation – bars dual citizens of any 'foreign power' from standing for or serving in its national Parliament. This applies even to those unaware of having inherited such a citizenship through, say, the birthplace of a parent.[59] In contrast, in New Zealand dual citizenship is no barrier to election, but an MP loses their seat if they actively take up a foreign allegiance or citizenship.[60] Similarly in the US, a limb of the emoluments clause captures any 'present, emolument, office or title' from a foreign monarch or state, but only applies during office.[61]

Citizenship is not the only way of understanding loyalties or fraternal political bonds. For a long time the 'dominions' of the British Empire relied on the shared status of being a subject of the Crown to define political rights. After the demise of its empire, the UK now permits non-citizens not only to vote, but also to stand, for its House of Commons – provided they are citizens of Commonwealth countries or Ireland, and resident in the UK. This glossed a rule, dating to at least 1701, that prohibited 'aliens' from election or parliamentary service. [62]

Residency is a more traditional and less formal notion than citizenship. Reflecting that heritage, laws surviving from older times, or reflecting communitarian expectations within distinctive communities, may impose lengthy residential requirements.[63] On the other hand some systems are

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[53] US Constitution, art 1 s 3(7).
[54] Indian Constitution, art 102 and Australian Constitution, ss 44(iii) and 45.
[55] Insolvency Act 1986 (UK), s 426A.
[56] Eg Electoral Act 1993 (NZ), s 47(3) compared to s 74(1).
[57] US Constitution art 1, ss 2(2) and 3(3).
[58] US Constitution, art 2 s 1(5).
[59] Australian Constitution, s 44(i) and *Re Canavan* [2017] HCA 45.
[60] Electoral Act 1993 (NZ), s 55(1) but even then see dispensation in s 55AA.
[61] US Constitution, art 1 s 9(8).
[62] Electoral Administration Act 2006 (UK), s 18(1) amending Act of Settlement 1700 (UK), s 3.
[63] So Tasmania, an island province of Australia, requires a five-year history of residence or at least two-years immediately prior to nominating.

satisfied if the candidate is a citizen of, and currently an inhabitant in, the wider jurisdiction.[64] That kind of liberality reflects mobile societies and expands the ability, in party-oriented elections, for parties to parachute in candidates from outside a local electorate.[65]

5. Incompatible Offices.[66]

A common conflict relates to serving in two houses or two levels of government at once. Simultaneous election to both houses of the same legislature at once is obviously double dipping, and raises the spectre of charismatic politicians crowding out others and diluting the role of upper houses as review bodies. A classic example is the old rule that a peer, entitled to sit in the UK House of Lords, cannot be a member of the Commons.[67] Rules against serving at two different legislative levels, especially in federal systems, are neither uncommon nor invariable. (Concerns may also arise about overlapping membership of local government, at least where such bodies are powerful or serving on them demanding). Prohibitions in these cases are often rationalised on the basis of practicality – workload and focus – rather than irreconcilable representative obligations. But there is no obvious principle to explain different practices.

Thus, members of the European Parliament were initially permitted to also serve as members of their national parliament. But, since 2002, such overlap is not permitted.[68] Within the UK, one can simultaneously be a member of the Scottish Parliament and a member of the House of Commons. Yet since 2014 that option is foreclosed for Wales and Northern Ireland. Leeway is in any event needed to allow politicians to move between chambers. Inflexible rules force people to forsake their existing seat to stand for another.[69] Yet other more liberal regimes allow a member of one elected body to maintain that role whilst standing for an alternative office, usually with a grace period to resign the older office if they win election to the newer one. Thus, in Wales and Northern Ireland, someone elected to a second legislative office has 8 days to resign from their regional or national role.[70]

A broad range of disqualifications typically applies to prevent those holding paid government appointments from being elected to or serving in a legislature. The obvious rationale is to enhance the separation of executive and legislative powers and the ability of the latter to scrutinise the former.[71] The traditional concern with MPs holding paid governmental appointments is that the executive will use plum appointments to buy MPs off or even, as an employer with control over public servants, suborn any who are also MPs. Another concern is that particularly sensitive public offices may be politicised.[72]

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[64] Compare US Constitution, art 1 ss 2(2) and 3(3): whilst lengthy citizenship is required, one need only be an 'inhabitant' of the relevant state for Congressional election.
[65] Orr, *The Law of Politics*, 95–96.
[66] *Debreczeny v The Netherlands* (1995) UN Doc. CCPR/C/53/D/500/1992 (UNHRC).
[67] A rule which inhibited the early political career of Tony Benn: *Re Bristol South East Parliamentary Election* [1961] 3 All ER 354. This led to hereditary peerages being renounceable. See now House of Lords Act 1999 (UK), s 3.
[68] Compare Act Concerning the Election of Members of the European Parliament by Direct Universal Suffrage [1976] OJ L 278, art 5 with current art 7(2).
[69] Commonwealth Electoral Act 1918 (Australia), s 164 (sub-national MP must resign before contesting national election).
[70] House of Commons Library, "Members of Parliament Holding Dual Mandates".
[71] *Sykes* (n 22). Rules like this date to at least the Succession to the Crown Act 1707 (UK).
[72] Gay, "Disqualification for Membership of the House of Commons," 2 calls this an 'office-based' consideration, to distinguish it from concerns with effects on the elected representative role.

A disqualification, for those holding 'offices of profit' under the Crown,[73]dates to the early 1700s in UK law. In Canada, the impact of this law was softened so it does not bar candidatures, except in sensitive law enforcement and judicial roles. Instead, a successful candidate's government job is deemed terminated. The 'office of profit' concept was also modernised to any 'office, commission or employment in the service of the Government of Canada'[74] Holding any 'office under the United States' is a disqualification from serving in, but not election to, its Congress.[75] Since the executive is truly separate, not fused, this means resigning from Congress to take up a cabinet position.

To avoid the appearance of public servants electioneering whilst drawing a government salary, they may be entitled or even required to take leave during their formal candidacy,[76] or (in US parlance) required to 'resign-to-run'.[77] Where the law requires a resignation, it may also guarantee an unsuccessful candidate a return to their public service role.[78] (Otherwise an economic barrier is imposed on the practical right of candidature of public servants.) To aid certainty and avoid spreading too wide a web via fuzzy phrases like 'office of profit', modern laws may specify a list of offices that are incompatible with candidature or elective service.[79] Classically sensitive offices include electoral officials and judges. When it comes to electoral officials, the rule may be explicit.[80] Or it may be indirect, as where electoral officials are caught by rules against public servants being MPs, or where members of political parties are barred from acting as electoral officials.[81]

6. Pecuniary Interests.

Just as paid government roles can generate conflicts of interest and duty, so too can the pecuniary interests of elected officials. One method of dealing with these is public disclosure, via a register of interests. Disqualification rules are also not uncommon, especially where contractual dealings with government are involved. Such disqualifications are not easy to define, however, especially as the reach of government has widened over time. They have been seen as a 'pitfall into which men who wish to walk uprightly … may unwittingly fall'.[82] That is a heightened risk for candidates with commercial interests; but such laws have a pair of noble rationales. One is to protect the independence of legislators, by avoiding the executive dangling lucrative arrangements in front of candidates and MPs. The other is to avoid venal behaviour. Such behaviour may occur if elected officials inveigle government agencies, or breach the public trust ideal of representation by letting their financial interests cloud consideration of policy issues involving public monies and agencies.[83]

The antecedent of modern pecuniary interest disqualification rules is the late 17th century British law on the freedom and independence of parliament.[84] In Australia, this provision matured into a full-blown constitutional barrier to election, or service, for anyone with 'any direct or indirect pecuniary interest in any agreement with' the public service, except as a shareholder in large

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[73] Eg Australian Constitution, s 44(iv).
[74] Parliament of Canada Act 1985 (Can), ss 32–35 and Canada Elections Act (Can), s 65.
[75] US Constitution, art 1, s 6(2).
[76] Compare Parliament of Canada Act 1985 (Can), s 80 and Electoral Act 1993 (NZ), s 52.
[77] Upholding such laws see *US Civil Service Commission v National Association of Letter Carriers* 413 US 548 (1973) and *Clements v Fashing* 457 US 957 (1982)
[78] Eg Public Service Act 1999 (Australia,) s 32.
[79] Eg House of Commons (Disqualification) Act 1975 (UK), sch 1.
[80] Eg Commonwealth Electoral Act 1918 (Australia), s 16.
[81] On the latter, compare Electoral Act 1907 (Western Australia,) s 16.
[82] *Royse v Birley* (1869) LR 4 CP 296 at 319.
[83] *Re Day (No 2)* [2017] HCA 2.
[84] Parliamentary Elections Act 1695. See also House of Commons (Disqualification) Act 1782 (UK)

company.[85] Applying such rules raise thorny questions about the width of the public service and about concepts like 'indirect' interest (should spousal interests qualify) and 'agreement'. There is also a practical need to filter out everyday dealings with government.[86] Canada on the other hand has retained a bar against pecuniary interests with government, but streamlined them so that they cut in when someone becomes an MP rather than at the time of election.[87]

Process and Reform: Updating and Applying the Rules

In thinking about qualifications, two process issues are notable. The first is 'who enforces the rules?' In Anglophone or common law jurisdictions, legislatures once exercised 'exclusive cognisance' over their own affairs. This included resolving questions about their memberships. From the latter part of the nineteenth century, election disputes came to be ceded to the courts. Because an unqualified candidate cannot be duly elected, a citizen can petition or challenge them if they are declared elected. Generally this only applies where a winning candidate was not properly qualified – although if the margin is tight and electors had to plump between candidates, there is room to argue that an unqualified loser's presence on the ballot casts doubt on the result.[88]

This ability to petition a court to upset an election is subject to strict time limits. The purpose of such time limits is to ensure election results are speedily settled so the business of democratic governance can move on.[89] But in cases of officials who were not qualified for election, this aim is put aside so that an elected person's right to sit might be challenged many months or years after the election. Such challenges may come in various forms, depending on the jurisdiction. The legislature itself may retain power to rule on its members' right to sit.[90] It may be able to refer the matter to a court for an independent ruling.[91] Or a 'common informer' may be able to approach a court to claim a penalty from an MP who sat whilst disqualified.[92]

The second key process issue concerns the source of the law and its updating or amendment. Here a contrast familiar to electoral law generally is apparent: the difference between entrenching rules constitutionally and allowing the legislature to set them. Entrenchment risks inflexibility and the dead hand of outdated rules. Legislative freedom allows ill-functioning rules to be easily updated, but invites unprincipled rule-making that might suit the political class as a whole, or even be partisan in its effect. The US Supreme Court has held that although each House of Congress could judge its members' qualifications, neither it, nor the various states, may add to the qualifications set out in the Constitution.[93] Courts in turn, in shaping constitutionalised rules, may or may not display the nous necessary to ensure qualification rules are practical.

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[85] Australian Constitution, s 44(v).
[86] Orr, "Parliamentary Disqualification for Financial Conflicts".
[87] Bosc and Gagnon, *House of Commons Procedure and Practice*, ch 4.
[88] Orr, "Does an Unqualified but Losing Candidate Upset an Election?".
[89] *Théberge v Laudry* (1870) 2 App Cas 102, 106.
[90] Eg US Constitution, art 1, s 5.
[91] Eg the UK Commons may refer a case to the Judicial Committee of the Privy Council: McKay, *Erskine May*, 40.
[92] Eg Parliament of Canada Act 1985 (Can), s 24. However allowing officious citizens to enforce public law through incentivised private action is now frowned upon and limited in many places. Such actions against UK MPs were abolished in 1957. See also *Alley v Gillespie* [2018] HCA 11.
[93] *Powell v McCormack* 395 US 486 (Congress); *US Term Limits Inc v Thornton* 514 US 779 (States). See further Tillman, "Who Can Be President of the United States?". In contrast, the Australian parliament has added to its constitutional disqualifications: compare Australian Constitution, s 44 and Commonwealth Electoral Act 1918 (Australia), s 163.

Australia and the UK offer a neat comparison. Australia's national Constitution is amendable only by referendum. This document is particularly rigid as, in modern times, politicians have avoided risking political capital on referendums on political process matters, despite all parties agreeing that the disqualification rules (dating to 1900) need modernising and simplifying. In contrast, lacking a written constitution, the UK parliament has flexibility to amend disqualification rules.[94] Flexibility can extend beyond the substance of particular disqualification rules, to operational flexibility. For instance the UK Commons can ignore a disqualifying office if the MP quickly resigns it.[95]

Reform

In broad terms, qualification laws mostly seek either to *prescribe* certain basic capacities or to *proscribe* integrity matters, especially those relating to conflicts of interest. Even accepting these aims, Carney (writing from within the Westminster tradition) notes two definitional and operational problems. One is imprecision. Imprecision is 'of concern given the effect on … the member, the member's electorate and the parliament itself'. The other is legal encrustation, as 'certain grounds [have become] outdated, based on notions from the 19th and even 18th centuries that are no longer current.'[96]

The problem of legal ambiguity or imprecision can be severe for practical politics. A rule about age, for instance, offers a bright-line. In contrast, a rule about overseas citizenships or dealings with government may create legal headaches. 'Fuzzy law' has its place, especially to generate ethical debate. For example the offence of electoral bribery is rarely prosecuted today, but it continues to encourage debates about which campaign promises and inducements cross a normative line. However qualifications rules are meant to have an all-or-nothing quality, especially for would-be candidates and electoral authorities trying to finalise nominations and ballot papers. The problem of fuzziness in qualifications law is exacerbated in systems with highly-devolved electoral administration.[97] One half-way-house solution is to streamline the law as it applies to mere candidates, whilst enhancing the ethical expectations that apply once someone assumes office (including mechanisms to screen for problems and hence increase the risk of an elected official having to forfeit their position in practice).[98]

The question of outdated laws – the dead hand of the past – should be easier to solve, provided the rules are not entrenched in a hard-to-amend constitution. Politicians have the wherewithal and incentive to update qualifications laws. The downside of leaving such basic rules to legislatures, as we have noted, is the risk of self-dealing, a reason why some prefer electoral law to be constitutionally locked-down even at the risk of inflexibility or inviting judicial creativity.[99] The mere accusation of self-dealing may even explain why politicians have been reluctant to propose updating qualification laws in some jurisdictions.

Republican theories of governance counsel that electors – and the political system – should be protected from would-be representatives who have undue conflicts of interest or loyalty. Buchler's theory of elections as occasions for the 'hiring and firing' of public officials,[100] would also seem to

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[94] This is not to say it has streamlined them as much as is desirable: Morris, *Parliamentary Elections*, 56– 60.
[95] House of Commons (Disqualification) Act 1975 (UK), s 6(2).
[96] Carney, *Members of Parliament*, 9
[97] Muller, "Scrutinizing Federal Electoral Qualifications".
[98] The approach taken in Canada, especially since the Lortie Commission Report of 1992.
[99] Or at least framed constitutionally but subject to judicial development, particularly if the courts scrutinise against political 'market failures': see Ely, *Democracy and Distrust*.
[100] Buchler, *Hiring and Firing Public Officials*.

support qualification rules that represent core 'job' capacities. (Whilst, it might be noted, casting doubts on term limits for cutting short the service of experienced and competent representatives).

Republican values and employment metaphors are not, however, the only ways to envision an electoral system. There are also democratic and competitive values. Hamilton observed that 'the people should choose whom they please to govern them', and Madison noted that this basic principle of representation could be as easily strangled by limiting who can be chosen as who could vote.[101] Such rules, in a worst case, may even undermine electoral competitiveness. Thorough-going democrats can cite these sentiments to argue that qualification rules should be kept as simple, and unrestrictive, as possible.

[101] As cited in *Powell* (n 93) 547.

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