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Judging Congressional Elections

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I. INTRODUCTION

Rarely does a constitutional provision escape notice. Yet a pivotal provision of the United States Constitution suffers from uncertainty and neglect. Article I, Section 5 states that each House of Congress "shall be the Judge of the Elections . . . of its own Members,"[1] and this provision potentially affects nearly 500 congressional races each election cycle. Indeed, it already has governed the resolution of hundreds of contested elections.[2] Yet its meaning has received virtually no interpretive attention at the national level—not by Congress, not by the federal courts, and not by scholars. This Article exposes the interpretive vacuum, and it begins to fill it.

The meaning of Article I, Section 5 has far-reaching implications: it directly affects democratic governance in the United States by giving a partisan body the power to dictate the outcomes of its elections.[3] This Article sets forth a novel interpretive theory for this constitutional provision, one that empowers Congress to replace the confused and inconsistent regime that currently governs these adjudications with a clearer and more sensible set of rules. Without such reform, the law of congressional elections will continue to impede the fair and accurate resolution of election disputes—and threaten a political crisis.

In its investigation of Article I, Section 5, this Article identifies three culprits contributing to the interpretive vacuum. The most

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[1] U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . ."). This provision governs all federal elections except for those associated with the presidential race. *Cf.* Bush v. Gore, 531 U.S. 98, 104 (2000) (adjudicating dispute over results in presidential election).

[2] *See infra* note 51 and accompanying text; *see also* Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1629–30 (2016) (discussing trends in election-related litigation).

[3] *See* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 653 (2001) (providing justification for letting legislatures resolve contests over their own elections); Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 715–16 (2001) (exploring the role of partisan politics in high-profile election disputes); *cf.* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 643–45, 647–48 (2002) (debating the merits of removing the power to redistrict from insider political operatives); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650, 653 (2002) (providing a counterargument to Issacharoff's position).

culpable is Congress. Each House of Congress enjoys the protection and power accorded by Article I, Section 5, but neither House has spoken authoritatively as to its meaning or reach.[4] The federal judiciary also is responsible. While the federal courts normally take command over ambiguous federal dictates, they have treated this particular issue as though it is one for Congress to address.[5] Without a set of precedents robust enough to trigger the nationwide debate that scholars typically deliver, the third culprit—the academy—likewise has failed to fill the analytical void.[6]

This Article reveals what therefore passes as federal constitutional law in this area: a chaotic set of ad hoc, state-based interpretations that vary drastically by jurisdiction. Some states, for example, have interpreted Article I, Section 5 to permit courts to adjudicate congressional election contests.[7] Others have concluded the opposite.[8] Through such conflicting interpretations, state courts have contributed to a deep, intractable split on the provision's meaning and reach. State legislatures have compounded the discord by enacting statutes that codify their interpretations, a move that renders their constitutional determinations practically unreviewable.[9] Meanwhile, both Houses of Congress continue to adjudicate these congressional election contests themselves.[10] This has allowed each House to articulate its view of Article I, Section 5 through two means, both inadequate: conclusory resolutions that do not address the reach or effect of the constitutional command and committee reports that do not represent the views of the entire body.[11] This motley collection of precedents is what currently constitutes the law of Article I, Section 5. It is a regime governed by authorities that are confused, conflicting, non-authoritative, and outdated.

To be clear, the inconsistencies are not due to experimentation or policy divides. The differences among states do not reflect their status as laboratories of democracy. Instead, this divide tracks

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[4] *See infra* Section II.C.
[5] *See infra* Section II.B.
[6] *See infra* note 28 and accompanying text.
[7] *See infra* Section III.A.
[8] *See infra* Section III.B.
[9] *See infra* notes 136–46 and accompanying text.
[10] *See infra* Section II.A.
[11] *See infra* Section II.C.

fundamental disagreements over the meaning of Article I, Section 5,[12] and it confirms that jurisdictions are struggling to reconcile the constitutional command with state control over election administration.[13] The harm caused by this arrangement is significant. Without clarification of basic procedural questions, election contests are governed by unpredictability and uncertainty, which in turn leads to the potential for partisan manipulation, illegitimacy, and delay.[14] Serious concerns in any context, these problems are particularly acute in the context of disputed federal elections, where the need for legitimate, accurate, and timely resolution of disputes is at an apex.[15] Moreover, without a sensible resolution of forum-related confusion, election contests are adjudicated in a suboptimal fashion,[16] with some states offering no judicial forum at all.[17] All the while, both the House and the Senate are grappling with state interference in their own adjudications.[18] Particularly given the skyrocketing rates of post-election disputes,[19] there looms, in the background of every congressional election, a threat of a political crisis.[20]

Despite the depth of the confusion, a resolution is possible. This Article asserts that Article I, Section 5 itself offers previously unrecognized answers to its procedural quandaries.[21] Namely, as the "Judge" of these elections, Congress gets to decide how they are resolved. Congress, in other words, gets to decide whether courts may participate in this process, and, if so, how.[22] As this Article will explain, Congress's actions thus far indicate tacit

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[12] As close analysis of the legal landscape reveals, while some of the variation associated with this deep split might be due to policy differences, its central cause is conflicting interpretations of the federal constitutional mandate. *See infra* note 176 and accompanying text; *see also infra* notes 140–45, 156–61, 182–90 and accompanying text. *See generally infra* Part III.

[13] *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .").

[14] *See infra* Section IV.B.

[15] *See infra* Section IV.B.

[16] *See infra* Section IV.A.

[17] *See infra* Section IV.B.

[18] *See infra* Section IV.B.

[19] *See infra* note 29 and accompanying text.

[20] *See infra* notes 270–72 and accompanying text.

[21] *See infra* Section IV.A.

[22] *See infra* Section IV.A.

approval of state court proceedings.[23] Yet tacit approval is no way to run an election, and Congress's indeterminate gestures have not made for good law. Nor have they made for good outcomes: flaws in the current system already may have changed the outcomes of elections and decreased the legitimacy enjoyed by those eventually seated.[24] Congress can, and it should, act to clarify its preferences pursuant to Article I, Section 5, and it should do so in a way that advances the values that are essential to fair and accurate elections.[25]

This Article proceeds in four parts. Part II documents the conditions that have produced the unusual interpretive vacuum. It reveals that Article I, Section 5 raises questions that demand resolution. One such question, as simple and inescapable as it is overlooked and unresolved, goes to the question of forum. Does Article I, Section 5 allow courts to adjudicate congressional election contests? Using this inquiry as an anchor, this Article exposes the failure of federal authorities to address the provision's ambiguities, much less to resolve them. The scholarly community, for its part, appears not to have recognized that these issues exist. This phenomenon can be understood as an interpretive vacuum.

This Article identifies both the legal and the practical consequences. Part III describes the dizzying legal landscape. Court-like proceedings, in both the House and Senate, operate alongside an inconsistent and capricious state-based regime for judging congressional election contests. In some jurisdictions, state legislatures have opened their courthouse doors to thwarted congressional candidates. Other jurisdictions have slammed those doors shut. Still other jurisdictions attempt to split the difference, as they permit courts to adjudicate congressional election contests but only pursuant to a sui generis set of rules. Inconsistency is the constant.

Part IV begins by proposing a novel theory of Article I, Section 5. This theory understands the constitutional mandate both to empower Congress and to accommodate court adjudication of congressional election contests. This Part then explores the practical effects of not embracing a unifying theory. The existing regime harms values fundamental to democracy in the United

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[23] *See infra* Section IV.A.

[24] *See infra* notes 267–68 and accompanying text.

[25] *See infra* Part V.

States, as it injects uncertainty and inappropriate procedure into the adjudication of political disputes. It does so, moreover, precisely at the moment that a stable and effective legal regime is most vital.

Part V concludes with a proposal for reform. It explores four ways that Congress could replace the confused, inconsistent regime with a set of procedures governed by a clear and sensible design. Ultimately, it advocates that Congress adopt the least drastic. Congress should, first, confirm its desire to rely on state court adjudication and, second, regulate the process. More specifically, it should impose procedures such as those relating to exhaustion, timing, and evidence preservation. This simple but powerful move would help to ensure impartial, timely, accurate, and constitutional adjudications of disputed congressional elections—adjudications that would then be subject to plenary final review by either House of Congress. The result would not only calm the procedural waters; it would help, in future elections, to prevent the disorder that this interpretive vacuum otherwise threatens to impose.

II. THE INTERPRETIVE VACUUM

The Constitution requires each House of Congress to judge the elections and returns of its own members.[26] Yet courts frequently are asked to intervene. To what extent is such intervention constitutional? Despite the importance of this question,[27] there is close to no academic commentary on the subject.[28] And despite the

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[26] For a discussion of the distinction between elections and returns, see *infra* note 36.

[27] *See infra* Part IV.B.

[28] The very small collection of scholarly works addressing this question includes Paul E. Salamanca & James E. Keller, *The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members*, 95 KY. L.J. 241 (2006–2007), which addresses the meaning of an analogous provision of the Kentucky Constitution, and Kristen R. Lisk, Note, *The Resolution of Contested Elections in the U.S. House of Representatives: Why State Courts Should Not Help with the House Work*, 83 N.Y.U. L. REV. 1213 (2008), which explores the policy implications of state court adjudication in this context and provides one constitutional theory concerning Article I, Section 5. Other academic works discuss the implications of Article I, Section 5 without addressing the depth of the confusion surrounding this provision or exploring the broad split it has created. *See, e.g.*, Franita Tolson, *Congressional Authority to Protect Voting Rights After* Shelby County *and* Arizona Inter Tribal, 13 ELECTION L.J. 322 (2014) (discussing Congress's authority to judge elections under Article I, Section 5 and the extent to which it grants Congress authority to regulate voter qualifications); Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND.

importance of the question to the federal interest—and notwithstanding a rise in the rate of disputed elections[29]—no federal authority has filled the legal gap. Congress as a whole has not weighed in; neither House has provided clear guidance; and the federal courts have failed to pick up the slack.[30] This vacuum in the law subjects states' election regimes to a pressure they are not able to handle, and the result is uncertainty and confusion.[31]

This Part provides the background necessary to understand this legal phenomenon. It begins by describing the constitutional questions facing each potential litigant (and each potential forum) once a congressional election devolves into litigation.[32] It then exposes the failure of federal authorities to answer these consequential questions of federal law.[33]

A. THE OPEN CONSTITUTIONAL QUESTIONS

Elections held biennially in the United States routinely trigger battles over the results of congressional races.[34] Yet the procedure of congressional election contests is plagued by profound and consequential ambiguity. (By using the term "congressional election contests," this Article means to refer to disputes, brought after a congressional election has taken place, concerning the

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L.J. 1, 24 (2013) (explaining that Congress's power to judge elections is a "lasting legacy of our Founding Fathers and a function of the separation of powers") [hereinafter Douglas, *Procedural Fairness*]; Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 321–322 (2007) (discussing the policy implications of Congress's power pursuant to Article I, Section 5, and similar state constitutional provisions); Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 595 (2015) (noting, in the context of an examination of federal electoral qualifications, that "states cannot interfere with Congress's ability to make an independent judgment, and states can only engage in a ministering manner, not an adjudicative manner").

[29] *See, e.g.*, Hasen, *supra* note 2, at 1629–30 (discussing "the high rate of election litigation the country has witnessed since *Bush v. Gore*," a rate that continues to rise); *see also* Joshua A. Douglas, *Discouraging Election Contests*, 47 U. RICH. L. REV. 1015, 1015 (2013) ("[P]reparing for post-election litigation is now a routine part of campaign strategy.").

[30] *See infra* Sections II.B, II.C.

[31] *See infra* Part III.

[32] *See infra* Section II.A.

[33] *See infra* Sections II.B, II.C.

[34] *See* 2 CONGRESSIONAL QUARTERLY GUIDE TO CONGRESS 833 (5th ed. 2000) (quoting FLOYD M. RIDDICK, THE UNITED STATES CONGRESS: ORGANIZATION AND PROCEDURE 12 (1949)) ("Seldom if ever has a Congress organized without some losing candidate for a seat in either the Senate or House contesting the . . . election in which the losing candidate participated.").

winner of that same election.[35]) As this Section reveals, the confusion in this area derives from Article 1, Section 5.

This constitutional provision designates each House of Congress as the judge of its elections.[36] Both Houses have responded by adjudicating election contests within their own walls. It may seem odd to vest power in this way—that is, to vest power to judge legislative elections in the legislative body itself—but the arrangement has a long historical pedigree. It predates the

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[35] So defined, a congressional election contest may occur either before or after the state's certification of the election. This definition may be more inclusive than other definitions of the term—such as those that would limit its use to disputes brought in a court after the state's certification of the election results—but, as this Article argues, these differences in definition do not affect the Article I, Section 5 analysis. *See infra* Section III.A (explaining that the most plausible reading of Article I, Section 5 does not distinguish among these different types of post-election proceedings in determining what states may do). A brief discussion of the implicated terminology nevertheless may be helpful, given that many jurisdictions use a similar set of terms to describe phases of post-election disputes. After an election, a dispute normally is first addressed in an administrative proceeding, which is often referred to as a "recount." At the conclusion of this initial stage, jurisdictions generally "certify" the results of the recount, and this certification—when brought before the relevant legislative or judicial body—normally serves as powerful evidence of how many validly cast votes each candidate has received. Many jurisdictions then allow parties to dispute the certified results in the courts through a proceeding often referred to as a "judicial contest." *See generally* Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129 (2011) (describing this process unfolding in Minnesota); MARIE GARBER & ABE FRANK, CONTESTED ELECTIONS AND RECOUNTS 1: ISSUES AND OPTIONS IN RESOLVING DISPUTED FEDERAL ELECTIONS (William C. Kimberling ed., 1990). The state's certification often serves, for various purposes, as a bright line. It nevertheless remains difficult to draw precise boundaries distinguishing between these various stages of the post-election proceedings, not least of all because litigants sometimes bring judicial claims prior to certification and because each jurisdiction has its own set of institutions and rules. As suggested above, the difficult task of definitively distinguishing among these phases does not seem to be necessary to understanding the meaning or implications of Article I, Section 5.

[36] U.S. CONST. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . ."). Unless otherwise indicated, this Article uses the term "elections" to refer both to elections and to returns. This is because the two are related. To the extent that "Elections" are distinct from "Returns," it is insofar as the latter refers to a report on the vote count, whereas the former refers to the election proceedings that led to the count. *See, e.g.*, Case XXIV: Spaulding v. Mead, United States Congress, House Committee on Elections, CASES OF CONTESTS ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, INCLUSIVE 157, 159 (M. St. Clair Clarke & David A. Hall eds., 1834) (indicating that where the election phase ends, the returns phase begins); *cf.* Foster v. Love, 522 U.S. 67, 71 (1997) ("When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder. . . ."). As for the final term in this list—"Qualifications"—this refers to the "requirements of age, citizenship, and residence contained in Art. I, § 2, of the Constitution," *Powell v. McCormack*, 395 U.S. 486, 489 (1969), and it is not the subject of this Article.

Constitution,[37] and similar provisions have been adopted in the constitutions of nearly every state.[38] Evidence suggests that the drafters of the Constitution assumed that such power was both "axiomatic" and critical for the protection of a legislative body.[39] The Founders were particularly concerned, after the failures of the Articles of Confederation, with the threat posed by uncooperative states. This concern was acute given a related provision of the Constitution: Article I, Section 4, which assigns to each state the primary responsibility for administering federal elections.[40] As Alexander Hamilton noted, relying on states to run congressional election risks "leav[ing] the existence of the Union entirely at their mercy."[41] It therefore became necessary to provide ways in which each House of Congress could protect itself.

In exercising its adjudicative power pursuant to Article I, Section 5, each House "acts as a judicial tribunal."[42] In fulfilling its duties, each is able to examine witnesses, manage discovery,

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[37] *See, e.g.*, Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986) ("In the formative years of the American republic, it was 'the uniform practice of England and America' for legislatures to be the final judges of the elections and qualifications of their members."); F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 247 (1911) ("The commons claim a right to determine all questions relating to the election of members of their house.").

[38] *See* Douglas, *Procedural Fairness*, *supra* note 28, at 5–6, n.27 (listing similar provisions in nearly all state constitutions).

[39] *See, e.g.*, H.R. REP. NO. 56-85, pt. 1, at 13 (1900) ("We do not think that this proposition needs amplifying; it is axiomatic."); *see also Morgan*, 801 F.2d at 447 ("The fragments of recorded discussion imply that many took for granted the legislative 'right of judging of the return of their members,' . . . and viewed it as necessarily and naturally exclusive."); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 833, at 604–05 (Melvin M. Bigelow ed., 5th ed. 1994) ("If [the power to judge elections is] lodged in any other than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed or put into imminent danger. No other body but itself can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights and sustain the free choice of its constituents.").

[40] *See* U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."); *cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 808–09 (1995) ("The Framers feared that the diverse interests of the States would undermine the National Legislature, and thus they adopted provisions intended to minimize the possibility of state interference with federal elections.").

[41] *U.S. Term Limits*, 514 U.S. at 809 (internal quotation marks omitted).

[42] Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 616 (1929).

and inspect ballots, among other powers.[43] To help facilitate these efforts, both Houses have adopted adjudicative procedures. In the House, legislators have adopted procedures consistent with the Federal Contested Elections Act (FCEA), a statute enacted in 1969 that sets forth procedures for challengers to contest elections.[44] Similar in many ways to rules of civil procedure, the FCEA sets forth a procedural framework for adjudication. It provides for notice, filings, service, and discovery, among other procedural mechanisms.[45] Gaps—both substantive and procedural—are filled through internal House rules and a loose sort of precedent created through committee reports.[46] These committee reports, normally drafted by the Committee on House Administration,[47] document each election contest and provide support for the committee's ultimate recommendation, which takes the form of a proposed resolution. (For example, the committee might propose a resolution dismissing the contest.[48]) The proposed resolutions are then voted on by the full House.[49] If approved, these resolutions represent the views of the entire body. By contrast, the committee reports represent the views of only a small number of members.[50] In accordance with this approach, the House has resolved hundreds of contested elections and published nearly as many

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[43] Kilbourn v. Thompson, 103 U.S. 168, 190 (1880) (discussing each House's "undoubted right to examine witnesses and inspect papers").

[44] *See* Morgan v. United States, 801 F.2d 445, 451 (D.C. Cir. 1986) (noting that the FCEA "establishes certain procedures . . . by which an election contest with respect to a seat in the House of Representatives shall be conducted").

[45] 2 U.S.C. §§ 381–396.

[46] A committee report is "[a] report from a committee to a deliberative assembly on business referred to the committee or on a matter otherwise under its charge." *Committee report*, BLACK'S LAW DICTIONARY (10th ed. 2014). *See generally infra* Section II.C (discussing committee reports addressing disputed congressional elections).

[47] By rule, election contests fall within the jurisdiction of the Committee on House Administration. *See* RULES OF THE HOUSE OF REPRESENTATIVES, R. X(1)(k)(12), at 7 (2015), http://clerk.house.gov/legislative/house-rules.pdf. Once such a matter is referred to this Committee, it will investigate the dispute and recommend a resolution. *See* U.S. HOUSE OF REPRESENTATIVES, A HISTORY OF THE COMMITTEE ON HOUSE ADMINISTRATION: 1947–2012, at 115–17 (2012) (explaining the role of the Committee on House Administration in contested elections). In response to more complicated contests, the Committee might appoint a bipartisan panel or Task Force to help with this work. *See infra* note 131 and accompanying text.

[48] U.S. HOUSE OF REPRESENTATIVES, *supra* note 47, at 116.

[49] *Id.*

[50] *See* George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 44.

committee reports addressing the law and facts of each of the underlying disputes.[51]

The Senate, for its part, has "developed a series of informal precedents" to guide its adjudication of election contests.[52] More specifically, it has established a "custom" of allowing an aggrieved candidate to file a petition stating his claims.[53] Non-frivolous petitions normally get referred to the Senate Committee on Rules and Administration.[54] The Committee then engages in the work of adjudication: it considers the arguments of counsel, it solicits the testimony of witnesses, it inspects ballots, and the like.[55] It too publishes committee reports and eventually passes resolutions.[56]

In short, both Houses of Congress have created procedural frameworks in response to the Article I, Section 5 mandate. This infrastructure allows each House to serve as the adjudicator of contested congressional elections. What neither has done, however, is to clarify the role that *other* institutions should play in adjudicating congressional election disputes.

In response to this vacuum, dissatisfied individuals routinely petition not only either House of Congress, but also state and federal courts, demanding that their claims be adjudicated in these various forums.

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[51] *See* Jeffery A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789–2002*, 18 STUD. AM. POL. DEV. 112, 115 (2004) (counting over 600 disputed elections in the House through 2002). *See generally* ANNE M. BUTLER & WENDY WOLFF, UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES, 1793–1990 (1995) [hereinafter BUTLER & WOLFF, ELECTION CASES] (detailing nearly 150 more cases in the Senate through 1990).

[52] SENATE HISTORICAL OFFICE, SENATE PROCEDURES IN CONTESTED ELECTIONS [hereinafter SENATE HISTORICAL OFFICE, SENATE PROCEDURES], http://www.senate.gov/artandhistory/history/common/contested_elections/procedures_contested_elections.htm (last visited Feb. 12, 2016); *see also* BUTLER & WOLFF, ELECTION CASES, *supra* note 51, at xiii–xxv.

[53] Roudebush v. Hartke, 405 U.S. 15, 27 (1972) (Douglas, J., dissenting).

[54] This is also called the Senate Rules Committee. For a stretch of time prior to 1947, the committee responsible for such work was the Senate Committee on Privileges and Elections. In 1947, the Senate Committee on Privileges and Elections was converted into a subcommittee organized under the Committee on Rules and Administration. It remained as such until 1977, when the Senate abolished the subcommittee. BUTLER & WOLFF, ELECTION CASES, *supra* note 51, at xix–xx.

[55] *Roudebush*, 405 U.S. at 27 (Douglas, J., dissenting); *see also* SENATE HISTORICAL OFFICE, SENATE PROCEDURES, *supra* note 52 ("[T]he Full Rules Committee continues to be responsible for contested election cases.").

[56] *See* SENATE HISTORICAL OFFICE, SENATE COMMITTEES, http://www.senate.gov/artandhistory/history/common/briefing/committees.htm (last visited Jan. 17, 2017) (explaining the procedures of Senate Committees).

Many petition the state courts.[57] Some petition both state courts and either House of Congress.[58] Occasionally, someone will attempt to petition the federal courts.[59] These differences reflect not only variations among candidates' legal strategies, but also, as discussed below, the jurisdictions' uneven treatment of Article I, Section 5.[60] These factors combine to produce a confused and unpredictable set of procedural pathways. Sometimes an election dispute will be adjudicated by a single House of Congress, and no else.[61] Other times, the dispute will be adjudicated by a House of

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[57] This occurred in Minnesota in 2008, for example, when Al Franken ran against Norm Coleman in one of the closest elections in the history of the Senate. After a recount resulted in a lead for Franken of 225 votes—out of over two million cast—Coleman filed an election contest in the Minnesota state courts. The trial-level proceedings took months, and it was not until over seven months after Election Day (and nearly half a year into the congressional term) that the Minnesota Supreme Court issued its final judgment. *See generally* JAY WEINER, THIS IS NOT FLORIDA (2010).

[58] This occurred in Connecticut in 1994, for example, when Edward Munster ran against Sam Gejdenson in one of the closest elections in the history of the House of Representatives. Anthony Pioppi & John McDonald, *Munster Gives Up House Seat Battle*, HARTFORD COURANT, Apr. 29, 1995, http://articles.courant.com/1995-04-29/news/9504290580_1_election-results-election-process-rep-sam-gejdenson. After a recount, both candidates filed petitions with the Supreme Court of Connecticut, which engaged in extensive proceedings before concluding that Gejdenson had won the election by a margin of twenty-one votes. *See In re* Election of the United States Representative for the Second Cong. Dist., 653 A.2d 79, 94 (Conn. 1994) (concluding that "there is no merit to Munster's claim for a new election" and that "Gejdenson was duly elected . . . as the United States Representative"). Munster responded by filing a notice of contest in the House of Representatives, which decided to seat Gejdenson pending those proceedings. Eventually, citing concerns over delay, Munster withdrew his challenge—six months after the election took place. *See* Pioppi & MacDonald, *supra* note 58 (detailing the progression of the election contest).

[59] This occurred, for example, after the razor-thin 1984 contest between Richard McIntyre and Frank McCloskey (for Indiana's "Bloody Eighth" Congressional District) produced a cluster of federal court lawsuits and decisions. *See infra* note 76 and accompanying text (listing some of the cases). The federal courts rebuffed all attempts at adjudication, however, and eventually, the House, which was controlled by Democrats, resolved the dispute by seating McCloskey. House Republicans responded by walking out in protest. *See* EDWARD B. FOLEY, BALLOT BATTLES 266 (2016).

[60] *See generally infra* Section II.B, Part III.

[61] *See* BUTLER & WOLFF, ELECTION CASES, *supra* note 51, at 364–67, 374–75, 380–87 (1995) (describing, among other contests, *Neal v. Stewart*, a challenge in 1939 by Neal in the Senate; *Willis v. Van Nuys*, a challenge in 1939 by Willis in the Senate; *Neal v. Stewart*, another challenge in 1943 by Neal in the Senate; *Markey v. O'Conor*, a challenge in 1946 by Markey in the Senate; *Sweeney v. Kilgore*, a challenge in 1947 by Sweeney in the Senate; and *Hook v. Ferguson*, a challenge in 1949 by Hook in the Senate); *see also* L. PAIGE WHITAKER, CONGRESSIONAL RESEARCH SERVICE, CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES: 1933 TO 2009, at 21, 33–34 (2010) (describing *Oliver v. Hale*, a challenge by Oliver in the House, resolved in 1958, where the state courts had refused to hear the challenge; and *Paul v. Gammage*, a challenge by Paul in the House, resolved in 1977, where the state courts had refused to hear the challenge).

Congress as well as by the state courts.[62] Still other times, either House defers—expressly or otherwise—to the state courts and then seats the winning candidate without conducting any substantive adjudication itself.[63] Perhaps unsurprisingly, litigants frequently battle over questions of forum, and courts often seem to be at a loss with respect to how to resolve those procedural disputes.[64]

Taken together, these contested congressional elections have produced a collection of high-stakes, high-profile cases being inconsistently adjudicated or thrown out by a variable combination of state courts, federal courts, and each House of Congress. As discussed below, this dynamic is highly problematic.[65] To mitigate such damage, the underlying question—the extent to which Article I, Section 5 limits the involvement of courts in congressional election contests—requires resolution. Yet as discussed above, there remains exceedingly little academic literature on the subject.[66] The federal courts have contributed only a spotty set of precedents on the question of how to interpret this provision—a phenomenon discussed in the next Section.[67] And neither House of Congress has provided a definitive answer.[68] This leaves fundamental questions (about, among other things, the federal structure and the institution of Congress) not to a federal authority, but instead to state entities that lack the ability to resolve nationwide splits. This ensures precisely the sort of

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[62] *See* BUTLER & WOLFF, ELECTION CASES, *supra* note 51, at 355–58, 426–28 (describing *Chavez v. Cutting*, a challenge over the 1934 election brought by Chavez in both the state courts and the Senate; and *Edmondson v. Bellmon*, a challenge over the 1974 election brought by Edmondson in both the state courts and the Senate); *see also* WHITAKER, *supra* note 61, at 37–38, 39–40, 46 (describing *Jennings v. Buchanan*, a challenge over the 2006 election brought by Jennings in both the state courts and the House; *McCloskey v. McIntyre*, an investigation over the 1984 election initiated by the House, where McCloskey also brought challenges in both the federal and state courts; and *Thorsness v. Daschle*, a challenge over the 1978 election brought by Thorsness in both the House and state courts).

[63] *See* WEINER, *supra* note 57, at 16–18 (describing the 2008 election contest, where the contestant challenged the election results in Minnesota state courts but not before the Senate); *see also* Roudebush v. Hartke, 405 U.S. 15, 18 (1972) (noting that the Senate had seated the contestee " 'without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order' " (quoting 117 CONG. REC. 6 (1971))).

[64] *See infra* notes 229–32 and accompanying text.

[65] *See infra* Section IV.B.

[66] *See supra* note 28 and accompanying text.

[67] *See infra* Section II.B.

[68] *See infra* Section II.C.

uncertainty and concerns over neutrality that are best avoided in such a consequential area of the law.[69]

B. RETICENCE BY THE FEDERAL COURTS

The federal courts frequently serve as arbiters of federal law, and they have particular expertise with respect to questions of procedure. However, in the context of congressional election contests—where the federal interest is so profound and questions of procedure so important—the federal courts have offered only a handful of precedents on point. The doctrine that emerges is confusing and ambiguous, and it fails to provide definitive answers. It nevertheless leads to at least one conclusion: under current law, federal courts almost certainly will not adjudicate congressional election contests themselves.[70]

Analysis of this doctrine begins with two propositions of law that the federal courts have managed to articulate more clearly. The first is that Article I, Section 5 does not impose significant obstacles to nonjudicial state proceedings, such as recounts.[71] The second is that Article I, Section 5 *does* pose an obstacle to federal court adjudication of congressional election contests, at least once either House of Congress has unconditionally seated a member.[72] Outside of these two narrow propositions, the law of Article I, Section 5 is unsettled in the federal courts.[73] These courts have not directly resolved, for example, the extent to which Article I, Section 5 imposes restrictions on state *judicial* proceedings, as opposed to state nonjudicial (i.e., administrative) proceedings. And they have not clarified whether federal courts may open their doors for adjudication *prior* to the unconditional seating of a

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[69] *See infra* Section IV.B.

[70] The justiciability of a case such as *Bush v. Gore*, 531 U.S. 98 (2000), is not implicated by this line of cases because Article I, Section 5 applies to congressional races, not presidential elections. Likewise, the justiciability of a case such as *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), is not clearly implicated by the discussion because Article I, Section 5 has been understood to apply to election contests, not to generally applicable litigation instigated prior to Election Day. For a definition of "congressional election contests," see *supra* note 35.

[71] *See* Roudebush v. Hartke, 405 U.S. 15, 26 (1972) (holding that Article I, Section 5 "does not prohibit Indiana from conducting a recount of the 1970 election ballots for United States Senator"); *see also infra* notes 75–88 and accompanying text.

[72] *See infra* notes 76, 89–102 and accompanying text.

[73] To an even greater degree, the law is unsettled in the state courts. *See infra* Part III.

member—particularly if Congress were to authorize such a proceeding. A review of the little case law that does exist provides some hint into how the doctrine is likely to evolve. Even more so, however, this review of the doctrine helps to reveal why states have struggled so mightily in looking for answers as they attempt to administer congressional elections.[74]

The two clearly articulated propositions of law emerge from a small collection of sources: a Supreme Court case called *Roudebush v. Hartke*[75] and a cluster of related decisions that this Article refers to as the McCloskey cases.[76] In *Roudebush*, the Supreme Court had been asked to decide whether Article I, Section 5 allowed a state to administer a post-election recount.[77] Concluding that it did allow such proceedings, the Court explained that while "a State's verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate's power to judge elections and returns," a recount does not cross the Article I, Section 5 line unless it "frustrates the Senate's ability to make an independent final judgment."[78] This rule applies, the Court held, even if the Senate already has seated the apparent victor of that election.[79] Because, in the case before it, the recount did not "prevent the Senate from independently evaluating the election any more than the initial count [did]," Article I, Section 5 posed no bar.[80]

In light of this language, *Roudebush* can be read broadly to permit *any* post-election state proceeding—whether administrative or judicial in nature—to go forward so long as that proceeding does not somehow interfere with either House's ability to conduct its

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[74] *See infra* Part III.

[75] 405 U.S. 15 (1972).

[76] *See* Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986); McIntyre v. Fallahay, 766 F.2d 1078, 1080–81 (7th Cir. 1985); McIntyre v. O'Neill, 766 F.2d 535, 535 (D.C. Cir. 1985); Barkley v. O'Neill, 624 F. Supp. 664, 667–68 (S.D. Ind. 1985).

[77] *Roudebush*, 405 U.S. at 23–24.

[78] *Id.* at 25.

[79] *Id.* at 18. The Senate had seated Senator Hartke conditionally, i.e., "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States." *Id.* (internal quotation marks omitted).

[80] *Id.* at 25. *See also id.* at 25–26 ("The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount." (citations omitted)).

own proceedings. Indeed, multiple authorities have read *Roudebush* in this manner.[81]

This broad reading of *Roudebush* squares with the Court's reasoning in the decision itself, which does not limit its logic to administrative proceedings.[82] The trouble with this reading is that many subsequent interpretations of *Roudebush* have construed the case much more narrowly. They have concluded that, in light of the Court's acknowledgement that it was only addressing administrative proceedings,[83] the case does not bear on state judicial proceedings.

A decision out of Illinois illustrates this narrow reading of *Roudebush*. Concluding that the Supreme Court case was "inapposite,"[84] the court held that the state's judicial proceedings remained subject to the "long-standing rule that Congress has exclusive jurisdiction to determine the election contests of its members"[85]—and therefore that the state judicial proceedings needed to be dismissed.[86] This Illinois precedent, along with a

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[81] *See, e.g.*, Durkin v. Snow, 403 F. Supp. 18, 20 (D.N.H. 1974) ("We find nothing in the maintenance of state court proceedings which would subvert the clear and acknowledged function of the United States Senate to determine whom to seat. No impending state court action or practice has been called to our attention which would impede the independent determination of the outcome by the United States Senate."). Likewise, in *Franken v. Pawlenty*, the Minnesota Supreme Court did not recognize any constitutional distinction between judicial and administrative proceedings in its reading of *Roudebush*. 762 N.W.2d 558, 569 (Minn. 2009). In *McIntyre v. Fallahay*, the court concluded that the case should be remanded to the state court without deeming it necessary to "decide whether the Indiana proceeding was 'judicial' " in nature. 766 F.2d 1078, 1084 (7th Cir. 1985). In *McIntyre*, the court also suggested that the result would be the same even after the House or Senate had seated the relevant member. *See id.* at 1086; *see also id.* ("Once the House decides it no longer cares to have the state's advice, the state is *less* constrained than before." (emphasis added)).

[82] The Court did find it necessary to determine whether the Indiana proceedings were administrative or judicial in nature, and it concluded that they were administrative. *Roudebush*, 405 U.S. at 20–23. However, it was conducting this analysis not to determine the effect of Article I, Section 5, but rather to determine the effect of the Anti-Injunction Act, 28 U.S.C. § 2283. *Id.*

[83] *See Roudebush*, 405 U.S. at 20–23 ("The state courts' duties in connection with a recount may be characterized as ministerial, or perhaps administrative, but they clearly do not fall within this definition of a 'judicial inquiry.' ").

[84] Young v. Mikva, 363 N.E.2d 851, 853 (Ill. 1977); *see also id.* (rejecting the petitioner's argument that *Roudebush* broadly "permits a State to examine election results fully so long as it does not frustrate the Congress' ability to render a final, independent judgment").

[85] *Id.* at 854.

[86] *Id.*

collection of authorities in agreement,[87] confirms that *Roudebush* has not come close to settling the question of how Article I, Section 5 affects state judicial proceedings.

Roudebush also fails to address the question of *federal* court involvement in the adjudication of congressional election disputes. While the decision's very existence confirms that the federal courts can be involved to a limited extent—namely, to the extent necessary to determine the constitutionality of parallel state proceedings[88]—*Roudebush* does not speak to the question of whether a federal court may itself adjudicate the claims raised in a congressional election contest. Much more on point, in this regard, are the McCloskey cases.[89]

The McCloskey cases emerged out of the 1984 race in Indiana between Richard McIntyre and Frank McCloskey. Initially, McIntyre appeared to have won the race, but before the state had concluded its recount proceedings, the House of Representatives assembled, refused to seat McIntyre, and instead appointed a Task Force to investigate the election.[90] This Task Force conducted its

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[87] *See, e.g.*, Gammage v. Compton, 548 S.W.2d 1 (Tex. 1977) (distinguishing *Roudebush* by noting that the Court there "said that the limited responsibilities involved in the recount did not constitute a 'court proceeding' "); LaCaze v. Johnson, 305 So. 2d 140, 144–46 (La. Ct. App. 1974) (interpreting *Roudebush* as drawing a distinction between recounts not involving "judicial inquiry," which are compatible with Article I, Section 5, and those that do constitute judicial action, which are unconstitutional); *see also* Lisk, *supra* note 28, at 1225–28 (analyzing three different interpretations of *Roudebush* concerning the permissibility of state court action in congressional election contests). These post-*Roudebush* authorities join the substantial collection of pre-*Roudebush* opinions almost universally concluding that Article I, Section 5 prohibits state courts from adjudicating congressional election contests. *See* Hartke v. Roudebush, 321 F. Supp. 1370, 1373 (S.D. Ind. 1970) ("The great weight of authority supports plaintiff's position that court proceedings for recount or contest with regard to an election for representative in [Congress] are unconstitutional, as in conflict *with* Article I, Section 5, whether brought in state or federal court."), *rev'd on other grounds*, 405 U.S. 15 (1972); *id.* (listing cases).

[88] Stated otherwise, the Supreme Court's willingness to decide the *Roudebush* case on the merits confirms that federal courts may adjudicate challenges to state proceedings, even in the context of congressional election contests. This is consistent with the conclusions reached by other federal courts. *See, e.g.*, Durkin v. Snow, 403 F. Supp. 18, 20 (D.N.H. 1974) ("The door of the federal court remains open should it be demonstrated that state actions or practices are being pursued which deprive the Senate or any candidate of rights conferred by the federal Constitution.").

[89] *See supra* note 76 (listing some of the cases that emerged from this dispute).

[90] FOLEY, BALLOT BATTLES, *supra* note 59, at 259–60.

own recount and concluded that, in fact, McCloskey had won.[91] On May 1, 1985, by a party-line vote, the House seated McCloskey.[92]

In response to this change of fortunes, McIntyre (and others aligned with the candidate) filed a series of lawsuits in the federal courts.[93] These challenges, rebuffed at every turn, produced a collection of precedents interpreting Article I, Section 5 to prohibit the federal courts from adjudicating congressional election contests. In one such decision, *Morgan v. United States*,[94] then-Judge Scalia articulated the question presented to the court as whether the federal courts "have jurisdiction to review the substance or procedure of a determination by the House of Representatives that one of two contestants was lawfully elected to that body."[95] He found the answer clearly to be no. Pointing to the text of Article I, Section 5, he insisted that "[t]he exclusion of others—and in particular of others who are judges—could not be more evident."[96]

In another McCloskey case, *McIntyre v. Fallahay*,[97] the court reached a similar conclusion. Judge Easterbrook, who wrote the opinion, relied on Article I, Section 5 for his conclusion that the court could do nothing that might even possibly "affect the outcome of [the] election."[98] Because any judicial resolution therefore would constitute an impermissible advisory opinion, the case could not proceed in the federal courts.[99] Noting that the Indiana state courts were not necessarily bound by the same

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[91] *See* Morgan v. United States, 801 F.2d 445, 446 (D.C. Cir. 1986).

[92] *Id.*

[93] *See* FOLEY, BALLOT BATTLES, *supra* note 59, at 266 ("Republicans also tried to overturn the outcome in federal court, raising equal protection and due process claims of the kind that they would present again in *Bush v. Gore*.").

[94] 801 F.2d 445 (D.C. Cir. 1986).

[95] *Id.*

[96] *Id.* at 447. He further explained: "Because the Constitution so unambiguously proscribes judicial review of the proceedings in the House of Representatives that led to the seating of McCloskey, we believe that further briefing and oral argument in this case would be pointless, and that the decision of the District Court should be summarily affirmed." *Id.* at 446–47.

[97] 766 F.2d 1078 (7th Cir. 1985).

[98] *Id.* at 1081 ("The House is not only 'Judge' but also final arbiter. Its decisions about which ballots count, and who won, are not reviewable in any court. . . . Nothing we say or do, nothing the state court says or does, could affect the outcome of this election. Because the dispute is not justiciable, it is inappropriate for a federal court even to intimate how Congress ought to have decided." (footnote omitted)).

[99] *Id.*

prohibition on advisory opinions, Judge Easterbrook remanded the case.[100]

The jurisdictional holdings in both *Morgan* and *McIntyre* provide some insight into the Article I, Section 5 line. But both addressed federal court proceedings occurring after the House had seated its member. As such, they did not resolve whether Article I, Section 5 might allow federal courts to adjudicate congressional election contests in other circumstances, and in particular during what tends to be the most critical time: *prior* to either House's resolution of the dispute. Both decisions nevertheless seem to suggest that the answer is no, at least in the absence of congressional authorization. To this end, *Morgan* repeated the dicta from *Roudebush* that " '[w]hich candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even *before* the Senate acted.' "[101] It nevertheless is possible to read these precedents more narrowly, particularly given the emphasis both placed on the fact that the House already had seated McCloskey. In short, while the McCloskey cases do not necessarily foreclose federal court review in all circumstances, they provide powerful authority for the proposition that, at least in

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[100] *See id.* at 1082 ("The remand of an improvidently removed case allows the state court to decide for itself whether to proceed. Considerations of federalism.. . . require that district courts not preclude state courts from hearing disputes that states may deem sufficiently 'live' for their own purposes.").

[101] *Morgan*, 801 F.2d at 449 (emphasis altered) (quoting Roudebush v. Hartke, 405 U.S. 15, 19 (1972)); *see also* Webster v. Doe, 486 U.S. 592, 612 (1988) (Scalia, J., dissenting) ("Claims concerning constitutional violations committed in [the context of Article I, Section 5]—for example, the rather grave constitutional claim that an election has been stolen—cannot be addressed to the courts."). This restrictive view of the federal courts' power is also consistent with several older decisions. *See, e.g.*, *In re* James, 241 F. Supp. 858, 860 (S.D.N.Y. 1965) (interpreting Article I, Section 5 to mean that "federal courts have no jurisdiction to pass on the qualifications and the legality of the election of any member of the House of Representatives"); Keogh v. Horner, 8 F. Supp. 933, 934 (S.D. Ill. 1934) (declaring that the court was "unable to find any authority, which by any stretch of the imagination holds or tends to hold that a District Court has any authority to" prohibit a governor from issuing certificates of election to individuals elected to the House of Representatives); *In re* Voorhis, 291 F. 673, 674–75 (S.D.N.Y. 1923) (Hand, J.) (concluding that the federal courts lack the authority to hear challenges to congressional elections because the Constitution puts that matter exclusively in the hands of Congress).

the absence of congressional authorization, the federal courts will refuse to get involved.[102]

Roudebush and the McCloskey cases, in sum, provide limited insight.[103] These precedents do not rest on broad rulings that might have provided guidance to states attempting to resolve congressional election disputes. As a result, there remains a recurring tension between, on the one side, the constitutional requirement that each House judge the elections of its own members and, on the other, the frequent appeals to state and federal courts to judge these same elections. It is a tension that the federal courts have failed to resolve—and a tension that implicates fundamental questions of democratic governance.

C. ABDICATION BY CONGRESS

Amid the confusion surrounding Article I, Section 5, at least one thing is clear: the provision empowers and protects each House of Congress. Despite this close relationship, neither House has spoken definitively on the meaning of the constitutional mandate.

What each House of Congress has done instead is rely on two means, both inadequate, to address the Article I, Section 5 line. First, each House has passed resolutions relating to congressional election contests. These resolutions are authoritative, but they are short and conclusory and they do not speak at all to the constitutional command. Second, each House has issued committee reports, which do occasionally address the

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[102] Were Congress to authorize the federal courts to adjudicate congressional election contests, that would trigger a host of constitutional questions. These are discussed in more detail below. *See infra* notes 301–05 and accompanying text.

[103] Other precedents, such as *Powell v. McCormack*, 395 U.S. 486 (1969), are even less informative. In *Powell*, the Supreme Court addressed the "Qualifications" language of Article I, Section 5 and ultimately concluded that the provision did not bar its review. *Id.* at 518–22. This case is not particularly on point, however, given that the dispute in that case revolved around whether the House could block an elected individual from being seated based on Qualifications not contained in the Constitution. *See id.* at 522 ("[T]he Constitution leaves the House without authority to exclude an person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." (emphasis and footnotes omitted)); *see also Morgan*, 801 F.2d at 448 ("[T]he holding of the [*Powell*] case was simply that Article I, section 5 had no application, since the House action in question did *not* consist of judging 'qualifications' within the meaning of the provision."). As for *Bush v. Gore*, 531 U.S. 98 (2000), it is of no direct relevance to Article I, Section 5, which applies to congressional races but not presidential ones. *See* U.S. CONST. amend. XII (describing procedures for electing the President and Vice-President).

constitutional command, but which do not represent the views of the entire body. Both Houses of Congress therefore have failed to address Article I, Section 5 in any way that is both on point and authoritative. This spotty authority nevertheless allows some insight into the views of these legislative bodies. That insight suggests that both Houses endorse an accommodating view of congressional election contests, one that permits state courts to adjudicate these disputes and may even require contestants to exhaust state court remedies. These signals emanating from each House of Congress are not enough, however, to have resolved the confusion surrounding the constitutional mandate.[104]

When speaking authoritatively, Congress has provided vanishingly little insight into Article I, Section 5. Each House can speak authoritatively through several means. Congress as a whole can do so through the passage of legislation or concurrent resolutions.[105] Alternatively, each House can speak individually through the passage of simple resolutions (often referred to more succinctly as resolutions).[106]

Through none of these means, it appears, has either House of Congress so much as addressed the tension emerging from court adjudication of congressional election contests. With respect to the first means, legislation, Congress has not spoken at all on the meaning of Article I, Section 5. The most on-point legislation, the FCEA,[107] does not speak to the provision. Likewise, there appear to be no on-point concurrent resolutions.

Speaking individually, each House of Congress has passed numerous resolutions addressing (and frequently resolving) disputed congressional elections. However, it appears that none of these resolutions has spoken to the question of how Article I, Section 5 affects court adjudication of election contests. Rather, the resolutions are generally both short and conclusory. An example, from the Senate, follows:

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[104] *See infra* Part III.

[105] A concurrent resolution is a resolution, "passed by one house and agreed to by the other," that "expresses the legislature's opinion on a subject but does not have the force of law." *Concurrent Resolution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[106] A simple resolution is a resolution, "passed by one house only," that "expresses the opinion or affects the internal affairs of the passing house, but . . . does not have the force of law." *Simple Resolution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[107] *See supra* note 45 and accompanying text.

Calendar No. 1038

69TH CONGRESS
1st Session

S. RES. 243

[Report No. 1021]

IN THE SENATE OF THE UNITED STATES

JUNE 7 (calendar day, JUNE 8), 1926

Mr. DENEEN, from the Committee on Privileges and Elections, reported the following resolution; which was placed on the calendar

JUNE 16, 1926

Considered and agreed to

RESOLUTION

Resolved, That Thomas D. Schall is hereby declared to be a duly elected Senator of the United States from the State of Minnesota, for the term of six years, commencing on the 4th day of March, 1925, and is entitled to be seated as such.

This resolution—which, as relevant, reads that "Thomas D. Schall is hereby declared to be a duly elected Senator of the United States from the State of Minnesota, for the term of six years, commencing on the 4th day of March, 1925, and is entitled to be seated as such"—resolved a disputed election between Schall and Magnus Johnson, after the latter had brought an election challenge before the Senate.[108] The resolution resolving this dispute, characteristically terse, provides no insight into Article I, Section 5.

The brevity of these resolutions stand in contrast to the breadth and depth of a different set of documents—the committee reports—that so often accompanies the resolutions. Take this same dispute, between Johnson and Schall. Per Senate procedure, once Johnson had brought an election contest in the Senate, it was

[108] S. Res. 243, 69th Cong. (1926).

referred to a designated committee.[109] After days of hearings, which included the airing of legal arguments and the testimony and cross-examination of witnesses, the Committee issued a ten-page "report" on its findings.[110] This document, typical of committee reports addressing contested elections, in many ways resembles a court opinion: it includes a summary of the claims,[111] a description of the evidence,[112] and an account of the committee's findings, both of fact and of law.[113] It is in this final section that the report addresses the effect of Article I, Section 5 on the judicial adjudication of election contests. The report notes, first, that Johnson had failed to bring certain claims before the Minnesota state courts.[114] It then asserts:

> The Senate is a judge of the election and qualification of its members and a judgment of a court under the provisions of the Minnesota law referred to would not be binding upon the Senate, but it would have great weight. It should not be expected that the Senate act as a substitute for a district court of that State.[115]

This passage makes clear that the Committee on Privileges and Elections (at least, as composed at the time) construed Article I, Section 5 to permit state court adjudication of congressional election contests. Indeed, it seems even to embrace something akin to an exhaustion principle, as the Committee went on to recommend rejection of the contest based in part on Johnson's failure to bring his claims before the Minnesota state courts.

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[109] S. REP. NO. 69-1021, at 1. More specifically, the Senate passed a resolution empowering the Committee on Privileges and Elections to, among other things, investigate and report on Johnson's claims. *Id.* (quoting S. Res. 20, 69th Cong. (1925) ("[T]he Committee on Privileges and Elections . . . is hereby . . . authorized and directed to investigate the charges and countercharges . . . in the matter . . . .")).

[110] *See id.* at 1–10.

[111] *See id.* at 2–3 (enumerating the various "allegations" filed by Johnson against Shall).

[112] *See id.* at 3–8 (describing the testimony of witnesses and introduction of evidence before the Committee).

[113] *See id.* at 8–10 (stating "the opinion of the committee" as to the issues of fact and law that were raised and "recommend[ing] that the contest in this case be dismissed").

[114] *See id.* at 9 ("No such contest has been filed in the district court of Minnesota where contestee resides.").

[115] *Id.*

The full Senate later passed a resolution consistent with the Committee's recommendation that Schall be seated. (It is the resolution reprinted above.[116]) In so doing, however, the Senate did not vote on whether it concurred with everything contained in the Committee's report. It simply passed the short and conclusory resolution seating Schall.

The Committee's treatment of the Johnson claims is no outlier. To the contrary, a similar pattern has recurred throughout the Senate's history.[117] Taken in sum, the Senate's committee reports overwhelmingly support the view that Article I, Section 5 poses no significant obstacle to state adjudicative proceedings.[118] But none of these reports is authoritative. It is in this sense that the Senate has failed to speak authoritatively on the question of the reach of Article I, Section 5, even when the committee reports address the matter more directly.[119]

A similar pattern holds in the House. A 2007 letter that the Chair of the House Administration Committee sent to a state court helps to reveal the House's approach:

> In contested House elections, the House customarily relies on state legal processes to provide a full and fair airing of contested election issues raised by the parties. This allows the states the opportunity to fully discharge their Constitutional responsibility to conduct Federal elections. These state proceedings

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[116] S. Res. 243, 69th Cong. (1926); *see also* S. REP. NO. 69-1021, at 1 (1926) (report produced to "accompany" Senate Resolution No. 243).

[117] *See, e.g.*, S. REP. NO. 72-1066, at 4 (1933) (indicating approval of state court proceedings by suggesting that the contest should be dismissed in part because the challenger had failed to exhaust state court remedies). Some inconsistency among these reports nevertheless does exist, particularly with respect to whether exhaustion of state court remedies really is required. *See* SENATE HISTORICAL OFFICE, SENATE PROCEDURES, *supra* note 52 (explaining that "the Senate [has not wanted] to step in where legal action in the federal or state courts was appropriate, and it seldom took very seriously the claims of a contestant who had failed to follow these avenues of redress").

[118] This conclusion is consistent with the Senate's treatment of the *Roudebush* litigation, discussed above, insofar as the Senate seated R. Vance Hartke "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order." Roudebush v. Hartke, 405 U.S. 15, 18 (1972) (quoting 117 CONG. REC. 6 (1971)).

[119] Although not authoritative, this precedent still provides some insight into the Senate's views of Article I, Section 5, and this insight may help to resolve ambiguities surrounding the provision. *See infra* note 219 and accompanying text.

> ordinarily enhance the ability of the House to evaluate the merits of any pending election contest.[120]

Tellingly, the Chair then cited *Roudebush*.[121]

This letter was included in a committee report recommending that the underlying election contest—a dispute between Democrat Christine Jennings and Republican Vern Buchanan—be dismissed.[122] In February 2008 the full House voted to pass the resolution that the Committee had recommended. As usual, the resolution included none of the substance of the report:

IV

House Calendar No. 190

110TH CONGRESS 2D SESSION **H. RES. 989**

[Report No. 110–528]

Dismissing the election contest relating to the office of Representative from the Thirteenth Congressional District of Florida.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 14, 2008

Mr. BRADY of Pennsylvania, from the Committee on House Administration, reported the following resolution; which was referred to the House Calendar and ordered to be printed

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RESOLUTION

Dismissing the election contest relating to the office of Representative from the Thirteenth Congressional District of Florida.

Resolved, That the election contest relating to the office of Representative from the Thirteenth Congressional District of Florida is dismissed.

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[120] Letter from Juanita Millender-McDonald, Chairman of the Committee on House Administration, to Jon J. Wheeler, Clerk of the Court for the Florida First District Court of Appeal (Jan. 4, 2007), *in* H.R. REP. NO. 110-528, pt. 2, at 1461 (2008).

[121] *Id.* (citing Roudebush v. Hartke, 405 U.S. 15 (1972)).

[122] *See* H.R. REP. NO. 110-528, pt. 1, at 11–12 (2008) (concluding that the election contest should be dismissed due to the lack of evidence suggesting irregularity in the election).

Instead, the resolution is short and conclusory, and it does not address Article I, Section 5.[123]

The language contained in the committee report nevertheless is consistent with other House committee reports.[124] Occasionally, however, a report will include language that complicates the House's state-friendly approach. In 1872, for example, the Committee of Elections refused even to consider a related decision by a state supreme court.[125] It explained: "The House being made by the Constitution the judge of the election returns and qualifications of its members, cannot delegate its authority to some other tribunal, and discharge by proxy a solemn duty which the Constitution imposes on the House."[126] Despite such precedent, resistance to state court proceedings by the House is a rarity. For the most part, committee reports from the House express strong support for states' parallel adjudications of election contests.

In sum, the authorities emerging from either House offer insight into each body's views. The committee reports collectively support the conclusion that Article I, Section 5 accommodates state judicial proceedings. And this interpretation of Article I, Section 5 very well may be correct.[127] Yet these reports are not authoritative, and they have failed to resolve the deep split characterizing this area of the law. Indeed, the interpretation of Article I, Section 5 that apparently dominates in each House of Congress is squarely inconsistent with the conclusions of many state courts and legislatures across the country.[128]

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[123] As relevant, the House resolution reads: "*Resolved*, That the election contest relating to the office of Representative from the Thirteenth Congressional District of Florida is dismissed." H.R. Res. 989, 110th Cong. (2008).

[124] *See, e.g.*, H.R. REP. NO. 96-785, at 3 (1980) (discussing favorably a state court's adjudication of an election dispute). Indeed, some of these reports have gone so far as to invoke, in an indirect way, an exhaustion requirement similar to that which the Senate has advanced. *See, e.g.*, H.R. REP. NO. 89-1008, at 2 (1965) (indicating that election challenges were improper because, inter alia, the contestants had failed to exhaust state and federal judicial remedies); H.R. REP. NO. 76-1722, at 2 (1940) (addressing whether the contestant had "exhausted his [State] remedy . . . before involving the aid of this committee"); *id.* (indicating that the contestant had failed to establish that no state remedy was available).

[125] H.R. REP. NO. 42-10, at 1 (1872) (noting that a state court decision was not "regarded as evidence by the committee, or entitled to consideration in disposing of the case").

[126] *Id.*

[127] *See infra* Section IV.A (explaining that Article I, Section 5 is best understood to empower Congress with respect to the question of Article I, Section 5's reach).

[128] *See infra* Part III.

III. A MAELSTROM OF STATE LAW REGIMES

As Part II has revealed, there is an absence of federal authorities authoritatively addressing questions arising out of the adjudication of congressional election contests. This is surprising, for these questions are largely federal in nature. They turn on interpretations of federal constitutional law that address the composition and legitimacy of the federal government. The dearth of federal authorities in this sense constitutes a vacuum, and one that has dragged in a disordered collection of fifty separate state regimes. Some of these regimes stem from state statutes; others from state court decisions. Collectively, they reflect a deep, nationwide split on the question of the meaning and reach of Article I, Section 5.[129]

Through a combination of case law and legislation, states have created regimes that fall into three general categories. In the first, which is discussed in Section III.A, states allow congressional election contests to proceed in the courts without restriction. In the second, discussed in Section III.B, states prohibit such proceedings. In the third, discussed in Section III.C, states have eked out a middle ground by permitting congressional election contests to go forward, but with substantive or procedural constraints on the proceedings. Each of these regimes, to varying degrees, reflects jurisdictions' understandings of the Article I, Section 5 line,[130] and they are in fundamental conflict. The result, in sum, is a state-driven, patchwork set of regimes for the resolution of congressional election contests.

A. ADJUDICATING THE CASES THE FEDERAL COURTS WILL NOT

In most states, courts are permitted to adjudicate congressional election contests.[131] These states do not appear to modify their

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[129] *See infra* note 130.

[130] As discussed below, some of the distinctions among jurisdictions are surely due not to constitutional concerns but instead to policy-motivated differences in state law. However, many of the state regimes expressly reflect states' conflicting views of the Article I, Section 5 line, and many more are at least consistent with such a conflict. *See infra* notes 156–76; *see also infra* notes 140–45, 156–61, 182–90 and accompanying text.

[131] Although unsettled case law and changing election codes makes it difficult to categorize jurisdictions in a definitive manner, thirty-six states appear, at the time of publication of this Article, to fall into this category: Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Louisiana, Maine, Maryland,

legal regimes at all in response to the Article I, Section 5 mandate. Implicit in each of these regimes, therefore, is the state's determination that Article I, Section 5 does not require any such modification.

In California, for example, where every election cycle potentially leads to dozens of disputed congressional elections, the state's Election Code sets forth procedures for initiating an election contest.[132] These contests may be brought in the superior court of any county in the relevant district.[133] The statutes do not distinguish between congressional elections and other types of elections, and the state's courts have confirmed that they do authorize the adjudication of congressional election contests.[134] In a recent decision, moreover, the California appellate court appeared poised to reject the argument that Article I, Section 5 poses any impediment to this regime.[135]

Further exploration of California's regime reveals an irony. This is because the California code prohibits contests over a different set of elections: *state* legislative elections.[136] This is consistent with the California state constitution, which has a provision analogous to Article I, Section 5. It reads, as relevant, that "Each house of the legislature shall judge the qualifications and elections of its Members."[137] The California courts have construed this provision as precluding court adjudication of

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Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.

[132] CAL. ELEC. CODE §§ 16000–16940 (West 2016).

[133] *Id.* § 16400.

[134] *See, e.g.*, Jacobson v. Bilbray, No. D049407, 2007 WL 824450, at *3–6 (Cal. Ct. App. Mar. 20, 2007) (suggesting that a state court can entertain an election challenge without infringing upon the House's constitutional authority to judge elections).

[135] *See id.* at *5 (indicating "support for contestants' assertion that pursuant to its independent federal constitutional authority, a state court can entertain an election challenge even after the House has unconditionally seated the member whose election is at issue without infringing on the House's constitutional authority to judge elections"). As such, the appellate court appeared poised to overrule the trial court, which had reached the opposite conclusion and dismissed the case on that basis. Ultimately, however, the court concluded it was unnecessary to reach the question in the case before it. *Id.* (concluding that the case was moot because Bilbray had already been seated by the House and had served his entire term of office).

[136] CAL. ELEC. CODE § 16200 (West 2016) ("This chapter shall not apply to elections for the office of state Senator or Member of the Assembly of the California Legislature.").

[137] CAL. CONST. art. IV, § 5.

election contests in state legislative races.[138] This tension—between, on the one hand, construing Article I, Section 5 to allow court adjudication of congressional election contests and, on the other, construing analogous state provisions to prohibit court adjudication of state legislative election contests—exists in other jurisdictions as well. This is because nearly every state constitution has a provision analogous to Article I, Section 5,[139] but only a tiny fraction of states allow courts to adjudicate state legislative election contests.[140]

Another jurisdiction representing the majority interpretation of Article I, Section 5 is South Dakota. Its conclusion—that Article I, Section 5 permits court adjudication of congressional election contests—is reflected in a decision by the state supreme court, which provided a helpful articulation of its reasoning.[141] The case arose out of a close race for the First Congressional District between Tom Daschle and Leo Thorsness.[142] Once Daschle was certified the winner, Thorsness responded with multiple challenges, including one before the United States House of Representatives and one before the South Dakota Supreme Court. While these proceedings were unfolding, the House seated Daschle, though it did not dismiss the election contest pending against him in the House.[143] Daschle then moved to dismiss in the state court. The Supreme Court of South Dakota rejected this

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[138] *See, e.g.*, Chavez v. Cox, No. C061170, 2010 WL 2913044, at *1 (Cal. Ct. App. July 27, 2010) (dismissing "election contest," which the contestant tried to reframe as a challenge concerning the candidate's qualifications and to bring under a different provision of the Elections Code, based on the conclusion that "the State Senate, not the courts, has jurisdiction to determine the qualifications of its members").

[139] *See* Douglas, *Procedural Fairness*, *supra* note 28, at 5–6 (noting that "virtually all state constitutions, much like the U.S. Constitution, provide that each house shall be the judge of its members' 'qualifications, elections and returns' ").

[140] *Id.* at 6 (identifying two such states). Perhaps some of these jurisdictions preclude contests over state legislative races simply for policy reasons, rather than based on an interpretation of the relevant state constitutional provision. However, many do so based on the latter consideration. *See, e.g.*, Carrington v. Human, 544 S.W.2d 538, 539 (Mo. 1976) ("[T]o determine the qualifications and election of members of the House of Representatives after the general election [would be] in contravention of our Constitution. . . .").

[141] Thorsness v. Daschle, 279 N.W.2d 166, 167–70 (S.D. 1979).

[142] Whitaker, *supra* note 61, at 37–38.

[143] *See Thorsness*, 279 N.W.2d at 168 (noting that Thomas's action in the House under the FCEA was pending during the state court proceeding); *id.* at 171 (Morgan, J., dissenting) (explaining that Daschle had already been seated unconditionally by the House).

motion. The court explained why Article I, Section 5 posed no bar to the proceedings:

> There are two fundamental principles that must be understood in order that there might be a proper analysis of this case. First, there is the question concerning *who won the election*, which necessarily carries with it an inquiry into how the winner was selected. Second, is the question concerning *who will be seated* as the First District Representative of South Dakota in the United States House of Representatives. These two questions are mutually exclusive. The questions "of who won" and the propriety of the election procedure are purely matters of state law. [citing *Roudebush*]. On the other hand, the question of "who sits" is solely within the province of the United States Congress. [citing, *inter alia*, Article I, Section 5].[144]

As a result of this dichotomy, the court held, the state court proceedings could continue.[145]

The decision by the South Dakota court forced Daschle to defend his victory before both the state court and the House of Representatives. Daschle prevailed first before the state supreme court. On November 27, 1979, it dismissed the suit with an opinion declaring that Daschle had "won" the election.[146] Several months later, the House of Representatives followed suit, dismissing Thorsness's election contest.[147] In the accompanying report, submitted by the Committee on House Administration, the Committee indicated that it found the parallel state court proceedings to be helpful.[148] It included in its report a full copy of

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[144] *Id.* at 168.

[145] *Id.*; *see also id.* at 170 ("The possibility that Congress may decide to make its own investigation and determination apart from the judgment of the state court and the fact that Congress has the final authority to make such determination do not constitute a bar to the enforcement of state procedures designed to insure the legal outcome of its elections.").

[146] *See* Thorsness v. Daschle, 285 N.W.2d 590, 590 (S.D. 1979) ("We determine that Daschle won.").

[147] H.R. RES. 576, 96th Cong. (1980).

[148] *See* H.R. REP. NO. 96-785, at 3 (1980) (discussing the usefulness of the state court's review of the election to the Committee in making its decision).

the South Dakota Supreme Court opinion dismissing Thorsness's challenge,[149] and it went so far as to reprint the conclusion reached by its Task Force that "[i]n light of the exhaustive de novo recount by South Dakota's highest Court, it would seem both redundant and presumptuous for this panel to recount the ballots ourselves and substitute our judgment for the court[']s."[150]

This endorsement of the state court proceedings is consistent with signals sent from both Houses of Congress, as discussed in Part II.[151] It also is consistent with the constitutional interpretation reached by the South Dakota Supreme Court.[152] And it is, as noted, the majority position on the question of Article I, Section 5.[153] It nevertheless elicited a dissent in the South Dakota Supreme Court,[154] and it is in tension with the positions adopted in the federal courts.[155] It is, moreover, flatly contrary to the conclusions reached in other states.

B. REFUSING TO PROVIDE ANY JUDICIAL RECOURSE AT ALL

In the second category of legal regimes, the states do not allow their courts to adjudicate congressional election contests. Often, the lack of authorization is grounded explicitly in the state's interpretation of Article I, Section 5. Texas provides an example.

In Texas, the state supreme court was asked to adjudicate a disputed congressional election between Robert Alton Gammage and Ron Paul.[156] After a close race, Paul instituted an election

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[149] *Id.* at 2.

[150] *Id.* at 3. The Task Force continued: "While we certainly have the authority, we find no reason to exercise it." *Id.* The Committee described this Task Force as a three-person Ad Hoc Election Panel. *Id.* at 1.

[151] *See supra* Section II.C.

[152] *See supra* notes 144–45 and accompanying text.

[153] *See supra* note 131 and accompanying text.

[154] *See* Thorsness v. Daschle, 279 N.W.2d 166, 170 (S.D. 1979) (Morgan, J., dissenting) ("How in the world can anyone argue that the questions 'who won the election?' and 'who will be seated?' are mutually exclusive. It is purely an appeal to the provincial and quixotic.").

[155] More specifically, it is in tension with the determination by the federal courts that Article I, Section 5 often precludes federal court adjudication. *See supra* Section II.B. The federal courts are, of course, grappling with restraints—such as the justiciability doctrines—that might not apply in a given state. *See infra* notes 301–05 and accompanying text. The conclusion also is in tension with conclusions reached by the few scholars who have addressed this question. *See infra* note 221 and accompanying text.

[156] Gammage v. Compton, 548 S.W.2d 1, 1 (Tex. 1977).

contest pursuant to a Texas statute that granted jurisdiction to the state district court " 'of all contests of elections, general or special, for all . . . federal offices.' "[157] Paul argued that this provision included congressional election contests.[158] The court rejected his argument, deeming this provision "of the Texas Election Code, as interpreted by Respondent Paul, [to be] in diametrical conflict with and contrary to Article I, § 5, of the United States Constitution."[159] Basing its decision largely on its reading of *Roudebush* and other judicial precedents,[160] the court indicated that Paul's exclusive recourse was to petition the House itself.[161]

A number of states have reached conclusions consistent with this decision by the Texas Supreme Court. In at least six additional states, state supreme courts have dismissed election contests based expressly on the Article I, Section 5 mandate.[162]

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[157] *Id.* at 2 (emphasis omitted) (quoting TEX. ELEC. CODE ANN. art. 9.01).

[158] *Id.*

[159] *Id.* at 3.

[160] *See id.* at 2–5.

[161] *See id.* at 4–5 (noting that the FCEA provides a "comprehensive procedure" for Paul to pursue his contest). Texas's election contest regime is now governed by Title 14 of the Election Code, which includes, as its first provision, the following: "This title does not apply to: (1) a general or special election for the office of United States senator or United States representative . . . ." TEX. ELEC. CODE ANN. § 221.001 (West 2016). Texas nevertheless has allowed its courts to adjudicate an election contest concerning a congressional primary election. *See* Rodriguez v. Cuellar, 143 S.W.3d 251, 256–57 (Tex. App. 2004).

[162] *See* Burchell v. State Bd. of Election Comm'rs, 68 S.W.2d 427, 429 (Ky. 1934) ("By article I, § 5, of the Federal Constitution, the power to pass upon the election and qualification of its own members is vested exclusively in each house of Congress, and no court has any authority to adjudicate upon that subject."); Laxalt v. Cannon, 397 P.2d 466, 467–68 (Nev. 1964) ("Art. I, § 5 of the United States Constitution invests the Senate of the United States with the supreme and exclusive jurisdiction to judge the election contest here presented."); *see also* Rogers v. Barnes, 474 P.2d 610, 612–13 (Colo. 1970) (noting that "section 5 empowers Congress, and Congress alone, to determine charges of voting irregularity, for example, stemming from a general election and concerning the offices of United States Senator and member of the United States House of Representatives"); Young v. Mikva, 363 N.E.2d 851, 853–54 (Ill. 1977) (concluding "that there is no statutory grant of jurisdiction to [the state court] to hear and determine contests of elections of Representatives in Congress" because "the Constitution gives Congress the exclusive authority to judge the elections of its members"); Smith v. Polk, 19 N.E.2d 281, 283 (Ohio 1939) (dismissing House of Representatives election contest since Article I, Section 5 vests exclusive jurisdiction in this House, and noting that a number of state courts had similarly concluded); Sutherland v. Miller, 91 S.E. 993, 993–98 (W. Va. 1917) (holding that the state's election contest statute unconstitutionally delegates power that Article I, Section 5 reserves for the Houses of Congress); *cf.* State *ex rel.* Fleming v. Crawford, 10 So. 118, 121–22 (Fla. 1891) ("The constitution of the United States has not elsewhere given to this court the power to pass upon the question of the legality of the election of United States senator, but by the last of the provisions quoted above it has expressly excluded from it the right to do

In a few states, the legislatures have responded to these decisions by codifying the constitutionally inspired prohibition. In Nevada, for example, the state legislature added the following language (italicized here for purposes of identification) to its election code only a year after its court dismissed as unconstitutional a senatorial candidate's contest:

> A candidate at any election, or any registered voter of the appropriate political subdivision, may contest the election of any candidate, *except for the office of United States Senator or Representative in Congress.*[163]

It is, of course, possible that this amendment reflected something other than the state supreme court's constitutional determination. Yet the timing constitutes strong evidence of a direct connection. This combination—a court decision followed by a statutory amendment codifying that decision—puts the jurisdiction in an uncomfortable position, as it now seems virtually impossible for the Nevada Supreme Court to reconsider its conclusion. Who would have standing to bring the suit?[164] In any event, this statutory amendment placed Nevada among a minority

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so."); LaCaze v. Johnson, 305 So. 2d 140, 146 (La. Ct. App. 1974) ("The forum for a resolution of these issues is the United States House of Representatives."); Belknap v. Bd. of Canvassers, 54 N.W. 376, 376–77 (Mich. 1893) (noting that the House of Representatives is the sole judge of its elections, and because of this, the state's recount statute "had no application" in this election contest); *In re* Williams' Contest, 270 N.W. 586, 587–88 (Minn. 1936) (stating that "Congress had not given to any state or to any court any authority whatsoever" to judge congressional elections, and concluding, after a discussion of other state courts' decisions in this area, that it had no jurisdiction to entertain this challenge); Britt v. Bd. of Canvassers, 90 S.E. 1005, 1007 (N.C. 1916) (holding that Article I, Section 5 "withdraw[s] from the courts and vest[s] in Congress the power to pass on the title to the office of Congressman"); *In re* Opinion to the Governor, 103 A. 513, 513 (R.I. 1918) ("Any answer given by a court to the question now before us must be regarded as inconclusive even as an advisory opinion; since the authoritative determination of this and like questions is not within the jurisdiction of the court of last resort in any state in the Union. By the Constitution of the United States, article I, section 5, the United States Senate is made the sole judge of the elections, returns and qualifications of its members."); State *ex rel.* Wettengel v. Zimmerman, 24 N.W.2d 504, 507–09 (Wis. 1946) (stating that it is "well established" that under Article I, Section 5 courts have no jurisdiction to judge election contests and concluding that "[t]his court, therefore, cannot go behind the returns and investigate frauds and mistakes, and adjudge which candidate was elected").

[163] Assembly B. No. 431, 53d Sess., at 1229–30 (Nev. 1965) (enacted).

[164] *See* Fergason v. Las Vegas Metro. Police Dep't, 364 P.3d 592, 600–02 (Nev. 2015) (addressing standing under Nevada law).

of jurisdictions—including Kansas,[165] Ohio,[166] and Texas[167]—that have, through statute, expressly prohibited judicial adjudication of congressional election contests. Ohio's prohibition is particularly explicit, as it provides that no federal election shall be "subject to a contest of election" conducted under the relevant chapter of the Elections Code.[168] Rather, "[c]ontests of the nomination or election of any person to any federal office shall be conducted in accordance with the applicable provisions of federal law."[169]

New Hampshire provides a distinct but similarly striking example. This state allows a quasi-judicial review of election contests by a five-member ballot law commission,[170] but it does not allow judicial review of its decisions when the election in question is congressional. The state identified its constitutional motivation in the actual statutory text. More specifically, its statute provides that the prohibition on judicial review exists "in view of the constitutional provisions vesting in both houses of congress . . . exclusive jurisdiction over the elections and qualifications of their respective members."[171]

Other regimes exclude congressional election contests not through express statutory prohibition, but rather by implication. In Alabama, for example, the constitution and statutory code set forth provisions addressing election contests for a number of offices,[172] but they do not include congressional elections. Similar regimes govern in Illinois,[173] Kentucky,[174] and West Virginia,[175] among others.

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[165] KAN. STAT. ANN. § 25-1435 (West 2016) ("Any registered voter [to] contest the election of any person for whom such voter had the right to vote, . . . except that the foregoing shall not apply to the election of persons to the United States congress.").

[166] OHIO REV. CODE ANN. § 3515.08 (West 2016).

[167] TEX. ELEC. CODE ANN. § 221.001 (West 2016). This amendment post-dated the Texas Supreme Court's decision in *Gammage v. Compton*, 548 S.W.2d 1 (Tex. 1977).

[168] OHIO REV. CODE ANN. § 3515.08 (West 2016).

[169] *Id.*

[170] N.H. REV. STAT. ANN. § 665:1(I) (West 2016).

[171] *Id.* § 665:16.

[172] *See* ALA. CODE § 17-16-40 (2016) (listing offices).

[173] *See* 10 ILL. COMP. STAT. ANN. 5/23-1.1a–1.12a (West 2016) (detailing election contest procedure).

[174] *See* KY. REV. STAT. ANN. § 120.155 (West current through 2016) (providing a contest mechanism for candidates "for election to say state, county, district, or city office).

[175] *See* W. VA. CODE § 3-7-1 to -9 (West 2016) (detailing the election contest procedure, which does not include congressional elections).

In short, in this second category of legal regimes—which encompasses around a dozen states[176]—the state courts will not adjudicate congressional election contests. This exists in stark contrast with the regimes that govern in the majority of states,[177] which allow election contests to proceed notwithstanding the command of Article I, Section 5. The result is a nationwide split not over how to run an election (or, at least, not *only* over how to run an election), but also over the meaning of the United States Constitution. For while it is possible that something other than constitutional analysis motivated some of the regimes that prohibit congressional election contests, the connection is explicit in some jurisdictions,[178] and in others it seems highly likely that the constitutional command played a part.[179] For every one of these jurisdictions that has concluded that Article I, Section 5 prohibits state court adjudication, another jurisdiction has reached precisely the opposite conclusion.[180] This divide ensures an inconsistent regime across the country—and in the jurisdictions adopting the minority position, it leaves potential challengers with no judicial recourse at all. Given that the federal courts almost certainly will refuse to hear these sorts of claims,[181] potential litigants in this second category of states stand before a barricade of closed courthouse doors.

C. SPLITTING THE DIFFERENCE

In a small number of jurisdictions, the states seek to have it both ways: to respect the prohibition they feel is imposed by the Article I, Section 5 mandate while also permitting judicial resolution of disputed congressional elections. The result in these

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[176] Although unsettled case law and changing election codes makes it difficult to categorize jurisdictions in a definitive manner, fourteen states appear, at the time of publication of this Article, to fall into this category: Alabama, Arizona, Colorado, Illinois, Indiana, Kansas, Kentucky, Ohio, Nebraska, Nevada, New Hampshire, Texas, Virginia, and West Virginia.

[177] *See supra* Section III.A.

[178] *See, e.g.*, *supra* notes 170–71 and accompanying text (describing statutory regime in New Hampshire); *see also supra* notes 156–62 and accompanying text (describing case law in Texas and Nevada).

[179] *See, e.g.*, *supra* notes 168–69 and accompanying text (describing statutory regime in Ohio); *cf. supra* notes 163–65, 167 and accompanying text (identifying statutory regimes in Nevada, Kansas, and Texas).

[180] *See supra* Section III.A.

[181] *See supra* Section II.B.

jurisdictions is a hybrid regime twisting to comply with what each state thinks the United States Constitution requires.

Perhaps the starkest example of this regime can be found in Minnesota, which provides a special set of rules for congressional election contests. The regime is so unusual that it is worth reading the statute itself. It provides:

> When a contest relates to the office of senator or a member of the house of representatives of the United States, the only question to be decided by the court is which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election. The judge trying the proceedings shall make findings of fact and conclusions of law upon that question. Evidence on any other points specified in the notice of contest, including but not limited to the question of the right of any person to nomination or office on the ground of deliberate, serious, and material violation of the provisions of the Minnesota Election Law, must be taken and preserved by the judge trying the contest, or by some person appointed by the judge for that purpose; but the judge shall make no findings or conclusion on those points.[182]

The statute then provides where all the unheard evidence relating to that second set of claims should go: "to the presiding officer of the Senate or the House of Representatives of the United States."[183]

This bifurcated regime, and its history, implies a struggle with the meaning of Article I, Section 5. The Minnesota statute was first enacted in 1963, in apparent response to a decision that same

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[182] MINN. STAT. ANN. § 209.12 (West 2016).

[183] *Id.* ("After the time for appeal has expired, or in case of an appeal, after the final judicial determination of the contest, upon application of either party to the contest, the court administrator of the district court shall promptly certify and forward the files and records of the proceedings, with all the evidence taken, to the presiding officer of the Senate or the House of Representatives of the United States. The court administrator shall endorse on the transmittal envelope or container the name of the case and the name of the party in whose behalf the proceedings were held, and shall sign the endorsement.").

year by the Minnesota Supreme Court.[184] Prior to this decision, the Minnesota Supreme Court had suggested, in a series of cases, that the United States Constitution prohibited the adjudication of congressional election contests.[185] In 1963, however, the Minnesota Supreme Court dismissed a congressional election contest not on constitutional grounds, but rather based on its conclusion that the court lacked *statutory* jurisdiction.[186] In concurring opinions, multiple Justices indicated that while they interpreted Article I, Section 5 to pose some restrictions on state court proceedings, they nevertheless interpreted it to permit a limited form of judicial review.[187]

The legislature appears to have responded to this decision by enacting a statute tracking the constitutional line articulated in the concurring opinions.[188] Decades later, the Minnesota Supreme Court had the opportunity to consider whether the statute in question did, indeed, comply with Article I, Section 5. Leaning heavily on the United State Supreme Court's holding in *Roudebush*, the state supreme court concluded that Minnesota's adjudicative regime did not violate the United States Constitution.[189]

The intuition reflected in Minnesota's unusual statutory regime—which permits court adjudication, but only of a limited

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[184] *See* Odegard v. Olson, 119 N.W.2d 717, 720 (Minn. 1963).

[185] *See In re* Youngdale, 44 N.W.2d 459, 462 (Minn. 1950) ("It is clear that our courts have no jurisdiction over the election of representatives to congress, but that congress is its own judge of the elections, returns, and qualifications of its members."); *In re* Williams' Contest, 270 N.W. 586 (Minn. 1936) (dismissing election contest for lack of jurisdiction); State *ex rel.* 25 Voters v. Selvig, 212 N.W. 604, 604 (Minn. 1927) (concluding that Article I, Section 5 "gives the House of Representatives exclusive jurisdiction to determine whether the respondent is or is not disqualified from becoming a member of that body").

[186] *See Odegard*, 119 N.W.2d at 720 (dismissing an election contest after "carefully examining these statutory provisions").

[187] *See id.* at 721–22 (Knutson, C.J., concurring) (arguing that the state can engage in certain review procedures of congressional elections, such as recounts, without violating Article I, Section 5); *id.* at 722–23 (Rogosheske, J., concurring specially) (concurring in the judgment that the court could not entertain this challenge, but arguing that this was due to a lack of statutory authorization, not a constitutional restriction).

[188] This statute was substantively identical to the one reprinted above. *See supra* note 182 and accompanying text; *see also* MINN. STAT. § 204.32 (repealed 1975) (containing similar language as § 209.12).

[189] *See* Franken v. Pawlenty, 762 N.W.2d 558, 569–70 (Minn. 2009) (holding that Minnesota's statutory regime did not usurp the Senate's constitutional authority because the Constitution does not require the presentation of a state-issued certificate of election for the Senate to seat a member).

nature, in congressional elections—is reflected in other authorities. In an older case out of Wisconsin, for example, the court concluded that Article I, Section 5 did not allow a court to "go behind the returns and investigate and correct frauds and mistakes, and adjudge which of the candidates was elected" but that a court nevertheless could address a narrower issue: whether the board of state canvassers should have counted certain votes.[190] Like the statute in Minnesota, this Wisconsin decision preserves the adjudication of some questions exclusively for each House of Congress. Given its reliance on Article I, Section 5, the decision by the Wisconsin Supreme Court also provides further evidence that this sort of limitation does not necessarily reflect the state's policy preferences, but instead reflects the state's understanding of federal law.

A similarly nuanced—but substantively distinct—interpretation of Article I, Section 5 also might have motivated the statutory regime in Connecticut, which distinguishes between, on the one hand, contests over federal elections,[191] and, on the other, contests over elections for state offices.[192] Although the two Connecticut provisions are in many respects identical, the differences are telling. For the state races, the tribunal's decision is "final and conclusive" unless it is appealed.[193] For federal races, by contrast, the tribunal's decision is merely "final," and it cannot be appealed.[194] This bifurcated regime in Connecticut joins others that give special treatment to congressional election contests.[195]

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[190] State *ex rel.* McDill v. Bd. of State Canvassers, 36 Wis. 498, 505 (1874).

[191] *See* CONN. GEN. STAT. ANN. § 9-323 (West 2016) (addressing both congressional elections and elections for presidential electors).

[192] *See id.* § 9-324 (addressing elections for state offices as well as for probate judges).

[193] *Id.*

[194] *Id.* § 9-323. The tribunals are also different. For federal races, the complaint is filed before a panel of three state supreme court justices. *Id.* For the state races, the complaint is filed before a single superior court judge. *Id.* § 9-324.

[195] *See, e.g.*, IOWA CODE ANN. §§ 60.0–.7 (West 2016) (specially selected five-member court and other provisions for federal elections); 25 PA. STAT. & CONS. STAT. ANN. §§ 3401, 3405 (West 2016) (special venue and other provisions for contested congressional elections); *cf.* ARK. CODE ANN. § 7-5-801(b) (West 2016) (providing that contests for U.S. Senate be heard in the same venue as other statewide election contests); OR. REV. STAT. ANN. § 258.036 (West 2016) (providing that federal election contests, along with a number of other specified elections, be heard in same venue as the state capital). In Michigan, the state has not enacted special provisions for the adjudication of congressional election contests, but it has empowered its courts to help protect evidence (and more specifically ballots) "[w]henever a contest for the office of congressman is in progress before the house of representatives" or

To varying degrees, these states' regimes seem to reflect concerns—either constitutional or policy-related—over the Article I, Section 5 mandate, and they confirm the depth of the conflict over the meaning of this federal provision. They also help to reveal the stakes. Suffering from a profound lack of consensus over its scope and meaning, Article I, Section 5 has affected (and, arguably, distorted) state court procedure throughout the country.

IV. DAMAGE ACROSS THE SYSTEM

The interpretive vacuum of Article I, Section 5—a phenomenon produced by the federal government's failure to clarify the constitutional line—has produced a confusing and conflicting jumble of state law regimes. This Part exposes the harm caused by this deep and entrenched split. It begins by offering a unifying theory of the difficult constitutional provision that has caused the split. As Section IV.A explains, Article I, Section 5 is best understood to empower each House of Congress, as "the Judge" of congressional elections, to decide the extent to which court adjudication may play a part. Pursuant to this theory of Article I, Section 5, court adjudication currently is permissible. This is because, though neither House of Congress has spoken definitively on this question, neither affirmatively has resolved to oust courts from the process, and reports issued by committees in both Houses have embraced court adjudication. These subtle signals should be interpreted as Congress's tacit approval of court adjudication of congressional election contests.

Yet many jurisdictions have not embraced this understanding. And Congress has not acted to clarify its position. The result, as explained in Section IV.B, is an assortment of harms. At the outset, election contests are defined by uncertainty and unpredictability. Potential challengers, as well as the jurisdictions themselves, lack clarity with respect to where or how to adjudicate their disputes. This, in turn, leads to the potential for partisan manipulation and illegitimacy. An additional set of harms emerges from the ad hoc nature of the procedural analysis, which leads to suboptimal forms of adjudication. In some jurisdictions,

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the Senate. *See* MICH. COMP. LAWS ANN. § 168.150 (West 2016) (detailing procedures for the House); *id.* § 168.109 (detailing procedure for the Senate); *see also* Douglas, *Procedural Fairness*, *supra* note 28, at 10, 29 (discussing Michigan's regime).

this ad hoc regime translates into a complete lack of judicial recourse for those seeking review. In others, it results in warped procedure. Across the country, when states do adjudicate disputes, they often do so in a manner that risks interference with the adjudication of either House of Congress, including through disruptive delay. Lurking in the background, amid this cacophony, is the threat of a political—or even constitutional—crisis.

A. THE ANSWER TO THE CONSTITUTIONAL QUESTION

The split across the country over Article I, Section 5 confirms that its meaning is not self-evident. Yet the standard tools of constitutional interpretation—tools that look to the text of the provision, the structure of the Constitution, historical practice, and decisions from the federal courts—all point to the same conclusion.[196] And this conclusion helps to explain why the confusion persists in the first place. This is because Article I, Section 5 is best understood to *empower Congress* with respect to the procedural questions it poses. Stated otherwise, it grants to each House of Congress the authority to decide whether and how to limit adjudication, judicial or otherwise. (Whether this power is bicameral or unicameral in nature is an important but distinct issue, which is addressed in more detail below.[197]) These same tools of constitutional interpretation also help to resolve the quandary that arises when either House of Congress simply has failed to act. Namely, in the absence of a clear ouster of jurisdiction by either House of Congress, the courts may adjudicate.[198]

One might begin with the text. Article I, Section 5, as relevant, reads that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."[199] The provision

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[196] As discussed below, an inquiry into original intent, which represents another analytical approach, is inconclusive. *See infra* notes 210–12 and accompanying text.

[197] *See infra* note 273 and accompanying text.

[198] It is true that one could adopt the opposite presumption—that in the absence of a clear grant of jurisdiction by either House of Congress, the courts may *not* adjudicate. As discussed below, however, the better understanding, given the context of this particular issue, is the one more accommodating of court adjudication. *See infra* notes 217–18 and accompanying text.

[199] U.S. CONST. art. I, § 5, cl. 1.

deems each House to be "*the* Judge," not "a Judge," and it insists that it "*shall*" judge, not merely that it "may."[200] The emphasized language confirms that the Constitution vests plenary authority over these adjudications to each House of Congress—it is a "textually demonstrable constitutional commitment."[201] Implicit in that authority is the power to determine the extent to which parallel proceedings may occur in the courts. While this language might be read to indicate that Congress is the exclusive judge—and, as a result, that no other judge (or court) should be participating in the process at all[202]—this reading relies on a cabined view of what a judge may and must do. Judges may rely on other adjudicative agents and bodies when resolving disputes. Article III judges, for example, may rely on the work of magistrate judges while still retaining ultimate authority over the dispute.[203] Similarly, the language of Article I, Section 5, properly understood, allows either House of Congress to rely on the work of a court while still retaining ultimate authority over whom it will seat in its chamber.[204]

The better understanding of the constitutional text, then, is that it really does grant plenary power to each House of Congress over the relevant adjudication—and, that being the case, that it

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[200] *Id.* (emphasis added).

[201] *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (noting that a "textually demonstrable constitutional commitment" of an issue to a coordinate political branch may prompt a court to conclude that it constitutes a political question); *see also* Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986) (stating that "it is difficult to imagine a clearer case of 'textually demonstrable Constitutional commitment' of an issue to another branch of government to the exclusion of the courts" than in the language of Article I Section 5 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

[202] *Cf. Morgan*, 801 F.2d at 447 ("The exclusion of others—and in particular of others who are judges—could not be more evident.").

[203] *See generally* United States v. Raddatz, 447 U.S. 667 (1980). The Constitution also requires that the federal courts, in certain circumstances, rely on juries. *See* U.S. CONST. amend. VII.

[204] An interesting constitutional question is presented if either House of Congress tried to delegate entirely its authority to make this ultimate determination. It is not clear whether the Constitution would allow Congress to bind itself to another institution's ruling. The currently toothless nature of a related doctrine—the nondelegation doctrine—would provide some support for the constitutionality of this approach. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."). This said, the constitutionality and wisdom of Congress taking such a bold (and politically unrealistic) step is beyond the scope of this Article.

grants to each House of Congress the power to determine the extent to which parallel court proceedings may go forward.

This understanding of Article I, Section 5 comports with the structure set up by its accompanying provision: Article I, Section 4. The latter provision, often referred to as the Elections Clause, provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.[205]

This clause strikes a careful balance between the federal and state governments. More specifically, it requires that each state hold congressional elections—but that each do so subject to overriding direction by Congress.[206] This regime, with its primary reliance on each state's electoral procedures and mechanisms, is very difficult to reconcile with an understanding of Article I, Section 5 that uniformly prohibits any adjudication by the state courts. In part, this is because no bright line separates administrative proceedings (which Section 4 clearly allows, and may even require) from judicial proceedings.[207] More fundamentally, a highly restrictive view of Article I, Section 5 produces a regime whereby Congress is prohibited from relying on state court proceedings even if it wishes to do so. This betrays the balance struck by Article I, Section 4. It pulls authority away from the state right as the state is likely to be of assistance in resolving the most challenging of elections. A more harmonious reading of the two provisions is the one that empowers Congress to determine the degree to which parallel proceedings may continue.

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[205] U.S. CONST. art. I, § 4, cl. 1.

[206] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2672 (2015) ("The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation."); *see also id.* ("[T]he Clause was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." (internal quotation marks omitted)).

[207] *Cf.* Roudebush v. Hartke, 405 U.S. 15, 21 (1972) (attempting to parse this distinction). This line appears even fuzzier once one recognizes that state law may draw the line differently than federal law. *Id.*

This "empowering" interpretation of Article I, Section 5 finds further support in historical practice. More specifically, it is consistent with how the two Houses of Congress have responded to state court adjudication of congressional election contests. As discussed above, committees in both the House and the Senate expressly have relied on findings of courts, and at times they have gone so far as to suggest that exhaustion of state judicial remedies may be necessary to prevail in an election contest before either House.[208] Neither appears ever to have attempted to prevent court proceedings. Historically, in short, each House has embraced state court adjudication of congressional election contests. It is true that this approach is consistent not only with the empowerment theory of Article I, Section 5, but also with a different theory: namely, one that understands Article I, Section 5 to grant wide latitude to the states regardless of congressional intent. Yet the power accorded by Article I, Section 4—a sweeping authority allowing Congress to regulate congressional elections[209]—would seem to foreclose the latter interpretation.

With respect to a related historical question—namely, how original understanding informs the debate—probative evidence appears lacking.[210] The dearth of evidentiary insight may be because election-related litigation was rare, if not nonexistent, during that time.[211] Indeed, according to Professor Edward Foley,

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[208] *See supra* notes 115, 117, 124 and accompanying text (describing exhaustion requirement occasionally cited in either House's committee reports); *see generally supra* Section II.C.

[209] *See supra* note 206 and accompanying text.

[210] Writing during his tenure on the D.C. Circuit, Justice Scalia explained as follows: "There was no opposition to the Elections Clause in the Federal Constitutional Convention, . . . and the minor opposition in the ratification debates focused upon the clause's removal of final authority not from the *courts*, but from the state legislatures, where the Articles of Confederation had vested an analogous power." Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986) (citations omitted). It is telling, moreover, that as early as 1805, the House was internally split with respect to the scope of the Article I, Section 5 power. At issue were the rules by which to judge the returns of an election out of Georgia. *See* 8 THE CONGRESSIONAL GLOBE 633 (Francis Preston Blair & John C. Rives eds., 1840) (describing the contested 1804 House election in Georgia between Cowles Mead and Thomas Spalding, in which the House rejected the returns provided by the state governor and decided to count previously excluded votes).

[211] *See Morgan*, 801 F.2d at 447–48 (discussing the absence of litigation on the issue). According to Professor Foley, "The expectation of the Founding Generation had been that conventional courts would have no authority to adjudicate these political disputes." FOLEY, *supra* note 59, at 76; *see also Morgan*, 801 F.2d at 447 (suggesting that the safeguard of judicial review was "evidently unthinkable").

it was not until decades after ratification that the judiciary became involved at all in the adjudication of election contests.[212]

In short, looking to original intent for an answer to the Article I, Section 5 question does not resolve the debate. But it also does not undermine the conclusion that Article I, Section 5 means to empower each House of Congress to determine the permissibility of parallel court proceedings.

Another persuasive analytical approach—perhaps less relevant than usual in this context, given the federal courts' reticence on the subject—looks to doctrinal authority. Here, the weight of authority supports the empowerment understanding of Article I, Section 5. In part this is because the few on-point federal court precedents that exist all seem to permit state court adjudication.[213] *Roudebush* is perhaps the most significant example. Although the dispute in that case was over an administrative recount rather than a judicial proceeding, the Court's primary concern—whether the state proceedings "frustrate[ ] the Senate's ability to make an independent final judgment"—would seem to allow room for judicial proceedings as well.[214]

In addition, in a case such as *McIntyre*, the federal court assumed, in dicta, that the state courts have wide latitude in adjudicating congressional election contests—and accordingly it remanded the case to the state courts for further proceedings.[215] Coupled with the federal courts' repeated insistence that Congress enjoys plenary authority in the context of congressional election contests, the most reasonable understanding of *McIntyre* is that it embraces the empowerment approach.[216]

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[212] *See* FOLEY, *supra* note 59, at 76 (explaining that the judiciary began to fill the "institutional vacuum" for vote counting disputes as the second party system matured); *see also id.* at 74 ("[N]either Madison individually nor the Foundation Generation collectively adopted a remedy for the problem of two-party conflict over statewide ballot-counting disputes. This problem had caught them by surprise . . . .").

[213] *See supra* Section II.B.

[214] Roudebush v. Hartke, 405 U.S. 15, 25 (1972).

[215] McIntyre v. Fallahay, 766 F.2d 1078, 1084, 1087 (7th Cir. 1985).

[216] Language offered in dicta in other cases further supports the empowerment approach. As the Court of Appeals for the District of Columbia explained in a case addressing the Senate's duties of impeachment, "Since *Powell* and *Roudebush*, this court has refused to entertain objections not only to the substance but also to the *procedures* used by the House of Representatives in the exercise of its ballot-counting authority under Art. I, § 5, cl. 1." Nixon v. United States, 938 F.2d 239, 245 (D.C. Cir. 1991), *aff'd by* Nixon v. United States,

In short, the best understanding of Article I, Section 5 is that it empowers each House of Congress to limit (or not to limit) the involvement of the courts.

The reasoning outlined above is, of course, more compelling as it relates to the state courts than to the federal courts. This is because many of the conclusions identified above—including those relating to structure, history, and doctrine—specifically relate to the state courts and do not necessarily extend in the same way to the federal courts. With respect to the Constitution's structure, for example, Article I, Section 4 does not rely on federal election apparatuses in the same way it relies on state election apparatuses. With respect to history and doctrine, federal courts have taken a different approach than many state courts toward their own jurisdiction, as the federal courts generally have refused to hear congressional election contests. As a result of these distinctions, it is easier to conclude that Article I, Section 5 accommodates state court adjudication than it is to conclude that the provision accommodates federal court adjudication.

This nevertheless seems to be the correct result. Largely, this is due to a distinct set of arguments. Namely, Article I, Section 5 empowers and protects Congress; it does not purport to limit the tools normally available to this body. And among its goals is to empower and protect Congress against the possibility of state obstruction.[217] Given these features, it would be curious indeed if this provision tacitly required that any court adjudication take place in the state courts. Separate constitutional provisions, including those limiting the reach of the federal courts, might pose separate constitutional concerns.[218] It nevertheless is difficult to understand why *this* provision—Article I, Section 5—would allow Congress to rely on state court proceedings but prohibit it from relying on federal court proceedings. As a result, Article I, Section 5 is best understood as accommodating both.

If the conclusion this Article reaches is correct, a complexity arises. Namely, if the Constitution does indeed empower each

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506 U.S. 224 (1993); *see also In re* Voorhis, 291 F. 673, 675 (S.D.N.Y. 1923) (Hand, J.) ("Again, the House is the exclusive judge of the 'elections, returns and qualifications of its own members.' Assuming that the ancillary power to perpetuate testimony must have the sanction of Congress, clearly it is the House alone which must on the contest, as a court, determine whether the procedure so created has been regularly followed.").

[217] *See supra* notes 39–41 and accompanying text.

[218] *See infra* notes 301–05 and accompanying text.

House of Congress to decide the extent to which court adjudication may take place, what happens if the Houses simply have failed to articulate their decisions?[219] As discussed above, this is the situation each jurisdiction, candidate, and interested observer now faces.[220] Determining how to resolve this quandary is difficult. However, looking to the factors discussed above leads to a reasonable conclusion. Namely, in this particular context, Congress's silence on the subject should be construed as tacit approval of court adjudication—or, at least, of state court adjudication. This is true when one looks both to the historical practices of each House of Congress (including the language in committee reports expressly relying on and supportive of state court adjudication) and to the case law (which does not include precedents enjoining state court proceedings).

In short, Article I, Section 5 is best understood to vest in each House of Congress the authority to determine whether courts may adjudicate congressional election contests. Although neither House of Congress has spoken definitively on the subject, silence in this particular context should be interpreted as tacit approval. It is true that these conclusions diverge from the conclusions reached by a number of courts and the few scholars who have spoken on the subject.[221] However, this Article concludes that the

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[219] There is an argument that this failure to decide is itself unconstitutional. In other words, by failing to articulate the Article I, Section 5 line, Congress may be unconstitutionally abdicating its affirmative responsibility to "judge" the elections of its members. Even if this understanding of Article I, Section 5 were correct, however, a claim raising such an argument would almost certainly be nonjusticiable. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (explaining that the presence of a textually demonstrable commitment to a coordinate political branch can render an issue a nonjusticiable political question); *see also* Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986) (noting Article I, Section 5's clear textual commitment to Congress).

[220] *See supra* Section II.C.

[221] *See supra* Section II.B; *see also supra* note 28 (identifying the few scholars who have explored these issues even tangentially). It contradicts, for example, the conclusion reached by Kristen R. Lisk, who has written what appears to be one of the only scholarly works directly addressing the question. *See* Lisk, *supra* note 28, at 1228 (arguing that "exclusive Congressional resolution of substantive claims for relief in congressional election contests is necessary in light of constitutional test" and that an interpretation barring substantive relief in state courts is preferable); *see also* Muller, *supra* note 28, at 595 (citing Lisk note for similar conclusion). Lisk's work is insightful and informative. However, it focuses more on policy-related argumentation than on constitutional analysis, and it does not consider the idea that Article I, Section 5 empowers each House of Congress to determine the involvement of court adjudication. This Article's conclusions also are in tension with those reached by Paul E. Salamanca and James E. Keller. *See* Salamanca & Keller, *supra* note 28, at 365–83 (criticizing a Kentucky Supreme Court decision, which construed an analogous state

decisions reached to the contrary—including in states such as Texas, Ohio, and Nevada[222]—are wrong. Unfortunately, many of these decisions are effectively unreviewable, given that the state legislatures have codified the state court opinions by stripping jurisdiction over congressional election contests from their courts.[223] In any event, these jurisdictions are not alone in causing problems. To the contrary, jurisdictions across the country are grappling unsuccessfully with the inadequately addressed question of Article I, Section 5's reach,[224] and the result is harm across the system.

B. THE COSTS OF RELYING ON AN UNCERTAIN, PATCHWORK REGIME

Congress's failure to clarify the Article I, Section 5 line undermines values fundamental to an effective and legitimate system of adjudication.[225] It undermines these values because it has produced an uncertain, patchwork regime for the adjudication of congressional election contests.

At the outset, the uncertainty itself creates problems. This uncertainty stems from the unclear messages emanating from Congress, as well as the mixed messages characterizing the various state regimes. These combine to produce a rule whereby, in the context of congressional election disputes, it is not clear whether state court adjudication is allowed or prohibited—or perhaps even required, given the exhaustion principle occasionally advanced in congressional committee reports.[226]

Legal uncertainty of this sort is frequently problematic; it can lead to inefficiencies and the risk of manipulation by savvy lawyers. It is particularly problematic, moreover, in the context of election disputes, where even the *appearance* of partisan manipulation of the rules can so directly undermine legitimacy

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constitutional provision to allow the court to entertain an election contest). The Salamanca-Keller article nevertheless addresses a distinct set of concerns: those that arise when a court purports to enjoin a candidate from serving in a legislative body. *Id.* at 362.

[222] *See supra* Section III.B.

[223] *See supra* notes 163–75 and accompanying text.

[224] *See supra* Part III (discussing the depth and breadth of the split across the states).

[225] As discussed in more detail below, these include values such as impartiality, appearance of impartiality, accuracy, and timeliness. *See infra* Section V.A.

[226] *See supra* notes 115, 117, 124 and accompanying text (describing exhaustion requirement occasionally cited in either House's committee reports).

regarding the election itself.[227] In this context, party affiliations contribute to the problem. When a candidate, aligned with a political party, is able to exploit ambiguity in the law to increase the odds of appearing before a judge also aligned with that same political party (or vice versa), that dynamic can lead to the appearance of judicial partiality—and perhaps actual partiality.[228]

The costs of uncertainty are most acute in jurisdictions that have wavered on the question of the reach of Article I, Section 5. In Colorado, for example, a state statute permits the adjudication of congressional election contests.[229] Yet in 1970, the state supreme court held this provision unconstitutional, citing Article I, Section 5.[230] Two decades later, the same court called that prior holding into question—but without formally overruling it.[231] A similar vacillation defines the regime in California, where the statutes also permit state court adjudication—but where the courts have offered competing visions of the constitutionality of this jurisdictional grant.[232] The uncertainty that characterizes this area of the law, across the country and certainly in these particular jurisdictions, creates an opportunity for gamesmanship at the cost of legitimacy and impartiality.[233]

The failure by Congress to clarify the Article I, Section 5 line produces more than just uncertainty. It also results in reliance on an ad hoc, state-based set of legal regimes to resolve disputes over

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[227] *See* Saul Zipkin, *Administering Election Law*, 95 MARQ. L. REV. 641, 647–60 (2011–2012) (discussing the impact that even the appearance of partisan self-dealing can have on the democratic legitimacy of an election).

[228] *See, e.g.*, FOLEY, *supra* note 59, at 258–59, 267–78 (describing questionable rulings by the Alabama Supreme Court over a disputed election for Chief Justice of that same body); *see also id.* at 347 (referring to the "egregious decision" of the Rhode Island Supreme Court in 1956 as an example of partisan manipulation).

[229] *See* COLO. REV. STAT. ANN. § 1-11-201 (West 2016).

[230] *See* Rogers v. Barnes, 474 P.2d 610, 612–13 (Colo. 1970) (concluding that the statute, "as it applies to the parties here before this Court, is held to be in conflict with Article I, Section 5 of the United States Constitution and in such situation the United States Constitution must prevail").

[231] *See* Meyer v. Lamm, 846 P.2d 862, 871 n.10 (Colo. 1993) ("*Rogers* was decided before and without benefit of *Roudebush v. Hartke* . . ., and we believe that the holding in *Rogers* should not be extended.").

[232] *See* Jacobson v. Bilbray, No. D049407, 2007 WL 824450, at *1, *5 (Cal. Ct. App. Mar. 20, 2007) (suggesting that it disagreed with the trial court over the question of Article I, Section 5's reach); *see also supra* notes 132–38 and accompanying text.

[233] *See* Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563, 612–13 (2013) (discussing litigant gamesmanship and its consequences in the context of redistricting litigation).

federal elections. Stated otherwise, it permits a patchwork regime, unregulated by Congress, to govern this fundamental question of United States governance. The problems with this approach vary by jurisdiction. In some, the federally unregulated regime results in no judicial recourse at all for those alleging election error. This strips jurisdiction from precisely those who need it the most: potential contestants who are concerned that going straight into either House of Congress will ensure an inappropriately quick dismissal. One example of a candidate in this circumstance came out of a close contest between Paul Laxalt and Howard W. Cannon, who were neck-and-neck after a tight race in Nevada for United States Senator. Laxalt sought to challenge the forty-eight-vote margin in Nevada state court, but Nevada refused to hear the case, citing Article I, Section 5.[234] Laxalt did not pursue recourse in the Senate[235]—presumably because, as a Republican without either an election certificate or a successful state court challenge on his side, he did not expect a reasonable chance of success.

On the flip side are contestees, dragged into court, hoping that a favorable judicial ruling will help defend their presumptive victory before a hostile House of Congress. The difference between two 1974 senatorial elections—one in Oklahoma (which allowed judicial proceedings) and New Hampshire (which did not)—help to illustrate this dynamic. At the time, Democrats controlled the Senate.[236] In each of the two races, the Republican candidate appeared to have won the election.[237] In response, each of the Democratic candidates challenged the results through state processes as well as before the Senate itself.[238] The state regime each candidate encountered, however, was different. In Oklahoma, the dispute went all the way up to the Oklahoma Supreme Court, which determined that the Republican had won the election.[239] After an admittedly long delay,[240] the Democrat-controlled Senate likewise determined that the Republican had

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[234] Laxalt v. Cannon, 397 P.2d 466, 467–68 (Nev. 1964).

[235] FOLEY, *supra* note 59, at 250.

[236] *Id.*

[237] *Id.*

[238] *See id.* at 250–56 (detailing the election contests).

[239] *Id.* at 254.

[240] *See id.* (describing the delay).

won the election—"an issue no nonpartisan tribunal ever would have considered in doubt after the Oklahoma Supreme Court's ruling," and a resolution the Senate felt compelled to reach in part due to the "fairness" of those state court proceedings.[241]

In New Hampshire, by contrast, judicial appeals were not available. Instead, the most definitive resolution was through the state's Ballot Law Commission, a three-member board with authority to resolve any recount-related issues that, at the time, was composed of two Republicans and one Democrat—and that was widely regarded as partisan.[242] After this Commission reached a decision in the Republican's favor, the Senate simply refused to seat the apparent winner.[243] What resulted was "a test of partisan power, loyalty, and stamina,"[244] with the stalemate finally breaking when the candidates, nine months after the original election day, agreed to participate in a new election.[245]

While the experiences out of New Hampshire and Oklahoma differed in a number of relevant ways,[246] the lack of a decision by the New Hampshire courts surely did not help the Republican's cause before an unwelcoming Senate. Court proceedings, in this sense, help each House of Congress to adjudicate contests notwithstanding the partisan pressures that pull so heavily.

This all said, the harm of relying on an inconsistent, ad hoc regime for congressional election contests is not limited to the jurisdictions without judicial recourse. It extends as well to jurisdictions such as Minnesota, which appears to have altered its procedures (and thereby prohibited review of certain claims) in an effort to comply with its view of the Article I, Section 5 line.[247] It also extends to jurisdictions that adhere to the majority position—that is, jurisdictions concluding that Article I, Section 5 poses no substantial obstacle to court adjudication.[248] Indeed, the harm

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[241] *Id.* at 254, 255.

[242] *Id.* at 251.

[243] *Id.* at 252.

[244] *Id.* (internal quotation marks omitted).

[245] *Id.*

[246] On the merits, the challenger's arguments were stronger in the New Hampshire case. *See id.* at 250–56 (describing the two sets of challenges). It also, ironically, took longer for the Senate to resolve the Oklahoma case than it took to resolve the New Hampshire case. *See id.* at 254–55 (stating that the Senate took approximately fifteen months to declare the winner).

[247] *See supra* notes 182–89 and accompanying text.

[248] *See supra* Section III.A.

extends to every jurisdiction that permits judicial proceedings. This is because Congress, by failing to speak on the question of state court adjudication, also has failed to engage in any regulation of these processes. This potentially leads to interference with the work of either House of Congress. This interference might occur through delay, through the destruction of evidence, or through any other means by which a parallel proceeding can undermine either House's adjudication.

It is true that the Supreme Court has suggested that interference with the work of either House is unconstitutional—or more specifically that state election procedures are unconstitutional if they "frustrate[ ] the . . . ability [of either House] to make an independent final judgment" on the question of which candidate should be seated.[249] Yet that line has not been policed as vigorously as it could be. This is perhaps most evident with respect to the problem of delay. Delay in election contests is a recurrent and difficult problem. To take one example, when the Minnesota state courts resolved the election challenge brought by Norm Coleman, it took nearly six months after the relevant senatorial term had started before the state was willing to grant a certificate of election to the winner, Al Franken.[250] As a result, the Senate lacked full representation from Minnesota for nearly half a year.[251] Similar examples—of election contests delaying the day on which a politician begins work—can readily be found.[252] While resolving disputes over elections inevitably takes time,[253] different procedures tend to speed up or slow down the proceedings, and each state adjudicating congressional elections has adopted its own set of procedural rules. In some, such as Minnesota, there is at least the potential for litigants to bring suit simply for the

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[249] Roudebush v. Hartke, 405 U.S. 15, 25 (1972).

[250] *See* WEINER, *supra note* 57, at 216–17, 219; *see also* FOLEY, *supra* note 59, at 332–33 ("[O]n July 7, eight months after Election Day, Franken took the seat as Minnesota's junior US Senator.").

[251] As discussed below, while the Senate could have seated Senator Franken without an election certificate, that would have run contrary to its own rules. *See supra* note 57 and accompanying text; Franken v. Pawlenty, 762 N.W.2d 558, 570 (2009) (noting that the Constitution did not prevent Senate from seating Franken without a certificate of election).

[252] *See, e.g.*, FOLEY, *supra* note 59, at 246 (discussing the 139-day delay between election and inauguration in the 1962 Minnesota gubernatorial election).

[253] *Cf. id.* at 306 ("[T]he decade after 2000 . . . cast serious doubt on the ability of even a well-run state to resolve a disputed presidential election fairly and accurately within five weeks.").

purpose of delaying the seating of an election's winner.[254] Even if the delay is not intentional, lengthy appeals processes (among other things) can stretch out the proceedings. While either House, of course, retains the authority to seat a candidate prior to the resolution of a disputed election contest,[255] the practice in the Senate in particular is to wait for a candidate to arrive with an election certificate,[256] which in turn allows this sort of delay to interfere with the workings of the federal government.

There are other interference-related risks stemming from state court adjudication of congressional election contests. Allowing a court to inspect and otherwise handle election-related evidence raises concerns over the destruction of evidence. Election contests often involve, for example, the inspection of ballots, where close examination of small details may make a difference in the outcome.[257] Disputes over the validity of absentee and provisional ballots can, in turn, raise concerns over commingling of ballots, which may as a practical matter preclude further legal proceedings.[258] Notwithstanding the Supreme Court's concern over "preserving the integrity of the evidence" in such cases,[259] the state courts have acted in an uneven manner in responding to congressional concerns.[260]

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[254] This potential arises in part because the statute provides that "[a]ny eligible voter" may contest an election, MINN. STAT. ANN. § 209.02 (West 2016). If a voter wishes to delay the seating of a disfavored politician, he or she could attempt to do so by bringing an election contest and dragging out the proceedings as long as possible. *Cf. Franken*, 762 N.W.2d at 569–70 (discussing these provisions and acknowledging that pursuant to the Senate's internal rules, the Senate normally will not seat a candidate without a certificate of election).

[255] *Cf. id.* at 570 ("[T]he Senate has authority to seat a Senator without a state-issued certificate of election. . . .").

[256] *See supra* note 254; *see also* WEINER, *supra* note 57, at 219 (describing the swearing in of Senator Franken after resolution of the election contest in Minnesota); *cf.* Roudebush v. Hartke, 405 U.S. 15, 28 (1972) (Douglas, J., dissenting) ("The Senator-Elect to a seat in the Senate generally appears with his credentials.").

[257] *See* Foley, *supra* note 35, at 135 (describing the effort of contestant in a senatorial election contest to introduce evidence with respect to 12,000 individual ballots); *see also id.* (alluding to the "hanging chads" on individual ballots that were at issue in the presidential election dispute between George W. Bush and Al Gore).

[258] *See id.* at 152 (discussing the problems with challenging ballots once they are removed from their envelopes and commingled with other ballots).

[259] *Roudebush*, 405 U.S. at 18 (Douglas J., dissenting).

[260] *See, e.g.*, H.R. REP. NO. 110-528, pt. 1, at 3 (2008) (describing resistance by Florida courts to evidence-related requests by members of Congress); *see also* Thorsness v. Daschle, 279 N.W.2d 166, 168 (S.D. 1979) (insisting that "this state has the *right* to decide 'who won' and determine the propriety of our election procedures" (emphasis added)).

Finally, on a more fundamental level, there is the threat that state court proceedings—if conducted in a biased or otherwise improper manner—may undermine the legitimacy of subsequent proceedings in either House of Congress. Justice Scalia articulated this concern when he stated (in another context) that

> [t]he counting of votes that are of questionable legality . . . threaten[s] irreparable harm to [a candidate], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election. Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires.[261]

Judge Easterbook, articulating similar concerns, has suggested that some disputes "may have more to do with political advantage than with legal rules," with "both sides . . . tempted to employ the courts more to obtain publicity than to achieve justice."[262] In particular, he observed, "[t]here is something unsettling about the prospect of one person sitting in Congress while the other seeks an advisory declaration in state courts that he 'really' won."[263]

Such concerns are, of course, greatly reduced if the court proceedings are run in a fair, efficient, and careful manner. This further confirms the importance of designing a clear and sensible set of procedures for disputed congressional elections—and the costs of failing to do so.

A final cost of relying on the patchwork regime is Congress's tacit acceptance of the absence of the federal courts. As discussed above,[264] the federal courts largely have insisted on remaining above the fray, which means that congressional elections receive the benefit only of the state court system, and further that there is the risk that issues of federal law will be resolved without the

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[261] Bush v. Gore, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring). Although *Bush v. Gore* does not provide significant insight into the meaning of Article I, Section 5, *see supra* note 103, Justice Scalia's comments about the harm of misguided vote counting does extend into the congressional context as well.

[262] McIntyre v. Fallahay, 766 F.2d 1078, 1087 (7th Cir. 1985).

[263] *Id.* The judge nevertheless remanded the case to the state courts, explaining that the political question doctrine did not bind the courts of Indiana. *Id.*

[264] *See supra* Section II.B.

opportunity for federal court review.[265] Moreover, one significant difference between the state court systems and the federal court system is that the former normally relies on elected judges.[266] The concerns over the election of judges—not least of those relating to partisanship—become magnified in the context of a disputed election, where often some of the judges and the litigants will share political parties. This can lead to accusations of partiality, which already are rife in this context. At times, such accusations may even appear accurate, as judges stretch to reach rulings that benefit candidates sharing their political affiliations.[267] Even when the accusations are unfounded, moreover, they call into question the legitimacy of the proceedings.

All these problems combine to create a deeply problematic regime that suffers from, among other things, the potential for inaccurate proceedings, increased partiality (and appearance of partiality), and delay. In many cases, the harm likely has been irreparable; a better designed system might have produced a different outcome in an election,[268] or allowed the candidate properly seated (as well as the institution seating the candidate) to enjoy increased legitimacy.[269] Still, in the face of all these harms, the federal government has managed to muddle through. The same may not be true going forward. The harms flowing from the cacophony surrounding Article I, Section 5 have the potential to transform into a true constitutional crisis. Professor Foley

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[265] While it is true that litigants may seek Supreme Court review via certiorari from the state court system, *see* 28 U.S.C. § 1257 (2012), such review presumably would be unavailable if the Supreme Court concluded that the justiciability doctrines prohibited federal courts from hearing the case. *See supra* notes 89–100 and accompanying text (describing this view of federal court jurisdiction); *infra* notes 301–05 and accompanying text (discussing the possibility that the federal courts would refuse to accept jurisdiction over congressional election contests even in response to a clear congressional grant of authority).

[266] *See* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266 (2008) ("[R]oughly ninety percent of state general jurisdiction judges are currently selected or retained [through popular election].").

[267] *See supra* note 228 and accompanying text.

[268] *See supra* note 234 and accompanying text (describing the dispute between Paul Laxalt and Howard W. Cannon, which never received a formal adjudication); *supra* notes 242–45 and accompanying text (describing the contest in New Hampshire, which never was resolved).

[269] *See, e.g.*, *supra* note 59 and accompanying text (describing the seating of McCloskey after the 1984 elections, in response to which the House Republicans walked out in protest); *infra* note 283 and accompanying text (citing source suggesting that discord over this election has led to dysfunction).

describes such a scene emerging out of New Jersey in the mid-1800s after New Jersey's entire congressional delegation was called into question.[270] In Professor Foley's words, "[c]haos reigned, exposing a flaw in the constitutional design."[271] Other scenarios pose similarly dire concerns.[272] In short, the problems currently associated with the Article I, Section 5 confusion are significant. And they only hint at the harm that could be caused going forward.

V. FILLING THE VOID

Article I, Section 5 empowers each House of Congress—and each House of Congress should embrace this power. More specifically, Congress should enact legislation to clarify the reach of Article I, Section 5.[273] The nationwide split over the meaning of this provision is deep and entrenched, and the effects of this uncertainty are widespread. By exercising its power as the "Judge" of congressional elections, Congress has the ability not only to cut through the confusion that dominates this area of the law, but also to impose a far more predictable, consistent, and sensible regime for the adjudication of congressional election contests. Such improvement would help to fulfill the central

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[270] *See* FOLEY, *supra* note 59, at 87 (explaining that the New Jersey vote-counting dispute involved the entire congressional delegation and, as a result, "ensnared Congress").

[271] *Id.* at 88; *see also id.* at 92 (describing an "anarchic situation," with the House "in paralysis"). This series of events often is referred to as the Broad Seal War. *Id.*

[272] *See, e.g.*, *id.* at 463 n.36 (identifying the particularly troubling problems posed if a disputed congressional election—one that affects the control of either House—were coupled with a disputed presidential election).

[273] Congress should enact bicameral legislation, rather than rely on unicameral resolutions, because the Constitution requires as much. Certainly, each House has the ability to *adjudicate* congressional election contests in a unicameral fashion; this is clear from Article I, Section 5's empowerment of "Each House." U.S. CONST. art. 1, § 5, cl. 1. Yet this provision almost certainly does not allow either House to regulate others (such as the states and the federal courts) through unicameral action. To act on others with the force of law, Congress must adhere to the bicameralism and presentment requirements. *Cf.* Clinton v. City of New York, 524 U.S. 417, 438–39 (1998) (describing the strict constitutional requirements of bicameralism and presentment for a bill to attain the force of law). By virtue of Article I, Section 4, Congress is empowered to enact legislation in the context of congressional elections. *See* Buckley v. Valeo, 424 U.S. 1, 131–32 (1976) ("There is, of course, no doubt that Congress has express authority to regulate congressional elections, by virtue of the power conferred in Art. I, § 4."). But it may not do so through unicameral resolutions. *Id.* at 133 ("Whatever power Congress may have to legislate, such qualifications must derive from § 4, rather than § 5, of Art. I.").

purpose underlying congressional election contests: that is, facilitating, in a manner that is timely and perceived as legitimate, the identification of the candidate who received the most validly cast votes. In pursuit of this end, Congress should seek to advance the values of impartiality, the appearance of impartiality, accuracy, and timeliness. Combined, these four values help to provide a framework for considering the advantages and disadvantages of alternative procedural regimes. Ultimately, the approach most likely to succeed is one that expressly empowers state courts to adjudicate congressional election contests. By adopting such an approach, each House can do more than resolve the legal puzzle that has baffled so many; it also can help to clean up the mess created by Article I, Section 5's ambiguous reach and meaning.[274]

A. THE VALUES AT ISSUE

Congress has the ability to resolve the ambiguity set by Article I, Section 5.[275] It also has the ability to create a more appropriate regime for the judicial adjudication of election contests.[276] It should embrace this power. In so doing, it should seek to better fulfill the purpose of congressional election contests (helping to identify, in a manner that is timely and perceived as legitimate,

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[274] Although Congress should act through legislation for the reasons stated above, *see supra* note 273 and accompanying text, there nevertheless remains the question of whether even bicameral action would bind either House in future adjudications. Given that Article I, Section 5 empowers each House, rather than Congress as a whole, to be the judge of the relevant elections, there is a quite colorable argument that each House retains complete authority over the procedures it employs in this context—even if enacted legislation purports to require it to follow separate procedures. (Consider, for example, if a statute required the dismissal of challenges brought before the exhaustion of state court remedies, and the Senate simply failed to comply with such a requirement.) Under this conception of Article I, Section 5, a statute such as FCEA, *see supra* note 45 and accompanying text, is merely suggestive, not binding or enforceable. The underlying question (going to whether either House can, in effect, ever be bound) not only calls into question the efficacy of possible contested-election reforms; it also may help to explain why Congress has failed to act in this area. And this problem remains even if each House acts unilaterally; resolutions reached by one House do not formally bind future Houses. Despite such complications, legislation does normally bind states, *see supra* note 273 and accompanying text, and at a minimum would, in this context, provide them with guidance in how to understand the relevant constitutional limitations. *See supra* Section IV.A; *see also infra* Section V.B. As a result, it remains of significant value in this context. Thanks are due to Professor Brian Kalt for raising and articulating these concerns.

[275] *See supra* Section IV.A.

[276] *See supra* note 273 and accompanying text.

the candidate who received the most validly cast votes) by advancing four main values: advance (1) impartiality, (2) the appearance of impartiality, (3) accuracy, and (4) timeliness.

The first value, impartiality, is particularly important in the context of election contests due to the role that partisan affiliation inevitably plays in such disputes. Unsurprisingly, therefore, calls for reform in this area have emphasized the importance of impartiality. With the Senate facing two protracted and contentious contests after the 1974 elections, for example, Claiborne Pell, a Democratic Senator from Rhode Island, suggested that the Senate create "an impartial, independent arbiter" to assist it with the task of adjudication.[277] Pursuant to Senator Pell's plan, this arbiter would provide an advisory report to the Senate, complete with findings of fact and a recommended disposition for the Senate to consider as it determined how to resolve the dispute.[278] What this proposed reform shares with so many others is its emphasis on what Professor Foley refers to as an "overarching ideal" of impartiality.[279]

With respect to the second value, the appearance of impartiality, this reflects the reality that, in the context of elections, "remedial processes need to be both fair and perceived as fair."[280] Stated otherwise, "[b]allot counting is something for which appearances truly matter."[281] The risk of apparent unfairness is particularly high when rules seem to be bent or changed after an election has taken place—which is precisely when the Article I, Section 5 quandary rears its head.[282] Maintaining the appearance of impartiality is therefore a critical function of post-election dispute resolution. Without it, even the prevailing candidate (and the candidate's supporters) can be significantly harmed as a result of the undermining of legitimacy.

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[277] FOLEY, *supra* note 59, at 255.

[278] *Id.*

[279] *Id.* at 5; *see also id.* at 5–7 (discussing the Grenville Act, which sought to achieve "the strictest impartiality" in the resolution of disputed parliamentary elections) (internal quotations omitted); Douglas, *Procedural Fairness*, *supra* note 28, at 50 ("Ensuring impartiality is one of the most important attributes of achieving a fair decision-making process for election cases.").

[280] Huefner, *supra* note 28, at 289.

[281] FOLEY, *supra* note 59, at 340.

[282] *See id.* at 341 (discussing analogous concerns arising with respect to rules over how to count votes).

Some scholars have credited some of the polarization in Congress, for example, to continuing ill will that has arisen out of election contest resolutions that are perceived to be unfair.[283]

With respect to the third value, accuracy, it goes to the heart of what is at stake: which candidate received more validly cast votes in a free and fair election. In the words of Professor Steven Huefner, "[b]ecause democratic legitimacy depends on a system in which votes determine political representatives and policy choices, any healthy democracy must have a mechanism for accurate and reliable voting."[284]

With respect to the fourth value, timeliness, a related set of concerns is at play. If an election remains in dispute so long that a seat remains empty even after the term of service has begun—which can happen in response to a disputed congressional election[285]—this constitutes irreparable harm to the candidate, to the legislative body, and to the electorate at large. Ironically, of course, the third and fourth values exist in some tension, given the difficulty of working quickly to reach an accurate decision.[286] Despite this tension, all four values are critical to an effective system of election dispute resolution.

B. AN APPROPRIATE ARBITER

To better effectuate the four values underlying the effective resolution of disputed congressional elections—impartiality, the appearance of impartiality, accuracy, and timeliness—Congress should clarify the extent to which post-election adjudication may (and must) occur outside of either House. In so doing, perhaps the most important decision for Congress to make is to determine the set of forums on which it will rely. This set of forums would not displace the ultimate authority that each House of Congress has over the resolution of election contests; rather, it would assist each

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[283] *See, e.g.*, JULIET EILPERIN, FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES 10–11 (2006) (suggesting that the House's resolution of the 1986 McCloskey-McIntyre contest, which was perceived as unfair by the Republicans, has contributed to a long-lasting, toxic form of partisanship).

[284] Huefner, *supra* note 28, at 291.

[285] *See supra* notes 249–56 and accompanying text.

[286] *See supra* note 253 and accompanying text.

House in its adjudicative process.[287] With respect to this question of forum, four potential options exist. First, Congress could insist that no court—state or federal—adjudicate congressional election contests. Second, Congress could attempt to enlist the Article III courts. Third, Congress could create a non-Article III tribunal. Fourth, Congress could expressly indicate its desire to rely on the state courts. As discussed below, none of these approaches is a perfect fit; each has its advantages and disadvantages. Ultimately, however, the final approach—expressly relying on the state courts—is likely to come closest to producing an impartial, timely, accurate, and constitutional adjudication of disputed congressional elections. Certainly, it would be a significant improvement over the status quo.

The first approach—preempting all court adjudication of congressional election contests—does not seem likely to advance three of the four values identified as critical. (It does, perhaps, help with problems of delay.[288]) It fails to take any advantage at all of perhaps the most valuable resource in this context: the courts, which, as less partisan bodies, can help to temper the party-based partiality that governs in each House of Congress. Nor does it take advantage of the expertise that the courts have in fact-finding and in resolving legal disputes. While this first approach has the benefit of clarifying the legal regime stemming from Article I, Section 5—thereby avoiding the problems caused by uncertainty itself[289]—it otherwise does not seem likely to make the resolution of congressional election contests any more impartial (in either appearance or in actuality) or any more accurate.[290]

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[287] As discussed above, this Article does not address the possibility of either House of Congress attempting to renounce its ultimate authority over the resolution of election contests, a move that seems unrealistic as a political matter and possibly unconstitutional. *See supra* note 204.

[288] *See supra* notes 249–56 and accompanying text (addressing delay resulting from the court adjudication of election contests).

[289] *See supra* note 226 and accompanying text.

[290] It also has the potential to add to the legal confusion by precluding consideration of election contests by state *courts* but allowing analogous work to be conducted by state *administrative bodies*. This quickly leads to line-drawing problems, particularly in jurisdictions that rely on quasi-judicial forms of review. *See supra* note 170 and accompanying text. Were Congress to go a step further and attempt to prohibit states from addressing election disputes through any means, including through administrative efforts, the challenges of line-drawing (among other problems) likely would overwhelm the effort. For when does a state's administration of the election end, and its administrative resolution

At least as importantly, this first approach does not appear to be the approach that either House of Congress desires. As discussed above, committees from both Houses of Congress have expressed how helpful court adjudication is to the deliberative process.[291] In light of this precedent that has been set, in a sense, by both Houses of Congress, there seems little reason to advocate for this first, court-free approach.

With respect to the second approach—enlisting the Article III courts—it has great potential. The trouble, as discussed below,[292] stems from the political and constitutional challenges it poses. At the outset, the life tenure provided by Article III permits federal judges to remain impartial in ways that are more difficult for judges who are elected.[293] The federal courts also seem to be perceived as impartial—or, at least, more impartial than Congress or an elected judiciary.[294] As generalist judges, this group has expertise in fact-finding and dispute resolution across different substantive areas and otherwise has the capacity to work toward accurate resolutions. And while federal court proceedings often take a very long time, judges are accustomed to working on expedited schedules or under significant time pressure. Given all these advantages, it is perhaps no surprise that some scholars have pointed to the federal courts when proposing improved regimes for disputed elections.[295] Vesting authority in the federal

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of election-related disputes begin? On a more practical note, it seems highly unlikely that either House of Congress would be willing (or able) to conduct all that work itself.

[291] *See supra* Section II.C.

[292] *See infra* notes 301–05 and accompanying text.

[293] *See supra* note 266 and accompanying text (addressing the election rates of state judges).

[294] *See, e.g.*, GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 5 (2001), http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf (finding that 62% of respondents agreed that the word impartial describes judges very well or well); *id.* at 4 (finding that 76% of voters believe that campaign contributions have at least some influence on judges' decisions); *see also* Polly J. Price, *Selection of State Court Judges*, *in* STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 9 (Roger Clegg & James D. Miller eds., 1996) ("Appointment of judges is usually thought to shield them from partisan interests. . . .").

[295] *See, e.g.*, Daniel Tokaji & Owen Wolfe, Baker, Bush, *and Ballot Boards*: *The Federalization of Election Administration*, 62 CASE W. RES. L. REV. 969, 995 (2012) ("[W]e think the increased federal court scrutiny of election administration is a salutary development, given the greater insulation that federal judges enjoy from partisan politics, in comparison with most election officials and state court judges."); *see also* FOLEY, *supra* note 59, at 347 (concluding that courts, on average, are better at adjudicating election disputes than are legislatures, and providing one illustration of the "relative superiority of

courts has particular advantage in the context of disputed congressional elections, given the federal interest in such disputes.

If Congress were to vest the federal courts with jurisdiction to hear disputed congressional elections, moreover, it might do so in a way that would help to advance the four implicated values. Congress might, for example, empower not a single trial judge, but rather a three-judge court, to adjudicate the disputes. It could be modeled after 28 U.S.C. § 2284, which requires that an expanded panel be convened in certain redistricting cases.[296] Relying on a panel, rather than a single judge, seems likely to increase the likelihood that the tribunal will be both impartial and perceived as impartial.

Unlike 28 U.S.C. § 2284, however, the regime enacted by Congress might eliminate appellate review.[297] This limited form of jurisdiction has at least two advantages. First, it significantly reduces the amount of time the proceedings would take, thereby advancing the value of timeliness. Second, it avoids the involvement of the Supreme Court. This may be a necessary prerequisite to convincing Congress to enact the reform. If either House of Congress—as the ultimate arbiter of the election—were to refuse to seat a Member who had won before the United States Supreme Court, that might deal a severe blow to the legitimacy of the election. If a House felt it necessary to reject the findings of a trial court, by contrast, the blow might be less severe.

Congress also could preempt parallel state court proceedings.[298] This would avoid duplicative litigation, reduce forum shopping, and protect the federal adjudications (in both the courts and each House of Congress) from any interference by the state court system.[299] Finally, Congress could enact a deadline by which the

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the federal judiciary's ability to deliver unbiased ruling" as compared to that of a state judiciary).

[296] *See* 28 U.S.C. § 2284(a) (2012) (requiring a three-judge court when "an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body").

[297] By contrast, certain orders issued by a three-judge court constituted pursuant to 28 U.S.C. § 2284 may be appealed directly to the United States Supreme Court. *See* 28 U.S.C. § 1253 (2012) ("[A]ny party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction . . . in any civil action . . . required . . . to be heard and determined by a district court of three judges.").

[298] As noted above, this nevertheless would pose some line-drawing problems. *See supra* note 290 and accompanying text.

[299] *See supra* notes 248–63 and accompanying text.

panel would be required to issue at least preliminary findings. Perhaps this could occur sometime in late December. Although this deadline (less than two months after Election Day) is unlikely to be enough time for a federal court to address an election contest thoroughly, it at least provides an opportunity to conduct initial proceedings.

This approach—vesting a limited and specialized form of jurisdiction in the Article III courts—would help to advance the four values identified above by incorporating the federal courts in a meaningful way. While each House of Congress would still be free to disregard a court's findings, they at the same time would receive some of the benefits of the federal courts. If Congress were to couple this with a clear statement that disputed congressional elections *must* proceed through this procedure, this approach also would provide much more clarity and predictability to what is now such a muddled and problematic regime.

This all said, this approach poses significant—and potentially insurmountable—problems. At the outset, it becomes problematic when coupled with state court adjudication. Were Congress to vest the federal courts with jurisdiction concurrently with the state courts, then parties would have a great incentive to engage in forum shopping—which in turn would undermine, at a minimum, the appearance of impartiality. Alternatively, if Congress were to vest the federal courts with exclusive jurisdiction, that would come at a major cost, as it fails to draw on the courts that have the most expertise and insight into the many state laws that govern congressional elections.[300] The circumvention of the state court system is also problematic from a political perspective: it is difficult to imagine Congress enacting such potentially controversial reform.

Perhaps the most troubling issues arising out of vesting the federal courts with jurisdiction, however, relate to the constitutional difficulties that this approach would pose. Among the concerns raised by relying on the Article III courts are whether the litigation would be incompatible with the political question

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[300] *Cf.* McIntyre v. Fallahay, 766 F.2d 1078, 1087 (7th Cir. 1985) (remanding dispute over disputed congressional election to state court after concluding that the complaint presented no question of federal law).

doctrine,[301] whether the decision to be reached by the panel would constitute an impermissible advisory opinion,[302] whether the jurisdictional grant would exceed Article III under the theory that no federal question is presented,[303] and whether the lack of appellate jurisdiction would constitute a constitutionally overbroad jurisdiction strip.[304] It is not clear whether this approach could survive such a multifaceted constitutional attack.[305]

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[301] An objection on the basis of the political question doctrine might look to dicta in *Roudebush*, which stated that "[w]hich candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even before the Senate acted," *Roudebush v. Hartke*, 405 U.S. 15, 18–19 (1972), as well as to the court's reasoning in *McIntyre*, which concluded that the political question doctrine precluded its review, 766 F.2d at 1081–83. *See also* Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986) (reaching a similar conclusion, based on similar logic, "without [relying on] the amorphous and partly prudential doctrine of 'political questions' "). *But see infra* note 305 and accompanying text.

[302] A federal court might conclude that a decision in this context constitutes an impermissible advisory opinion insofar as, in light of Article I, Section 5, "[n]othing [the court] say[s] or do[es] . . . could affect the outcome of [the] election." *McIntyre*, 766 F.2d at 1081; *see also id.* ("When a court has no right to determine the outcome of a dispute, it also has a duty not to discuss the merits of that dispute."); *id.* ("The doctrine of justiciability is designed to prevent meddlesome advisory opinions fully as much as it is designed to prevent unwarranted interference with decisions properly made elsewhere."). *But see infra* note 305 and accompanying text.

[303] This would not be a concern if a contestant raised a federal claim or if a contestee raised a federal defense. Absent such an injection of federal law, however, there is an argument that disputes over elections—even congressional elections—present no federal question. *See, e.g.*, *McIntyre*, 766 F.2d at 1083–84 (concluding that complaint in a congressional election contest presented no federal question). *But see infra* note 305 and accompanying text.

[304] The Supreme Court has been reluctant to construe statutes in a manner that precludes its own review. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 574–83 (2006) (rejecting the argument that the Detainee Treatment Act stripped the Court of jurisdiction over certain detainee habeas actions); Felker v. Turpin, 518 U.S. 651, 660–62 (1996) (concluding that Congress did not repeal the Court's authority to hear original habeas petitions); *Ex Parte* McCardle, 74 U.S. 506, 514 (1869) ("Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised."). And it has concluded in at least one context that such a strip of jurisdiction violated the Constitution. *See* Boumediene v. Bush, 553 U.S. 723, 798 (2008) (finding a violation of the Suspension Clause).

[305] The difficulty in predicting how the courts would respond to these challenges derives largely from the lack of precedent specifically addressing Article I, Section 5, which is such an unusual provision. If Congress were to adopt the proposed regime—that is, if it were to vest jurisdiction in the federal courts to adjudicate congressional election contests—Congress might alleviate some of the constitutional concerns by creating a statutory entitlement to a federally issued election certificate, which would be granted to the

Assuming some combination of these political and constitutional problems would prove to be insurmountable, Congress might look to the third approach: creation of a non-Article III federal tribunal. The tribunal might look similar to the Article III tribunal identified above—complete with a three-judge panel, a lack of appellate review, and deadlines—but it would avoid the constitutional concerns by enlisting non-Article III judges.[306] These individuals could be pulled from the existing non-Article III bench, or they could be appointed from the general population.

The trouble with this approach is that the solution to the problem (that is, avoiding the Article III protections) undermines perhaps the most compelling reason to rely on the federal tribunals (that is, taking advantage of those same Article III protections).[307] The federal courts are, relatively speaking, likely to advance the ends of accuracy, impartiality, and the appearance of impartiality precisely because Article III guarantees that judges can do their jobs without fear of reprisal. By contrast, concerns over retaliation threaten to undermine the work of a non-Article III tribunal in the context of a political dispute, particularly one of such high stakes as a congressional contest.

This approach also fails to take advantage of the expertise of the Article III judges as generalists. Where would Congress find the judges to serve on a non-Article III tribunal?[308] If they pulled

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individual adjudged to have received the most validly cast votes in a free and fair election. If the controversy to be adjudicated by the court concerned entitlement to this election certificate, rather than the more abstract notion of who "won" the election (and therefore who presumptively would be seated by either House), perhaps that would respond adequately to constitutional concerns relating to advisory opinions and the lack of a federal question—and possibly the political question doctrine as well. Thanks are due to Professor Foley for insightful discussion on this subject.

[306] The four constitutional concerns identified above derive primarily from Article III. *See supra* notes 301–05 and accompanying text. Relying on non-Article III judges would sidestep such concerns. Moreover, given the reluctance by the Article III courts to enter the area of congressional election contests in the first place, adjudication by such a panel surely would not run afoul of the Supreme Court's recent jurisprudence addressing the circumstances in which Congress may vest jurisdiction in non-Article III courts. *See* Stern v. Marshall, 564 U.S. 462, 482–504 (2011) (discussing the constitutional limits on congressional attempts to vest judicial power in non-Article III tribunals).

[307] *See supra* notes 292–95 and accompanying text.

[308] In considering reforms to state-law regimes for the adjudication of election contests, scholars have developed creative responses to this question. *See, e.g.*, Douglas, *Procedural Fairness*, *supra* note 28, at 52 (suggesting that each state enact a regime that "creates a multi-member panel of judges, political operatives, and experts who have different

from sitting judges, then the panel very well might consist of some combination of bankruptcy judges, tax court judges, and administrative law judges. An esteemed set of jurists no doubt, but it is not at all clear that such a panel would feel comfortable adjudicating an election law dispute. Congress instead could pull judges not from those currently sitting, but rather from the population at large—but at that point, the panel is even further removed from the ideal of an impartial and disinterested collection of expert jurists. In short, while reliance on a non-Article III tribunal remains an option, it is one that is difficult to support in light of its failure to take advantage of what the Article III bench has to offer—particularly once one recalls that this second approach would trigger the same difficulties related to state court jurisdiction (either involving forum shopping or the costs of ousting the state courts of jurisdiction).

This recognition, in turn, leads to the final option: simply clarifying that the state courts do indeed have the authority to adjudicate congressional election contests. This approach would clarify that Article I, Section 5 itself imposes no limitations on the processes that states can use to administer or resolve their elections. Jurisdictions that have concluded otherwise would be free to open their courts, whether through the overruling of court precedents or through the repeal of jurisdiction strips.[309] Jurisdictions that have attempted to split the difference—to permit state court adjudication while adhering to some supposed constitutional limitations imposed by Article I, Section 5—would be able to reform their laws to reflect the most sensible approach, not the approach that best straddles the perceived constitutional line.[310] For all jurisdictions, moreover, Congress could insist on certain ground rules. These rules could indicate that failure to exhaust state judicial remedies would prejudice a claim later

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backgrounds and expertise to serve as an election contest tribunal," that "gives an equal number of seats on the panel to those sympathetic to each candidate, while requiring candidates to identify these prospective members when they file their nominating petitions," and that "has the candidates or members of the panel together pick mutually agreed-upon 'neutral' members for the tribunal, or requires a supermajority for any decision"). Proposals of this sort warrant further examination.

[309] *See supra* Section III.B (describing the combination of case law and statutory law that has closed the courthouse doors in these jurisdictions).

[310] *See supra* Section III.C (describing jurisdictions that appear to have altered their procedures in response to Article I, Section 5 concerns).

brought before either House;[311] they could impose a deadline by which the panel would be required to issue at least preliminary findings;[312] they could insist on certain protections and access to evidence;[313] and they otherwise could impose procedural requirements that would be likely to promote accurate, impartial, and timely resolutions that are perceived as fair.[314] These sorts of regulations are likely to pass constitutional muster, in light of Article I, Section 4,[315] and they would constitute a significant improvement over the current regime.

It is true that an express endorsement of the state courts would not solve all ills. In many jurisdictions, it would allow continued reliance on elected state judges, which may undermine the appearance of impartiality (and perhaps impartiality itself), at least when compared to reliance on federal judges, who do not face the political pressures associated with future elections.[316] It also would not require states to open their courthouse doors, thereby leading to the possibility that potential contestants in certain jurisdictions would continue to lack judicial recourse.[317] It nevertheless would create a more sensible procedural regime. Compared to the first regime (which would permit no judicial resource), a state court-based regime would advance the values of impartiality, as well as the appearance of impartiality, by allowing courts to play a role in what is otherwise a highly charged political process. This regime also would advance the value of accuracy, both by providing a judicial forum for disputes and by drawing on the particular expertise that state courts have with respect to state election law. And while additional processes generally result

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311 *See supra* notes 115, 117, 124 and accompanying text (describing exhaustion requirement occasionally cited in either House's committee reports).

312 *See supra* notes 285–86 and accompanying text (discussing the value of timeliness); *supra* notes 249–56 and accompanying text (discussing delay resulting from the court adjudication of election contests).

313 *See supra* notes 257–60 and accompanying text (discussing concerns related to evidence preservation).

314 *See, e.g.*, Huefner, *supra* note 28, at 310–20 (discussing "uniformly desirable features of election contest statutes").

315 *See supra* note 273 and accompanying text.

316 *See supra* note 294 and accompanying text.

317 While an interesting constitutional question arises if Congress were to *require* that state courts adjudicate congressional election contests, *cf. Haywood v. Drown*, 556 U.S. 729, 742–50 (2009) (Thomas, J., dissenting) (advancing the position that the Constitution does not give Congress the authority to compel a state court to entertain a cause of action), such a solution seems politically unrealistic, and it is beyond the scope of this Article.

in additional delay, this state court regime would not necessarily undermine the value of timeliness, particularly if Congress imposed, with its reforms, reasonable deadlines. A state court-based regime also seems likely to be the most realistic option for reform, given that it is likely to have a much better chance than the other approaches of making it through the political process. It comports with the preferences each House has expressed (albeit indirectly), and it does not require the politically bold move of preempting all state court jurisdiction in this sensitive area of the law.

In short, Congress should clarify the Article I, Section 5 line. In light of concerns over the constitutional, political, and practical implications, the approach that seems most likely to succeed is one that relies on state court adjudication of congressional election contests. As a result, Congress should expressly endorse this approach, and in so doing, it should establish a set of ground rules that will help to advance the ends of impartiality, the appearance of impartiality, accuracy, and timeliness.

VI. CONCLUSION

The ambiguities surrounding Article I, Section 5 are deep and consequential. They implicate perhaps the most important of procedural questions—that of forum—in the context of exceedingly high-stakes disputes. Although Article I, Section 5 empowers each House of Congress, neither body has clarified the reach of this constitutional protection. The federal courts have likewise failed to fill the gap. The result is an ad hoc, state-based regime dictating the adjudication of congressional election contests.

The harms of this confused regime are widespread. Disputed congressional elections are defined by uncertainty, which leads to the potential for partisan manipulation and illegitimacy. In the confusing, patchwork regime that currently governs, many jurisdictions do not allow their courts to adjudicate congressional election contests at all. In these jurisdictions, there is no judicial recourse, a troubling result that threatens to undermine accuracy, impartiality, and legitimacy in the context of congressional elections. The states that do allow adjudication of congressional election contests do so in a manner unregulated by Congress. Adjudication therefore occurs in a manner that risks interference with the work of either House of Congress, including through

profoundly disruptive delay. Lurking in the background is the threat of a constitutional crisis.

The best understanding of Article I, Section 5 recognizes that this provision empowers each House of Congress. These two legislative bodies have the ability to clarify the law in this area. And they should. In so doing, Congress should impose a clear and sensible regime for the adjudication of congressional election disputes. A reasonable approach would be to enlist the work of the federal courts, which enjoy unique and robust protections against partisan pressures. Yet this approach may be politically and constitutionally untenable. A better response to the Article I, Section 5 vacuum, therefore, would be for Congress to acknowledge explicitly that it desires to rely on the state courts, and to couple that clarification with regulation of the adjudicative process. By filling the void in this way, Congress would calm the maelstrom that has been causing such harm—and, going forward, provide the clear rules necessary for those navigating such politically treacherous waters.