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An Issue of First Impression? State Constitutional Law and Judging the Qualifications of Candidates for the House and Senate

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ABSTRACT

Article I, section 5, clause 1, makes each House of Congress the judge of the "Elections, Returns, and Qualifications of its members." But what does that mean? For historical and jurisdictional reasons, there is a lack of federal precedent on the scope of judicial review of constitutional qualifications of candidates for the House or Senate. However, as federal courts encounter this issue, they should not treat it as an issue of first impression. Instead, they should look to state constitutional law, which has a wealth of precedent on the interaction between the power to run elections and the power of each legislative chamber to judge the returns and qualifications of its members—as virtually all of them have an identical clause to section 5, clause 1.

Contrary to older commentaries collecting precedent, this paper establishes—for the first time, as far as I can ascertain—that a modern consensus has developed in the states over the last fifty to seventy years of "Sequential Jurisdiction": pre-election adjudication of legislative candidates' qualifications is allowed, but post-election disputes must be resolved by the relevant chamber. There are other options: "Judicial Supremacy," where courts retain the power at any time to judge the qualifications of legislators, and "Legislative Supremacy," where the appropriate chamber is the only body who can ever judge qualifications. However, they are both minorities in the American system. The consensus of the states should be persuasive for federal courts facing this issue; both the consensus itself and because the reasoning of representative

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cases is itself persuasive. And in general, federal courts should look to parallel state constitutional law when faced with an issue of "first impression."

TABLE OF CONTENTS

I. Introduction

Imagine the following scenario:

A foreign provocateur, based in Eastern Europe, decides to sow chaos in a U.S. congressional election. To do so, they legally change their name in the courts of their home country to something nearly identical to the incumbent's, and then hire signature gatherers to col-

lect sufficient signatures to qualify them for the ballot. They are not a United States citizen, nor even a United States resident, but they submit enough signatures and pay the filing fee. They say they might move to the state on Election Day. Their goal is not to win, but to spoil a close race. Can the state exclude them from the ballot because they are not qualified under the United States Constitution?[1]

For most candidates, whether for federal or state office, there is no controversy: states can exclude unqualified candidates from the ballot.[2] But for *legislative* candidates, both the United States Constitution and almost every state constitution lodge the power to judge the "Elections, Returns, and Qualifications" of its members in the chamber the would-be legislator is running to join.[3] Some commentators have argued, in the federal context, that this clause makes the relevant chamber the sole and exclusive judge of those qualifications, thus prohibiting any pre-election adjudication of the qualifications of congressional candidates by state officials or judges.[4] However, these arguments are primarily derived from constitutional first principles, because the federal system has virtually no guiding precedent.[5] The purpose of this piece is not to refute those arguments directly,[6] but to

1. Contrary to some commentators, this is not as far-fetched as it would seem. *See, e.g.*, Cawthorn v. Amalfi, 35 F.4th 245, 265–66 (4th Cir. 2022) (Wynn, J., concurring) (collecting news stories of potentially unqualified candidates running in multiple states); *see also In re* Carlson, 430 A.2d 1210 (Pa. Commw. Ct. 1981) (barring an out-of-state congressional candidate from the ballot).
2. *See, e.g.*, Lindsay v. Bowen, 750 F.3d 1061, 1064 (9th Cir. 2014) (upholding a decision to bar an unqualified presidential candidate from the ballot); Hassan v. Colorado, 495 Fed. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (same); Escamilla v. Cuello, 282 P.3d 403, 405–08 (Ariz. 2012) (upholding a decision to bar an unqualified city council candidate from the ballot).
3. U.S. CONST. art. I, § 5, cl. 1; *see also* Paul E. Salamanca & James E. Keller, *The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members*, 95 KY. L.J. 241, 243 n.7 (2007) (collecting state constitutional provisions).
4. *See, e.g.,* Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 596 (2015) (arguing that "any adjudication about whether someone is qualified to become a member, before or after that election, would effectively usurp Congress's role and prevent it from independently evaluating the qualifications of its members.").
5. *See, e.g.*, *id.* at 604 (arguing that the constitution makes the "people" and the respective house the relevant constitutional decision makers in congressional elections).
6. For a response to those arguments, *see* Greene v. Raffensperger, 599 F.Supp.3d 1283, 1316–19 (N.D. Ga. 2022). For an indirect refutation, refer to the court filings found here: *Challenges to Paul Gosar, Andy Biggs, and Mark Finchem Under 14.3 Insurrectionist Disqualification Clause*, FREE SPEECH FOR PEOPLE, https://freespeechforpeople.org/challenges-to-paul-gosar-andy-biggs-and-mark-finchem-under-14-3-insurrectionist-disqualification-clause/ [https://perma.cc/J684-M63E]; *Challenge to Madison Cawthorn Under 14.3 Insurrectionist Disqualification Clause,* FREE SPEECH FOR PEOPLE, https://freespeechforpeople.org/challenge-to-madison-cawthorn-under-14-3-insurrectionist-disqualification-clause/ [https://perma.cc/7KF3-HVZR]; *Challenge to Marjorie Taylor Greene*

offer a more in-depth exploration of an argument that has not been advanced in this debate: the persuasive value of parallel state constitutional law.

Unlike federal courts, state courts have addressed the constitutional issues presented by challenges to the qualifications of candidates for state legislative office extensively. The consensus is that after an election, the appropriate chamber's decision is not subject to judicial or executive review. And, unless the state allows advisory opinions, a state court may not issue an opinion on the matter. However, every state to consider the question directly—save one—has decided that *pre-election* challenges to legislative candidates' qualifications do not "usurp" the appropriate chamber's role in judging the qualifications of its members. This consensus is contrary to secondary sources summarizing the doctrine,[7] and has not been cataloged before.

The reasoning of state courts reflects a consensus that pre-election judicial review[8] of candidate eligibility consists of statutory and constitutional interpretation which is firmly in the domain of the judiciary. The countervailing power of the appropriate chamber does not attach until the election is decided—the power is absolute, but "narrow."[9] Recent federal judicial concurrences arguing that *any* judicial ruling on a congressional candidate's qualifications would usurp the legislative prerogative have universally ignored this state-level consensus. While state constitutional law is, of course, not binding on the

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Under 14.3 Insurrectionist Disqualification Clause, FREE SPEECH FOR PEOPLE, https://freespeechforpeople.org/challenge-to-marjorie-taylor-greene-under-14-3-insurrectionist-disqualification-clause/ [https://perma.cc/828G-YK3P].

7. *See, e.g.*, 107 A.L.R. 205 III. a. ("The constitutions of most if not all, of the states contain provisions similar to Art. 1, § 5 . . . and it is well settled that such a provision vests the legislature with sole and exclusive power in this regard and deprives courts of jurisdiction over these matters."). Crucially, this review primarily concerns cases from the first half of the 20th century, predating *Baker v. Carr* 369 U.S. 186 (1962) and the shift away from the old-fashioned approach to the political question doctrine.

8. This sometimes includes executive review by the Secretary of State—whether state executive review should be allowed is a separate issue outside the scope of this paper. Nevertheless, nearly every state that allows executive review also allows judicial review of those executive adjudications, meaning the distinction is one without a difference. *Cf.* N.H. REV. STAT. ANN. §§ 665:6(II), 665:7 (2004) (making certain decisions of the Ballot Law Commission (BLC), an executive administrative body, final and unreviewable, including those regarding constitutional qualifications of candidates); § 665:16 (2004) (laying out appellate procedures for recount disputes, suggesting there is no appeals process for other disputes before the BLC); *but see* Sununu v. Ballot L. Comm'n, 451 A.2d 177, 178 (N.H. 1982) (seemingly ignoring those statutory provisions and ruling on a BLC decision).

9. JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW, 191 (2007) ("Within the narrow confines of judging election returns and the enumerated qualifications and disqualifications, the House's judgment is final.").

federal judiciary, the Supreme Court has recognized state courts create "an ongoing dialogue" when provisions in the federal constitution parallel state provisions.[10] And the opinions of state courts that align with this consensus consist of well-reasoned, persuasive arguments. At the very least, the consensus itself—and the opinions of state supreme courts—should be carefully examined by federal courts faced with this issue. This is not an issue of first impression in American courts, and should not be treated as such.

II. THEORETICAL BACKGROUND & METHODOLOGY

There are three ways legislative elections could be run in the United States with regard to qualifications and returns. First, a system could lodge the final power to judge qualifications and returns at any point—or at least until the seating of legislators[11]—with the judiciary. This system is called "Judicial Supremacy."[12] Second, a system could lodge the final and exclusive power to judge qualifications and returns in the legislative body being constituted. This system would bar *any* pre-election adjudications, even by the chamber itself. This is because it is not merely the legislative body (e.g., the "House") but the body being constituted that is the proper judge (e.g., the "118th House"). This system is called "Legislative Supremacy." Finally, a system could lodge the final power with the appropriate legislative chamber but allow pre-election[13] judicial adjudication of qualifications and primary returns. This system is called "Sequential Jurisdiction."

As discussed in more detail below, Supreme Court precedent establishes that the federal system is not one of Judicial Supremacy. However, there is no binding federal or Supreme Court precedent

10. Obergefell v. Hodges, 576 U.S. 644, 663 (2015) ("the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions"); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 207 (2018).

11. In theory, one could have a system that allows for judicial adjudication of a member-elect's qualifications, but not the qualifications of sitting members of legislatures. The decision of whether to adjudicate the qualifications of a sitting member is a different question than the one tackled in this paper, as it concerns the legislature's power to *expel* rather than *exclude* unqualified members. Those are different powers that are exercised differently. *See* Powell v. McCormack, 395 U.S. 486, 506–12 (1969) (holding that Powell was excluded and not expelled, and therefore they would construe the limits of the exclusion power, not the expulsion power); *see also* U.S. CONST. art. I, § 5, cl. 2 (requiring a two-thirds vote to expel a member, not limiting the grounds for expulsions). For this reason, precedent concerning post-seating disputes is not directly relevant in state cases, either.

12. This is the system for most state-level non-legislative races.

13. Or, more accurately, "pre-inflection point" adjudications. All but three states treat the proper inflection point as the general election, so that is how it is discussed in this paper. For a discussion of those three states *see infra* section IV.B.v.

establishing whether it is a system of Legislative Supremacy or Sequential Jurisdiction. Given the lack of federal precedent, state case law on this issue should be persuasive.

All fifty states are categorized below by their approach to legislative elections: Legislative Supremacy, Judicial Supremacy, or Sequential Jurisdiction. To do so, the author Shepardized the state Qualifications Clause, any constitutional qualifications for legislators (both those unique to legislators as well as those for all elected offices), any pre-election challenge procedures, and generally searched for "candidates" and "objections" or "qualifications" or "challenges." The author also encountered other case law in practice that did not come up in those searches. Therefore, while the author is confident in the consensus this reflects, some relevant precedent may be missing.

This research yielded the following results, discussed in more detail below. States marked with an asterisk have some case law that merits further discussion, and states marked with a "#" have no precedent on post-election challenges:

Unclear: Connecticut, Florida, Nebraska, South Dakota, Utah, Vermont, Virginia, Wyoming

Judicial Supremacy: Hawaii, Kentucky, Montana, New Jersey, North Dakota

Sequential Jurisdiction: Alabama*, Alaska#, Arizona#, Arkansas, Colorado*, Delaware*, Georgia, Idaho, Illinois#, Indiana*, Iowa, Louisiana*, Maine*, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska#, Nevada, New Hampshire, New Mexico#, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania*, Rhode Island*, South Carolina, Tennessee, Texas#, Washington*, West Virginia*

Legislative Supremacy: California

III. THE FEDERAL CONSTITUTIONAL SYSTEM STRUCTURING THE REGULATION OF CONGRESSIONAL RACES

Two relevant constitutional provisions structure congressional elections: Article I, § 4, clause 1 ("the Elections Clause") and Article I, § 5, clause 1 (referred to as "the Qualifications Clause"). The Elections Clause gives the states broad power to regulate congressional elections,[14] and the Qualifications Clause gives each house of Congress the power to judge the returns and qualifications of its members.[15] In

14. U.S. CONST. art I, § 4, cl. 1.

15. U.S. CONST. art I, § 5, cl. 1. The qualifications for congressional office in Article I are sometimes referred to as the "Qualifications? Clauses." U.S. CONST. art I, § 3, cl. 3. In this Note, they are referred to, along with other qualifications such as Section Three of the Fourteenth Amendment, as the "Enumerated Qualifications."

interpreting the interplay between these clauses, the Supreme Court has forbidden any binding action *after* an election that would "usurp" the power granted to each house—though it has asserted its jurisdiction to police the contours of that power.[16] Thus, the federal system is not one of "Judicial Supremacy" because there is a point—the election—at which the judiciary cannot interfere with the judging process. However, there is no binding precedent[17] on the interaction between the two clauses *before* an election. Thus, nothing conclusively establishes whether the federal system is a system of Legislative Supremacy, where pre-election adjudication of qualifications is barred, or Sequential Jurisdiction, where pre-election adjudication is allowed. The lack of binding precedent suggests that parallel state precedent should be especially influential.

A. The Elections Clause and the Qualifications Clause

The consensus[18] is that states only have the power to regulate congressional elections via the power delegated to them by the Elections Clause.[19] That Clause grants states the power to regulate the "time, place, and manner" of congressional elections.[20] That broad power allows states (and Congress, if it chooses) to provide "a complete code for congressional elections,"[21] including control over ballot access.[22] Fur-

16. *See infra* sections A–C of Part III.
17. *Cf.* Cawthorn v. Amalfi, 35 F.4th 245, 261–66 (4th Cir. 2022) (Wynn, J., concurring) (arguing for sequential jurisdiction); *accord* Greene v. Raffensperger, 599 F.Supp.3d 1283, 1298–99 (N.D. Ga. 2022).
18. *But see* Derek Muller, *Is a majority of the Supreme Court willing to revisit* U.S. Term Limits v. Thornton*?*, ELECTION L. BLOG (March 16, 2022, 3:20 PM), https://electionlawblog.org/?p=128223 [https://perma.cc/NN6A-97R7]; *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846–65 (1995) (Thomas, J., dissenting) (articulating a vision of state sovereignty that has been rejected since at least the Civil War); *accord* Chiafalo v. Washington, 140 S. Ct. 2316, 2329–35 (2020) (Thomas, J., concurring in the judgment) (making a similar argument about states' "reserved powers" in the context of presidential elections).
19. *Term Limits*, 514 U.S. at 798–805 (majority opinion); Cook v. Gralike, 531 U.S. 510, 522 (2001) ("The federal offices at stake arise from the Constitution itself. Because any states authority to regulate election to those offices could not precede their very creation by the Constitution, such power" had to be delegated to, rather than reserved by, the States.) (citing *Term Limits*, 514 U.S. at 804–05); *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 433–34 (2nd ed. 1851) (quoting Thomas Jefferson's view that "the assumption of particular powers seems an exclusion of all not assumed."); *accord* 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 382–83 (1907).
20. U.S. CONST. art. I, § 4, cl. 1.
21. Smiley v. Holm, 285 U.S. 355, 366 (1932). *See also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 240–41 (Max Farrand ed. 1911) (statement of Madison) (the Elections Clause encompassed "words of great latitude"); *accord* THE FEDERALIST NO. 59 (Alexander Hamilton). Indeed, the anti-federalists vigorously opposed this provision—such opposition would not make sense if states re-

thermore, it is well established that in the context of presidential races, states have a "legitimate interest in protecting the integrity and practical functioning of the political process [which] permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office,"[23] as allowing unqualified candidates would "clutter and confuse our electoral ballot."[24] The same concerns are present in congressional races: "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[25] Absent some limit, the Elections Clause includes the power to remove candidates from the ballot if they do not meet the constitutional qualifications for office.

The question is whether the Qualifications Clause is such a limit. It makes each house the "Judge of the Elections, Returns, and Qualifications of its own members" (which does not include the power to add qualifications[26]). There is at least a prima facie case that this clause limits the scope of the Elections Clause power. A single Supreme Court decision[27] directly addresses the relationship between the Elec-

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tained reserved plenary powers over federal elections. *See generally* Eliza Sweren-Becker & Michael Waldman*, The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1013–15 (2021) (describing anti-federalist opposition to the Elections Clause).

22. *See Term Limits*, 514 U.S. at 835. Indeed, no one seriously contends that a legislative candidate—state or federal—could not be denied access to the ballot on "procedural" grounds. *See* Storer v. Brown, 415 U.S. 724, 730 (1974) ("as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."). The line between qualifications and regulations is not clear. Muller, *supra* note 4, at 566; *see also id.* at 595–96 (arguing that when states to require candidate to "truthfully submit affidavits in compliance with the Election Code," including affidavits that such candidates are constitutionally qualified for office, they are merely exercising these procedural powers.). It is unclear how adding an additional requirement of proof—that the candidate *knows* they are unqualified—somehow makes the inquiry into whether the candidate is constitutionally qualified less of an "usurpation" of Congress.
23. Hassan v. Colorado, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.).
24. Lindsay v. Bowen, 750 F.3d 1061, 1064 (9th Cir. 2014).
25. Storer v. Brown, 415 U.S. 724, 730 (1974).
26. *See* Powell v. McCormack, 395 U.S. 486, 549–50 (1969).
27. Roudebush v. Hartke, 405 U.S. 15 (1972); There are a few federal cases that consider whether federal courts can entertain post-election disputes under Article III; the consensus is that, at least voters lack standing in such cases. *See, e.g.*, Morgan v. United States, 801 F.2d 445, 446–51 (D.C. Cir. 1986) (Scalia, J.); McIntyre v. Fallahay, 766 F.2d 1078, 1080–81 (7th Cir. 1985); Barkley v. O'Neill, 624 F. Supp. 664, 668–69 (S.D. Ind. 1985); Evansville Branch NAACP v. Simcox, 624 F. Supp. 162, 165 (S.D. Ind. 1985) (holding issue moot given the House actually conducted a recount); *see also* Lyons v. Gordon, No. CIV.A. 05-00870RMC, 2006 WL 241230, at *2 (D.D.C. Feb. 1, 2006) (dismissing losing candidate's case for lack of subject matter jurisdiction after the House had already voted to reject his challenge. "The United States House of Representatives has exclusive jurisdic-

tions Clause and the Qualifications Clause: *Roudebush v. Hartke*.[28] The specific holding is of little help because it concerns a post-election dispute. But the Court's overall move to harmonize the Elections Clause and the Qualifications Clause, rather than to read the latter formalistically as an absolute bar on actions taken pursuant to the Elections Clause is paralleled in state court proceedings establishing systems of Sequential Jurisdiction. At the very least, neither *Roudebush* nor the related federal precedent is inconsistent with a system of Sequential Jurisdiction.

B. *Roudebush*, *Powell*, and *Bond*: The Qualifications Clause After an Election

Three cases and a smattering of federal precedent implicate the Qualifications Clause after a general election. The cases establish that while judicial review of the *scope* of the judging power—such as whether additional qualifications were added—is permissible, there cannot be federal judicial review of the actual judgments by each House as to its members qualifications or the returns. However, states are free to issue what are essentially advisory opinions on those questions after the election pursuant to their Elections Clause power.

In the Senate race at issue in *Roudebush*, the Senate administered the oath to Hartke (the putative winner), but seated him conditionally on the results of a state-initiated recount.[29] Hartke argued that the recount was an unconstitutional usurpation of the Senate's power to judge returns under the Qualifications Clause.[30] First, the majority in *Roudebush* held that the recount was within the scope of the Elections Clause power, a power "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."[31] Although the Court is not explicit, the fundamental right involved seems to be the right of representation in the national legislature. The Court found holding recounts "necessary to guard against irregularity and error in the tabulation of votes" and that it was "an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by [the Elections Clause]."[32]

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tion over contested elections under a specific constitutional provision."); *but see* Overby v. Simon, No. 20-CV-2250 (WMW/TNL), 2021 WL 2529920, at *2 (D. Minn. June 21, 2021) (explaining that a candidate not placed on the ballot, allegedly unlawfully, has standing to request declaratory relief). There is also one federal case that applies *Roudebush* to a recount challenge. Durkin v. Snow, 403 F. Supp. 18 (D. N.H. 1974).

28. *Roudebush*, 405 U.S. 15.
29. *Id.* at 18.
30. *Id.* at 17.
31. *Id.* at 24–25 (citing Smiley v. Holm, 285 U.S. 355, 366 (1932)).
32. *Roudebush*, 405 U.S. at 25.

However, "a State's verification of the accuracy of election results pursuant to its [Elections Clause] powers is not totally separable from the Senate's power to judge elections and returns."[33] Therefore, a recount would be unconstitutional if it "usurp[s]" the Senate's power by "frustrat[ing] the Senate's ability to make an independent final judgment."[34] But because the Senate was free to make a decision without waiting for the recount or to conduct its own recount, Indiana's procedures could not "usurp" the Senate's power.[35]

Allowing recounts ensures that states (and Congress, should it choose to create a national system)[36] can provide for free and fair federal elections. But rendering those recounts advisory ensures that the House and Senate retain their independence from individual states. It would be highly suspect if the Senate or House rejected a recount procedure from a state without significant evidence that the recount was corrupt. If the recount *was* corrupt, lodging the final power in the Senate ensures that a regional cabal cannot corrupt the national legislature.[37] Thus, the ruling in *Roudebush* harmonizes the two powers.[38]

Roudebush determined that if the exercise of the Elections Clause power usurps the appropriate house by usurping its "independent final judgment" it is barred by the Qualifications Clause. A broader reading is that courts should resolve an apparent conflict between the power to regulate elections and the power to judge elections in a way that empowers lawmakers to create enforceable rules (subject to judicial review) that ensure fair elections while leaving a final, unreviewable "backstop" power in each house to protect against extreme abuse

33. *Id.*

34. *Id.* at 25.

35. *Id.* at 25–26. Under *Roudebush*, post-election usurpation might consist of refusing to send a count of the election *at all,* or other measures designed to frustrate rather than inform the Senate or House's decision. Although the Court does not cite it, its opinion is consistent with the oldest cited consideration of the Qualifications Clause. A Florida Supreme Court decision that considered a contested congressional election noted in dicta that the election was "irregular," but concluded that "it is out of our power to *decide* that the election was 'illegal and void,' that question being exclusively for the Senate of the United States." Op. of Justices, 12 Fla. 686, 688 (1868).

36. *Cf.* 2 U.S.C. §§ 381–89 (creating a system for contestants in House races to engage in some evidentiary proceedings in federal courts).

37. CHAFETZ, *supra* note 9, at 170 (arguing that the Enumerated Qualifications are both substantively anti-aristocratic, and that national uniformity was itself anti-aristocratic because aristocracies were likely to be local); *cf.* THE FEDERALIST NO. 10 (James Madison).

38. *Cf.* CHAFETZ, *supra* note 9, at 192 (suggesting that an ideal system would involve lodging the final power in the House itself, but allowing for some legal process beforehand); *accord* C.H. Rammelkamp, *Contested Congressional Elections*, 20 POL. SCI. Q. 421, 439–41 (1905); HENRY LAURENS DAWES, THE MODE OF PROCEDURE IN CASES OF CONTESTED ELECTIONS 11–13 (1869).

and ensure the internal legitimacy of that house. Under either reading post-election, non-advisory review of an election is normally barred.

There are arguably two exceptions or addendums to this rule: *Bond v. Floyd*[39] and *Powell v. McCormack*.[40] In *Bond,* the Court rejected the argument that state legislative immunity[41] precluded review of the Georgia House's decision to bar a member-elect who had opposed the war in Vietnam on the basis that his taking of the state and federal oaths was not sincere.[42] The Court ruled that the Georgia House's action was not privileged if it violated the member-elect's First Amendment rights.[43] The Court then ruled that testing the sincerity of the oath, at least in a case where the sincerity was not obviously false, violated the First Amendment.[44]

Bond could be seen as standing for the principle that legislative privilege—whether immunity from suit or the power to judge members—does not extend to acts by the legislature that violate the constitution. However, *Roudebush*'s concern with usurpation at least casts doubt on that interpretation. Instead, *Bond* should be understood as a straightforward application of federal supremacy: *state* legislators construed their state constitution in an unconstitutional way, misconstrued a federal constitutional provision, and were corrected. State legislative immunity cannot supersede the federal Constitution. That the federal requirement the Court construed also applies to members of Congress raises the possibility that Congress might contravene *Bond* and construe the federal oath requirement to require a sincerity test. Whether the Supreme Court could review such a decision would turn on whether such an action would be functionally "adding" a qualification,[45] as discussed below, or if it was the application of an existing requirement. If it was the latter, *Roudebush* seems to foreclose

39. Bond v. Floyd, 385 U.S. 116 (1966).
40. Powell v. McCormack, 395 U.S. 486 (1969).
41. The court does not use that language exactly, but subsequent case law has confirmed both *Bond*'s holding and the survival of state legislative immunity as a federal common law doctrine that normally immunizes state legislators from civil suit when they act in a legislative capacity. *See, e.g*., Bogan v. Scott-Harris, 523 U.S. 44 (1998) (holding that local legislators are entitled to the same absolute immunity as state, regional, and federal legislators from suits challenging acts arising out of legislative duties).
42. *Bond*, 385 U.S. at 130–31; *see also* U.S. CONST. art. VI, cl. 3 (the clause of the constitution cited by the Court in *Bond*); GA. CONST. art. 3, § 4, ¶ II (1945) (the adjacent constitutional clause in Georgia's constitution, at issue in *Bond:* "Each Senator and Representative, before taking the seat to which elected, shall take the oath or affirmation prescribed by law.").
43. *Bond*, 385 U.S. at 131.
44. *Id.* at 132–33.
45. State *ex rel*. Schieck v. Hathaway, 493 P.2d 759, 762 (Wyo. 1972) ("[I]n the Bond case it appeared the Georgia legislature was directly in violation of the First Amendment of the United States Constitution in attempting to add indirectly qualifications in addition to those directly stated in the constitution.").

judicial review of such a decision; but the possibility of such idiosyncrasies is not without precedent in our constitutional system.[46]

Powell also deals with the contours of the Qualifications Clause. There, the Court held that the power to judge qualifications is only the power to determine whether or not a candidate meets the qualifications enumerated in the Constitution and not to include additional qualifications.[47] Although the Court in *Powell* left open the question of whether it could review the judgment of the appropriate chamber under those enumerated qualifications,[48] *Roudebush* and later precedent[49] has largely foreclosed that type of review.

There is also a smattering of federal cases involving post-election disputes over congressional races that merit brief review. First, even though federal courts may not entertain the question of who won a congressional election directly, actions instituted to direct state executive branch officials to take certain actions short of certifying an election might be acceptable, even if the contours are not entirely clear.[50]

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46. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-13, at 376 (3d ed. 2000) (comparing Gilligan v. Morgan, 413 U.S. 1 (1973), in which the adequacy of the training of the Ohio National Guard after the Kent State massacre was deemed a political question because the relief sought, an injunction against the Ohio National Guard, was a federal judicial takeover of the training process, which the Constitution had committed to the military and to Congress, *id.* at 11–12, with Scheuer v. Rhodes, 416 U.S. 232 (1974), in which the same question–the adequacy of the National Guard's training–was treated as justiciable in a ruling denying the state governor immunity from liability for the shootings, *id.* at 250); *see also* McPherson v. Blacker, 146 U.S. 1, 22–23 (1892) (rejecting the argument that questions regarding presidential electors were non-justiciable because various political actors might ignore them); *accord* United States v. Nixon, 418 U.S. 683, 696–97 (1974).

47. Powell v. McCormack, 395 U.S. 486, 549–50 (1969).

48. *Id.* at 520 ("If examination of § 5 [the Qualifications Clause] disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine."); *see also* Morgan v. United States, 801 F.2d 445, 448 (D.C. Cir. 1986) (describing *Powell* as "display[ing] what might be termed a begrudging attitude towards Article 1, section 5 [the Qualifications Clause]. . . .").

49. Nixon v. United States, 506 U.S. 224, 237 (1993) ("Our conclusion in *Powell* was based on the fixed meaning of '[q]ualifications' set forth in Art. I, § 2. . . . The decision as to whether a Member satisfied these qualifications *was* placed with the House, but the decision as to what these qualifications consisted of was not."); *but see id.* at 253–54 (Souter, J., concurring) (suggesting that even in cases where there is a textual commitment to a coordinate branch, judicial review might be appropriate in cases of gross abuses of power, such as deciding guilt by coin toss).

50. *See, e.g.*, Ron Barber for Cong. v. Bennett, No. CV-14-02489-TUC-CKJ, 2014 WL 6694451, at *3 (D. Ariz. Nov. 27, 2014) (finding jurisdiction to order the Secretary of State to count certain ballots and refrain from certifying an election); *cf. Morgan*, 801 F.2d at 446 (the court asserted it had no jurisdiction where the plaintiffs "requested an injunction seating McIntyre with full seniority rights retroactive to January 3, 1985, a declaration that the House proceedings pursuant to the election investigation and the seating of McCloskey are void, and monetary dam-

Similarly, federal courts may entertain questions about a state's power to fill congressional vacancies,[51] or a state's power to determine what "winning" means *ahead* of a congressional election[52] (that is, the state can determine what it means to "win" an election, but not which candidate "won"). The question before the federal courts in those cases is the power of the state pursuant to the Elections Clause, not the question of whether a candidate won or was qualified. Thus, as discussed below, states that have similar precedent cannot be said to have a system of Judicial Supremacy on those grounds alone.

C. The Qualifications Clause Before an Election

There is no significant precedent on the interaction of the Qualifications Clause and the Elections Clause in the pre-election context. This gap exists largely because pre-election challenges to the constitutional eligibility of *any* candidate were not available until the mid-20th Century. Even after that, precedent is sparse, conflicting, and non-binding.

As a historical matter, there are two reasons for the lack of precedent. First, prior to the late-nineteenth century, states exercised virtually no control over the ballot. Instead, private parties or individuals printed their own ballots to distribute to voters, who brought them to the voting booth on election day.[53] Therefore, there is no precedent on pre-election adjudications prior to state control of the ballot because such an exercise would have been incoherent.[54] Second, until the mid-twentieth century, Congress could not regulate congressional prima-

ages."); *but see* McIntyre v. Fallahay, 766 F.2d 1078, 1080 (7th Cir. 1985) (wherein the court asserted it had no jurisdiction where the plaintiffs removed a state lawsuit over objections to how a recount should be conducted).

51. *See generally* Judge v. Quinn, 623 F. Supp. 2d 933, 935 (N.D. Ill. 2009), *aff'd*, Judge v. Quinn, 612 F.3d 537 (7th Cir. 2010).

52. Pub. Citizen, Inc. v. Miller, 992 F.2d 1548 (11th Cir. 1993). This per curiam opinion consists of a brief declaration with the District Court opinion attached as an unpaginated unpublished text. Although there is no doubt a federal court can determine whether or not this power is part of the Elections Clause, the District Court opinion glosses over the relief requested by the plaintiffs: declaring the election null. The Eleventh Circuit sided with the defendants, but it is not clear even if it had envisioned a more limited Elections Clause power it could have nullified a congressional election, even though it could certainly rule the underlying law unconstitutional. *Cf.* Love v. Foster, 90 F.3d 1026, 1027–28 (5th Cir. 1996), *aff'd*, Foster v. Love, 522 U.S. 67 (1997) (holding Louisiana's open primary in violation of federal law where relief requested is declaring the law void, not a specific election null).

53. *See* Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 14–17 (2011) (describing the pre-secret ballot system of American elections).

54. *See generally* Charles Chauncey Binney, *American Secret Ballot Decisions*, 41 Am. L. Reg. 101 (1893) (discussing the novel legal questions posed by the near-universal adoption of the secret ballot over the preceding decade).

ries,[55] judicial review of the conduct of private primaries was muddled,[56] and the approach to the political question doctrine could be summarized as refusing to judge "political issues" like apportionment,[57] or whether states could run primaries or create absentee ballots.[58] Those doctrines have been discarded,[59] but they functionally prevented most courts from commenting on these issues prior to the 1950s.

In contrast, the development of post-1950s precedent is hampered by Article III limitations on *voters'* ability to bring these challenges

55. Newberry v. United States, 256 U.S. 232, 249–50 (1921) ("Undoubtedly elections within the original intendment of section 4 [the Elections Clause] were those wherein Senators should be chosen by Legislatures and Representatives by voters [not primaries]. . . .").

56. *See generally* Nixon v. Herndon, 273 U.S. 536 (1927) (state law forbidding Black voters from participating in primaries unconstitutional); Nixon v. Condon, 286 U.S. 73 (1932) (party executive was exercising state power in forbidding Black voters from participating in primaries); Grovey v. Townsend, 295 U.S. 45 (1936) (private party rules barring Black participation was not state action).

57. Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT 571, 596 (2002) (noting that the old version of the political question doctrine was so overbroad it dismissed apportionment cases because "they concerned politics").

58. *See, e.g.*, *In re* Op. of the Justices, 113 A. 293, 298 (N.H. 1921) (noting that absentee ballots in congressional races were probably preempted by federal legislation but holding that it could not pass on that question because the Qualifications Clause makes the House the final judge); State v. Blaisdell, 118 N.W. 141, 145 (N.D. 1908) (whether a state law that created primaries was constitutional under the Elections Clause could only be decided by the appropriate house of Congress under their Qualifications Clause power). The idea that the Qualifications Clause could block judicial review of these pre-election questions would be unlikely to occur to most commentators or judges today.

59. United States v. Classic, 313 U.S. 299, 315–16 (1941) ("We may assume that the framers of the Constitution in adopting that section [the Elections Clause], did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it."). *Classic* functionally overturns *Newberry*, although the court does not cite *Newberry* in its opinion. *See also* Smith v. Allwright, 321 U.S. 649, 664–66 (1944) (overruling *Grovey*) (holding that the Texas Democratic Party's policy of prohibiting Black people from voting in primary elections violated the Fourteenth and Fifth Amendments); Terry v. Adams, 345 U.S. 461, 466 (1953) (quoting *Smith*) ("[T]he constitutional right to be free from racial discrimination in voting 'is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election."); *see generally* Baker v. Carr, 369 U.S. 186 (1962) (finding apportionment a justiciable issue). Like *Classic*, *Baker* functionally (rather than formally) overruled the prior doctrine. *Id.* at 252–53 (holding that precedent was not disturbed because precedent was distinguishable); *contra id.* at 277 (Frankfurter, J., dissenting) ("In sustaining appellants' claim, based on the Fourteenth Amendment, that the District Court may entertain this suit, this Court's uniform course of decision over the years is overruled or disregarded.").

directly in federal court.[60] Thus, post-1950s precedent either occurs in state courts (where voters can challenge candidates, or where secretaries of state independently evaluate candidates) or in federal cases brought to block those state proceedings or decisions—and even there it is sparse and not binding on any federal court. For instance, one state court has taken the position that the federal Qualifications Clause creates a system of Legislative Supremacy,[61] while another has assumed that the federal system is one of Sequential Jurisdiction without addressing the issue directly[62] (and one other claims the Qualifications Clause creates a system of Legislative Supremacy, then adjudicated a congressional candidate's constitutional qualifications anyway).[63] The few federal circuit courts to opine on the subject have assumed in dicta that the system is one of Sequential Jurisdiction.[64] A federal district court recently ruled that the system is one of Sequential Jurisdiction,[65] and three circuit judges have split on the issue in concurring opinions.[66] If there is any trend, it is toward Sequential Jurisdiction, but that trend is by no means uniform.

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60. *Cf.* Neal v. Harris, No. 1:20CV840, 2020 WL 6702145, at *3 (S.D. Ohio Nov. 13, 2020) (collecting cases holding that voters lack standing to challenge the constitutional qualifications of presidential candidates). Based on this case law, there is no reason to think voters have standing to challenge the qualifications of congressional candidates, but it is unclear if an opposing candidate might have standing.

61. State *ex rel*. Chavez v. Evans, 446 P.2d 445, 448–49 (N.M. 1968) (Qualifications Clause bars pre-election adjudication of the qualifications of a candidate). *Chavez* considered the residency requirement, which does not attach until the election. U.S. CONST., art. I, § 2, cl.2. Because of that, it probably cannot be adjudicated in a pre-election context—but that *strengthens* the position that other qualifications can, because none of the other qualifications attach at the election.

62. Kryzan v. N.Y. State Bd. of Elections, 55 A.D.3d 1217, 1220–21 (N.Y. Sup. Ct, App. Div. 2008) (holding a disqualified congressional candidate may withdraw his candidacy).

63. *In re* Nomination Papers of Carlson, 430 A.2d 1210 (Pa. Commw. Ct. 1981) (barring a congressional candidate for lying about his residency, and unconvincingly holding that is distinct from passing on the qualification).

64. *See, e.g.*, Storer v. Brown, 415 U.S. 724, 737 (1974) (noting that "[t]he District Court need not have heard a challenge to these other provisions of the California Elections Code by one *who did not satisfy the age requirement for becoming a member of Congress*. . . .") (emphasis added); Campbell v. Davidson, 233 F.3d 1229, 1235–36 (10th Cir. 2000); *see also* Ekwall v. Stadelman, 30 P.2d 1037, 1039 (Or. 1934) (holding that an oath submitted by a prospective candidate when taking office as a judge could not disqualify him from pursuing a seat in the House of Representatives).

65. Greene v. Raffensperger, 599 F.Supp.3d 1283, 1316–1319 (N.D. Ga. 2022).

66. Cawthorn v. Amalfi, 35 F.4th 245, at 261–66 (4th Cir. 2022) (Wynn, J., concurring); *contra id.* at 266–85 (Richardson, J., concurring in the judgment); *see also* Greene v. Sec'y of State, 52 F. 4th 907, 914-16 (11th Cir. 2022) (Branch, J., concurring) (arguing for Legislative Supremacy on different grounds than Judge Richardson).

D. Conclusion: Federal Courts Should Look to the States.

Roudebush establishes that the federal system is not one of Judicial Supremacy, but it does not establish that the federal system is one of Legislative or Sequential Jurisdiction, nor is there any binding precedent on the issue. Though, to the extent *Roudebush* can be read broadly, Sequential Jurisdiction is more consistent with its attempt to harmonize constitutional provisions rather than reading them formalistically. *Powell*, *Bond*, and other decisions establish that post-election cases that rule either on the contours of the judging power or order an executive official to complete a ministerial duty do not create a system of Judicial Supremacy because they do not interfere with the judging power of the relevant legislative chamber. But due to historical changes in election processes as well as judicial doctrine, precedent is sparse. Given that lack of precedent, looking to state court decisions is helpful to determine if the federal system is one of Sequential Jurisdiction or Legislative Supremacy. After all, these are American courts interpreting a constitutional provision with a common history.[67]

However, that also means that any state with a system of Judicial Supremacy does not lend even persuasive authority to federal courts. In Hawaii, for instance,[68] courts may order the legislature to accept or bar a legislative member-elect *after* the election, so the fact that they may judge the qualifications of a candidate *before* an election means nothing to a federal court interpreting the contours of a system that bars post-election adjudication. Similarly, any state that lacks pre-election precedent is not useful—it is not clear whether the state embraces Legislative Supremacy or Sequential Jurisdiction. However, the remaining states have made a choice between those two systems and the overwhelming majority of them have found a system of Sequential Jurisdiction most consistent with their constitutional structure. In fact, only California has embraced Legislative Supremacy. This consensus should be persuasive to federal courts because the constitutional structures of the state and the federal system are alike in all relevant ways, and the opinions themselves are well-reasoned and persuasive.

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67. *See* Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986) ("In the formative years of the American republic, it was 'the uniform practice of England and America' for legislatures to be the final judges of the elections and qualifications of their members.") (citations omitted).

68. HAW. CONST. ART. II, § 10 ("Contested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law."); *see generally* Akizaki v. Fong, 461 P.2d 221 (Haw. 1969) (holding that this provision supersedes the, since repealed, standard Qualifications Clause language in the Hawaii constitution and allows courts to adjudicate post-election disputes between legislators).

IV. STATE CONSTITUTIONAL SYSTEMS STRUCTURING LEGISLATIVE RACES

In this Section, the non-persuasive state constitutional systems are addressed first. These systems are not discussed any further because they either embrace a constitutional system that is inconsistent with the federal system or they simply have no precedent. Then the systems of the remaining states are cataloged, concluding that all but one have systems of Sequential Jurisdiction.

A. Judicial Supremacy or No Precedent

Six states have precedent allowing binding, post-election adjudication of legislative candidates' constitutional qualifications; these are systems of Judicial Supremacy. Eight have no precedent on pre-election adjudication at all. The case law from these states offer nothing persuasive to federal courts because they either come out of constitutional systems that are so different as to offer no lessons in this context or there are no lessons to draw at all. However, it is telling that these states are in the minority—as discussed below, most states bar post-election adjudications of this type while allowing pre-election adjudication. That is, most states are consistent with the federal system, suggesting that federal courts should note their case law.

By a mixture of textual differences and judicial interpretation, Kentucky,[69] Hawaii,[70] Montana,[71] and North Dakota[72] allow binding post-election (and sometimes post-seating) adjudication of the qualifications of legislative members-elect. New Jersey, despite having a

69. KY. CONST. § 38 ("Each House of the General Assembly shall judge of the qualifications, elections and returns of its members, but a contested election shall be determined in such manner as shall be directed by law."); *see generally* Stephenson v. Woodward, 182 S.W.3d 162 (Ky. 2005) (holding that, at least where the challenge was commenced before the election, courts could adjudicate a qualifications dispute and declare an election void even after the legislature had seated the challenged candidate).

70. *See* HAW. CONST. ART. II, § 10.

71. MONT. CONST. art. V, § 10 ("Each house shall judge the election and qualifications of its members. It may by law vest in the courts the power to try and determine contested elections."); *see generally* Big Spring v. Jore, 326 Mont. 256 (2005) (adjudicating a post-election dispute).

72. N.D. CONST. art. IV, § 12 ("Each house is the judge of the qualifications of its members, but election contests are subject to judicial review as provided by law"); Dist. One Republican Comm. v. Dist. One Democrat Comm., 466 N.W.2d 820, 824 n.2 (N.D. 1991) (noting that the provisions allowing for judicial review of elections for state legislative office require legislation, but that such legislation had been passed and was now operative, and therefore post-election adjudications were allowed).

state Qualifications Clause that tracks the federal clause,[73] has no precedent firmly establishing that its Qualifications Clause bars post-election adjudication and significant precedent concerning circumstances where a sitting legislator accepted an incompatible seat, and therefore was considered to vacate their legislative office.[74] This precedent suggests that New Jersey has a system of Judicial Supremacy.

A few states have no precedent on pre-election challenges, or non-binding or unclear precedent that does not provide enough evidence to show that they allow pre-election adjudication.[75] Because of this lack of precedent, it is not clear which system these states embrace, and therefore they offer no guidance to federal courts. Utah has a single, per curiam case addressing a pre-election challenge, *Jenkins v.*

73. Unlike the other four states, New Jersey's Qualification Clause tracks the federal clause. N.J. CONST. art. IV, § 4, ¶ 2. ("Each house shall be the judge of the elections, returns and qualifications of its own members.").

74. Wilentz *ex rel*. Golat v. Stanger, 30 A.2d 885, 892 (N.J. 1943) ("[T]he courts have supreme authority to decide the constitutional questions here presented"); *accord* Att'y Gen. *ex rel*. Werts v. Rogers 28 A. 726 (N.J. 1894); State v. Parkhurst, 9 N.J.L. 427 (1802); *see also* Reilly v. Ozzard, 166 A.2d 360, 364 (N.J. 1960) (noting that "[w]e can find no grant to the Senate of exclusive authority to deal with the external activities of its members"). Unlike some of the cases discussed below, the opinions here do not present themselves as exceptions or otherwise attempt to justify themselves in the face of the Qualifications Clause.

75. These include Connecticut, Idaho, *cf.* IDAHO CODE § 34-2103(1) (committing post-election contests to each house) Florida, *cf.* McPherson v. Flynn, 397 So. 2d 665, 667–68 (Fla. 1981) (suggesting pre-election challenges would be barred but only ruling on post-election challenges); James v. Cnty of Volusia, 683 So. 2d 555, 556–67 (Fla. Dist. Ct. Ap. 1996) (the constitutional residency requirement attaches at the election); Orange Cnty v. Gillespie, 239 So. 2d 132, 133 (Fla. Dist. Ct. App. 1970) (adjudicating a statutory procedural requirement); Kansas, Michigan, South Dakota, *cf.* State *ex rel.* Walter v. Gutzler, 249 N.W.2d 271, 272–73 (S.D. 1977) (after ruling that there is no jurisdiction over post-election adjudication of the qualifications of a state legislative candidate, noting that this ruling does not decide the issue of pre-election verification of eligibility in such cases), Vermont, Virginia, Wisconsin, *cf.* WIS. STAT. § 8.30 (2016) (requiring candidates to be constitutionally eligible for their offices); § 5.06 (allowing challenges to eligibility to be filed with the Wisconsin Elections Commission); *see also* Mitch Smith, *Wisconsin Election Officials Held in Contempt for Refusing to Purge Voters*, NEW YORK TIMES (Jan. 13, 2020), https://www.nytimes.com/2020/01/13/us/wisconsin-voter-purge.html [https://perma.cc/5ZRT-5CD7] (an example of how when the Wisconsin Elections Commission deadlocks, nothing occurs—perhaps explaining the lack of precedent in Wisconsin), and Wyoming, *but see* State *ex rel.* Sullivan v. Schnitger, 95 P. 698, 704 (Wyo. 1908) (holding that even if the state legislature was malapportioned in contravention of the constitution, the state Qualifications Clause barred judicial review of that malapportionment). This doctrine is universally rejected. *See* Tribe, *supra* note 58, at 596 (noting that the old version of the political question doctrine was so overbroad it dismissed apportionment cases because "they concerned politics"). Although *Sullivan* has never been overruled, there was no need for it to be overruled because Baker v. Carr, 369 U.S. 186 (1962) made these cases justiciable in federal courts. This, coupled with *Sullivan*'s endorsement of an archaic doctrine, means *Sullivan* should not be read to imply Wyoming endorses Legislative Supremacy.

Bishop.[76] The posture of the case is unusual in that it concerned a *class* of candidates—school administrators and teachers—who were being sued on the grounds that their employment barred them from serving in the legislature due to two state constitutional prohibitions on incompatible offices.[77] The overlapping and conflicting concurring opinions in that case do not shed much light on Utah's stance toward pre-election verification, and ultimately it is not clear whether Utah endorses Sequential Jurisdiction or Legislative Supremacy.

B. States with Sequential Jurisdiction Systems

Every remaining state has a Qualifications Clause that tracks the federal clause found in Appendix A.[78] Most states have straightforward precedent, establishing systems of Sequential Jurisdiction; the relevant precedent is in Appendix B. Seven states have no precedent on their Qualifications Clause, but allow pre-election adjudication; the relevant precedent is found in Appendix B. Only five states have embraced Judicial Supremacy, and the practice of granting each legislative chamber the final say over its membership is well-established.[79] Given the facts, these seven states (lacking post-election precedent) can be characterized as having Sequential Jurisdiction on the assumption that their highest court would read the Qualifications Clause to bar binding post-election adjudication in line with the consensus approach of the federal government and the other states.[80] However, their lack of precedent is noted in Appendix B. A number of states have complex or inconsistent precedent that merits further explanation below, but ultimately all have systems of Sequential Jurisdiction. Before discussing these more "complex" states, a brief review precedent from a state that unambiguously creates a system of Sequential Jurisdiction frames the subsequent analysis.

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76. Jenkins v. Bishop, 589 P.2d 770 (Utah 1978).

77. UTAH CONST. art. V, § 1 (prohibiting holding offices in two "departments"—here, the executive and legislative); *id.* art. VI § 6 (prohibiting legislators from "holding any public office of profit or trust.").

78. Textual differences between the state Qualifications Clause and the federal clause are italicized; *see infra* section V.A.i. for a discussion as to why those textual differences are not important.

79. Morgan v. United States, 801 F.2d 445, 447–48 (D.C. Cir. 1986) (collecting commentary).

80. That they have similar language is not the primary reason to assume they would be interpreted identically; it also means the slight differences in text are probably not determinative. *See, e.g.*, Sanford Levinson, *Courts As Participants in "Dialogue": A View from American States*, 59 U. KAN. L. REV. 791, 821 (2011) (skeptical of text as a constraint on constitutional interpretation); Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1175 (2000) ("[T]he strength of a state's constitutional education clause is not related to the likelihood that a court will find a school finance scheme constitutional.").

1. Missouri: A Model of Sequential Jurisdiction

One of the most straightforward examples of Sequential Jurisdiction is Missouri. There, a legislative candidate who was challenged on the grounds that they failed to meet the constitutional requirements for office (residency), argued that Article III, §18 of the Missouri Constitution forbade judicial adjudication of those qualifications prior to a primary.[81] The Missouri Supreme Court affirmed that *post-election* challenges would be barred by the state Qualifications Clause: "In our view, it applies when a General Election has been held and one then presents himself for membership, and, of course, it also applies in instances after the person has been seated and question as to his qualifications and right to remain a member arises."[82] The Court it also clarified that the ruling would have no *res judicata* effect on the legislature's later decision to admit or bar him.[83]

Therefore, Missouri is not a system of Judicial Supremacy because after the election the legislature is the sole judge of the member-elects' qualifications. But, in a system of Sequential Jurisdiction, the "right to be a candidate" is separate from the right to be a *member*.[84] The court held that in Missouri, before a general election occurs, there is nothing preventing the courts from adjudicating a candidate's qualifications for office or returns from a primary.[85] It is the existence of this general election inflection point, at which jurisdiction passes from the courts to the legislature, that separates a system of Sequential Jurisdiction from both systems of Legislative and Judicial Supremacy. Although the states below do not have case law as unambiguous as Missouri's, the best interpretation of their case law is still one of Sequential Jurisdiction. There is (1) precedent barring post-election (or post-inflection point) adjudication and (2) precedent affirming pre-election adjudication.

2. Rhode Island and West Virginia

Although neither Rhode Island nor West Virginia have precedent establishing that their Qualifications Clause bars post-election adjudication—and therefore that they do not have a system of Judicial Supremacy—precedent suggests that post-election challenges are

81. State *ex rel.* Gralike v. Walsh, 483 S.W.2d 70, 73 (Mo. 1972) (citing MO. CONST. art. III, § 18 ("Each house . . . shall be sole judge of the qualifications, election and returns of its own members. . . .."). Missouri's constitution, if anything, is even stricter than the federal Qualifications Clause, which omits the word "sole."

82. *Gralike*, 483 S.W.2d at 73.

83. *Id.* at 73–74.

84. *Id.* at 74 ("The action of the court will settle only the proposition that the person shall not be denied the right to be a candidate. No violation of the separation of powers doctrine occurs.").

85. *Id.* at 73 (pointing out the absurdity of such a position).

barred. This, coupled with evidence of pre-election adjudication of legislative candidates' eligibility, implies a system of Sequential Jurisdiction.

Rhode Island has never squarely ruled on the meaning of its Qualifications Clause, but available precedent suggests that it interprets it in line with the federal clause. In a case from the 1900s, the Rhode Island Supreme Court ruled that it had no jurisdiction over a post-election recount of a state legislative race because jurisdiction was not granted by statute; it also suggested that the challenge was barred by the state Qualifications Clause.[86] In more recent cases where it has asserted jurisdiction in post-election disputes, Rhode Island has been careful not to disturb the relevant house's final power. For instance, in ordering that certain votes should not be counted because the law that would have allowed them to be counted was unconstitutional, it noted that its holding does not decide "the ultimate issue of the seating or not seating of the petitioner or the intervenor" because of the state Qualifications Clause.[87] Similarly, it noted that while it had the power to review the lawfulness of the Secretary of State's refusal to administer an oath to a putative member-elect, it had no power to seat or unseat the member-elect.[88] This indicates that Rhode Island does not have a system of Judicial Supremacy. The precedent in Appendix B establishes that pre-election adjudication is allowed; therefore, it is a system of Sequential Jurisdiction.

As in Rhode Island, the West Virginia Supreme Court of Appeals (the highest court in the state) has never squarely ruled on the meaning of its Qualifications Clause, but available precedent strongly suggests it interprets it to bar post-election adjudication. In two cases it has held it has no statutory authority to hear a post-election dispute concerning a state legislative race, but in both cases it noted that the lack of statutory authority was consistent with the constitutional limitations created by the state Qualifications Clause.[89] Thus, as with Rhode Island, this precedent establishes it is not a system of Judicial Supremacy, and the precedent in Appendix B establishes that pre-election adjudication is allowed; therefore, it is a system of Sequential Jurisdiction.

86. Corbett v. Naylor, 57 A. 303, 303–04 (R.I. 1904).

87. McGann v. Bd. of Elections, 129 A.2d 341, 344 (R.I. 1957).

88. Bailey v. Burns, 375 A.2d 203, 206–08 (R.I. 1977). There, the Court held that after the Rhode Island House disqualified the member-elect, the Secretary of State lawfully refused to administer the oath. *Id.*

89. State *ex rel.* Underwood v. Silverstein, 278 S.E.2d 886, 888–90 (W. Va. 1981); Luther v. McClaren, 104 S.E. 294 95–96 (W. Va. 1920).

3. Maine and Indiana

Both Indiana and Maine have precedent squarely establishing that the courts can determine disputes over the returns of primaries, but neither has precedent clearly establishing that courts can determine the eligibility of legislative candidates before a general election. Thus, the jurisprudence of these two states merits more discussion. Ultimately, both Indiana and Maine are functionally Sequential Jurisdiction states.

In *Lucas v. McAfee*,[90] the Indiana Supreme Court held that it would violate the state Qualifications Clause to adjudicate the qualifications of a legislative candidate prior to an election, dismissing the relevance of the pre-election context,[91] and apparently establishing it as a Legislative Supremacy state. But only twelve years later, Indiana clarified that while the relevant chamber had the exclusive power to judge its members *after* elections,[92] the courts could pass over *recounts* in a pre-election context because:

> This is not an action to determine either the election, eligibility, qualifications, or returns of relator as a member of the Legislature. The sole question here presented is the right of the petitioner Seng to have the court, through the appointment of recount commissioners, determine his rights, if any, to the *nomination* on his party's ticket. . . .[93]

Thus, the state Qualifications Clause did not apply because the question did not concern a *member* of the legislature, only a *candidate*. In other words, candidacies are regulated by the general lawmaking power and are reviewable by courts, whereas membership in the body is reserved via the quasi-judicial power granted to the appropriate house of the legislature—but that quasi-judicial power cannot attach until there are members-elect to judge. However, rather than overrule *Lucas*, the court held "[f]or the reasons stated above, the doctrine of the Lucas [sic] case . . . should not be extended to prohibit a recount of votes for the nomination for a legislative office in the primary election."[94] The Indiana Supreme Court made no attempt to explain why qualifications are different than returns in the pre-election context—after all, the judging power in the state Qualifications Clause goes to both "returns" and "qualifications." And other courts have held there is no principled distinction between the two.[95]

Complicating matters, Indiana now has a statute that contemplates pre-election challenges to candidate eligibility before the Indi-

90. Lucas v. McAfee, 29 N.E.2d 403 (Ind. 1940).
91. *Id.* at 405.
92. State *ex rel.* Gramelspacher v. Martin Cir. Ct., 107 N.E.2d 666, 668 (Ind. 1952).
93. *Id.*
94. *Id.* at 669.
95. *See, e.g.*, State *ex rel*. Gralike v. Walsh, 483 S.W.2d 70, 73 (Mo. 1972).

ana Election Commission,[96] and that the commission regularly hears and decides challenges to the constitutional eligibility of state legislative candidates.[97] Recently, the commission passed on the constitutional qualifications of a United States Senate candidate.[98] There have been no attempts to enforce *Lucas* against these proceedings. Although it is a close case, Indiana functionally allows pre-election challenges to state legislative candidate eligibility; *Lucas* should be considered "dead," if not overruled, precedent.[99] This is especially apparent given that the Indiana Supreme Court's later opinion made no attempt to explain why disputes over qualifications were any different than disputes over returns. Because pre-election adjudications are allowed, Indiana is not a state with Legislative Supremacy, but because post-election adjudications are barred, it should be understood as a Sequential Jurisdiction state.

As in Indiana, Maine's Supreme Judicial Court has held that disputes over the returns of primaries are not governed by the state's Qualifications Clause, announcing in even stronger language that the clause "governs only general elections to the House and the Senate."[100] It further explained that primaries are "creatures of statute,"[101] and therefore are governed by the lawmaking power and subject to judicial review. Further, primaries "do not determine Senate and House members, but only determine the nominee of a political party,"[102] whereas the Qualifications Clause's quasi-judicial power only applies to *members*. Although Maine does not have any *Lucas*-type precedent suggesting qualifications are different, this does not directly answer the question of whether pre-election eligibility challenges are allowed.

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96. IND. CODE ANN. §§ 3-8-2-14, 18 (West 2017).

97. *See, e.g.*, IND. ELECTION COMM'N, INDIANA ELECTION COMMISSION MINUTES FEBRUARY 24, 2022 (2022), https://www.in.gov/sos/elections/files/IEC-Minutes-and-Transcript-2.18.2022.pdf. [https://perma.cc/8GB8-BKGM]

98. *Id.* at 143–44. *See also id.* at 132–33 (rejecting challenged candidate argument that the state law had no jurisdiction over federal claims).

99. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express *what is already obvious*: *Korematsu* was gravely wrong the day it was decided, has been overruled *in the court of history*, and—to be clear—'has no place in law under the Constitution'") (citing Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)) (emphasis added). Thus, the Supreme Court recognizes that, at times, precedent loses its legal value without formal overruling. This is not to compare the gravity of the two mistakes, but merely that a concept of "dead" precedent is not novel. *See also* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT 295, 297 (2000) (arguing the case of *Giles v. Harris* "has been airbrushed out of the constitutional canon.").

100. *In re* Primary Election Ballot Disputes, 857 A.2d 494, 496 (Me. 2004).

101. *Id.*

102. *Id.* at 497.

Despite a statute that appears to allow for pre-election challenges to constitutional qualifications,[103] there is no precedent on such challenges. However, a different statute directs election officials to exclude any candidate disqualified by Maine's term limits statute from the ballot,[104] and *that* provision has been enforced against legislative candidates.[105] It is not a constitutional qualification, but Maine allows substantive, non-procedural qualifications for state legislative office to be added via the normal lawmaking process.[106] Thus, it is a "qualification" that each house is given the power to judge, not merely a procedural qualification for office like a signature or filing fee requirement. The discussion of primaries and the existence of at least one instance of pre-election verification of a substantive, if not constitutional, qualification strongly indicates that Maine is not a state of Legislative Supremacy. As the precedent in Appendix B establishes, post-election adjudications are barred. Thus, Maine should be considered a Sequential Jurisdiction state.

4. Alabama and Louisiana.

Both Alabama and Louisiana have one-off cases where the court examined the qualifications of a sitting member,[107] which would seem to justify putting them in the Judicial Supremacy category. However, a close examination of those cases shows that, at worst, they are one-off, *sui generis* cases that do not upset the larger constitutional balance, and, at best, there are alternative interpretations of the cases that demonstrate they do not usurp the proper chamber's role in adjudicating the qualifications of its members. Thus, both states should be understood as Sequential Jurisdiction states.

Alabama's doctrine has vacillated over time. In 1950, the Alabama Supreme Court refused to answer any questions about the *limits* of the Qualifications Clause power on the basis that they had no jurisdiction to decide such questions, suggesting a very broad view of that power.[108] In 1975, it ruled that the court had no jurisdiction over post-seating appeals, noting that "[i]t has been a policy of the courts of this

103. ME. REV. STAT. ANN. tit. 21-a, § 336(3) (2011) (requiring a declaration of candidacy that "must contain a declaration . . . that the candidate meets the qualifications of the office the candidate seeks, which the candidate must verify by oath or affirmation. . . . If, pursuant to the challenge procedures in section 337, any part of the declaration is found to be false by the Secretary of State, the consent and primary petition are void.").
104. *Id.* § 554.
105. League of Women Voters v. Sec'y of State, 683 A.2d 769, 770 (Me. 1996).
106. *Id.* at 771–73 (holding that the legislative power in Maine extends to creating substantive qualifications for office, on par with constitutional qualifications).
107. Crothers v. Jones, 120 So. 2d 248 (La. 1960); State *ex rel.* James v. Reed, 364 So. 2d 303 (Ala. 1978).
108. *See generally In re* Op. of the Justices, 47 So. 2d 586 (Ala. 1950).

state to handle such cases speedily before issues become moot."[109] In a more recent opinion the Alabama Supreme Court held that what constitutes a "majority" is a "political question reserved to the legislature."[110] These precedents put Alabama in line with most states in barring post-election adjudication of the qualifications of a sitting member of the legislature.

But in 1978, in *State ex rel. James v. Reed*[111] the Alabama Supreme Court held that it had the power to remove a sitting legislator if it found them to be unqualified under the "infamous crimes" provision of the Alabama Constitution, which renders anyone who has committed certain crimes ineligible for public office.[112] It reasoned that the infamous crimes provision "is a specific constitutional limitation on legislative authority,"[113] and that it was different from other constitutional qualifications like "age, citizenship, and residency" because it "embodies the policy that a person proven not to be of good moral character, through conviction of an infamous crime, may not hold public office."[114]

This would seem to justify characterizing Alabama as a state of Judicial Supremacy. After all, it is not clear why the age requirement does not "embody" a similar "policy" with regard to maturity. However, the Alabama Supreme Court noted in *James* that it had historically rejected claims that the infamous crimes provision could only be enforced via impeachment where the office in question is subject to an impeachment provision.[115] Therefore, just as the Alabama Constitution's impeachment provisions do not preclude judicial review of a sitting official's qualifications under the infamous crimes provision,[116] nor does the Qualifications Clause preclude judicial review of a sitting legislator under that provision.[117]

While this reasoning is not particularly persuasive, it does counsel against characterizing Alabama as a Judicial Supremacy state because it creates an exception to a rule. The Alabama Supreme Court is clear that "[t]he legislative power to judge the constitutional qualifications of age, citizenship, and residency is exclusive."[118] It is only with regard to the infamous crimes provision of the constitution that the

109. Buskey v. Amos, 310 So. 2d 468, 469 (Ala. 1975); *accord* Nunn v. Baker, 518 So. 2d 711, 713 (Ala. 1987).
110. Birmingham-Jefferson Civic Center Auth. v. Birmingham, 912 So. 2d 204, 205 (Ala. 2005).
111. State *ex rel.* James v. Reed, 364 So. 2d 303 (Ala. 1978).
112. *Id.* at 305–06 (citing ALA. CONST. art. IV, § 60).
113. *James*, 364 So. 2d at 306.
114. *Id.* at 307.
115. *Id.* at 307–08 (collecting cases).
116. *See James*, 364 So. 2d 303.
117. *See In re* Op. of the Justices, 47 So. 2d 586 (Ala. 1950).
118. *Id.* at 307 (internal citations omitted).

Alabama Supreme Court may usurp the legislative privilege to judge its own members. Furthermore, the recent opinion regarding what constitutes a "majority" shows that, generally, Alabama still respects the legislature's prerogative. Given the precedent in Appendix B allowing pre-election challenges,[119] Alabama should be understood as a system of Sequential Jurisdiction.

The Louisiana Supreme Court has held that it has no jurisdiction over post-election disputes regarding state legislative races due to the Qualifications Clause.[120] Although that precedent is old, it has never been overturned and it has been followed by lower courts in more recent years.[121] But like Alabama, Louisiana does have an "exceptional" case.

In *Crothers v. Jones*,[122] the Louisiana Supreme Court decided a post-election challenge, holding that a challenged candidate was eligible to vote or hold office,[123] which was a condition of candidacy in Louisiana at the time.[124] In *Crothers* the challenged candidate was convicted of mail fraud in a federal court in Arkansas,[125] which the plaintiff argued stripped the candidate of his Louisiana citizenship, as well as his rights to vote and be a candidate for public office.[126] At the time, the Louisiana Constitution required candidates to be citizens of the state for two years[127] and forbade people from voting or holding office "who have been convicted of any crime which may be punishable by imprisonment in the penitentiary."[128] The Louisiana Supreme Court held that a federal conviction had no effect on citizenship in Louisiana.[129] It also held that crimes "punishable by imprisonment in the penitentiary" meant *Louisiana*'s penitentiary, and a state law that extended the prohibition on voting and candidacy to those incarcerated under federal law was unconstitutional.[130]

Crothers addressed a post-election dispute, but it did not create a system of Judicial Supremacy in Louisiana. First, only matter the Court decided was that the challenged candidate "was and had been a

119. There is at least an argument that any pre-election precedent regarding infamous crimes does not establish Alabama as a Sequential Jurisdiction state because that provision is a complete exception to the Qualifications Clause power. However, all the pre-election precedent revolves around residency challenges.
120. State *ex rel.* O'Donnell v. Houston, 4 So. 482, 483–85 (La. 1888).
121. Lee v. Lancaster, 262 So. 2d 124 ,125 (La. Ct. App. 1972) (citing *Houston*, 4 So. 482).
122. Crothers v. Jones, 120 So. 2d 248 (La. 1960).
123. *Id.* at 252–57.
124. LA. CONST. of 1921, art. III, § 9.
125. *Crothers*, 2120 So. 2d at 249.
126. *Id.*
127. LA. CONST. of 1921, art. VIII, § 1.
128. *Id.* art. VIII, § 6.
129. *Crothers*, 120 So. 2d at 252–54.
130. *Id.* at 254–56.

citizen of the State of Louisiana for five years and was a duly qualified elector of the State of Louisiana"[131]—it never declared him to be qualified for the Louisiana Senate, despite that being the crux of the challenge. Thus, although *Crothers* is not presented as an advisory opinion, it functions as one. The relief granted dismissed the challenge against the candidate but did not order or bind the Louisiana Senate to accept the candidate.[132]

Second, the interpretation of a constitutional provision that determines whether someone has the right to vote and the constitutionality of legislation are firmly part of the judicial function. For instance, a federal court would not be prevented from hearing an immigration case, a case that turned on a defendant's age, or a criminal insurrection case involving a candidate for the House of Representatives even though the determination would go to the question of qualifications.[133] The unusual posture of this case meant that plainly justiciable issues (whether the challenged candidate was a registered voter) were bound up in arguably non-justiciable issues. But again, all the Louisiana Supreme Court decided in *Crothers* was that the challenged candidate was a citizen and eligible to vote.

Finally, to the extent *Crothers* did decide a qualifications issue, it should be understood to be a state law version of the decision in *U.S. Term Limits, Inc. v. Thornton*.[134] The statute in *Crothers* prevented people who had been convicted outside of Louisiana from holding legislative office, and it was therefore an unconstitutional attempt to *add* qualifications to office.[135] Just as Arkansas had no right in *U.S. Term Limits* to add qualifications to candidates for Congress via the lawmaking power granted to it by the Elections Clause,[136] Louisiana had no right to add qualifications for state legislative office via its plenary lawmaking power—both require a constitutional amendment.[137] Because *Crothers* does not usurp the power of the Louisiana Senate to judge its members, Louisiana does not have a system of Judicial Supremacy. The precedent in Appendix B establishes that pre-election contests of legislative candidates' qualifications are quite common; as such, Louisiana has a system of Sequential Jurisdiction.

131. *Id.* at 257.

132. *Id.*

133. 28 U.S.C. § 1331 (since the issues listed are constitutional issues, the federal courts would have jurisdiction).

134. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

135. *See Crothers*, 120 So. 2d 248.

136. *Term Limits,* 514 U.S. at 837.

137. *Crothers*, 120 So. 2d 248.

5. Delaware, Colorado, and Washington.

The discussion above has assumed that the proper inflection point was the general election and that the assumption of judicial power after that point created a system of Judicial Supremacy. However, it is conceivable that the inflection point could be different without necessarily creating a system of Judicial Supremacy. A state might put that inflection point later—for example, at the point the Secretary of State issues a certificate—or earlier, for example, at the primary election. Delaware, Colorado and Washington may have such systems. However, all a system of Sequential Jurisdiction requires is that there is some time allotted to the judiciary to review qualifications and some time allotted to the appropriate House to exercise its exclusion powers.[138] Furthermore, of the three states discussed, only Colorado unquestionably has a different inflection point than the general election—there is at least an argument that the other two still use the general election as the inflection point.

The Colorado Supreme Court has held that the final decision as to a member-elect's qualifications is made by the appropriate House.[139] However, the Colorado Supreme Court has also held the appropriate inflection point at which the Qualifications Clause attaches is *certification*, not the general election.[140] Thus, a post-election, pre-certification recount does not interfere with the Qualifications Clause power.[141] This is different than the federal system, but it is still a system of Sequential Jurisdiction. There is still an inflection point at which the appropriate chamber exercises exclusive power over legislative election disputes—it is just slightly later in Colorado than (almost) everywhere else. Setting the inflection point later does not make

138. Not its *expulsion* powers, which do not attach until members-elect become members.

139. Meyer v. Lamm, 846 P.2d 862, 870 (Colo. 1993) (discussing the procedure for "election contests" and concluding that the Colorado constitution allows for the presentation of evidence and other trial-like procedures to be conducted in the courts, but the *decision* is made by the appropriate house).

140. *Id.* ("proceedings involving recounts . . . prior to the certification by the secretary of state that a person has been duly elected, are not 'election contests' for [statutory or constitutional purposes]. . . .").

141. *Id.* at 873 (finding that asserting jurisdiction did not intrude on "'a textually demonstrable constitutional commitment of the issue to a coordinate political department,' because, under the interpretation of article V, section 10 [the state Qualifications Clause], above, the court was 'not being asked to overturn any legislative determination already made, or to enjoin the [House] from deciding a contest properly presented to it.'" (quoting Baker v. Carr, 369 U.S. 186, 217 (1962); Lamb v. Hammond, 518 A2d 1057, 1066 (Md. 1987)) (internal citations omitted).

Colorado a Judicial Supremacy state because the appropriate chamber still has an opportunity to exercise its exclusion power.[142]

Like Colorado, Delaware's Supreme Court has held that once the certificate of election is presented to the appropriate chamber, adjudication is blocked by the state Qualifications Clause.[143] Technically, it has not held that presenting the certification is *the* inflection point, merely that once it has happened there is no question that judicial intervention is barred. That the actual inflection point in Delaware might be the general election can be inferred by an older opinion where the Delaware Supreme Court held that a recount of a state legislative race—before the certificate was presented—did not violate the Qualifications Clause power because it did not determine membership; anticipating *Roudebush*, the court held the appropriate house was free to reject or deny the results of the recount.[144] Thus, certain post-election cases are acceptable in Delaware, not because they do not implicate the state Qualifications Clause, but because they are functionally advisory opinions. Regardless, for the reasons discussed above with regard to Colorado, even if Delaware's inflection point is the certification of the election rather than the election itself, that does not establish it as a Judicial Supremacy state: there is still an exclusive power lodged in the appropriate house of the legislature that attaches slightly later.

Washington, in contrast, may have an earlier inflection point. In 1910, the Washington Supreme Court held that contests of returns of primaries in state legislative races were not barred by the state Qualifications Clause, noting that the state Qualifications Clause does not "prevent the Legislature from providing a method of nominating and electing candidates for office."[145] But in 1942 the Washington Supreme Court held that post-primary, pre-election adjudications of candidate's constitutional eligibility were barred by the state Qualifications Clause.[146] The Washington Supreme Court did not attempt to explain why qualifications were different from returns. In 1966, the Washington Supreme Court attempted to reconcile the two cases, holding that while petitioners should bring challenges to the qualifications of legislative candidates "well in advance of the pri-

142. Although the Court does not address the issue in detail, it is dealing with disputes that occur immediately after the election—there might be constitutional, or at the very least equitable problems if a Secretary of State dragged out the certification process in an effort to frustrate the appropriate House's exercise of their exclusion power.

143. State *ex rel.* Smith v. Carey, 112 A.2d 26, 28–29 (Del. 1955).

144. State *ex rel.* Wahl v. Richards, 64 A.2d 400, 403 (Del. 1949).

145. State *ex rel*. McAvoy v. Gilliam, 111 P. 401, 402 (Wash. 1910).

146. State *ex rel*. Boze v. Superior Ct. In & For Pierce Cnty., 129 P.2d 776 (Wash. 1942).

mary,"[147] the state Qualifications Clause "does not divest the courts of jurisdiction to hear and decide questions respecting the election, returns and qualifications of candidates at the primary election."[148]

Because, as discussed in Appendix B, pre-primary adjudication of qualifications is allowed, one interpretation of Washington's system is that it sets its inflection point—at least for qualifications—at the primary election. This is still a system of Sequential Jurisdiction: the judiciary is able to police qualifications prior to the primary and the legislature is able to police qualifications after it.[149] However, the more persuasive interpretation suggests that the 1966 case reinterpreted the 1942 case as turning on equitable, rather than constitutional concerns; challenges *should* be brought in advance of the primary, but there is no constitutional bar on post-primary qualification challenges. Some of the dicta in the 1966 case seems to go further, suggesting jurisdiction in post-election cases,[150] but that dicta should not be understood as transforming the state from one of Legislative to Judicial Supremacy. First, because it is dicta, and second, because the actual holding suggests that Washington courts would not entertain post-election cases: if the Qualifications Clause did not prevent post-election disputes, there would be no reason to emphasize the differences between primaries and general elections. Instead, the dicta is best understood as referring to the possibility that a gross abuse of the judging power might be judicially reviewable.[151] Thus, Washington should be understood as a system of Sequential Jurisdiction, whether the inflection point is at primaries or the general election.

6. Pennsylvania

Although Pennsylvania has strong precedent barring post-election adjudication of the qualifications of sitting legislators or members-elect, similarly to Alabama and Louisiana, it has exceptional precedent that must be discussed. Furthermore, Pennsylvania courts have declared themselves to be a Legislative Supremacy state, while con-

147. State *ex rel*. O'Connell v. Dubuque, 413 P.2d 972, 978 (Wash. 1966).

148. *Id.* at 979.

149. To be clear, the legislature would not be able to police qualifications in the time between the primary and when they constitute themselves; it is that they would be responsible for *eventually* adjudicating disputes that were raised after the primary.

150. *Dubuque*, 413 P.2d. at 977, n.5 (giving the example of one party simply refusing to seat any members of the other party);

151. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 253–54 (1993) (Souter, J., concurring) (suggesting that even in cases where there is a textual commitment to a coordinate branch, judicial review might be appropriate in cases of gross abuses of power, such as deciding guilt by coin toss). It is at least arguable that such cases involve "adding" qualifications or otherwise acting outside the *scope* of the relevant power, justifying judicial review.

structing a formalistic workaround to functionally allow the judicial adjudication of legislative candidate qualifications before the general election. Because it allows pre-election adjudication of constitutional qualifications, Pennsylvania should be considered a Sequential Jurisdiction state.

The Pennsylvania Supreme Court has held that its role in post-election disputes of state legislative races, in light of the state Qualifications Clause, is only to issue advisory opinions[152] and order executive officials to comply with applicable laws,[153] not to announce winners. Although these precedents are more than a century and more than half a century old, respectively, this view has been adhered to more recently by the Pennsylvania Commonwealth Court (Pennsylvania's appellate court).[154]

However, the Pennsylvania Commonwealth Court has also decided whether the President *pro tempore* of the Pennsylvania Senate could retain that seat after assuming the office of Lieutenant Governor due to a vacancy in that position,[155] and its decision was summarily affirmed by the Pennsylvania Supreme Court.[156] There, the Pennsylvania Commonwealth Court addressed two requirements in the Pennsylvania Constitution. First, that if there is a vacancy in the office of Lieutenant Governor, the "President *pro tempore* of the Senate shall become Lieutenant Governor for the remainder of the term" and if the President *pro tempore* of the Senate fills the Governor's seat (in a case where both the Governor and Lieutenant Governor's seats are vacant), "[h]is seat as Senator shall become vacant whenever he shall become Governor and shall be filled by election as any other vacancy in the Senate."[157] ("Section Fourteen"). Second, that "[n]o member of Congress or person holding any office . . . shall exercise the office of [ ] Lieutenant Governor"[158] ("Section Six"). In a rather bizarre opinion, the Commonwealth Court held that Section Six only applied to "offices," and that a Senator is not an "office," and therefore the prohibition does not apply to Senators,[159] notwithstanding the direct reference to a "member of Congress," in Section Six, which the court does not address. As to the state Qualifications Clause, the court holds:

152. *In re* Contested Election of Senator, 2 A. 341, 342–43 (Pa. 1886).
153. *In re* Disputed Ballots of Morann Precinct, Woodward Twp., 133 A.2d 824, 828 (Pa. 1957).
154. Balmer v. Pippy, 702 A.2d 587, 590 (Pa. Commw. Ct. 1997) ("the judiciary has jurisdiction over a challenge to the constitutional qualifications of a CANDIDATE for the General Assembly only prior to his or her election. . . .").
155. Lawless v. Jubelirer, 789 A.2d 820, 828 (Pa. Commw. Ct. 2002).
156. Lawless v. Jubelirer, 811 A.2d 974 (Pa. 2002).
157. PA. CONST. art. IV, § 14.
158. *Id.* art. IV, § 6.
159. *Lawless*, 789 A.2d at 831.

> [W]e are not asked to decide an issue of the qualifications of an individual member of the Senate under [the state Qualifications Clause], *which is clearly within the legislative purview*. Instead, we are called upon to confront compelling issues that undoubtedly require a studied and thoughtful interpretation of the relevant Constitutional provisions, and only the Courts may engage in such an exegesis.[160]

The Commonwealth Court accepts that the appropriate house has the exclusive role to adjudicate the qualifications of its members in the post-election context. There are a number of charitable readings of the case, any of which might have been the basis for the Pennsylvania Supreme Court's summary affirmance. First, because the relief requested (removing the Senator) was denied,[161] the Pennsylvania Supreme Court might have felt it was unnecessary to re-litigate a politically explosive case only to come to the same conclusion by relying on the Qualifications Clause. Second, this might be characterized as an advisory opinion: it is an "exegesis" of constitutional issues but does nothing to prevent the exclusion of a sitting member by the Senate should the Senate disagree with the court's interpretation of the Senator's qualifications. Also, one might frame this case as regarding the *scope* of the qualifications, rather than a determination of whether an individual is qualified, insofar as it defines the bounds of a particular constitutional provision.[162] That being said, the most likely interpretation is that the Pennsylvania Commonwealth Court, in a one-off case, upheld the general principle that post-election non-advisory opinions are not available, while violating that very principle. This puts it in the company of *James* in Alabama and possibly *Crothers* in Louisiana: a *sui generis* case that does not establish Pennsylvania as a Judicial Supremacy state.

The jurisprudence of Pennsylvania surrounding pre-election adjudications is slightly convoluted and involves a murky dialogue between the Pennsylvania Supreme Court and the Commonwealth Court. In what was apparently a matter of first impression, in *In re Jones*,[163] the Pennsylvania Supreme Court issued a per curiam opinion dismissing a pre-election challenge to a legislative candidate's qualifications because no "valid challenge" was established.[164] In a plurality opinion, Chief Justice Nix argued that the state Qualifications Clause barred pre-primary adjudication of qualifications,[165] but not pre-primary adjudication of a candidate's sincerity in declaring

160. *Id.* at 828 (emphasis added).
161. *Id.*
162. *Cf.* Nixon v. United States, 506 U.S. 224, 237 (1993) ("Our conclusion in *Powell* was based on the fixed meaning of '[q]ualifications' set forth in Art. I, § 2. . . . The decision as to whether a Member satisfied these qualifications *was* placed with the House, but the decision as to what these qualifications consisted of was not.").
163. *In re* Jones, 476 A.2d 1287 (Pa. 1984).
164. *Id.* at 1288.
165. *Id.* at 1290–93 (Nix, C.J.) (plurality opinion).

their qualifications.[166] Two years later in *In re Street*[167] the Pennsylvania Commonwealth Court held that, in light of new legislation that specifically required candidates to file affidavits stating that they complied with constitutional provisions and allowed objections to those affidavits,[168] judicial review of the whether those affidavits were "false" was consistent with the plurality opinion in *Jones*.[169] However, the court in *Street* did not inquire into the *sincerity* of the candidate; it simply inquired into the candidate's qualifications, and finding they were qualified, concluded the challenge had to fail.[170]

In *In re Prendergast*,[171] the Pennsylvania Supreme Court held that *Jones* was functionally overruled by the statutory changes discussed in *Street* and that it "approve[s] the reasoning in *Street* and conclude[s] that the challenge to the nomination petition in the instant case is therefore justiciable."[172] As in *Street*, the court in *Prendergast* does not frame its analysis in terms of sincerity.[173] Instead, the court ruled straightforwardly on the merits of the qualifications challenge, but concluded at the end of its opinion that the candidate was ineligible for filing a "false" affidavit.[174] It is empty formalism to allow courts to determine whether or not a candidate meets the qualifications for office, and then announce it is not an "*a priori* determination of whether a candidate meets the constitutional requirements for the office he or she seeks,"[175] but merely a procedural inquiry into the truthfulness of an affidavit. In practice, Pennsylvania bars post-election adjudication of qualifications and allows pre-election adjudication of qualifications: it is a Sequential Jurisdiction state.

C. Legislative Supremacy: California

Only one state, California, has unequivocally embraced a system of Legislative Supremacy: their supreme court has interpreted the state Qualifications Clause to bar pre-election challenges to state legislative candidates. Indeed, California is odd in that it seems to have never ruled on a post-election, pre-seating challenge to a candidate's qualifications. Instead, it ruled in 1905—in line with the vast majority of the states and the federal government—that post-seating challenges to

166. *Id.* at 1290; *Id.* at n.5.
167. *In re* Street, 516 A.2d 791 (Pa. Commw. Ct. 1986).
168. *Id.* at 793 (citing 25 PA. STAT. AND CONS. STAT. ANN. §§ 2870, 2937 (West 1937) (amended 2019)).
169. *Id.* The court in *Street* seems to treat the plurality opinion as the opinion of the court.
170. *Id.* at 793–96.
171. *In re* Prendergast, 673 A.2d 324 (Pa. 1996).
172. *Id.* at 325.
173. *Id.* at 325–28.
174. *Id.* at 328.
175. *Id.* at 325.

qualifications, whether brought by challengers or expelled members of the legislature, were barred.[176] Seven years later, it extended that ruling to pre-election challenges in a short, per curiam opinion, holding that "[f]or this court to undertake to try the question of eligibility and to deprive the candidate of any chance to be elected would simply be to usurp the jurisdiction of the assembly."[177] That ruling was affirmed in *In re McGee*[178] in 1951 and has been affirmed since.[179] Indeed, the California Appellate courts have clarified that the specific inflection point in California, the point at which the Qualifications Clause attaches, is when the candidate files with the Secretary of State.[180] At that point no judicial or executive adjudication of qualifications is allowed—functionally, filing with the Secretary prevents *any* later pre-election adjudication.

V. THE STATE COURT CONSENSUS IS PERSUASIVE

A consensus among state courts has been established, but this conclusion should be distinguished from the determination that the consensus is persuasive. It should be persuasive to federal courts for two reasons. First, there are no relevant differences between the state and federal systems that would lead to a different interpretation. Given that there are no relevant differences between the two systems, that consensus, built over decades and with a keen awareness of the practical effects of such a doctrine, should be persuasive. This is especially important where there is virtually no federal precedent. Second, the reasoning of the state supreme courts that have rigorously interrogated this question is independently persuasive, and more persuasive than the contrary position offered by the California Supreme Court.

A. Any Differences Between the State and Federal Systems Are Irrelevant

Some might argue that even if there is a consensus in the states that Sequential Jurisdiction is appropriate, that consensus reflects something idiosyncratic to the states. They might point to minor textual differences between the state and federal constitutional provi-

176. French v. Senate of State of Cal., 80 P. 1031, 1032–34 (Cal. 1905).
177. Allen v. Lelande, 127 P. 643, 643 (Cal. 1912) (the state Qualifications Clause bars pre-election eligibility challenges).
178. *In re* McGee, 226 P.2d 1 (Cal. 1951).
179. *See, e.g.,* Fuller v. Bowen, 138 Cal. Rptr. 3d 394, 402–04 (Cal. Ct. App. 2012); California War Veterans for Justice v. Hayden, 222 Cal. Rptr. 512, 517 (Cal. Ct. App. 1986).
180. *See Fuller*, 138 Cal. Rptr. 3d at 402–04 (Cal. Ct. App. 2012) (the Qualifications Clause attaches when the candidate files with the Secretary of State); *accord Hayden*, 222 Cal. Rptr. 512. *But see* Schweisinger v. Jones, 81 Cal. Rptr. 2d 183 (Cal. Ct. App. 1998) (upholding Secretary of State's refusal to accept filing papers because candidate was term-limited).

sions. They might contrast the state's plenary power with the federal government's enumerated powers, possibly including an ability to delegate this power that is unavailable in the federal context; the power of state courts to issue advisory opinions; or the power of states to add substantive, in addition to procedural qualifications. Most significantly, they might argue that state courts have no business deciding federal qualifications. Ultimately, none of these distinctions are persuasive or relevant.

1. Minor Textual Differences

A number of states have Qualifications Clauses with minor textual differences from the federal clause. These differences fall into three categories[181]: constitutions that make it clear the judging power attaches when the chamber is "assembled," constitutions that explicitly give some role to the courts in adjudicating election disputes,[182] and miscellaneous provisions that might affect the relationship between the power to run elections and the power to judge elections. But minor textual differences between constitutions are rarely important.[183] They matter only insofar as a state court interprets them in a way that diverges from the federal system. For example, if a state court adopted a Sequential Jurisdiction system by stressing that the "assembled" language in their constitution is proof the judging power is limited to members-elect and cannot affect determinations of candidate qualifications, that might create a divergence that would make the opinion less persuasive. But none of the textual differences have been interpreted by the courts in a way that would lead them to be more likely to adopt a system of Sequential Jurisdiction. Their decisions are solely based on considerations that are equally applicable to the federal context.

Four states—Idaho, Indiana, Oregon, and Tennessee—have Qualifications Clauses that mirror the federal clause, with the exception that they make it clear that the power does not attach until the body is

181. A number of states have language that makes the appropriate house the "sole" judge of its members' qualifications. *See, e.g.*, ARK. CONST. art. 5, § 11. That these "sole" states still adopt systems of Sequential Jurisdiction could be evidence that the federal system, which merely says that the appropriate house will be the "judge" of its members, is more lenient. However, it is more likely that these textual differences are too minor to cut either way.

182. Four of the states discussed above have language to this effect. *See* section IV.A. But the language is less important than the case law affirming that it creates a system of Judicial Supremacy; as discussed below, other states with similar language have rejected that interpretation and they have not relied on it to justify pre-election adjudication.

183. *See* Levinson, *supra* note 81, at 821; Swenson, *supra* note 81, at 1174–75.

"assembled."[184] However, the precedent (discussed above and in Appendix B) never assigns importance to that language. Also, the Supreme Court clarified in *Barry v. United States ex rel. Cunningham*[185] that the federal Qualifications Clause extends to members-elect, not just members. *Barry* suggests the jurisdiction of the appropriate house attaches when the member-elect "present[s] himself to the Senate, claiming all the rights of membership,"[186] not at any time before. And under the Twentieth Amendment each House of Congress convenes on January 3 of the year following an election[187]; it can only judge "its own Members" once it comes into existence. Although *investigations* may be undertaken before the newly elected members meet,[188] decisions can only be made by the new house.[189] Thus, the federal Qualifications Clause power only attaches once the body is "assembled." Because the states have assigned no importance to the language and the Supreme Court has functionally read in "when assembled" into the federal constitution, there is no reason to think this textual difference led these states to adopt the Sequential Jurisdiction approach.

184. IDAHO CONST. art. III, § 9 ("Each house *when assembled* shall choose its own officers; [and] judge of the election, qualifications and returns of its own members.") (emphasis added); IND. CONST. art. 4, § 10 ("Each House, *when assembled*, shall choose its own officers, the President of the Senate excepted; [and] judge the elections, qualifications, and returns of its own members. . . ." (emphasis added)); OR. CONST. art. IV, § 11 ("Each house *when assembled*, shall choose its own officers, [and] judge of the election, qualifications, and returns of its own members. . . .") (emphasis added)); TENN. CONST. art. II, § 11 ("The senate and house of representatives, *when assembled*, shall each choose a speaker and its other officers; [and] be judges of the qualifications and election of its members. . . ." (emphasis added)).

185. Barry v. United States *ex rel.* Cunningham, 279 U.S. 597 (1929).

186. *Id.* at 614; *see also* United States v. Dietrich, 126 F. 676, 680–86 (C.C.D. Neb. 1904) (a "member" of Congress is one who has been admitted to the appropriate house).

187. U.S. CONST. amend. XX, §§ 1–2.

188. *See, e.g.*, Federal Contested Elections Act, Pub. L. No. 91–138, 83 Stat. 285 (codified as amended at 2 U.S.C. §§ 381–96); *see also* Act of Jan. 23, 1798, ch.8, 1 Stat. 537 ("An Act To prescribe the mode of taking Evidence in cases of contested Elections for Members of the House of Representatives of the United States, and to compel the attendance of Witnesses," creating the earliest procedures for contested elections).

189. *See* DAWES, *supra* note 39, at 8 (describing an act that organized contested elections in the House: "[T]his statute secures the entire proofs in advance of the meeting of Congress, ready for reference on the first day of the term."); *see also* CHAFETZ, *supra* note 9, at 174–75 (describing a controversy in 1838 where a contested at large election of five representatives prevented the House from organizing itself for weeks); Salamanca & Keller, *supra* note 3, at 339 ("[Exclusion] arises inexorably with the gathering of the body. . . . [it] operates at the threshold of service without regard to the distinction between 'qualifications,' 'elections,' and 'returns,' . . . [even when the] alleged infirmity [in each case] preceded [their] appearance in the Senate. . . .").

Colorado, Iowa, Maryland, Minnesota, Ohio, and Pennsylvania all have constitutional provisions that envision some role for the courts in election disputes—what this paper terms "election contest" provisions.[190] However, as outlined in Appendix B, all six states have, at most, read those provisions to give state legislatures the power to pass laws that allow for post-election advisory opinions or post-election evidentiary hearings. As discussed below, post-election advisory opinions and evidentiary hearings are already part of the federal system. Therefore, these powers make it no more likely that the states would adopt a system of Sequential Jurisdiction.

Finally, one state—Mississippi—seems to enumerate a pre-election lawmaking power to provide for fair primaries.[191] A critic might point to this "power" as a distinction between the federal and state system. But all states are given an enumerated pre-election lawmaking power to regulate congressional primaries.[192] Indeed, given the state legislature's plenary powers, Mississippi's provision seems superfluous. Instead, consistent with the Mississippi Supreme Court's recent opinion,[193] this provision should be understood as a *duty* to enact laws regulating primaries. That duty is unique to Mississippi,[194]

190. COLO. CONST. art. V, § 10 ("Each house . . . shall judge the election and qualification of its members."); *id.* art. VII, § 12 (giving the general assembly the power to "designate the courts and judges by whom the several classes of election contests, not herein provided for, shall be tried, and regulate the manner of trial, and all matters incident thereto"); IOWA CONST. art. III, § 7 ("Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. *A contested election shall be determined in such manner as shall be directed by law*." (emphasis added)); MD. CONST. art. III, § 19 ("Each House shall be judge of the qualifications and elections of its members, *as prescribed by the Constitution and Laws of the State*. . . ." (emphasis added)); MINN. CONST. art. IV, § 6 ("Each house shall be the judge of the election returns and eligibility of its own members. *The legislature shall prescribe by law the manner for taking evidence in cases of contested seats in either house*." (emphasis added)); OHIO CONST. art. II, § 6 ("Each House shall be judge of the election, returns, and qualifications of its own members."); *id.* art. II, § 21 ("The General Assembly shall determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted."); PA. CONST. art. II, § 9 ("Each House shall choose its other officers, and shall judge of the election and qualifications of its members."); *id.* art. VII, § 13 ("The trial and determination of contested elections of . . . members of the General Assembly . . . shall be by the courts of law, or by one or more of the law judges thereof.").

191. *See* MISS. CONST. art. 12, § 247 ("The Legislature shall enact laws to secure fairness in party primary elections, conventions, or other methods of naming party candidates").

192. United States v. Classic, 313 U.S. 299, 311 (1941) ("[T]he states are given and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.").

193. Dillon v. Myers, 227 So. 3d 923, 929 (Miss. 2017) (describing Section 247 as a "mandate . . . to enact laws to secure fairness in party primaries. . . .").

194. *But see generally* Sweren-Becker & Waldman, *supra* note 22 (arguing the purpose of the Elections Clause was to ensure free and fair congressional elections—al-

but it does not make it more or less likely that Mississippi would enact a system of Sequential Jurisdiction. In fact, there was significant controversy even with said provision, as to whether Mississippi's constitution enacted a system of Sequential Jurisdiction or Legislative Supremacy.

2. Differences Between the State and Federal Powers to Regulate Elections

It is true that the power states exercise pursuant to the Elections Clause is not the same as the power they exercise pursuant to their plenary powers over state legislative races—there is no question that the latter is broader. And there is no question that state courts can do things Article III courts cannot, like issue advisory opinions. But these differences do not justify different jurisprudence for state and federal elections unless they make it more likely that a state court would interpret its constitutional structure to allow Sequential Jurisdiction instead of Legislative Supremacy. None of the differences between the state and federal systems give state courts any reason to make this choice one way or the other.

Every state legislature, by virtue of its plenary powers,[195] has the power to regulate state elections, including by passing ballot access laws.[196] Whereas a state's action is only unconstitutional if some constitutional provision limits it,[197] Congress must, in the first instance, justify legislation with reference to a specific enumerated power in the constitution.[198] And states only have the power to regulate congressional elections because that power is delegated to them by the Elections Clause.[199] In that way, the state's power is constrained as if they

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though Sweren-Becker and Waldman are principally concerned with Congress's power to prevent states from creating unfair systems, the power also embraces states who choose to create fair systems in the first instance).

195. *See, e.g.*, Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's* Failed Discourse, 24 RUTGERS L.J. 927, 950 (1993).

196. *Cf.* Hubbard v. Ammerman, 465 F.2d 1169, 1176 (5th Cir. 1972) (discussing the scope of the Elections Clause, holding that "[I]f the States have these broad powers as to the conduct of elections for federal office, *a fortiori* they certainly have them, if they choose to exercise them, as to elections held for state and local offices.").

197. *See, e.g.*, ALA. CONST. art. III, § 42 (placing all "powers . . . which are legislative" in the legislature); *see id.* art. IV, § 45 (limiting the legislature's general power by requiring all laws to concern a single subject).

198. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 533–34 (2012).

199. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 798–805 (1995) (majority opinion); Cook v. Gralike, 531 U.S. 510, 522 ("The federal offices at stake 'aris[e] from the Constitution itself.' Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power 'had to be delegated to, rather than reserved by, the States.'") (citations omitted); *see also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, ch. 9, § 625, at *101 ("[N]o powers could be reserved to the states, except

were Congress exercising a power. But, as discussed above, the Elections Clause includes the power to control ballot access, and it is well established that states have an interest in preventing unqualified candidates from appearing on the ballot.[200] If there is a bar to pre-election adjudication—i.e., a reason for a court to adopt a system of Legislative Supremacy—in both the federal and the state contexts it is because some other provision bars courts' qualification review powers, not because those powers are internally limited. Therefore, the generic difference in breadth is inapplicable to this discussion.

Two states, New York and Minnesota, have unfortunate language in case law discussing the "delegat[ion]" or "surrender[ ]" of power from the legislature to the courts to judge qualifications of members.[201] It might be argued that state legislatures can delegate this judging power in state legislative races, where state legislatures hold both the pre-election lawmaking and the post-election judging powers; however, because state legislatures possess only the lawmaking power (which they share with Congress) in congressional elections, they cannot delegate the judging power in the federal context (although it is possible that Congress could).[202] This argument misunderstands the judging power. The power to judge is a power of the appropriate chamber to constitute itself. It is given to a single chamber, and only to the chamber to which the candidate is elected to (e.g., only the 118th Congress can judge the qualifications of the members elected in 2022). It cannot be delegated by the legislature or even by a prior house any more than a prior house or the legislature as a whole could bind a future house's power to set its own rules. Furthermore, if the power can be "delegated," there is no reason to treat pre- and post-election adjudications any differently. But, as discussed above, there is near universal agreement, including in New York and Minnesota, that post-election adjudication is barred. Had this language been widespread in the decisions cited, it might pose a problem. But seeing as it crops up only in a handful of cases, and in states where post-election adjudications are barred, it should be disregarded. Because state legislatures may not delegate this power any more than Congress can,

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those, which existed in the states before the constitution was adopted."); *accord* 1 ASHER C. HINDS, HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ch. 13, § 414, at 382–83 (1907).

200. *See* Lindsay v. Bowen, 750 F.3d 1061, 1064 (9th Cir. 2014); Hassan v. Colorado, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.).

201. Scaringe v. Ackerman, 506 N.Y.S.2d 918, 920 (App. Div. 1986), *aff'd*, 501 N.E.2d 593 (N.Y. 1986); Harwood v. Meisser, 339 N.Y.S.2d 270, 271 (App. Div. 1973), *aff'd*, 293 N.E.2d 827 (N.Y. 1973) (mem.); *see* Moe v. Alsop, 180 N.W.2d 255, 259 (Minn. 1970).

202. *See, e.g.*, Hansen v. Finchem, No. CV 2022-004321, slip. op. at 13 n.8 (Ariz. Apr. 21, 2022) (holding that Congress did not *yet* "delegat[e]" its judging power to the states).

the language referring to delegation does not make it more likely that states would have adopted a Sequential Jurisdiction system.

It is not uncommon for state courts to issue advisory opinions after a general election.[203] In contrast, advisory opinions are barred in federal courts.[204] However, that speaks to a difference between Article III and the jurisdictional limits of state courts; it has nothing to do with the power of the appropriate house to make a final judgment. Indeed, *Roudebush* makes it clear that post-election state court opinions are advisory;[205] and as other precedent clarifies, state courts may issue advisory opinions regarding congressional elections.[206] Therefore, advisory opinions are allowed in the federal system, just not from federal courts. The existence of advisory opinions does not make it more likely a court would adopt Legislative Supremacy or Sequential Jurisdiction.[207]

Finally, some commentators have argued that adjudicating qualifications in a pre-election context is the same as adding qualifications because qualifications apply to members-elect, not candidates.[208] Such actions would be barred by *U.S. Term Limits* in the federal context, but some states do not adopt the *U.S. Term Limits* position that substantive qualifications can only be added via constitutional amendments.[209] Therefore, the argument goes, states might consider pre-election adjudication to be equivalent to adding qualifications *and* consider that a valid exercise of the lawmaking power of state legislatures. But other states have adopted a doctrine paralleling the one in *U.S. Term Limits*,[210] and more importantly, there is no indication in any of these cases that the courts understand these cases to involve

203. *See, e.g.*, Jenkins v. Bogard, 980 S.W.2d 270, 271–74 (Ark. 1998) (announcing what the court admitted was an advisory opinion, as the challenged candidate had lost the general election, defining the scope of the state's constitutional residency requirements).

204. *See, e.g.*, Morgan v. United States, 801 F.2d 445, 446–51 (D.C. Cir. 1986) (Scalia, J.) (dismissing post-election contest of congressional races on jurisdictional grounds); *accord* McIntyre v. Fallahay, 766 F.2d 1078, 1080–81 (7th Cir. 1985); *see also* Cawthorn v. Amalfi, 35 F.4th 245, 267–73 (4th Cir. 2022) (Richardson, J. concurring in the judgment) (finding a "jurisdictional bar" on judicial review of congressional qualifications).

205. Roudebush v. Hartke, 405 U.S. 15, 25–26 (1972).

206. *See McIntyre*, 766 F.2d at 1081 ("[S]tate courts are free to hear disputes that are not 'cases or controversies' within the jurisdiction of federal courts.").

207. Indeed, one could imagine a system of Legislative Supremacy where advisory opinions were allowed at any point in the election process.

208. Derek Muller, *Adding Qualifications for Congressional Candidates and a Section 3 Puzzle*, ELECTION L. BLOG (Feb. 7, 2022, 11:49 AM), https://electionlawblog.org/?p=127486 [https://perma.cc/JU2S-YMD8].

209. League of Women Voters v. Sec'y of State, 683 A.2d 769, 771–73, 772 n.7 (Me. 1996).

210. Crothers v. Jones, 120 So. 2d 248, 254–56 (La. 1960) (implying qualifications for legislative office cannot be added by statute).

additional qualifications.[211] Instead, the opinions apply the existing qualifications in their constitution to prevent unqualified candidates from interfering in the election process. Therefore, there is no reason to think those states adopted a system of Sequential Jurisdiction because of this possible difference from the federal system.

3. Federalism Concerns

A critic might argue, somewhat intuitively, that state officials have no power to decide federal issues—that there is no reason to grant a local election administrator the power to interpret and enforce the constitutional qualifications imposed on federal candidates.[212] But every state allows judicial review of these decisions[213] and under the structure of Article III, state courts are presumed to be as competent as any federal court—except the Supreme Court—at interpreting the Constitution.

A stronger version of this argument is that although state courts are competent to interpret the Constitution, the qualifications of congressional candidates is a matter of national concern—it matters to voters in Massachusetts if candidates in Montana are unqualified, and vice versa. The Supreme Court in *U.S. Term Limits* and *Gralike* was adamant that states could not interfere with the national character of Congress. But enforcing the limited qualifications enumerated in the Constitution furthers the goal of national uniformity.

The reasoning of *U.S. Term Limits* and *Gralike* was that allowing states unfettered power to add qualifications would interfere with the national nature of the house by creating regional distinctions.[214] The power to add qualifications could encompass the power to bind—or at least punish[215]—members of Congress that disobeyed the state's pre-

211. *But see* State *ex rel.* Fisher v. Brown, 289 N.E.2d 349, 352 (Ohio 1972) (constitutional qualifications only apply to members-elect, not candidates). This was functionally overruled. *See* State *ex rel.* O'Neill v. Athens Cty. Bd. of Elections, 154 N.E.3d 44, 48–53 (Ohio 2020) (adjudicating a pre-primary dispute, finding the candidate eligible and ordering the votes cast for her to be counted).

212. *Cf.* S.B. Tillman & Josh Blackman, *Only the Feds Could Disqualify Madison Cawthorn and Marjorie Taylor Greene*, N.Y. TIMES (Apr. 20, 2022), https://www.nytimes.com/2022/04/20/opinion/madison-cawthorn-marjorie-taylor-green-section-3.html [https://perma.cc/M22R-ZS37] (making the somewhat distinct argument that, at least with regard to the qualification in Section Three of the Fourteenth Amendment, Congress would have to create a cause of action before *any* court, federal or state, could adjudicate a challenge to a candidate's qualifications).

213. *Cf. supra* note 8 (noting New Hampshire's somewhat tortured position on judicial review of the Ballot Law Commission, which is part of the executive branch).

214. TRIBE, *supra* note 47, at 1249 n.72.

215. In Cook v. Gralike, 531 U.S. 510, 514–16 (2001), Missouri passed a law punishing incumbent candidates who did not support a constitutional amendment imposing term limits by printing a pejorative label on their ballot when they ran for reelec-

rogatives. This was a power that the framers rejected,[216] instead lodging the powers of punishment with the people (via regularly scheduled elections) and the chamber itself (via expulsion). But adding qualifications is not the same as verifying existing ones.[217] Indeed, not enforcing qualifications also threatens the national character of the house by allowing regions who object to certain requirements to ignore them. There is the issue of patchwork enforcement, where certain states do their constitutional duty and others abdicate it. But that national enforcement may be preferable is not a reason to prevent states from aspiring to enforce a national standard.

However, what recourse does a candidate have if a state abuses its verification power?[218] As discussed above, each house has the final, exclusive power to correct such abuse by voiding the election.[219] Although that may seem extreme, consider the position of some commentators that it is a good thing that the exclusion power is exercised by a political body because they "should not be bound by all the rules of legal procedure."[220] While that is occasionally in service of leniency, more often it is to allow the legislature to exclude members who could

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tion. If allowed, there would be nothing preventing Alabama, for example, from punishing candidates in a similar fashion who did not support certain conservative social policies, or Massachusetts, for example, from punishing candidates who do not support LGBTQ rights.

216. The power to recall delegates was written into the Article of Confederation. ARTICLES OF CONFEDERATION OF 1781, art. V, para. 1. It was also part of the "Virginia Plan," but was rejected. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 20, 210 (Max Farrand ed., 1911).

217. *Contra* Greene v. Sec'y of State, 52 F. 4th 907, 914-16 (11th Cir. 2022) (Branch, J., concurring) (arguing in a case concerning the qualifications of a congressional candidate that while the dispute was moot, had it been live, pre-election verification by the states is unconstitutional—at least as applied to Section Three of the Fourteenth Amendment). Judge Branch's concurrence relies, to some extent, on a cramped view of the Elections Clause power and on the error that verifying qualifications prior to an election *is* adding qualifications. The former is inconsistent with the text and structure of the Elections Clause, *see generally* Sweren-Becker, *supra* note 22, while the latter is foreclosed by analogous precedent. *See, e.g.*, Hassan v. Colorado, 495 F. App'x 947, 948 (10th Cir. 2012) (Gorsuch, J.) (upholding a presidential ballot access exclusion decision against a challenge by a constitutionally ineligible candidate); *see also* Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014) (same); Chiafalo v. Washington, 140 S. Ct. 2316, 2324, n.4 (2020) (assuming that it would be unconstitutional for a state to add qualifications to a presidential candidacy).

218. THE FEDERALIST NO. 10 (James Madison) (arguing that factions opposed to the common good are more likely to constitute a majority in smaller republics).

219. Muller, *supra* note 4, at 598, n.312 (framing this as a "weaker" version of his argument that still stands if his "strong" argument—that states cannot bar congressional candidates who are constitutionally unqualified—is rejected).

220. CHAFETZ, *supra* note 9, at 172; *see also* Salamanca & Keller, *supra* note 3, at 337 ("[E]xercise of the privilege [to judge qualifications] is not and never has been a purely legalistic process, instead lying somewhere at the intersection of law and politics.").

likely not be excluded in a formal judicial forum but whose presence threatens democratic institutions.[221] State verification procedures, in contrast, are constrained by state and federal judicial review, if not for substance in the latter case,[222] then certainly for procedure,[223] limiting the chance of abuse. The founders worried that giving *unreviewable* powers to states would lead to regional cabals, not that delegating reviewable verification powers was a threat to our national character.

Finally, the Elections Clause only gives states a default power: it is a power that Congress can override at any time. If it becomes clear that states are abusing this power, Congress can create a law that strips them of this ability. Because it is only the Elections Clause—and not some intrinsic power given to them as sovereigns—that gives states the power to regulate congressional elections, they will have no recourse if Congress asserts its power. There is nothing about allowing state courts to determine the qualifications of Congressional candidates that upsets the balance between the federal government and the states.

B. That State Courts Have Reached a Consensus Is Persuasive

Federal courts have begun to construe the interaction between the Elections Clause and the Qualifications Clause in the pre-election context. However, the opinions in both directions have completely ignored state law precedent.[224] It is a serious error to ignore over seventy

221. CHAFETZ, *supra* note 9, at 187 (describing a case during Reconstruction where the House simply "counted" the black citizens who were not allowed to vote as Republican votes to place a Republican congressman and concluding that while it was certainly not a *judicial* decision, it was nonetheless a *democratic* one); *see also* Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 166 (discussing the exclusion of representatives during the civil war but prior to the Disqualification Clause for giving aid and comfort to the enemy, which would be unconstitutional under *Powell*).

222. *See, e.g.*, Morgan v. United States, 801 F.2d 445, 446–51 (D.C. Cir. 1986) (Scalia, J.); McIntyre v. Fallahay, 766 F.2d 1078, 1080–81 (7th Cir. 1985).

223. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 432–34 (1992) (establishing the modern test for determining the constitutionality of ballot access rules).

224. One federal court has ruled squarely on this issue, finding the precedent from presidential cases persuasive and holding that pre-election adjudication did not usurp the House's final decision-making power under the Qualifications Clause. Greene v. Raffensperger, 599 F.Supp.3d 1283 at 26–28 (N.D. Ga. 2022), vacated as moot, Greene v. Sec'y of State, 52 F. 4th 907 (11th Cir. 2022). Discussed above, a concurring opinion argued that pre-verification of qualifications was tantamount to "adding" qualifications, which went beyond the mere "procedural" power given to states under the Elections Clause. *Id.* at 914–16 ((Branch, J., concurring). An opinion from the Fourth Circuit was split, with the main opinion reserving the issue. Cawthorn v. Amalfi, 35 F.4th 245, 255–57 (4th Cir. 2022)

years of decisions of state courts that address a virtually identical question concerning provisions with a common history and work solely from constitutional first principles. Instead, the fact that a broad consensus has emerged from state courts should itself be persuasive.

The Supreme Court noted in *Obergefell v. Hodges*[225] that "many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions."[226] Indeed, similar to the project here, the court cataloged state supreme court decisions regarding same-sex marriage.[227] Furthermore, the court approvingly cited the Massachusetts Supreme Judicial Court's interpretation of its own Equal Protection Clause.[228] Although *Obergefell* grounds itself in federal precedent, it is hard to overstate the practical importance of those state decisions; as Judge Sutton argued: "[o]ngoing dialogue indeed. This was not only a conversation to which the States contributed; it was one in which they announced the first words. There is no *Obergefell* without *Goodridge*."[229] In contrast, the majority in *Rucho v. Common Cause*[230] held that whatever the normative appeal of addressing partisan gerrymandering, state supreme court decisions were unhelpful because they referenced provisions in state constitutions that have no parallel in the federal constitution: "[T]here is no 'Fair Districts Amendment' to the Federal Constitution."[231]

Here, virtually every state has a qualifications clause. The state and federal provisions have a common history,[232] and they mean the same thing. There are parallel structures between the state and federal systems: a lawmaking power to regulate the pre-election process and a quasi-judicial judging power lodged after the election in the appropriate house. And every state but one to consider the issue has decided that structure provides a system of Sequential Jurisdiction where judicial review of legislative candidate qualifications is permit-

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(holding it was not deciding this issue by construing the 1872 Amnesty Act), a concurring opinion emphasizing the difference between *members* and *candidates*, *id.* at 261–66 (Wynn, J., concurring), a difference reflected in the state case law, *see infra* section V.C., while a third opinion argued the Qualifications Clause covered both candidates and members. *Id.* at 266–85 (Richardson, J., concurring in the judgment).

225. Obergefell v. Hodges, 576 U.S. 644 (2015).
226. *Id.* at 663.
227. *Id.* at 681–85 (Appendix A) (collecting cases).
228. *Id.* at 662, 666 (citing Goodridge v. Dept. of Pub. Health, 798 N.E. 2d 941 (Mass. 2003)).
229. SUTTON, *supra* note 10, at 207; *see also* Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 HASTINGS CONST. L.Q. 115, 142 n.135 (2022) (collecting instances where state court interpretation influenced federal interpretation).
230. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).
231. *Id.* at 2507.
232. Morgan v. United States, 801 F.2d 445, 447–48 (D.C. Cir. 1986) (collecting commentary).

ted. This is an issue of first impression for federal courts, but it is not one for American courts; federal courts should heed the overwhelming consensus that has developed over seventy years that the power of a chamber of a legislature to judge the qualifications and returns of a general election has no bearing on the judiciary's power to judge the qualifications of candidates *before* the general election.[233] Furthermore, some commentators have mustered a parade of horribles should these adjudications be allowed.[234] These challenges to state legislators are commonplace, yet state elections are not in disarray. Indeed, state courts are closer to the mechanics of the electoral process—their approval is a rejoinder to the idea that Sequential Jurisdiction is unworkable.

Should a federal court pass on this question, it has a duty—normative, if not constitutional—to address the state consensus. If it agrees with the consensus, it should not make the mistake of Justice Jackson in *West Virginia Board of Education v. Barnette*,[235] where the Supreme Court failed to give due credit to state courts that had protected freedom of expression in the fallout of the disastrous *Minersville School District v. Gobitis*[236] decision.[237] Instead, it should credit the state supreme courts that have already addressed this question. And if it diverges it should explain that divergence—as the Chief Justice did in *Rucho*, even if unconvincingly.[238]

C. State Courts Opinions Arguing for Sequential Jurisdiction Are Persuasive

That every state supreme court but one to decide the issue has ruled in favor of pre-election challenges to state legislative candidates' constitutional qualifications should be persuasive. Equally persuasive is the actual reasoning found in the state supreme courts that consider the interaction between the two powers in an in-depth manner. Notably, the decisions use a similar line of reasoning. First, they emphasize the constitutional distinction between *candidates* and *mem-*

233. Subject, of course, to the protections granted by the Due Process Clause and the First Amendment, as well as other constitutional provisions.

234. *See* Derek Muller, *Timing and procedural morass hit* Cawthorn *Disqualification Challenge*, ELECTION L. BLOG (March 16, 2022, 9:32 AM), https://electionlawblog.org/?p=128218 [https://perma.cc/6F9Y-QF3K] (arguing that the difficulties show reasons to be skeptical of the power to judge pre-election qualifications—ignoring that these questions are raised because this is an issue of first impression, and subsequent challenges would not face such difficulties).

235. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

236. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

237. SUTTON, *supra* note 10, at 172.

238. Rucho v. Common Cause, 139 S. Ct. 2484, 2524 n.6 (2019) (Kagan, J., dissenting) (pointing out that the "standards and guidance" provided by these state amendments amount to more than what is available under the Equal Protection Clause).

bers-elect; the lawmaking power to regulate elections covers the former, whereas the judging power extends to the latter. Second, these decisions emphasize the absurd results of refusing to engage in this screening—with a recent opinion emphasizing that absurdity is the result of a failure to reconcile competing constitutional powers. Although there are legitimate countervailing points, most compellingly espoused by the California Supreme Court, they are ultimately unpersuasive.

In *State ex rel. Gralike v. Walsh*,[239] as discussed above, the Missouri Supreme Court passed on the qualifications of a candidate for the state legislature. It first noted the breadth and absurdity of the plaintiff's position, as it would take "the entire election process of members of the General Assembly" out of the courts, meaning that if "a 15-year old resident of Illinois" ran for office the state would be powerless and if "there were widespread charges of counting and voting fraud, the courts . . . would be unable to accept and hear a Primary Election contest."[240] The Missouri Supreme Court went on to hold that these absurdities could be avoided by complying with the text of the state Qualifications Clause: which applies *after* general elections.[241] Pre-election adjudication does not violate separation of powers principles because the final post-election decision of the relevant chamber is untouched.[242]

The two-prong argument was made two years later in *Comer v. Ashe*[243] by the Tennessee Supreme Court, though in reverse. It began by noting that in a pre-election contest the house with the power to judge the candidate's qualifications did not exist—it *could not* exist until the general election.[244] Furthermore, that the primaries, after the White Primary cases, are an "integral part of the electoral process" does not change their nature as "preliminary" and not "ultimate" contests.[245] It goes on to cite *Gralike*'s absurdity arguments with approval, concluding that it "adopt[s] the reasoning of the Missouri

239. State *ex rel.* Gralike v. Walsh, 483 S.W.2d 70 (Mo. 1972).
240. *Id.* at 73.
241. *Id.* Although the court intimates here that the clause does not attach until the candidate is presented with a certificate of election, subsequent case law establishes that the general election is the appropriate marker. State *ex rel.* Carrington v. Human, 544 S.W.2d 538, 539–40 (Mo. 1976).
242. *Gralike*, 483 S.W.2d at 73–74 (further noting that, if the court finds the candidate eligible, that has no res judicata effect on the legislature).
243. Comer v. Ashe, 514 S.W.2d 730 (Tenn. 1974).
244. *Id.* at 733; *see also* Greene v. Raffensperger, 599 F.Supp.3d 1283, 1319 (N.D. Ga. 2022) ("[I]t is also not clear that the current 117th Congress would be permitted to assess the qualifications of a candidate, like Plaintiff, for the 118th Congress. If this is so, under Plaintiff's theory, neither the State nor Congress would be permitted to exclude a constitutionally unqualified candidate from the ballot before the election.").
245. *Comer*, 514 S.W.2d at 735.

Court."[246] However, the court also notes another aspect, the rights of the public:

> The people of this Senatorial District are entitled to representation. His party is entitled to representation . . . This Court is under a sworn duty to protect not only the rights and interests of litigants but also to guard with equal vigilance the interests of the body politic.[247]

If the election is voided, as it would be the Tennessee Senate's duty to do,[248] the right to representation would be undermined.[249] Early commentators understood that allowing an ineligible candidate on the ballot would "result in practical disenfranchisement."[250] Here, as the Michigan Supreme Court noted in a non-legislative contest, rules governing post-election disputes are justified by a need to prevent confusion and conflicts with the legislative body, but "in the context of a pre-election challenge, judicial review can have the opposite effect, avoiding post-election challenges to an official who was ineligible to have his or her name included on the ballot in the first place."[251]

This highlights that the debate is not merely about whether the power is consistent with constitutional structure but also whether it is consistent with democracy and the right to representation.[252] After all, structural arguments are useful "only to the extent that the substantive human realities they engender cohere with underlying consti-

246. *Id.* at 738–39 (citing *Gralike*, 483 S.W.2d at 72–73).

247. *Comer*, 514 S.W.2d at 741.

248. *Id.* (affirming that the Senate has exclusive jurisdiction after "election day").

249. For instance, after allegations of fraud led to the House of Representatives refusing to seat Mark Harris after the 2018 general election, North Carolina's 9th Congressional District had to wait until September 10, 2019 to elect a representative, losing nearly a year of representation. Mike Lillis, *Hoyer: Dems won't seat Harris until North Carolina fraud allegations resolved*, THE HILL (Dec. 4, 2018 12:34 PM), https://thehill.com/homenews/house/419658-hoyer-dems-wont-seat-harris-until-north-carolina-fraud-allegations-are/ [https://perma.cc/4YV9-EMMG]; Leigh Ann Caldwell & Dartunorro Clark, *New election ordered in North Carolina House district after possible illegal activities*, NBC (Feb. 21, 2019, 1:53 PM), https://www.nbcnews.com/politics/congress/republican-candidate-mark-harris-calls-new-election-north-carolina-disputed-n974176?cid=public-rss_20190221 [https://perma.cc/YRH5-Z2QR]; Alex Seitz-Wald & Leigh Ann Caldwell, *Republican Dan Bishop wins narrow victory in North Carolina special election*, NBC NEWS (Sep. 10, 2019, 4:01 PM), https://www.nbcnews.com/politics/2020-election/north-carolina-special-election-mccready-bishop-n1052021 [https://perma.cc/C2U3-Z45F].

250. Binney, *supra* note 55, at 125.

251. Berdy v. Buffa, 928 N.W.2d 204, 207 (Mich. 2019); *cf.* Scott L. Kafker & David A. Russcol, *The Eye of a Constitutional Storm: Pre-Election Review by the State Judiciary of Initiative Amendments to State Constitutions*, MICH. ST. L. REV. 1280 (2012) (arguing for pre-election review of both the substance and procedure of constitutional initiatives to state constitutions on similar grounds).

252. *Cf.* Laurence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J. FORUM 86, 104–05 (2016).

tutional principles and values."[253] As Professor Jackson has argued, debates over the scope of these powers are, at base, about democracy.[254] Thus, courts and legislative bodies should be hesitant if this harmonization of the two clauses violates the "fundamental principle of our representative democracy . . . that the people should choose whom they please to govern them,"[255] and that it does not provide powerful support for the system of Sequential Jurisdiction.

Finally, a recent case from Mississippi is instructive. Prior to 2017, there was competing case law on whether pre-election challenges were available for legislative races.[256] However, where the Elections Clause *allows* the state and Congress to regulate pre-election conduct like primaries,[257] the Mississippi Constitution *commands* its legislature to do so.[258] The majority held that the prior cases that held the state Qualifications Clause barred pre-election contests "failed to address the interplay between" these two clauses.[259] Insofar as the Mississippi Constitution gives the legislature the duty and authority to pass legislation to ensure fair primaries, that duty includes giving jurisdiction to administrative bodies and the courts to hear pre-election cases.[260] However, once a general or special election is held, the state Qualifications Clause ensures "exclusive jurisdiction" is given to the appropriate house, ensuring "harmony."[261] Although the case involved a contest over ballots, the court overruled an earlier case that turned on a candidate's constitutional eligibility at the pre-election stage.[262]

The importance of this case is that it correctly re-frames the absurdity arguments of the earlier cases in constitutional dimensions: it is not just that the result is absurd, but that it ignores the interplay between two equally important constitutional provisions. As in *Roudebush*, the appropriate method is to read the two clauses in harmony with each other, rather than reading one clause rigidly and for-

253. *Id.* at 105.
254. Vicki C. Jackson, Cook v. Gralike: *Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299, 344–45 (2001) (in a similar context, arguing that "[T]he core of the argument here is deeply structural, and to treat the issue as if it turned on the particularities of the Elections Clause, and of whether the ballot-labeling law can be shoehorned into the word 'Manner,' is to miss the point of representative democracy.").
255. Powell v. McCormack, 395 U.S. 486 (1969).
256. Dillon v. Myers, 227 So. 3d 923, 924–26 (Miss. 2017).
257. *See* United State v. Classic, 313 U.S. 299, 319–21 (1941) (the Elections Clause empowers Congress to regulate congressional primaries).
258. MISS. CONST. art. XXII, § 247. That the Elections Clause allows, but does not require, regulation of primaries does not make the provisions any less parallel in the relevant respects; in both cases they represent a division of labor between pre-election and post-election adjudication.
259. *Dillon*, 227 So. 3d at 927.
260. *Id.* at 927–28.
261. *Id.* at 927.
262. *Id.* at 928 (overruling Foster v. Harden, 536 So. 2d 905 (Miss. 1988)).

malistically and ignoring or cabining the other. It may be that lacking a specific provision for the regulation of pre-election conduct, notwithstanding states' plenary legislative powers, prevented these earlier states from articulating that interplay. Nevertheless, even in a state where the legislative power is plenary, the "absurdity" is that the state Qualifications Clause would preempt what is obviously the constitutional domain of the legislature in its normal, lawmaking capacity: the regulation of elections up until election day. Moreover, as discussed above, that power *is* enumerated in the federal context.

The most rigorous defense of the Legislative Supremacy system is found in the California Supreme Court decision *In re McGee*.[263] The Court rejected the view that the state Qualifications Clause did not apply to a candidate's qualifications at the primary election, first holding that primaries are an integral part of the electoral process, not merely a private affair.[264] Furthermore, although the California Constitution gives the legislature the power to regulate primaries, the California Supreme Court holds that "[w]e see nothing in [the power to regulate primaries] that purports to strip or relieve the assembly or senate of their duty and obligation to judge the qualifications, and returns of their members."[265] Finally, the Court raised the specter of its ruling being disregarded by the legislature.[266]

The first point is logically inconsistent: if primaries were ungovernable by any law, they would not only be outside the power of the state Qualifications Clause, but they would also be outside the normal lawmaking power and thus judicial review would not be appropriate. The rule of the White Primary cases the court cites is that judicial review *is* appropriate. The second point begins with the assumption that the Qualifications Clause reaches primaries, then argues the lawmaking power does not "strip or relieve" the appropriate house of its power. But the real question is whether and how the state Qualifications Clause power interacts with pre-election laws, which is elided by the California Supreme Court's approach. Finally, that two branches might issue conflicting opinions is unavoidable in this arena. There are conceivable scenarios in which every qualification for office is judicially reviewable outside of a candidate challenge. A sitting member of the state legislature might have their citizenship reviewed by a court in a deportation proceeding; their age might be the subject of insurance litigation; their residency might be reviewed in a case about their right to vote, et cetera. Those conflicts are unavoidable and not a rea-

263. *In re McGee*, 226 P.2d 1 (Cal. 1951).

264. *Id.* at 3–4 (citing United States v. Classic, 313 U.S. 299 (1941); Smith v. Allwright, 321 U.S. 649 (1944)).

265. *McGee*, 226 P.2d at 4.

266. *Id.* at 4–5.

son to limit a state's power to regulate its ballot. California's approach is not only an outlier, it is unpersuasive and should be disregarded.

VI. CONCLUSION

The states and the federal government have parallel constitutional structures governing the regulation of legislative elections: the law-making power, reviewable by courts, administers elections and after the general election occurs, each house of the legislature exercises a quasi-judicial power to constitute itself. A majority of the states have concluded—persuasively—that part of that pre-election regulatory power is allowing the adjudication of the qualifications of legislative candidates' constitutional eligibility. Courts hearing this issue in the context of congressional races for the first time should look to both the consensus and the opinions of state courts for their persuasive value.

APPENDIX A

State	**Constitutional Provision**	**Constitutional Text**
U.S.	U.S. CONST. art. I, § 5, cl. 1.	"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . ."
Alabama	ALA. CONST. art. IV, § 51.	"Each house . . . shall judge of the election, returns, and qualifications of its members."
Alaska	ALASKA CONST. art. II, § 12.	"Each [house] is the judge of the election and qualifications of its members. . . ."
Arizona	ARIZ. CONST. art. IV, pt. 2, § 8.	"Each house, *when assembled*, shall choose its own officers, judge of the election and qualification of its own members . . ." (emphasis added).
Arkansas	ARK. CONST. art. V, § 11.	"Each house . . . shall be *sole* judge of the qualifications, returns and elections of its own members." (emphasis added).
California	CAL. CONST. art. IV, § 5.	"Each house of the Legislature shall judge the qualifications and elections of its Members. . . ."
Colorado	COLO. CONST. art. V, § 10; *id.* art. VII, § 12.	"Each house . . . shall judge the election and qualification of its members."; "*The general assembly shall, by general law, designate the courts and judges by whom the several classes of election contests, not herein provided for, shall be tried, and regulate the manner of trial, and all matters incident thereto, but no such law shall apply to any contest arising out of an election held before its passage*." (emphasis added)
Delaware	DEL. CONST. art. II, § 8.	"Each House shall be the judge of the elections, returns and qualifications of its own members. . . ."
Georgia	GA. CONST. art. III, § IV, ¶ 7.	"Each house shall be the judge of the election, returns, and qualifications of its members. . . ."
Idaho	IDAHO CONST. art. III, § 9.	"Each house *when assembled* shall choose its own officers; judge of the election, qualifications and returns of

		its own members . . .” (emphasis added).
Illinois	ILL. CONST. art. IV, § 6 (d).	“Each house shall determine the rules of its proceedings, judge the elections, returns and qualifications of its members and choose its officers.”
Indiana	Indiana IND. CONST. art. IV, § 10.	Each House, *when assembled*, shall choose its own officers, the President of the Senate excepted; judge the elections, qualifications, and returns of its own members. . . .” (emphasis added).
Iowa	IOWA CONST. art. III, § 7.	“Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. *A contested election shall be determined in such manner as shall be directed by law*.” (emphasis added).
Louisiana	LA. CONST. art. III, § 7(A).	“Each house shall be the judge of the qualifications and elections of its members. . . .”
Maine	ME. CONST. art. IV, pt. 3, § 3.	“Each House shall be the judge of the elections and qualifications of its own members. . . .”
Maryland	MD. CONST. art. III, § 19.	“Each House shall be judge of the qualifications and elections of its members, *as prescribed by the Constitution and Laws of the State* . . .” (emphasis added).
Massachusetts	MASS. CONST. pt. 2, ch. 1, § 2, art. IV; *id.* at pt. 2, ch. 1, § 3, art. X.	“The senate shall be the final judge of the elections, returns and qualifications of their own members. . . .”; “The house of representatives shall be the judge of the returns, elections, and qualifications of its own members. . . .”
Michigan	MICH. CONST. art. IV, § 16.	“Each house shall be the *sole* judge of the qualifications, elections and returns of its members. . . .” (emphasis added).
Minnesota	MINN. CONST. art. IV, § 6.	“Each house shall be the judge of the election returns and eligibility of its own members. *The legislature shall prescribe by law the manner for taking evidence in cases of contested seats in*

		either house." (emphasis added).
Mississippi	MISS. CONST. art. IV, § 38.	"Each house shall elect its own officers, and shall judge of the qualifications, return and election of its own members."
Missouri	MO. CONST. art. III, § 18.	"Each house shall appoint its own officers; shall be *sole* judge of the qualifications, election and returns of its own members. . . ." (emphasis added).
Nebraska	NEB. CONST. art. III, § 10.	"[T]he Legislature shall . . . be the judge of the election, returns, and qualifications of its members. . . ."
Nevada	NEV. CONST. art. IV, § 6.	"Each House shall judge of the qualifications, elections and returns of its own members. . . ."
New Hampshire	N.H. CONST. pt. 2, art. XXII; *id.* at pt. 2, art. XXXV.	"The house of representatives . . . shall be judge of the returns, elections, and qualifications, of its members, as pointed out in this constitution."; "The senate shall be final judges of the elections, returns, and qualifications, of their own members, as pointed out in this constitution."
New Mexico	N.M. CONST. art. IV, § 7.	"Each house shall be the judge of the election and qualifications of its own members."
New York	N.Y. CONST. art. III, § 9.	"Each house shall . . . be the judge of the elections, returns and qualifications of its own members. . . ."
North Carolina	N.C. CONST. art. II, § 20.	"Each house shall be judge of the qualifications and elections of its own members. . . ."
Ohio	OHIO CONST. art. II, § 6; *Id.* art. II, § 21.	"Each House shall be judge of the election, returns, and qualifications of its own members." "*The General Assembly shall determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted*." (emphasis added).
Oklahoma	OKLA. CONST. art. V, § 30.	"Each House shall be the judge of the elections, returns, and qualifications of its own members. . . ."
Oregon	OR. CONST. art. IV, § 11.	"Each house *when assembled*, shall choose its own officers, judge of the

		election, qualifications, and returns of its own members. . . ." (emphasis added).
Pennsylvania	PA. CONST. art. II, § 9; *id.* art. VII, § 13.	"Each House shall choose its other officers, and shall judge of the election and qualifications of its members." "*The trial and determination of contested elections of . . . members of the General Assembly . . . shall be by the courts of law, or by one or more of the law judges thereof*." (emphasis added).
Rhode Island	R.I. CONST. art. VI, § 6.	"Each house shall be the judge of the elections and qualifications of its members. . . ."
South Carolina	S.C. CONST. art. III, § 11; *id.* at art. III, § 7.	"Each house shall judge of the election returns and qualifications of its own members . . ." "*A candidate for the Senate or House of Representatives must be a legal resident of the district in which he is a candidate at the time he files for office*." (emphasis added).
Tennessee	TENN. CONST. art. II, § 11.	"The senate and house of representatives, *when assembled*, shall each choose a speaker and its other officers; [and] be judges of the qualifications and election of its members. . . ." (emphasis added).
Texas	TEX. CONST. art. III, § 8.	"Each House shall be the judge of the qualifications and election of its own members; *but contested elections shall be determined in such manner as shall be provided by law*." (emphasis added).
Washington	WASH. CONST. art. II, § 8.	"Each house shall be the judge of the election, returns and qualifications of its own members. . . ."
West Virginia	W. VA. CONST. art. VI, § 24.	"Each house shall determine the rules of its proceedings and be the judge of the elections, returns and qualifications of its own members."

State	**Post-Election Adjudication**	**Pre-Election Binding Adjudication**
Alabama	See subsection IV.B.iv.	*White v. Knight*, 424 So. 2d 566, 567–69 (Ala. 1982) upholding party subcommittee decision not to certify the winner of primary for state legislature on the basis that she is constitutionally ineligible; accord *Hobbie v. Vance*, 294 So. 2d 743, 744–47 (Ala. 1974); see also *Butler v. Amos*, 292 So. 2d 645, 645–46 (Ala. 1974), holding a legislative candidate constitutionally ineligible.
Alaska	No precedent.	*Gilbert v. Alaska*, 526 P.2d 1131, 1132–36 (Alaska 1974), upholding the lieutenant governor's decision to bar a constitutionally ineligible legislative candidate from the primary ballot.
Arizona	No precedent. Cf. *State ex rel. Nelson v. Yuma County Board of Supervisors*, 511 P.2d 630, 630 (Ariz. 1973), determining the constitutionality of the appointment of a member of the House to the Senate when a vacancy in the latter opened up. As in *Dorf v. Skolnik*, 371 A.2d 1094, 1095–96 (Md. 1977), the relief here is an injunction against an executive branch official (here, county officials), not an order directed toward the appropriate house.	*Bearup v. Voss*, 690 P.2d 790, 790–92 (Ariz. Ct. App. 1984), upholding a lower court's determination that a legislative candidate was constitutionally ineligible and enjoined his placemen on the primary ballot; *Pacion v. Thomas*, 236 P.3d 395, 397 (Ariz. 2010), citing *Bearup* approvingly for the proposition that statutory and constitutional qualifications can be challenged in the pre-election procedure provided by ARIZ. REV. STAT. § 16-351.

	Nelson, 511 P.2d at 630. Therefore, it does not implicate the state Qualifications Clause at all because it does not bind the Senate to accept the Senator if they are appointed.	
Arkansas	*Pendergrass v. Sheid*, 411 S.W.2d 5, 5–6 (Ark. 1967); see also *Magnus v. Carr*, 86 S.W.3d 867, 869–70 (Ark. 2002), which barred a lower court from enjoining a sitting legislator from voting, in part via a reference to the Qualifications Clause as giving each house exclusive powers over punishment; *McCuen v. McGee*, 868 S.W.2d 503, 505 (Ark. 1994), post-seating eligibility challenge deemed moot; cf. *Jenkins v. Bogard*, 980 S.W.2d 270, 271–74 (Ark. 1998), issuing an advisory opinion in a post-election case, describing the contours of a constitutional residency requirement.	*Valley v. Bogard*, 28 S.W.3d 269, 273–74 (Ark. 2000), affirming the lower court's decision that candidate was constitutionally ineligible and barred from the primary ballot, *abrogated on other grounds*, *State v. Jernigan*, 385 S.W.3d 776 (Ark. 2011). An early decision suggested that both a lack of statutory authority and the Qualifications Clause might bar pre-election review by executive officials, see *Irby v. Barrett*, 163 S.W.2d 512, 513–14 (Ark. 1942), but it was later clarified that *Irby* concerned the power of the executive branch and private officials under the relevant statutes, not the scope of judicial power. *Ivy v. Republican Party of Arkansas*, 883 S.W.2d 805, 807–09 (Ark. 1994).
California	See section IV.C.	See section IV.C.
Colorado	See subsection	*Romero v. Sandoval*, 685 P.2d 772,

	IV.B.v. See also *Meyer v. Lamm*, 846 P.2d 862, 870 (Colo. 1993), discussing the procedure for "election contests" where the presentation of evidence and other trial-like procedures are conducted in courts, but the decision is made by the appropriate house.	773–76 (Colo. 1984), compelling the Secretary of State to include candidate on the primary ballot because he met the constitutional qualifications; *Anderson v. Gonzalez*, 155 Colo. 381, 381–82 (1964), denying petition to compel Secretary of State to place candidate's name on primary ballot because he did not meet the constitutional qualifications for a state legislator; see also *Meyer v. Lamm*, 846 P.2d 862, 870 (Colo. 1993); contra *Mills v. Newell*, 70 P. 405, 406–07 (Colo. 1902), state Qualifications Clause bars pre-election adjudication where it was not clear whether the district was entitled to a senate seat in the upcoming election. Apart from being functionally overruled by *Romero*, *Anderson*, and *Meyer*, *Mills* reflects the discarded doctrine that apportionment challenges are non-justiciable. See, e.g., Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT. 571, 596 (2002), noting that the old version of the political question doctrine was so overbroad it dismissed apportionment cases because "they concerned politics"; see also *State ex rel. Sullivan v. Schnitger*, 95 P. 698, 704 (Wyo. 1908), holding that, even if the legislature was malapportioned, such a question was barred from judicial review due to the state Qualifications Clause.
Delaware	See subsection IV.B.v	*Fonville v. McLaughlin*, 270 A2d 529, 530–32 (Del. 1970), ordering a state legislative candidate stricken from the general election ballot because he was constitutionally ineligible.
Georgia	*Beatty v. Myrick*, 129 S.E.2d 764 (Ga. 1963), holding there is no jurisdiction	These challenges are heard by an Administrative Law Judge, whose decision is reviewed by the Secretary of State, whose decision can be

	over post-election disputes over returns of state legislative elections due to the state Qualifications Clause; see also *Dawkins-Haigler v. Anderson*, 799 S.E.2d 180, 181 (Ga. 2017), declaring a dispute over a primary moot after the general election without specifically referencing the Qualifications Clause. Cf. *Bailey v. Colwell*, 111, 428 S.E.2d 570, 571 (Ga. 1993), calling for a new election in a post-election dispute. This is pursuant to Georgia's Election Contest statute, which only allows judges to call for a new election, not to determine a winner. GA. CODE § 21-2-527(d). This is no different from the Georgia statute that requires a second election if no candidate receives less than 50% of the vote; it does not allow the judiciary to determine who won and therefore it does not constrain the ultimate	appealed through the Georgia court system. See generally GA. CODE § 21-2-5. These have included determinations of legislative candidate's constitutional eligibility. See, e.g., *Russell v. Hudgens*, Docket No. OSAH-ELE-CE-or18341-95-Gatto, Office of Administrative Hearings (June 2, 2004) (order). Georgia also allows for new elections to be called passed on post-primary challenges. See, e.g., *Howell v. Fears*, 571 S.E.2d 392 (Ga. 2002), ordering primary election void because of sufficient irregularities; *Hammill v. Valentine*, 258 Ga. 603, 603, 373 S.E.2d 9, 10 (1988). For the same reason this procedure is not a binding adjudication in the post-election context, it cannot be taken as evidence of pre-election adjudication, either.

	decision of the appropriate house. Cf. *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993).	
Idaho	*Burge v. Tibor*, 397 P.2d 235, 237 (Idaho 1964), in dismissing a writ to count absentee ballots, notes that the decision is not binding on the legislature due to the state Qualifications Clause).	See generally *Hansen v. Denney*, 346 P.3d 321 (Idaho Ct. App. 2015). Although the court dismissed the case because the appeal was untimely, the case concerns a candidate contesting the Secretary of State's refusal to put him on the ballot for not being an elector for the previous year, IDAHO CONST. art. III, § 6.
Illinois	No precedent. But see *Reif v. Barrett*, 188 N.E. 889, 898–99 (Ill. 1933), *overruled in part by Thorpe v. Mahin*, 250 N.E.2d 633 (Ill. 1969), on different, statutory grounds, a nearly identical state Qualifications Clause from an earlier constitution barred the state from inquiring into the qualifications of a sitting legislator; cf. *People v. Capuzi*, 170 N.E.2d 625, 626–27 (Ill. 1960), the court passes on sitting legislators' qualification insofar as they held incompatible offices, but with the contemplated relief	*Dillavou v. County Officers Electoral Board*, 632 N.E.2d 1127, 1132 (Ill. App. Ct. 1994), "Curran is a *candidate* for office, not a *member* whose qualifications the House of Representatives can judge"; accord *Walsh v. County Officers Electoral Board*, 642 N.E.2d 843 (Ill. App. Ct. 1994).

	being ejection from the non-legislative office; see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 n.48 (1995).	
Indiana	*State ex rel. Jacobs v. Marion Circuit Court*, 644 N.E.2d 852, 853–54 (Ind. 1994), refusing to "expend excess judicial resources" on what must be an advisory opinion given the state Qualifications Clause; accord *State ex rel. Wheeler v. Shelby Circuit Court*, 369 N.E.2d 933 (Ind. 1977); *State ex rel. Batchelet v. Dekalb Circuit Court*, 229 N.E.2d 798 (Ind. 1967); *State ex rel. Beaman v. Circuit Court*, 96 N.E.2d 671 (Ind. 1951); *State ex rel. Acker v. Reeves*, 95 N.E.2d 838 (Ind. 1951).	See subsection IV.B.iii.
Iowa	*Iowa Citizens for Community. Improvement v. State*, 962 N.W.2d 780, 795 (Iowa 2021), discussing justiciability in reference to the limits of *Luse* and the nonjusticiability of deciding whether	See generally *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845 (Iowa 2014), adjudicating the qualifications of a state legislative candidate in a ballot access challenge and holding him eligible.

	a successful legislative candidate had met the residency requirement in Iowa's constitution; see also *Luse v. Wray*, 254 N.W.2d 324, 326 (Iowa 1977), the provision of the Iowa Constitution allowing for the legislature to create "election contests" merely allows for them to create laws where "the power of the respective legislative bodies . . . is clearly spelled out," not to allow post-election adjudications in courts; see also *State ex rel. Turner v. Scott*, 269 N.W.2d 828, 830–31 (Iowa 1978), post-election disputes over legislative races are generally non-justiciable political questions unless they concern situations about the contours of the power to judge, as in *Powell v. McCormack* and *Bond v. Floyd*; contra *Luse*, 254 N.W.2d at 328 (Iowa 1977), suggesting a much broader power	

	to police constitutional infractions that has since been pared back by later cases.	
Louisiana	See subsection IV.B.iv.	*Deculus v. Welborn*, 964 So. 2d 930, 935 (La. 2007), adjudicating a state legislative candidate's constitutional qualifications). The appellate court opinion appealed from in *Deculus,* which affirmed the lower court's decision, addressed the Qualifications Clause issue in passing. *Deculus v. Welborn*, 970 So. 2d 1057, 1060 (La. Ct. App. 2007), "[The state Qualification Clause] has no bearing on the district court's authority to adjudicate the plaintiffs' challenge to Senator Fields's qualifications as a *candidate*." accord *Daley v. Morial*, 205 So. 2d 213, 215 (La. Ct. App. 1967), *writ refused*, 205 So. 2d 442 (La. 1967). Louisiana also has a long history of ballot access challenges based on constitutional eligibility. See, e.g., *Wright v. Prevost*, No. 2015-CA-1047, 2015 WL 5772007 (La. Ct. App. Sep. 30, 2015); *Graham v. Prevost*, 176 So. 3d 1142 (La. Ct. App. 2015); *Morton v. Hicks*, 74 So. 3d 268 (La. Ct. App. 2011); *Suarez v. Barney*, 903 So. 2d 555 (La. Ct. App. 2005); *Augillard v. Barney*, 904 So. 2d 751 (La. Ct. App. 2005); *Cade v. Lombard*, 727 So. 2d 1221 (La. Ct. App. 1999); *Pattan v. Fields*, 669 So. 2d 1233 (La. Ct. App. 1995); *Davis v. English*, 660 So. 2d 576 (La. Ct. App. 1995); *Broussard v. Romero*, 607 So. 2d 979 (La. Ct. App. 1992); *Tomlinson v. Frazier*, 407 So. 2d 1385 (La. Ct. App. 1982); *Slocum v. DeWitt*, 374 So. 2d 755 (La. Ct. App. 1979); *Mix v. Blanchard*, 318 So. 2d 125 (La. Ct. App. 1975); *Mix v. Alexander*, 318 So.

		2d 130 (La. Ct. Ap. 1975); *Charbonnet v. Hayes*, 318 So. 2d 917 (La. Ct. App. 1975); *Pendleton v. Jackson*, 256 So. 2d 494 (La. Ct. App. 1972); *McIntire v. Carpenter*, 202 So. 2d 297 (La. Ct. App. 1967); *Stavis v. Engler*, 202 So. 2d 672 (La. Ct. App. 1967).
Maine	*Appeal of Davis*, 369 A.2d 628, 630 (Me. 1977), there is no jurisdiction over post-election disputes over the returns of state legislative elections due to the Qualifications Clause; accord *In re Opinion of the Justices*, 88 A.2d 151 (Me. 1948).	See subsection IV.B.iii.
Maryland	*Duffy v. Conaway*, 455 A.2d 955, 965, n.14 (Md. 1983), the state Qualifications Clause bars post-election adjudications; not addressing its Election Contest provision; see also *Snyder v. Glusing*, 520 A.2d 349, 358 n.8 (Md. 1987), noting that they do not understand the state Qualifications Clause to bar jurisdiction over contested primaries "when, as here, the court action is instituted and decided before the general election";	*Stevenson v. Steele*, 720 A.2d 1176, 1177–82 (Md. 1998), adjudicating and denying ballot access challenge on constitutional grounds for legislative candidate; accord *Blount v. Boston*, 718 A.2d 1111, 1113–1125 (Md. 1998); *Roberts v. Lakin*, 665 A.2d 1024, 1025–28 (Md. 1995); *Bainum v. Kalen*, 325 A.2d 392, 393–98 (Md. 1974); *Hillyard v. Board of Supervisors of Elections*, 269 A.2d 42, 43–44 (Md. 1970); see also *Snyder v. Glusing*, 520 A.2d 349, 358 n.8 (Md. 1987), noting that the Qualifications Clause does not bar jurisdiction over contested primaries "when, as here, the court action is instituted and decided before the general election); *Foxwell v. Beck*, 82 A. 657, 658 (Md. 1911) (Boyd, C.J., concurring), arguing that primaries are not "elections" as referred to in the constitution.

	but see *Dorf v. Skolnik*, 371 A.2d 1094, 1101–03 (Md. 1977), finding the challenged candidate ineligible to be nominated to the Governor for appointment following a vacancy. Because the relief granted was an injunction directed at the governor, *id.* at 1095–96, not the legislature, it is better understood as a "pre-election" case.	
Massachusetts	*Greenwood v. Registrars of Voters*, 184 N.E. 390, 392 (Mass. 1933); accord *Wheatley v. Secretary of Commonwealth*, 792 N.E.2d 645, 649 (Mass. 2003), "[a]lthough the judiciary may . . . order that a certificate of election issue to a particular individual, that certificate is nothing more than evidence that a candidate may present to the House in support of a claim of election." see also *Dinan v. Swig*, 112 N.E. 91, 92–94 (Mass. 1916),	The Massachusetts State Ballot Law Commission hears these cases with some frequency. See, e.g., *Cote v. Meas*, State Ballot Laws Commission (June 22, 2018), finding legislative candidate constitutionally eligible and ordering his name to remain.

	a law that gave courts jurisdiction to hear "corrupt practices" cases regarding elections was unconstitutional as applied to state legislative candidates given the state Qualifications Clause. In *Madden v. Board of Election Commissioners*, the Supreme Judicial Court ordered votes for a candidate known to be dead not to be counted. 146 N.E. 280, 281 (Mass. 1925). That decision was later cabined to its exact facts given doubts about its correctness. *Murtagh v. Registrars of Voters*, 166 N.E.2d 702, 703 (Mass. 1960).	
Michigan	*Berdy v. Buffa*, 928 N.W.2d 204, 205–07 (Mich. 2019), holding that constitutional provisions that give legislative bodies the ability to judge the qualifications of members prevent courts from interfering in post-election disputes, collecting cases; see	*Berdy v. Buffa*, 928 N.W.2d 204, 205–07 (Mich. 2019), although passing on a municipal charter with a "Qualifications Clause" for the Town Council, citing the state Qualifications Clause in holding that, in general, pre-election challenges deal with "candidates," not "members," and therefore are not barred by such provisions, and allowing such a pre-election challenge to go forward.

	also *People v. Smith*, 922 N.W.2d 615, 619–23 (2017), vacated as moot, 918 N.W.2d 718 (2018), holding that a plea deal that required a state legislator to resign was void as against public policy given the state Qualifications Clause.	
Minnesota	*Derus v. Higgins*, 555 N.W.2d 515, 518 (Minn. 1996), post-election adjudication of legislative races are for advisory and evidentiary purposes only); accord *Scheibel v. Pavlak*, 282 N.W.2d 843, 847 (Minn. 1979); *Philips v. Ericson*, 80 N.W.2d 513, 529 (Minn. 1957); *State ex rel. Haines v. District Court*, 61 N.W. 553 (Minn. 1894); *see also Fitzgerald v. Morlock*, 120 N.W.2d 336, 338–39 (Minn. 1963), ordering the Secretary of the State to not issue certificates of election until judicial appeals are resolved, but not interfering with the	*Melendez v. O'Connor*, 654 N.W.2d 114, 115–18 (Minn. 2002), adjudicating a legislative candidate's constitutional eligibility; accord *Lundquist v. Leonard*, 652 N.W.2d 33, 36–37 (Minn. 2002); *Olson v. Zuehlke*, 652 N.W.2d 37, 40 (Minn. 2002); *Piepho v. Bruns*, 652 N.W.2d 40, 43–46 (Minn. 2002); *Jude v. Erdahl*, 207 N.W.2d 715, 716–20 (Minn. 1973); *State ex rel. Beck v. Erickson*, 221 N.W. 245 (Minn. 1928); *Flaten v. Kvale*, 179 N.W. 213, 214–15 (Minn. 1920); *State ex rel. Olson v. Scott*, 117 N.W. 845 (Minn. 1908); *In re Slater*, 100 N.W. 1125 (Minn. 1904).

	House's role as final adjudicator); cf. *Monaghen v. Simon*, 888 N.W.2d 324, 331 (Minn. 2016), pursuant to statute, calling a new election because the challenge was decided so close to the general election. Calling a special election pursuant to existing statutory rules does not "usurp" the legislative role in judging its members. See, e.g., *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993).	
Mississippi	*Dillon v. Myers*, 227 So. 3d 923, 926–27 (Miss. 2017), in post-election cases involving state legislative races, contests are heard by the legislature alone.	*Dillon v. Myers*, 227 So. 3d 923, 926–27 (Miss. 2017), overruling earlier cases that held the state Qualifications Clause barred disputes over primaries.
Missouri	*State ex rel. Carrington v. Human*, 544 S.W.2d 538, 539–40 (Mo. 1976), post-election disputes over state legislative races are non-justiciable due to the Qualifications Clause; see also *Danforth v. Hickey*, 475 S.W.2d 617 (Mo. 1972),	*State ex rel. Gralike v. Walsh*, 483 S.W.2d 70, 73–76 (Mo. 1972), the state Qualifications Clause is not applicable to eligibility disputes before the election and pre-election adjudications do not have a *res judicata* effect if the candidate comes before the legislature in the future.

	Qualifications Clause bars judicial resolution of post-seating disputes; accord *Danforth v. Banks*, 454 S.W.2d 498 (Mo. 1970).	
Nebraska	No precedent.	*State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007), affirming Secretary of State's denial of ballot access to candidates in the primary as constitutionally ineligible); accord *State ex rel. Chambers v. Beermann*, 299 Neb. 696, 704705, 428 N.W.2d 883, 888 (1988).
Nevada	*Heller v. Legislature*, 93 P.3d 746, 753 (Nev. 2004); accord *Laxalt v. Cannon*, 397 P.2d 466, 468 (Nev. 1964), in a case rejecting jurisdiction over a United States Senate race, raising doubts about the constitutionality of any post-election contest where a different tribunal is constitutionally mandated; but see *LaPorta v. Broadbent*, 530 P.2d 1404, 1405 (Nev. 1975), holding a post-election "revote" due to a technical terror that resulted in the wrong ballot being distributed to voters in a single precinct for three hours. This	*Mengelkamp v. List*, 501 P.2d 1032, 1033–34 (Nev. 1972), "it seemingly is petitioners' position that although a would-be candidate is admittedly disqualified . . . election officials must place his name on the ballot . . . We reject this contention."

	is comparable to calls for new elections consistent with rules decided prior to the election, which are not barred in the federal system, either. See, e.g., *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993). Such a "revote" is no more of an usurpation of the judging power than a recount.	
New Hampshire	*In re Dondero*, 51 A.2d 39, 40–41 (N.H. 1947), there is no jurisdiction over post-election appeals from the Ballot Law Commission in state legislative races (an administrative adjudicatory board, because at that point the Qualifications Clause makes the respective house the appropriate forum; see also *Brown v. Lamprey*, 206 A.2d 493, 496 (N.H. 1965), there is no jurisdiction over post-seating disputes in the legislature because of the state Qualifications Clause; accord	The N.H. Ballot Law Commission hears these cases frequently and seems to have done so for decades. See, e.g., *In re Kelley*, BLC 2020-5, N.H. Ballot Law Commission (Sep. 21, 2020) (order), finding legislative candidate constitutionally eligible and ordering her name to remain on the ballot; accord Petition of Robert Kingsbury, BLC 2002-2, N.H. Ballot Law Commission (Sep. 8, 2002); see generally N.H. BALLOT L. COMM'N, https://www.sos.nh.gov/elections/elections/ballot-law-commission [https://perma.cc/PQQ2-MHRP] (last visited April 8, 2022).

	Bingham v. Jewett, 29 A. 694 (1891); *In re Opinion of the Justices*, 56 N.H. 570 (1875).	
New Mexico	No precedent.	*Thompson v. Robinson*, 688 P.2d 21, 22–25 (N.M. 1984), holding a candidate ineligible and nullifying the results of the primary race.
New York	*People ex rel. Sherwood v. Board of State Canvassers*, 29 N.E. 345, 345–46 (N.Y. 1891), state Qualifications Clause strips the courts of jurisdiction over post-election adjudication of state contests, and therefore it had no jurisdiction to correct the executive branch's usurpation of the Qualifications Clause power; but see *Harwood v. Meisser*, 339 N.Y.S.2d 270, 271 (N.Y. App. Div. 1973), in light of the state Qualifications Clause, courts cannot pass on post-election contests of legislative races, but they can play a "ministerial role" in post-election disputes, *aff'd*, 293 N.E.2d 827 (N.Y. 1973); see also *Barker v. People*, 3 Cow. 686, 707 (N.Y.	See generally *Glickman v. Laffin*, 59 N.E.3d 527 (N.Y. 2016) (in pre-election dispute, adjudicating candidate eligibility and ordering his candidate petition to be invalidated); *accord Bourges v. LeBlanc*, 777 N.E.2d 239 (N.Y. 2002); *Drohan v. Power*, 239 N.E.2d 388 (N.Y. 1968). New York has a long history of ballot access challenges to legislative candidates based on constitutional eligibility. See, e.g., *Patch v. Bobilin*, 132 N.Y.S.3d 1 (N.Y. App. Div. 2020); *Quart v. Koffman*, 124 N.Y.S.3d 330 (N.Y. App. Div. 2020), *leave to appeal denied*, 149 N.E.3d 52 (N.Y. 2020); *Notaristefano v. Marcantonio*, 83 N.Y.S.3d 540 (N.Y. App. Div. 2018); *Jones v. Blake*, 991 N.Y.S.2d 595 (N.Y. App. Div. 2014); *Dilan v. Salazar*, 83 N.Y.S.3d 668 (N.Y. App. Div. 2018); *Chaimowitz v. Calcaterra*, 909 N.Y.S.2d 76 (N.Y. App. Div. 2010); *Stavisky v. Koo*, 863 N.Y.S.2d 87 (N.Y. App. Div. 2008); *Robinson v. Sharpe*, 820 N.Y.S.2d 617 (N.Y. App. Div. 2006); *Riccio v. Cairo*, 616 N.Y.S.2d 255 (N.Y. App. Div. 1994); *Robertson v. Foster*, 587 N.Y.S.2d 863 (N.Y. App. Div. 1992); *Carey v. Foster*, 599 N.Y.S.2d 589 (N.Y. App. Div. 1990); *Markowitz v. Gumbs*, 505 N.Y.S.2d 948 (N.Y. App. Div. 1986); *Berman v. Weinstein*, 408 N.Y.S.2d 143 (N.Y. App. Div. 1978); *Thompson v. Hayduk*, 359 N.Y.S.2d 72 (N.Y.

	1824), a statute that disqualified anyone who dueled from public office could only apply to the legislature by operation of the exclusion or expulsion power of the legislature.	App. Div. 1974), *aff'd*, 318 N.E.2d 604 (N.Y. 1974); *Sterler v. Feuer*, 359 N.Y.S.2d 326 (N.Y. App. Div. 1974), *aff'd*, 318 N.E.2d 602 (N.Y. 1974); *Gelfman v. Koopersmith*, 263 N.Y.S.2d 297 (N.Y. App. Div. 1965), *aff'd*, 210 N.E.2d 644 (N.Y. 1965); *In re Flynn*, 196 N.Y.S. 926 (N.Y. App. Div. 1922).
North Carolina	No precedent. Cf. *Alexander v. Pharr*, 103 S.E. 8 (N.C. 1920), the state Qualifications Clause strips courts of jurisdiction in quo warranto actions against sitting members; *see also In re Protest of Whittacre*, 743 S.E 2d 68, 69 (N.C. Ct. App. 2013), finding a non-constitutional challenge to a member of the United States House of Representatives initiated when he was a candidate moot given that he had since been sworn in.	These cases are handled by the North Carolina State Board of Elections. See, e.g., *In re Bonapart,* N.C. State Bd. of Elections (Jan. 21, 2020) (order), holding a candidate constitutionally ineligible and ordering them off the ballot.
Ohio	*Dalton v. State ex rel. Richardson*, 3 N.E. 685, 702 (Ohio 1885), state Qualifications Clause bars adjudication of post-election disputes of state legislative races—not	*State ex rel. O'Neill v. Athens County Board of Elections*, 154 N.E.3d 44, 48–53 (Ohio 2020), adjudicating a pre-primary dispute, finding the candidate eligible and ordering the votes cast for her to be counted); cf. *State, ex rel. Speck v. Board of Elections,* 439 N.E.2d 893, 894–95 (Ohio 1982), affirming a decision, on procedural grounds, by the election

	discussing the Election Contest provision; see also *Smith v. Polk*, 19 N.E.2d 281, 283 (Ohio 1939), in barring a post-elections case for federal congressional office on the basis of the federal Qualifications Clause, noting that the state Qualifications Clause also bars adjudication of post-election disputes in the state context.	board to affirm a legislative candidate's constitutional qualifications; but see *State ex rel. Fisher v. Brown*, 289 N.E.2d 349, 352 (Ohio 1972), constitutional qualifications only apply to members-elect, not candidates. *Fisher* alternately held that because the challenger sued the Secretary of State but not the challenged candidate, "depriv[ing] the candidate . . . of his day in court," and there were serious equitable concerns given that the challenger had waited until there was no statutory method for replacement (significantly after the primary) and that the challenged candidate only faced a single opponent, who would be elected by default if the challenger was successful. *Id.* at 350–51. Thus, *Fisher* stands for the uncontroversial proposition that equitable concerns might prevent the adjudication of certain pre-election disputes, apart from any concerns about the Qualifications Clause. Further doubt has been cast on *Fisher*'s interpretation by subsequent cases. See, e.g., *State ex rel Markulin v. Ashtabula County Board of Elections*, 602 N.E.2d 626, 630 (Ohio 1992), statutory qualifications attach when the candidate submits their declaration of candidacy.
Oklahoma	*Daniel v. Bound*, 85 P.2d 759, 760 (Okla. 1938), adjudication of post-election disputes of legislative races is barred by state Qualifications Clause; see also *Wixson v. Green*, 521 P.2d 817, 819	*State ex rel. Cloud v. Election Bd.*, 36 P.2d 20, 22 (Okla. 1934), "A plain and simple construction of [the Qualification Clause] forces us to the conclusion that said section has, and can have, no field of operation until after election"; accord *McKye v. State Election Board*, 890 P.2d 954, 957 (Okla. 1995), the state Qualifications Clause "has no force until after an election". Oklahoma has a long

	(Okla. 1974), state Qualifications Clause bars adjudication of post-seating disputes of legislative races; *Williamson v. State Election Board*, 431 P.2d 352 (Okla. 1967), state Qualifications Clause does not bar state court from reviewing post-election actions of executive branch to ensure they comply with the relevant law); *Wickersham v. State Election Board*, 357 P.2d 421, 424–25 (Okla. 1960), the federal and state Qualifications Clauses are "identical," and the federal Qualifications Clause does not bar state-initiated recounts.	history of adjudicating pre-election eligibility disputes. See, e.g., *Hendrix v. State ex rel. State Election Board*, 554 P.2d 770 (Okla. 1976); *Box v. State Election Board*, 526 P.2d 936, 940 (Okla. 1974); *Johnson v. State Election Board*, 370 P.2d 551 (Okla. 1962); *Stafford v. State Election Board*, 218 P.2d 617 (Okla. 1950); *Brown v. State Election Board*, 170 P.2d 200 (Okla. 1946); *Love v. State Election Board*, 170 P.2d 191 (Okla. 1946).
Oregon	*Combs v. Groener*, 472 P.2d 281, 282–83 (Or. 1970), courts may not adjudicate post-election disputes; accord *Lessard v. Snell*, 63 P.2d 893 (Or. 1937), the executive branch may not adjudicate post-election disputes.	*Roberts v. Myers*, 489 P.2d 1148 (Or. 1971), upholding Secretary of State's decision to bar constitutionally ineligible candidate from the primary ballot. It does not appear Oregon has a forum to object to the nomination of candidates, but this case shows the Secretary of State can refuse to certify ineligible candidates to the ballot. See OR. REV. STAT. § 246.046, requiring the Secretary of State to "diligently seek out any evidence of violation of any election law"; see also *Combs v.*

		Groener, 472 P.2d 281, 283 (Or. 1970), in dicta in a post-election case noting that "[t]he primary election does not make the winner of that election a member of the legislative assembly."
Pennsylvania	See Section IV.B.vi. See also *In re Contested Election of Senator*, 2 A. 341, 342–43 (Pa. 1886), in light of the Qualifications Clause and the Election Contest provisions, the court may only issue advisory opinions; accord *In re Disputed Ballots of Morann Precinct*, 133 A.2d 824, 828 (Pa. 1957), the courts may order executive officials to comply with applicable laws after an election.	See Section IV.B.vi.
Rhode Island	See subsection IV.B.ii.	These cases are heard by the Rhode Island Board of Elections and include challenges to constitutional eligibility. R.I GEN. LAWS §§ 17-14-13–14 (1956); see e.g., R.I. STATE Bd. OF ELECTIONS, TUESDAY, JULY 26, 2016 AT 7:00 P.M. (2016), https://opengov.sos.ri.gov/Common/DownloadMeetingFiles?FilePath=/notices/132/2016/201622.pdf [https://perma.cc/9U95-JKPJ], minutes of meeting, describing multiple candidacy challenges. See also *Bailey v. Burns*, 375 A.2d 203, 204 (R.I. 1977), assuming that a challenge to a legislative candidate's constitutional eligibility would be available via this mechanism.

South Carolina	*Scott v. Thornton*, 106 S.E.2d 446, 446–47 (S.C. 1959); accord *Andersen v. Blackwell*, 167 S.E. 30 (S.C. 1932); *Ex parte Scarborough*, 12 S.E. 666 (S.C. 1891); see also *Stone v. Leatherman*, 541 S.E.2d 241 (S.C. 2001), rejecting appeal of election results in state legislative race due to state Qualifications Clause; *Rainey v. Haley*, 745 S.E.2d 81, 84–85 (S.C. 2013), state Qualifications Clause bars adjudication of ethics complaints against sitting legislators; accord *Culbertson v. Blatt*, 9 S.E.2d 218, 220 (S.C. 1940); cf. *S.C. Public Interest Foundation v. Judicial Merit Selection Commission*, 632 S.E.2d 277, 278–79 (S.C. 2006), finding that where the state constitution gives the General Assembly to review the qualifications of judicial *candidates*, S.C. CONST. art. V, §	*Wilder v. Charleston County Board of Voter Registration & Elections*, No. 2020-001232, 2020 WL 6445077, at *2 (S.C. Nov. 2, 2020), affirming a lower court finding that candidate was constitutionally eligible for office and not to be barred from the ballot.

	27, pre-election eligibility challenges are barred.	
Tennessee	*Comer v. Ashe*, 514 S.W.2d 730, 741 (Tenn.1974); see also *State ex rel. Chesnutt v. Phillips*, 21 S.W.2d 4 (Tenn. 1929), without directly passing on the Qualifications Clause issue, the proper remedy in case where a sitting legislator holds incompatible offices under the constitution is to remove them from the non-legislative office; accord *State ex rel. Carey v. Bratton*, 253 S.W. 705 (Tenn. 1923).	*Comer v. Ashe*, 514 S.W.2d 730, 733–41 (Tenn.1974), the state Qualifications Clause does not attach until the general election.
Texas	No precedent.	See generally *Wentworth v. Meyer*, 839 S.W.2d 766 (Tex. 1992), finding legislative candidate constitutionally eligible under provision that bars holding certain offices while retaining a seat in the legislature; *Dawkins v. Meyer*, 825 S.22d 444 (Tex. 1992), finding a legislative candidate ineligible under the same provision. To be fair, the inconsistency between these two cases given similar facts against candidates of different parties might be used to highlight the danger of pre-election adjudication. The rejoinder would be that lodging that power in a transparently partisan body would not improve the quality of decision-making.
Washington	See subsection	*Defilipis v. Russell*, 328 P.2d 904,

	IV.B.v. See also *State ex rel. McIntosh v. Hutchinson*, 59 P.2d 1117, 1117–18 (Wash. 1936), finding a sitting legislator qualified, and therefore denying injunctive relief against the Secretary of State to call a new election. As with other cases, the relief requested is imperative—it is directed at the Executive, not the Legislature. As it stands, the order did not prevent the house from expelling the legislator, creating a vacancy, nor would have siding with the challenger forced the appropriate house to accept the results of the election. The relief is not expulsion from the legislature.	905–06 (Wash. 1958), adjudicating legislative candidate's constitutional qualifications and barring them from the primary ballot; accord *State ex rel. McAvoy v. Gilliam*, 111 P. 401, 402 (Wash. 1910), contests of returns of primaries in state legislative races were not barred by the state Qualifications Clause because the state Qualifications Clause does not "prevent the Legislature from providing a method of nominating and electing candidates for office."
West Virginia	See subsection IV.B.ii.	*Isaacs v. Board of Ballot Commisioners*, 12 S.E.2d 510, 512 (W. Va. 1940), holding a legislative candidate is constitutionally eligible in a pre-primary challenge, not addressing the Qualifications Clause issues brought up in a concurring opinion; see also *State ex rel. Palumbo v. County Court of Kanawha County*, 150 S.E.2d 887, 894 (W. Va. 1966), passing on contests to the returns of several primaries, including a

		legislative primary, and ordering the contests to go forward without ruling on the Qualifications Clause issue, *overruled in part by Qualls v. Bailey*, 164 S.E.2d 421, 427 (W. Va. 1968), overruling issue of statutory interpretation.