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Texas Statute Conferring Jurisdiction on District Courts over Election Contests Is Inapplicable to Contests of Congressional Election.

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the illegal activity.[61] The *Rumfolo* court effectively continued this policy which further indicates that the foundation of the court's rationale lay in punishing gamblers rather than protecting the public from gamblers. While the burden imposed on the state by the court does not provide the full panoply of criminal proceedings, it does assist in safeguarding the claimant's property rights from the punitive effects of in rem proceedings.

By construing article 18.18 of the Texas Code of Criminal Procedure to require the state to prove the proceeds were used in gambling and then to trace it to the respondents, the Texas Supreme Court compels the state to establish a civil case against the property before the money may be lawfully confiscated. Although some consideration may have been given to the punitive effects of in rem forfeitures, the principle of *stare decisis* seems to have been the guiding force in reaching the decision. The court did not avail itself of the opportunity to take a fresh look at the constitutionality of taking private property by means of statutory forfeitures. Instead, the court reaffirmed the policy of punishment for those engaged in illegal activities, and did not reach the issue that forfeiture proceedings conducted in lieu of criminal prosecution might violate due process.[62]

Curtis Vaughan, III

CONSTITUTIONAL LAW—Election Contests—Texas Statute Conferring Jurisdiction on District Courts over Election Contests is Inapplicable to Contests of Congressional Elections

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

Robert Gammage defeated Ron Paul in the November 2, 1976 election for United States Representative for the Twenty-Second Congressional District of Texas. Pursuant to his request the state granted Paul a recount, which was conducted in accordance with the provisions of the Texas Elec-

61. Schwarting v. State, 505 S.W.2d 399, 402 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); Demaris v. State, 367 S.W.2d 909, 911 (Tex. Civ. App.—Beaumont 1963, no writ); Jones v. Pettigrew, 328 S.W.2d 450, 451 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.); *see* Hightower v. Larimore, 156 Tex. 267, 268-69, 295 S.W.2d 654, 655 (1956) (per curiam).

62. The Supreme Court has indicated the "broad sweep" of statutory forfeitures could, in some unnamed circumstances, "give rise to serious constitutional questions." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 688-89 (1974).

tion Code.[1] Gammage was then certified by the Governor of the State of Texas as the winner of the election. Alleging election fraud and irregularity,[2] Paul filed notices of contest in state district court under the Texas Election Code[3] and with the United States House of Representatives under the Contested Elections Act.[4] After Gammage was sworn in as a member of the United States House of Representatives, he filed a motion to dismiss Paul's suit in the state court contesting the election. The motion was denied. On February 9, 1977, however, the Texas Supreme Court granted Gammage leave to file his petition for writ of mandamus to order a dismissal of the suit. Held—*Writ granted.* Article 9.01 of the Texas Election Code, which provides that the district court shall have original and exclusive jurisdiction of election contests, including elections for "federal offices," is inapplicable to contests of elections of members of the United States Congress.[5] Any attempt to apply the statute to a congressional election would violate the United States Constitution.[6]

At common law no right existed to contest any public election in any court;[7] the only remedy was in the nature of a quo warranto or information.[8] Texas courts originally had no jurisdiction over election contests because of their political or extrajudicial nature,[9] but in 1891 the Texas

1. TEX. ELECTION CODE ANN. art. 7.15, subd. 23 (Supp. 1976-1977). The recount was conducted under the general observation of inspectors from the Office of the Texas Secretary of State and counsel from the Privileges and Elections Subcommittee of the United States House of Representatives. The recount revealed Gammage to be the winner by 268 votes. Gammage v. Compton, 548 S.W.2d 1, 2 (Tex. 1977).

2. *See* Gammage v. Compton, 548 S.W.2d 1, 6 (Tex. 1977) (dissenting opinion). The contestant Paul alleged that he had knowledge of at least 500 persons who illegally voted for his opponent in the election, of over 300 ballots that were miscounted, and of at least 300 persons who supposedly voted but either were not residents of the state or were not physically present within the state on election day. He alleged that in Harris County, 149 more votes were counted than there were persons voting. He complained of irregularity in the counting of absentee ballots, alleging that the election judge who initially counted these ballots was a paid employee of his opponent.

3. TEX. ELECTION CODE ANN. art. 9.03 (1967). This article provides in part:

> Any person intending to contest the election of anyone holding a certificate of election for any office mentioned in this law, shall, within thirty (30) days after the return day of election, give him a notice thereof in writing and deliver to him, his agent or attorney, a written statement of the ground on which such contestant relies to sustain such contest.

4. Federal Contested Elections Act of 1969, 2 U.S.C. § 382 (1970).

5. Gammage v. Compton, 548 S.W.2d 1, 5 (Tex. 1977).

6. *Id.* at 5.

7. McCall v. City of Tombstone, 185 P. 942, 943 (Ariz. 1919) (election contest held to be special proceeding, being neither action in law nor suit in equity); Johnson v. Du Bois, 294 N.W. 839, 840 (Minn. 1940) (election contest held to be purely statutory).

8. Johnson v. Stevenson, 170 F.2d 108, 110 (5th Cir. 1948), *cert. denied,* 336 U.S. 904 (1949).

9. *E.g., Ex parte* Towles, 48 Tex. 413, 437 (1878); Wright v. Fawcett, 42 Tex. 203, 206 (1875); Rogers v. Johns, 42 Tex. 339, 340 (1875).

Constitution was amended to give state district courts jurisdiction to adjudicate these contests.[10] Pursuant to that constitutional amendment, the Texas Legislature enacted a comprehensive election code which now provides that district courts in Texas have exclusive jurisdiction over congressional election contests.[11] Article 9.01 of the Texas Election Code expressly gives Texas courts jurisdiction over an election contest for "federal offices,"[12] thereby raising the possibility of a conflict with the election provisions of the United States Constitution.[13] The validity of this article can best be determined against the backdrop of an evolving national trend to deny any judicial relief to the contestant in a congressional election.[14]

Both state and federal courts have held repeatedly that judicial decisions concerning the validity of a congressional election and the determination as to whether a candidate is entitled to be seated in either the Senate or the House of Representatives would violate article I, section 5 of the United States Constitution.[15] This Constitutional provision states that, "[e]ach House shall be the Judge of the Elections, Returns, and Qualifications of its own Members."[16] Expounding on the meaning of section 5 of article I of the Constitution, the Supreme Court in *Barry v. United States ex rel. Cunningham*[17] concluded that the separate houses of Congress

10. TEX. CONST. art. V, § 8. This provision, as amended, vests the district courts with original jurisdiction over certain enumerated suits, including election contests, regardless of the amount in controversy.

11. TEX. ELECTION CODE ANN. art. 9.01 (1967) provides:

> The district court shall have original and exclusive jurisdiction of all contests of elections, general or special, for all school, municipal, precinct, county, district, state offices, or federal offices, except elections for the offices of Governor, Lieutenant Governor, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, Attorney General, and Members of the Legislature.

12. *Id.*

13. *See* Gammage v. Compton, 548 S.W.2d 1, 2-3 (Tex. 1977). U.S. CONST. art. I, § 5, cl. 1 provides for the determination of election contests in Congress.

14. *See, e.g.,* Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 619 (1929) (United States Senate held to have sole authority to judge elections of its members); Keogh v. Horner, 8 F. Supp. 933, 935 (S.D. Ill. 1934) (federal district court held to have no authority to judge manner in which candidates in congressional election were elected); Rogers v. Barnes, 474 P.2d 610, 612 (Colo. 1970) (en banc) (state supreme court held to have no jurisdiction over contest involving primary election for party nomination to United States House of Representatives); Laxalt v. Cannon, 397 P.2d 466, 467 (Nev. 1964) (United States Senate held to have exclusive jurisdiction over election contest for Senate seat).

15. *See, e.g.,* Roudebush v. Hartke, 405 U.S. 15, 18-19 (1972); Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 619 n.14 (1929); Manion v. Holzman, 379 F.2d 843, 845 (7th Cir. 1967); Rogers v. Barnes, 474 P.2d 610, 612 (Colo. 1970) (en banc); Burchell v. State Bd. of Election Comm'rs, 68 S.W.2d 427, 429 (Ky. 1934). *Contra,* Durkin v. Snow, 403 F. Supp. 18, 20 (D.N.H. 1974). When the question involved in the suit is "to which of the candidates the congressional office belongs," the courts are divested of their jurisdiction. Roudebush v. Hartke, 405 U.S. 15, 18-19 (1972).

16. U.S. CONST. art. I, § 5, cl. 1.

17. 279 U.S. 597 (1929). The conflict in *Barry* arose from an election contest proceeding

should assume judicial roles when determining the results of an election or the qualifications of their members.[18] The Court enumerated the powers granted to Congress by article I, section 5, specifically including the power "to render a judgment which is beyond the authority of any other tribunal to review."[19] A significant aspect of the Supreme Court's decision in *Barry* was the determination that the Senate has "sole authority" over the election contests of its members.[20] The "sole authority" concept has been interpreted as a rejection of the argument that a congressional election contest in state court is permissible if it does not interfere in any way with a final congressional determination of the contest.[21] Application of this theory has precluded concurrent jurisdiction of state courts and the Congress over such contests.[22]

State courts generally have based their refusal to grant relief in congressional election contests on one of three major grounds.[23] The most prevalent reason for such refusal has been the lack of a state statute expressly providing for such a contest.[24] Although the majority of states have enacted statutes that provide for election contest proceedings in many of their elections,[25] few have included a provision for contesting a congressional election.[26]

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being conducted by the Senate to determine the validity of the election of a United States Senator from Pennsylvania. In the course of the hearing, the Senate appointed a special committee to investigate campaign contributions. Cunningham, a witness who was called to testify by the Senate committee, admitted that he had contributed $50,000 to the campaign but refused to give any information concerning the sources of the money. The Senate passed a resolution instructing the President to issue a warrant for the arrest of this witness. Upon execution of the warrant, Cunningham brought a habeas corpus proceeding in federal district court. The question before the Supreme Court was whether the Senate had the power to punish a recalcitrant witness for contempt. *Id.* at 609-11.

18. *Id.* at 616.

19. *Id.* at 613. The Supreme Court described the other powers granted to Congress by article I, section 5, including the power to examine witnesses, determine the relevant facts, and apply the appropriate rules of law. *Id.* at 613.

20. *Id.* at 619.

21. *See* Burchell v. State Bd. of Election Comm'rs, 68 S.W.2d 427, 429 (Ky. 1934); Laxalt v. Cannon, 397 P.2d 466, 467 (Nev. 1964).

22. Odegard v. Olson, 119 N.W.2d 717, 720 (Minn. 1963); Laxalt v. Cannon, 397 P.2d 466, 467 (Nev. 1964).

23. Comment, *Congressional Election Contests and Recount Proceedings: A Critical Difference*, 72 DICK. L. REV. 433, 433-34 (1968).

24. *See, e.g.*, Odegard v. Olson, 119 N.W.2d 717, 720 (Minn. 1963) (state election contest statute does not include contest for congressional office); *In re* Youngdale, 44 N.W.2d 459, 462 (Minn. 1950) (courts have no jurisdiction over election contests absent statutory authorization); Wyman v. Durkin, 330 A.2d 778, 780 (N.H. 1975) (state statute specifically excluded contests of elections for congressional offices).

25. Comment, *Congressional Election Contests and Recount Proceedings: A Critical Difference*, 72 DICK. L. REV. 433, 435 (1968). *See, e.g.*, CAL. ELECTION CODE § 20021 (Deering 1976); ILL. ANN. STAT. ch. 46, § 23-19 (Smith-Hurd 1965); PA. STAT. ANN. tit. 25, § 3291 (Purdon 1963).

26. Two states other than Texas which have statutes expressly allowing a judicial contest

The second ground for denying relief has been that any judicial interference in a congressional election contest would violate article I, section 5 of the Constitution.[27] Persons who have filed contest proceedings in state courts have attempted to repudiate this particular objection, arguing that the article I, section 5 powers granted to Congress are not sufficiently broad to divest the individual states of control over elections held in their state.[28]

The third basis for the state courts' refusal to grant relief in a congressional election contest has been the proposition that such a determination would amount merely to an advisory opinion.[29] Such opinions have been held to be of no consequence in light of the congressional power of final determination of an election contest.[30]

In *Gammage v. Compton*[31] the Texas Supreme Court held that the Texas courts have no jurisdiction over congressional election contests.[32] In so deciding, it rendered inapplicable to congressional election contests that portion of the Texas Election Code which gives district courts exclusive jurisdiction of election contests for all federal offices.[33] Although the Election Code does include "federal offices" among those elective offices which may be contested in the state's courts, the court concluded that the Texas Legislature did not intend for the term "federal offices" to apply to members of Congress.[34] The court reasoned that under any other construction,

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in a congressional election are Connecticut and Georgia. *See* CONN. GEN. STAT. ANN. § 9-323 (West 1967); GA. CODE ANN. § 34-1702 (1970).

27. *See, e.g.*, Manion v. Holzman, 379 F.2d 843, 845 (7th Cir. 1967); McLeod v. Kelly, 7 N.W.2d 240, 242 (Mich. 1942); State *ex rel* 25 Voters v. Selvig, 212 N.W. 604, 604 (Minn. 1927).

28. *See* Durkin v. Snow, 403 F. Supp. 18, 19 (D.N.H. 1974) (successful contest of congressional election in federal court); Laxalt v. Cannon, 397 P.2d 466, 467 (Nev. 1964) (contestant unsuccessful in attempt to contest congressional election in state court).

29. Odegard v. Olson, 119 N.W.2d 717, 720 (Minn. 1963) (court order in congressional election contest held to be gratuitous and of no force as bearing upon the merits of election contest pending in House of Representatives); State *ex rel* 25 Voters v. Selvig, 212 N.W. 604, 604 (Minn. 1927) (state court decision in contest of congressional election would be "officious and nugatory"); Laxalt v. Cannon, 397 P.2d 466, 467 (Nev. 1964) (state court has no power to make binding determination of congressional election contest).

30. State *ex rel* 25 Voters v. Selvig, 212 N.W. 604, 604 (Minn. 1927). The Texas Constitution restricts the jurisdiction of Texas courts to the exercise of judicial power, thus prohibiting advisory opinions. TEX. CONST. art. V, §§ 3, 6, 8; *see* Fireman's Ins. Co. v. Burch, 442 S.W.2d 331, 332-33 (Tex. 1968); Morrow v. Corbin, 122 Tex. 553, 562, 62 S.W.2d 641, 646 (1933).

31. 548 S.W.2d 1 (Tex. 1977).

32. *Id.* at 3.

33. *Id.* at 3.

34. *Id.* at 3. The court, in its attempt to determine the legislative intent behind the wording of article 9.01, traced the sequence of election contest statutes in Texas, showing that previous election contest statutes did not include the term "federal offices." *Id.* at 3. *Compare* Tex. Rev. Civ. Stat. art. 3049 (1911), *with* Tex. Rev. Civ. Stat. art. 3041 (1925). The term "federal offices" was first included in the election contest statute which was enacted in 1951 as part of a revision of the Election Code. The court indicated that its inclusion was not a studied recommendation of the Revision Commission. Gammage v. Compton, 548 S.W.2d 1, 3 (Tex. 1977).

the code would conflict with article I, section 5 of the Constitution.[35] This decision by the Texas court invalidates article 9.14 of the Texas Election Code insofar as it applies to contests of congressional elections in state court.[36] The statute directs the trial judge, after hearing the contest provided for in article 9.01, to "decide to which of the contesting parties the office belongs."[37] This decision brought Texas directly in line with the majority of those jurisdictions which have considered the issue and have adopted the general rule that courts have no jurisdiction over the election of representatives to Congress.[38]

The Texas court expressly rejected the contestant Ron Paul's contention that a state court's jurisdiction over a congressional election contest is within the broad powers delegated to the states by article I, section 4 of the Constitution.[39] Paul relied exclusively upon the Supreme Court's decision in *Roudebush v. Hartke*[40] to support his proposition that the congressional election contest he sought was an integral part of the state's electoral process and thereby sanctioned by article I, section 4.[41]

In *Hartke* the Supreme Court rendered a landmark decision, holding that Indiana's recount procedures did not interfere with the Senate's ultimate authority to judge the elections, returns, and qualifications of its members.[42] Prior to this decision, a state recount of the ballots in a congres-

35. Gammage v. Compton, 548 S.W.2d 1, 3 (Tex. 1977); *accord,* Rogers v. Barnes, 474 P.2d 610, 613 (Colo. 1970) (en banc) (state statute purporting to vest courts with jurisdiction over contests arising out of primary for nomination to congressional seat held unconstitutional).

36. Gammage v. Compton, 548 S.W.2d 1, 4 (Tex. 1977). TEX. ELECTION CODE ANN. art. 9.14 (1967) provides:

> If any vote or votes are found upon the trial of any contested election to be illegal or fraudulent, the trial court shall subtract such vote or votes from the poll of the candidate who received the same, and after a full and fair investigation of the evidence shall decide to which of the contesting parties the office belongs.

37. TEX. ELECTION CODE ANN. art. 9.14 (1967). In Roudebush v. Hartke, 405 U.S. 15, 19 (1972) the Supreme Court said, "Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this court even before the Senate acted."

38. *See, e.g.,* Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 619 n.14 (1929); Rogers v. Barnes, 474 P.2d 610, 612 (Colo. 1970) (en banc); Odegard v. Olson, 119 N.W.2d 717, 720 (Minn. 1963). *Contra,* Durkin v. Snow, 403 F. Supp. 18, 20 (D.N.H. 1974) (state court contest proceedings do not usurp exclusive jurisdiction of the Senate).

39. U.S. CONST. art. I, § 4, cl. 1 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

40. 405 U.S. 15 (1972).

41. Gammage v. Compton, 548 S.W.2d 1, 3 (Tex. 1977).

42. Roudebush v. Hartke, 405 U.S. 15, 25 (1972). For a general discussion of the Constitutional questions raised by *Hartke* and an analysis of its impact on future congressional election contest cases, see Note, *State Control over the Recount Process in Congressional Elections,* 23 SYRACUSE L. REV. 139 (1972).

sional election contest had been determined by many state courts to be prohibited by article I, section 5 of the Constitution.[43] This restrictive interpretation was overruled in *Hartke* with the Court concluding that state recount procedures would be fully permissible as long as they did not impair or frustrate the Senate's ability to make an independent determination.[44] The Supreme Court determined that a state's right to conduct a recount of congressional election ballots is clearly within the broad powers granted to the states under article I, section 4, as those powers had been enumerated previously.[45]

Both the majority and the dissenting opinions in *Gammage* interpreted the *Hartke* rule, but applied it differently to support their opposing positions on the issue of state court jurisdiction over congressional election contests.[46] The majority effectively distinguished the facts in *Gammage* from those in *Hartke,* noting that *Hartke* dealt merely with the Indiana state recount procedure, while *Gammage* involved numerous allegations of election fraud and irregularity.[47] Indiana, unlike Texas, did not have a statute vesting its courts with exclusive jurisdiction over congressional election contests.[48] Furthermore, Hartke was conditionally seated by the Senate pending a recount, while Gammage had been unconditionally seated by the House of Representatives after completion of the electoral process, including a recount.[49] In light of these differences, the majority in *Gammage* took a narrow view of the rule in *Hartke,* leaving its application to the specific factual situation presented in that case.[50] The Supreme Court allowed a recount so long as it did not frustrate the Senate's ability to make an independent judgment, but the Texas court refused to extend this rule to an actual contest.[51]

While the majority opinion in *Gammage* represents a well-reasoned re-

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43. *See* State *ex rel.* Beaman v. Circuit Court, 96 N.E.2d 671, 672 (Ind. 1951); Dingeman v. Board of State Canvassers, 164 N.W. 492, 494 (Mich. 1917).

44. Roudebush v. Hartke, 405 U.S. 15, 25 (1972).

45. *Id.* at 25. The Court defined these powers in an earlier case, stating:

> These comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932).

46. Gammage v. Compton, 548 S.W.2d 1, 3-4, 7-8 (Tex. 1977).

47. *Id.* at 4.

48. *See id.* at 4.

49. *Id.* at 4. A state recount is an integral part of the state's electoral process. Roudebush v. Hartke, 405 U.S. 15, 25 (1972).

50. Gammage v. Compton, 548 S.W.2d 1, 3-4 (Tex. 1977).

51. *Id.* at 4.

fusal to extend the *Hartke* rule, the court's extensive treatment of that case misplaced reliance upon a particular facet of the *Hartke* decision. In a separate issue in *Hartke,* the Supreme Court formulated a "judicial inquiry" test for determining whether a federal court could enjoin a state court proceeding.[52] The Texas Supreme Court inferred that this test could be applied in determining whether any court has jurisdiction over an election contest.[53] While the court was free to make its own determination that the judicial inquiry necessitated by the contest divested the state court of its jurisdiction in the case, it was in error in citing *Hartke* as authority for such proposition.[54] The misinterpretation, nevertheless, is insignificant in view of the many factual distinctions between the two cases.

The dissenting justices in *Gammage* broadly applied the rule in *Hartke* to the facts in *Gammage,* suggesting that the state's article I, section 4 powers could be extended to include jurisdiction over congressional election contests.[55] They argued that an election contest in state court would be permissible so long as it did not interfere with a final determination of the contest by the House of Representatives.[56] While conceding that the Congress would have final authority to determine its membership, the dissenting opinion stated that the adjudication made by a state court might actually aid the House of Representatives in its inquiry.[57] The dissenting justices proposed that under the article 9.01 provision for congressional election contests, Congress and state courts could conduct parallel, but separate, proceedings.[58] Such jurisdiction necessary to conduct concur-

52. Roudebush v. Hartke, 405 U.S. 15, 21 (1972). 28 U.S.C. § 2283 (1970) prohibits federal courts from enjoining state court proceedings. The Court determined in *Hartke* that since a state court's duties in connection with a recount are purely administrative and require no "judicial inquiry," that the federal court had the power to enjoin the state court's administrative function. The judicial inquiry test used by the Court to resolve the jurisdictional issue in the case clearly had no application to the Constitutional question of whether article I, section 5 precludes state court jurisdiction over a congressional election contest.

53. *See* Gammage v. Compton, 548 S.W.2d 1, 4 (Tex. 1977).

54. In a similar case arising in Louisiana, the Louisiana Court of Appeals misapplied the judicial inquiry test to the Constitutional issue of jurisdiction over congressional election contests. The court cited *Hartke* as authority for the proposition that any controversy arising out of a congressional election may be settled by the state as long as it does not require a judicial inquiry. This decision was overruled by the Supreme Court of Louisiana in a memorandum opinion, thus providing no insight to the court's reasons for reversal. *See* LaCaze v. Johnson, 302 So. 2d 613 (La. 1974), *rev'g* 305 So. 2d 140 (La. Ct. App.)

55. Gammage v. Compton, 548 S.W.2d 1, 7-8 (Tex. 1977) (dissenting opinion).

56. *Id.* at 5 (dissenting opinion).

57. *Id.* at 12 (dissenting opinion). *Contra,* Roudebush v. Hartke, 405 U.S. 15, 32-33 (1972) (dissenting opinion). In his dissent in *Hartke,* Mr. Justice Douglas expressed his belief that state officials should not be allowed to recount the sealed ballots in a congressional election. He explained that when local investigators are free to recompute the results of an election it will be impossible to preserve the integrity of the evidence for the congressional determination.

58. Gammage v. Compton, 548 S.W.2d 1, 2 (Tex. 1977) (dissenting opinion).

rent proceedings, however, would appear to be precluded by article I, section 5 of the Constitution.[59]

The dissent's conclusion that the *Hartke* decision could be read to include congressional election contests within the broad powers delegated to the states under article I, section 4[60] seems to misinterpret the Supreme Court's rationale in *Hartke*. There is no express or implied authority in *Hartke* for the extension of the states' article I, section 4 powers to include congressional election contests.[61] In fact, the Supreme Court stated in *Hartke* that the issue of "which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question . . . ."[62] In its failure to recognize the numerous factual distinctions between *Hartke* and *Gammage*, the dissent erroneously attempted to apply the same rule of law to two factually dissimilar cases.

It is readily apparent that the Texas Supreme Court in *Gammage*, at the expense of holding unconstitutional its own election contest statute, capitalized on the opportunity to adopt the construction of article I, section 5 followed by the majority of state and federal courts. One evident difference, however, is that the majority of these jurisdictions, unlike Texas, have not had a statute expressly authorizing jurisdiction of the state courts over these election contests.[63] An examination of the opinions of other jurisdictions shows that although the majority of state and federal courts have denied judicial relief in congressional election contests, they have done so for differing reasons,[64] not always recognizing the unconstitutionality of a statute that attempts to vest in state courts either concurrent

59. *See* Roudebush v. Hartke, 405 U.S. 15, 19 (1972) (nonjusticiable political question—state courts have no jurisdiction over such matters); Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 619 n.14 (1929) (sole authority of Senate precludes concurrent jurisdiction of state courts and Congress over congressional election contests); Laxalt v. Cannon, 397 P.2d 466, 467 (Nev. 1964) (state court precluded from judging congressional election contests by Constitutional grant of judicial power to Senate).

60. *See* Gammage v. Compton, 548 S.W.2d 1, 7 (Tex. 1977) (dissenting opinion).

61. *See id.* at 3-4.

62. Roudebush v. Hartke, 405 U.S. 15, 19 (1972).

63. Comment, *Congressional Election Contests and Recount Proceedings: A Critical Difference*, 72 DICK. L. REV. 433, 435 (1968). Two states other than Texas which have statutes expressly allowing a judicial contest in a congressional election are Connecticut and Georgia. *See* CONN. GEN. STAT. ANN. § 9-323 (West 1967); GA. CODE ANN. § 34-1702 (1970).

64. *See* Manion v. Holzman, 379 F.2d 843, 845 (7th Cir. 1967) (judicial interference in congressional election contest would violate article I, section 5 of Constitution); Odegard v. Olson, 119 N.W.2d 717, 720 (Minn. 1963) (court order held gratuitous and of no force as bearing upon merits of election contest pending in House of Representatives); *In re* Youngdale, 44 N.W.2d 459, 462 (Minn. 1950) (no judicial jurisdiction over election contests absent statutory authorization); State *ex rel* 25 Voters v. Selvig, 212 N.W. 604 (Minn. 1927) (state court decision in contest of congressional election would be "officious and nugatory"); Wyman v. Durkin, 330 A.2d 778, 780 (N.H. 1975) (state statute specifically excluded contests of elections for congressional offices). *See generally* Comment, *Congressional Election Contests and Recount Proceedings: A Critical Difference*, 72 DICK. L. REV. 433, 433-40 (1968).

or exclusive jurisdiction over these contests.[65] A federal district court in New Hampshire, seemingly in contravention of the Constitution, recently held that the state court had jurisdiction over a contested Senate election because it found no evidence to indicate that the impending state court action would impede an independent determination of the outcome by the United States Senate.[66] According to the *Gammage* rationale, such a finding is irrelevant.

Gammage is significant in that it recognizes congressional supremacy regarding the elections of its members and enforces the exclusive jurisdiction of Congress over contests resulting from these elections. In its decision, the Texas Supreme Court has determined with finality that the state cannot usurp this congressional power by enacting a statute which vests its courts with jurisdiction over congressional election contests. The court rectified the Constitutional conflict raised by the state's election code and clarified the relief open to a contestant in a congressional election contest. *Gammage* precludes any further attempts by candidates to file suit contesting a congressional election in state court. As a result, the only remedy open to the contestant is afforded by the Federal Contested Elections Act.[67]

Although *Gammage* effectively clarifies the law in Texas concerning authority to adjudicate congressional election contests, it also signals the need for a definitive ruling by the United States Supreme Court outlining in a clear and concise manner precisely those powers which states may exercise over congressional election procedures in light of article I, section 4. In order to alleviate any further confusion which may arise in the area of congressional election contests, the Supreme Court should take the first opportunity to interpret article I, section 5 of the Constitution as barring any judicial interference in these contests.

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65. *See* Durkin v. Snow, 403 F. Supp. 18, 20 (D.N.H. 1974); Odegard v. Olson, 119 N.W.2d 717, 722 (Minn. 1963) (concurring opinion). In *Odegard,* the court held that the Minnesota state courts had no jurisdiction over a congressional election contest. *Id.* at 720. In a concurring opinion, however, it was observed that although the courts had no jurisdiction over these contests under present state law, the legislature was not precluded from conferring jurisdiction upon the courts to supervise an election contest or recount of the ballots in order to determine the winner. *Id.* at 722 (concurring opinion).

66. Durkin v. Snow, 403 F. Supp. 18, 20 (D.N.H. 1974). The court here held that the election contest proceedings were an integral part of the New Hampshire electoral process and within the broad powers delegated to the states by article I, section 4 of the Constitution. *Id.* at 19. Although the federal district court in *Durkin* acknowledged the Senate's authority to make an independent final judgment over the election contests of its members, it expressly sanctioned state court intervention in a congressional election contest. *Id.* at 20.

67. Gammage v. Compton, 548 S.W.2d 1, 5 (Tex. 1977).