

Winter 2013

## Procedural Fairness in Election Contests

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### Recommended Citation

Douglas, Joshua A. (2013) "Procedural Fairness in Election Contests," *Indiana Law Journal*: Vol. 88 : Iss. 1 , Article 1.

Available at: <https://www.repository.law.indiana.edu/ilj/vol88/iss1/1>

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# Procedural Fairness in Election Contests

JOSHUA A. DOUGLAS\*

INTRODUCTION .....	1
I. ELECTION CONTESTS BY TYPE OF ELECTION.....	5
A. ELECTION CONTESTS INVOLVING STATE LEGISLATIVE OFFICES.....	5
B. ELECTION CONTESTS INVOLVING GOVERNOR AND LIEUTENANT GOVERNOR .....	9
C. ELECTION CONTESTS INVOLVING JUDICIAL ELECTIONS .....	20
D. ELECTION CONTESTS INVOLVING CONGRESSIONAL ELECTIONS .....	24
E. ELECTION CONTESTS INVOLVING PRESIDENTIAL ELECTORS .....	29
II. COMMON CHARACTERISTICS OF ELECTION CONTEST PROCEDURES .....	34
A. STATUTORY DEADLINES .....	34
B. SPECIFIC PROCEDURAL DETAILS REGARDING THE JUDICIAL PROCESS .....	36
C. APPELLATE REVIEW .....	41
III. REFORMING ELECTION CONTEST PROCEDURES: TIMING, STANDARDS, AND IMPARTIALITY.....	44
A. GOALS FOR RESOLVING ELECTION CONTESTS.....	44
B. IMPROVING ELECTION CONTEST PROCESSES .....	46
CONCLUSION .....	57
APPENDIX: SUMMARY OF STATUTORY PROCEDURES FOR CONTESTING ELECTIONS.....	58

## INTRODUCTION

On November 2, 2010, over a quarter million Alaskans cast their ballots for various offices, including United States Senator.<sup>1</sup> The hotly contested election involved incumbent Lisa Murkowski, who had lost the Republican primary but was running a vigorous write-in campaign, Republican and Tea Party favorite Joe Miller, and Democrat Scott McAdams.<sup>2</sup> An initial count of the votes demonstrated that approximately 40% of voters had written in a candidate, over 35% had voted

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\* Assistant Professor of Law, University of Kentucky College of Law. This Article was named a winner of the 2011–2012 SEALS Call for Papers. The Article benefitted greatly from comments I received at the Fourth Annual Junior Faculty Federal Courts Workshop and the Southeastern Association of Law Schools (SEALS) New Scholars Workshop. Special thanks to Ned Foley, Rick Hasen, Justin Levitt, Michael Kang, Mike Pitts, Lori Ringhand, and Michael Solimine for providing invaluable insights on prior drafts. Thanks also to Beau Steenken for extremely helpful library assistance and to Colin Bruckel, Matt Hassen, and Kyle Hermanson for excellent research assistance. Finally, thanks to the editors and staff of the *Indiana Law Journal* for helping to polish this Article.

1. ALASKA DIVISION OF ELECTIONS, STATE OF ALASKA 2010 GENERAL ELECTION: NOVEMBER 2, 2010 OFFICIAL RESULTS (2010), available at <http://www.elections.alaska.gov/results/10GENR/data/results.htm>.

2. See Sean Cockerham & Erika Bolstad, *Murkowski Says “Let’s Make History,”* ANCHORAGE DAILY NEWS (Sept. 18, 2010), <http://www.adn.com/2010/09/17/1459578/murkowski-expected-to-say-yes.html>.

for Miller, and over 23% had voted for McAdams.<sup>3</sup> If, as was expected, most of the write-in votes went to Murkowski, then she would retain her Senate seat.<sup>4</sup>

Although it became clear fairly soon after Election Day that Murkowski had received many more votes than Miller, Miller still refused to concede the election.<sup>5</sup> Instead, he turned to the courts<sup>6</sup>—a destination for many close elections.<sup>7</sup> Miller argued that a large number of the write-in votes for Murkowski were invalid, particularly if the voters had misspelled her name.<sup>8</sup> Miller finally conceded almost two months after Election Day, after he lost before both the Alaska Supreme Court and the federal district court.<sup>9</sup>

Alaska, like all other states,<sup>10</sup> has a specific, adjudicative procedure for election contests, or post-election disputes about the true winner of the election. Under Alaska's election contest provision, a losing candidate may bring a lawsuit challenging the election results in the superior court within ten days after the completion of the state's review of the election and may appeal the decision to the state supreme court.<sup>11</sup> Other states have even more detailed provisions. For example, Norm Coleman, the losing candidate in the 2008 U.S. Senate election in Minnesota, had to follow a statutorily-prescribed process in bringing a lawsuit to contest the election of Al Franken.<sup>12</sup> Minnesota's election contest provisions place a strict time limit on the filing of an election contest and the location of filing.<sup>13</sup> The case is heard before a special court of three judges assigned by the chief justice of the Minnesota Supreme Court.<sup>14</sup> The three-judge court's decision is appealable directly to the supreme court (thus skipping the intermediate court of appeals level), and the appeal must take precedence over all other matters before the state supreme court.<sup>15</sup>

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3. ALASKA DIVISION OF ELECTIONS, *supra* note 1.

4. See Sandhya Somashekhar, *In Alaska, the Final Countdown*, WASH. POST, Nov. 10, 2010, at A01.

5. Sandhya Somashekhar, *Despite Alaska Senate Race Results, Joe Miller Presses on in Principle*, WASH. POST (Nov. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/27/AR2010112702896.html>.

6. *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).

7. See *infra* Part I.

8. *Miller*, 245 P.3d at 869.

9. Becky Bohrer, *Miller Ending Legal Battle, Conceding Senate Race*, ASSOCIATED PRESS (Jan. 1, 2011), <https://advance.lexis.com/GoToContentView?requestid=1f93f35b-8220-46fd-bbd6-84646d2e72af>; see *Miller v. Treadwell*, 736 F. Supp. 2d 1240 (D. Alaska 2010) (raising federal constitutional issues); *Miller*, 245 P.3d at 867.

10. See *infra* Part I.

11. ALASKA STAT. §§ 15.20.540, .550 (2010).

12. See *Sheehan v. Franken*, 767 N.W.2d 453, 456 (Minn. 2009) (per curiam). For a detailed discussion of the Coleman-Franken dispute, see Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129 (2011) [hereinafter Foley, *Lake Wobegone Recount*].

13. MINN. STAT. ANN. § 209.021 (West 2009) (providing that a contester must file an election contest within seven days of a general election with the court administrator of the District Court in Ramsey County).

14. MINN. STAT. ANN. § 209.045 (West 2009).

15. MINN. STAT. ANN. § 209.10(4) (West 2009) (providing that “[t]he appeal from an election contest relating to the office of state senator or representative takes precedence over all other matters before the Supreme Court”).

State legislatures recognize that cases involving election contests are different from normal legal disputes. A decision maker must determine the winner of an election; in other words, a court or other tribunal will decide who will enact laws under which the state's residents are governed. Election contest cases therefore play a fundamental role in shaping our democracy. As a result, state legislatures have acknowledged the uniqueness of post-election disputes by enacting specific provisions for election contests.<sup>16</sup>

This Article uncovers the different mechanisms states use to resolve election contests. One universal rule regarding post-election disputes is that “[t]here is no common law basis for election challenges.”<sup>17</sup> As the Iowa Supreme Court explained, “[t]he right to contest an election is only conferred by statute, and contestants must strictly comply with the provisions of the statute in order to confer jurisdiction. Thus, contestants are limited to the scheme provided by the legislature.”<sup>18</sup> An inquiry into election contests therefore entails a survey of state election statutes and constitutions.<sup>19</sup> Although it is possible that parties may file in federal court and raise federal constitutional issues to challenge an election, election contests are typically the province of state law.<sup>20</sup> This Article provides the first comprehensive analysis of existing state election codes regarding the procedures for election contests.

In analyzing election contest procedures among the fifty states, the main trend that emerges is a lack of uniformity in how states decide disputed elections. Some states have multi-tiered processes involving many judges, while others leave the decision up to a single body without possibility of appeal. Some states seem to value quick decision making through their statutes, while others elevate the virtues of robust review or the prevention of ideological bias. Understanding the myriad processes currently on the books is vital to evaluating current procedures for

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16. Election contest procedures are not unique to the United States. For example, the English High Court of Justice (Queen's Bench Division) recently voided the election results for a member of parliament after the losing candidate brought an election contest, alleging that the winning candidate had “published several false statements of fact in relation to the [losing candidate's] personal character or conduct which he had no reasonable grounds for believing to be true and did not believe to be true.” See *Watkins v. Woolas*, [2010] EWHC (Q.B.) 2702, [3] (Eng.), available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2010/2702.html>.

17. BARRY H. WEINBERG, *THE RESOLUTION OF ELECTION DISPUTES: LEGAL PRINCIPLES THAT CONTROL ELECTION CHALLENGES* 1 (2d ed. 2008); see also Steve Bickerstaff, *Counts, Recounts, and Election Contests: Lessons From the Florida Presidential Election*, 29 FLA. ST. U. L. REV. 425, 431 (2001).

18. *Taylor v. Cent. City Cmty. Sch. Dist.*, 733 N.W.2d 655, 657 (Iowa 2007) (citation omitted); see also *Taylor v. Roche*, 248 S.E.2d 580, 582 (S.C. 1978) (“The right to contest an election exists only under the constitutional and statutory provisions, and the procedure proscribed by statute must be strictly followed.”).

19. The appendix summarizes the various procedures for election contests by state and type of election.

20. See Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud, Learning From Florida's Presidential Election Debacle*, 63 U. PITT. L. REV. 159, 192 (2001) (“Arguably, Congress has not adopted laws addressing persistent flaws in the election process because such election contests have always been a matter of state law.”). Professor Lee advocates for the broader use of the Federal Corrupt Practices Act or 42 U.S.C. § 1983 to fill the gap of state laws that have deficient election contest provisions. See *id.* at 192–214.

resolving post-election disputes and deciding what aspects of the provisions are most in need of reform.

The analysis of current election contest mechanisms leads to two conclusions for moving forward. First, every state should, at a minimum, ensure that their methods for resolving election contests are tied to defined goals, such as minimizing ideological decision making, fostering timely resolution, and promoting clarity in the resolution process. Second, and most lacking under the current regimes, states should make certain that they appoint a neutral, unbiased decision maker to resolve all election contests. This Article provides several models and discusses the key considerations states should contemplate in creating an impartial election contest tribunal.

A quick word on terminology is important before embarking on this discussion. An “election contest” occurs once the election goes past the regular administrative procedures of counting the votes and conducting a recount.<sup>21</sup> That is, an election contest is remedial in nature, in which a losing candidate seeks to have the certified result overturned because of an election irregularity.<sup>22</sup> The various provisions for automatic or requested recounts are beyond the scope of this Article.<sup>23</sup> I am instead focusing on what happens when an election moves past the recount stage and goes to an adjudicatory election contest procedure. Additionally, although parties may raise federal constitutional issues such as equal protection or due process should they exist in a post-election lawsuit—and might do so in federal court either simultaneously or sequentially with a state case<sup>24</sup>—the focus of this Article is on the state-created statutory mechanisms for resolving election contests.

Part I describes, for various types of elections, the procedures states have enacted to resolve election contests. This Part analyzes state election contest provisions for state representatives, governor and lieutenant governor, judges (for those states that have elected judiciaries), members of Congress, and presidential electors. Part II reveals the various trends that emerge from the different ways states handle election contests, focusing on statutory deadlines, specific procedural details, and the appeals process. Part III begins the discussion of what factors should inform state election contest procedures. This Part calls on states to evaluate their election contest provisions, with a specific focus on timing concerns and the elimination of ideology or partisanship in the decision maker. In particular, this Part offers one possible mechanism to minimize ideological decision making: the creation of a five-member election contest tribunal with two “partisans” and three “neutrals,” as well as a diversity of expertise among the panel members. Further, by examining several factors that can help to eliminate, or at least balance, bias in who

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21. See Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 278–79 (2007) (explaining the difference between a recount and an election contest).

22. See *id.* at 278–79.

23. For a summary of each state’s recount process, see Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1817–36 (2005).

24. See, e.g., *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 228 (6th Cir. 2011) (analyzing federal equal protection issues even though the parties also were litigating in the Supreme Court of Ohio).

decides an election contest, this Part provides a starting point for a discussion of best practices states should consider in reformulating their election contest statutes.

### I. ELECTION CONTESTS BY TYPE OF ELECTION

One mechanism for decoding the myriad state election contest statutes is to group them by type of election. Indeed, many state contest provisions depend on the specific office involved. This Part will describe the most common election contest procedures for state legislative offices, governor and lieutenant governor, judicial positions, congressional offices, and presidential electors. Although not covering every possible election (such as referenda, municipal elections, or primaries),<sup>25</sup> this Part will describe election contest procedures for the most salient and highly visible elections and the ones that are likely to impact the most people. Public interest in election contests for these offices is likely to be substantial, making it important to understand the procedures by which tribunals decide these disputes. What emerges is a multitude of different processes and procedures, with surprisingly little consistency among the states. Breaking down the categories by type of election contest, however, demonstrates various trends in how states handle post-election challenges. States can use this data to rethink their own approaches to disputed elections.<sup>26</sup>

#### *A. Election Contests Involving State Legislative Offices*

By far, the most common mechanism states use for resolving contests for state house and senate seats is to leave the matter to each respective house in the legislature. Indeed, virtually all state constitutions, much like the U.S. Constitution, provide that each house shall be the “judge of” its members’ “qualifications, elections and returns.”<sup>27</sup> Allowing each house to judge the elections of its members

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25. Many states do not separate election contest provisions for municipal offices or primaries from the general election contest statute. The states that mention these elections typically follow the same general procedure as for other offices. *See, e.g.*, ALA. CODE § 17-16-56 (LexisNexis 2007) (providing that the circuit court hears election contests for municipal offices); ARK. CODE ANN. § 7-5-801 (2011) (same); CAL. ELEC. CODE §§ 16100, 16101 (West 2003 & Supp. 2012) (stipulating rules for contesting primary elections, which are roughly the same as for general election contests). The extent of any differences for these lower-profile elections is beyond the scope of this Article.

26. In many ways, this compilation is a follow-up to a 1978 report by the National Clearinghouse on Election Administration, Federal Election Commission. *See* INST. FOR RESEARCH IN PUB. SAFETY, SCH. OF PUB. & ENVTL. AFFAIRS, IND. UNIV., AN ANALYSIS OF LAWS AND PROCEDURES GOVERNING CONTESTED ELECTIONS AND RECOUNTS: FINAL REPORT, VOL. II: THE STATE PERSPECTIVE (1978). That publication, while outdated, presents a general synopsis of both the recount and contest procedures in all fifty states. This Article, while obviously providing an updated account, also goes further, synthesizing the various election contest regimes to identify the main trends among the states. It also offers a unique perspective on the kind of tribunal that is best suited to resolve election contests. *See infra* Part III.

27. U.S. CONST. art. I, § 5, cl. 1; ALA. CONST. art. IV, § 51; ALASKA CONST. art. II, § 12; ARIZ. CONST. art. IV, pt. 2, § 8; ARK. CONST. art. 5, § 11; CAL. CONST. art. IV, § 5; COLO. CONST. art. V, § 10; CONN. CONST. art. III, § 7; DEL. CONST. art. II, § 8; FLA. CONST. art. III,

is one aspect of legislative sovereignty.<sup>28</sup> Accordingly, all but two states allow only its own members ultimately to resolve a contested election to that body.<sup>29</sup>

Several states, however, still invoke judicial processes in deciding legislative election contests even when giving the respective body of the legislature the final say.<sup>30</sup> For instance, Kansas statutes specifically require courts to play a role in the

§ 2; GA. CONST. art. III, § 4, para. 7; HAW. CONST. art. III, § 12; IDAHO CONST. art. III, § 9; ILL. CONST. art. IV, § 6; IND. CONST. art. IV, § 10; IOWA CONST. art. III, § 7; KAN. CONST. art. II, § 8; KY. CONST. § 38; LA. CONST. art. III, § 7; ME. CONST. art. IV, pt. 3, § 3; MD. CONST. art. III, § 19; MASS. CONST. pt. 2, ch. 1, §§ II, art. IV, III, art. X; MICH. CONST. art. IV, § 16; MINN. CONST. art. IV, § 6; MISS. CONST. art. IV, § 38; MO. CONST. art. III, § 18; MONT. CONST. art. V, § 10; NEB. CONST. art. III, § 10; NEV. CONST. art. IV, § 6; N.H. CONST. pt. II, arts. 22, 35; N.J. CONST. art. IV, § 4, para. 2; N.M. CONST. art. IV, § 7; N.Y. CONST. art. III, § 9; N.C. CONST. art. II, § 20; OHIO CONST. art. II, § 6; OKLA. CONST. art. V, § 30; OR. CONST. art. IV, § 11; PA. CONST. art. II, § 9; R.I. CONST. art. VI, § 6; S.C. CONST. art. III, § 11; S.D. CONST. art. III, § 9; TENN. CONST. art. II, § 11; TEX. CONST. art. III, § 8; UTAH CONST. art. VI, § 10; VT. CONST. ch. II, §§ 14, 19; VA. CONST. art. IV, § 7; WASH. CONST. art. II, § 8; W. VA. CONST. art. VI, § 24; WIS. CONST. art. IV, § 7; WYO. CONST. art. III, § 10.

28. See, e.g., Ronald A. Parsons, Jr., *Pierre Pressure: Legislative Elections, the State Constitution, and the Supreme Court of South Dakota*, 50 S.D. L. REV. 218, 242 (2005) (describing the legislature's authority over election contests for legislative seats as "a sovereign power that may not be constitutionally delegated to or shared with the courts").

Paul Salamanca and James Keller offer three historical and theoretical reasons why most states give legislatures the authority to judge the elections of their own members: the conceptual relationship between legislative independence and legislative privilege, the connection between control of a legislature's membership and its independence among the branches of government, and tradition in allowing legislatures to seat members whom the voters choose even if the members do not meet the precise qualifications for service. See Paul E. Salamanca & James E. Keller, *The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members*, 95 KY. L.J. 241, 255 (2006-07).

29. North Dakota and Hawaii are the lone exceptions. North Dakota's Constitution provides, "[e]ach house is the judge of the qualifications of its members, but election contests are subject to judicial review as provided by law." N.D. CONST. art. IV, § 12. In 1987, the North Dakota Supreme Court ruled that then-current North Dakota law manifested the legislature's intent that, notwithstanding the Constitutional provision, only the legislature could hear legislative-election contests. *Timm v. Schoenwald*, 400 N.W.2d 260, 263 (N.D. 1987). In response, the legislature passed the current version of the election contest statute, which provides, "[l]egislative election contests must be determined in court as provided in this chapter for other contests. No legislative election may be contested before either house of the legislative assembly." N.D. CENT. CODE § 16.1-16-10 (2009).

Hawaii's Constitution provides both that "[e]ach house shall be the judge of the elections, returns and qualifications of its own members," HAW. CONST. art. III, § 12, and that "[c]ontested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law," HAW. CONST. art. II, § 10. In 1969, the Hawaii Supreme Court reconciled these seemingly contradictory clauses by ruling that the state's courts must resolve election contests for state legislature and that under article III, section 12, "the House's function in judging the elections of its members extends only to ascertaining whether the Constitution has been complied with; that is, whether the parties have properly invoked the jurisdiction of a competent court to judge the contest." *Akizaki v. Fong*, 461 P.2d 221, 223 (Haw. 1969) (emphasis omitted). Hawaii's statutes provide that all election contests originate in the state's supreme court. HAW. REV. STAT. § 11-172 (West 2008).

30. Oregon's election law statutes provide that a plaintiff can bring a contest in the circuit court to contest the election of a state senator or representative. OR. REV. STAT. § 258.036(1)(b) (2011). However, the Oregon Constitution provides that "[e]ach house when

fact-finding process.<sup>31</sup> To initiate an election contest, the challenger must file a notice with the district court clerk, who submits a copy to the chief justice of the state supreme court.<sup>32</sup> The chief justice then provides both parties with a list of the district court judges whose districts comprise the entirety or part of the contested legislative district.<sup>33</sup> If there is more than one judge that falls within the legislative district, the parties alternate striking the names of the judges until only one remains.<sup>34</sup> That judge, applying the rules of evidence for civil actions, makes findings of fact solely as to what number of legally-cast votes each of the candidates received.<sup>35</sup> The district judge then transmits his or her findings to the appropriate house, which convenes a committee to report to the full house.<sup>36</sup> The full house decides which candidate is the winner.<sup>37</sup> No appeal is permissible, either of the district judge's findings of fact or of the house's final determination, meaning that the district judge has complete discretion on the factual findings but that the house has the ultimate say on who won the election and could even disregard the district court's ruling.<sup>38</sup>

Other states have similar mechanisms for allowing courts to render decisions on election contests while preserving the legislature's constitutional role in deciding the election of its own members. For example, in both Minnesota and Ohio, the courts make a final decision on the election contest and then transmit that determination to the appropriate house for its consideration.<sup>39</sup> In Pennsylvania, the

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assembled, shall choose its own officers, judge of the election, qualifications, and returns of its own members." OR. CONST. art. IV, § 11. The Oregon courts have not been asked to invalidate the conflicting portion of the election contest statute, although the Oregon Supreme Court has held that "the constitution does vest the sole jurisdiction of this contest [for election of a state representative] to be within the House of Representatives of the Legislative Assembly." *Combs v. Groener*, 472 P.2d 281, 283 (Or. 1970). It would seem, therefore, that if presented with the question the Oregon Supreme Court would invalidate the portion of section 258.036(1)(b) that permits judicial election contests for state representatives and senators, although it would still allow contests for primary elections for these seats. *See id.* at 283 ("There is justification for a distinction between a primary and general election contest. The primary election does not make the winner of that election a member of the legislative assembly. It is no more than a form of party nomination. It is not the exclusive process for getting an aspirant's name on the general election ballot.").

31. KAN. STAT. ANN. § 25-1442 (2000).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*; KAN. STAT. ANN. § 25-1451 (2000).

36. § 25-1451.

37. *Id.*

38. KAN. STAT. ANN. § 25-1450 (2000).

39. *See* MINN. STAT. ANN. § 209.10 (West 2009); OHIO REV. CODE ANN. § 3515.14 (LexisNexis 2012). In Minnesota, the district court decides the election contest by issuing findings of fact and conclusions of law, which are appealable to the supreme court. The district court, or the supreme court if the case is appealed, must then transmit the findings to the appropriate house, which conducts a hearing and makes a final, unappealable decision. MINN. STAT. ANN. § 209.10. A judge in Ohio renders a decision on the election contest but then transmits that decision to the appropriate House for it to decide the election of its own members. OHIO REV. CODE ANN. § 3515.14. Other states give the fact-finding power to a separate commission. In Arkansas, for example, those wishing to contest an election to the house of representatives must file a complaint with the Arkansas State Claims Commission, which makes a nonbinding recommendation to the house of representatives on how to



court of common pleas of the county in which the winner resides tries and determines the election contest, but any claimant to the seat can present a petition challenging the court's decision to the proper house for a final resolution of the contest.<sup>40</sup> New Hampshire has a bipartisan Ballot Law Commission decide appeals of recounts for state legislative offices, but no further appeal of the commission's decision is permitted "in view of the constitutional provision[] vesting in . . . both houses of the general court exclusive jurisdiction over the elections and qualifications of their respective members."<sup>41</sup>

Sometimes a state's judiciary may insert itself into a legislative election contest. In *Stephenson v. Woodward*, the Kentucky Supreme Court overruled the Kentucky Senate's resolution affirming a sitting member's qualifications for service, ousting the member from office.<sup>42</sup> The court determined that it had jurisdiction to hear the dispute because it was not technically an "election contest" but instead a challenge to the qualifications of one of the candidates to appear on the ballot.<sup>43</sup> Commentators, however, lambasted the "extraordinary" decision as contradicting the explicit text of the Kentucky Constitution, which gives the legislature the authority to resolve election contests for its own members.<sup>44</sup> This decision exemplifies the difficulty inherent in an election contest regime in which an institution narrowly reads the governing language vesting jurisdiction in another body so as to retain authority for itself.

Thus, for state legislative contests in virtually all states, each respective house has the final say in the election of its own members. In many states, however, courts play a major role in this process. Indeed, some state courts render decisions on the ultimate outcome and then transmit these findings to the house. In this way, the house can maintain its sovereign role of determining the election of its own members, although it does so with the backdrop of a judicial decision on the issue. Of course, a house that makes a decision contrary to the court's recommendation might appear to be acting solely along partisan lines. This might affect its legitimacy and, therefore, would suggest that the house should simply adopt the judiciary's determination.<sup>45</sup> In many situations, then, the court's decision would seem likely to have an extremely strong influence on the house's resolution of the contest. The contrary, however, is also true: if the majority party has only a slim lead in the chamber, it might seek to seat its ideological ally to bolster its hold as the majority party regardless of what the court recommends. It is this concern of partisanship and entrenchment that counsels toward using impartial decision makers for election contests, as discussed below.<sup>46</sup>

In sum, virtually all states delegate to the legislative branch the power to determine the election of its own members when a dispute arises. Some states, however, augment this legislative authority with a significant role for the judiciary.

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resolve the dispute. ARK. CODE. ANN. § 7-5-805(b)(1)(D)(2) (2011).

40. 25 PA. CONS. STAT. ANN. §§ 3401-3409 (West 2007).

41. N.H. REV. STAT. ANN. §§ 665:8(II), :16 (2008).

42. 182 S.W.3d 162 (Ky. 2005).

43. *Id.* at 167-68.

44. Salamanca & Keller, *supra* note 28, at 243-44.

45. See Parsons, Jr., *supra* note 28, at 234 ("The inherent political pressure placed upon the Legislature by the supreme court's announcement that a particular candidate has, in its view, won a disputed election should be readily obvious to all.")

46. See *infra* Part III.

### *B. Election Contests Involving Governor and Lieutenant Governor*

State processes for election contests involving the state's chief executives vary considerably. Some states involve the legislature heavily, others leave the decision up to the judiciary, and some have special committees decide the dispute. Additionally, certain states provide for several levels of appeal, while other states allow no appeals at all.

#### 1. Trial-Level Court Decides

The most common procedure states use for election contests for governor and lieutenant governor is to permit the losing candidate to file suit in the trial court of general jurisdiction, usually with an appeal allowable to either the court of appeals or directly to the supreme court. Eighteen states provide that a party seeking to contest an election result must file in the trial court.<sup>47</sup> A nineteenth state, Oklahoma, allows a party to file in the trial court but also grants jurisdiction over contests to the appropriate election board.<sup>48</sup> In these states, a party wishing to challenge the election must simply file the suit in the normal trial court, albeit sometimes within strict time guidelines.

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47. ALASKA STAT. § 15.20.550 (2010); ARIZ. REV. STAT. ANN. § 16-672(B) (2006); CAL. ELEC. CODE § 16400 (West 2003); CONN. GEN. STAT. ANN. § 9-324 (West 2009); FLA. STAT. ANN. § 102.168 (West 2008); GA. CODE ANN. § 21-2-523 (2008); LA. REV. STAT. ANN. § 18:1403 (2012); MASS. ANN. LAWS ch. 55, § 35 (LexisNexis 2001); MONT. CODE ANN. § 13-36-103 (2011); NEB. REV. STAT. ANN. § 32-1102(2) (LexisNexis 2008); N.J. STAT. ANN. § 19:29-2 (West 1999); N.M. STAT. ANN. § 1-14-3 (West 2003); N.D. CENT. CODE § 16.1-16-04 (2009); OR. REV. STAT. § 258.036(1) (2011); UTAH CODE ANN. § 20A-4-403 (LexisNexis 2010); VT. STAT. ANN. tit. 17, § 2603 (2002 & Supp. 2011); WIS. STAT. ANN. § 9.01(6) (West 2004); WYO. STAT. ANN. § 22-17-102 (2011). Note that some state constitutions purportedly give the power to decide election contests to the legislature, but the legislature has enacted statutes delegating that power to the courts. For example, Oregon's Constitution states, "Contested Elections for Governor shall be determined by the Legislative Assembly in such manner as may be prescribed by law." OR. CONST. art. V, § 6. Nevertheless, the legislature has enacted a judicial election contest regime that specifically includes gubernatorial elections. *See* OR. REV. STAT. § 258.036.

Some states have different rules for primary contests involving gubernatorial elections. For example, in Mississippi, the State Executive Committee initially decides the contest. Judicial review is available from a special tribunal composed of the members of the original committee and a circuit court judge whom the chief justice of the supreme court designates, with the circuit judge acting as the sole decision maker. That judge's decision is appealable to the supreme court, which may review the findings of fact only if the commissioners on the State Executive Committee were not unanimous or at least three of them did not attend the hearing with the circuit judge. MISS. CODE ANN. §§ 23-15-923, -927 to -933, -937 (West 2003).

48. OKLA. STAT. ANN. tit. 26, § 8-109 (West 1997) (A challenger may "contest the correctness of the announced results of said election by filing a written petition with the appropriate election board. . . . Nothing in this section shall be construed to prohibit any proceedings in district court, which are otherwise authorized by law, alleging irregularities or fraud in an election.").

Of the states that give a trial court jurisdiction to decide the dispute, four allow an appeal directly to the state supreme court.<sup>49</sup> By contrast, fourteen states' statutes either have no specific guidance regarding an appeal or provide that an appeal of an election contest lies with the next-highest court in the state's system or proceeds like any other civil case.<sup>50</sup> The final state in this group of nineteen, Louisiana, provides that a direct appeal lies to the court of appeals sitting en banc.<sup>51</sup>

Two states—Michigan and New York—do not have separate election code provisions discussing election contests, but each state provides a remedy of quo warranto, which ultimately serves the same function by requiring the ouster of a candidate who has already taken office but then loses a post-election challenge.<sup>52</sup> Historically, quo warranto actions were the common law mechanism to contest an election.<sup>53</sup> Most states in the nineteenth century modernized their election contest provisions by enacting statutes to replace the common law quo warranto proceeding.<sup>54</sup> Michigan and New York, however, retained and codified quo

49. CONN. GEN. STAT. ANN. § 9-325 (West 2009); MASS. ANN. LAWS ch. 56, § 59 (LexisNexis 2001); N.M. STAT. ANN. § 1-14-5 (West 2003); N.D. CENT. CODE § 16.1-16-09 (2009).

50. ALASKA STAT. §§ 15.20.540–560 (2010); ARIZ. REV. STAT. ANN. §§ 16-671 to -678 (2006); CAL. ELEC. CODE § 16900 (West 2003); FLA. STAT. ANN. § 102.168; GA. CODE ANN. § 21-2-528 (2008); MONT. CODE ANN. §§ 13-36-101 to -104 (2011); NEB. REV. STAT. § 32-1117 (LexisNexis 2008); N.J. STAT. ANN. § 19:29-11 (West 1999); OKLA. STAT. ANN. tit. 26, § 8-109; OR. REV. STAT. § 258.085 (2011); UTAH CODE ANN. § 20A-4-406 (LexisNexis 2010); VT. STAT. ANN. tit. 17, § 2617 (2002); WIS. STAT. ANN. § 9.01(9) (West 2004); WYO. STAT. ANN. §§ 22-17-101 to -114 (2011).

51. LA. REV. STAT. ANN. § 18:1409(H); *cf.* 2 U.S.C. § 437h (2006) (providing for direct appeal to the circuit court sitting en banc for nonfrivolous constitutional questions regarding the Federal Election Campaign Act).

52. MICH. COMP. LAWS ANN. § 600.4501 (West 1996); N.Y. EXEC. LAW § 63-b (McKinney 2010). Florida has a specific election contest provision but also allows for ouster via quo warranto as another possible remedy. FLA. STAT. §§ 102.1682, .169; *see* Bailey v. Davis, 273 So. 2d 422, 423 (Fla. Dist. Ct. App. 1973) (suggesting that a challenger may initiate a quo warranto action even after he or she lost the election contest).

53. *See, e.g.,* Steven F. Huefner, *Just How Settled Are the Legal Principles that Control Election Disputes?*, 8 ELECTION L.J. 233, 235–36, 235 n.8 (2009); Lee, *supra* note 20, at 183 (“Prior to the adoption of statutory election contest provisions, the primary methods of contesting elections were *quo warranto* and mandamus actions, common law actions to test the validity of an election and compel the performance of a duty, respectively.”); *see generally* GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 279–429 (4th ed. 1897).

54. *See* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 570–71 (2004) (explaining that “throughout the nineteenth century, legislatures sought to modernize election challenges by creating election contest laws to supplement quo warranto actions”). As Professor Foley explains,

[t]he most important early use of quo warranto in the United States to challenge an incumbent governor's reelection based on wrongdoing in the counting of ballots occurred in Wisconsin's gubernatorial election of 1855. This Wisconsin Supreme Court decision, which ordered the incumbent governor to vacate his office because he was not the rightful winner of the election, is considered the *Marbury v. Madison* of Wisconsin law.

Edward B. Foley, *The Founders' Bush v. Gore: The 1792 Election Dispute and its Continuing Relevance*, 44 IND. L. REV. 23, 31 n.54 (2010) [hereinafter Foley, *The Founders'*

warranto as the means to contest an election. The theory behind a quo warranto action is that the candidate declared the winner has “usurped” the office.<sup>55</sup> The losing candidate therefore must ask the attorney general to initiate an investigation into whether the winner has “usurped” the elected position.<sup>56</sup> The attorney general screens the case and has the discretion to decide whether to bring a quo warranto judicial action seeking to “oust” the winner from office.<sup>57</sup> In Michigan, if the attorney general refuses to act a private party may bring suit,<sup>58</sup> but in New York the attorney general has complete discretion as to whether to proceed, and the quo warranto action is the sole mechanism to challenge the election.<sup>59</sup> The “usurper” may suffer a penalty for taking the office: in both Michigan and New York, if a court rules in favor of the losing candidate, the “usurper” is subject to a \$2000 fine.<sup>60</sup>

Given the theoretical underpinning of a quo warranto action—that the purported winner has “usurped” the position—the attorney general may not initiate the proceeding until that person has assumed office. One virtue of this process is that there will always be someone in office during the pendency of an election challenge, which is often a drawn out affair.<sup>61</sup> Then again, that person may not be a legitimate office holder. Whether it is better to have someone illegitimately in office to perform governmental functions or to leave the office vacant is a normative question that Michigan and New York have resolved in favor of having someone in office.<sup>62</sup>

Finally, two states—Kansas and Minnesota—require the supreme court to appoint a special three-judge trial court to consider the evidence and decide the election contest.<sup>63</sup> Appeal lies directly to the supreme court.<sup>64</sup>

Most states that have a trial-level judge initially hear the dispute do not specify the manner of selecting that judge. New Jersey, Oklahoma, Utah, and Wisconsin are slightly different: in New Jersey<sup>65</sup> and Wisconsin,<sup>66</sup> the chief justice of the

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Bush v. Gore] (citations omitted).

55. See N.Y. EXEC. LAW § 63-b; Delgado v. Sunderland, 767 N.E.2d 662, 665 (N.Y. 2002).

56. N.Y. EXEC. LAW § 63-b(1).

57. *Id.*

58. MICH. COMP. LAWS ANN. § 600.4501 (West 1996).

59. Delgado, 767 N.E.2d at 665.

60. MICH. COMP. LAWS ANN. § 600.4515; N.Y. EXEC. LAW § 63-b(3). New York also subjects the usurper to arrest. N.Y. EXEC. LAW § 63-b(2).

61. Shannon v. Jacobowitz, 301 F. Supp. 2d 249, 254–55 (N.D.N.Y. 2003).

62. Not all states leave the office vacant during an election challenge. For example, in 2004, Christine Gregoire assumed the governorship of Washington even while the election contest proceeded. See *In re Coday*, 130 P.3d 809, 811 (Wash. 2006).

63. KAN. STAT. ANN. § 25-1443 (2000); MINN. STAT. ANN. § 209.045 (West 2009); see Sheehan v. Franken, No. 62-CV-09-56, 2009 WL 981934, at \*1 (Minn. Dist. Ct. Apr. 13, 2009). This is analogous to the federal provision that authorizes a three-judge district court to hear certain election law cases, with direct appeal to the U.S. Supreme Court. See Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 455–56 [hereinafter Douglas, *Procedure of Election Law*].

64. KAN. STAT. ANN. § 25-1450 (2000); MINN. STAT. ANN. §§ 209.09(2), .10(4) (West 2009).

65. N.J. STAT. ANN. § 19:29-2 (West 1999).

66. WIS. STAT. ANN. § 9.01(6) (West 2004).

supreme court selects the judge to hear the case; in Oklahoma, the supreme court as a whole may assign a judge to hear the contest;<sup>67</sup> and in Utah, the chief judge of the district court chooses the judge.<sup>68</sup>

Georgia has the most detailed provisions for selecting the initial trial judge. The challenger must file the contest in the superior court of the county in which the defendant resides.<sup>69</sup> Georgia's confusingly-worded statute then directs the clerk of that court to have an administrative judge select a superior court judge to hear the case.<sup>70</sup> However, a different administrative judge must make the selection if the initial administrative judge resides in the same circuit in which the contest will proceed.<sup>71</sup> Ultimately, Georgia's procedure ensures that a judge of the district (larger-level unit) but not the circuit (smaller-level unit) presides over the dispute, which is likely to increase the possibility that the judge will be a neutral arbiter.

## 2. State Legislature Decides

The second most common procedure for deciding election contests for governor and lieutenant governor is to have the full legislature determine the proper winner. Thirteen states use this process.<sup>72</sup> In these states there is no possibility of appeal; the legislature has the final say in who won the election.<sup>73</sup> There are also few

67. OKLA. STAT. ANN. tit. 26, §§ 8-119, -120 (West 1997).

68. UTAH CODE ANN. § 20A-4-404(1)(b)(i) (LexisNexis 2010).

69. GA. CODE ANN. § 21-2-523(a) (2008).

70. § 21-2-523(c). Georgia's Superior Court, its court of general jurisdiction, is divided into ten judicial districts. Each judicial district includes between one and eight judicial circuits, corresponding to the counties within the district, for a total of forty-nine judicial circuits within the ten judicial districts. *Learn About Your Courts*, ADMINISTRATIVE OFFICE OF THE COURTS OF GEORGIA, <http://www.georgiacourts.org/index.php/component/content/article/116>.

71. § 21-2-523(d).

72. Twelve states require a joint session of the full legislature to decide the contest, while a thirteenth, Mississippi, directs only its house to resolve the dispute. MD. CONST. art. II, § 4; MISS. CONST. art. V, § 140; ALA. CODE § 17-16-65 (LexisNexis 2007); ARK. CODE ANN. § 7-5-806 (2011); COLO. REV. STAT. §§ 11-205 to -207 (West 2009); IDAHO CODE ANN. § 34-2104 (2008); KY. REV. STAT. ANN. § 120.205(5) (LexisNexis 2004); NEV. REV. STAT. § 293.433(1) (LexisNexis 2008); N.C. GEN. STAT. § 163-182.13A(a) (West 2007); TENN. CODE ANN. § 2-18-101 (2003); TEX. ELEC. CODE ANN. § 221.002(b) (West 2010); VA. CODE ANN. § 24.2-804 (2011); W. VA. CODE ANN. § 3-7-2 (LexisNexis 2011).

A fourteenth state, Indiana, has seemingly contradictory provisions regarding gubernatorial election contests. The Indiana Constitution provides that "[c]ontested elections for Governor or Lieutenant Governor, shall be determined by the General Assembly, in such manner as may be prescribed by law." IND. CONST. art. V, § 6. Indiana, however, does not have a law on the books describing such a procedure regarding how the General Assembly is to resolve a gubernatorial election contest. Indiana law does provide that the State Recount Commission, an administrative body, "shall conduct contest proceedings . . . resulting from . . . an election for a federal, state, or legislative office," which presumably includes governor. IND. CODE § 3-12-10-4(b) (2005). It is unclear whether this delegation to the State Recount Commission satisfies the constitutional mandate that the General Assembly resolves election contests. *See also supra* note 47 (discussing a similar contradiction in Oregon's statutes).

73. MD. CONST. art. II, § 4; MISS. CONST. art. V, §§ 128, 140; ALA. CODE § 17-16-65; ARK. CODE ANN. § 7-5-806; COLO. REV. STAT. §§ 11-205 to -207; IDAHO CODE ANN. § 34-

procedural specifications for the process by which the legislature is to decide the dispute. Some states, however, ask a special committee of the legislature to hear testimony and prepare a report for the full legislature to consider. For example, in Kentucky, the senate randomly selects three of its members and the house chooses eight of its members to serve as an eleven-member board to make an initial assessment of the contest and report its findings to the full legislature.<sup>74</sup> Similarly, the Tennessee Speaker of the House appoints seven members—not more than four of whom may belong to the same political party—and the speaker of the senate appoints five members—not more than three of whom may belong to the same political party—to serve as a “Committee on the Governor’s Election” to take evidence and hear objections.<sup>75</sup>

Three states—Delaware,<sup>76</sup> Iowa,<sup>77</sup> and Pennsylvania<sup>78</sup>—use a special committee comprised of select members of the legislature to decide the contest without ever involving the full legislature. Delaware’s Constitution provides that each house must choose one-third of its members by ballot to serve on the contest committee, and the chief justice of the supreme court or, in his or her absence, the chancellor, shall preside and rule on the admissibility of evidence and other legal questions.<sup>79</sup> In Iowa, each house selects seven of its members randomly to serve on the “contest court.”<sup>80</sup> The statute does not specify what happens if there is a seven-to-seven tie. Iowa’s administrative regulations, however, do state that if the election contest court finds that there were errors in the conduct of an election that make it impossible to determine a winner, the state commissioner of elections must invoke its emergency powers to order a repeat election.<sup>81</sup> It is unclear whether a seven-to-seven tie would constitute an “election contest emergency” under the regulations.

Pennsylvania’s process is much more complicated and interesting.<sup>82</sup> Within five days after receiving a petition contesting the election (signed by at least 100 registered voters), the senate and house must convene to choose a “select committee” of thirteen members.<sup>83</sup> The process is two-tiered: The senate first selects twelve members and the house twenty-five members through a highly specific process. For the senate, the names of each senator are written on “distinct pieces of paper as nearly alike as may be, each of which shall be rolled up and put into a box by the clerk of the house of representatives and placed on the speaker’s table.”<sup>84</sup> The secretary of the senate then must “shake[] and intermix[]” the papers, draw them out, and put them alternately into three separate boxes on the speaker’s

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2104; KY. REV. STAT. ANN. § 120.205(5); NEV. REV. STAT. § 293.433(1); N.C. GEN. STAT. § 163-182.13A(a); TENN. CODE ANN. § 2-18-101; TEX. ELEC. CODE ANN. § 221.002(b); VA. CODE ANN. § 24.2-804; W. VA. CODE § 3-7-2.

74. KY. REV. STAT. ANN. § 120.205.

75. TENN. CODE ANN. §§ 2-18-106, -109 (2003).

76. DEL. CONST. art. III, § 4.

77. IOWA CODE ANN. §§ 58.1–7 (West 2012).

78. 25 PA. CONS. STAT. ANN. §§ 3314–20 (West 2007).

79. DEL. CONST. art. III, § 4.

80. IOWA CODE § 58.4.

81. IOWA ADMIN. CODE r. 721-21.1(47)(21.1)(14) (2012).

82. For a general overview of Pennsylvania’s post-election litigation procedures, see Clifford B. Levine & David J. Montgomery, *Post-Election Litigation in Pennsylvania*, 41 DUQ. L. REV. 153 (2002).

83. 25 PA. CONS. STAT. ANN. §§ 3314, 3315 (West 2007).

84. § 3314(a) (punctuation omitted).

table.<sup>85</sup> The clerk of the house then must “shake and intermix” the three boxes and draw twelve names alternately from each box.<sup>86</sup> Presumably, the three boxes are meant to increase the random nature of the selection process. The house uses the same process to select its initial twenty-five members, with the secretary of the senate and the clerk of the house switching their administrative and selection duties.<sup>87</sup> Either of the parties to the contest can object to a selected member, which requires the selection of a new member to the initial pool, but no further objections are allowed if there are no remaining names in the boxes to take the challenged member’s place.<sup>88</sup> The clerk of the house and the secretary of the senate each then draws the remaining names from the other chamber’s boxes and reads them aloud to ensure there have been no mistakes or unfairness in the process so far.<sup>89</sup>

Once the legislature has selected its initial thirty-seven members, further winnowing occurs: the parties to the election contest receive the names of the twelve senators and twenty-five representatives, retire to an “adjoining” room, and, in the presence of “a clerk or members appointed by the joint vote of members present,” alternately strike off the names on each list until there are four members of the senate and nine members of the house remaining.<sup>90</sup> The parties have only one hour to complete this process.<sup>91</sup> The list of thirteen legislators serves as the final “select committee” to decide the dispute.<sup>92</sup> The select committee must meet within forty-eight hours after its appointment to begin the proceedings.<sup>93</sup> The chief justice of the supreme court serves as the select committee’s presiding officer, who decides questions regarding the admissibility of evidence and must “pronounce his opinion upon other questions of law involved in the contest, but he shall not have a vote on the final determination of the case.”<sup>94</sup> Demonstrating the antiquated yet charming nature of the statutory scheme, all witnesses that the special committee subpoenas are entitled to “six cents for every mile of the distance necessarily traveled by him in coming to and returning from the place of trial, and shall also be allowed the sum of two dollars and fifty cents for every day he may be detained at the place of such trial.”<sup>95</sup>

The current version of this law dates to 1937.<sup>96</sup> However, the 1937 law is largely identical to the provision from 1874 that formalized these procedures.<sup>97</sup> Although

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85. § 3314(b).

86. § 3314(c).

87. § 3315.

88. 25 PA. CONS. STAT. ANN. § 3316 (West 2007).

89. 25 PA. CONS. STAT. ANN. § 3317 (West 2007).

90. 25 PA. CONS. STAT. ANN. § 3318 (West 2007).

91. 25 PA. CONS. STAT. ANN. § 3320 (West 2007). The statute makes no mention of what happens if the parties fail to finalize the list within the hour. However, the members of each house may not leave the “conference room” where the initial process took place “without permission” until the select committee is finalized. 25 PA. CONS. STAT. ANN. § 3319 (West 2007).

92. § 3320.

93. 25 PA. CONS. STAT. ANN. § 3321 (West 2007).

94. 25 PA. CONS. STAT. ANN. § 3324 (West 2007).

95. 25 PA. CONS. STAT. ANN. § 3330 (West 2007). The Pennsylvania legislature has not updated this law since its enactment to increase the amount of compensation witnesses receive.

96. Pennsylvania Election Code, No. 320, art. XVII, §§ 1712–1730, 1937 Pa. Laws 1333, 1468–73.

97. Act of May 19, 1874, No. 136, 1874 Pa. Laws 208.

the legislative history is not entirely clear, it appears that Senator Harry White introduced the gubernatorial contest provisions as an amendment<sup>98</sup> to an existing house bill regarding election contests.<sup>99</sup>

It is possible that Senator White thought the detailed procedures necessary in light of a political scandal in Texas involving that state's gubernatorial election of 1873.<sup>100</sup> As part of the Coke-Davis election dispute, the Texas Supreme Court issued a decision in *Ex parte Rodriguez*, often referred to as the "semicolon case," in which the court rendered the general election unconstitutional.<sup>101</sup> The Texas Supreme Court determined that the election was illegal because it was held under an unconstitutional law, the interpretation of which turned on the placement of a semicolon in the section of the Texas Constitution that delineated election procedures.<sup>102</sup> This was controversial because the original election results showed a huge victory for Democrat Richard Coke over incumbent Governor Edmund J. Davis.<sup>103</sup> Davis had appointed all three members of the Texas Supreme Court.<sup>104</sup> Thus, the decision was seen as a simple power-grabbing maneuver from Davis's partisan supporters on the court so that Davis could remain in office.<sup>105</sup>

The decision set off a firestorm, with Coke trying to take office and Davis asserting that he instead should remain as governor to give effect to the Texas Supreme Court's decision.<sup>106</sup> As Coke and his supporters began to organize a legislature for an inauguration and to assume office, Davis asked President Ulysses S. Grant to send federal troops to prevent Coke from taking over.<sup>107</sup> Eventually, after President Grant refused to send troops amid the uncertainty of Davis's right to hold office, Davis succumbed and Coke assumed the governorship.<sup>108</sup>

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98. JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PENNSYLVANIA, FOR THE SESSION BEGUN AT HARRISBURG, ON THE 6TH DAY OF JANUARY, 1874 1098 (1874).

99. *Id.* at 1096–98 (citing H.B. 355, 1874 Reg. Sess. (Pa. 1874)).

100. See Lance A. Cooper, "A Slobbering Lame Thing"? *The Semicolon Case Reconsidered*, 101 SW. HIST. Q. 320, 320–29 (1998).

101. *Ex parte Rodriguez*, 39 Tex. 705 (1873).

102. Cooper, *supra* note 100, at 323. The section of the Texas Constitution provided: "All elections for State, District and County officers shall be held at the county seats of the several counties, until otherwise provided by law; and the polls shall be opened for four days, from 8 o'clock A.M. until 4 o'clock P.M. of each day." The Texas legislature, however, had passed a law reducing the number of days the polls were to remain open to one. Joseph Rodriguez was arrested for voting twice in the election, and he filed a writ of habeas corpus alleging that the entire election was void because the law reducing the number of polling days was unconstitutional. If the election itself was illegal, he could not have committed the crime of voting twice. The Texas Supreme Court agreed, throwing out the election results. *Id.*

103. *Id.* at 321.

104. *Id.* at 325.

105. *Id.* at 321–22 (noting that Democrats viewed the decision as "nothing more than the legally indefensible product of partisan judges who were struggling to maintain the Republican party's power and to keep their own jobs," and that even today "Texas lawyers still are warned against citing *Rodriguez* as precedent and, further, are warned to think twice before citing any Semicolon Court opinion").

106. Carl H. Moneyhon, *Edmund J. Davis in the Coke-Davis Election Dispute of 1874: A Reassessment of Character*, 100 SW. HIST. Q. 131, 139–40, 143, 147 (1996).

107. *Id.* at 146–47.

108. *Id.* at 150.



The turmoil from Texas involving the state supreme court's decision in favor of the very person who had appointed the justices, combined with the feeling at the time that corrupt political machines ran Pennsylvania's legislature,<sup>109</sup> likely led Senator White to propose a process for resolving gubernatorial election contests that would at least remove explicit partisan taint from the decision-making process. That is, Texas's experience with biased decision makers in the Coke-Davis controversy, along with the political climate of Pennsylvania's legislature, counseled for a procedure that would require complete randomness in the selection of those who resolved an election contest. Any partisanship in the tribunal would be the result of the random selection method.

Although Senator White's amendment detailed the specific contours of Pennsylvania's unique process, Senator White's proposal no doubt originated from Pennsylvania's Constitutional Convention of 1790, which stipulated that a committee of the legislature would decide the dispute:

In case of contested elections, the same shall be judged of and determined by a committee to be selected from both houses of the legislature, in such manner as shall be by law directed. During the trial of contested elections, the speaker of the senate shall exercise the office of governor.<sup>110</sup>

Pennsylvania has never had an election contest for governor or lieutenant governor, so the state has never needed to invoke these processes. It is clear, however, that the statute is intended to root out bias or fraud. For example, the opposite chamber's chief administrator—likely a person with very little interest in influencing the membership of the special committee—plays a large role in the selection process. Moreover, the pulling of names from one box and placement of them into three additional boxes contributes to the random nature of the proceeding. Ultimately, in light of the political climate at the time, the Pennsylvania legislature adopting these provisions must have believed that this sort of procedure would best eliminate bias or corruption and would be most fair for all involved.

After the 2012 election, Republicans held a 27–23 majority in the fifty-member senate and a 110–93 majority in the 203-member house.<sup>111</sup> From a statistical

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109. Robert Harrison, *The Hornets' Nest at Harrisburg: A Study of the Pennsylvania Legislature in the Late 1870s*, 103 PENN. MAG. HIST. & BIOGRAPHY 334, 335–36 (1979).

110. FRANCIS SHUNK, *THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776, AND THE COUNCIL OF CENSORS* 370 (1825), available at [http://www.duq.edu/Documents/law/pa-constitution/\\_pdf/conventions/1776/proceedings1776-1790.pdf](http://www.duq.edu/Documents/law/pa-constitution/_pdf/conventions/1776/proceedings1776-1790.pdf) (emphasis omitted).

111. See Pa. Dep't of State, *2012 General Election, Unofficial Election Returns, Representative in the General Assembly*, (Nov. 6, 2012), <http://www.electionreturns.state.pa.us/ElectionsInformation.aspx?FunctionID=13&ElectionID=53&OfficeID=13>; Pa. Dep't of State, *2012 General Election, Unofficial Election Returns, Senator in the General Assembly*, (Nov. 6, 2012), <http://www.electionreturns.state.pa.us/ElectionsInformation.aspx?FunctionID=13&ElectionID=53&OfficeID=12>; Pugliese Assocs., *Pennsylvania Election Results November, 2012* <http://puglieseassociates.com/issues/november-2012-election-summary>.

perspective, then, Republicans would seem more likely to control a gubernatorial election contest because they are more likely to have a majority of members on the special committee. However, given that Democrats have a significant number of representatives in the General Assembly, it is quite possible that the minority party would secure a majority of seats on the special committee based on the random draw. Either way, the chances of a complete balance in partisanship on the committee are unlikely, meaning that Pennsylvania's process, while guaranteeing randomness and eliminating overt bias such as occurred in the Coke-Davis dispute, will still produce a partisan decision maker. The skew of that partisanship will be based on the respective numbers in the General Assembly at the time and the luck of the draw.

### 3. State Supreme Court Decides

Five states provide that the state's supreme court has original jurisdiction to decide election contests for governor or lieutenant governor, with no possibility of appeal.<sup>112</sup> In two of these states, however, the supreme court must ask another judge for assistance: in Illinois, the supreme court must appoint a circuit judge to oversee the hearing or a recount,<sup>113</sup> and in Missouri, the supreme court must appoint a commissioner of the court to take testimony on points and facts that the supreme court specifies.<sup>114</sup>

Two states have hybrid approaches that allow their supreme courts to be involved from the outset. In Ohio, the chief justice of the supreme court or another justice that the chief justice assigns initially hears the election contest.<sup>115</sup> A party may appeal to the full supreme court.<sup>116</sup> Washington's statutes allow a party to file an election contest with the supreme court, court of appeals, or a superior court, with possible appeal to the supreme court from a decision of the superior court.<sup>117</sup>

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112. HAW. REV. STAT. § 11-174.5 (West 2008); 10 ILL. COMP. STAT. ANN. 5/23-1.1a (West 2010); ME. REV. STAT. ANN. tit. 21-A, § 737-A(10) (2008 & Supp. 2011); MO. ANN. STAT. § 115.555 (West 2003); S.D. CODIFIED LAWS § 12-22-7 (2004). Maine used to send all election contests to the Commission on Governmental Ethics and Election Practices. ME. REV. STAT. ANN. tit. 21-A, §§ 741-746, *enacted by* Laws 1985, c. 161, §§ 5, 6, *repealed by* Laws 1993, c. 473, § 34. After a major ballot tampering scandal during a recount, however, Maine repealed its previous election contest law and decided to send all contests besides those for state legislature to its supreme court. SPECIAL COMM'N TO REVIEW THE ELECTORAL PROCESS, REPORT TO THE SECRETARY OF STATE 7 (1993) ("The Commission believes that public confidence in the integrity of the recount process will best be served by having final decisions made by the judiciary on direct appeal from the processing of the recount by the Secretary of State's office."); *see* Editorial, *Election Reform*, BANGOR DAILY NEWS, June 14, 1993, at 6 ("The Maine House is expected to vote today on a wide-ranging election-reform bill that makes sensible changes to a system badly out of date. Sprung from the ballot-tampering scandal of last December, the reform measure should reassure Maine voters that the state's election system has been returned to health.")

113. 10 ILL. COMP. STAT. ANN. 5/23-1.8a (West 2010).

114. MO. ANN. STAT. § 115.561 (West 2003).

115. OHIO REV. CODE ANN. § 3515.08(B) (LexisNexis 2012).

116. OHIO REV. CODE ANN. § 3515.15 (LexisNexis 2012).

117. WASH. REV. CODE ANN. § 29A.68.011 (West 2005) (providing that "[a]ny justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper

That is, a challenger may select the level of court in which to initiate the action—and, as discussed below, in the 2004 gubernatorial election the parties invoked the jurisdiction of both the Washington Supreme Court and several superior courts.<sup>118</sup> The statutes allow an appeal from the superior court, and also grant the supreme court original jurisdiction, but curiously do not specify whether an appeal is allowed from the court of appeals if the challenger chooses to commence the action in that court.<sup>119</sup>

Washington provides a recent example of a gubernatorial election contest statute in practice.<sup>120</sup> The 2004 gubernatorial election between Democrat Christine Gregoire and Republican Dino Rossi was razor-thin, with Gregoire enjoying a 129-vote margin of victory after recounts.<sup>121</sup> After preliminary litigation regarding which ballots to include in a recount and the secretary of state's certification of Gregoire as the winner, seven electors, including some on behalf of the Republican Party and Rossi campaign, filed an election contest in the Chelan County Superior Court.<sup>122</sup> The contesting parties chose Chelan County rather than King County, where most of the alleged improprieties took place, likely because they believed Chelan County would be a more favorable forum given that it had voted overwhelmingly for Rossi.<sup>123</sup> The Democratic Central Committee intervened to defend the election result.<sup>124</sup> After conducting a two-week trial, the court issued an oral decision in favor of Gregoire's election, dismissing the contest.<sup>125</sup> Rossi and his supporters chose not to appeal this ruling to the supreme court.<sup>126</sup> However, several months later, four Rossi voters initiated an election contest in the Washington Supreme Court, alleging various improprieties with respect to the

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county" can order an election official to correct the results of an election); § 29A.68.120. Washington's Constitution actually confers upon the legislature the power to decide election contests for governor. WASH. CONST. art. III, § 4 ("Contested elections for such officers shall be decided by the legislature in such manner as shall be determined by law."). Nevertheless, the Washington Supreme Court, in 2004, asserted authority to decide an election contest for that state's gubernatorial election, stating,

We have assumed, without deciding, that chapter 29A.68 RCW confers jurisdiction on this court to decide the present election contests. We reserve the right to consider the question of whether the constitution gives the legislature exclusive jurisdiction over governor's election contests if it is properly raised at some future time.

*In re Coday*, 130 P.3d 809, 817 (Wash. 2006). Thus, it is possible that the legislature would decide a future gubernatorial election contest, although the supreme court took it upon itself to perform that task in 2004.

118. *In re Coday*, 130 P.3d at 811.

119. §§ 29A.68.011, .120.

120. *See, e.g., In re Coday*, 130 P.3d at 809.

121. Ralph Thomas, *Rossi Urges Revote to Fix "Mess"*, SEATTLE TIMES, Dec. 30, 2004, at A1.

122. *Borders v. King Cnty.*, No. 05-2-00027-3 (Chelan Cnty. Super. Ct. June 24, 2005) available at <http://www.seattleweekly.com/content/printVersion/165891/>; *see In re Coday*, 130 P.3d at 811.

123. *See* David Postman, Susan Gilmore & Keith Ervin, *GOP Suit Doesn't Ask to Prevent Swearing-in*, SEATTLE TIMES, Jan. 8, 2005, at A1.

124. *In re Coday*, 130 P.3d at 811.

125. *Id.*

126. *Id.*

recount.<sup>127</sup> The court ultimately dismissed three of the allegations for failure to state a legally cognizable claim and the fourth based on the res judicata effect of the Chelan County Superior Court's decision.<sup>128</sup> The court took "judicial notice" in ruling that the earlier decision had res judicata effect on the original action in the supreme court.<sup>129</sup> That is, the Washington Supreme Court dismissed the subsequent original action before it, based on the prior lower court's resolution of the first election contest.<sup>130</sup> Washington's strange statute, which allows a contest in whichever forum the challengers select, resulted in the Washington Supreme Court never reaching the ultimate substantive merits of the dispute, even though it would have had original jurisdiction had the Chelan County plaintiffs filed there, and it also would have heard the case if the first plaintiffs had appealed.

#### 4. Other Tribunal Decides

New Hampshire, Rhode Island, and South Carolina initially ask the Board of Elections or a similar nonjudicial body to hear an election contest.<sup>131</sup> South Carolina allows a direct appeal of the State Board of Canvasser's decision to the supreme court.<sup>132</sup> By contrast, there is no statutory right of appeal of the Rhode Island Board of Elections' decision, and the Rhode Island Supreme Court will only grant discretionary review under a writ of certiorari based on "substantial issues of law."<sup>133</sup>

In New Hampshire, losing parties may appeal a recount to the five-member Ballot Law Commission.<sup>134</sup> The Commission is comprised of two members the house of representatives selects (each major party chooses a member), two members the senate selects (again, one from each party), and one member the governor appoints.<sup>135</sup> No member of the Commission may be an elected official.<sup>136</sup> The supreme court may review the Ballot Law Commission's decision, but the Commission's findings of fact are "final if supported by the requisite evidence."<sup>137</sup>

127. *Id.* at 812.

128. *Id.* at 815–16.

129. *Id.* at 816 n.3, 817.

130. *But see id.* at 817–19 (Sanders, J., dissenting) (arguing that the prior election contest did not bar the Supreme Court's consideration of this case and that a contrary ruling "strikes at the heart of the fundamental right of every person to access the courts").

131. N.H. REV. STAT. ANN. § 665:5 (2008); R.I. GEN. LAWS § 17-7-5(a)(11) (2003); S.C. CODE ANN. § 7-17-250 (1977). As noted earlier, Indiana also seems to direct its State Recount Commission to hear election contests for governor, but this provision conflicts with Indiana's Constitution, which leaves gubernatorial election contests to the legislature. *See supra* note 72.

132. S.C. CODE ANN. § 7-17-270.

133. R.I. GEN. LAWS § 17-7-5(a); *Van Daam v. DiPrete*, 560 A.2d 953, 954 (R.I. 1989) ("There is no statutory appeal provided from a decision of the Board of Elections. The review by this court is discretionary and may be granted only after a showing of substantial issues of law.").

134. N.H. REV. STAT. ANN. §§ 665:1(I), :5(I)(b).

135. § 665:1(I).

136. *Id.*

137. N.H. REV. STAT. ANN. § 665:16 (2008).

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In sum, states use varying procedures for resolving contested elections for the state's highest office. Although infrequently invoked, virtually all states have contemplated how to resolve a disputed gubernatorial election so that there are at least procedures in place ahead of time. Many states delegate the authority to hear the contest to the judiciary, with different rules and structures. Other states give the legislature the power to decide the case. The table below summarizes the wide variety of approaches states use to deal with this issue.

Type of Procedure for Election Contests for Governor or Lieutenant Governor	Number of States that Use This Procedure <sup>138</sup>
Trial court has initial jurisdiction (including via quo warranto); appeal allowed	21
Legislature decides (either joint session, the House alone, or special committee)	16
Supreme court has original jurisdiction (including hybrid approaches)	7
Other tribunal has original jurisdiction	4
Special three-judge court with direct appeal to supreme court	2

### C. Election Contests Involving Judicial Elections

Thirty-nine states elect some or all members of their judiciaries.<sup>139</sup> They employ elections for members of their general jurisdiction trial courts, appellate courts, or both, either through regular elections or retention elections in which voters choose whether to allow a judge to keep his or her position.<sup>140</sup> Twenty-one states elect their highest judges, and seventeen initially appoint supreme court justices and provide for retention elections.<sup>141</sup> Of course, election “contests” typically involve the

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138. I placed Oregon in the “Trial Court” category, even though it is possible to read its constitution as conflicting with its statutes, because the legislature has delegated responsibility for gubernatorial election contests to its courts. *See supra* note 47. I placed Indiana in the “Other tribunal” category for the same reason. *See supra* note 72.

139. *Republican Party of Minn. v. White*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring); *Judicial Selection Methods in the States*, AMERICAN JUDICATURE SOCIETY, [http://www.ajs.org/selection/sel\\_state-select-map.asp](http://www.ajs.org/selection/sel_state-select-map.asp). The eleven states that do not have any elections for its judiciary are Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia. *Id.*

140. *Judicial Selection Methods in the States*, *supra* note 139.

141. *Id.* The states that have elected supreme court justices are Alabama, Arkansas,

declared winner of an election and the second-place candidate. Thus, it is more likely that the states that elect their judges outright (as opposed to having retention elections) would explicitly provide for how to deal with election contests for those seats.

Several states use their judiciaries to resolve election contests for judicial offices. Idaho, Missouri, Ohio, and South Dakota direct their supreme courts to resolve an election contest for that same court.<sup>142</sup> In Idaho, the governor “shall act with them” if the supreme court “shall disagree.”<sup>143</sup> In Missouri, a nominating commission appoints supreme court justices for the initial term of one year, and the justices then must go before the voters in retention elections for a twelve-year term.<sup>144</sup> Missouri’s election contest provision provides that the supreme court must hear and determine questions related to the retention of these judges, but circuit court judges hear election contests for lower courts.<sup>145</sup> Ohio uses a single justice of the supreme court to decide election contests for supreme court justices: the chief justice must hear the case or appoint another justice to decide the dispute.<sup>146</sup> The governor names a justice to hear an election contest for chief justice.<sup>147</sup> For judicial contests for judges of the court of common pleas or below, however, Ohio has its court of appeals decide the challenge, with appeal allowed to the supreme court.<sup>148</sup> Finally, South Dakota grants original jurisdiction for contests involving “judicial officers” to its supreme court.<sup>149</sup>

By contrast, Illinois circuit (trial) courts hear contests for supreme court and circuit court judges.<sup>150</sup> Louisiana also directs election contests for supreme court justices and lower court judges to its trial courts, with appeal available to an en

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Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin. *Id.* The states that provide for appointment and then retention elections for the state’s highest courts are Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. *Id.* New York does not have either outright elections or retention elections for its highest court judges but holds elections for its lower court judges. *Id.*

142. IDAHO CODE ANN. § 34-2004 (2008); MO. ANN. STAT. § 115.555 (West 2003); OHIO REV. CODE ANN. § 3515.08(B) (LexisNexis 2012); S.D. CODIFIED LAWS § 12-22-7 (2004). In Idaho, a district court hears contests of retention elections for the magistrate courts. IDAHO CODE ANN. § 34-2004.

143. IDAHO CODE ANN. § 34-2004.

144. *See Judicial Selection Methods in the States*, *supra* note 139.

145. MO. REV. STAT. §§ 115.555, .575.

146. OHIO REV. CODE ANN. § 3515.08(B).

147. *Id.*; *see Moss v. Bush*, 105 Ohio St. 3d 11, 2004-Ohio-2088, 821 N.E.2d 992, at ¶ 5. This case involved an election contest for Ohio’s 2004 presidential electors, which the chief justice—who was involved in his own election contest for reelection to his seat—heard under section 3515.08. The chief justice refused to recuse himself based on a purported conflict of interest regarding the election contest for his seat given that the governor had appointed a different justice to hear his case. *Id.* at 993–94.

148. OHIO REV. CODE ANN. § 3515.08(C); *see, e.g., Squire v. Geer*, 117 Ohio St. 3d 506, 2008-Ohio-1432, 885 N.E.2d 213 (applying “clear and convincing evidence” standard to election contest for judge of court of common pleas).

149. S.D. CODIFIED LAWS § 12-22-7(1) (2004).

150. 10 ILL. COMP. STAT. ANN. 5/23-3 (West 2010).

banc session of the court of appeals.<sup>151</sup> Oregon, too, uses trial courts, with appeal to the court of appeals like in a normal case.<sup>152</sup> Pennsylvania appears to require two-judge courts for contests involving supreme court justices and three-judge courts for contests for lower court judges.<sup>153</sup> Tennessee does not specify the procedure for election contests for supreme court justices (who have retention elections), but provides that for a contested election for chancellor, the chief justice of the supreme court must assign a chancellor from a different division to decide the case.<sup>154</sup>

Alabama and Nevada use a joint session of the legislature to resolve a disputed supreme court justice election, with no possibility of appeal.<sup>155</sup> However, trial courts hear disputes regarding elections for lower court judges in both states.<sup>156</sup> Moreover, it is still possible for the state and federal judiciaries to become involved in an election contest for supreme court justice: In *Roe v. Alabama*, the United States Court of Appeals for the Eleventh Circuit certified a question of Alabama election law regarding absentee ballots to the Alabama Supreme Court, the answer of which would allow the Eleventh Circuit to resolve the federal constitutional issues surrounding the election of Alabama's chief justice.<sup>157</sup> The Eleventh Circuit explained, "[b]ecause Alabama has barred its courts from entertaining statewide election contests . . . there is only one state remedy in this case: a contest in the legislature. The legislature, however, is not an adequate or proper forum for the resolution of the federal constitutional issues presented."<sup>158</sup> The Alabama Supreme Court answered the certified question by explaining that the federal court had incorrectly stopped the state courts from determining whether all of the properly cast absentee ballots had been counted and that Alabama law required the counting of all ballots.<sup>159</sup> A challenge to the ballots based on fraud, gross negligence, or

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151. LA. REV. STAT. ANN. §§ 18:1403, :1409(D), :1409(H) (2012).

152. OR. REV. STAT. § 258.036(1)(a), .085 (2011). Oregon statutes specify the venue for election contests involving judges on the supreme court, court of appeals, and tax court. § 258.036(1)(a).

153. 25 PA. CONS. STAT. ANN. §§ 3351, 3377 (West 2007); see *In re Morganroth Election Contest*, 50 Pa. D. & C. 143 (Pa. Ct. C.P. 1942) (three-judge court for election contest for judge of the Court of Common Pleas of Northumberland County). Although three "president" judges hear an election contest for Class III cases (judges), two president judges hear Class II cases (which include judges elected statewide). §§ 3291, 3351, 3377. There are no reported election contests under the two-judge provision, nor does the statute provide the procedure in the case of a tie.

154. TENN. CODE ANN. § 2-17-101(a) (2003); see *Taylor v. Tenn. State Democratic Exec. Comm.*, 574 S.W.2d 716, 717-18 (Tenn. 1978) (leaving open question of whether chancery court would have jurisdiction for a contest of an *election* for supreme court justice in ruling that it did not have jurisdiction for a *nomination* contest for that position).

155. ALA. CODE § 17-16-65 (LexisNexis 2007); NEV. REV. STAT. ANN. § 293.433 (LexisNexis 2008).

156. In Alabama, a joint session of the legislature hears disputes for court of appeal judges, with no appeal allowed, but a probate court hears election contests for district and circuit judges, with appeal to the supreme court. ALA. CODE §§ 17-16-65, -54, -61. In Nevada, a trial-level court hears disputes for lower-level judges, and the court can refer the matter to a special master. NEV. REV. STAT. ANN. § 293.413(3). The Nevada statute does not mention appeals.

157. 43 F.3d 574 (11th Cir. 1995).

158. *Id.* at 582 (citation omitted).

159. *Roe v. Mobile Cnty. Appointment Bd.*, 676 So. 2d 1206, 1226 (Ala. 1995).

intentional wrongdoing, however, had to be raised in an election contest in the legislature.<sup>160</sup> Having received an answer to its certified question, the Eleventh Circuit remanded the case to the district court for a trial on whether all absentee ballots had been counted in the same manner as they had in previous elections so as to avoid a federal equal protection or due process violation.<sup>161</sup> Thus, even when states try to exclude any judicial involvement in state election contests, federal courts might enter the fray to resolve federal constitutional issues.

West Virginia has the most unique procedure for judicial election contests of any of the states. Its statute provides that a special court must hear a dispute involving elections to the supreme court of appeals or circuit court.<sup>162</sup> The special court is comprised of one person that the contestee selects, a second person that the contestant chooses, and a third person that the governor appoints.<sup>163</sup> Appeal lies with the supreme court.<sup>164</sup> There is apparently no prohibition on whom each party may select. In *McWhorter v. Dorr*, McWhorter objected to his opponent Morrison naming Dorr on the special court given that Dorr served as Morrison's attorney in preparing the notice of contest and was a Morrison partisan.<sup>165</sup> The West Virginia Supreme Court, however, ruled that the special three-judge court is a subordinate legislative tribunal and not part of the judiciary, so a writ of prohibition could not reach it.<sup>166</sup> Accordingly, there was nothing to stop Morrison from naming his own lawyer to the special court.<sup>167</sup>

In 1968, West Virginia again used its procedures to resolve a disputed judicial election. Luke Terry contested the certification of Vance Sencindiver as the properly elected judge of the thirty-first judicial circuit.<sup>168</sup> Each side named a member of the special court, and the governor chose the third member.<sup>169</sup> The special court divided two-to-one in favor of Sencindiver, with Terry's appointee dissenting.<sup>170</sup> Terry appealed, and the supreme court affirmed the special court's decision.<sup>171</sup> Although the court did not specify a standard of review, its analysis reads as if it considered the election contest *de novo*, especially given that it was construing the legal question of whether a state law that required the polls to close at 7:30 PM was mandatory.<sup>172</sup> Thus, it is unclear what role the special court actually played in this decision beyond contributing its initial view of the proper outcome.

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160. *Id.*

161. *Roe v. Alabama*, 52 F.3d 300 (11th Cir. 1995); *see Roe v. Mobile Cnty. Appointing Bd.*, 904 F. Supp. 1315 (S.D. Ala. 1995), *aff'd sub nom. Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995).

162. W. VA. CODE ANN. § 3-7-3 (LexisNexis 2011).

163. *Id.*

164. *Id.*

165. 50 S.E. 838, 838 (W. Va. 1905).

166. *Id.* at 840.

167. *Id.*

168. *Terry v. Sencindiver*, 171 S.E.2d 480, 481 (W. Va. 1969).

169. *Id.*

170. *Id.* at 481–82.

171. *Id.* at 485.

172. *Id.* at 483–84.



In the remainder of states that hold judicial elections, the statutes do not provide specific rules for election contests for judicial offices. Thus, presumably the general provisions for election contests would apply.

In sum, only twelve of the thirty-nine states that elect their judges specify procedures for tribunals to use to resolve election contests for judicial positions.<sup>173</sup> There is little uniformity among the states that have enacted a procedure. A few states use the judiciary or a modified form of a judicial body to resolve the case, but two leave it up to the legislature. Moreover, the statutes frequently fail to provide any guidance as to why the state chose a particular procedure or the goals behind the processes enacted. Instead, judicial election contest procedures represent a patchwork of schemes under which states must try to operate a fair and open process.

#### *D. Election Contests Involving Congressional Elections*

Like most state constitutions, the U.S. Constitution provides that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .”<sup>174</sup> Thus, the Constitution expressly delegates the authority to decide election contests for congressional seats to Congress. This is a lasting legacy of our Founding Fathers<sup>175</sup> and a function of the separation of powers: as James Madison explained in the Federalist Papers, “it is evident that each department should have a will of its own, and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.”<sup>176</sup>

However, state tribunals still have some authority in this area, both as a matter of constitutional text and general practice. The Constitution delegates to the states the authority to regulate the “Times, Places and Manner of holding Elections.”<sup>177</sup> Various states have construed this language as giving them a role in deciding

173. In addition, Mississippi provides for contests for their primary, but not general, judicial elections. MISS. CODE ANN. § 23-15-923 (West 2003).

174. U.S. CONST. art. I, § 5.

175. *Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986) (explaining that “[i]n 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”) (citation omitted) (internal quotation marks omitted).

176. THE FEDERALIST NO. 51 (James Madison). As Justice Story explained,

If [the power to judge elections is] lodged in any other than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed or put into imminent danger. No other body but itself can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights and sustain the free choice of its constituents.

1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 833, at 604–05 (5th ed. 1891), quoted in *Morgan*, 801 F.2d at 450 (alteration in original); see also Salamanca & Keller, *supra* note 28, at 255.

177. U.S. CONST. art. I, § 4.

election disputes, even if the respective house might have the final say in the matter.<sup>178</sup>

In *Roudebush v. Hartke*, the Supreme Court declared that state courts have the authority to order a recount in a congressional election because this was merely an administrative act that was consistent with the state's power to regulate the "Times, Places and Manner" of conducting an election.<sup>179</sup> The Court explained,

[A] recount can be said to "usurp" the Senate's function only if it frustrates the Senate's ability to make an independent final judgment. A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount.<sup>180</sup>

Based on this language, some state courts have concluded that they may order only recounts in congressional elections, while others have determined that they can decide election contests so long as the respective house has the ability to make an independent final judgment.<sup>181</sup> *Sheehan v. Franken*, the judicial contest of Minnesota's 2008 U.S. Senate election between Norm Coleman and Al Franken that ended after the Minnesota Supreme Court resolved the case in favor of Franken, is a recent example of a state judicial proceeding that would not have precluded ultimate resolution of the election in Congress.<sup>182</sup> Under Minnesota law, Minnesota's chief justice appointed a three-judge panel to hear the contest, which ruled in favor of Franken.<sup>183</sup> Coleman then appealed directly to the Minnesota Supreme Court, which also upheld the election result.<sup>184</sup> At that point Coleman conceded the race.<sup>185</sup> But if he had wished to continue the fight, he could have petitioned the U.S. Senate to determine if he was the proper winner.

Congress exercises its constitutional role as the "Judge of the Elections," at least for House seats, through the Federal Contested Elections Act.<sup>186</sup> Under this Act, a

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178. See Kristen R. Lisk, Note, *The Resolution of Contested Elections in the U.S. House of Representatives: Why State Courts Should Not Help with the House Work*, 83 N.Y.U. L. REV. 1213, 1225 n.64 (2008).

179. 405 U.S. 15, 21 (1972).

180. *Id.* at 25–26.

181. See Lisk, *supra* note 178, at 1225–28.

182. *Sheehan v. Franken*, 767 N.W.2d 453 (Minn. 2009) (per curiam).

183. See *Sheehan v. Franken*, No. 62-CV-09-56, 2009 WL 981934 (Minn. Dist. Apr. 13, 2009).

184. *Sheehan*, 767 N.W.2d at 456. The relevant Minnesota statute provides that the "only question to be decided by the court is which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election." MINN. STAT. § 209.12 (West 2009). The court must "certify and forward the files and records of the proceedings, with all the evidence taken, to the presiding officer of the Senate or the House of Representatives of the United States." *Id.*

185. See P.J. Huffstutter & James Oliphant, *Franken Win Alters Power Equation; He'll Give Democrats a 60-Vote Supermajority, But Senate Vagaries Can Override Numbers*, L.A. TIMES, July 1, 2009, at A1.

186. 2 U.S.C. §§ 381–96 (2006). Congress has not enacted similar rules for contested Senate races.

losing candidate who wishes to contest the election of a member of the U.S. House of Representatives must file a notice of election contest with the clerk within thirty days of the state election official's certification of the election result.<sup>187</sup> The statute provides judicial-type rules for gathering evidence and conducting depositions.<sup>188</sup> The matter then proceeds before the Committee on House Oversight of the House of Representatives.<sup>189</sup> That Committee appoints a task force with representatives from both parties to conduct a full investigation and submit its findings to the Committee, which then votes on the matter and issues a report for the full House's consideration.<sup>190</sup> The House has decided several hundred election contests throughout history.<sup>191</sup>

Aside from this federal statutory mechanism, several states have adopted specific procedures for handling election contests for congressional seats. The types of processes states have enacted for resolving contested congressional elections run the gamut. On one end of the spectrum are states that have promulgated highly specialized procedures for handling congressional election contests. Connecticut, Indiana, Iowa, New Hampshire, and South Carolina all exemplify this approach. In Connecticut, the losing candidate can present an election contest to any justice of the supreme court, who, along with two other justices of the supreme court that the chief court administrator selects, decides the case.<sup>192</sup> The statute has explicit timing requirements: a losing candidate must file a complaint within fourteen days after the election (or seven days after a manual tabulation of paper ballots), and the court must hear the case within three to five days.<sup>193</sup> The court also must act quickly, rendering a decision "before the first Monday after the second Wednesday in December."<sup>194</sup>

In Iowa, the special court to hear congressional election contests consists of the chief justice of the supreme court and four judges of the district court that the full supreme court selects.<sup>195</sup> Two of the selected district court judges, along with the chief justice, constitute a quorum, and the next most senior member of the supreme court shall preside if the chief justice is unavailable.<sup>196</sup> The members of the special court must take an additional specific oath before hearing the case to uphold the U.S. and Iowa Constitutions.<sup>197</sup> The court must render its decision "at least six days before the first Monday after the second Wednesday in December next following."<sup>198</sup> No appeal is allowed.<sup>199</sup>

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187. 2 U.S.C. § 382.

188. 2 U.S.C. §§ 386–91.

189. 2 U.S.C. § 392.

190. *See* Lisk, *supra* note 178, at 1233–34.

191. *See id.* at 1235.

192. CONN. GEN. STAT. ANN. § 9-323 (West 2009).

193. *Id.*

194. *Id.*

195. IOWA CODE ANN. § 60.1 (West 2012).

196. *Id.*

197. IOWA CODE ANN. § 60.3 (West 2012).

198. IOWA CODE ANN. § 60.5 (West 2012).

199. IOWA CODE ANN. § 60.6 (West 2012).

Congressional election contests in New Hampshire go before a five-member Ballot Law Commission.<sup>200</sup> The New Hampshire Speaker of the House and President of the Senate each select two of the members, one from each major political party.<sup>201</sup> The governor picks the last person, with the advice and consent of the Executive Council (a separate elected body that is part of the executive branch),<sup>202</sup> and this person must be “a person particularly qualified by experience in election procedure.”<sup>203</sup> There are also five alternate members of the Ballot Law Commission, selected in the same manner.<sup>204</sup> Any general election candidate—including congressional candidates—may seek an appeal of a recount decision before the Ballot Law Commission.<sup>205</sup> The statutes forbid any appeal of the Ballot Law Commission’s decision on a congressional race:

No appeal may be made under this section in the cases of contested elections for the offices of United States senator [or] representative in congress . . . in view of the constitutional provisions vesting in both houses of congress . . . exclusive jurisdiction over the elections and qualifications of their respective members.<sup>206</sup>

Thus, New Hampshire gives its electoral administrative body oversight, in a quasi-judicial manner, of congressional election contests but adheres to the constitutional grant of final decision-making authority to each house of Congress to determine the election of its own members.

South Carolina also delegates to its Board of Canvassers the authority to resolve election contests for federal offices but allows an appeal to the state supreme court.<sup>207</sup> Indiana, too, provides for election contests for legislative seats before its state recount commission, although its statutes focus more on recounts than on contests.<sup>208</sup>

On the other end of the spectrum are states that expressly prohibit contests for U.S. House and Senate elections. Kansas,<sup>209</sup> Nevada,<sup>210</sup> Ohio,<sup>211</sup> and Texas<sup>212</sup> all explicitly exclude congressional election contests from their election contest provisions. Ohio is perhaps most direct:

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200. N.H. REV. STAT. ANN. § 665:1(I) (2008 & Supp. 2011).

201. *Id.*

202. N.H. CONST. pt. 2, art. 60 (“There shall be biennially elected, by ballot, five councilors, for advising the governor in the executive part of government.”)

203. N.H. REV. STAT. ANN. § 665:1(I).

204. § 665:1(II).

205. N.H. REV. STAT. ANN. §§ 660:1 (providing for recounts in “any” election), 660:2 (mentioning congressional elections in the schedule of fees required for recounts), 665:8 (discussing appeals of a recount decision) (2008 & Supp. 2011).

206. N.H. REV. STAT. ANN. § 665:16 (2008 & Supp. 2011).

207. S.C. CODE ANN. §§ 7-17-260 (providing for the board to decide election contests for “federal officers”), -270 (1977 & Supp. 2011) (discussing appeals).

208. IND. CODE § 3-12-11-21 (2006 & Supp. 2011).

209. KAN. STAT. ANN. § 25-1435 (2000).

210. NEV. REV. STAT. ANN. § 293.407 (LexisNexis 2008).

211. OHIO REV. CODE ANN. § 3515.08(A) (LexisNexis 2012).

212. TEX. ELEC. CODE ANN. § 221.001 (West 2010).

The nomination or election of any person to any federal office, including . . . the office of member of congress, shall not be subject to a contest of election conducted under this chapter. Contests of the nomination or election of any person to any federal office shall be conducted in accordance with the applicable provisions of federal law.<sup>213</sup>

Thus, candidates seeking to contest a congressional election in these states may bring the challenge only in federal court or the respective house. However, state courts still sometimes manage to enter the fray. For example, in 2008, the election for Ohio's Fifteenth Congressional District was subject to intense litigation in both state and federal court over disputes about the eligibility of particular provisional ballots.<sup>214</sup> This suggests that the Ohio courts found a meaningful distinction between ballot eligibility issues and a formal election contest. Similarly, courts in Texas still can hear election contests involving primaries for federal legislative seats. Although the Texas election contest provision is inapplicable to "a general or special election for the office of United States senator or United States representative,"<sup>215</sup> the Texas Court of Appeals considered an election contest stemming from a 2004 Democratic primary for the U.S. House.<sup>216</sup>

In the middle are states that either refer to congressional election contests obliquely or provide election contest provisions for any election without specifying explicitly whether elections to Congress fall within the statute's scope. For example, in Georgia an aggrieved voter or candidate may contest "[t]he nomination of any person who is declared nominated at a primary as a candidate for any federal, state, county, or municipal office" and "the election of any person who is declared elected to any such office."<sup>217</sup> The contestant must bring the case to a superior court and can appeal to the supreme court as in a normal case.<sup>218</sup> Oregon<sup>219</sup> and Vermont<sup>220</sup> specify the venue for a congressional election contest but otherwise do not provide any unique procedures. Pennsylvania separates election contests for U.S. Senate and House: Senate disputes go before a two-judge court of "president judges" of the court of common pleas; House election challenges are tried and determined by the court of common pleas of the county in which the winner resides.<sup>221</sup> Arkansas law provides a process for contesting U.S. Senate elections—

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213. OHIO REV. CODE ANN. § 3515.08(A).

214. *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 471–72 (6th Cir. 2008) (per curiam) (remanding case back to the Ohio Supreme Court, which had jurisdiction over the original mandamus action).

215. TEX. ELEC. CODE ANN. § 221.001(1).

216. *Rodriguez v. Cuellar*, 143 S.W.3d 251 (Tex. App. 2004).

217. GA. CODE ANN. § 21-2-521 (2008).

218. GA. CODE ANN. §§ 21-2-523, -528 (2008).

219. OR. REV. STAT. § 258.036(1)(a) (2011) (providing that the Circuit Court for Marion County is the proper venue). A party can appeal the court's decision to the court of appeals as in a normal case. § 258.085.

220. VT. STAT. ANN. tit. 17, § 2603(c) (2002 & Supp. 2011) (providing that parties wishing to contest an election for a congressional seat must file in the Superior Court for Washington County).

221. 25 PA. CONS. STAT. ANN. §§ 3291, 3351, 3401 (West 2007). Senate election disputes are considered "Class II" contests, and House election contests are "Class IV"

by filing in the Pulaski County Circuit Court with an appeal allowed only within seven days of the court's determination of the election result—but does not mention any similar processes for elections to the U.S. House of Representatives.<sup>222</sup>

Michigan has not enacted any procedures for deciding congressional election contests, but it has promulgated detailed provisions for protecting the ballots during the pendency of a contest occurring in the respective house.<sup>223</sup> The supreme court (for Senate races) or a circuit court (for House races) can issue a restraining order to preserve the ballot boxes.<sup>224</sup> The supreme court has further powers for Senate contests: it can require delivery of the ballot boxes to the county clerk and appoint three commissioners to open the ballot boxes and “place them in packages securely wrapped and sealed and so marked as to show in what voting districts such ballots were cast.”<sup>225</sup>

The remainder of states do not mention congressional elections at all in their election contest statutes. Presumably, then, either election contests for these seats are forbidden (meaning that a challenger must go to federal court or directly to the respective house), or election contests fall within the general election contest provision that applies to “any” election in the state.<sup>226</sup>

The analysis of the various mechanisms states use to handle congressional election contests demonstrates the lack of consistency among the states. Most states that mention congressional election contests channel these disputes to the state's courts, but alternatives also exist. Ultimately, Congress has the final say in any dispute involving one of its own seats, making any “conclusive” determination from a state entity actually advisory. State tribunals can nonetheless have a significant influence in giving an appearance of finality, thereby convincing the losing candidate to concede before a contest ever reaches Congress.

#### *E. Election Contests Involving Presidential Electors*

As is well known, U.S. citizens do not vote for President or Vice President directly but instead vote for “electors” as part of the Electoral College.<sup>227</sup> Each state

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contests. § 3291.

222. ARK. CODE ANN. §§ 7-5-801(b), -810 (2011).

223. MICH. COMP. LAWS ANN. §§ 168.109–.120 (West 2008) (providing special provisions for preserving evidence in contested U.S. Senate elections); §§ 168.150–.155 (providing similar procedures for contested U.S. House elections).

224. §§ 160.109, 168.112–.113, 168.150–.151.

225. §§ 168.109, .112–.113.

226. *See, e.g.*, UTAH CODE ANN. § 20A-4-402(1) (LexisNexis 2010) (“The election or nomination of any person to *any public office*, and the declared result of the vote on any ballot proposition or bond proposition submitted to a vote of the people may be contested according to the procedures established in this part . . . .”) (emphasis added); *see also* Bickerstaff, *supra* note 17, at 433 (“State recounts and possibly even state judicial election contests can proceed as a means of policing state election laws, so long as they do not interfere with the exclusive power of the respective houses of Congress to ultimately determine the election dispute.”).

227. U.S. CONST. art. II, § 1, cl. 2, 3; *see also* Att’y Gen. of the Territory of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984) (“Thus, citizens do not vote for the President. Electors, appointed by ‘each State,’ vote for the President. . . . The right to vote in presidential elections under Article II inheres not in citizens but in states: citizens vote indirectly for the President by voting for state electors.”).

appoints the electors “in such Manner as the Legislature thereof may direct.”<sup>228</sup> Every state except Maine and Nebraska appoints its presidential electors based on the statewide popular vote, while Maine and Nebraska appoint their presidential electors proportionally based on the vote in each congressional district.<sup>229</sup> Voting for presidential electors in most states thus resembles gubernatorial and other statewide elections. Consequently, challenges to the counting of ballots for presidential electors resemble challenges to the counting of ballots for other statewide elections and are presumptively subject to the state’s election contest provisions.

It may seem odd that there is no federal constitutional mechanism for resolving presidential election disputes. The President is a nationwide, federal position, even if each state appoints the presidential electors who ultimately vote for President. The Constitution does provide that the House of Representatives, voting through state delegations, will decide a presidential election in the case of a tie in the Electoral College or if a candidate does not receive a majority of electoral votes.<sup>230</sup> But there is no constitutional mechanism for disputing the outcome of an election or the awarding of presidential electors to one candidate or another.

Perhaps this is not so surprising. The Founding Fathers were unfamiliar with election contests for executive offices.<sup>231</sup> Moreover, “[t]he Electoral College in each state is an institution of state government, and it is understandable if the Framers (to the extent they thought about it at all) assumed that any disputes over ballots cast for a state’s presidential electors would be handled within the state’s own governmental apparatus.”<sup>232</sup>

The most famous disputed presidential election before *Bush v. Gore* was the Hayes-Tilden controversy of 1886, during which Congress created a special Electoral Commission of five senators, five representatives, and five Supreme Court Justices to determine whether Rutherford B. Hayes or Samuel Tilden was the proper winner.<sup>233</sup> The Election Commission ruled eight to seven in favor of Hayes, with Justice Joseph Bradley providing the tiebreaking vote for Hayes.<sup>234</sup>

In the wake of this dispute, Congress attempted to place some parameters around a state’s independent resolution of presidential election controversies. Under the Electoral Count Act of 1887, a state can guarantee that its electoral votes will count if it creates, before Election Day, a scheme to resolve contests that will ensure the resolution of all disputes at least six days prior to the meeting of electors.<sup>235</sup> This “safe harbor” provision was the focus of the Supreme Court’s

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228. U.S. CONST. art. II, § 1, cl. 2.

229. ME. REV. STAT. ANN. tit. 21-A, § 802 (West 2008); NEB. REV. STAT. ANN. § 32-714 (LexisNexis 2008).

230. U.S. CONST. amend. XII.

231. Foley, *The Founders’ Bush v. Gore*, *supra* note 54, at 26 (explaining that “[t]he Founders could not look to their colonial history for experience on how to handle a dispute over any kind of election for a chief executive”).

232. *Id.* at 25–26.

233. See John Copeland Nagle, *How Not to Count Votes*, 104 COLUM. L. REV. 1732, 1743–45 (2004).

234. *Id.* at 1747.

235. 3 U.S.C. § 5 (2006) (“If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy

decision in *Bush v. Gore*, in which the majority concluded that Florida would not be able to complete an additional recount before the December 12 deadline and therefore could not guarantee by law that the Electoral College would include its electoral votes.<sup>236</sup> A state that wishes to make certain that its electoral votes will count under the “safe harbor” provision must promulgate a procedure ahead of time that mandates a final resolution of the dispute before the federal statutory deadline.<sup>237</sup>

Surprisingly, not every state spells out how to decide election contests for presidential electors. Only twenty of the fifty states and the District of Columbia provide specific guidance for these types of disputes.<sup>238</sup> In the states that do explicitly include electors in their election contest statutes, much as before, the procedures lack consistency. Most processes involve the state’s judiciary: twelve states channel the dispute to the judicial process.<sup>239</sup> But the procedures for who hears the case also vary among the states.

Five states provide for a trial court initially to consider the challenge, typically with regular appeal to the court of appeals.<sup>240</sup> By contrast, five states form a special court to decide the dispute. Pennsylvania grants jurisdiction to resolve presidential elector contests to the court with the “two nearest president judges.”<sup>241</sup> Iowa and Minnesota use the same process for presidential elector contests as they do for contests to congressional seats, in which the state designates a special multi-

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or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.”). For a history of the Electoral Count Act and a discussion of its complexity and ambiguity, see Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 516–19 (2010).

236. *Bush v. Gore*, 531 U.S. 98, 110–11 (2000) (per curiam).

237. See Lee, *supra* note 20, at 164.

238. CAL. ELEC. CODE § 16401 (West 2003 & Supp. 2012); COLO. REV. STAT. ANN. § 1-11-204 (West 2009 & Supp. 2011); CONN. GEN. STAT. ANN. § 9-323 (West 2009); DEL. CODE ANN. tit. 15, §§ 5921–28 (2007); D.C. CODE § 1-1001.11(a)(2), (b)(1) (2011); IND. CODE § 3-12-11-19.5 (2005); IOWA CODE ANN. §§ 57.1, 60.1–.7 (West 2012); KAN. STAT. ANN. § 25-1435, -1437 (2000); MINN. STAT. ANN. § 209.01 (West 2009); MO. ANN. STAT. § 128.100 (West 2003); N.H. REV. STAT. ANN. § 665:16 (2008); OHIO REV. CODE ANN. § 3515.08(A) (LexisNexis 2012); OR. REV. STAT. § 258.036(1)(a) (2011); 25 PA. CONS. STAT. ANN. § 3291 (West 2007); S.C. CODE ANN. § 7-17-260 (1977 & Supp. 2011); S.D. CODIFIED LAWS §§ 12-22-4, -5, -6, -13 (2004); TENN. CODE ANN. § 2-17-103 (2003); TEX. ELEC. CODE ANN. § 221.002 (West 2010); VT. STAT. ANN. tit. 17, § 2603(c)(2010); VA. CODE ANN. § 24.2-805 (2011); WYO. STAT. ANN. § 22-17-114 (2011).

239. These states are California, Colorado, Connecticut, Delaware, Iowa, Kansas, Minnesota, Oregon, Pennsylvania, South Dakota, Vermont, and Virginia. See *infra* notes 240–48 and accompanying text.

240. CAL. ELEC. CODE §§ 16400, 16900 (West 2003); DEL. CODE ANN. tit. 15, § 5927 (2007); OR. REV. STAT. §§ 258.036, .085 (2011); S.D. CODIFIED LAWS §§ 12-22-7, -25 (2004); VT. STAT. ANN. tit. 17, § 2603 (2010). South Dakota law provides that appeal lies directly to the supreme court as in a normal civil proceeding. See § 12-22-25.

241. 25 PA. CONS. STAT. ANN. §§ 3291, 3351.



member court to hear the case.<sup>242</sup> Kansas uses the same election contest procedure for presidential electors as it does for statewide offices: the supreme court assigns three district judges to hear the dispute in the District Court of Shawnee County, with direct appeal allowed to the state supreme court.<sup>243</sup> Similarly, Virginia's statute covering primaries for U.S. Senate or any other statewide office also applies to presidential electors.<sup>244</sup> The contest is heard in the Circuit Court of the City of Richmond before a special court composed of the chief judge of the circuit court and two circuit judges from different circuits "not contiguous to the City of Richmond" whom the chief justice of the supreme court appoints.<sup>245</sup> The statute also includes contingencies if the chief judge or the chief justice is unavailable, as well as strict timing requirements.<sup>246</sup> The provisions do not specify whether an appeal is allowed.

Two states—Colorado and Connecticut—give their supreme courts original jurisdiction over election contests for presidential electors. In Colorado, the full supreme court decides the dispute.<sup>247</sup> Connecticut uses the same procedure for presidential elector contests as it does for congressional races: the losing party can present the contest to any judge of the supreme court, and that judge, with two other supreme court judges that the chief court administrator selects, decides the case.<sup>248</sup>

By contrast, seven states employ a nonjudicial decision maker to resolve election contests for presidential electors.<sup>249</sup> Indiana,<sup>250</sup> New Hampshire,<sup>251</sup> and South Carolina<sup>252</sup> use the same board for presidential elector contests as they do for congressional seats; New Hampshire and South Carolina allow appeal to the supreme court, while Indiana's law does not specify whether the losing party may appeal.<sup>253</sup>

Tennessee and Wyoming do not use the judiciary at all in the process. In Tennessee, an election contest goes before a Presidential Electors Tribunal composed of the governor, the secretary of state, and the attorney general (who serves as the reporter).<sup>254</sup> In Wyoming, the legislature has the task of deciding

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242. IOWA CODE ANN. § 60.1; MINN. STAT. ANN. §§ 209.01(2) (defining a "statewide office" to include presidential electors), 209.045. *See supra* notes 182–84, 195–99 and accompanying text.

243. KAN. STAT. ANN. §§ 25-1437, -1443, -1450 (2000).

244. VA. CODE ANN. § 24.2-805 (2011).

245. *Id.*

246. *Id.*

247. COLO. REV. STAT. ANN. § 1-11-204 (West 2009).

248. CONN. GEN. STAT. ANN. § 9-323 (West 2009); *see supra* note 192 and accompanying text.

249. These states are Indiana, Missouri, New Hampshire, South Carolina, Tennessee, Texas, and Wyoming. *See infra* notes 250–58 and accompanying text.

250. IND. CODE §§ 3-12-11-1, -19.5 (2011).

251. N.H. REV. STAT. ANN. § 665:8(II) (2008).

252. S.C. CODE ANN. § 7-17-260 (1977 & Supp. 2011) (explaining that the state board decides protests or contests in cases of "federal officers," which presumably includes presidential electors).

253. N.H. REV. STAT. ANN. § 665:16 (2008) (allowing for appeal to the supreme court); S.C. CODE ANN. § 7-17-270 (1977) (allowing for appeal to the supreme court).

254. TENN. CODE ANN. § 2-17-103(a) (2003).

presidential elector contests.<sup>255</sup> Missouri also leaves an election contest for presidential electors up to its legislature, but its statute includes detailed rules for the evidence gathering process, allowing a judge to take and certify testimony in a deposition.<sup>256</sup> No appeal is allowed in any of these states.<sup>257</sup>

Texas avoids any formal adjudicatory method altogether and instead grants the governor exclusive jurisdiction to resolve contests involving presidential electors.<sup>258</sup> Of course, giving the governor unfettered discretion could invite a conflict of interest because the governor could tip the election to a political ally.

Finally, one state—Ohio—explicitly excludes presidential elections from its election contest statutes, much like it does for other federal offices, instead directing any resolution of presidential elector contests to “applicable provisions of federal law.”<sup>259</sup>

As noted above, thirty states do not provide specific guidance on how to resolve election contests for presidential electors.<sup>260</sup> Thus, parties will invoke the particular state’s regular election contest provisions, many of which apply to “any” election in the state.<sup>261</sup> Virtually all of these states involve the judiciary and ask a trial-level court to make an initial assessment of the case. Ultimately, however, the lack of explicit guidance on the proper procedures can prove problematic at a time when political passions are high, as the Florida 2000 election experience demonstrated. Additionally, the tight deadline under which states must certify who won their presidential electors to qualify under the federal “safe harbor” provision makes this lack of guidance for post-election disputes even more disconcerting.

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If the foregoing discussion demonstrates anything, it is that election contest provisions are all over the map—both literally and figuratively. There is little consistency both with respect to the type of office under contention and among the states generally. Some states use their judiciary quite liberally to resolve all sorts of election contests. Other states leave it up to their legislature, create a special tribunal, or give an administrative body such as the board of elections the authority to resolve disputes.

A major omission from the multitude of mechanisms for resolving election contests is the impetus behind their creation. Why have state legislatures enacted

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255. WYO. STAT. ANN. § 22-17-114 (2011).

256. MO. ANN. STAT. § 128.100 (West 2003).

257. *Id.*; TENN. CODE ANN. § 2-17-103(a); WYO. STAT. ANN. § 22-17-114.

258. TEX. ELEC. CODE ANN. § 221.002(e) (West 2010).

259. OHIO REV. CODE ANN. § 3515.08(A) (LexisNexis 2012) (“The nomination or election of any person to any federal office, including the office of elector for president and vice president . . . , shall not be subject to a contest of election conducted under this chapter. Contests of the nomination or election of any person to any federal office shall be conducted in accordance with the applicable provisions of federal law.”); *see supra* note 213 and accompanying text.

260. *See supra* text accompanying note 238.

261. *See Lee, supra* note 20, at 172, 178; *see, e.g.*, GA. CODE ANN. § 21-2-521 (2008) (applying election contest law to “any federal, state, county, or municipal office”); ME. REV. STAT. ANN. tit. 21-A, § 737-A(10) (2008) (applying statute to “all elections”).

special procedures for election contests? Obviously there is something unique regarding the manner of deciding the proper winner of an election. The next Part identifies trends among the different types of procedures, uncovering several goals legislatures implicitly consider in determining who should decide election contests and delineating the way the cases must proceed. This analysis will help to start the discussion of “best practices” for election contest provisions moving forward.

## II. COMMON CHARACTERISTICS OF ELECTION CONTEST PROCEDURES

As the description of the various modes of election contest procedures in the previous Part demonstrates, in many ways state election contest processes are all over the map. States differ widely in the types of procedures available to contest elections to various offices. But that does not mean that there are no unifying trends. This Part takes a closer look at three common features of election contest provisions: statutory deadlines, specific procedural details, and appeals.

### A. Statutory Deadlines

State election contest codes promote timeliness in resolving the dispute in two ways. First, most states have strict provisions for when a complaining party must file an election contest.<sup>262</sup> Second, many state statutes provide either mandatory or aspirational goals for when the court or other tribunal must resolve the case.<sup>263</sup>

Deadlines to file election contests are mandatory and strict. The Illinois Supreme Court explained that “[c]ourts have no inherent power to hear election contests, but may do so only when authorized by statute and in the manner dictated by statute,” and therefore the court did not have jurisdiction to hear the dispute unless the plaintiff had timely filed the election contest.<sup>264</sup> The court then went through a painstaking discussion of determining the triggering event for the running of Illinois’s ten-day time limit for filing the action, ultimately concluding that a plaintiff must file the case within ten days after the state board of elections (as opposed to the county board) completes its final canvass of returns.<sup>265</sup>

Of the fifty states, all but four include specific deadlines for when a challenger can bring an election contest.<sup>266</sup> The deadlines generally range from as few as three days after the election results are certified (primary elections for governor in Maryland)<sup>267</sup> to as long as forty days (all elections in Oregon).<sup>268</sup> Montana and

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262. *E.g.*, ALA. CODE § 17-16-49 (LexisNexis 2007); FLA. STAT. ANN. § 102.168(2) (West 2008); KAN. STAT. ANN. § 25-1439 (2000); MINN. STAT. ANN. § 209.021(1) (West 2009); OHIO REV. CODE ANN. § 3515.09 (LexisNexis 2012); VT. STAT. ANN. tit. 17, § 2603(c) (2002); WASH. REV. CODE ANN. § 29A.68.011 (West 2005).

263. *See infra* notes 267–280 and accompanying text.

264. Pullen v. Mulligan, 561 N.E.2d 585, 589 (Ill. 1990).

265. *Id.* at 589–95.

266. The four states that do not list deadlines in their statutes are Maine, Massachusetts, New York, and Rhode Island. As discussed above, New York uses quo warranto, not a statutory election contest procedure. *See supra* notes 52–60 and accompanying text.

267. MD. CODE ANN., ELEC. LAW § 12-202(b)(2) (LexisNexis 2010).

268. OR. REV. STAT. § 258.036 (2011). In a presidential election, Oregon’s statutory deadline would authorize a contest action even after the federal safe harbor provision has

North Dakota appear to be the outliers. Montana allows an action to “contest the right of a candidate to be declared elected to an office or to annul and set aside the election or to remove from or deprive any person of an office” for up to one year after the election.<sup>269</sup> In North Dakota, there is no time limitation for an allegation of bribery or if the person elected cannot meet the qualifications to hold the office.<sup>270</sup> Generally, however, a common timing requirement for filing an election contest is between five and fourteen days after the completion of the canvass or certification of the result.<sup>271</sup> Most states include these strict deadlines to ensure that the election does not drag on indefinitely.<sup>272</sup>

Many states also include specific timeliness requirements or goals directed to the decision maker in their election contest provisions. For example, Arkansas law provides,

If the case comes in regular term, it shall be given precedence and be speedily determined. The judge may adjourn other courts in order to hear these cases and may call another judge in exchange to sit in other courts or vacate the bench in other courts and cause a special judge to be elected to hold the court.<sup>273</sup>

Virginia directs its judges to decide election contests “as soon as possible.”<sup>274</sup> South Dakota assists its judges in deciding cases quickly by authorizing the chief justice of the supreme court to relieve a lower court judge of his or her official duties so the judge can focus on the election contest.<sup>275</sup>

Some states set specific deadlines on when the court must hear or decide the case, although the statutes do not provide any specific remedy for a failure to comply. In New Jersey, a person seeking to challenge an election must file a petition within thirty days after the election, and the judge must hear the complaint within fifteen to thirty days after filing.<sup>276</sup> States also may require a judge to rule within a certain time period. For instance, in Arizona, the court must render its decision within five days after the hearing.<sup>277</sup> For Connecticut election contests to federal office, the court must decide the case “before the first Monday after the second Wednesday in December.”<sup>278</sup> Similarly, some states limit the ability of judges to adjourn the proceedings: Ohio law stipulates that the court cannot allow adjournments for more than thirty days,<sup>279</sup> while a Texas judge can continue a

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passed and just before the meeting of electors. *See* 3 U.S.C. § 5 (2006).

269. MONT. CODE ANN. § 13-36-102(2) (2011). Moreover, “[t]he court is always considered to be in session for the trial of contest cases.” § 13-36-206.

270. N.D. CENT. CODE § 16.1-16-04 (2009).

271. *See, e.g.*, IND. CODE § 3-12-8-5 (2005) (fourteen days); S.C. CODE ANN. § 7-17-260 (1977) (five days).

272. *See* Lisk, *supra* note 178, at 1222 (“The value of *finality* represents the need to have election contests resolved promptly so that elected officials may rightfully take office, ideally when their terms begin.”) (emphasis in original).

273. ARK. CODE ANN. § 7-5-802(b) (2011).

274. VA. CODE ANN. § 24.2-810 (2011).

275. S.D. CODIFIED LAWS § 12-22-18 (2004).

276. N.J. STAT. ANN. §§ 19:29-3, -4 (West 1999).

277. ARIZ. REV. STAT. ANN. § 16-676(B) (2006).

278. CONN. GEN. STAT. ANN. § 9-323 (West 2009).

279. OHIO REV. CODE ANN. § 3515.11 (LexisNexis 2012).

contest involving a primary or a runoff election for only ten days, unless both parties consent otherwise.<sup>280</sup>

The reasons for these deadlines are obvious: there is an inherent value in deciding an election law case quickly.<sup>281</sup> Protracted litigation draws out the election, and continued uncertainty as to the winner might entrench litigants in their positions and contribute to negative public discourse.<sup>282</sup> It also can impede public confidence in the election and even in the legitimacy of the ultimate winner.<sup>283</sup> Of course, strict deadlines also might have a downside: they may force a court to render a decision before it is ready, eliminating a judge's ability to proceed deliberately in deciding a difficult question.

Prompt resolution of elections is good for our democracy.<sup>284</sup> A state's process has resulted in a "failed election" when its contest provisions still do not allow the state to identify a winner by the date on which the winner is to take office.<sup>285</sup> Whether states choose to set specific deadlines or instead include merely aspirational timeliness language in their codes is a policy choice up to state legislatures, and it is one that states should actively consider.

In sum, timeliness is essentially a universal attribute of states' election contest provisions, employed for both primary and general elections and cutting across types of elections. States place a high value on adjudicating disputed elections quickly. Losing candidates must decide shortly after certification of the results whether to continue the fight, and courts are admonished to decide cases quickly, sometimes even under strict guidelines.

### *B. Specific Procedural Details Regarding the Judicial Process*

As the analysis in Part I demonstrates, there are various structures states employ to decide election contests, including giving the case to the legislature, the state supreme court, a special nonjudicial tribunal, or the state's regular court system.<sup>286</sup> Using the judiciary is the most common mechanism. Therefore, it is important to understand in greater detail the nuances of how states invoke the judicial process.

Typically, states that involve the judiciary in an election contest send the case to the trial court of general jurisdiction. A common trait is to treat an election contest like any other case, with the possible exception of including more stringent timing

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280. TEX. ELEC. CODE ANN. § 232.012(e) (West 2010).

281. See Lisk, *supra* note 178, at 1222.

282. See Joshua A. Douglas, *Election Law and Civil Discourse: The Promise of ADR*, 27 OHIO ST. J. ON DISP. RESOL. 291, 299, 302 (2012).

283. See Huefner, *supra* note 21, at 293 ("[I]t is important that representatives serve with full authority and respect, rather than with unresolved questions about their legitimacy.").

284. *Id.* at 292–93.

285. Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 361 (2007) [hereinafter Foley, *Analysis & Mitigation*]. But see Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83, 143–44 n. 196 (2012) (arguing that a failed election is one that declares the wrong person the winner and that leaving a seat vacant even after the person is supposed to take office is less concerning for a multimember body that can still function while the election contest is resolved).

286. See *supra* Part I.

requirements such as a deadline by which a party must initiate the contest.<sup>287</sup> For example, Idaho directs that election contests “shall be held according to the Idaho Rules of Civil Procedure so far as practicable.”<sup>288</sup> Accordingly, even though the election contest provisions usually appear in a separate part of a state’s code, Idaho exemplifies the approach of asking the judiciary to act as it normally does in resolving a dispute.

Although a few states use a three-judge panel of trial judges,<sup>289</sup> in most of the states a single judge initially hears the challenge. Moreover, there are not many guidelines for selecting the judge that considers the case. Instead, the judiciary uses its regular method for assigning judges. For example, in Alaska a person wishing to challenge an election simply must file in the superior court, and the statute does not specify any particular rule for how the judge is assigned.<sup>290</sup>

Of the states that send the case to a trial-level court, only a handful provide specifics on who should select the judge hearing the dispute. In Minnesota<sup>291</sup> and New Jersey,<sup>292</sup> the chief justice of the supreme court appoints the judge or judges for the lower court, while in Kansas<sup>293</sup> the entire supreme court assigns three district judges to hear the case. In Georgia,<sup>294</sup> Maryland,<sup>295</sup> and Wisconsin,<sup>296</sup> the chief administrative judge for the judicial district assigns the trial court. Texas does not provide guidance on how to select a judge but does stipulate that a judge is *disqualified* from hearing the case if the judge’s district includes any territory subject to a non-statewide contested election.<sup>297</sup> All other states that send a case to a trial-level court do not declare how that judge is assigned, meaning that the state will use its regular method.<sup>298</sup>

A couple of states involve the parties in selecting the judges to sit on a special court to resolve the case. As noted above, West Virginia uses a special three-member election court in which each side picks a judge and the governor chooses

287. *See supra* Part II.A.

288. IDAHO CODE ANN. § 34-2013 (2008). Idaho requires a party to initiate the election contest within twenty days after the votes are canvassed. § 34-2008. *See also* N.J. STAT. ANN. § 19:29-5 (West 1999) (“The proceedings shall be similar to those in a civil action so far as practicable, but shall be under the control and direction of the court . . .”).

289. KAN. STAT. ANN. § 25-1443 (2000); MD. CODE ANN., ELEC. LAW § 12-203(a)(2) (LexisNexis 2010); MINN. STAT. ANN. § 209.045 (West 2009).

290. ALASKA STAT. § 15.20.550 (2010).

291. MINN. STAT. ANN. § 209.045 (West 2009).

292. N.J. STAT. ANN. § 19:29-2 (West 2009).

293. KAN. STAT. ANN. § 25-1443 (2000).

294. GA. CODE ANN. § 21-2-523(c) (2008).

295. MD. CODE ANN., ELEC. LAW § 12-203(a)(2) (LexisNexis 2010).

296. WIS. STAT. ANN. § 9.01(6)(b) (West 2004) (directing chief administrative judge for the judicial district to assign the trial judge if the election is held in more than one judicial circuit, and directing the chief justice of the supreme court to make the appointment if the election is held in more than one judicial administrative district).

297. TEX. ELEC. CODE ANN. § 231.004(a) (West 2010) (“The judge of a judicial district that includes any territory covered by a contested election that is less than statewide is disqualified to preside in the contest.”).

298. Many courts have a random-assignment method of selecting the judge for a case, such as through lotteries. *See* Kimberly Jade Norwood, *Shopping For a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 292 (1996); Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 47 (2009).

the third.<sup>299</sup> For county elections in Iowa, each side names a member of the contest court, and those two members select a third.<sup>300</sup> If the parties fail to select a member, or if the two members cannot agree on a third person, then the chief judge of the judicial district makes the selection.<sup>301</sup>

Just as states generally offer little guidance for how to select the judge or judges hearing the case, only a few states provide rules on the specific venue most appropriate for an election contest. Most states simply allow venue in the judicial district in which the declared winner resides or where the election took place.<sup>302</sup> A handful of states, however, channel election contests to a specific court, typically in the state capital, while often allowing venue in the county of the challenger's residence as well.<sup>303</sup>

Most states specify who may dispute an election and typically allow either the candidate who lost, any eligible voter, or both to initiate an election contest.<sup>304</sup> A few states are slightly stricter and require a group of eligible voters to commence the litigation.<sup>305</sup> Some states even allow a political party<sup>306</sup> or the county clerk who conducted the election to file the case.<sup>307</sup>

States also provide instructions to challengers regarding what arguments they may raise in an election contest, thereby specifying in essence a court's subject-matter jurisdiction in a challenge to an election result. The types of challenges are fairly consistent across states. Typically, states allow an election contest for the following: (1) misconduct, fraud, bribery, or corruption; (2) ineligibility of the

299. W. VA. CODE ANN. § 3-7-3 (LexisNexis 2011).

300. IOWA CODE ANN. § 62.1A (West 2012). Recall that for gubernatorial elections Iowa uses a "contest court" of fourteen members of its legislature. *See supra* notes 77, 80 and accompanying text.

301. § 62.1A.

302. *See, e.g.*, N.M. STAT. ANN. § 1-14-3 (West 2003) ("Any action to contest an election shall be commenced by filing a verified complaint of contest in the district court of the county where either of the parties resides."); S.D. CODIFIED LAWS § 12-22-7(2) (2004) ("As to all other contests [not involving state offices or judicial officers of the Supreme Court], [original jurisdiction exists] in the circuit court of a county which includes the locality where the election or some part thereof was conducted.").

303. ARIZ. REV. STAT. ANN. § 16-672(B) (2006); ARK. CODE ANN. § 7-5-801(b) (2011); FLA. STAT. ANN. § 102.1685 (West 2008); KAN. STAT. ANN. § 25-1438(a) (2000); KY. REV. STAT. ANN. § 120.155 (LexisNexis 2004); LA. REV. STAT. ANN. § 18:1404 (2012); MINN. STAT. § 209.045 (West 2009); NEB. REV. STAT. ANN. § 32-1102 (LexisNexis 2008); N.C. GEN. STAT. ANN. § 163-182.14 (West 2007); OR. REV. STAT. § 258.036(a) (2011); TEX. ELEC. CODE ANN. § 232.006(a) (West 2010); VT. STAT. ANN. tit. 17, § 2603(c) (2002 & Supp. 2011); VA. CODE ANN. § 24.2-805 (2011). Wisconsin does not specify a venue for the trial court but requires all appeals of contests for statewide offices to go to the 4th District Court of Appeals. WIS. STAT. § 9.01(9)(b) (West 2004).

304. *See, e.g.*, GA. CODE ANN. § 21-2-521 (2008).

305. *See, e.g.*, ALASKA STAT. § 15.20.540 (2010) (allowing a candidate or ten qualified voters to bring an election contest); 10 ILL. COMP. STAT. ANN. 5/23-1.2a (West 2010) (allowing a candidate or a voter who submits a verified petition signed by at least as many voters as would satisfy a nominating petition to file an election contest); N.J. STAT. ANN. § 19:29-2 (West 1999) (allowing a candidate or twenty-five voters to contest an election).

306. *See, e.g.*, HAW. REV. STAT. § 11-172 (West 2008) (allowing a political party directly interested in the election to file an election contest); IND. CODE ANN. § 3-12-11-1 (LexisNexis 2011) (allowing the state chairman of the candidate's political party to file an election contest if the losing candidate fails to do so within the statutory deadline).

307. *See* OR. REV. STAT. § 258.016 (allowing a voter, candidate, county clerk who conducted the election, or secretary of state (if the election involved a state measure, recall of a state officer, or candidate for whom the secretary of state is the filing officer) to contest the election).

person elected to hold the office; (3) illegal votes being counted; or (4) legal votes being rejected.<sup>308</sup> Moreover, the challenged votes must actually have the potential to change the outcome; courts will not sustain a challenge, even if there was misconduct, upon a finding that the winner would be the same even with the misconduct occurring.<sup>309</sup> Thus, there is no omnipresent right to an error-free election; a challenger must also be able to show that the errors would have actually changed the result or at least put the outcome in doubt.<sup>310</sup> Stated differently, a challenger must show “but for” causation.

Moving to the evidence-gathering process, a few states have addressed whether a court can compel voters to testify as to how they voted, with some states allowing this practice and others finding it an unwarranted invasion of a voter’s privacy. Texas exemplifies the former approach:

A voter who cast an illegal vote may be compelled, after the illegality has been established to the satisfaction of the tribunal hearing the contest, to disclose the name of the candidate for whom the voter voted or how the voter voted on a measure if the issue is relevant to the election contest.<sup>311</sup>

A challenger in a Texas House of Representatives contest invoked this statute in early 2011 to compel voters to disclose for whom they voted.<sup>312</sup>

By contrast, the Arizona Supreme Court held that voters should not have to make public how they voted because the testimony might be unreliable and because it cuts against the goals of a secret ballot.<sup>313</sup>

Maine takes a hybrid approach, granting every person an evidentiary privilege to refuse to disclose how he or she voted unless the court finds that the vote was cast illegally or that the court should compel the voter to testify pursuant to the state’s election laws.<sup>314</sup> Washington similarly allows testimony regarding only specified votes:

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308. See, e.g., ALA. CODE § 17-16-40 (LexisNexis 2007); IOWA CODE ANN. § 57.1(2) (West 2012); OR. REV. STAT. § 258.016; TEX. ELEC. CODE ANN. § 221.003; UTAH CODE ANN. § 20A-4-402(1) (LexisNexis 2010); WYO. STAT. ANN. § 22-17-101 (2011).

309. See, e.g., ALA. CODE § 17-16-41; WASH. REV. CODE. § 29A.68.110 (West 2005).

310. Edward B. Foley, *The Legitimacy of Imperfect Elections: Optimality, Not Perfection, Should Be the Goal of Election Administration*, in MAKING EVERY VOTE COUNT: FEDERAL ELECTION LEGISLATION IN THE STATES 97, 99, 109 (Andrew Rachlin ed., 2006).

311. TEX. ELEC. CODE ANN. § 221.009(a); see also IOWA CODE ANN. § 62.17 (West 2012) (“The court may require any person called as a witness, who voted at such election, to answer touching the person’s qualifications as a voter, and, if the person was not a registered voter in the county where the person voted, then to answer for whom the person voted.”).

312. Tim Eaton, *Votes in Disputed Election Disclosed*, AUSTIN AMERICAN-STATESMAN (Texas), Feb. 2, 2011, at B01.

313. *Huggins v. Super. Ct. in & for Cnty. of Navajo*, 788 P.2d 81, 83–84 (Ariz. 1990).

314. ME. R. EVID. 506; see also *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 630–31 (Mass. 1982) (holding that a court cannot compel “good faith” voters to testify as to how they voted, but leaving open whether a court can compel those who intentionally voted fraudulently to testify).



No testimony may be received as to any illegal votes unless the party contesting the election delivers to the opposite party, at least three days before trial, a written list of the number of illegal votes and by whom given, that the contesting party intends to prove at the trial. No testimony may be received as to any illegal votes, except as to such as are specified in the list.<sup>315</sup>

This statute does not resolve, however, whether the court can compel the illegal voters themselves to testify as to how they voted. Missouri, through its constitution, also takes a hybrid approach, mandating the secrecy of ballots except for contested elections, grand jury investigations, and civil or criminal trials involving the violation of an election law.<sup>316</sup>

Trial judges usually act as the primary evidence gatherer and fact finder—but not always. For instance, in Nebraska, an “official of the court” takes testimony, administers oaths, and compels the attendance of witnesses.<sup>317</sup> Missouri has a similar provision, albeit not for the trial court: its supreme court has original jurisdiction over an election contest for a statewide office, and the court can appoint a commissioner to take testimony regarding specific points and facts that the court directs.<sup>318</sup> Moreover, although most states explicitly dictate that the court must decide the case without a jury,<sup>319</sup> Montana allows a judge to empanel a jury to resolve questions of fact,<sup>320</sup> while Georgia stipulates that the judge should decide the case without a jury unless one of the litigants demands a jury trial and other laws would permit a jury for that issue.<sup>321</sup> In that instance the judge can require the jury to return only a special verdict if the election was held in a single county and must require the jury to return a special verdict if the election took place across multiple counties.<sup>322</sup>

Finally, although most states that use the judiciary attempt to treat the case like any other civil action, often judges are given special powers. For example, in New Jersey, a judge presiding over the case has the authority to order any amendments to the petition and to “compel the production of all ballot boxes, books, papers, tally lists, ballots and other documents which may be required at such hearing.”<sup>323</sup> Similarly, in South Dakota, the court may “make such order or orders as the court

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315. WASH. REV. CODE ANN. § 29A.68.100 (West 2005).

316. MO. CONST. art. VIII, § 3 (“All election officers shall be sworn or affirmed not to disclose how any voter voted; provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, and received as evidence.”).

317. NEB. REV. STAT. ANN. § 32-1103 (LexisNexis 2008).

318. MO. ANN. STAT. §§ 115.555, .561 (West 2003).

319. *See, e.g.*, N.J. STAT. ANN. § 19:29-5 (West 1999).

320. MONT. CODE ANN. § 13-36-207 (2011).

321. GA. CODE ANN. § 21-2-526(a) (2008).

322. § 21-2-526(c). It is unclear why the Georgia statute requires special verdicts for multiple county contests but merely permits them for single county contests.

323. N.J. STAT. ANN. §§ 19:29-5, -6; *see also* OHIO REV. CODE ANN. § 3515.12 (LexisNexis 2012).

deems necessary to bring about the expeditious and just determination of the contest,” which can include shortening the time for an answer, actively managing discovery, and appointing referees.<sup>324</sup> In this manner, states attempt to give trial-level judges great discretion over managing the case. Some jurisdictions also include special procedural protections in an election contest: in South Dakota and Texas, for example, a default judgment is expressly prohibited.<sup>325</sup> In Washington, by contrast, the court can dismiss the case for want of prosecution.<sup>326</sup>

In sum, states have varying methods for using their judiciaries to resolve election contests, but a few trends emerge: most often, states randomly assign a judge to hear an election contest, although several states at least specify the proper venue for a dispute. Most courts must decide the case without a jury, although in a few states the court can appoint an official to take testimony and gather evidence. Statutes usually include the substantive bases a party may allege to contest an election, which are generally consistent across the states. Finally, most states attempt to treat election contests like any other civil case, although some states give judges additional powers. These trends are important to keep in mind when formulating best practices for election contest procedures.

### *C. Appellate Review*

Most state election contest statutes either provide for some form of appellate review or stipulate that no review is permissible. The states that prohibit appeals typically do so when either the legislature or the state’s supreme court decides the case in the first instance.<sup>327</sup> These states send the case directly to the final decision maker. In the remainder of states, challengers are allowed to appeal the case up the judicial ladder. Of course, there are some variations: In Connecticut, for example, upon request from a party a superior court judge must make findings of fact and then certify any questions of law that the parties contest to the chief justice of the supreme court, who immediately calls a special session of the supreme court to resolve the legal issue.<sup>328</sup> A party who then ultimately loses the contest at the superior court, however, can still appeal that court’s final judgment to the supreme court, which may promulgate rules of procedure for a “speedy and inexpensive” resolution of the case within fifteen days of the superior court’s final judgment.<sup>329</sup>

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324. S.D. CODIFIED LAWS § 12-22-10 (2004).

325. See § 12-22-17; TEX. ELEC. CODE ANN. § 221.004 (West 2010).

326. WASH. REV. CODE ANN. § 29A.68.050 (West 2005).

327. See, e.g., 10 ILL. COMP. STAT. ANN. 5/23-1.1a (West 2010) (“The Supreme Court shall have jurisdiction over contests of the results of any [statewide] election . . . and shall retain jurisdiction throughout the course of such election contests.”); IOWA CODE ANN. § 58.7 (West 2012) (“The judgment of the committee [of the legislature] pronounced in the final decision on the election [for governor] shall be conclusive.”); S.C. CODE ANN. § 7-17-250 (1977) (“Appeals from decisions of the State Board shall be taken directly to the Supreme Court on petition for a writ of certiorari only based on the record of the State Board hearing and shall be granted first priority of consideration by the Court.”). The District of Columbia also sends election contests to its highest court, the D.C. Court of Appeals, and prohibits any appeals. D.C. CODE § 1-1001.11(b)(1), (b)(4) (2011).

328. CONN. GEN. STAT. 9-325 (West 2009).

329. *Id.*

In Louisiana, appeals for most election contests must go to the full en banc courts of appeal (instead of a three-judge panel), and the losing party may seek certiorari review at the state supreme court.<sup>330</sup>

Although many states simply channel appeals through their normal appellate process,<sup>331</sup> other states skip the intermediate or court of appeals stage and allow a party to appeal a trial court's decision directly to the state's supreme court. This procedure streamlines the process and contributes to timeliness.<sup>332</sup> For example, both Kansas and Minnesota have their supreme courts appoint a three-judge court to hear certain election contests and then allow direct appeal of the three-judge court's decision to the supreme court.<sup>333</sup> Sometimes this expedited appeal procedure is limited to statewide offices: in Minnesota, an appeal of an election contest decision for all contests besides statewide offices must go first to the court of appeals.<sup>334</sup>

Another common attribute of election contest appellate provisions is the requirement that the appellant post a bond.<sup>335</sup> The purpose of the bond is to ensure that the party appealing the lower court's decision will be able to cover the costs of an appeal. It also has the corollary effect of, in theory, reducing the number of appeals because it provides an added hurdle for litigants who want to continue the fight.<sup>336</sup> That is, the states that require appellants to post a bond are also sending a signal that appeals in an election contest are less favored.

Many of the provisions related to appealing an election contest decision are intended to foster prompt finality. For example, Minnesota permits, and North Dakota requires, its appellate courts to hear election contest appeals in a summary fashion.<sup>337</sup> In Utah, an appeal does not stay the district court's execution or further proceedings, except for costs.<sup>338</sup> Presumably, this both encourages finality of the lower court's decision and discourages appeals in the first place, as the parties know that an appeal will neither prevent the lower court's decision from going into effect nor stop the winner from taking office.

Some state statutes are even ambiguous as to whether appeals are permitted. Wisconsin's election contest provision states that challengers can appeal an election result after a recount first to a state trial court and then to the court of appeals

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330. LA. REV. STAT. ANN. § 1409(G), (H) (2012); *cf.* 2 U.S.C. § 437h (2006) (providing that district courts may certify constitutional questions regarding the Federal Election Campaign Act to the court of appeals sitting en banc).

331. *See, e.g.*, N.J. STAT. ANN. § 19:29-11 (West 1999); N.M. STAT. ANN. § 1-14-5 (West 2003).

332. *See* Douglas, *Procedure of Election Law*, *supra* note 63, at 458–59.

333. KAN. STAT. ANN. §§ 25-1443, -1450 (2000); MINN. STAT. ANN. §§ 209.045, .09(2), .10(4) (West 2009).

334. MINN. STAT. ANN. § 209.09(1).

335. *See, e.g.*, ALA. CODE § 17-16-62 (LexisNexis 2007); KAN. STAT. ANN. § 25-1450 (requiring the posting of a bond of at least \$500 “or such reasonable greater amount as the court may order”); MINN. STAT. ANN. § 209.09 (requiring a bond of \$500).

336. *See, e.g.*, Tal Finney & Joel Yanovich, *Expanding Social Justice Through the “People’s Court,”* 39 LOY. L.A. L. REV. 769, 779 (2006) (explaining that requiring a bond can reduce the number of appeals).

337. MINN. STAT. ANN. § 209.09(1); N.D. CENT. CODE § 16.1-16-09 (2009).

338. UTAH CODE ANN. § 20A-4-406(1)(b) (LexisNexis 2010).

(which must be the Fourth District Court of Appeals if the election is statewide).<sup>339</sup> The statute then provides, “This section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process.”<sup>340</sup> This limitation necessarily raises the question, is appeal permitted to the Wisconsin Supreme Court as in a normal case, or does the statute give the court of appeals the final say on the matter? This could potentially be an issue itself in a contested election, especially if, as was the case in early 2011, the disputed election involves a seat on the Wisconsin Supreme Court.<sup>341</sup> Although news reports quoted the Wisconsin Government Accountability Board Director as understanding the law to allow an appeal to the state supreme court, presumably the candidate who wins at the Fourth District Court of Appeals would argue that the supreme court would lack jurisdiction over the case.<sup>342</sup> This election was resolved based on the recount, however, meaning that the courts did not have to answer this question.

Where an appeal is allowed, the scope of an appellate court’s review of a lower tribunal’s decision is usually quite limited.<sup>343</sup> Generally, the appellate court will defer to the lower court’s findings of fact and will reverse the outcome only on questions of law.<sup>344</sup> This rule exists because of the recognition that first-level actors have better ability to gather the facts, proximity to the events under review, and expertise in conducting and reviewing electoral outcomes.<sup>345</sup> As the Ohio Supreme Court explained,

[t]he test for reversing a decision of a board of elections is not necessarily whether this court agrees or disagrees with such decision, but it is whether the decision of the board of elections is procured by fraud or corruption, or whether there has been a flagrant misinterpretation of a statute or a clear disregard of legal provisions applicable thereto.<sup>346</sup>

Thus, the lower-level court has a lot of power in shaping the scope of an election contest and the ultimate outcome. The appellate court will not reverse a lower court or administrative board’s findings of fact unless they are against the “manifest

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339. WIS. STAT. ANN. § 9.01(6), (9) (West 2004).

340. § 9.01(11).

341. See Patrick Marley, Jason Stein & Lee Bergquist, *State Supreme Court Race Headed for Likely Recount*, MILWAUKEE JOURNAL SENTINEL (Apr. 6, 2011), <http://www.jsonline.com/news/statepolitics/119308059.html>.

342. *Id.* Although it might seem odd to allow a court of appeals to be the final decision maker in an election contest, Texas has a provision stipulating that, for a contested *primary* election, “[t]he decision of the court of appeals is not reviewable by the supreme court by certified question or any other method.” TEX. ELEC. CODE ANN. § 232.014(f) (West 2010). Presumably, Texas believes that primary election contests require quicker finality and therefore only one level of appeal.

343. See WEINBERG, *supra* note 17, at 121.

344. *See id.*

345. *See id.*

346. *State ex rel. Hanna v. Milburn*, 161 N.E.2d 891, 893 (Ohio 1959) (emphasis omitted).

weight of the evidence,” an admittedly high standard.<sup>347</sup> “[T]he pivotal role of a reviewing court is to interpret the law in order to determine whether or not the trial court’s legal conclusion is against the manifest weight of the facts.”<sup>348</sup>

For example, Louisiana explicitly prohibits a court from granting a new trial or rehearing, “but a court, upon its own motion, may correct manifest error to which its attention is called.”<sup>349</sup> Thus, an appellate court can overturn a lower court’s decision only for “manifest error,” demonstrating a high level of deference to the trial court. By contrast, when an appeal is from a special election court comprised of members that the parties select (such as in West Virginia), the appellate court might have more leeway to “decide the matter in controversy, both as to the law and the evidence, as may seem to it to be just and right.”<sup>350</sup> The statute gives broader authority to the West Virginia Supreme Court presumably because the lower tribunal did not necessarily include members of the judiciary, meaning that, in West Virginia’s view, there is less warrant for judicial-type deference to the special court’s decision.

In sum, states that use their judiciaries to resolve election contests typically allow an appeal to a higher-level court, unless the case must originate with the state’s supreme court in the first place. Some states use their normal appellate procedure, while others expedite the process by skipping the intermediate court of appeals or including other procedural mechanisms. Moreover, many states limit the ability of the appellate court to overturn the decision, especially with regard to factual findings.

### III. REFORMING ELECTION CONTEST PROCEDURES: TIMING, STANDARDS, AND IMPARTIALITY

The preceding discussion is mainly descriptive and analytical; we now know what types of laws are actually on the books with respect to election contests, and we understand what general characteristics these statutes embody. To achieve the value of robust, fair democracy, we must go one step further and identify what goals we should seek to elevate in promulgating procedures for resolving election contests. This Part discusses these goals and, recognizing that the most significant reform state election codes need is fostering impartiality in the decision maker, offers several potential models for creating an impartial election contest tribunal.

#### *A. Goals for Resolving Election Contests*

One of the starkest findings from the survey of state election contest statutes is that there is little consistency among the states. Instead, states have a myriad of methods for resolving election contests. These procedures vary even within the state, depending on the office.<sup>351</sup> Many of these provisions, however, seem to be

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347. See WEINBERG, *supra* note 17, at 124.

348. *Id.* at 127.

349. LA. REV. STAT. ANN. § 18:1409(I) (2012).

350. W. VA. CODE ANN. § 3-7-3 (LexisNexis 2011).

351. See *supra* Part I.

relics of a prior time and merely remain on the books due to inertia.<sup>352</sup> There appears to be no systematic adoption of state laws for resolving election disputes, suggesting that the variation among states may stem from the reality of local differences or the accident of history.

Therefore, a beginning step for reform is to have states consider whether the dispute resolution systems currently in place make sense in today's political climate. Anticipating post-election litigation has become a routine part of campaign strategy.<sup>353</sup> Given this reality, states should evaluate whether the processes currently in place are the most appropriate for the inevitable election contests that will occur. Does it make sense to send the case to a single judge or a group of judges? Who should decide the case? How quickly must a tribunal render a decision? Should the provisions allow appeals? If nothing else, states should appoint a commission or undertake legislative initiatives to determine if the current procedures are consistent with the state's goals in resolving post-election disputes: to quickly and accurately determine the winner in the most fair manner possible. Failure to do so will result in tumultuous election disputes occurring without clear guidance on the best procedure for deciding the contest.

In analyzing the various forms of election contest provisions currently in effect, some trends are apparent. Scholars have opined on universal goals or values that should be inherent in any process for resolving disputed elections. One commentator broke these goals down into four parts: first, "to give effect to the will of the electorate" as a whole; second, "to give effect to the desire of the [individual] voter"; third, "to avoid upsetting the results of an election where possible"; and fourth, "to respect specific legislative commands."<sup>354</sup> Another formulation suggests that election contest procedures must vindicate the goals of "legitimacy" (which includes fairness, accuracy, and transparency), "finality and efficiency," and "non-politicization."<sup>355</sup> Other vital criteria for the proper decision maker include lack of bias, expertise in the substantive rules, and the ability to decide in a timely manner.<sup>356</sup> Universal values—which often conflict—entail: "(1) fairness and legitimacy; (2) voter anonymity; (3) accuracy and transparency; (4) promptness and

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352. See, e.g., 25 PA. CONS. STAT. ANN. §§ 3312–29 (West 2007); see *supra* notes 82–110 and accompanying text.

353. Richard L. Hasen, *Judges as Political Regulators: Evidence and Options for Institutional Change*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 104 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang, eds., 2011) ("One theory [for the rise in election law litigation] posits that election law has become part of a 'political strategy' followed by politicians in an effort to manipulate the rules of the game to get elected and to win in the event of an election recount or contest."); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 957 (2005) (referring to "election law as political strategy"); Charles Anthony Smith & Christopher Shortell, *The Suits That Counted: The Judicialization of Presidential Elections*, 6 ELECTION L.J. 251, 252–53 (2007) (discussing litigation as an election strategy, particularly in presidential elections).

354. WEINBERG, *supra* note 17, at xviii.

355. See Lisk, *supra* note 178, at 1221–22.

356. See Nagle, *supra* note 233, at 1753–62.

finality; and (5) efficiency and cost.<sup>357</sup> Underscoring these ideals is the desire for impartiality in the decision maker.<sup>358</sup>

Synthesizing these concepts, three overarching goals emerge: (1) resolving the election in a timely manner; (2) correctly and accurately determining the winner, which requires clear standards for a decision maker to follow; and (3) doing so through a tribunal that both is and is perceived as fair and just. These are the main values a state should promote in considering its election contest provisions. The remainder of this Article discusses ways to achieve these three goals, with a particular focus on the creation of an impartial tribunal.

### *B. Improving Election Contest Processes*

#### 1. Timeliness

State statutes already address the first goal, timeliness, fairly robustly, albeit somewhat erratically.<sup>359</sup> There are two aspects to timeliness: first, most states include a deadline by which a challenger may contest an election; and second, some states have adopted a date by which a tribunal must decide the case or at least offer guidance on how quickly a decision maker should rule.<sup>360</sup> Most election contest provisions provide clear deadlines for when to file and at a minimum allow courts to move the case to the front of the docket, but there are variations. As noted above, some states provide mandatory deadlines, while other states are more aspirational in their timeliness language.<sup>361</sup> Further, not all states have deadlines for when a challenger may contest an election,<sup>362</sup> and the deadlines vary among the states.<sup>363</sup>

In conducting a robust review of their election contest procedures, states should consider both aspects of the timeliness equation. States that do not include deadlines for filing a contest should follow the majority of states and adopt clear, mandatory timing requirements. Additionally, states should enact specific timing requirements that are binding on the decision maker. Aspirational timing guidelines, such as simply moving the case to the front of the docket, are insufficient to ensure prompt decision making. Strict deadlines help to promote quick finality, which is good for the legitimacy of the eventual winner and the process itself.<sup>364</sup> Courts or other decision-making bodies can still make accurate decisions even when faced with a strict deadline. Further, the deadline can be dependent on the office in question and how quickly the office needs to be filled. For example, an election for a single executive might require faster resolution than an election for a multi-member body that can still function with a vacant seat.<sup>365</sup>

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357. See Huefner, *supra* note 21, at 288.

358. See Foley, *The Founders' Bush v. Gore*, *supra* note 54, at 34, 50, 70, 79, 81–82.

359. See *supra* Part II.A.

360. See *supra* Part II.A.

361. See *supra* Part II.A.

362. See *supra* note 266 and accompanying text.

363. See *supra* Part II.A.

364. See Huefner, *supra* note 21, at 314–16.

365. See Edward B. Foley, *How Fair Can Be Faster: The Lessons of Coleman v. Franken*, 10 ELECTION L.J. 187 (2011) [hereinafter Foley, *How Fair Can Be Faster*] (proposing a model calendar for resolving presidential vote-counting disputes that includes

Moreover, a specially constituted tribunal for a specific election contest will likely need less time than a court that has a regular docket in addition to the pressing election case.

Although states certainly can come up with their own deadlines, here is one proposal: first, states should require challengers to an election result to contest the election within three days of the certification. Challengers likely already have participated in the administrative recount, so they have been intimately involved in the post-election proceedings. It makes sense to give them a little bit of time to craft their legal pleadings even when time is of the essence, but three days seems sufficient. In addition, states should place deadlines on the tribunal deciding the case: if the election is for a single executive or office, the tribunal must decide the dispute within one week of when the new elected official is supposed to assume the position. Those who hold offices such as governor need time to prepare for the job, and the public needs finality, so a week seems about right—although, of course, the tribunal should try to decide the case even sooner. If the election is for a multi-member body that can function without the seat being filled, then the tribunal can have some more time: perhaps it must decide within a month after someone was supposed to take office. States should not allow election contests to drag on, however, because that leaves constituents without someone to represent their interests.

The point, of course, is not to mandate these specific deadlines on all states. Instead, the goal is to prompt states to enact deadlines that apply both to challengers and the decision maker so that the case is decided expeditiously. This will allow candidates to move on, government to run smoothly, and the public to have a sense of finality. Further, although the deadlines suggested here may seem tight, the adoption of clear standards and the creation of a separate tribunal, as discussed below, will help to temper these concerns because a single decision-making body will serve solely to decide the case. In sum, states should revise their election contest codes to enact specific timeliness requirements for the resolution of these disputes.

## 2. Clearer Standards

Professor Huefner has already devoted significant attention to the second goal, providing guidelines for correctly and accurately determining the winner in a post-election dispute. In his article, “Remedying Election Wrongs,” he urged states to define clearly

procedural matters such as: (1) who can be a contestant; (2) what standard of evidence to require; and (3) how to expedite contests. [States should also consider] several fundamental issues that any [election contest] statute should address, in addition to specifying the acceptable reasons or grounds for a contest. These include: (1) whether and in what circumstances to permit proportional or statistical adjustment of election results; (2) how readily to permit new elections to occur; and (3) whether races for different kinds of offices deserve different approaches to these and other issues. Another crucial matter is

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specific deadlines).



the extent to which primary elections ought (or need) to receive different treatment from general elections.<sup>366</sup>

States would be wise to consider Professor Huefner's proposed reforms, and, in particular, to provide greater clarity to decision makers regarding the appropriate evidentiary burdens on challengers and the permissible remedies for an election failure.<sup>367</sup>

States can look to recent election contests to anticipate disputes over whether to count certain ballots,<sup>368</sup> the standard for determining the "intent of the voter,"<sup>369</sup> and whether to require strict or substantial compliance with voting rules, such as casting an absentee<sup>370</sup> or write-in vote,<sup>371</sup> among others. Legislatures should consider the specific substantive rules the decision maker must use in resolving these kinds of issues, as well as the appropriate remedy should one of these problems arise. Crafting clearer guidelines would also eliminate the concern that partisan judges are deciding cases at their whim, as the standards would constrain their discretion.

When the laws for resolving disputed elections are unclear, "judges are free to decide the case in accordance with their political preferences if they are so inclined."<sup>372</sup> This fact ties into the reason for needing clear substantive standards: granting biased election contest judges too much discretion is dangerous because it gives decision makers wiggle room to impose their partisan views. "[T]he conventional rules that most states use[] for adjudicating disputes over the counting of ballots [are] sufficiently malleable that judges prone to partisanship [can] easily manipulate those rules to support a decision for their favored candidate."<sup>373</sup> Thus, "[w]hen the existing law is insufficiently clear on how to resolve the election dispute . . . the law cannot constrain the courts, and judges are free to decide the case according to politics, as they often appear to do—especially when the election is a prominent one."<sup>374</sup> As Professor Huefner explains,

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366. Huefner, *supra* note 21, at 311.

367. Professor Huefner specifically urged states to provide clear rules to judges for (1) when to invalidate some portion of votes; (2) when, if ever, to use statistical adjustments to correct vote totals for demonstrated errors; (3) in what circumstances to compromise the anonymity of the polling booth by compelling voters to reveal their ballot choices; (4) whether to adjust election rules once an election is underway; and (5) when to take the dramatic steps of either postponing an election or invalidating a completed election and holding a new one.

*Id.* at 268.

368. See, e.g., *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 245 (6th Cir. 2011) (deciding whether to count certain provisional ballots).

369. *Bush v. Gore*, 531 U.S. 98 (2000).

370. *Sheehan v. Franken*, 767 N.W.2d 453 (Minn. 2009) (per curiam).

371. *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).

372. Foley, *Analysis & Mitigation*, *supra* note 285, at 378.

373. Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 471, 477 (2010) [hereinafter Foley, *The McCain v. Obama Simulation*].

374. Foley, *Analysis & Mitigation*, *supra* note 285, at 377.

[E]lection contest provisions often provide courts with little substantive guidance for determining whether a remediable election failure in fact has occurred, and if so, how to remedy it. Instead, the focus of typical contest statutes is on the procedures for bringing a contest action. Many courts adjudicating election problems therefore have had to develop their own standards for deciding if an actionable failure has occurred and how to resolve it. The unsurprising result has been a variety of judicially developed tests for when courts will uphold, invalidate, call for a rerunning of, or themselves declare the winners of, a contested election.<sup>375</sup>

The problem, of course, is that it is virtually impossible to create standards for every conceivable election failure. Even if we were to enact a robust list of potential election problems and how courts should resolve them, there will always be something new that throws a wrench in the administration of an election—which could potentially affect the result. This is why we also need a strong focus on *who* is making these decisions. The manner in which a state resolves a disputed election can impact the ultimate winner's legitimacy.<sup>376</sup> Thus, when a seemingly biased tribunal determines the winner of an election stemming from a previously unforeseen election problem, the loser—and the public—might think that the outcome was a result of the tribunal's ideological skew. But the converse is also true: the more “neutral” the decision maker, the more secure we might feel in granting that tribunal some discretion in interpreting the laws to resolve the dispute—or at least in deciding the case when the substantive rules are not perfectly clear. Because the substantive guidelines are impossible to define specifically for every possible election failure, we need impartial decision makers so that, when they do inevitably use some discretion in resolving the dispute, it is not seen as merely a product of their partisanship. That is, there must be an additional structural protection in the composition of the election contest tribunal to ensure that the procedure of resolving a disputed election is as fair and unbiased as possible.

### 3. Impartiality in the Decision Maker

The third goal—impartiality—is where states need the most work. A significant feature missing from most states' election contest provisions is a mechanism to ensure the impartiality of the tribunal. States that include some way of addressing bias in the decision maker—such as Pennsylvania, with its strange process of drawing names from boxes,<sup>377</sup> or New Hampshire with its five-member Ballot Law Commission<sup>378</sup>—are outliers, and even those states do not completely balance or eliminate bias from the tribunal. Indeed, Pennsylvania virtually guarantees bias by giving authority to a randomly selected committee of the legislature that is likely to skew one way or the other, although the process for selecting the members

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375. Huefner, *supra* note 21, at 270–71.

376. Foley, *Analysis & Mitigation*, *supra* note 285, at 379; *see also* Douglas, *Procedure of Election Law*, *supra* note 63, at 441.

377. 25 PA. CONS. STAT. ANN. §§ 3314, 3318 (West 2007).

378. N.H. REV. STAT. ANN. § 665:1 (2008).

randomizes the direction of that skew. The more common approach is simply to send the case to some forum in the state judiciary without regard to rooting out any potential bias of those charged with resolving the dispute.<sup>379</sup>

Ensuring impartiality is one of the most important attributes of achieving a fair decision-making process for election cases.<sup>380</sup> The legitimacy of an election dispute's outcome depends in large part on the impartiality of the tribunal that decides the case.<sup>381</sup> Research suggests, however, that judges' partisanship can influence their decisions when resolving election disputes.<sup>382</sup> This taints the fairness in the tribunal's resolution of the contest:

When cases like these are dependent on the personal identity of the particular judges who happen to sit on the court at the time they are decided (as is true whenever a four-to-three, or a three-to-two [sic], decision might have gone the other way with just one change in the composition of the court), the risk is that the outcome will depend on how many Democrats or how many Republicans hold those seats. While that risk exists in other kinds of cases, it is particularly acute in election contests. There is no point in letting the state's supreme court, rather than its legislature, resolve the dispute over which candidate will become governor, if the court's resolution will be just as politically motivated as the legislature's.<sup>383</sup>

As it stands, however, few states actually consider the ideology of the decision maker in their election contest provisions. Many states have detailed statutes for how to select who decides a disputed election, but there is little consideration for minimizing ideological decision makers in that process. Some states attempt to select a judge who will be "impartial" in the sense of not having a direct interest in the election: in Georgia, for example, the trial judge must come from a different circuit (but same district) as where the election took place.<sup>384</sup> But this says nothing about the ideology of the judge deciding the case, which is particularly concerning given that the majority of states elect their judges. Indeed, judges who rely on voters for obtaining or keeping their jobs are inherently political actors—even if the

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379. See *supra* Part I.

380. See Douglas, *Procedure of Election Law*, *supra* note 63, at 442–43.

381. See Foley, *The Founders' Bush v. Gore*, *supra* note 54, at 34.

382. See Kyle C. Kopko, Sarah McKinnon Bryner, Jeffrey Budziak, Christopher J. Devine & Steven P. Nawara, *In the Eye of the Beholder? Motivated Reasoning in Disputed Elections*, 33 POL. BEHAV. 271 (2010) (finding that the party identification of ballot counters influences their ballot counting decisions). *But see* Kyle C. Kopko, *Partisanship Suppressed: Judicial Decision-Making in Ralph Nader's 2004 Ballot Access Litigation*, 7 ELECTION L.J. 301 (2008) (finding that state supreme court justices did not rule along partisan lines in cases involving Ralph Nader's attempt to appear on the presidential ballot in fifteen states); Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 789–92 (2007) (suggesting that it is unclear whether federal judges rule in partisan ways in election law cases).

383. Foley, *Analysis & Mitigation*, *supra* note 285, at 378; see also Foley, *The McCain v. Obama Simulation*, *supra* note 373, at 477.

384. GA. CODE ANN. § 21-2-523(c) (2008).

elections themselves are nonpartisan or retention elections—because judicial elections by their very nature require judges to engage with the political process.

States that simply send an election contest to their judiciaries thus have a flawed process, because there is always the risk of a partisan taint. Even if the judges are perfectly fair, there still might be the perception of ideological bias, which ultimately affects the legitimacy of the resolution process and the declared winner.<sup>385</sup> As Justice Breyer wrote in his *Bush v. Gore* dissent about the Electoral Commission that resolved the Hayes-Tilden presidential dispute, the Commission “simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process.”<sup>386</sup> Thus, those states that ask their regular judges to decide a dispute, or who do not have a mechanism to ensure equal representation on the tribunal, should reform their procedural processes for election contests. The same goes for states that allow a single judge to decide the contest. There is too great of a risk in that setting that the outcome—or at least the public’s perception of the outcome—will turn on the identity of the judge who happens to hear the case.

a. Proposed Solution: A Five-Member Panel with Two “Partisans” and Three “Neutrals”

The solution to eradicating, or at least reducing, partisanship in election contest outcomes is to ensure that the tribunal deciding the case represents each side of the dispute.<sup>387</sup> It will be virtually impossible to find truly impartial arbiters to comprise the entire election court; many people, including those that are appointed by a partisan executive or win an election for a judgeship, have political leanings that may be difficult to separate when making a ruling that will affect political power.<sup>388</sup> Thus, a decision-making body should include multiple individuals of different backgrounds and ideological viewpoints. Building in a bipartisan structure is the best way to ensure that the losing candidate cannot point to the ideological makeup of the tribunal as the reason for his or her loss.<sup>389</sup> It also may be beneficial to include individuals with different backgrounds and expertise—such as judges, board of election officials, and election experts—to foster a diversity of viewpoints.

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385. See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408–09 (2001).

386. *Bush v. Gore*, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting).

387. See Foley, *Analysis & Mitigation*, *supra* note 285, at 378; Foley, *The Founders’ Bush v. Gore*, *supra* note 54, at 34 (explaining that the legitimacy of a disputed election’s outcome “require[s] the physical manifestation of evenhandedness by making sure that the tribunal [is] composed of equal numbers from each of the two competing political parties”); see also *id.* at 81–82 (advocating for impartial institutions “so that they will not be, or appear to be, predisposed to tilt their decisions towards one candidate or another based on the partisanship of the governing body”).

388. See, e.g., Foley, *The Founders’ Bush v. Gore*, *supra* note 54, at 79 (noting that “politicians inevitably will be partisans” and, therefore, that we need “an institution that protects the resolution of disputed elections from becoming hijacked by politicians from either party seeking an electoral advantage”); Lisk, *supra* note 178, at 1243–44 (stating that “the detrimental politicization risks associated with judicial resolution of election contests must undoubtedly be avoided whenever possible” and detailing the threat to impartiality embodied in *Bush v. Gore*).

389. See Foley, *The McCain v. Obama Simulation*, *supra* note 373, at 488, 502.

To address these problems, states should enact an election contest regime that (1) creates a multi-member panel of judges, political operatives, and experts who have different backgrounds and expertise to serve as an election contest tribunal; (2) gives an equal number of seats on the panel to those sympathetic to each candidate, while requiring candidates to identify these prospective members when they file their nominating petitions; (3) has the candidates or members of the panel together pick mutually agreed-upon “neutral” members for the tribunal, or requires a supermajority for any decision; and (4) denies the possibility of an appeal.<sup>390</sup>

Two recent election disputes—one real, one hypothetical—demonstrate the efficacy of a multi-member body that includes “partisans” from each side. First, in the Minnesota Senate contest between Norm Coleman and Al Franken, the Minnesota Supreme Court appointed a three-judge district court to hear the case, which included one Democratic-leaning judge, one Republican-leaning judge, and one Independent judge, all from different parts of the state.<sup>391</sup> The Minnesota Supreme Court actively sought to achieve partisan and geographic balance in the makeup of the court.<sup>392</sup> This court was unanimous in its decision, and the Minnesota Supreme Court easily affirmed, also unanimously.<sup>393</sup> Second, in a simulated election contest based on the 2008 presidential election between Barack Obama and John McCain, Professor Foley created an election court to hear the case, comprised of one senior federal judge known to be more liberal, one former state supreme court justice known to be more conservative, and a third judge that the first two judges selected jointly, who happened to be a former federal judge and current law school dean.<sup>394</sup> The court heard oral arguments from leading practitioners on each side and rendered a decision that ultimately would determine who won the presidency.<sup>395</sup> Once again, the opinion in the mock case was unanimous.<sup>396</sup> This suggests that when a court has an equal number of members “sympathetic” to each side, the partisanship of those judges cancels each other out and the court is able to render a decision devoid of partisan considerations.

One problem with these approaches, however, is that having a three-member panel with only one moderate could leave the decision in the hands of that moderate judge. Although the two examples above produced unanimous opinions, that is not guaranteed through this structure. If judges are prone to ideological bias, then the court’s decision might often be two to one, with the moderate judge simply siding with one side or the other.

Therefore, a better model would be to have a five-member panel, with one “partisan” that each side appoints and three “neutral” decision makers that the two partisans jointly select. Although a panel might work with seven or even nine

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390. At this stage I am not advocating for a single, uniform procedure for all contests in all states, particularly because sustained scholarly attention to this issue is at its infancy. But states should consider these structural guideposts in reforming their election contest provisions, which will be a significant improvement over the current ad hoc approach.

391. Foley, *Lake Wobegone Recount*, *supra* note 12, at 146.

392. *See id.*

393. *Id.* at 161.

394. Foley, *The McCain v. Obama Simulation*, *supra* note 373, at 489–91.

395. *Id.* at 493–96.

396. *Id.* at 497.

members, five members seems to be the best size to ensure ease of administration and will allow the “partisan” members to have a significant, but not overwhelming, influence.<sup>397</sup> To achieve diversity in expertise, at least two of the neutrals should be actual judges with significant judicial experience, and at least one neutral must be an expert in election administration. It is important for the tribunal to have both judicial and election expertise so it can resolve the complex issues that will arise. Having three neutrals allows the “moderate” decision makers to constitute a majority, thus lending credibility to the notion that any decision is not based on the ideological makeup of the court. The three moderate voices also can help to temper any preconceived partisanship one of the candidate-appointed judges might exhibit.

To choose the two “partisan” judges, states should require candidates, when filing nominating papers, to identify a person they would like to be part of an election contest court, if needed. There would be no other limitations on whom a candidate may select, meaning that candidates can feel secure that the tribunal will include someone “on their side.” Selecting the “partisan” members of the tribunal before the election will help to remove the intense scrutiny that would accompany the choice in the heat of a post-election contest, potentially leading to less ideological picks. Of course, even these two candidate-selected members must take an oath to decide the case on the law and facts, not their loyalties to the candidate. These two people would then select the three “neutral” judges, ensuring that at least two have served in the judiciary for a set amount of time (such as the past five years) and one is an expert in election administration. It makes sense to have the candidate-nominated members select their “neutral” colleagues, as it will be easier for them to choose moderate individuals and reach compromise given that they must work together with these people on the panel. None of the “neutrals” may hold elective office (besides judge) or have any ties (including making contributions) to either campaign. The partisan members should be admonished that they may not “trade” selections, with each picking another partisan, but instead should endeavor to pick three truly neutral voices. The tribunal’s decision should be final: given clearer standards and an impartial makeup, an appellate round will not add anything to this process and could contribute to the sense that the membership of the particular tribunal is what drives the decision.<sup>398</sup>

In sum, borrowing from and improving upon the models previously used that have exhibited impartial decision making in election contests, states should enact legislation that authorizes the creation of a special five-member election tribunal

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397. Indeed, a seven- or nine-member panel might dilute the influence of each side’s single “partisan” member too much. Having each side appoint more than one “partisan” member of the panel might create too much administrative burden, especially when these additional people must jointly select the neutral members.

398. Cf. Foley, *How Fair Can Be Faster*, *supra* note 365, at 191 (making a similar point with respect to presidential elections). It still makes sense for pre-election litigation, or regular lawsuits about election administration, to have multiple levels of review so that the legal system can deliberate appropriately on the proper interpretation of an election statute. See Douglas, *Procedure of Election Law*, *supra* note 63, at 450–51. Election contests are different, however, because they occur immediately after the election and are about which candidate actually won. In this context, states are wise to enact unique rules tailored to this kind of dispute, including limiting the number of appeals to achieve the fastest resolution possible.

for post-election contests. The methods of selecting the members of the tribunal—with each side appointing one person and those two picking the three “neutrals”—ensures that, at least procedurally, the tribunal’s resolution of the contest will be as impartial as practicable.

b. Other Potential Ways to Achieve Impartiality

Although the five-member tribunal described above is well-suited to meet the goal of impartiality, there are certainly other ways for states to minimize bias in the decision maker of an election contest. Professor Foley, with a plan similar to the five-member tribunal, advocates for the creation of a specialized election court to resolve election contests, comprised of two Democratic-leaning judges, two Republican-leaning judges, and a fifth non-judicial member chosen by mutual agreement of the other four.<sup>399</sup> This type of body “would represent a balanced blend of law and politics.”<sup>400</sup> As mentioned above, however, having four partisans on a five-member panel likely would make the non-judicial member the tiebreaking vote, vesting too much power in one person to resolve the contest. An advantage of the five-member court this Article proposes is that it allows for the inclusion of more non-judicial members (although still ensuring a judicial presence), more moderate voices, and at least one neutral election expert.

New Hampshire’s and West Virginia’s systems of choosing the tribunal are also good models, although they need some tweaking. Recall that in New Hampshire, a Ballot Law Commission—comprised of two members the house of representatives selects (each major party chooses a member), two members the senate selects (again, one from each party), and one member the governor appoints—resolves most disputed elections.<sup>401</sup> Further, none of the Ballot Law Commission members may be an elected official, and the governor must choose a person with experience in election procedure.<sup>402</sup> West Virginia uses a special court for judicial election contests, comprised of one person that the contestee selects, a second person that the contestant chooses, and a third person that the governor appoints.<sup>403</sup> Both of these systems guarantee that each side to the contest has sympathetic decision makers on the panel. They suffer, however, from the concern that the final member of the body, whom the governor appoints, will skew the body toward a partisan imbalance. A better solution would be either to have a mutually agreed upon person fill the last spot or to require a supermajority vote for any decision. For example, if a state wanted to copy New Hampshire’s five-member Ballot Law Commission (with the governor selecting the fifth member), it should also require four votes for any effective decision, thus necessitating at least one “crossover” vote for a resolution of the contest. There would also have to be unpalatable consequences in the event of a deadlock, such as the replacement of the members of the Commission. Another idea is to require unanimous consent for the appointment of

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399. See Foley, *Analysis & Mitigation*, *supra* note 285, at 378–79.

400. *Id.* at 379.

401. N.H. REV. STAT. ANN. §§ 665:1, :8(II) (2008).

402. § 665:1.

403. W. VA. CODE § 3-7-3 (LexisNexis 2011).

the members of the election contest tribunal from a body that encompasses several political viewpoints, such as the state supreme court in many states.<sup>404</sup>

States could also have a list of eligible people who can hear a dispute (using criteria that demonstrates their neutrality), and the litigants could alternately strike members of the list until there are a set number to hear the case. States could further look to the rise of independent redistricting commissions for drawing legislative maps as an analogy of how to create a partisan-balanced body to decide disputes.<sup>405</sup>

Regardless of how states do it, the key point is that states have *not* thought much about how to root out partisanship in their election contest procedures. This is one significant reform that will improve the process of resolving disputed elections. Moreover, states should consider how to eliminate bias in the decision maker for every type of election. New Hampshire and West Virginia use the processes discussed above for only certain elections. But there is no reason to limit the goal of impartial decision making only to some elected offices. States should evaluate their election contest provisions as a whole to decide who best can resolve post-election disputes.

There is an argument, of course, that partisanship should actually be part of the resolution process. Legislatures resolve election contests for their own members, and there is no suggestion that legislatures must do so impartially. If a legislature acts unfairly, the theory goes, the electorate can vote against the incumbents the next time around.<sup>406</sup> The flaw in this reasoning is that election contests are not about which candidate is the best person politically to serve in the position; they are instead about whether particular votes should count or whether there was an error in the election process.<sup>407</sup> These disputes, although about a political office, are nonpolitical in nature. They are about compliance with the state's electoral code. Therefore, it is inappropriate to leave the resolution of these elections solely to political actors. Additionally, voters are highly unlikely to vote in a subsequent election based on how their representatives voted in an election contest, particularly if that contest involves a member from a different part of the state. Although most legislatures have the power to resolve contests regarding their own members as part of their own sovereignty, it might be wiser to follow Hawaii and North Dakota and allow some form of review for election contests for state legislators.<sup>408</sup>

To be sure, states need not adopt the highly detailed Pennsylvania mechanism for resolving disputed gubernatorial elections—in which members of the legislature are selected randomly through successive drawing of names from boxes to serve on

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404. See Foley, *How Fair Can Be Faster*, *supra* note 365, at 200.

405. See, e.g., J. Gerald Hebert & Marina K. Jenkins, *The Need For State Redistricting Reform To Rein In Partisan Gerrymandering*, 29 *YALE L. & POL'Y REV.* 543, 556–58 (2011) (“State-level redistricting reform, particularly in the form of independent redistricting commissions, is absolutely necessary in order to fulfill the promise of government *for* the people, *by* the people.”) (emphasis in original).

406. See Saul Levmore, *Precommitment Politics*, 82 *VA. L. REV.* 567, 569–70 (1996).

407. See, e.g., Huefner, *supra* note 21, at 270 (“Ultimately, in many close elections the real fight therefore is not over whether to conduct a recount, but rather over *which* ballots to count.”) (emphasis in original).

408. See *supra* note 29. This would require a constitutional amendment in many states. See *supra* note 27 and accompanying text.



the tribunal—to achieve partisan balance.<sup>409</sup> In fact, that method likely would create an ideological imbalance through the random selection process if one party happens to have more names pulled than the other. States should nonetheless consider how best to create an ideologically-neutral arbiter of election disputes. Using a model discussed above, such as creating a five-member tribunal with three “neutral” members and a diversity of expertise, is a good place to start.<sup>410</sup>

One final point is worth mentioning. States must promulgate procedural guidelines for an election contest before it occurs; trying to create a system in the middle of an actual dispute will be impossible given the stakes involved. It can also lead to concerns of partisanship infecting the procedural rules selected and therefore the ultimate outcome. Indeed, the post-election creation of the Electoral Commission to resolve the Hayes-Tilden 1876 presidential dispute was itself contentious, mostly because Congress was reacting to a current controversy in the context of each side seeking a mechanism that would be most advantageous to its candidate.<sup>411</sup> Specifying *ex ante* the specific procedural rules for resolving election contests can eliminate or at least reduce judicial discretion ahead of time and will therefore help to create some stability when disputes arise.<sup>412</sup>

Of course, none of this is to suggest that we should encourage post-election judicial proceedings. It is much better if states can reform their electoral codes so as to avoid post-election battles.<sup>413</sup> But perfection in election processes is unrealistic.<sup>414</sup> Therefore, states should carefully consider the manner in which they resolve election contests and, in particular, who should decide the dispute. Clarity and precision in procedural rules can help to ensure that the election contest process will reveal the candidate who actually received the greater number of valid votes.

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409. 25 PA. CONS. STAT. §§ 3312–30 (2007).

410. There is a secondary problem that also warrants attention: now that we know which reforms are needed, how do we convince state legislatures—who necessarily won their seats under the current regime—to change the current processes on the books? *See, e.g.*, Heather K. Gerken, *Getting From Here to There in Redistricting Reform*, 5 DUKE J. CONST. L. & PUB. POL’Y 1, 1–2 (2010) (noting that because “foxes are guarding the henhouse . . . we have to do something more than appeal to self-interested political actors to ignore their self-interest. We need to realign the incentives of the foxes with those of the hens, to redirect competitive political energies into healthier channels.”). Hopefully, the recognition that a failure to consider carefully a state’s post-election mechanisms might lead to electoral meltdown will spur legislators to act.

411. *See* Nagle, *supra* note 233, at 1744–45.

412. *See* Foley, *The Founders’ Bush v. Gore*, *supra* note 54, at 68 (“In the post-2000 debate regarding whether strict or lenient enforcement of election rules is preferable, it has become widely acknowledged that it is better, where possible, to sidestep this debate about ‘general principles’ by relying on specific provisions of state law that address the situation. Thus, scholars urge states to take legislative positions on the debate between strict and lenient enforcement, spelling out their own state-specific resolutions of this debate in as much detail as they can.”).

413. *See* Huefner, *supra* note 21, at 289.

414. *See* Foley, *Analysis & Mitigation*, *supra* note 285, at 351.

## CONCLUSION

States should actively pay attention to the dispute resolution mechanisms in their statutory codes. The analysis of current state election contest provisions suggests three main reforms for states to consider as a starting point in revamping their procedures. First, states should include mandatory timing requirements both for litigants contesting an election and tribunals deciding the cases. Second, states should adopt clear guidelines on how to address the substantive issues that are most likely to arise in a post-election dispute. Finally, states should consider how, in reforming their election contest statutes, they should handle the reality of ideology infiltrating the decision-making process. In doing so, they should create mechanisms to appoint a neutral, or at least ideologically balanced, decision maker.

These proposals are simply a starting place for reform. As noted above, planning for post-election litigation has become a routine part of a candidate's campaign strategy. Given this reality, states would be wise to take a comprehensive look at their election contest procedures, as they no doubt will be invoked more often in the future. One needed reform involves a close examination of who should decide the dispute, but there are many other aspects for states to rethink. These include, among others, identifying who has standing to bring a challenge, the evidentiary burdens on a challenger, the substantive rules to invoke, and the possible remedies. To the extent the current statutes address them at all, states are widely divergent on all of these characteristics of their election contest provisions. It is time for states to consider the procedural aspects of their election contest statutes so as to ensure a post-election process that will reveal, in the fastest, most accurate, and fairest way possible, the true winner of the election.

APPENDIX: SUMMARY OF STATUTORY PROCEDURES  
FOR CONTESTING ELECTIONS

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Alabama <sup>415</sup>	Joint session of the legislature; no appeal	Legislature (respective house)	Supreme court justice: joint session of the legislature, with no possibility of appeal  Lower court justice: trial court	Not included in the list of contestable offices	Not included in the list of contestable offices
Alaska <sup>416</sup>	Trial court; no guidance for appeal process	Legislature (respective house)	Trial court; no guidance for appeal process	Trial court; no guidance for appeal process	Trial court; no guidance for appeal process
Arizona <sup>417</sup>	Trial court; no guidance for appeal process (statute applies to “election of any person declared elected to a state office”)	Legislature (respective house)	Trial court; no guidance for appeal process (statute applies to “election of any person declared elected to a state office”)	Statute seemingly excludes federal elections by implication (statute discusses “state office”)	Statute seemingly excludes federal elections by implication (statute discusses “state office”)

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415. ALA. CONST. art. IV, § 51 (state legislature); ALA. CODE § 17-16-65 (LexisNexis 2007) (governor); § 17-16-50 (state legislature); §§ 17-16-54, -65 (state judge); § 17-16-40 (congressional election and presidential electors).

416. ALASKA CONST. art. II, § 12 (state legislature); ALASKA STAT. § 15.20.540 (2010) (grounds for election contest); § 15.20.550 (jurisdiction and time for contest); § 15.20.560 (providing for judgment of the court).

417. ARIZ. CONST. art. IV, pt. 2, § 8 (state legislature); ARIZ. REV. STAT. ANN. § 16-672 (2006) (“election of any person declared elected to a state office”); *see* § 16-676 (outlining the responsibilities of the trial court but not mentioning any mechanism for appeal from its decision).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Arkansas <sup>418</sup>	Joint session of the legislature; no appeal	Senate: Determined by senate's rules  House: Arkansas State Claims Commission makes nonbinding recommendation; house makes final determination	Circuit or district office: Circuit court within any county in the circuit or district wherein any of the wrongful acts occurred  State office: Pulaski County Circuit Court; if there are two or more counties in the district and fraud is alleged, any circuit court in the district may hear testimony; appeal to the Arkansas Supreme Court (statute applies to "any election")	Senate: Pulaski County Circuit Court, appeal to the Arkansas Supreme Court  House: impliedly authorized, but no venue is specified (statute applies to "any election")	Impliedly authorized, but no venue is specified (statute applies to "any election")
California <sup>419</sup>	Superior court of any county in the district; appeal to the court of appeals as in other civil cases (statute applies to "any election")	Legislature (respective house)	Superior court of any county in the district; appeal to the court of appeals as in other civil cases (statute applies to "any election")	Superior court of any county in the district; appeal to the court of appeals as in other civil cases (statute applies to "any election")	Superior court of any county in the district; appeal to the court of appeals as in other civil cases (statute applies to "any election")

418. ARK. CODE ANN. § 7-5-801 (2011) (right of action "in any election"); § 7-5-801(b) (U.S. Senate); § 7-5-805(a) (state senate); § 7-5-805(b) (state house of representatives); § 7-5-806 (governor); ARK. SUP. CT. R. 1-2(a)(4) (appeal to the Arkansas Supreme Court).

419. CAL. CONST. art. IV, § 5 (state legislature); CAL. ELEC. CODE §§ 16400, 16200 (West 2003) (all offices except state legislature); § 16900 (appeals).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Colorado <sup>420</sup>	Joint session of the legislature; no appeal	Legislature (respective house)	Impliedly authorized; no venue specified (statute applies to “any candidate to any office”)	Impliedly authorized; no venue specified (statute applies to “any candidate to any office”)	Supreme court
Connecticut <sup>421</sup>	Trial court; direct appeal to the supreme court	Legislature (respective house)	No judicial elections besides probate judges  Probate judges: trial court; direct appeal to the supreme court	Contest may be presented to any judge of the supreme court, who decides the case with two other supreme court judges the chief court administrator selects	Contest may be presented to any judge of the supreme court, who decides the case with two other supreme court judges the chief court administrator selects
Delaware <sup>422</sup>	Joint committee of the legislature composed of one-third of the members of each house; no appeal	Legislature (respective house)	No judicial elections	Superior court (statute applies to “an office to be exercised in and for any county, district or hundred”); no guidance for appeal process	Superior Court of Kent County is considered “special board of canvass”; no guidance for appeal process
District of Columbia <sup>423</sup>	N/A	District of Columbia Court of Appeals (for City Council)	No judicial elections	District of Columbia Court of Appeals	District of Columbia Court of Appeals

420. COLO. CONST. art. V, § 10 (state legislature); COLO. REV. STAT. ANN. §§ 1-11-205 to -207 (West 2009) (governor); § 1-11-208(1) (state legislature); § 1-11-201(1) (state judge and congressional election); § 1-11-204 (presidential electors).

421. CONN. CONST. art. III, § 7 (state legislature); CONN. CONST. art. V, §§ 2–4 (judicial appointments); CONN. GEN. STAT. ANN. § 9-323 (West 2009 & Supp. 2012) (congressional elections and presidential electors); § 9-324 (governor and probate judges); § 9-325 (appeals).

422. DEL. CONST. art. II, § 8 (state legislature); DEL. CONST. art. III, § 4 (governor); DEL. CONST. art. IV, § 3 (judicial appointments); DEL. CODE ANN. tit. 15, §§ 5901–07 (2007) (state legislature); §§ 5921–28 (presidential electors); §§ 5941, 5950 (other offices).

423. D.C. CODE § 1-1001.11(b)(1) (2011) (granting District of Columbia Court of Appeals authority to review election results, including “initiative, referendum, and recall

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Florida <sup>424</sup>	Circuit Court of Leon County; no guidance for appeal process (statute applies to “election or nomination of any person to office”)	Legislature (respective house)	Circuit court in the county in which the contestant qualified or if the election covered more than one county, in Leon County; no guidance for appeal process (statute applies to “election or nomination of any person to office”)	Circuit court in the county in which the contestant qualified or if the election covered more than one county, in Leon County; no guidance for appeal process (statute applies to “election or nomination of any person to office”)	Circuit court in the county in which the contestant qualified or if the election covered more than one county, in Leon County; no guidance for appeal process (statute applies to “election or nomination of any person to office”)
Georgia <sup>425</sup>	Trial court; appeal as in other civil cases; heard by a judge from the same district, but not the same circuit (statute applies to “any primary or election”)	Legislature (respective house)	Trial court; appeal as in other civil cases; heard by a judge from the same district, but not the same circuit (statute applies to “any primary or election”)	Trial court; appeal as in other civil cases; heard by a judge from the same district, but not the same circuit (statute applies to “any primary or election”)	Trial court; appeal as in other civil cases; heard by a judge from the same district, but not the same circuit (statute applies to “any primary or election”)

measures as well as elections for a particular office”).

424. FLA. CONST. art. III, § 2 (state legislature); FLA. STAT. ANN. § 102.168 (West 2008 & Supp. 2012) (circuit court is contest court for all elections but legislature); § 102.1685 (venue either in county where contestant qualified or Leon County); § 102.171 (contest of election to legislature).

425. GA. CONST. art. III, § 4, para. 7 (state legislature); GA. CODE ANN. §§ 21-2-521, -523 (2008) (governing election contests in the trial court); § 21-2-528 (treating appellate review of election contests as in other civil cases).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Hawaii <sup>426</sup>	State supreme court	State supreme court; Hawaii's Constitution confers the power to decide state legislative election contests to each house of the legislature, but the Hawaii Supreme Court declared that it has jurisdiction over an election contest; see footnote 29	No judicial elections	State supreme court	State supreme court
Idaho <sup>427</sup>	Joint session of the legislature; no appeal	Legislature (respective house)	Supreme court, "and in case they shall disagree, the governor shall act with them in determining the contest"	Contest impliedly authorized; no venue specified (statute applies to "any public office")	Contest impliedly authorized; no venue specified (statute applies to "any public office")
Illinois <sup>428</sup>	State supreme court	Legislature (respective house)	Trial court hears all contests for judicial offices	No statutory guidance	No statutory guidance

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426. HAW. CONST. art. 6, § 3 (appointment of state judges); HAW. CONST. art. 3, § 12 (state legislature); HAW. REV. STAT. §§ 11-171 to -175 (West 2008) (any election); *Akizaki v. Fong*, 461 P.2d 221, 223 (Haw. 1969) (state legislature).

427. IDAHO CONST. art. III, § 9 (state legislature); IDAHO CODE ANN. § 34-2001 (2001) (congressional election and presidential electors); § 34-2004 (state judge); § 34-2104 (governor); § 34-2105 (state legislature).

428. ILL. CONST. art. IV, § 6 (state legislature); 10 ILL. COMP. STAT. ANN. 5/23-1.1a (West 2010) (governor); 5/23-13, -17 (state legislature); 5/23-3 (state judges).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Indiana <sup>429</sup>	General assembly or state recount commission; see footnote 72	Legislature (respective house)	State recount commission makes decision; judicial review of commission's decision allowed for supreme court, court of appeals, and tax court judges (state offices) under limited circumstances, with a deferential standard, in the Marion County Circuit Court; further appeal unclear	State recount commission makes decision; no guidance for appeal process	State recount commission makes decision; no guidance for appeal process

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429. IND. CONST. art. IV, § 10 (state legislature); IND. CONST. art. V, § 6 (governor); IND. CODE § 3-12-10-4(b) (2005) (governor, state legislature, congressional election, and presidential electors); § 3-12-10-18 (state judges); § 3-12-11-19.5 (presidential electors); § 3-12-11-21 (state legislature).



<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Iowa <sup>430</sup>	Special legislative committee; no appeal	Legislature (respective house)	Statewide: three district judges selected by the supreme court, and judgment has force of supreme court decision; no appeal  County: one person named by the contestant and another by the incumbent, who together select a third; appeal to district court	Special court consisting of the chief justice of the supreme court and four judges of the district court that the supreme court selects; no appeal	Special court consisting of the chief justice of the supreme court and four judges of the district court that the supreme court selects; no appeal
Kansas <sup>431</sup>	Supreme court appoints three-judge court; appeal directly to the supreme court	Legislature (respective house); courts serve role as finders of fact	Statewide election: District Court for Shawnee County  Less than statewide: district court of the county in which the person whose election is contested resides; appeal to the supreme court for either	Contests for congressional elections prohibited	Supreme court appoints three-judge court; appeal directly to supreme court

430. IOWA CONST. art. III, § 7 (state legislature); IOWA CODE ANN. §§ 58.1–.7 (West 2012) (governor and appeals); §§ 59.1–.7 (state legislature); §§ 61.1, .12 (statewide judges and appeals); §§ 62.1A, .20 (county judges and appeals); §§ 60.1, .6 (congressional elections, presidential electors, and appeals).

431. KAN. CONST. art. II, § 8 (state legislature); KAN. STAT. ANN. § 25-1443 (2000) (governor); § 25-1451 (state legislature); § 25-1437 (state judge and presidential electors); § 25-1435 (congressional election).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Kentucky <sup>432</sup>	Board of eleven state legislators refers findings to a full joint session of the legislature; no appeal	Legislature (respective house)	Statewide office: Franklin Circuit Court; appeal to the court of appeals  Less than statewide office: Circuit court in the county where the contestee resides; appeal to the court of appeals	Statute seemingly excludes federal elections by implication (statute refers only to “state, county, district or city office”)	Statute seemingly excludes federal elections by implication (statute refers only to “state, county, district or city office”)
Louisiana <sup>433</sup>	Trial court; appeal to the court of appeals sitting en banc	Legislature (respective house)	Trial court hears all contests for judicial offices	Impliedly authorized in trial court with appeal to court of appeals sitting en banc (statute applies to “an office”)	Impliedly authorized in trial court with appeal to court of appeals sitting en banc (statute applies to “an office”)
Maine <sup>434</sup>	State supreme court hears contests for “all elections”; no appeal	Legislature (respective house)	No judicial elections	State supreme court hears contests for “all elections”; no appeal	State supreme court hears contests for “all elections”; no appeal

432. KY. CONST. § 38 (state legislature); KY. REV. STAT. ANN. § 120.155 (LexisNexis 2004) (state judge, congressional election, and presidential electors); § 120.175 (appeals); § 120.205 (governor); § 120.215 (state legislature).

433. LA. CONST. art. III, § 7 (state legislature); LA. REV. STAT. ANN. §§ 18:1401–15 (2012) (other offices).

434. ME. CONST. art. IV, pt. 3, § 3 (state legislature); ME. REV. STAT. ANN. tit. 4, §§ 1–3, 157 (2008 and Supp. 2011) (appointed judiciary); *id.* tit. 21-A, § 737-A(10) (all elections except state legislature).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Maryland <sup>435</sup>	Joint session of the legislature; no appeal	Legislature (respective house)	Trial court or, upon the request of a party or sua sponte, a three-judge panel of circuit court judges assigned by the chief administrative judge for the circuit; appeal to the court of appeals (statute applies to "an election")	Trial court or, upon the request of a party or sua sponte, a three-judge panel of circuit court judges assigned by the chief administrative judge for the circuit; appeal to the court of appeals (statute applies to "an election")	Trial court or, upon the request of a party or sua sponte, a three-judge panel of circuit court judges assigned by the chief administrative judge for the circuit; appeal to the court of appeals (statute applies to "an election")
Massachusetts <sup>436</sup>	Inquest in district court; superior court then has jurisdiction; appeal directly to the supreme court (statute applies to "elections")	Legislature (respective house)	No judicial elections	Inquest in district court; superior court then has jurisdiction; appeal directly to the supreme court (statute applies to "elections")	Inquest in district court; superior court then has jurisdiction; appeal directly to the supreme court (statute applies to "elections")

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435. MD. CONST. art. III, § 19 (state legislature); MD. CONST. art. II, § 4 (governor); MD. CODE ANN., ELEC. LAW § 12-203 (LexisNexis 2010) (state judge, congressional election, and presidential electors).

436. MASS. CONST. pt. 2, ch. 1, § 3, art. X, (house); MASS. CONST. pt. 2, ch. 1, § 2, art. IV (senate); MASS. CONST. pt. 2, ch. 2, § 1, art. IX (appointed judiciary); MASS. GEN. LAWS ch. 55, § 35 (LexisNexis 2001) (inquest); ch. 56, § 59 (superior court and supreme court jurisdiction).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Michigan <sup>437</sup>	Quo warranto	Legislature (respective house)	Quo warranto	Quo warranto	Quo warranto
Minnesota <sup>438</sup>	File in Ramsey County; chief justice of the supreme court appoints three- judge court; appeal directly to the supreme court	Trial court makes initial decision, with appeal allowed to the Minnesota Supreme Court; the decision is sent to legislature for a legislative hearing (in respective house)	Supreme court and court of appeals: chief justice of the supreme court appoints three- judge court; appeal directly to the supreme court  District court: district court in the county where the contestee resides; appeal to the court of appeals	Senate: chief justice of the supreme court appoints three- judge court; appeal directly to the supreme court  House: district court in which contestee resides; appeal to the court of appeals	File in Ramsey County; chief justice of the supreme court appoints three- judge court; appeal directly to the supreme court
Mississippi <sup>439</sup>	House of representatives alone decides; no appeal	Legislature (respective house)	Circuit court; appeal not specified (statute applies to “any office in any county”)	Circuit court; appeal not specified (statute applies to “any office in any county”)	Circuit court; appeal not specified (statute applies to “any office in any county”)

437. MICH. CONST. art. 4, § 16 (state legislature); MICH. COMP. LAWS ANN. § 600.4501 (West 1996) (quo warranto).

438. MINN. CONST. art. IV, § 6 (state legislature); MINN. STAT. § 209.021 (West 2009) (venue for statewide offices, including governor and presidential electors); § 209.045 (appointment of three-judge court for contests over statewide elections); § 209.12 (congressional elections); § 209.10 (appeals from three-judge court for statewide contests); § 209.09 (appeals from district court for local contests).

439. MISS. CONST. art. III, § 140 (governor); MISS. CONST. art. IV, § 38 (state legislature); MISS. CODE ANN. § 23-15-955 (West 2003) (state legislature); § 23-15-951 (state judge, congressional election, and presidential electors).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Missouri <sup>440</sup>	Supreme court; court can appoint commissioner to take testimony	Legislature (respective house)	Retention elections for circuit and appellate courts: supreme court  Elections for circuit or associate circuit judge: circuit court; appeal allowed as in regular civil case  Court can appoint commissioner to take testimony for either	Circuit court of any circuit in which any or all of the election was held; appeal as in other civil cases (statute applies to any offices not specifically mentioned)	Supreme court; court can appoint commissioner to take testimony

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440. MO. CONST. art. III, § 18 (state legislature); MO. ANN. STAT. § 115.555 (West 2006) (governor); § 115.563 (state legislature); §§ 115.555, .561, .575(1) (state judge); §§ 115.575(2), .597 (congressional election); §§ 115.555, .561 (presidential electors).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Montana <sup>441</sup>	District court of the county in which the certificate, declaration, or acceptance of the person's nomination is filed or in which the incumbent resides; appeal not specified (statute applies to "any person" for "any nomination or election")	Legislature (respective house)	District court of the county in which the certificate, declaration, or acceptance of the person's nomination is filed or in which the incumbent resides; appeal not specified (statute applies to "any person" for "any nomination or election")	District court of the county in which the certificate, declaration, or acceptance of the person's nomination is filed or in which the incumbent resides; appeal not specified (statute applies to "any person" for "any nomination or election")	District court of the county in which the certificate, declaration, or acceptance of the person's nomination is filed or in which the incumbent resides; appeal not specified (statute applies to "any person" for "any nomination or election")
Nebraska <sup>442</sup>	Trial court (Lancaster County); appeal as in other civil cases	Legislature (respective house)	Not included in the list of contestable offices	Not included in the list of contestable offices	Not included in the list of contestable offices
Nevada <sup>443</sup>	Joint session of the legislature; no appeal	Legislature (respective house)	Supreme court justice: joint session of the legislature, with no possibility of appeal  Lower court justice: trial court	Contests for congressional elections prohibited	Trial court (venue unspecified); appeal unclear (statute applies to "any election" besides those specified)

441. MONT. CONST. art. V, § 10 (state legislature); MONT. CODE ANN. §§ 13-36-101 to -103 (2011) ("any . . . election").

442. NEB. CONST. art. III, § 10 (state legislature); NEB. REV. STAT. ANN. § 32-1102 (LexisNexis 2008) (governor); § 32-1117 (appeals).

443. NEV. CONST. art. IV, § 6 (state legislature); NEV. REV. STAT. ANN. § 293.407 (LexisNexis 2008) (congressional election and presidential electors); §§ 293.425, .427 (state legislature); § 293.430 (governor and justice of the supreme court).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
New Hampshire <sup>444</sup>	Five-member ballot law commission: New Hampshire Speaker of the House and President of the Senate each select two members (one from each major party), and the governor selects the last person, who must be qualified in election procedure; appeal to the supreme court, but issues of fact are “final if supported by the requisite evidence”	Five-member ballot law commission: New Hampshire Speaker of the House and President of the Senate each select two members (one from each major party), and the governor selects the last person, who must be qualified in election procedure; legislature (respective house) makes final decision	No judicial elections	Five-member ballot law commission: New Hampshire Speaker of the House and President of the Senate each select two members (one from each major party), and the governor selects the last person, who must be qualified in election procedure; no appeal allowed	Five-member ballot law commission: New Hampshire Speaker of the House and President of the Senate each select two members (one from each major party), and the governor selects the last person, who must be qualified in election procedure; appeal to the supreme court, but issues of fact are “final if supported by the requisite evidence”

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444. N.H. CONST. pt. II, arts. 22, 35 (state legislature); N.H. CONST. pt. II, art. 46 (appointed judiciary); N.H. REV. STAT. ANN. § 665:1(I) (2008) (governor, congressional election, and presidential electors); § 665:16 (2008) (appeals); § 665:8(II) (state legislature).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
New Jersey <sup>445</sup>	Judge of the superior court assigned by the chief justice of the supreme court; appeal to appellate division of superior court (statute applies to elections “voted for by the voters of the entire State or more than 1 county thereof”)	Legislature (respective house)	No judicial elections	Judge of the superior court assigned by the chief justice of the supreme court; appeal to appellate division of superior court (statute applies to elections “voted for by the voters of the entire State or more than 1 county thereof”)	Judge of the superior court assigned by the chief justice of the supreme court; appeal to appellate division of superior court (statute applies to elections “voted for by the voters of the entire State or more than 1 county thereof”)
New Mexico <sup>446</sup>	District court where either of the parties resides; appeal to supreme court (statute applies to “an election”)	Legislature (respective house)	District court where either of the parties resides; appeal to supreme court (statute applies to “an election”)	District court where either of the parties resides; appeal to supreme court (statute applies to “an election”)	District court where either of the parties resides; appeal to supreme court (statute applies to “an election”)
New York <sup>447</sup>	Quo warranto	Legislature (respective house)	Quo warranto	Quo warranto	Quo warranto (presumably against the presidential elector)

445. N.J. CONST. art. 4, § 4, ¶ 2 (state legislature); N.J. CONST. art. 6, § 6, ¶ 1 (appointed judiciary); N.J. STAT. ANN. § 19:29–2 (West 1999) (governor, congressional election, and presidential electors).

446. N.M. CONST. art. IV, § 7 (state legislature); N.M. STAT. ANN. § 1-14-3 (West 2003) (“an election”); § 1-14-5 (appeals).

447. N.Y. CONST. art. III, § 9 (state legislature); N.Y. EXEC. LAW § 63-b (McKinney 2010) (quo warranto).



<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
North Carolina <sup>448</sup>	Joint session of the legislature; no appeal	Legislature (respective house)	County board of elections; appeal to the state board of elections; further appeal to Superior Court of Wake County (statute applies to “an election” besides state legislative elections and offices established by Article III of the state constitution)	County board of elections; appeal to the state board of elections; further appeal to Superior Court of Wake County (statute applies to “an election” besides state legislative elections and offices established by Article III of the state constitution)	County board of elections; appeal to the state board of elections; further appeal to Superior Court of Wake County (statute applies to “an election” besides state legislative elections and offices established by Article III of the state constitution)
North Dakota <sup>449</sup>	Trial court in county of contestee’s residence; appeal directly to the supreme court (statute applies to “an election”)	Trial court in county of contestee’s residence; appeal directly to the supreme court; statute specifically prohibits resolution of contest in the respective house	Trial court in county of contestee’s residence; appeal directly to the supreme court (statute applies to “an election”)	Trial court in county of contestee’s residence; appeal directly to the supreme court (statute applies to “an election”)	Trial court in county of contestee’s residence; appeal directly to the supreme court (statute applies to “an election”) (presumably the “contestee” is the presidential elector)

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448. N.C. CONST. art. II, § 20 (state legislature); N.C. GEN. STAT. ANN. § 163-182.13A (West 2007) (governor and state legislature); §§ 163-182.10-.11, .14(b) (state judge, congressional election, and presidential electors).

449. N.D. CENT. CODE § 16.1-16-04 (2009) (“an election”); § 16.1-16-09 (appeals); § 16.1-16-10 (legislative contests determined by courts and not by either house of the legislative assembly).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Ohio <sup>450</sup>	Chief justice of supreme court or other supreme court justice assigned by chief justice (statute applies to “an office” voted on by “entire state”)	Court of Common Pleas conducts an inquiry and forwards “all testimony and all evidence adduced” to the legislature (respective house) for determination	Supreme court justice: chief justice of supreme court or other supreme court justice assigned by chief justice  Chief justice: governor selects supreme court justice  Lower court judges: court of appeals decides, with appeal to the supreme court	Contests for congressional elections expressly prohibited	Contests for presidential electors expressly prohibited

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450. OHIO CONST. art. II, § 6 (state legislature); OHIO REV. CODE ANN. § 3515.08(B) (LexisNexis 2012) (statewide offices); § 3515.14 (state legislative positions); § 3515.08(B) (supreme court, court of appeals, and chief justice); § 3515.08(C) (other judicial elections); § 3515.15 (appeal to supreme court); § 3515.08(A) (all federal positions).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Oklahoma <sup>451</sup>	Contest alleging fraud or irregularity may be filed with the state election board, and the case is heard by the district court judge of the county where the alleged fraud or irregularity occurred, or if the fraud or irregularity occurred in more than one county, another judge the supreme court designates; no provision for appeal (statute applies to “an election”)	Legislature (respective house)	Contest alleging fraud or irregularity may be filed with the state election board, and the case is heard by the district court judge of the county where the alleged fraud or irregularity occurred, or if the fraud or irregularity occurred in more than one county, another judge the supreme court designates; no provision for appeal (statute applies to “an election”)	Contest alleging fraud or irregularity may be filed with the state election board, and the case is heard by the district court judge of the county where the alleged fraud or irregularity occurred, or if the fraud or irregularity occurred in more than one county, another judge the supreme court designates; no provision for appeal (statute applies to “an election”)	Contest alleging fraud or irregularity may be filed with the state election board, and the case is heard by the district court judge of the county where the alleged fraud or irregularity occurred, or if the fraud or irregularity occurred in more than one county, another judge the supreme court designates; no provision for appeal (statute applies to “an election”)

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451. OKLA. CONST. art. V, § 6 (state legislature); OKLA. STAT. ANN. tit. 26, § 8-109 (West 1997) (“Time for filing contest—Contests alleging irregularities or fraud”); § 8-118 (“Election contested due to fraud or other irregularity”); § 8-119 (“Petition alleging fraud—Procedure”); § 8-120 (“Petition alleging irregularities—Procedure”); § 8-121.1 (“Hearings on petitions alleging irregularities or fraud involving two or more counties”); § 8-122 (“Determination of successful party impossible—Procedure—Governor to call special election”).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Oregon <sup>452</sup>	Circuit Court for Marion County; appeal to the court of appeals as in other civil cases	Legislature (respective house); but a statute also gives jurisdiction to a circuit court; see footnote 30	Supreme court justices and court of appeals judges: Circuit Court for Marion County  Circuit court judges: trial court  Appeal to the court of appeals as in other civil cases	Circuit Court for Marion County; appeal to the court of appeals as in other civil cases	Circuit Court for Marion County court; appeal to the court of appeals as in other civil cases
Pennsylvania <sup>453</sup>	Special legislative committee	Trial court makes initial determination; appeal to the legislature for final resolution	Supreme court justices: two-judge court  Lower court judges: three-judge court	Senate: two-judge court of “president judges” of the court of common pleas  House: court of common pleas of the county in which the winner resides	Special court with the “two nearest president judges”

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452. OR. CONST. art. IV § 11 (state legislature); OR. REV. STAT. § 258.036 (2011) (governor, state judge, congressional election, and presidential electors); § 258.085 (appeals).

453. PA. CONST. art. II, § 9 (state legislature); 25 PA. CONS. STAT. ANN. § 3312 (West 2007) (governor); §§ 3401, 3407 (state legislature); §§ 3351, 3376–77 (state judges); §§ 3401, 3405 (congressional election); § 3351 (presidential electors).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Rhode Island <sup>454</sup>	State board of elections; review only by discretionary writ of certiorari to Rhode Island Supreme Court under R.I. Supreme Court case law (statute applies to “an election”)	Legislature (respective house)	No judicial elections	State board of elections; review only by discretionary writ of certiorari to Rhode Island Supreme Court under R.I. Supreme Court case law (statute applies to “an election”)	State board of elections; review only by discretionary writ of certiorari to Rhode Island Supreme Court under R.I. Supreme Court case law (statute applies to “an election”)
South Carolina <sup>455</sup>	Board of state canvassers; appeal to supreme court on writ of certiorari (statute applies to elections for “federal officers, state officers, members of the State Senate and the State House of Representatives, and offices involving more than one county”)	Board of state canvassers; legislature (respective house) makes final decision	No judicial elections	Board of state canvassers; appeal to supreme court on writ of certiorari (statute applies to elections for “federal officers, state officers, members of the State Senate and the State House of Representatives, and offices involving more than one county”)	Board of state canvassers; appeal to supreme court on writ of certiorari (statute applies to elections for “federal officers, state officers, members of the State Senate and the State House of Representatives, and offices involving more than one county”)

454. R.I. CONST. art. VI, § 6 (state legislature); R.I. GEN. LAWS § 17-7-5(a)(11) (2003) (state board of elections); *Van Daam v. DiPrete*, 560 A.2d 953, 954 (R.I. 1989) (holding that the decision of the board of elections is “final and subject to review only by a petition for certiorari filed in this court”).

455. S.C. CONST. art. III, § 11 (state legislature); S.C. CONST. art. V §§ 3, 8, 13 (judiciary appointed by general assembly); S.C. CODE ANN. § 7-17-260 (Supp. 2011) (governor, state legislature, congressional election, and presidential electors); § 7-17-270 (appeals).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
South Dakota <sup>456</sup>	Supreme court (statute applies to “state offices or judicial officers in the Supreme Court”)	Legislature (respective house)	Supreme court justices: supreme court (statute applies to “state offices or judicial officers in the Supreme Court”)  Lower court judges: circuit court of a county which includes the locality where the election or some part thereof was conducted; appeal as in other civil cases	Circuit court of a county which includes the locality where the election or some part thereof was conducted; appeal as in other civil cases (statute applies to “all other contests” that do not go straight to supreme court)	Circuit court of a county which includes the locality where the election or some part thereof was conducted; appeal as in other civil cases (statute applies to “all other contests” that do not go straight to supreme court)
Tennessee <sup>457</sup>	Joint session of the legislature; twelve member “Committee on the Governor’s Election” comprised of 7 house members and 5 senate members takes evidence and hears objections; no appeal	Legislature (respective house)	Supreme court justice: not specified  Chancellor elections: chancellor assigned by the chief justice of the supreme court	Chancery court where the contestee resides; no provision for appeal (statute applies to “election contests” other than those expressly provided for in the statute)	Presidential electors tribunal composed of the governor, secretary of state, and the attorney general; no appeal

456. S.D. CONST. art. III, § 9 (state legislature); S.D. CODIFIED LAWS § 12-22-7 (2004) (governor and supreme court justices); § 12-22-7(2) (state judges, congressional election, and presidential electors); § 12-22-25 (right to appeal contests involving state judges, congressional election, and presidential electors).

457. TENN. CONST. art. II, § 11 (state legislature); TENN. CODE ANN. §§ 2-18-101, -106, -109, -116 (2003) (governor and appeals); § 2-17-102 (state legislature); § 2-17-101

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Texas <sup>458</sup>	Joint session of the legislature; no appeal	Legislature (respective house)	Statewide office: Travis County District Court  Less than statewide: Either the county where the contestee resides if it is within the territory covered by the election, or any county wholly or partly covered if no contestee resides in the county; appeal as in other civil cases	Contests for congressional elections prohibited	Governor has exclusive jurisdiction
Utah <sup>459</sup>	District court of the county in which the complaining voter resides; appeal as in other civil cases (statute applies to "election or nomination of any person to any public office")	Legislature (respective house)	District court of the county in which the complaining voter resides; appeal as in other civil cases (statute applies to "election or nomination of any person to any public office")	District court of the county in which the complaining voter resides; appeal as in other civil cases (statute applies to "election or nomination of any person to any public office")	District court of the county in which the complaining voter resides; appeal as in other civil cases (statute applies to "election or nomination of any person to any public office")

(chancellors and congressional elections); § 2-17-103 (presidential electors).

458. TEX. CONST. art. III, § 8 (state legislature); TEX. ELEC. CODE ANN. § 221.001 (West 2010) (congressional election); § 221.002(b) (governor); § 221.002(c)–(d) (state legislature); § 221.002(e) (presidential electors); § 221.002(f) (appeals); § 231.004 (disqualification of district court judge); § 232.006 (venue).

459. UTAH CONST. art. VI, § 10 (state legislature); UTAH CODE ANN. §§ 20A-4-402 to -403 (LexisNexis 2010) (governor, state judge, congressional election, and presidential electors); § 20A-4-406 (appeals).

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Vermont <sup>460</sup>	Superior Court for Washington County; appeal to court of appeals as in other civil cases (statute applies to “any office, other than for the general assembly”)	Legislature (respective house)	No judicial elections	Superior Court for Washington County; appeal to court of appeals as in other civil cases (statute applies to “any office, other than for the general assembly”)	Superior Court for Washington County; appeal to court of appeals as in other civil cases (statute applies to “any office, other than for the general assembly”)
Virginia <sup>461</sup>	Joint session of the legislature; no appeal	Legislature (respective house)	No judicial elections	No specific guidance  U.S. Senate primaries: decided in the Circuit Court in Richmond by a special court composed of the chief judge of the circuit court and two circuit judges from different circuits “not contiguous to the City of Richmond” who the chief justice of the Virginia Supreme Court appoints	Circuit Court in Richmond by a special court composed of the chief judge of the circuit court and two circuit judges from different circuits “not contiguous to the City of Richmond” who the chief justice of the Virginia Supreme Court appoints

460. VT. CONST. ch. II, §§ 14, 19 (state legislature); VT. CONST. ch. II, § 32 (providing that the governor shall fill judicial vacancies); VT. STAT. ANN. tit. 17, § 2603 (2002 & Supp. 2012) (“any office, other than for the general assembly”); §§ 2605–2606 (state legislature).

461. VA. CONST. art. IV, § 7 (state legislature); VA. CONST. art. VI, § 7 (judiciary appointed by General Assembly); VA. CODE ANN. § 24.2-804 (2011) (governor); §§ 24.2-805



<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Washington <sup>462</sup>	Any justice of the supreme court, judge of the court of appeals, or judge of the superior court has jurisdiction; possible appeal to the supreme court from a decision of the superior court; appeal from court of appeals if action initiated there unclear (statute applies to “any candidate,” “any election officer,” or “the election”)	Legislature (respective house)	Any justice of the supreme court, judge of the court of appeals, or judge of the superior court has jurisdiction; possible appeal to the supreme court from a decision of the superior court; appeal from court of appeals if action initiated there unclear (statute applies to “any candidate,” “any election officer,” or “the election”)	Any justice of the supreme court, judge of the court of appeals, or judge of the superior court has jurisdiction; possible appeal to the supreme court from a decision of the superior court; appeal from court of appeals if action initiated there unclear (statute applies to “any candidate,” “any election officer,” or “the election”)	Any justice of the supreme court, judge of the court of appeals, or judge of the superior court has jurisdiction; possible appeal to the supreme court from a decision of the superior court; appeal from court of appeals if action initiated there unclear (statute applies to “any candidate,” “any election officer,” or “the election”)
West Virginia <sup>463</sup>	Joint session of the legislature; no appeal	Legislature (respective house)	Special court consisting of one person the contestee selects, a second person the contestant chooses, and a third the governor appoints; appeal to the supreme court	Not included in the list of contestable offices	Not included in the list of contestable offices

to -806 (congressional election and presidential electors).

462. WASH. CONST. art. III, § 4 (executive offices); WASH. CONST. art. II, § 8 (state legislature); WASH. REV. CODE ANN. § 29A.68.011 (West 2005); § 29A.68.120 (describing the appeal period from the superior court); *In re* Coday, 130 P.3d 809, 817 (Wash. 2006) (finding that, even though Washington’s Constitution confers power over election contests involving governor and other executive officers to the state legislature, § 29A.68 confers jurisdiction to the courts).

463. W. VA. CONST. art. VI, § 24 (state legislature); W. VA. CODE ANN. § 3-7-2 (LexisNexis 2011) (governor); § 3-7-4 (state legislature); § 3-7-3 (state judge); §§ 3-7-1 to -9

<u>State</u>	<u>Governor/ Lt. Governor</u>	<u>State Legislature</u>	<u>State Judge</u>	<u>Congressional Election</u>	<u>Presidential Electors</u>
Wisconsin <sup>464</sup>	Trial court; if election is in only one appellate district, appeal is to the court of appeals; if election spans more than one appellate district, appeal is to the 4th District Court of Appeals; further review to supreme court unclear (statute applies to “any election”)	Legislature (respective house)	Trial court; if election is in only one appellate district, appeal is to the court of appeals; if election spans more than one appellate district, appeal is to the 4th District Court of Appeals; further review to supreme court unclear (statute applies to “any election”)	Trial court; if election is in only one appellate district, appeal is to the court of appeals; if election spans more than one appellate district, appeal is to the 4th District Court of Appeals; further review to supreme court unclear (statute applies to “any election”)	Trial court; if election is in only one appellate district, appeal is to the court of appeals; if election spans more than one appellate district, appeal is to the 4th District Court of Appeals; further review to supreme court unclear (statute applies to “any election”)
Wyoming <sup>465</sup>	Trial court; no guidance for appeal process (statute applies to “an office” besides those specifically mentioned)	Legislature (respective house)	Trial court; no guidance for appeal process (statute applies to “an office” besides those specifically mentioned)	Trial court; no guidance for appeal process (statute applies to “an office” besides those specifically mentioned)	Legislature; no appeal

(congressional election and election of presidential electors not included in the list of contestable elections).

464. WIS. CONST. art. IV, § 7 (state legislature); WIS. STAT. ANN. §§ 9.01 (West 2004 & Supp. 2012) (“any election”); § 13.23 (state legislature).

465. WYO. CONST. art. III, § 10 (state legislature); WYO. STAT. ANN. § 22-17-102 (2011) (governor, state judge, and congressional election); § 22-17-114 (presidential electors).