JUDGING CONGRESSIONAL ELECTIONS

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INTRODUCTION

Elections are often close, and close elections are often disputed. In 2008, for example, 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 a mere 225 votes – out of over two million cast – Coleman filed an election contest in the Minnesota state courts. The trial that ensued took over two months. After the three-judge panel eventually rejected Coleman's claims, Coleman renewed them before another state authority: the Minnesota Supreme Court. This court again rejected the claims, though not until June 30, 2009 – nearly seven months after Election Day, and over half a year into the congressional term for which the election took place. During this period, neither candidate was able to obtain an election certificate, as Minnesota's Governor refused to sign the certificate until the courts had resolved the legal claims. It was not until Coleman conceded that the Governor finally signed the certificate. On July 7, 2009, Al Franken was sworn into the Senate. Pursuant to its own rules, the Senate had been waiting to fill Minnesota's second seat with someone arriving with an official election certificate, not with a mere set of legal claims.[1]

The proceedings in Minnesota elicited enormous media coverage and significant scholarly attention. But few questioned how the proceedings before the state judges could be reconciled with a deceptively straightforward constitutional command: under Article I, Section 5 of the Constitution, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."[2] It is true that Minnesota Supreme Court considered and rejected the claim that this constitutional provision precluded the state courts from adjudicating Coleman's challenges.[3] Otherwise, however, the Article I, Section 5 mandate received little attention; no federal authority – not a federal court, nor Congress, nor the Senate itself – reviewed the Minnesota Supreme Court's interpretation of Article I, Section 5 or offered an independent opinion. Yet the position of the Minnesota Supreme Court hardly is self-evident. To the contrary, it is one that is in conflict with other states' determinations across the country.

This Article, the first to offer a comprehensive analysis of how Article I, Section 5 affects the state-based adjudication of congressional contests, recognizes that the proceedings out of Minnesota were not unusual in their treatment of this constitutional mandate. Rather, across the country, states have adopted different regimes for congressional election contests, and these regimes are rarely if ever subject to federal review. The result is an inconsistent, state-based regime for judging congressional elections – even

[1] *See generally* JAY WEINER, THIS IS NOT FLORIDA (2010).
[2] U.S. CONST. Art. I, Sec. 5.
[3] Franken v. Pawlenty, 762 N.W. 2d 558 (Minn. 2009).

though this area of constitutional law so profoundly implicates quintessentially federal interests.

This Article proceeds in five parts. In Part I, it identifies the constitutional tension. It explains how, in response to Article I, Section 5, each House has adopted and employed procedures to judge the elections and returns of its members. Despite these frameworks, litigants nevertheless frequently petition the federal and state courts for adjudication of their election contests. Emerging from this arrangement is a dueling set of adjudicatory forums, and it is not clear how the tension should be resolved.

Part II analyzes how the federal government – through its legislative and judicial branches – has interpreted and otherwise responded to the Article I, Section 5 command. In so doing, it reaches a startling conclusion: despite the federal interest in policing this constitutional line, neither Congress nor the federal courts have clarified the circumstances in which courts can adjudicate congressional election contests. Rather, as Part III explains, the interpretative torch has been passed to the states, which have created 50 separate regimes for adjudicating disputed election contests. By analyzing these 50 regimes, as well as the implicated state-court case law, this Part demonstrates that the states collectively have produced an inconsistent regime based primarily on each jurisdiction's determination of how congressional election contests should be adjudicated. Part IV recognizes the result: each state now determines the involvement of courts in congressional elections contests. These state regimes operate largely without federal oversight, despite the regimes' potential to interfere with each House's judging of the elections of its own members. Part V argues that this arrangement reflects an imbalance in federalism that is consistent with broader trends in election law, and that a normatively preferable regime would correct this imbalance.

I. THE CONSTITUTION REQUIRES THAT EACH HOUSE BE THE JUDGE OF THE ELECTIONS AND RETURNS OF ITS OWN MEMBERS.

As the Constitution declares, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."[4] This is an

[4] U.S. CONST. Art. I, sec. 5. "Elections" are generally understood to be distinct from "returns" 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.*, Spaulding v. Mead, United States Congress, House Committee on Elections, Cases of Contests Elections in Congress; from the year 1789 to 1834, Inclusive 159 (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.").

unusual provision: a judicial power vested in a legislative body. In exercising this power, each House "acts as a judicial tribunal,"[5] and in fulfilling its duties "has an undoubted right to examine witnesses and inspect papers," among other abilities.[6]

Vesting this power in this way – that is, vesting the power to judge the elections of the members of a legislative body in the legislative body itself – has a long historical pedigree. It predates the Constitution,[7] and parallel provisions have been adopted in the majority of states.[8] Evidence suggests that the drafters of the Constitution assumed that such power was both "axiomatic" and critical for the protection for a legislative body,[9] as they apparently took it as self-evident that "[s]uch power is necessary to the preservation of the body itself and to the dignity of its character."[10] Justice Story later attempted an explanation:

> 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

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Unless otherwise indicated, this Article uses the term "election" to refer both to elections and to returns.

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

[6] Kilbourn v. Thompson, 103 U.S. 168, 190 (1880).

[7] *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.").

[8] [citation]

[9] *See, e.g.*, House Report No. 85, first session Fifty-sixth Congress (1900) ("We do not think that this proposition needs amplifying; it is axiomatic."); *see also Morgan*, 801 U.S. 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.").

[10] Hinds' Precedents at 528; *see also* House Report No. 85, first session Fifty-sixth Congress (1900); Hartke v. Roudebush, 321 F. Supp. 1370 (D.C. Ind. 1970) (overruled on other grounds) ("The right is deemed essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches."); Lucas v. McAfee, 29 N.E. 2d 403 (Ind. 1940).

> vindicate its own character, and to preserve the rights and sustain the free choice of its constituents.[11]

Nearly a century later, Justice Scalia endorsed this same view as a judge on the Court of Appeals:

> [While] Justice Story's description of the purifying character of election-judging by the legislature may have been exaggerated, his basic point that institutional incentives make it safer to lodge the function there than anywhere else still stands. The major evil of interference by other branches of government is entirely avoided, while a substantial degree of responsibility is still provided by regular elections, the interim demands of public opinion, and the desire of each House to preserve its standing in relation to the other institutions of government.[12]

In light of the failures of the Articles of Confederation, the drafters of the Constitution were particularly concerned about protecting the federal government's legislative bodies against abuse by uncooperative states. This concern was particularly acute in the context of congressional election disputes given that the Constitution provided for the state administration of federal elections.[13]

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[11] I J. STORY, COMMENTARIES ON THE CONSTITUTION § 833, at 604-5 (5th ed. 1905)

[12] *Morgan*, 801 F.2d at 450.

[13] *See* U.S. CONST. Art. I, sec. 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, 808-809 (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. . . . [For example,] in Art. I, § 4, cl. 1, though giving the States the freedom to regulate the 'Times, Places and Manner of holding Elections,' the Framers created a safeguard against state abuse by giving Congress the power to 'by Law make or alter such Regulations.' The Convention debates make clear that the Framers' overriding concern was the potential for States' abuse of the power to set the 'Times, Places and Manner' of elections. Madison noted that '[i]t was impossible to foresee all the abuses that might be made of the discretionary power.' 2 Farrand 240. Gouverneur Morris feared that 'the States might make false returns and then make no provisions for new elections.' *Id.*, at 241. When Charles Pinckney and John Rutledge moved

Axiomatic or not, the Article I, Section 5 mandate almost immediately became subject to dispute,[14] and such uncertainty has characterized subsequent interpretations of the provision.[15] With respect to the fundamental question of who, other than each House, may "judge" congressional election contests – more specifically, the extent to which Article I, Section 5 limits the involvement of courts – there is very little academic literature on the subject.[16] There is similarly sparse case law, at least out of the federal system; the federal courts have weighed in very little on the question of how to interpret this mandate.[17] This has left the interpretative work to each House of Congress and to the states.[18]

A. Each House Has Adopted and Employed Procedures To Judge The Elections and Returns of Its Members.

As discussed in more detail below, neither House has spoken definitively on many constitutional questions implicated by Article I, Section 5. They have not made clear, among other things, the extent to which this provision permits state or federal courts to be a "judge" of congressional election contests. Both Houses, however, have adopted procedures governing their own adjudication of election contests. A brief

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to strike the congressional safeguard, the motion was soundly defeated. *Id*., at 240-241. As Hamilton later noted: 'Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.' The Federalist No. 59, at 363.").

[14] 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. A substantial minority of Representatives concluded that the Constitution vested power in the states to create the rules by which returns are to be judged, while a narrow majority concluded that the Article I, Section 5 power over returns was plenary and therefore included the power to set the rules by which returns are to be judged. *See* Spaulding v. Mead, United States Congress, House Committee on Elections, Cases of Contests Elections in Congress; from the year 1789 to 1834, Inclusive 159 (1834).

[15] *See infra*.

[16] *See, e.g*., Note, Kristen R. Lisk, *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); Paul E. Salamanca & James E. Keller, The Legislative Privilege To Judge the Qualifications, Elections, and Returns of Members, 95 Kentucky L.J. 241 (2006-2007).

[17] *See infra*.

[18] *See infra*.

overview of each helps to illustrate how the process unfolds. In the House, legislators have adopted procedures consistent with the Federal Contested Elections Act (FCEA), a statute that sets forth procedures for challengers to contest elections. Similar in many ways to rules of civil procedure, the FCEA sets forth a procedural framework for adjudication. It provides for notice, filings, service, discovery, among other procedural mechanisms.[19] Although the FCEA itself does not set forth substantive standards governing these proceedings, the House has reached a number of substantive rulings pursuant to its resolution of election contests filed pursuant to the FCEA,[20] and through the years it has adjudicated hundreds of contested elections.[21]

The Senate, for its part, has "developed a series of informal precedents" to guide its adjudication of election contests.[22] More specifically,

> the Senate has established a custom of resolving disagreements over which of two or more candidates in a senatorial race attracted more ballots. The apparent loser may initiate the process by filing with the Senate a petition stating (a) what voting irregularities he suspects, and (b) how many votes were affected. Upon receipt of such a petition, a special committee may be authorized to investigate the charges alleged. If the allegations are not frivolous and would be sufficient, if true, to alter the apparent outcome of the election, actual ballots may be and have been subpoenaed to Washington for recounting by the committee. Also, witnesses may be required to testify. The committee performs the function of deciding both the

[19] See 2 U.S.C. § 381 et seq.

[20] See generally L. Paige Whitaker, Contested Election Cases in the House of Representatives: 1933 to 2009, Congressional Research Service (2010). *See also Morgan* ("The House has on many occasions asserted authority to disregard the statutory rules for resolving disputed elections where it finds them inappropriate. (citing I HINDS' PRECEDENTS §§ 330, 449, 597, 600, 680, 713, 825, 833; II id. at § 1122)).

[21] See Jeffery A. Jenkins, Partisanship and Contested Election Cases in the House of Representatives, 1789-2002, available at http://faculty.virginia.edu/jajenkins/SAPD2004.pdf.

[22] Senate Procedures In Contested Elections, available at http://www.senate.gov/artandhistory/history/common/contested_elections/procedures_contested_elections.htm. *See also* UNITED STATES SENATE ELECTION, EXPULSION, AND CENSURE CASES (1995).

> factual issues and what allegations would be sufficient to warrant favorable action on a petition.[23]

The resolution of election challenges in the Senate has involved, among other things, "sealed ballot boxes [being] shipped to Washington where staff members, carefully observed by representatives of both candidates, scrutinize[] the ballots and election records for possible irregularities."[24]

If an individual, subject to this sort of challenge, arrives with the proper credentials – that is, "credentials," such as an election certificate, "that appear[] valid on their face and [are] signed by the proper state authorities" – the Senate normally will allow that individual to take his seat, but to do so "without prejudice."[25] This conditional seating allows the Senate, if it deems it necessary based on the election challenge, later to "exclude" that individual by a majority vote.[26]

B. Litigants Nevertheless Frequently Petition the Courts.

Despite the mechanisms available in each House to adjudicate election contests – and despite the constitutional mandate that each House be the "judge" of those elections – these disputes are not necessarily adjudicated in that forum. Rather, dissatisfied individuals routinely petition the state and federal courts and demand resolution of their claims.

Many petition the state courts. This occurred, for example, after the 2008 Senate election in Minnesota, which resulted in the proceedings (and profound delay in seating Senator Franken) described above. This also occurred after the 2006 election for Florida's 13th Congressional District between Christine Jennings and Vern Buchanan. After the results showed Jennings behind by only a handful of votes, Jennings challenged these results in both the Florida state courts and the House. She dropped her challenge in the courts after the House rejected her claims.[27]

These litigants – Coleman, Jennings, and others purporting to be aggrieved by election outcomes – might decide to petition state courts for several reasons. First, state courts are a natural place to turn in light of the

[23] Roudebush v. Hartke, 405 U.S. 15, 27 (1972) (Douglas, J., dissenting). Generally, the committee with the responsibility to investigate such petitions is the Rules Committee.

[24] *Id*.

[25] Senate Procedures In Contested Elections, available at http://www.senate.gov/artandhistory/history/common/contested_elections/procedures_contested_elections.htm. If, by contrast, an individual arrives without such credentials – perhaps as a result of continuing disputes over the election results – she normally cannot be seated.

[26] *Id*. This is in contrast to having to be expelled, which requires a two-thirds majority. *Id*.

[27] [Citation]

state's role in administering elections. States are constitutionally charged with administering federal elections, as Article I, Section 4 instructs each state to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." Despite the Constitution's apparent demarcation between election-related tasks – between, on the one hand, *administering* elections (a task constitutionally vested in each state) and, on the other, *judging* elections (a task constitutionally vested in each House) – the line between the two modes is not always clear. As the dispute resolution begins to feel more judicial, rather than administrative, in nature, a challenger may turn to the state's judicial forum rather than (or in addition to) either House of Congress.

Moreover, many states have enacted statutory frameworks for contesting congressional election contests. These statutory frameworks provide invitations of sorts for potential litigants. Both Minnesota (the site of the Franken-Coleman dispute) and Florida (the site of the Jennnings-Buchanan dispute) are examples of states with statutory regimes for the adjudication of congressional election contests.[28]

Finally, challengers might petition the state courts because there is some precedent, emerging from each House, suggesting (albeit in an unclear manner) that exhaustion of state remedies may be a prerequisite for relief. This pressure is discussed in more detail below.

In addition to turning to the state courts, many litigants attempt to file suit in the federal courts. This occurred, for example, after a close 1970 Indiana senatorial election between Richard L. Roudebush and R. Vance Hartke culminated in a resolution of certain election-related claims by the United States Supreme Court.[29] On the House side, this occurred after the razor-thin 1984 contest between Rick McIntyre and Frank McCloskey for Indiana's 8th Congressional District produced a cluster of federal court lawsuits and decisions (which this Article refers to collectively as the "McCloskey cases").[30] Unlike many state courts, the federal courts are not governed by statutory regimes permitting congressional election contests. To the contrary, plaintiffs bringing suit in the federal courts face a set of judicially developed precedents – including the justiciability doctrines – that are extremely difficult for challengers of congressional elections to

[28] *See infra*.

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

[30] *See, e.g.*, Morgan v. United States, 801 F.2d 445 (D.C. Cir. 1986); McIntyre v. O'Neill, 603 F.Supp. 1053 (D.D.C.1985), vacated and remanded with instructions to dismiss as moot, 766 F.2d 535 (D.C.Cir.1985); McCloskey v. Simcox, No. EV 84-321-C (S.D.Ind.Dec. 7, 1984); McIntyre v. O'Neill, 603 FSupp 1053 (D.C.D.C. 1985); Barkley v. O'Neill, 624 F. Supp. 664 (S.D. Ind. 1985); McIntyre v. Fallahay 766 F.2d 1078 (7th Cir.1985).

overcome.[31] This forum might nevertheless appear favorable to those concerned about partisan pressures affecting elected state judges – or simply trying to engage in forum selection.[32]

C. It Is Not Clear How the Courts' Adjudication of Congressional Election Contests Should Be Reconciled with Article I, Section 5.

As the preceding descriptions reveal, there is a tension implicated by the adjudication of congressional election contests. On the one hand, the Constitution requires that each House of Congress judge the elections of its members. On the other hand, litigants routinely petition another set of judges – those presiding on the state and federal benches – to adjudicate election-related challenges. It is not clear how this tension should be resolved. On the merits, the constitutional question poses difficult questions relating to federalism and separation of powers, among other concerns, and it has produced a split in authority across the country.[33]

Yet at least one aspect of this constitutional debate is clear: there is the potential for the state and federal court proceedings to interfere with the work of each House. This observation is consistent with the literature recognizing, in other contexts, the difficulties posed by parallel proceedings.[34]

The potential for interference arises from, among other things, (1) the destruction or degradation of evidence; (2) delay, including by virtue of a state's failure to issue, in a timely manner, *prima facie* evidence of election results (e.g., failure to issue, in a timely manner, an election certificate); and (3) a challenge to the legitimacy of either House's ultimate determination. What is more, depending how one resolves this tension between congressional adjudication and court-based adjudication, there is the potential for issues of federal law to be resolved without the opportunity for federal review.[35] The interference potentially wrought by court proceedings is discussed in more detail below.[36]

In short, the Constitution requires that each House be the judge of the elections and the returns of its members. As a result, each has mechanisms in place to resolve election-related disputes. Dissatisfied contestants and other affected parties nevertheless petition the state and federal courts – despite the potential for these proceedings to interfere with the work of each House. This creates the need to resolve the question: to what extent does Article I, Section 5 permit courts to adjudicate these claims?

[31] *See infra*.

[32] *See generally* Lisa Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. Rev. 563 (2013).

[33] *See infra*.

[34] [citation]

[35] *See infra*.

[36] *See* Section IV.B, *infra*.

II. NEITHER CONGRESS NOR THE FEDERAL COURTS HAVE CLARIFIED THE CIRCUMSTANCES IN WHICH COURTS CAN ADJUDICATE CONGRESSIONAL ELECTION CONTESTS.

Though each House is required to judge the elections and returns of its own members, courts frequently are asked to intervene. To what extent is that intervention constitutional? Despite the importance of this question, there is close to no academic commentary on the subject.[37] And despite the importance of the question to the federal interest, no federal authority has clarified the answer. 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.

At the outset, there is no legislation on the subject. The most on-point legislation, the FCEA, does not so much as address the question.

Each House, speaking individually, has responded in various ways to the problem, but neither has provided clarification. The House of Representatives, for its part, has resolved a handful of election contests while invoking a vaguely stated principle that challengers first should exhaust state remedies. The scope of this principle is not clear. It seems to encompass state recounts, which (unlike election contests) are considered administrative in nature.[38] As for election contests (which are judicial in nature), the effect of this vaguely stated exhaustion principle is uncertain. One of the most direct precedents on this point came out of a 1964 dispute, brought pursuant to the FCEA, involving five contestees purportedly elected in Mississippi. The contestants – five individuals selected at a separate, "unofficial election" – argued that the contestees' election was illegitimate due to, among other things, the race-based exclusion of voters from the polls.[39] The House rejected the contestants' claims on multiple grounds, including lack of standing and failure to prove that the alleged disenfranchisement actually affected any outcome. It also suggested that the challenges were improper because the contestants had failed to exhaust state and federal judicial remedies.[40] To the extent that this precedent indicates an exhaustion requirement, it is not clear how it can be reconciled with other House precedents in which the House appears to have considered challenges (and, occasionally, granted relief) without the contestant's exhaustion of state remedies.[41] It is also not clear how this

[37] *See supra*.

[38] *See, e.g.*, Swanson v. Harrington (H.Rept. 1722), 9th District of Iowa, available at http://assets.opencrs.com/rpts/98-194_20101102.pdf.

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

[40] *Id*. *See also, e.g.*, Huber v. Ayres (H.Rept. 82-986), 14th District of Ohio; Carter v. LeCompte (H. Rept. 85-1626), 4th District of Iowa.

[41] *See, e.g.*, Sanders v. Kemp (H.Rept. 334), 6th District of Louisiana; Roy v. Jenks (H.Rept. 1521), 1st District of New Hampshire; Wilson v. Granger (H.Rept. 80-2418), 1st District of Utah (no relief

principle can be reconciled by the willingness of the House, on occasion, to resolve election contests while parallel state proceedings are still unfolding.[42] Even when taken at face value, this precedent leaves many unanswered questions. Most prominently, *which* state mechanisms must be exhausted? When, if ever, does a state judicial proceeding cross the Article I, Section 5 line?

As for the Senate, the guidance is similarly vague. The Senate Historical Office has explained 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."[43] And in response to at least one election dispute, the Senate has identified the court proceeding for which it wanted to wait; it 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."[44] Despite these gestures, the Senate has failed to provide guidance with respect to the ultimate question. Namely, when is "legal action in the federal or state courts . . . appropriate"?

In sum, the authority stemming from either House is vague at best. To the extent it suggests a governing principle, it is that no limit exists on the courts' adjudication of congressional election contests. Whether this conclusion – that is, that Article I, Section 5 imposes no limit on the courts – could possibly be correct is a subject for another Article,[45] but for now it suffices to say that such a conclusion is inconsistent with conclusions emerging from other authorities, such as the state courts, state legislatures, and the federal courts.[46]

In the absence of clarification by Congress, there is the potential for the federal courts to have weighed in. And indeed there are a handful of judicial precedents arguably on point. Yet the precedents they set are confusing and contradictory, and they leave much to be resolved. Taken in sum, these precedents might be read to suggest that while the Constitution

granted); Roush or Chambers (H.Rept. 87-513), 5th District of Indiana (but no recount available under Indiana law);

[42] *See, e.g.*, *Morgan*. 801 F.2d 445, [citation] (D.C. Cir. 1986).

[43] *Senate Procedures in Contested Elections*, available at http://www.senate.gov/artandhistory/history/common/contested_elections/procedures_contested_elections.htm

[44] *Roudebush,* 405 U.S. 15, [citation] (1972). At issue in the appeal was the constitutionality of a recount for which Hartke's challenger, Richard L. Roudebush, had petitioned an Indiana state court.

[45] While this question warrants separate analysis, it is fair to observe that few even would argue that Article I, Section 5 imposes no limit on the courts, particularly in light of delegation concerns.

[46] *See infra*.

prevents federal courts from adjudicating congressional election contests, state courts may do whatever is permissible under state law – so long as they do not physically alter election-related evidence. Particularly with respect to the limits on state courts, however, the federal authority is so sparse that this latter principle really is little more than a suggestion.

The federal courts nevertheless have reached a consensus of sorts regarding whether *federal* courts can adjudicate congressional election contests – at least once either House has already made a decision and unconditionally seated a member. The answer appears to be no. Then-Judge Scalia made this point forcefully in response to an attempt, by a group of registered Republicans, to challenge the seating of Democrat Frank McCloskey, whom the House had determined had won an election by an exceedingly narrow margin.[47] In response to the question presented to the court – that is, 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" – Judge Scalia found the answer to be clear.[48] As he explained,

> [Article I, Section 5] states not merely that each House "may judge" these matters, but that each House "shall be *the* Judge" (emphasis added). The exclusion of others—and in particular of others who are judges—could not be more evident.[49]

He continued: "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."[50] Judge Scalia's opinion is consistent with the other cases stemming out of the McCloskey election, including one penned by Judge Easterbrook. In *McIntyre v. Fallahay*,[51] Judge Easterbrook considered the justiciability of a separate election contest, which has been removed from the Indiana state courts to federal court. Like Judge Scalia, he cited Article I, Section 5 in forcefully rejecting the challenge:

> The House is not only "Judge" but also final arbiter. Its decision about which ballots count, and who won, are not reviewable in any court . . . .

[47] *Morgan v. United States*, 801 F.2d 445 (D.C. Cir. 1986).
[48] *Id*.
[49] *Id.*
[50] *Id*.
[51] 766 F.2d 1078 (7th Cir.1985).

> 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.[52]

These precedents are consistent with dicta set forth in various Supreme Court opinions. In *Roudebush v. Hartke*, for example, the Court acknowledged that the Senate already had seated a Senator (albeit conditionally) and insisted 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."[53] Other Supreme Court opinions include similar dicta,[54] and no Supreme Court dicta clearly suggests otherwise.[55]

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[52] *Id*. at 1081 (footnote omitted); *see also McIntyre v. O'Neill*, 603 F.Supp. 1053 (D.D.C.1985), vacated and remanded with instructions to dismiss as moot, 766 F.2d 535 (D.C.Cir.1985) ([explain]); McCloskey v. Simcox, No. EV 84-321-C (S.D.Ind.Dec. 7, 1984) ([explain]); McIntyre v. O'Neill, 603 FSupp 1053 (D.C.D.C. 1985) ([explain]); Barkley v. O'Neill, 624 F. Supp. 664 (S.D. Ind. 1985). It is similarly consistent with other lower court federal opinions. See, e.g., Application of James, 241 F.Supp. 858 (S.D.N.Y. 1965) ([explain]).

[53] *Roudebush,* 405 U.S. 15, [citation] (1972).

[54] *See, e.g*., Reed v. County Commissioners, 277 U.S. 376, 388, 48 S.Ct. 531, 532, 72 L.Ed. 924 (1928) ("[The Senate] is the judge of the elections, returns and qualifications of its members. Art. I, § 5. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department."); Barry v. United States ex rel. Cunningham, 279 U.S. 597, 613, 49 S.Ct. 452, 455, 73 L.Ed. 867 (1929) ("Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members. Art. I, § 5, cl. 1.... Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review."). *See also*, *e.g*., Nixon v. United States ("Because [Section 5] unequivocally states that each house of Congress—rather than the courts—shall be 'the Judge' of these matters, it has been held that courts may not consider a claim that the House or Senate seated the wrong candidate following a

It is true that these cases address the constitutionality of federal court involvement *after* the seating of a Member of Congress. In other words, they do not address whether federal court proceedings would be appropriate *prior* to a member's seating. Yet the rhetoric used in the opinions suggests that the outcome would be the same in either circumstance.[56] Other federal courts have reached this conclusion more directly. In *Keogh v. Horner*,[57] for example, a district court concluded that it lacked jurisdiction to hear a challenge to the election of a representative from Illinois, whom had not yet been seated. In response to the argument that the Governor of Illinois (who, under state law, was required under certain conditions to grant a certificate of election) was acting in a quasi-judicial capacity, the court distinguished between an official acting "purely in a ministerial capacity," which he deemed permissible under Article I, Section 5, and acting in a capacity that is "judicial or quasi judicial in its character," which he deemed impermissible. The logic appeared to extend to the district court itself. The court explained:

> To hold that the Governor acts in a judicial capacity . . . would confer upon him the right to conduct and settle contests concerning members of Congress, when that power is expressly conferred upon the respective House of Congress by the Constitution of the United States. . . . . [T]he power of the respective Houses of Congress with reference to the qualifications and legality of the election of

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contested congressional election. . . . If courts were permitted to review a congressional decision to seat a particular candidate by recounting the ballots or scrutinizing other findings of fact, the judiciary, and not the Congress, would in the last analysis be 'the Judge' of election returns."). *Cf*. Dornan v. Sanchez, 955 F. Supp. 1210, 1211 (C.D. Cal. 1997) .

[55] It might be argued that Judge Scalia's opinion is in some tension with *Powell v. McCormack*, 395 U.S. 486 (1969), in which the Supreme Court concluded that the Constitution prohibits either House from setting qualifications for membership (as opposed merely to judging whether prospective members have met those qualifications). Yet the two are not inconsistent, as the holding of Powell was that "the House action in question did not consist of judging 'qualifications' within the meaning of the provision," and therefore that "Article I, section 5 had no application." *Morgan*, 801 F.2d at [cite].

[56] *See also Webster v. Doe*, 486 U.S. 592, 612 (1988) (Scalia, J., dissenting) ("Claims concerning constitutional violations committed in [the context of Art. I, Sec. 5]-—for example, the rather grave constitutional claim that an election has been stolen-—cannot be addressed to the courts.").

[57] 8 F. Supp. 933 (D.C. Ill. 1934).

> its members is supreme. The many volumes of election contest cases in which every conceivable question has been raised with reference to the right of persons to sit as members of Congress, together with the fact that there are no court decisions to be found, controlling such matters, bear mute but forcible evidence that this court has no authority to be the judge of the manner in which such members were elected, or to interfere with the Governor in furnishing them a certificate or commission as to what the canvass shows with reference to their election.[58]

Taken in sum, these federal precedents provide sparse but consistent support for the conclusion that federal courts cannot adjudicate congressional election contests. They leave open, however, the question whether the Constitution permits *state* courts to adjudicate congressional election contests.

It is here that the federal court precedents become truly thin. The case most cited in this context is *Roudebush v. Hartke*, in which the United States Supreme Court concluded that Article I, Section 5 did not prohibit Indiana from conducting a recount of the 1970 election ballots for United States Senator.[59] Yet even this case does not address the extent to which courts can judge congressional election contests; rather, it addresses interference by state *administrative* processes, such as recounts.[60] (It concluded, in the case before it, that the interference did not rise to the point of constitutional objection.) This distinction – between judicial proceedings and administrative proceedings – has been lost in many discussions of the case,[61] as some have interpreted *Roudebush* to mean, in effect, that the only type of "interference" that can arise from state proceedings (administrative, judicial, or otherwise) is that which arises from physical destruction of evidence, and not from interference that can arise specifically as a result of state judicial work.[62] Indeed, in a case decided only two years after *Roudebush*, the district court made exactly this conflation in rejecting a challenge to proceedings conducted by the

[58] *Id*. at 934-935. *See also* In re Voorhis, 291 F. 673 (S.D.N.Y. 1923) (Hand, J.).

[59] *Roudebush,* 405 U.S. 15, [citation] (1972).

[60] *See id*. The court squarely held that the proceedings were administrative in nature.

[61] A rare counterexample is Note, Kristen R. Lisk, 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).

[62] *See supra*.

New Hampshire state courts.[63] *Roudebush*, in short, does not address the extent to which a state court can "judge" congressional election contests.

The cluster of cases deriving from the McCloskey election, discussed above, confuse the matter further. While these cases go primarily to the constitutionality of federal court involvement, they also include a disposition that indirectly addresses the role of state courts in congressional election contests, and it is one that suggests that Article I, Section 5 is particularly toothless with respect to state courts. More specifically, the court in *McIntyre v. Fallahay* concluded that while the congressional election contest was not justiciable in federal court, it nevertheless was proper for the federal court to remand the case to state court.[64] In so doing, it rejected the argument that the state proceedings must stop – and the case should therefore be dismissed rather than remanded – because the House already had seated McCloskey. In response to this argument, the *McIntyre* court reached, essentially, the opposite conclusion, stating that '[o]nce the House decides it no longer cares to have the state's advice, the state is *less* constrained than before."[65] It reached this conclusion even after observing, with respect to its own involvement in the election, the potential for conflict with the legislative branch:

> Because the House has settled the election contest, nothing this or any other court can do will affect who represents Indiana's Eighth Congressional District through the end of 1986. The dispute at this stage may have more to do with political advantage than with legal rules; both sides may be tempted to employ the courts more to obtain publicity than to achieve justice. There 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. The political question doctrine is designed in part to prevent such unseemly conflicts between federal courts and the political branches of the government. The political question doctrine may not bind the courts of Indiana, but these concerns may lead the state courts to dismiss this litigation nonetheless.[66]

Under the *McIntyre* court's logic, in other words, the state courts may continue to adjudicate an election contest, even though the federal courts

[63] *See* Durkin v. Snow, 403 F.Supp. 18 (D.C.N.H. 1974); *see also* Franken v. Pawlenty, 762 N.W.2d 558 (Minn. 2009).

[64] [*McIntyre*].

[65] [*McIntyre*] (emphasis added).

[66] [*McIntyre*]

are constitutionally barred from doing so. This leads to an unsettling result: that issues of federal law – even on issues as important to the federal interest as the validity of congressional elections – can be heard by state courts but by not federal courts, with no opportunity for either federal court review or a litigation-ending resolution by either House of Congress. The exact reach of the *McIntyre* opinion is not clear, and in part this is because the state courts arguably had been engaging in administrative proceedings rather than judicial proceedings.[67] *McIntyre* is also in tension with cases such as *Keogh*, discussed above, and arguably even with *Roudebush*, if the *McIntyre* approach is taken to mean that federal courts cannot intervene in election disputes even to adjudicate the constitutionality of state-court proceedings. In any event, even when *McIntyre* is read narrowly, the precedent strikes a surprising balance with respect to federalism.

In short, although there is a recurring tension – between, on the one side, the constitutional requirement that each House judge the elections and returns of its own members and, on the other, the frequent appeals to state and federal courts to judge these same elections – no federal authority has provided a clear answer with respect to how this tension should be resolved. To the extent a principle can be discerned, it is one that ensures even *less* federal involvement, as the federal courts generally have reached a consensus prohibiting their own adjudication of congressional election contests. The failure by the federal government to engage more substantively in this area is ironic, given that the issues implicated are quintessentially federal. Indeed, they go to the very preservation of the federal government.

III. THE STATES HAVE IMPLEMENTED LEGAL REGIMES RESPONSIVE TO THIS CONSTITUTIONAL COMMAND.

While the various actors in the federal system have remained reticent, the states have developed a set of precedents in response to the Article I, section 5 command. Stated otherwise, the legal vacuum has been filled by 50 separate state regimes. This set of precedents is comparatively rich – but not at all uniform. To the contrary, through a combination of case law and legislation, some states have permitted congressional election contests to proceed in the courts without substantive restriction; others have expressly prohibited such proceedings; and still others have eked out a middle ground by permitting congressional election contests but imposing substantive or procedural restrictions. The result of these varied precedents is a state-driven, patchwork set of regimes for the resolution of congressional election contests.

[67] [*McIntyre*] ("We need not decide whether the Indiana proceeding was 'judicial'. . . .")

A. State Court Case Law Addressing the Constitutional Command.

A number of state courts have had occasion to address Article I, Section 5 and the effect it has on state resolution of congressional election contests. These jurisdictions have not reached uniform results – even though, as a matter of basic legal principle, the federal mandate should apply uniformly throughout the country.

On the one hand are decisions like the one emerging from the Texas Supreme Court in response to a disputed congressional election between Robert Alton Gammage and Ron Paul.[68] After a close election, Paul instituted an election contest pursuant to Texas statute, which granted jurisdiction to the state district court "of all contests of elections, general or special, for all . . . federal offices."[69] Paul argued that this provision included congressional election contests. 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, s 5, of the United States Constitution."[70] The court concluded that a state-adjudicated election contest for congressional office was prohibited by the United States Constitution,[71] and it indicated that Paul's exclusive recourse was to petition the House itself.[72] A number of states have reached decisions consistent with this decision by the Texas Supreme Court.[73]

On the other hand are cases in which the courts have concluded that Article I, Section 5 poses no relevant bar on the state's adjudication of congressional election contests. This class of decisions includes the most high profile, recent decision on the subject, which emerged out of the disputed senatorial election between Al Franken and Norm Coleman. Franken had argued that Minnesota's adjudication of Coleman's election challenge violated Article I, Section 5.[74] Leaning heavily on *Roudebush*, the state supreme court disagreed, even after acknowledging that the effect of the state's election contest was to delay the issuance of an election certificate and that, under the Senate's longstanding rules, an election

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

[69] *Id*. (quoting Article 9.01 of the Texas Election Code).

[70] *Id*. at 3.

[71] *Id*. at 4.

[72] *Id*. at 4-5.

[73] *See, e.g*., Britt v. Board of Canvassers of Buncombe County, 90 S.E. 1005 (N.C. 1916); Smith v. Polk, 19 N.E.2d 281 (Ohio 1939); Sutherland v. Miller, 91 S.E. 993 (W.Va. 1917); In the Matter of the Executive Communication of the 28th [of] January, 12 Fla. 686 (1869); Odegard v. Olson, 119 N.w.2d 717(Minn. 1963), Williams v. Maas, 270 N.W. 586 (Minn. 1936).

[74] Franken v. Pawlenty, 762 N.W.2d 558 (Minn. 2009).

certificate is necessary to seat a Senator.[75] Suggesting that the Senate could change its rules to allow the seating of a Senator without a state-issued certificate of election, the court concluded that "application of the contest tolling provision in Minn.Stat. § 204C.40, subd. 2, to an election for the United States Senate does not usurp the Senate's power and does not conflict with federal law, either statutory or constitutional."[76] Other states have reached decisions aligned with Minnesota's.[77]

B. State Legislation Reflecting Constitutional Judgments.

State courts are not the only entities responding to the Article I, Section 5 mandate. Rather, state legislatures across the country have enacted regimes for congressional election contests that reflect (or at least appear to reflect) the Article I, Section 5 command. In Kansas, for example, a statute permits "[a]ny 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."[78] Kansas's regime for resolving disputed elections, in other words, expressly excludes congressional elections.

While Kansas is far from alone in this approach,[79] it is in the minority. Rather, most state regimes for election contests do not distinguish between congressional elections and other elections. (More precisely, most state regimes treat congressional elections like most other elections, rather than

[75] Id. at 570.

[76] Id. Ironically, this conclusion is in serious tension with two Minnesota cases, *Odegard v. Olson*, 119 N.W.2d 717 (Minn. 1963), and *Williams v. Maas*, 270 N.W. 586 (Minn. 1936), despite the Minnesota court's attempt to distinguish them.

[77] In an old case out of Wisconsin, for example, the court concluded that while, in light of Article I, Section 5, it could not "go behind the returns and investigate and correct frauds and mistakes, and adjudge which of the candidates was elected," it nevertheless could address a narrower issue: "whether the board of state canvassers ought to include in its canvass and statement of the votes cast for representative in congress those returned from [a particular state] county." McDill v. Board of State Canvassers, 36 Wis. 498, 1874 WL 6333 (Wis. 1874). Other courts have reached similar results in response to similar constitutional mandates in the context of state legislative races. *See, e.g.*, Lamb v. Hammond, 308 Md. 286 (1987) (Court's role in making certain that board of canvassers follow the legislature's statutory directions as to how to collect and count votes for seat in state legislature was separate from legislature's ultimate power to judge the elections and qualifications of its members; and issue presented was fully justiciable).

[78] K.S.A. 25-1435.

[79] *See, e.g.*, Ohio [citation].

creating a special regime for congressional elections. These regimes often do create special legal regimes for other elections, such as for state governor or state legislative office.[80]) In California, for example, the Election Code sets forth procedures for initiating an election contest, which may be brought in the superior court of any county in the relevant district.[81] This statutory regime does not distinguish between congressional elections and most other types of elections.

At the same time, California's regime does expressly exclude contests over *state* legislative elections.[82] This carve-out – that is, for elections for state legislative positions – is common in state regimes that otherwise do not distinguish between congressional election contests and other contests. Ironically, these carve-outs often appear to reflect state constitutional provisions analogous to that set forth in Article I, Section 5 – i.e., that require each state legislative house to "judge the . . . elections" of its members.[83] In other words, these regimes treat federal legislative elections like most other elections, even while setting forth special regimes for *state* legislative elections in light of state constitutional commands.

Taken as a whole, the state statutory regimes can be broken down into three categories relevant to the Article I, Section 5 mandate. In the first category, the statutes prohibit congressional election contests. An example is Kansas's regime, which expressly excludes congressional elections. This category also includes statutory regimes, like Alabama's,[84] that exclude congressional election contests by implication.[85] This first

[80] *See, e.g.*, [citation].

[81] Cal. Elec. Code § 16400; *see also* Joshua A. Douglas, *(Mis)Trusting States To Run Elections*, 92 WASH. U. L. REV. __ (forthcoming 2015) (appendix).

[82] Cal. Elec. Code § 16200 ("This chapter shall not apply to elections for the office of state Senator or Member of the Assembly of the California Legislature."); *see also* Joshua A. Douglas, *(Mis)Trusting States To Run Elections*, 92 WASH. U. L. REV. __ (forthcoming 2015) (appendix).

[83] *See, e.g.*, Cal. Const. Art. 4, § 5(a) ("Each house shall judge the qualifications and elections of its Members and, by rollcall vote entered in the journal, two thirds of the membership concurring, may expel a Member.").

[84] [citation]

[85] In Alabama, for example, the Constitution and statutory code set forth provisions addressing election contests for a number of offices – more specifically,"[t]he election of any person declared elected to the office of Governor, Secretary of State, Auditor, Treasurer, Attorney General, Commissioner of Agriculture and Industries, Public Service Commissioner, senator or representative in the Legislature, justices of the Supreme Court, judges of the courts of appeals, judge of the circuit court

approach is consistent with a determination by legislators that Article I, Section 5 prohibits states from adjudicating congressional election contests. (Although it is correct to call this regime "consistent" with such a legislative determination, such a determination did not necessarily motivate the choice of statutory regime, a caveat that applies to each of the three categories discussed in this paragraph.) In the second category, the states do permit congressional election contests, but the regimes require a different set of procedures or substantive standards with respect to this sort of election contest than they do with respect to most other election contests. An example of a regime falling into this second category can be found in Minnesota, which provides the following, special regime for congressional election contests:

> 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.[86]

or district court, or any office which is filled by the vote of a single county, or to the office of constable," Ala. Code § 17-16-40 – but does not include congressional elections.

[86] Minn. St. § 209.12. The provision continues: "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."

This approach is consistent with a determination by legislators that while Article I, Section 5 permits state adjudication of congressional election contests, it does not permit such adjudication to proceed in the same manner as it does in other election contests. In the third category, the state statutory regime makes no distinction between congressional election contests and most other sorts of election contests. An example is California's regime. This approach is consistent with a legislative determination that Article I, Section 5 poses no relevant bar on a state adjudication of congressional election contests. The table below identifies where each state's regime falls. It includes 51 entries, as Arkansas treats election contests for Senate differently than it does election contests for the House of Representatives and therefore is included twice.

Table 1: State Statutory Regimes
Organized by Treatment of Congressional Election Contests

A: Jurisdictions Without State Court Adjudication of Congressional Election Contests. *Total jurisdictions: 11*		
	Alabama	
	Arizona	
	Illinois	
	Kansas	
	Kentucky	
	Ohio	
	Nebraska	
	Nevada	
	Texas	
	Virginia (but permits contests over Senate primary elections)	
	West Virginia	
B: Jurisdictions With State Court Adjudication of Congressional Election Contests, Subject to Special Treatment. *Total jurisdictions: 6*		
	Arkansas (for Senate)	
	Connecticut	
	Iowa	
	Minnesota	
	New Hampshire	
	Pennsylvania	
C: Jurisdictions With State Court Adjudication of Congressional Election Contests, Subject to No Special Treatment. *Total jurisdictions: 34*		
	Alaska	Montana
	Arkansas (for House)	New Jersey
	California	New Mexico
	Colorado	New York
	Delaware	North Carolina
	Florida	North Dakota
	Georgia	Oklahoma
	Hawaii	Oregon
	Idaho	Rhode Island
	Indiana	South Carolina
	Louisiana	South Dakota
	Maine	Tennessee
	Maryland	Utah
	Massachusetts	Vermont
	Michigan	Washington
	Mississippi	Wisconsin
	Missouri	Wyoming

As this table indicates, there is very little consistency across jurisdictions regarding how or whether a state will adjudicate congressional election contests. To the extent that a federal constitutional mandate – Article I, Section 5 – is motivating this disparate treatment, such a result is problematic. There is no uniformity across the country, and no branch of the federal government has resolved the conflict.[87]

Even if these different regimes do not reflect legislative interpretations of the Article I, Section 5 mandate (a conclusion that seems unlikely, at least with respect to a jurisdiction such as Minnesota or Kansas, but is nevertheless a possibility), concerns remain. Unless Article I, Section 5 truly poses no bar on state adjudication of congressional election contests, then the jurisdictions permitting these contests to proceed like any other – which constitute the majority of jurisdictions – likely have set in place legal regimes that run afoul of constitutional law. Moreover, this regime strikes a curious balance in terms of federalism. As discussed in more detail below, it is a regime in which state law, rather than federal law, determines the involvement of courts in this quintessentially federal issue.

IV. EACH STATE NOW DETERMINES THE INVOLVEMENT OF COURTS IN CONGRESSIONAL ELECTIONS CONTESTS.

Despite the concerns such an arrangement raises, the states have, in effect, set the line imposed by Article I, section 5. Stated otherwise, it is each state – and not the federal government – that determines the extent to which courts adjudicate congressional election contests. This arrangement is unlikely to change either easily or incrementally. To the contrary, a set of judicially developed federal doctrines ensures these regimes will continue to operate largely without federal oversight. Nor is it without consequence. Rather, this arrangement continues notwithstanding the demonstrated potential these regimes have to interfere with each House's ability to judge the elections of its own members.

A. The State Regimes Operate Largely Without Federal Oversight.

There is little federal oversight of state-based regimes for adjudicating congressional election contests. In part, this is due to the failure of federal actors – such as either House of Congress – to act to clarify the constitutional line. In part, however, it is because the federal courts have developed doctrines rendering so many of the implicated disputes

[87] Of similar concern, there is no way for federal courts to review some of these constitutional judgments. If a state legislature were to conclude, for example, that federal law required a prohibition on congressional election contests – and a federal court were to disagree – it is not clear how that determination ever could be reviewed. This lack of federal oversight is discussed in more detail below.

nonjusticiable in the federal courts. As a result of these doctrines, there are at least three circumstances in which the state regimes for the adjudication of congressional election contests will escape federal court review.

First, if a state legislature alters its statutory regime based on its legal determination that Article I, Section 5 prohibits a regime it otherwise would have put in place – for example, if a state legislature prohibits congressional election contests due to its conclusion that Section 5 requires that result – the federal courts lack jurisdiction to hear any challenge to this determination. In light of the inability of a federal court to grant relief (among other problems), no litigant would have Article III standing to challenge it. This is true even if the legislature's determination were incorrect as a matter of federal law.

Second, under the theory of justiciability set forth in the McCloskey cases, a federal court lacks jurisdiction to adjudicate election-related contests once the House has made its "unconditional and final judgment.'"[88] Because the state courts are not necessarily subject to the same justiciability doctrines, however, the case may proceed in the state courts on remand.[89] The *McIntyre* opinion – which, admittedly, is not a model of clarity – does not make clear how far this ruling of nonjusticiability extends.[90] But the case, as written, at least arguably supports the argument that, once a member has been seated, the federal courts are barred from reviewing *any* election-related challenge, even if the litigant merely is challenging a separate state-court proceeding as itself violative of Article I, Section 5. In other words, the logic of *McIntyre* arguably could be extended to support the conclusion that once Congress has seated a member, federal courts simply cannot review the propriety of state-court proceedings relating to that same member's election.

Moreover, despite the *McIntyre* court's attempt to draw the justiciability line at the time that the House seated its member – that is, to insist that its ruling of nonjusticiability arose only after the House seated McCloskey – this line-drawing is in tension with the court's own reasoning. The *McIntyre* court concluded that no "case or controversy" existed because the federal court could not "determine the outcome of [the] dispute" before it,[91] and it defined that outcome as Congress's ultimate decision regarding whom to seat.[92] Yet a federal court *never* has

[88] *McIntyre*, 766 F.2d at 1081.

[89] As the court in *McIntyre* stated, "[t]hat the case is defunct for purposes of relief in federal courts does not mean that we should prohibit Indiana from adjudicating any issues that remain live under state law theory." *Id*. at 1083.

[90] *See supra*.

[91] [citation]

[92] [citation]. *See also id*. at 1081 (referring to the "resolution of the dispute about who is entitled to the seat").

the ability to dictate whom the House should seat. The *McIntyre* court itself acknowledged as much. Indeed, in addressing a related issue (whether federal law controlled the controversy before it), the court rejected the idea that the House's final determination could have made a difference to its analysis. It explained:

> The last question is whether this particular election should be treated differently because the House decided to count the ballots itself. We think not. The decision of the House certainly meant that the state would not have the final say, but then the state *never* has the final say. Whether or not the House conducts its own count, the state's count and the certificate of election are just advice from the state to Congress. The final decision always is that of the House, no matter who counts the ballots and no matter how many times they are tallied.[93]

Under this logic, it is difficult to understand why the court's justiciability analysis should depend on what steps the House already has taken. Even if the House had not acted, the federal court would have no ability to dictate which candidate would be seated. As such, *McIntyre*'s approach to justiciability arguably would have precluded review even in a separate set of cases – cases like *Roudebush*, in which the House of Congress had not yet unconditionally seated a member.

In short, the McCloskey cases take such a parsimonious view of federal-court review of congressional election contests that they support, at least indirectly, the conclusion that a state's adjudication of congressional election contests can *never* be reviewed by the federal courts.

A third circumstance in which the federal courts lack the ability to review state-court proceedings occurs when no litigant is willing to bring the case. This observation reflects a practical reality: that, for any number of reasons, a litigant may not be willing or able to mount a challenge in the federal courts. Particularly in light of the political considerations dominating the decisions of these aspiring Members of Congress – including their awareness that a federal court challenge ultimately may undermine the legitimacy of the election in which they just participated – some may choose never to bring a suit in federal court. Without a litigant, the federal courts lack jurisdiction to hear the case. As a result, the state's election-related proceedings remain unimpeded by federal court review,[94]

[93] [citation]

[94] It also warrants mention that even if a litigant is somehow able to secure federal-court review of state-court proceedings, that review very well might come after the state-court proceedings have prejudiced the

which is part of the broader pattern of these state regimes operating without federal oversight.

B. Historical Practice Has Confirmed the Potential for These State Regimes To Interfere with Congressional Judging.

It is true that, pursuant to Article I, Section 5, each House ultimately has the final say with respect to which members to seat. There nevertheless is the potential for the state-based adjudication of congressional election contests to interfere with the proceedings of either House. Indeed, it arguably has already occurred.

At the outset, state court proceedings can produce harmful delay. It can, for example, interfere with the issuance of an election certificate, which in turn can delay the seating of a Member of Congress. This occurred recently in the Franken-Coleman litigation discussed above, which resulted in now-Senator Franken receiving his election certificate nearly six months after his term of office had started. For nearly half a year, in other words, the Senate was unable, under its own precedents, to seat the second senator from Minnesota. Particularly in light of the politics unfolding during that time (including the attempted passage of comprehensive health care reform – which eventually was enacted, under rushed conditions and dependent on Senator Franken's vote – as the Affordable Care Act), it seems likely that this delay significantly affected legislation that might otherwise have been enacted. While the Senate theoretically could have changed its own rules to seat Senator Franken, it did not do so.

In addition to causing delay, state court proceedings have the potential to undermine the legitimacy of adjudicatory proceedings in either House of Congress. A vivid illustration of this concern emerged, for example, after the seating of Representative McCloskey, who had been subject to multiple lines of litigation in the state and federal courts. After the House had determined McCloskey to be the winner of the election – notwithstanding ongoing state proceedings that seemingly were headed in McIntyre's favor – a substantial minority of Members of Congress walked out of the chambers as a symbolic protest. A further illustration of the potential prejudice occurs when a candidate files simultaneous challenges in a House of Congress and a state court. The historical record is filled with examples of candidates losing their challenge in state court – and then simply dropping out of the congressional forum.

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election proceedings or the ability of Congress to govern. This concern is particularly acute in the context of House races, where the terms are so short that significant proceedings at the state-court level can have profound effects, both in terms of interference with a challenger's actual term of office and the prejudice associated with that challenger in a subsequent election.

The court in *McIntyre* recognized these sorts of concerns over legitimacy, describing as "unsettling" the "prospect of one person sitting in Congress while the other seeks an advisory declaration in state courts that he 'really' won."[95] Indeed, the court went so far as to cite such concerns as a reason for concluding that federal courts lacked the ability to hear the case.[96] Yet instead of extending that logic to the state courts, the court seemed almost to invite such inference from the state judicial system. It explained:

> [The state courts] may think it appropriate to complete the recount to facilitate a comparison of the results under purely state rules with the results the House obtained by applying federal rules. This comparison would be of historical interest only; the House has decided this election once and for all. But such comparisons ultimately may lead to changes in the rules of either Indiana or the House.[97]

Another potential point of interference relates to evidence. More specifically, state proceedings could compromise evidence that might be necessary for adjudicatory work in either House of Congress. While the precedent set by a case like *Roudebush* purports to recognize this sort of concern – thereby providing litigants with support for challenges to state-court proceedings based on this evidentiary threat – even this principle has been called into some question by the parsimonious view of the role of the federal courts taken in post-*Roudebush* cases.[98]

Finally, it must be acknowledged that the hands-off approach taken by the federal courts, coupled with the varying levels of involvement adopted by the state courts, produces an unsettling result: that a state court is able to adjudicate substantive issues relating to congressional elections with no opportunity for meaningful federal court review. *McIntyre* made clear that this result may arise whenever a state decides, notwithstanding the

[95] [citation]
[96] [citation]
[97] [citation]
[98] *See*, *e.g.*, *McIntyre* [citation] ("This does not mean that the state may interfere with the House's recount. It may not. Because the House is the judge of its own elections, it must have preferential access to the ballots. In the event of any conflict about who is to count which ballots and when, the House prevails. If a continuing state recount should endanger the security of the ballots, the state must desist until the House is done. But there was no conflict over access here. The cases were removed before the House began its count, and if Indiana wants to continue its recount it may do so now without creating multifarious claims of access."); *see also Franken* [citation].

issuance of a decision by either House of Congress, to continue its adjudicatory proceedings.

In sum, the quintessentially federal interests implicated by Article I, Section 5 are being protected not by the federal government, but rather by the states, all with little federal oversight. The result is an uncertain and inconsistent legal regime that inadequately protects the proceedings each House must conduct to judge the elections of its own members.

V. THE JUDGING OF CONGRESSIONAL ELECTION CONTESTS REFLECTS A FEDERALISM IMBALANCE THAT IS CONSISTENT WITH BROADER TRENDS IN ELECTION LAW.

Taken in sum, the legal regimes governing the adjudication of congressional election contests represent a misbalanced sort of federalism. Rather than set a uniform rule, Congress and the federal courts have remained largely silent, and this reticence has permitted each state to decide the extent to which courts judge congressional elections. As a result, the regimes for congressional election contests vary drastically by state and, particularly in light of examples such as that affecting the seating of Senator Franken, it is not at all clear that this patchwork regime is adequately protecting the federal interest.

This imbalance is characteristic of a larger trend in election law. Indeed, a critical theme beginning to emerge in the area, as scholars recently have identified examples of a similar federalism imbalance affecting other aspects of federal elections. Recently, for example, Joshua Douglas has argued as follows:

> Current Supreme Court doctrine defers too readily to states' voting systems. In the process, the Court has removed Congress from the elections business. The Court has done so not explicitly but through two judicial maneuvers, one substantive and the other procedural, that place tremendous trust in states: lowering the bar for the state interest prong of the constitutional analysis, and forbidding facial challenges to state rules on election administration.[99]

Franita Tolson provides further support for the conclusion that a federalism imbalance characterizes this area of the law:

> [T]he theories of federalism employed by the Court and the commentary do little to explain the allocation of power between the states and the federal government over

[99] Joshua A. Douglas, *(Mis)Trusting States To Run Elections*, 92 WASH. U. L. REV. __ (forthcoming 2015).

> elections. As the historical record shows, the Founders did not intend that the structure of the Elections Clause be federalist; rather, it is best viewed as having a decentralized organizational structure that prioritizes federal law.[100]

This Article has identified and explored a third area where the federalism balance is askew: that emanating from the law governing the adjudication of congressional election contests. As such, it helps to identify a broader pattern of the federal government – and particularly the federal courts – according too much deference to states in their administration of federal elections.

In context of congressional election contests, a normatively preferable regime would begin by tasking federal actors with the difficult work of interpreting and enforcing Article I, Section 5. Federal law, rather than state law, should dictate the involvement of the courts in judging congressional elections. Ideally, Congress would take the initiative and enact legislation, or at least issue guidance emanating from each House, making clear their understanding of the Article I, Section 5 line. The federal courts could then police this line. In the absence of congressional clarification, the federal courts should expand their review of these state processes, rather than retreat from them (as they did in the McCloskey cases). To the extent this requires a reconsideration of the justiciability doctrines, the federal interest implicated in this area warrants such reexamination.

CONCLUSION

The Constitution requires that each House of Congress judge the elections and returns of its own members. Yet across the country, states have adopted different regimes for judging congressional election contests, and these regimes are rarely if ever subject to federal review. The result is an inconsistent, state-based regime for judging congressional election contests. This area of constitutional law implicates quintessentially federal interests, and the current arrangement reflects an imbalance in federalism. This imbalance, which is consistent with broader trends in election law, warrants correction.

[100] Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act,* 65 VANDERBILT L. REV. 1195 (2012).