

# NOTES

## THE RESOLUTION OF CONTESTED ELECTIONS IN THE U.S. HOUSE OF REPRESENTATIVES: WHY STATE COURTS SHOULD NOT HELP WITH THE HOUSE WORK

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*The resolution of federal congressional election contests implicates a tension between states' Article I, Section 4 power to conduct elections for federal office and Congress's Article I, Section 5 power to decide the elections of its members. The seminal Supreme Court decision on this issue, Roudebush v. Hartke, held that state courts may order administrative recounts in congressional elections because these decisions require state courts only to engage in "nonjudicial functions" and do not impinge on Congress's ability to make independent and final decisions in these contests. The Roudebush decision has, in some cases, been interpreted expansively, permitting electoral losers to seek substantive post-election remedies (such as new elections) simultaneously in state courts and in Congress. This "Congress-and-courts" approach to deciding congressional election contests is problematic in light of constitutional considerations, federalism concerns, and the values underlying election contest resolution. This Note argues that the Roudebush decision instead should be interpreted narrowly and, therefore, that all congressional election contests should be resolved by Congress exclusively.*

### INTRODUCTION

The 2006 election for the United States House of Representatives in Florida's 13th Congressional District was finally decided on February 14, 2008.<sup>1</sup> Back on November 20, 2006, the Elections

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<sup>1</sup> While Republican candidate Vern Buchanan was conditionally seated by the House on January 4, 2007, the Speaker of the House noted that Buchanan's seating was "entirely without prejudice to the contest over the final right to that seat that is pending . . ." 153 CONG. REC. H5 (daily ed. Jan. 4, 2007) (statement of Speaker Pelosi). More than a year later, the bipartisan task force appointed by the Committee on House Administration to

Canvassing Commission of the State of Florida certified Republican Vern Buchanan as the winner of the election after he received 369 more votes than his Democratic opponent, Christine Jennings.<sup>2</sup> However, Jennings contended that this certification was invalid because the vote count on which it was based failed to include “thousands of legal votes . . . cast in Sarasota County but not counted due to the pervasive malfunctioning of electronic voting machines.”<sup>3</sup> Jennings alleged that the number of uncounted votes exceeded the margin of victory, and therefore called the result of the election into question.<sup>4</sup>

During this election, Sarasota County experienced an abnormally high undervote rate for the congressional race.<sup>5</sup> The term “undervote” is used to describe a situation where a voter’s ballot indicates votes for other candidates or ballot measures, but does not register a vote for any candidate for a particular office.<sup>6</sup> Statistical analysis of the Florida vote suggested that the electronic voting machines used in Sarasota County may have malfunctioned, failing to record voters’ selection of Jennings as their preferred candidate for Congress and causing the high undervote rate.<sup>7</sup> Because the high

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investigate the election finally voted to dismiss Christine Jennings’s election contest. H.R. REP. NO. 110-528, pt. 1, at 6 (2008) (Conf. Rep.); Press Release, Comm. on House Admin., Task Force Dismisses Contest of 2006 Election (Feb. 8, 2008), *available at* [http://cha.house.gov/view\\_press\\_release.aspx?r=20080208130233](http://cha.house.gov/view_press_release.aspx?r=20080208130233) [hereinafter Task Force Dismissal]. The House formally dismissed the election contest on February 14, 2008. H.R. RES. 989, 110th Cong. (2008).

<sup>2</sup> First Amended Complaint to Contest Election at 1, *Jennings v. Elections Canvassing Comm’n*, No. 2006-CA-2973 (Fla. Cir. Ct. Nov. 30, 2006), 2006 WL 5518562 [hereinafter *Jennings Complaint*].

<sup>3</sup> *Id.* at 1–2.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> While the undervote rate for the congressional race in Sarasota County was 14.9%, the rates in the 13th District’s other counties were much lower: 2.5% in Charlotte County, 2.2% in DeSoto County, 5.3% in Hardee County, and 2.4% in Manatee County. *Id.* at 8. Additionally, the undervote rate in the congressional race was much higher than that in other high-profile races in Sarasota County, such as those for Governor (1.28%) and U.S. Senator (1.14%). *Id.* Furthermore, within the congressional race in Sarasota County, there were large discrepancies in the undervote rates of early and election-day voting and absentee voting (17.6% for early voting and 13.9% for election-day voting, but only 2.53% for absentee voting). *Id.* at 7–8. These differences are significant since both early and election-day votes were cast on electronic machines, while absentee votes were cast on paper ballots. Declaration of Charles Stewart III on Excess Undervotes Cast in Sarasota County, Florida for the 13th Congressional District Race at 8, *Jennings v. Elections Canvassing Comm’n*, No. 2006-CA-2973 (Fla. Cir. Ct. Nov. 20, 2006), 2006 WL 5508638 [hereinafter *Stewart Declaration*]. Finally, the undervote rate in Sarasota County in the 2006 congressional contest is much higher than the undervote rate in Sarasota County in the 2002 congressional race (2.2%). *Jennings Complaint*, *supra* note 2, at 8–9.

<sup>6</sup> *Jennings Complaint*, *supra* note 2, at 7. See FLA. STAT. § 97.021(37) (2007) (defining “undervote”).

<sup>7</sup> *Jennings Complaint*, *supra* note 2, at 9. Others have suggested that the high undervote rate was the result of poor ballot design and screen layout rather than of

undervote rate appeared to be correlated with the county's use of particular electronic voting machines<sup>8</sup>—and did not appear to be the result of voters' lack of interest or disgust with both candidates<sup>9</sup>—and because Jennings was the favored candidate in the county,<sup>10</sup> Jennings challenged the election results. She claimed that but for the use of these electronic machines she would have prevailed in Sarasota County by a large enough margin to change the outcome of the district-wide race.<sup>11</sup>

With the results allegedly turning on such an unusual dropoff in votes, Jennings sought remedies that could grant her the election victory she believed she deserved.<sup>12</sup> She filed complaints in Florida state court, pursuant to Article I, Section 4 of the U.S. Constitution and state law,<sup>13</sup> and in the U.S. House of Representatives, pursuant to Article I, Section 5 of the U.S. Constitution and the Federal Contested Elections Act (FCEA).<sup>14</sup> Both complaints challenged the outcome of the election and sought relief from either forum in the form of a new election or a declaration that Jennings was the rightful winner.<sup>15</sup> Jennings's decision to seek resolution in the House of Representatives raises questions about the House's power to decide congressional elections. Article I, Section 5 of the U.S. Constitution grants each house of Congress the power to be the "Judge of the Elections,

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machine malfunction. Steven F. Heufner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 296 (2007).

<sup>8</sup> Stewart Declaration, *supra* note 5, at 8–9.

<sup>9</sup> *Id.* at 9–10 (rejecting possibility that undervote rate could be caused by voter revulsion as anomalous undervote rates were confined to single county).

<sup>10</sup> *Id.* at 2–3.

<sup>11</sup> *Id.*; Jennings Complaint, *supra* note 2, at 3. See also H.R. REP. NO. 110-528, pt. 1, at 6–7 (2008) (Conf. Rep.), for a discussion of Jennings's "basis of contest," including a review of the allegations identified in her Notice of Contest and of the supporting Stewart Declaration.

<sup>12</sup> It is important to mention that this Note does not assess the desirability of different types of post-election remedies. Instead, it seeks to determine the most suitable institutional system for resolving federal congressional election contests.

<sup>13</sup> 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 . . ."); FLA. STAT. § 102.168(1) (2007) (providing that "the certification of election or nomination of any person to office . . . may be contested in the circuit court by any unsuccessful candidate for such office").

<sup>14</sup> U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ."); 2 U.S.C. §§ 381–396 (2006) (outlining procedure for House resolution of election disputes).

<sup>15</sup> Jennings Complaint, *supra* note 2, at 23; Notice of Contest Regarding the Election for Representative in the 110th Congress from Florida's 13th Congressional District at 29, *Jennings v. Buchanan* (U.S. House of Representatives Dec. 20, 2006), *reprinted in* H.R. REP. NO. 110-528, pt. 1, app. F, at 1625 [hereinafter Jennings Notice of Contest].

Returns and Qualifications of its own Members.”<sup>16</sup> Pursuant to this power, the House of Representatives<sup>17</sup> routinely investigates and resolves contested congressional elections according to House precedent and the procedures contained in the FCEA.<sup>18</sup> Upon receipt of Jennings’s complaint, the House referred her contest to the Committee on House Administration, which then appointed a bipartisan task force to oversee the investigation.<sup>19</sup> The task force, in turn, delegated responsibility for investigation of the voting machines to the independent and nonpartisan Government Accountability Office (GAO).<sup>20</sup> Despite this process, the obvious risk of partisan decision-making in the resolution of such election disputes may be disconcerting. This concern is addressed at length in Part III of this Note, in which I conclude that exclusive congressional resolution is nevertheless quite desirable.<sup>21</sup>

Congress’s constitutional power to decide its contested elections is in tension with the states’ Article I, Section 4 power to conduct elections, including elections for federal office. This tension makes it difficult to discern where state authority over congressional elections ends and where Congress’s power begins. In *Roudebush v. Hartke*,<sup>22</sup> the seminal Supreme Court case on this issue, the Court found that a

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<sup>16</sup> U.S. CONST. art. I, § 5, cl. 1.

<sup>17</sup> While many of the arguments made in this Note would apply directly to contested elections in the Senate, I have chosen to limit the scope of my Note to the House of Representatives, to which the Federal Contested Elections Act (FCEA) applies. For a discussion of the FCEA, see *infra* notes 94–103 and accompanying text. The Senate has adopted no comparable legislation.

<sup>18</sup> See *infra* notes 104–15 and accompanying text for a full discussion of the House process for resolving election disputes.

<sup>19</sup> H.R. REP. NO. 110-528, pt. 1, at 4 (2008) (Conf. Rep.); Aaron Blake, *House Forms Task Force on Florida’s 13th District*, HILL, Mar. 19, 2007, available at <http://thehill.com/campaign-2008/house-forms-task-force-on-floridas-13th-district-2007-03-19.html>.

<sup>20</sup> H.R. REP. NO. 110-528, pt. 1, at 4–5; see also Press Release, Comm. on House Admin., Task Force Unanimously Agrees on Procedure to Investigate Disputed Congressional Race in FL-13 (May 2, 2007), available at [http://cha.house.gov/view\\_press\\_release.aspx?r=20070502232027](http://cha.house.gov/view_press_release.aspx?r=20070502232027) (announcing unanimous decision of task force to proceed with investigation and utilize assistance of Government Accountability Office) [hereinafter Task Force Announcement]. During its investigation, the Government Accountability Office (GAO) provided an update of its findings to the task force. *GAO Briefing on the Status of the Investigation into the FL-13 Congressional District Election: Meeting Before the Comm. on H. Admin. Task Force for the Contested Election in the 13th Cong. Dist. of Florida*, 110th Cong. 9 (2007) (statement of Dr. Nabajyoti Barkakati, Senior-Level Technologist, Applied Research and Methods, U.S. Gov’t Accountability Office), available at <http://www.gao.gov/new.items/d0897t.pdf>. Once the GAO investigation was complete, the task force voted to dismiss Jennings’s election contest. H.R. REP. NO. 110-528, pt. 1, at 6; Task Force Dismissal, *supra* note 1. The House’s dismissal of the contest became final soon thereafter. H.R. Res. 989, 110th Cong. (2008).

<sup>21</sup> See *infra* Part III.C.3 for a discussion of partisanship and politicization concerns.

<sup>22</sup> 405 U.S. 15 (1972).

state court–ordered recount did not impinge on Congress’s Article I, Section 5 powers because the state court remedy at issue was determined to be administrative rather than judicial in nature. It could “be said to ‘usurp’ [Congress’s] function only if it frustrate[d] [Congress’s] ability to make an independent final judgment.”<sup>23</sup>

Because *Roudebush* is open to various interpretations,<sup>24</sup> it has motivated congressional contestant-candidates,<sup>25</sup> like Christine Jennings, to seek substantive post-election remedies simultaneously in state court and in the House. Jennings’s decision to seek remedies in two forums raises interesting and largely unexplored questions about the proper method for resolving these disputes. It took nearly a year for Jennings’s state court case to reach completion;<sup>26</sup> meanwhile, Congress’s investigation of her claim remained ongoing for more than a year after she filed her complaint.<sup>27</sup> Because a congressional term lasts only two years and because Jennings’s case was stuck in a long, double legal process, more than half of the term of office was over before any resolution occurred.

This Note evaluates the current approach for resolving contested congressional elections, which permits both state courts and Congress to hear contests seeking substantive post-election relief<sup>28</sup> so long as Congress has final say. It then argues that the Court’s decision in *Roudebush* is best understood in the narrowest of its current interpretations: that state court–ordered recounts are permissible in federal congressional elections only because the decisions to grant them are administrative in nature. The Note advocates for exclusive congress-

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<sup>23</sup> *Id.* at 25.

<sup>24</sup> See *infra* Part II.B (outlining interpretations).

<sup>25</sup> Throughout this Note, I use the term “contestant-candidate” to refer to the candidate who has lost the election and who legally contests its results. I use the term “contestee-candidate” to refer to the candidate who won the election and who is the “respondent” in the election contest.

<sup>26</sup> The last judicial decision rendered by the trial court was the denial of Jennings’s motion to compel discovery in June 2007. See *Jennings v. Elections Canvassing Comm’n*, 958 So. 2d 1083, 1084 (Fla. Dist. Ct. App. 2007) (denying Jennings’s petition for certiorari of trial court’s order denying motions to compel discovery). In November 2007—almost one year after she had filed her complaint—Jennings announced her decision to voluntarily dismiss the Florida litigation. Press Release, Christine Jennings for Cong., Jennings Statement on Ending Florida Litigation (Nov. 28, 2007), available at <http://www.christinejenningsforcongress.com/node/18>. See also H.R. REP. NO. 110-528, pt. 1, at 3 (2008) (Conf. Rep.) for a discussion of the Florida state court proceedings in Jennings’s case.

<sup>27</sup> See H.R. REP. NO. 110-528, pt. 1, at 4–6 (noting that Jennings filed her Notice of Contest on December 20, 2006 and that investigation of her claim concluded on February 8, 2008).

<sup>28</sup> See *infra* Part II.A for a discussion of the difference between procedural and substantive post-election remedies.

sional jurisdiction over all election contests seeking more than administrative recounts, because these contests involve substantive claims that require decisionmakers to engage directly with election results and make difficult policy decisions.

Part I explains the possible alternative systems for resolving congressional election contests and introduces values by which these various systems can be evaluated. Part II discusses the *Roudebush* decision and explores the problematic nature of some interpretations thereof. Part III argues, in light of constitutional and federalism considerations and the electoral values introduced in Part I, that *Roudebush* should be interpreted narrowly so that all substantive remedial decisions in congressional election contests are made by the House alone.

## I

### THE CHOICE BETWEEN CONGRESS-ALONE AND CONGRESS-AND-COURTS

There are two potential options for the resolution of congressional election contests: resolution exclusively by Congress, or resolution both by state courts and by Congress, with Congress always retaining final decisionmaking authority. Both options are rooted in constitutional text, namely in Article I, Sections 4 and 5.

#### A. *Constitutional Powers in Tension: Article I, Sections 4 and 5*

The Elections and Qualifications Clause of the U.S. Constitution provides that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .”<sup>29</sup> In this way, the constitutional text contemplates an adjudicative role for Congress in the event that an election of one of its members must be decided in a forum outside of the election itself. At first it may seem odd that the Framers entrusted Congress with the power to make determinations of its own membership. While the Framers may not have expected the intensely partisan nature of today’s Congress when allocating this power, they must have known that members of Congress would inevitably be self-interested when deciding election disputes.<sup>30</sup> Nevertheless, they decided to entrust these decisions to Congress itself. On its

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<sup>29</sup> U.S. CONST. art. I, § 5, cl. 1.

<sup>30</sup> Cf. Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1129 (1999) (“The Framers of the Constitution appreciated that . . . Members of Congress would be political actors, motivated at times by partisanship, personal self-interest, and institutional concerns . . .”).

face, Article I, Section 5 contemplates no role for the state courts and expects Congress to be a competent arbiter.

The Supreme Court has noted, in reference to Article I, Section 5, that each house of Congress “is fully empowered, and may determine such matters without the aid of the [other house] or the Executive or Judicial Department.”<sup>31</sup> This direct allocation of constitutional power to the houses of Congress presents a “textually demonstrable constitutional commitment of the issue to a coordinate political department,”<sup>32</sup> which would, for federal courts, traditionally have meant that these cases presented nonjusticiable political questions.<sup>33</sup> This would leave Congress with ultimate control over membership disputes.

However, elections for Congress are conducted by the states pursuant to their Article I, Section 4 power to establish the “Times, Places and Manner” of these elections.<sup>34</sup> State laws generally provide, as part of states’ power to conduct elections, that state courts constitute an appropriate forum for post-election litigation in elections for state office and often in elections for federal office.<sup>35</sup> The Supreme Court in *Roudebush v. Hartke* accepted that state courts and Congress may play a dual role, to some extent, in the resolution of these elections so long as the states’ attempts at resolution do not impede Congress’s ability to make a final, independent determination.<sup>36</sup> As such, Congress retains “full, original and unqualified power conferred by the Constitution” to decide the elections of its members.<sup>37</sup>

Despite the role that state courts may play in congressional election disputes, the Elections and Qualifications Clause ensures that

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<sup>31</sup> *Reed v. County Comm’rs*, 277 U.S. 376, 388 (1928).

<sup>32</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>33</sup> *Id.*; see also Heufner, *supra* note 7, at 295 (discussing political questions). The political question doctrine “refers to subject matter that the [Supreme] Court deems to be inappropriate for judicial review” and that instead “should be left to the politically accountable branches of government, the president and Congress.” ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 2.8.1 (2d ed. 2002). While the political question doctrine applies to federal courts, I believe there are important parallels making it worthwhile to bear in mind even in the context of state courts. See *infra* note 81.

<sup>34</sup> U.S. CONST. art. I, § 4, cl. 1. It is important to note that the states’ power to regulate federal elections is subject to the proviso that “Congress may at any time by Law make or alter such Regulations.” *Id.*

<sup>35</sup> Heufner, *supra* note 7, at 270 (“[State election codes] authorize the judicial branch . . . to resolve what otherwise traditionally would have been deemed nonjusticiable political questions.”); see also, e.g., CONN. GEN. STAT. ANN. § 9-323 (West 2002 & Supp. 2008) (permitting losing candidates for federal office to contest elections and seek remedies—including new elections—in state court); FLA. STAT. § 102.168(1) (2007) (providing that any unsuccessful candidate may challenge election results in state circuit courts).

<sup>36</sup> *Roudebush v. Hartke*, 405 U.S. 15, 25–26 (1972).

<sup>37</sup> *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929).

each house of Congress has the power to make final, unappealable decisions.<sup>38</sup> In *Barry v. United States*, the Supreme Court noted that each house of Congress possesses “certain powers, which are not legislative, but judicial in character. . . . [including] the power to judge of the elections, returns and qualifications of its own members.”<sup>39</sup> The Court recognized as incidental to this power the ability to conduct a full investigation, examine witnesses, and apply the relevant facts to law.<sup>40</sup> Ultimately, the Court said that this constitutional allocation of power includes the authority to “render a judgment which is beyond the authority of any other tribunal to review.”<sup>41</sup>

The tension between Sections 4 and 5 of Article I makes it difficult to discern where state courts’ power to decide election contests (as part of state election processes) ends and where Congress’s power to decide the elections of its members begins. Because Congress can never be denied final decisionmaking power in these cases, two potential approaches to resolution of these contests exist. Under the first option, which I call “Congress-and-courts,” Congress and state courts share the power to decide congressional contested elections, such that state courts may hear these cases and decide on particular remedies unless and until Congress has reached its decision. For instance, a state court could order a new election so long as Congress had not already determined that this remedy was inappropriate; Congress could, however, subsequently reject the use of such a remedy. The alternative option—and the one which this Note advocates—vests all adjudicative power in contested congressional elections in Congress itself. This option, which I call “Congress-alone,” therefore preserves the role of state courts only insofar as it is protected by *Roudebush*: State courts may complete the actual administration of an election by ordering a recount. The next Section of this Note proposes several values with which we can evaluate the relative merits of these approaches.

### *B. Identifying Values with Which to Assess the Alternatives*

The Supreme Court’s decision in *Roudebush* sheds light on the appropriateness of the two alternative approaches, but has not been determinative. Thus, to reach a conclusion about which system is preferable, in Part III I will assess these two possibilities—namely,

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<sup>38</sup> *Id.*; *Roudebush*, 405 U.S. at 25–26.

<sup>39</sup> *Barry*, 279 U.S. at 613.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Congress-and-courts and Congress-alone—according to several values that are at stake in all post-election disputes.<sup>42</sup>

In a recent article on post-election remedies, Professor Steven Heufner has identified and provided comprehensive analysis of these post-election dispute resolution values, many of which had only been touched upon by previous authors. Professor Heufner names the values as follows: “fairness and legitimacy,” “voter anonymity,” “accuracy and transparency,” “promptness and finality,” “efficiency and cost,” and “separation of powers” implications.<sup>43</sup> The most relevant of these values, for the purposes of this Note, may be placed into three groups.

### 1. *Legitimacy: Fairness, Accuracy, and Transparency*

The first group of values is captured in the idea of *legitimacy*. Legitimacy flows from notions of *fairness*: Candidates and voters should be treated fairly, and the public should perceive the resolution of election contests—as well as the electoral system as a whole—as just.<sup>44</sup> Another element of legitimacy is *accuracy*. Accuracy reflects the need for the resolution of an election dispute to represent the will of the electorate.<sup>45</sup> Lastly, the value of *transparency* contributes to legitimacy by requiring that the electorate be able to “understand why the election failed” and to see and “accept how it will be fixed.”<sup>46</sup> Notice that legitimacy calls not only for creating a “good” system for resolution but also for creating a system that is publicly perceived as such.

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<sup>42</sup> See Heufner, *supra* note 7, at 288 (listing values). For a comprehensive discussion of these values, see *id.* at 288–96. Professor Steven Heufner and others have used these values to assess the appropriateness of particular election remedies, such as new elections or adjustments to vote totals. See, e.g., *id.* at 288 (introducing “Fundamental Values Underlying the Choice of Appropriate Electoral Remedies”). While this Note assesses different institutional approaches for resolution, not particular types of remedies, the values identified by Heufner and others remain relevant.

<sup>43</sup> *Id.* at 288.

<sup>44</sup> See *id.* at 289–90 (discussing values of fairness and legitimacy). See also Joaquin G. Avila, *The Washington 2004 Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process*, 29 SEATTLE U. L. REV. 313, 315 (2005) (“[T]he continued legitimacy of our form of government rest[s] upon the understanding that the electoral process will accurately reflect the will of the people.”); Sarah E. LeCloux, Comment, *Too Close to Call? Remediating Reasonably Uncertain Ballot Results with New Elections*, 2001 WIS. L. REV. 1541, 1544 (discussing need to avoid risk “that the public will lose faith in the legitimacy of government and fair elections”).

<sup>45</sup> See Heufner, *supra* note 7, at 291–92 (describing value of accuracy); see also LeCloux, *supra* note 44, at 1553–54 (discussing importance of “enacting the will of the electorate”); Tova Andrea Wang, *Competing Values or False Choices: Coming to Consensus on the Election Reform Debate in Washington State and the Country*, 29 SEATTLE U. L. REV. 353, 354 (2005) (discussing importance of “ensuring the count of every vote”).

<sup>46</sup> Heufner, *supra* note 7, at 291–92 (discussing value of transparency).

## 2. *Finality and Efficiency*

The next group of values relates to the costs in time and resources that are imposed by election contests. The value of *finality* represents the need to have election contests resolved promptly so that elected officials may rightfully take office, ideally when their terms begin.<sup>47</sup> Similarly, *efficiency* reflects the desire to reach resolution at the lowest cost possible.<sup>48</sup>

## 3. *Non-Politicization*

The third and final value relevant to this Note is the desire to check or avoid the *politicization* of the institutional actors charged with resolving election contests. Adherence to this value may—counterintuitively in some cases—require courts to refrain altogether from taking action in election disputes to avoid public perceptions that supposedly impartial arbiters are acting on partisan impulses.<sup>49</sup>

To make the case for a limited role for state courts in congressional election disputes, I review the Supreme Court's decision in *Roudebush v. Hartke* in the next Part. I present three possible interpretations of this decision and assess the merits of these interpretations as they relate to the Congress-and-courts and Congress-alone approaches to election contest resolution. I will then return in Part III to a discussion of the values identified by Professor Heufner above and use them to evaluate the appeal of each approach.

## II

### THE PROBLEMATIC AMBIGUITY OF *ROUDEBUSH V. HARTKE*

#### A. *The Supreme Court's Decision in Roudebush v. Hartke*

In 1972, the Supreme Court had the opportunity to define the contours of Congress's power to judge the elections of its members. In *Roudebush v. Hartke*,<sup>50</sup> the Court was to determine whether an Indiana state court could order an administrative recount in a federal senatorial election contest in light of Congress's powers over congressional elections. Recognizing the states' power to prescribe the

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<sup>47</sup> See *id.* at 292–93 (describing value of finality); see also LeCloux, *supra* note 44, at 1550–53 (discussing finality as important policy concern at stake in contested elections); Wang, *supra* note 45, at 354 (noting that “creating finality” is one important value in “election administration decisions”).

<sup>48</sup> See Heufner, *supra* note 7, at 293–94 (describing value of efficiency); Wang, *supra* note 45, at 354 (discussing value of “election efficiency”).

<sup>49</sup> See Heufner, *supra* note 7, at 295–96 (discussing separation of powers and politicization concerns).

<sup>50</sup> 405 U.S. 15 (1972).

“Times, Places and Manner of holding Elections for Senators and Representatives” under Article I, Section 4 of the Constitution, the Supreme Court held that a state court decision to order a recount was merely an administrative act that fit within the states’ power, since that decision implicated only a procedural, “nonjudicial function” of the court.<sup>51</sup> Furthermore, the state court’s decision could “be said to ‘usurp’ [Congress’s] function *only if* it frustrate[d] [Congress’s] ability to make an independent final judgment.”<sup>52</sup> The Court ruled that the recount ordered by the lower court was permissible since the Senate could later “accept or reject the apparent winner in either count” or “conduct its own recount.”<sup>53</sup> The Court also found no evidence that a recount by the state would limit Congress’s power to conduct an “independent evaluation” of the election.<sup>54</sup>

Though it permitted the recount order, the *Roudebush* Court cabined its decision in two ways. First, it explained that state courts may not take any action that would impinge on Congress’s ability to make an independent final judgment.<sup>55</sup> Second, the Court noted that in ordering recounts, state courts take only ministerial action.<sup>56</sup> In other words, courts ordering recounts engage in administrative—rather than judicial—decisionmaking. Lower courts emphasize this second part of the holding to various degrees.<sup>57</sup>

The Court’s distinction in this case between ministerial and judicial decisions highlights the two types of remedies that may be sought in contested elections: procedural and substantive. An important difference between these types of remedies lies in the level of evaluation

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<sup>51</sup> *Id.* at 20–22.

<sup>52</sup> *Id.* at 25 (emphasis added).

<sup>53</sup> *Id.* at 25–26.

<sup>54</sup> *Id.* at 26.

<sup>55</sup> The question of whether state courts could entertain claims by candidates for Congress *after* the House has issued its decision seems settled in the negative by *Roudebush*. However, see generally 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), for a discussion of a Kentucky state court’s decision to entertain an analogous claim on the state level following a decision on a qualifications question by the Kentucky legislature. Regardless, this issue is beyond the scope of this Note.

<sup>56</sup> *Roudebush*, 405 U.S. at 21–22. The Court held that the administrative recount order was not a judicial “proceeding” within the meaning of 28 U.S.C. § 2283 (2000) (corresponds to Act of Mar. 2, 1793, § 5, 1 Stat. 333, 334–35). *Roudebush*, 405 U.S. at 20–23. In doing so, the Court emphasized the importance of the fact that the state judges granting the recount were not engaging in a “judicial inquiry.” *Id.* at 21. Instead, the court was merely taking “administrative” action, ensuring that the petition for a recount was timely filed and in proper form, and subsequently appointing three commissioners to conduct the recount. The Court found that “[t]he exercise of these limited responsibilities [did] not constitute a court proceeding.” *Id.* at 21.

<sup>57</sup> See *infra* Part II.B (examining different interpretations of *Roudebush*).

and judgment required from the decisionmaker. Administrative recount orders<sup>58</sup> may be considered *procedural* remedies since they require judges to engage only in administrative (or ministerial) decisionmaking. As the Court in *Roudebush* explained, a decision to order a recount is ministerial,<sup>59</sup> generally requiring only minimal deliberation by the court. Significantly, this sort of decision does not require courts to explore the particular election results in any substantive way. Instead, judges merely order an electoral commission to conduct a recount. The members of that commission, and not the judges, are thus asked to engage with the actual results of the election. Under this reasoning, a judicial decision to order a recount merely sets in motion an administrative process whereby a commission will conduct a recount of the ballots.<sup>60</sup> In this way, a judicially ordered recount is only somewhat more remedial than an automatic recount, and is perhaps “best viewed as part of [a state’s] ordinary election processes.”<sup>61</sup>

In contrast, *substantive* remedies, such as new elections and adjustments to vote totals, require state courts to engage in full judicial decisionmaking and to make discretionary determinations after thoroughly investigating the election results. Substantive remedies for contested elections are drastic and raise many concerns. For example, an adjustment to vote totals is generally only made when judges are able to identify defective votes that were wrongfully counted or valid votes that were not counted.<sup>62</sup> Substantive remedial action therefore requires decisionmakers to reach calculated policy decisions<sup>63</sup> and, in this way, differs dramatically from grants of procedural relief.

While the *Roudebush* decision, according to the description above, may appear to impart relatively clear standards, state courts have interpreted it in different ways that provide them with more or less power in election challenges. The uncertainty of the actual holding in *Roudebush* allows contestant-candidates, like Christine

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<sup>58</sup> By “administrative recount order,” I mean to refer only to a court decision to have an electoral commission (or other administrative body) conduct a recount. A recount actually conducted by judges might better be characterized as a form of substantive relief.

<sup>59</sup> See *Roudebush*, 405 U.S. at 21 (referring to court ordering of administrative recount as “nonjudicial function”).

<sup>60</sup> Cf. *id.* at 25 (noting that administrative recount is merely “one procedure necessary to guard against irregularity and error in the tabulation of votes”).

<sup>61</sup> Heufner, *supra* note 7, at 278.

<sup>62</sup> *Id.* at 280. For cases in which courts have adjusted vote totals, see, for example, *Womack v. Foster*, 8 S.W.3d 854, 863 (Ark. 2000), *In re Protest of Election Returns*, 707 So. 2d 1170, 1175 (Fla. Dist. Ct. App. 1998), and *Delahunt v. Johnston*, 671 N.E.2d 1241, 1243 (Mass. 1996).

<sup>63</sup> See *infra* notes 121–23 and accompanying text (explaining that state election codes provide very little guidance to judges about whether and when to use particular remedies).

Jennings, to maximize their chances for success by seeking substantive relief both from state courts and from Congress.

### B. Three Potential Interpretations of *Roudebush*

The *Roudebush* decision has been interpreted in roughly three different ways. I will review each in turn.

#### I. State Courts May Grant Any Relief

The broadest interpretation of *Roudebush* focuses only on the Court's claim that state courts may act so long as Congress's ability to reach an independent final judgment is not frustrated (described above as the first of two limitations on state court power). Courts adhering to this interpretation believe it is appropriate to grant *any* type of relief—not just administrative recounts as in *Roudebush* itself—since Congress can technically overrule their decisions and grant whichever form of relief it prefers.<sup>64</sup>

This interpretation of the opinion is problematic for two reasons. First, it ignores the language in *Roudebush* stressing the significance of the *administrative* nature of the court's decision to order a recount.<sup>65</sup> Other types of relief granted in election contests, like the ordering of new elections, are not administrative in nature.<sup>66</sup> The Court in *Roudebush* undoubtedly understood this distinction, as evidenced by the fact that its decision rested in part on its determination that, unlike decisions to grant other forms of relief, the ordering of a recount did not actually require state courts to engage in judicial analysis.

Second, this broad reading of *Roudebush* fails to give any real meaning to the Court's test for whether Congress's power to render a

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<sup>64</sup> Thorsness v. Daschle, 279 N.W.2d 166, 168–69 (S.D. 1979) (reading *Roudebush* to allow state court remedies “so long as those procedures do not interfere with Congress’ ability to make a final determination of who shall sit”); Gammage v. Compton, 548 S.W.2d 1, 5 (Tex. 1977) (Reavley, J., dissenting) (“In the event Congress decides to make its own investigation and/or determination . . . Congress may do so. That possibility and the final authority of Congress do not bar Texas entirely from a role in insuring the legal outcome of its elections.”); see also Steve Bickerstaff, *Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election*, 29 FLA. ST. U. L. REV. 425, 433 (2001) (“State recounts and possibly even state judicial election contests can proceed as a means of policing state election laws, so long as they do not interfere with the exclusive power of the respective houses of Congress to ultimately determine the election dispute.”); *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1304 n.26 (1975) (“The Court’s language [in *Roudebush*] suggests that state courts may declare a new winner or even order a new election in contests of congressional elections, so long as the House and Senate remain free to decide for themselves whom to seat.”).

<sup>65</sup> *Roudebush*, 405 U.S. at 21; see also *supra* text accompanying note 51.

<sup>66</sup> See *supra* notes 62–63 and accompanying text (explaining how new elections and adjustments to vote totals are substantive remedies).

final independent judgment would be frustrated.<sup>67</sup> Therefore, this interpretation is most in tension with the Court's two limitations on state courts.<sup>68</sup>

## 2. *Procedural Relief Includes More than Recounts*

The second interpretation of *Roudebush* theoretically recognizes the limits of the decision, but broadens the scope of what the Court called "nonjudicial function[s]."<sup>69</sup> Under this approach, judges recognize that state courts are permitted only to grant procedural relief in their ministerial capacities. However, judges maintain a broad understanding of what types of relief are included as part of the regular electoral process for which the state is responsible. In other words, they understand more substantive forms of relief (such as the ordering of new elections or adjusting of vote totals) to be procedural forms of relief and therefore within the scope of the *Roudebush* decision.<sup>70</sup>

In this way, state courts may technically comply with both limits of *Roudebush*—they grant administrative remedies integral to the actual electoral process and do not frustrate Congress's ability to reach an independent judgment. Yet this interpretation expands the Court's definition of remedies involving "nonjudicial function[s]"<sup>71</sup> beyond recognition and is therefore unappealing. The second limitation on the authority of state courts to resolve federal congressional election contests rests on a clear demarcation between procedural relief and substantive relief.

As discussed above,<sup>72</sup> the types of analysis involved in decisions to grant procedural versus substantive forms of relief are extremely different. While procedural decisions to grant administrative recount orders do not require judges actually to engage with the election results, substantive decisions—to adjust vote totals, for example—do entail difficult policy questions about how to reach the best election outcome. Interpreting *Roudebush* to permit the latter as a nonjudicial part of the election does not account for these relevant differences.

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<sup>67</sup> See *Roudebush*, 405 U.S. at 25–26.

<sup>68</sup> See *supra* notes 55–56 and accompanying text (discussing limitations).

<sup>69</sup> *Roudebush*, 405 U.S. at 21.

<sup>70</sup> *Gammage v. Compton*, 548 S.W.2d 1, 7–11 (Tex. 1977) (Yarbrough, J., dissenting) (noting Congress's ultimate authority but arguing that contested elections fall under state courts' ministerial, nonjudicial functions). *Thorsness v. Daschle* might also be read this way, inasmuch as its analysis is grounded in state courts' authority to assess the "propriety of the election procedures." See 279 N.W.2d 166, 168 (S.D. 1979) (emphasis added).

<sup>71</sup> *Roudebush*, 405 U.S. at 21.

<sup>72</sup> See *supra* notes 59–63 and accompanying text.

### 3. State Courts May Grant Only Recounts

The final—and most appropriate—interpretation of *Roudebush* recognizes the important distinction that the Court drew between procedural and substantive remedies.<sup>73</sup> *Roudebush* held that state courts, acting administratively and thus *not* making judicial determinations, could order administrative recounts of congressional elections and thereby provide a limited procedural remedy.<sup>74</sup> Because recounts, like the one ordered in *Roudebush*, are so routine, it would not make sense to require that every decision to conduct a recount in a congressional race be made by Congress itself. This frequency supports the argument that these decisions are procedural, as opposed to substantive.

Full-on election contests seeking substantive relief are both more uncommon and more significant. *Roudebush*'s holding, therefore, does not necessarily permit state courts to engage in judicial decision-making regarding more substantive remedies,<sup>75</sup> such as adjustments to vote totals and the ordering of new elections.<sup>76</sup>

In light of this line drawn by the Court, some state courts have determined that they should grant only procedural relief, leaving consideration of all substantive claims to Congress.<sup>77</sup> Unfortunately, however, this understanding of *Roudebush* has not been determinative of the system for resolving congressional election disputes. As noted above, some lower courts take a much broader interpretation.

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<sup>73</sup> Cf. Heufner, *supra* note 7, at 278–79 (drawing distinction between automatic and requested recounts on one hand and election contests on other).

<sup>74</sup> See *supra* note 56 (describing Court's determination that ordering of recounts was not "judicial inquiry," but rather just another part of actual election process).

<sup>75</sup> SAMUEL ISSACHAROFF ET AL., *LAW OF DEMOCRACY* 1038 (2d ed. 2002). For comprehensive discussions of available election remedies, see generally *id.* at 1038–88 and Heufner, *supra* note 7.

<sup>76</sup> See *supra* notes 56–63 and accompanying text for a discussion of this part of the *Roudebush* holding and the distinction between procedural and substantive claims for relief.

<sup>77</sup> See *Thorsness v. Daschle*, 279 N.W.2d 166, 170–71 (S.D. 1979) (Morgan, J., dissenting) (arguing that in *Roudebush*, Supreme Court only permitted court-ordered recounts because they constituted nonjudicial function of court); *Gammage v. Compton*, 548 S.W.2d 1, 4 (Tex. 1977) ("In the first place, Indiana's recount statute and procedure was all that was involved in [*Roudebush*]. Indiana was not operating under a statute which attempted to vest in its courts 'original and exclusive jurisdiction of all contests of elections' to the House . . ."); *Young v. Mikva*, 363 N.E.2d 851, 853–54 (Ill. 1977) (finding that *Roudebush* holding was limited to administrative recounts and noting that many courts have construed state legislation authorizing judicial election contests not to apply to federal congressional elections); *LaCaze v. Johnson*, 305 So. 2d 140, 146 (La. Ct. App. 1974) (finding it inappropriate for state court to entertain election contest over congressional election and holding that contestant-candidate's requests for judicial determination of "validity of certain absentee ballots and [conducting of] an evidentiary hearing as to the alleged malfunction of one voting machine" were outside scope of *Roudebush*).

In the case of Christine Jennings's complaint, the Florida courts were willing to entertain her claims for substantive relief, demonstrating the ongoing belief that state courts may provide resolution of congressional election contests. Jennings did not ask the Florida state court merely to order an administrative recount, as was the case in *Roudebush* itself. Instead, she requested an independent judgment from the state court granting an adjustment to the vote totals (such that she would become the winner) or a new election (such that she would receive another opportunity to be elected)—a substantive, judicial resolution of her electoral challenge.<sup>78</sup> Her attempt to secure such substantive relief from the state court, while simultaneously petitioning the House of Representatives for similar remedies, raises many concerns that will be considered below. An interpretation of *Roudebush* barring contestant-candidates from seeking substantive relief in state courts is both more faithful to the Court's decision than other interpretations and, as I will argue in Part III, reflects the most appropriate balance of power when other concerns are considered.

### III

#### THE HOUSE SHOULD RETAIN EXCLUSIVE AUTHORITY OVER SUBSTANTIVE DECISIONMAKING IN ITS DISPUTED ELECTIONS

This Part argues that exclusive congressional resolution of substantive claims for relief in congressional election contests is necessary in light of constitutional text, the distinct federal interest in resolving these disputes, and the electoral values discussed above in Part I. Even so, exclusive congressional resolution raises concerns of its own, the most obvious of which is that partisan decisionmaking is problematic in this context.<sup>79</sup> This Part explores each of these contentions in turn.

#### A. *Constitutional Text Supports Exclusive Congressional Resolution*

Article I, Section 5 presents “a textually demonstrable constitutional commitment”<sup>80</sup> of power to a particular political branch by granting each house of Congress the power to decide the elections of

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<sup>78</sup> See *supra* notes 12–15 and accompanying text (describing Jennings's complaints challenging outcome of election and requested relief).

<sup>79</sup> See Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 715–16 (2001) (noting that Justices deciding *Bush v. Gore* may have worried that resolution by partisan political institutions could result in crisis and breed instability).

<sup>80</sup> This language, taken from *Baker v. Carr*, 369 U.S. 186, 217 (1962), represents one form of the political question doctrine.

its own members.<sup>81</sup> The Framers placed responsibility for decisions regarding congressional membership in Congress exclusively,<sup>82</sup> presumably for good reason. In his *Commentaries on the Constitution of the United States*, Justice Story explained,

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.<sup>83</sup>

In *Morgan v. United States*, then–Judge Scalia noted that while party-line votes in congressional election disputes do sometimes occur, “[Justice Story’s] basic point that institutional incentives make it safer to lodge the function there than anywhere else still stands.”<sup>84</sup>

The constitutional commitment of this power to Congress—as well as the rationale behind this commitment—applies not only to federal courts, but to state courts as well. State authority to conduct elections under the Times, Places and Manner Clause<sup>85</sup> undoubtedly complicates matters, but the intervention of state courts on substantive post-election questions remains inappropriate in light of the explicit delegation of this power to Congress. Administrative recounts, as protected in *Roudebush*, are arguably part of the states’ power to conduct elections granted in this clause. On the other hand, actual judicial decisions, even by state courts, on substantive election contests in the context of federal congressional elections are a usurpa-

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<sup>81</sup> While the political question doctrine mentioned here applies directly only to the federal courts, state judges have also recognized the implications of this doctrine on their jurisdiction. See, e.g., *Thorsness*, 279 N.W.2d at 170–71 (Morgan, J., dissenting) (noting that, even for state courts, “the outcome of the election, being a political question, was not a justiciable question because of the separation of powers provided by the United States Constitution” (emphasis omitted)); see also *McPherson v. Flynn*, 397 So. 2d 665, 667–68 (Fla. 1981) (holding that Florida’s constitutional allocation of power to state legislature to decide contested elections of its members rendered these contests political questions that state courts could not decide).

<sup>82</sup> See THE FEDERALIST NO. 51, at 318 (James Madison) (Clinton Rossiter ed., 1961) (“[I]t is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.”).

<sup>83</sup> 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 833, at 604–05 (5th ed. 1891), quoted in *Morgan v. United States*, 801 F.2d 445, 450 (D.C. Cir. 1986) (alteration in quoting source).

<sup>84</sup> *Morgan*, 801 F.2d at 450.

<sup>85</sup> 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 . . .”).

tion of Congress's exclusive power to make such decisions under Article I, Section 5. This is especially true given the condition placed on states' power to conduct elections: "Congress may at any time by Law make or alter such Regulations."<sup>86</sup> Even if election contests were to be regarded as part of the state-controlled election process, Congress could still assert its Article I, Section 5 authority pursuant to this exclusive power. Looking at the two Sections side by side, it is clear that Congress retains more control than the states in determining the substantive questions of election contests.

### B. *The Distinct Federal Interest in Congressional Elections*

Because they send representatives to a national body, elections for Congress involve important federal interests that are not present in elections for state and local office and are potentially not considered by state courts in election disputes.<sup>87</sup> As a result, despite the Times, Places and Manner Clause, state interests in these elections are necessarily diminished. Chief Justice Rehnquist's concurring opinion in *Bush v. Gore* recognizes the additional federal interests implicated in elections for national office.<sup>88</sup> Quoting from *Anderson v. Celebrezze*,<sup>89</sup> Chief Justice Rehnquist wrote: "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest."<sup>90</sup> Members of Congress, like the President, exercise powers granted to them by the Federal Constitution and are ultimately responsible for the creation and implementation of national policy. As such, the federal government retains an exceedingly strong interest in elections for Congress that does not exist in the case of state and local elections.<sup>91</sup> The strength of this interest supports the contention that Congress—and not any state court—is the proper institution for resolution of federal election contests.

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<sup>86</sup> *Id.*

<sup>87</sup> See ISSACHAROFF ET AL., *supra* note 75, at 239 (noting that U.S. House and Senate elections present distinct federal interests since in elections for these "national offices, the Constitution does assign Congress certain additional powers, or perhaps imposes some additional constraints on States, beyond those implicated in state elections").

<sup>88</sup> *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (noting that Court was "deal[ing] here not with an ordinary election, but with an election for the President of the United States").

<sup>89</sup> 460 U.S. 780 (1983).

<sup>90</sup> *Bush*, 531 U.S. at 111 (Rehnquist, C.J., concurring) (quoting *Anderson*, 460 U.S. at 794–95 (alteration in original)).

<sup>91</sup> Because the President represents the entire nation, as opposed to a district within a particular state, federal interests in presidential elections are arguably stronger than those in congressional elections.

On the other hand, precluding state courts from making substantive decisions in federal congressional election contests arguably imposes on the constitutional power of states to conduct elections. Indeed, many state judges have argued that state courts retain a strong interest in these cases for this very reason,<sup>92</sup> and Justices Stevens and Ginsburg echoed those arguments in their opinions in *Bush v. Gore*.<sup>93</sup> These arguments are not without merit. However, permitting Congress to determine, for example, whether vote totals in particular elections should be adjusted in light of fraud or irregularity does not threaten states' interests in their own election processes, since states retain responsibility for the overall conducting of elections. Congressional exercise of exclusive jurisdiction over these cases would not impinge on states' ability to conduct recounts or to engage in administrative investigations into election irregularities. This Note merely advocates that state courts not be permitted to grant particular forms of substantive post-election relief—states would remain free to control their own election systems overall. This allocation of power reflects the balance of state and federal interests and best adheres to the constitutional text.

### C. *The Congress-Alone Approach Better Responds to Electoral Values*

This Section returns to the three groups of important values identified in Part I: (1) legitimacy; (2) finality and efficiency; and (3) non-politicization. It demonstrates that an exclusively congressional resolution process will better advance these values than a system in which both Congress and courts act together.

#### 1. *Congress-Alone Advances Legitimacy*

Exclusive congressional resolution achieves fairness, transparency, and accuracy because Congress is accustomed and equipped to decide these claims, it resolves election disputes under particular statutory and precedential guidelines, and it utilizes both bipartisan and nonpartisan bodies to investigate claims and publicize results.

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<sup>92</sup> See, e.g., *Thorsness v. Daschle*, 279 N.W.2d 166, 169 (S.D. 1979) (“[W]here a recount or contest is an integral part of a state’s election process those procedures are a valid exercise of a state’s authority to control its election procedures.”); *Gammage v. Compton*, 548 S.W.2d 1, 7 (Tex. 1977) (Yarbrough, J., dissenting) (arguing that state judicial review over federal congressional election contest was appropriate since “these inquiries are clearly of direct concern and interest to the state in the administration and enforcement of election laws”).

<sup>93</sup> *Bush*, 531 U.S. at 123–24 (Stevens, J., dissenting) (arguing that state courts retain authority to interpret state election law and make decisions even in context of national presidential election); *id.* at 142–43 (Ginsburg, J., dissenting) (same).

Unnecessary state court involvement threatens the advancement of these values.

a. The Federal Contested Elections Act (FCEA) and Current Practice Both Demonstrate Congress's Adequate Response to This Value

Since 1798, Congress has resolved election contests pursuant to statutory guidelines to ensure orderly resolution and to mitigate concerns about unbridled partisanship.<sup>94</sup> These early laws, passed in 1798 and 1851, and later amended in 1873 and 1875, attempted “to give a judicial rather than partisan character to contested election proceedings” and to lend a degree of legitimacy to such proceedings.<sup>95</sup> In 1969, Congress passed the FCEA, which superseded all previous legislation in this area.<sup>96</sup> The FCEA governs only House elections; no companion legislation applicable to the Senate has been passed. The FCEA prescribes procedures for contestant-candidates to bring claims,<sup>97</sup> for contestee-candidates to answer claims brought against them,<sup>98</sup> and for the service and filing of other papers.<sup>99</sup> Under the FCEA, if a contestee-candidate fails to answer a contestant's claim, the burden remains on the contestant-candidate “to prove that the election results entitle him to the contestee's seat.”<sup>100</sup> The FCEA goes on to stipulate procedures and rules to guide the conduct of the remaining aspects of the contest.<sup>101</sup> While the FCEA ensures a judicial-like process and was modeled in part on the Federal Rules of Civil Procedure,<sup>102</sup> it does not provide substantive guidance for the resolution of House election disputes. This lack of substantive guidance is However, it seems more appropriate to leave substantive discretion to members of Congress, since they are political actors who regularly engage in deliberative policy decisions.

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<sup>94</sup> See 2 CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 833 (5th ed. 2000) (discussing laws passed by Congress in 1798 and 1851 to regulate congressional resolution of its election contests).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*; see also Federal Contested Elections Act, 2 U.S.C. §§ 381–96 (2006).

<sup>97</sup> 2 U.S.C. § 382.

<sup>98</sup> *Id.* § 383.

<sup>99</sup> *Id.* §§ 384, 393.

<sup>100</sup> *Id.* § 385.

<sup>101</sup> *Id.* §§ 386–88, 391 (regarding deposition of witnesses); *id.* §§ 389, 396 (entitlement to fees and reimbursements); *id.* § 390 (penalties for failing to appear, testify, or produce documents); *id.* § 392 (maintenance of a record); *id.* § 394 (computation of time); *id.* § 395 (abatement of claim following death of contestant).

<sup>102</sup> H.R. REP. NO. 104-852, at 8–9 (1996).

<sup>102</sup> See *infra* notes 121–23 and accompanying text (discussing lack of substantive guidance for state courts in state election codes).

In arguing for a limited role for state courts it may seem odd to highlight the judicial nature of the congressional practice. However, it is not the judicial nature of the state courts that is problematic. Instead, it is their jurisdiction. The Congress-alone solution is appealing because it preserves desirable aspects of judicial resolution—the FCEA procedures—but does so within a body for which jurisdiction over such a politically charged question is more appropriate.

In addition to the FCEA, Congress’s internal procedures and resources for resolving these cases lend transparency and accuracy to its decisions, both of which lead to greater legitimacy. Each case that is not immediately dismissed is referred to the Committee on House Administration, where a full investigation can take place.<sup>103</sup> The Committee appoints a bipartisan task force, which is then responsible for conducting field hearings, calling witnesses, and determining the rules that should apply to the case.<sup>104</sup> The House uses the independent and nonpartisan GAO<sup>105</sup> to review ballots, investigate technical issues, and conduct any necessary statistical analysis.<sup>106</sup> The House may also take into account the results of state investigations of these elections when making its own independent decisions.<sup>107</sup> An investigation reaches its completion when the bipartisan task force votes to dismiss or finds in favor of the claim and submits its findings to the full Committee.<sup>108</sup> After the Committee votes on the matter and issues a

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<sup>103</sup> See Rules of the House of Representatives, R. X(1)(j)(12), available at <http://www.rules.house.gov/ruleprec/110th.pdf> (defining Committee on House Administration’s jurisdiction to include “contested elections . . . and Federal elections generally”). All committee reports reaching decisions on these disputes are issued by this committee. It is also worth noting that Congress retains the power to conduct investigations and hearings on a wide variety of other matters, including executive action. See generally CHEMERINSKY, *supra* note 33, § 3.8 (discussing Congress’s broad power to investigate).

<sup>104</sup> See, e.g., Task Force Dismissal, *supra* note 1 (discussing measures taken by Task Force on Florida’s 13th Congressional District).

<sup>105</sup> See U.S. Gov’t Accountability Office, About GAO, <http://www.gao.gov/about/index.html> (last visited Aug. 26, 2008) (“The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress.”).

<sup>106</sup> *Id.*; see also H.R. REP. NO. 110-528, pt. 1, at 4–6, 9–11 (2008) (Conf. Rep.) (reviewing GAO’s analysis in Jennings’s case); Press Release, Christine Jennings for Cong., Jennings Applauds Independent Testing of District 13 Voting Machines, <http://www.christinejenningsforcongress.com/node/25> (last visited Aug. 26, 2008) (noting that GAO, “a non-partisan and independent agency,” determined that independent testing of voting machines was necessary).

<sup>107</sup> See, e.g., H.R. REP. NO. 105-416, at 7 (1998) (discussing Committee on House Oversight’s consideration of state investigations of voter fraud).

<sup>108</sup> E.g., H.R. REP. NO. 110-528, pt. 1, at 6 (“[T]he Task Force unanimously moved to report to the Committee . . . that the election contest in District 13 be dismissed.”); Task Force Dismissal, *supra* note 1 (discussing same).

report regarding its determination, the contest is voted on by the full House.<sup>109</sup>

The House's reliance on bipartisan task forces and the nonpartisan GAO for election contest investigations enhances the accuracy of its decisions by preventing purely partisan considerations from driving the decisionmaking and ensuring adequate resources are dedicated to a full and fair investigation. The House resolution process—through committee reports and the Congressional Record—is also quite transparent. The use of bipartisan and nonpartisan entities that create a clear record enhances the overall legitimacy of the system.

In addition to its procedural rules, the House is guided by an “elaborate set of precedents that grew out of its adjudications of other contested elections.”<sup>110</sup> Unlike the FCEA, this precedent provides substantive guidelines, identifying when complaints are to be dismissed, investigated, or vindicated.<sup>111</sup> While this precedent is generally followed, Congress members occasionally are accused of flouting established rules by acting on partisan sentiments.<sup>112</sup> Notably, even when members are accused of doing so, they continue to cite precedent to show that they have some “legal” grounds on which to make their arguments.<sup>113</sup> This potential manipulation of precedent to serve one interest or another is not unlike the use of precedent seen in courts.<sup>114</sup>

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<sup>109</sup> Task Force Dismissal, *supra* note 1.

<sup>110</sup> *McIntyre v. Fallahay*, 766 F.2d 1078, 1085 (7th Cir. 1985).

<sup>111</sup> *See, e.g.*, H.R. REP. NO. 109-57, at 3 n.9 (2005) (“According to House precedent, if a Member-elect is found to be disqualified, a losing congressional candidate is not entitled to the seat.”); H.R. REP. NO. 104-852, at 19, 21 (1996) (minority opinion) (noting existence of “consistent precedents that have been followed since enactment of the FCEA 25 years ago” and arguing that “House precedents over the last 25 years have established a clear legal standard governing motions to dismiss”); 131 CONG. REC. 381 (1985) (statement of Rep. Wright) (“To prevent election disputes from degenerating into partisan confrontations, the House has created a general presumption in favor of the candidate who is certified by the appropriate State election official as a Member-elect.”). However, precedent is often ambiguous and in some cases may be used for partisan gain. *See, e.g.*, H.R. REP. NO. 104-852, at 10–12 (1996) (describing Republican and Democratic positions on certain points as adhering to precedent yet reaching different results).

<sup>112</sup> *See infra* text accompanying notes 152–57 (discussing impact of partisanship on resolution of McCloskey-McIntyre and Dornan-Sanchez contests).

<sup>113</sup> Consider, for example, the Dornan-Sanchez contest in the 105th Congress. While the Republican majority argued that it based its treatment of the case on longstanding and consistent Republican interpretation of the FCEA and House precedent, H.R. REP. NO. 105-416, at 7, 10–12 (1998), the Democratic minority insisted that “the majority ignored committee precedent,” *id.* at 1044.

<sup>114</sup> *Cf. Salamanca & Keller, supra* note 55, at 337 (“[L]egislators are quite lawyerly in discharging this function, declaiming text, citing precedent, and seeking to justify their positions in terms of theoretical principles—in other words, resorting to conventional legal analysis. . . . [T]hey appear to combine the functions of an attorney . . . with those of a judge . . .”).

House precedent, internal procedures, and the FCEA guidelines ultimately enhance the fairness of resolution of House election disputes by providing uniformity and predictability. Not only do these standards ensure that candidates are treated equally, but they also signal to the public that congressional resolution of its election contests is, at minimum, procedurally just. In doing so, they enhance the legitimacy of the House's actions by ensuring transparency and striving for fairness and accuracy.

Finally, the frequency with which the House has decided internal election contests also responds to the electoral value of legitimacy. Congress has exercised its power to decide the election contests of its members routinely throughout history.<sup>115</sup> Most experts agree that the number of elections decided in the House "since 1789 probably is in the hundreds . . . [although] an exact number has never been determined because students of the subject disagree on what constitutes a contested election."<sup>116</sup> One estimate holds that the House has decided more than 600 cases since the first Congress.<sup>117</sup> According to Jennings's complaint, the House has decided to seat the contestant-candidate in 128 cases and has declared the election void and vacated the seat pending a new election in 66 cases.<sup>118</sup> According to one commentator, a total of 212 election-dispute cases have been brought before the House in the twentieth and twenty-first centuries.<sup>119</sup> As this statistic demonstrates, Congress has routinely engaged in its responsibility to decide the elections of its members, even in recent years. Congress's vast experience in deciding these cases lends additional legitimacy to exclusive congressional resolution by assuring candidates and the public that Congress is sufficiently knowledgeable and capable to decide these cases in a disciplined and just manner.

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<sup>115</sup> See *id.* at 278 ("Legislatures in the United States, particularly the two houses of Congress, have resolved questions about their members' eligibility so many times and in so many contexts . . . [T]hey have adjudicated . . . questions about who received the most votes . . . and whether so-called 'corrupt practices' occurred at the polls . . .").

<sup>116</sup> 2 CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS, *supra* note 94, at 833.

<sup>117</sup> Jeffery A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789–2002*, 18 *STUD. AM. POL. DEV.* 112, 115 (2004). Of the 601 in Jenkins's estimate, 205 are attributed to "criminal action/intent (fraud, corruption, and/or bribery)," 137 to "serious election irregularities not involving criminal action/intent," 79 to "illegal election," 50 to "improper canvass/counting of ballots," and 6 to "improper ballots." *Id.* at 117 tbl.2. The remaining cases are attributed to a variety of other reasons, including lack of qualifications under federal and state constitutions and defective credentials. *Id.*

<sup>118</sup> Jennings Notice of Contest, *supra* note 15, at 4.

<sup>119</sup> Jenkins, *supra* note 118, at 115.

b. State Court Resolution Responds No Better to This Value

State court decisions in election disputes generally are no better at achieving fairness, accuracy, or transparency than congressional decisions. First, state courts are given very little substantive guidance by state legislatures with regard to remedies in election disputes.<sup>120</sup> While state election codes carefully outline procedures for conducting election recounts and initiating contests, they generally stop short of prescribing particular forms of relief or recommending when judges should use particular remedies.<sup>121</sup> Without the benefit of legislative direction, judges are left to determine the most equitable resolution in each case by relying instead on common law principles.<sup>122</sup> This lack of clarity makes it difficult for courts to determine the most appropriate remedy in any given case, and therefore may lead to varied—and sometimes logically or politically questionable—results.

Unlike legislators, who are elected to reflect the will of their voters, judges—including those who are elected—are charged with rendering impartial and apolitical decisions grounded in law. While the relative political insulation of the courts may be touted as a benefit, it is not necessarily so in the context of election contests, where clear legal guidelines are often lacking and where the political stakes are extraordinarily high. In the absence of clear standards, it is arguably unfair to candidates to leave such complicated political decisions to one or a few judges, instead of to a large deliberative body that is accustomed to making policy choices and that will likely consider many more arguments and options before reaching a decision.<sup>123</sup> In other words, in contrast to Congress's expertise in policymaking, courts' relative lack of institutional competency in these cases threatens the legitimacy of their decisions.

The legislative process for resolution arguably is also more transparent than the judicial process since members of Congress are forced to defend their rationales against the critiques of other members, and their defenses are then made publicly available in committee reports

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<sup>120</sup> See Heufner, *supra* note 7, at 277 (“Although most state election codes include provisions that create processes by which aggrieved candidates or voters may seek judicial review of election outcomes, these provisions often provide courts little substantive guidance.”).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* (“[C]ourts asked to adjudicate election controversies must often draw upon common law and equitable principles to fashion appropriate remedies for particular circumstances not specifically addressed in their state’s applicable election code.”).

<sup>123</sup> See *infra* notes 162–65 and accompanying text for a related discussion of politicization concerns associated with state court adjudication of congressional election contests.

or the Congressional Record.<sup>124</sup> To be sure, state court decisions are transparent in the sense that party briefings and judicial opinions are published. However, the congressional process affords even more transparency since, in addition to party briefings and ultimate congressional decisions, the actual deliberations of members of Congress are also available to the public. It is thus apparent that, at the least, state courts are no better than Congress at resolving such contests. Given the fact that the fairness, accuracy, and transparency of judicial resolution of election contests may be questionable generally, it is hard to see the benefit of adding preliminary judicial review to the already necessary and adequate congressional resolution of these disputes.

For these reasons and others, courts may not present the optimal avenue for relief in election-dispute cases, even though for some elections they are the only option.<sup>125</sup> Because state courts are not the only option for resolution in congressional election contests, and because their availability does not enhance the fairness, accuracy, or transparency of the election dispute resolution process, state courts should not play any role.

c. The Congress-Alone Approach Thus Better Advances Legitimacy

The congressional process responds to the values under consideration, while the state court process does no better on this account. Still, it is the combination of the two processes that poses the greatest challenge to the values of fairness, accuracy, and transparency. Simultaneous congressional and state court action raises the risk of conflicting judgments. Because Congress retains ultimate discretion with regard to these decisions, there is always the chance that Congress will ultimately reach a different decision than the state court.<sup>126</sup> This inconsistency would seriously harm the credibility and legitimacy of the resolution of the election dispute. Were a state court to reach a decision declaring one candidate the winner or ordering a new election, voters might seriously question the legitimacy and accuracy of these results—and of the election process in general—if Congress

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<sup>124</sup> See Heufner, *supra* note 7, at 291–92 (discussing importance of transparency in resolutions of failed elections).

<sup>125</sup> State courts may, for example, present the only option for resolution in the case of elections for offices in the state executive branch.

<sup>126</sup> See *Hutchinson v. Miller*, 797 F.2d 1279, 1285 (4th Cir. 1986) (noting that substantive judicial review of congressional elections “raise[s] the possibility of inconsistent judgments concerning elections”); Salamanca & Keller, *supra* note 55, at 350 (“[C]ourts working in this area have almost universally recognized that . . . exercise of the [legislative power to decide elections] will sometimes yield inconsistent legislative and judicial determinations.”).

were then to reach a wholly different decision and reverse whatever consequential move the state court had made. Conflicting decisions from state courts and Congress also threaten transparency. Voters might find it difficult to understand why two wholly separate and independent bodies are reviewing the results of one election, and might thus be confused as to the sources of the outcomes. While it may be less problematic for a state recount to proceed and possibly be overturned by a congressional recount, it would be extremely troublesome if Congress were to disregard the results of a new state court-ordered election or to decline to seat a candidate that the state court had determined to be the rightful winner. Conflicting decisions will diminish the perception of legitimacy in the final outcome. Because of this risk, it is not only unnecessary but also detrimental for courts to be involved in substantive decisions in these disputes.

## 2. *Congress-Alone Advances Finality and Efficiency*

The interest in finality and efficiency in the resolution of contested elections also counsels in favor of exclusive House resolution of election contests. Congressional election disputes, like most election disputes, generally take a long time to resolve. Even in the context of the U.S. House of Representatives, where each term lasts only two years, contests pursued under the FCEA can take more than a year to resolve if Congress pursues a full investigation.<sup>127</sup> That said, “[a]dding a layer of judicial review” only exacerbates the problem in light of the “pressing legislative demands of contemporary government [that] have if anything increased the need for quick, decisive resolution of election controversies.”<sup>128</sup> The judicial process is lengthy and involves an appeals process. In the Christine Jennings case, for example, the initial complaint was filed in court in November 2006, just after the election; however, the court case did not reach a conclusion until nearly a year later.<sup>129</sup> This delay is extremely consequential, particu-

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<sup>127</sup> As examples, consider the Jennings-Buchanan case itself, as well as the Dornan-Sanchez case. See H.R. REP. NO. 110-528, pt. 1, at 1, 4 (2008) (Conf. Rep.) (noting that Jennings filed contest in House on December 20, 2006 and that Committee decided to dismiss on February 12, 2008); H.R. REP. NO. 105-416, at 1, 17 (1998) (noting that Dornan filed contest in House on December 26, 1996 and that Committee decided to dismiss on February 4, 1998). Many of these cases, however, are dismissed relatively quickly. See, e.g., H.R. REP. NO. 110-178, at 1-2 (2007) (dismissing Russell-Brown-Waite election contest within approximately six months of notice of contest); H.R. REP. NO. 110-175, at 1-2 (2007) (same for Gonzales-Diaz-Balart contest); H.R. REP. NO. 110-176, at 1-2 (2007) (same for Curtis-Feeney contest).

<sup>128</sup> *Morgan v. United States*, 801 F.2d 445, 450 (D.C. Cir. 1986).

<sup>129</sup> See *supra* note 26 and accompanying text (explaining that Jennings filed her contest in Florida state court in November 2006 and that her case remained in Florida's courts until Jennings formally withdrew her complaint in November 2007).

larly in the context of a House term of only two years, since in most cases the House will not reach a decision of its own before permitting state court proceedings to conclude.<sup>130</sup> If contestant-candidates no longer enjoy the option of bringing their claims to state courts, they will likely file complaints with the House more promptly. Likewise, the House will be motivated to address these complaints more quickly if there is no “need to maintain [the] tradition” of allowing state court cases “to run [their] course” before beginning an investigation of its own.<sup>131</sup>

It could be argued that some contestant-candidates would prefer to seek resolution solely in state courts and would not file duplicate cases in court and in Congress, thus mitigating some of the finality and efficiency concerns associated with nonexclusivity. Similarly, state court decisions might save time and resources that Congress would otherwise spend resolving these cases. While these contentions are fair, they are not necessarily rooted in practice. First, it does not appear that contestant-candidates often turn down the opportunity to seek resolution from both available forums.<sup>132</sup> Like Jennings, contestant-candidates are likely to file complaints both in courts and in Congress so long as both options are available, thereby raising many of the concerns reviewed above. Thus, Congress is already spending its time and resources on these cases, and is the final arbiter in these decisions. Both the Committee on House Administration and the GAO have proven themselves capable of handling the caseload. In some cases, Congress may spend more time and do more work on cases under the proposed Congress-alone solution—work that previously it would have deferred to state courts. Even so, this would not result in adding overall costs to the election-resolution process. Instead, it would simply reallocate them from state courts to Congress, lowering total costs and increasing efficiency.

Finally, Congress retains ultimate authority in any case. Even if a state judicial election contest proceeds all the way through appeals, Congress retains the opportunity to conduct an independent assessment of the case and make its own, possibly opposing, decision. These dual and potentially competing processes pose a threat to the effi-

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<sup>130</sup> See, e.g., Blake, *supra* note 19 (noting that ranking member of Committee on House Administration “stressed the need to maintain tradition and allow the [Jennings] state lawsuit to run its course” before “[f]orming a task force and conducting hearings”).

<sup>131</sup> *Id.*

<sup>132</sup> See, e.g., H.R. REP. NO. 110-528, pt. 1, at 3–4 (noting that Jennings filed election contests both in House and in state court); H.R. REP. NO. 110-176, at 2 (noting same of contestant-candidate Clint Curtis); H.R. REP. NO. 108-207, at 1, 3 (2003) (noting same of contestant-candidate Steve Tataii).

ciency of the resolution system. It seems a waste of time and resources to permit contestant-candidates to pursue long court proceedings over the substantive issues at stake in federal election contests when these proceedings ultimately may be irrelevant.<sup>133</sup>

### 3. *Consideration of Politicization Concerns Supports the Congress-Alone Approach*

The most obvious concern associated with exclusive congressional resolution of its disputed elections is that unbridled partisanship will motivate all resolution of these issues and, therefore, undermine the legitimacy of its decisions. It is important to note at the outset of this discussion that whether it retains exclusive jurisdiction over these cases or shares jurisdiction with state courts, Congress always retains final authority. Thus, partisanship may pose a problem even if state courts continue to make substantive decisions in these cases.<sup>134</sup>

Even so, because much of the debate and policymaking in today's House of Representatives is bitterly partisan,<sup>135</sup> many voters might be uncomfortable entrusting the House with exclusive authority over its election contests. Commentators note that "[l]egislatures obviously will resolve contested elections without even a patina of political neutrality,"<sup>136</sup> and "in many instances may reach outcomes through votes

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<sup>133</sup> See *Hutchinson v. Miller*, 797 F.2d 1279, 1285 (4th Cir. 1986) (noting that allowing courts to "consider[ ] the particulars of a disputed election . . . would be to . . . erode the finality of results, [and] to give candidates incentives to bypass the procedures already established").

<sup>134</sup> It may be argued that a state court decision rendered prior to congressional resolution acts as an important check on potential partisan abuses in the congressional resolution process, since Congress may be reluctant to overturn a valid judicial decision on purely partisan grounds. While this may be true in some cases, this possibility is not reason enough to continue operating under a system imposing such large costs in efficiency and finality. Additionally, in cases where partisanship is a primary motivator for the majority party of Congress, it seems likely that the majority would be willing to overrule an otherwise proper state court decision that favored the minority candidate. Such cases would result not only in partisan triumph (with its potential costs in fairness and legitimacy), but also in significant costs in finality and efficiency. As discussed above, congressional exclusivity at least reduces the latter costs.

<sup>135</sup> For a discussion of the acrimonious nature of politics in the House, see generally JULIET EILPERIN, *FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES* (2006). In particular, Eilperin notes that members of each party know that they will be rewarded for toeing the party line and punished for voting against the party, *id.* at 28, and that members who try to act in a bipartisan manner are subtly—and sometimes not so subtly—reprimanded for it, *see id.* at 61. Interestingly, Eilperin credits the current polarization of the House in part to its 1986 resolution of an election dispute—the infamous McCloskey-McIntyre "Bloody Eighth" contest, in which the House was widely perceived to have determined a contested election based on partisanship. *See id.* at 10–12, 130.

<sup>136</sup> Heufner, *supra* note 7, at 321.

that fall closely along party lines.”<sup>137</sup> While this is perhaps overly cynical, it is not outrageous. Without substantive constraints, the majority party of Congress could always vote to seat the contestant-candidate or contestee-candidate from its party, even without supporting facts. This charge, however, need not be so distressing for three reasons: (1) Congress generally has not abused its power in this way; (2) all resolution of election disputes, whether by courts or by Congress, raises concerns about the neutrality of decisionmakers; and (3) even if Congress does reach partisan decisions, it is still entirely appropriate for this political body to resolve these disputes.

a. Most Congressional Resolution is Bipartisan

Reviewing House cases from the last thirty years reveals that the process results in many dismissals and often ends with unanimous bipartisan votes,<sup>138</sup> despite sometimes taking a long period of time to reach resolution. Frivolous cases generally “should be ‘weeded out’ at the committee level,” even when raised by contestant-candidates from the majority party.<sup>139</sup> Congress has decided in favor of the contestee-candidate—and thereby dismissed contests—in 85.4 percent of the twentieth- and twenty-first-century cases mentioned above,<sup>140</sup> and the contestant-candidate has won in only 10.8 percent of these cases.<sup>141</sup> Only 50.2 percent of all House election disputes throughout history have been decided in favor of the majority party candidate,<sup>142</sup> even though majority party claimants contest at a “significantly higher rate.”<sup>143</sup> As Professor Heufner has noted, “Even these partisan institutions [such as the House] ought to protect a minority party’s candidate in the face of compelling evidence that an election result is unreliable, rather than face the political consequences of being perceived to have thrown an election.”<sup>144</sup> Perhaps because of the two-party system, the majority party is constrained from acting on partisan impulses by the threat of retaliation by the current minority party when it, in the future, will become the majority.

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<sup>137</sup> *Id.* at 296.

<sup>138</sup> *See, e.g.*, H.R. REP. NO. 104-852, at 5 (1996) (noting bipartisan unanimous vote of task force to dismiss claim); H.R. REP. NO. 92-626, at 1 (1971) (resulting in unanimous decision of Committee). The latter decision has been “cited with approval again and again in unanimous bipartisan Committee decisions.” H.R. REP. NO. 104-852, at 20–21 (1996).

<sup>139</sup> Jenkins, *supra* note 118, at 121.

<sup>140</sup> *Id.* at 120 tbl.3.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 120.

<sup>143</sup> *Id.* at 121. Seventy-two percent of all cases are brought by the majority candidate. *Id.*

<sup>144</sup> Heufner, *supra* note 7, at 321.

The above statistics show that the House does not routinely reverse election outcomes whenever the majority party deems it to be in its political favor to do so, even though partisanship plays some role in these disputes.<sup>145</sup> As far back as 1968, one commentator noted, “The best evidence we have of a shift away from discretionary and toward automatic decision making [in the House] is . . . the growth of the practice of deciding contested elections to the House strictly on the merits.”<sup>146</sup>

While partisanship generally does not lead to the success of unmeritorious claims, it does play a significant role in the resolution of those disputes with at least some merit. Indeed, contestant-candidates from the majority party win seventy percent of split-committee cases.<sup>147</sup> Additionally, of the cases in which the House has actually decided to unseat the contestee-candidate in order to seat the contestant-candidate, 85.8 percent have been resolved in favor of the majority party candidate.<sup>148</sup> And, while less than one-third of all cases have been decided by roll call—the remaining cases were decided by voice vote or no action<sup>149</sup>—most of those roll call votes have been party-line votes.<sup>150</sup>

To be sure, the majority party in the House occasionally has taken advantage of its position and engaged in unabashedly partisan review. In the 1985 McCloskey-McIntyre contest, Congress decided to pursue an investigation and recount pursuant to the FCEA even though Democrat McCloskey never even filed a notice of contest.<sup>151</sup> For sixteen months—two-thirds of the House term of office—the Democratic majority carried on with an investigation that, according to the Republican minority, was unfounded and represented an

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<sup>145</sup> Consider the Dornan-Sanchez case, discussed *infra* in text accompanying notes 155–57. In that case, the Republican majority ultimately dismissed the claim of Republican Robert Dornan, thereby protecting the seat of Democrat Loretta Sanchez. However, the majority refused to dismiss the case without first conducting an extensive—and arguably unnecessary—investigation that lasted more than a year (i.e., more than half of the congressional term of office). See H.R. REP. NO. 105-416, at 17–28 (1998) for a chronology of the House’s investigation.

<sup>146</sup> See Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 144, 160 (1968). Polsby also noted that “nowadays, contested elections are settled with much more regard to due process and the merits of the case than was true throughout the nineteenth century” and that “contemporary House procedures no longer hold out the hope of success for [frivolous] contests.” *Id.* at 163.

<sup>147</sup> Jenkins, *supra* note 118, at 121.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 121, 123. A voice vote is one in which members of the House express their votes orally; no action decisions are reached when the House takes no vote on a matter and “thereby accept[s] the outcome from the initial election.” *Id.* at 123.

<sup>150</sup> *Id.* at 123 (“[A] distinct majority of roll calls are party votes: exactly 87 percent.”).

<sup>151</sup> H.R. REP. NO. 99-58, at 2–3 (1985).

example of the “brutal power of the Majority to *change* elections, not just judge them.”<sup>152</sup> In the end, despite questionable rules and seemingly concocted precedent, the majority voted to seat its candidate, McCloskey.<sup>153</sup>

The Dornan-Sanchez contest from the 105th Congress, involving allegations of fraudulent voting by illegal aliens, raised similar concerns.<sup>154</sup> Republican Dornan sought relief from the House in the form of an adjustment to the vote totals to account for the many illegal votes that Democrat Sanchez had allegedly received. For thirteen months the Republican majority conducted an investigation that, according to the Democratic minority, was entirely fruitless and conducted in retaliation for the Democrats’ treatment of the McCloskey-McIntyre case eight years earlier.<sup>155</sup> In the end, a bipartisan decision to dismiss Dornan’s complaint was reached,<sup>156</sup> though not without costs in time, resources, and goodwill.

Nonetheless, concerns about partisanship should not be fatal to advocacy of exclusive congressional resolution of election contests because pure partisanship is limited. More importantly, partisan concerns remain present whether state courts share jurisdiction or not.

#### b. Neutrality of Decisionmakers May Always Be Questioned in Election Contest Resolution

Though the politicization that results from congressional resolution of election contests is certainly a concern, the detrimental politicization risks associated with judicial resolution of election contests must undoubtedly be avoided whenever possible. In *Bush v. Gore*<sup>157</sup> and in the years since that decision, judges, commentators, and the media have opined about the implications of judicial resolution of disputed elections.<sup>158</sup> The Supreme Court opinions in *Bush v.*

<sup>152</sup> *Id.* at 53.

<sup>153</sup> *Id.* at 44; 131 CONG. REC. 387–88 (1985).

<sup>154</sup> See H.R. REP. NO. 105-416, at 4 (1998).

<sup>155</sup> See *id.* at 1063 (statement of Rep. Kilpatrick) (“In my opinion, this case and the very bad precedent that the Majority is attempting to establish is a direct outgrowth of the outrage the Majority still harbors about the process and decision in the *McCloskey v. McIntyre* case . . .”).

<sup>156</sup> *Id.* at 1.

<sup>157</sup> 531 U.S. 98 (2000).

<sup>158</sup> See, e.g., *id.* at 157 (Breyer, J., dissenting) (“I think it not only legally wrong, but also most unfortunate, for the Court simply to have terminated the Florida recount.”); Kenneth Ward, *Looking for Law in All the Wrong Places: A Critique of the Academic Response to the Florida Election*, 57 U. MIAMI L. REV. 55, 57 (2002) (arguing that rule of law virtues influence definition of judicial authority whether or not legal principles constrain judges, and law influences political community independent of how judges decide cases); Jeffrey Rosen, *The Recount Is In, and the Supreme Court Loses*, N.Y. TIMES, July 17, 2001, at A19

*Gore* themselves recognize the threats to impartiality that both state and federal judges face when they resolve election disputes. As Justice Stevens argued in his dissent, the plurality's willingness to decide the case as it did constituted an "endorsement" of petitioners' "unstated lack of confidence in the impartiality and capacity of the *state* judges who would make the critical decisions if the vote count were to proceed."<sup>159</sup> At the same time, as Justice Breyer noted in his dissent, "in this highly politicized matter, the appearance of a split decision [in the Supreme Court] runs the risk of undermining the public's confidence in the Court itself."<sup>160</sup> As the plurality and dissent opinions demonstrate, both state and federal judges risk politicization when deciding election disputes.

Therefore, the supposed advantage of judicial resolution of election disputes—impartiality—is often lost, or may at least appear to the public to have been lost.<sup>161</sup> In order to choose an appropriate substantive remedy in an election contest, judges are forced to make questionable policy choices.<sup>162</sup> These choices lead to the possibility that a judge's decision, even if impartial, may be perceived as politically charged. With such high political stakes and amorphous remedial standards, judges—particularly those who are elected on partisan platforms themselves, as many state judges are<sup>163</sup>—further risk the loss of popular confidence in their impartiality.<sup>164</sup> Again, judicial intervention seems especially problematic in the context of congressional disputes. After all the trouble of judicial review has been incurred, Congress remains free to reach an entirely different result.

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(arguing that Supreme Court was "wrong to intervene" and that "the dispute over the recount was political, not legal, and should have been resolved by Congress rather than by the courts").

<sup>159</sup> *Bush*, 531 U.S. at 128 (Stevens, J., dissenting) (emphasis added).

<sup>160</sup> *Id.* at 157.

<sup>161</sup> See, e.g., Heufner, *supra* note 7, at 322 (noting ongoing concern that, in election contests, "the outcome [could] reflect[] the partisan bias of a particular [state] judge or court").

<sup>162</sup> See *supra* notes 121–23 and accompanying text (discussing lack of statutory guidelines for state courts and consequent necessity of making policy-based decisions).

<sup>163</sup> See Ryan L. Souders, Note, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 545 (2006) ("Thirty-one states select some, most, or all of their judges in partisan or nonpartisan elections. [Of those, f]our states select only some of their judges by partisan election, while seven states . . . select most or all judges by this method.").

<sup>164</sup> While not crucial to my argument, one of the beneficial side effects of the Congress-alone solution is that it preserves, and possibly enhances, judicial neutrality.

### c. The Partisan Nature of Congress Is a Virtue

Because politicization is inevitable in these cases, it is preferable to leave these decisions to actors whom the public expects to act politically, particularly where the Constitution commits such responsibility to them.<sup>165</sup> As Professor Samuel Issacharoff has argued, “It hardly seems an affront to democratic self-governance to channel the ultimate resolution of a true electoral deadlock into other democratically-elected branches of government.”<sup>166</sup> Even in the case of presidential elections, Congress is statutorily charged with resolving disputes over election counts that cannot be resolved within the states.<sup>167</sup> The partisan nature of Congress does not prevent it from addressing these disputes. Justice Breyer argued in *Bush v. Gore* that “[h]owever awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people’s will far more accurately than does an unelected Court. And the people’s will is what elections are about.”<sup>168</sup>

Members of the public expect their congressional representatives to act on partisan impulses. Indeed, the partisan character of congressional decisionmaking is a virtue that advances the validity of resultant policies.<sup>169</sup> Additionally, the “partisan and acrimonious”<sup>170</sup> nature of decisions like that in the McCloskey-McIntyre contest “only

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<sup>165</sup> See Heufner, *supra* note 7, at 321–22 (“[W]hen the election contest presents a close question, even a nakedly partisan outcome determined by a politically accountable branch may be as defensible as a judicial remedy under ambiguous statutory standards.”).

<sup>166</sup> Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 653 (2001).

<sup>167</sup> See *Bush v. Gore*, 531 U.S. 98, 153–54 (2000) (Breyer, J., dissenting) (noting that Electoral Count Act of 1887, 3 U.S.C. §§ 5–6, 15–18 (2000), “enacted after the close 1876 Hayes-Tilden Presidential Election, specifies that, after states have tried to resolve disputes. . . Congress is the body primarily authorized to resolve remaining disputes”). Indeed, the Constitution itself explicitly contemplates that the House will decide presidential elections in the event that an electoral college vote does not return a definitive winner. U.S. CONST. art. II, § 1, cl. 3 (“[I]f there be more than one [candidate with] . . . an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President. . . .”); U.S. CONST. amend. XII (“[I]f no person [has] such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.”).

<sup>168</sup> *Bush*, 531 U.S. at 155 (Breyer, J., dissenting). While many state judges are elected, the thrust of this quotation still applies in the context of state courts given that even elected judges are charged with making impartial decisions based on statutory and precedential law and are expected not to resolve cases based on popular will.

<sup>169</sup> Cf. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998) (“Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens.”); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) (“Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be

reaffirms the wisdom of avoiding judicial embroilment and of leaving disputed political outcomes to the legislative branch.”<sup>171</sup> Because members of the public will often perceive substantive remedial decisions in election contests, whether made by courts<sup>172</sup> or by politicians, as political ones—and because Congress will *always* retain the opportunity to resolve these disputes politically whether state courts participate or not—these decisions should be left to Congress exclusively.

### CONCLUSION

The Supreme Court’s decision in *Roudebush v. Hartke* has left Congress’s Article I, Section 5 power to decide the elections of its members vulnerable to intrusion by state judicial review. The ambiguity of this decision has resulted in state court review of federal congressional election contests in which contestant-candidates request substantive relief as consequential as the adjustment of vote totals or the ordering of new elections. The existence of this problem is demonstrated by the fact that in 2006 Christine Jennings requested these forms of relief from both state courts and the House of Representatives, risking inconsistent judgments and a waste of time and other resources. Indeed, arguably in part because her Florida state court claim remained unresolved for so long, her case took more than half of the two-year term of office to reach resolution in the House.

Constitutional text and federalism considerations both weigh in favor of Congress retaining the sole authority to make the substantive decisions in these cases. Further, Congress’s system for resolution responds favorably to all the important values which must be pursued by any resolution system. The current system, with an uncertain allocation of power between Congress and state courts, poses a risk to the political values discussed in this Note.

Congressional resolution is not perfect and could certainly benefit from improvements, such as additional substantive guidelines and incentives for speedy resolution. In the end, though, the advantages in exclusive congressional resolution of substantive election contests outweigh the disadvantages. Requiring a system of exclusivity is preferable to allowing the congressional system to proceed while also per-

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channeled not through the branches of government, but rather through . . . political parties.”).

<sup>170</sup> *Hutchinson v. Miller*, 797 F.2d 1279, 1284 (4th Cir. 1986) (referring to McCloskey-McIntyre debate).

<sup>171</sup> *Id.*

<sup>172</sup> *See, e.g., Bush*, 531 U.S. at 157–58 (Breyer, J., dissenting) (discussing risk of public confidence in courts being undermined when courts become involved in “highly politicized matter[s]”).

mitting separate judicial resolution. While the *Roudebush* decision itself does not necessarily impinge on Congress's authority, the ambiguous nature of the Court's holding in that case has created such a possibility. Perhaps Congress should respond legislatively by making clear that its processes for resolution under Article I, Section 5 and the FCEA preempt state court review of substantive election contests.<sup>173</sup> Perhaps state legislatures should statutorily preclude state courts from resolving federal congressional election contests. In the absence of such legislative commands, however, state courts should exercise restraint in their interpretations of *Roudebush*, and the Supreme Court, if given the occasion, should revisit its prior decision to make clear that substantive judicial inquiry into disputed federal congressional elections is not permitted.

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<sup>173</sup> Cf. *Gammage v. Compton*, 548 S.W.2d 1, 11–12 (Tex. 1977) (Yarbrough, J., dissenting) (arguing that FCEA does not act as congressional preemption of state court resolution of federal congressional election contests).