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Swearing in the Phoenix: Toward a More Sensible System for Seating Members of the House of Representatives at Organization

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SWEARING IN THE PHOENIX: TOWARD A MORE SENSIBLE SYSTEM FOR SEATING MEMBERS OF THE HOUSE OF REPRESENTATIVES AT ORGANIZATION

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Under U.S. House precedent, any member-elect can challenge the right of any other member-elect to take the oath of office at the beginning of a new term. The uncontested members-elect then swear in and decide the fate of those who were forced to stand aside. If the House is closely divided and there are disputed elections at the margins, a minority party could exploit this procedure to try to seize control of the House.

This would be outrageous and damaging, even if the effort failed. Contending for ultimate control, both sides could level motions, appeals, and tit-for-tat pre-oath challenges. The proto-House would degenerate into a chaotic mass of votes, meta-votes (about who gets to vote), and meta-meta-votes before anyone has even been sworn in. Instead of the House being controlled by the party that won the most seats in the election, it might go instead to the party that is most disciplined and unified—or, failing that, to the party that is more adept at parliamentary machinations.

This nightmare is not completely hypothetical; the House once witnessed a power grab much like this—and it succeeded. But even an unsuccessful attempt could worsen the national partisan divide, weaken the House's legitimacy, and threaten the House's already dangerously low levels of comity. So could an attempt by a majority to bolster its advantage by a seat or two.

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This Article proposes to avoid this danger by rejecting this precedent. The House used a sensible "Oaths First" process for many decades, starting with the First Congress in 1789. The current, problematic "Step Aside" process only arose in the 1860s, for reasons that were either ill-considered, are no longer applicable, or both. The House has not used the Step Aside process in recent decades, but given the way House precedent functions, the Step Aside needs to be discarded, not just disused. This Article seeks to nudge the House into a more careful, considered, and consistent practice, re-embracing the Oaths First procedure officially and definitively.

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I. INTRODUCTION

The House of Representatives, like the United States as a whole, is deeply divided. High-stakes hardball politics reign in the Capitol. The public legitimacy of elections is under threat; Republicans trumpet claims of voter fraud, while Democrats complain about voter suppression. Add to this an obscure point of House of Representatives procedure—the subject of this Article—and the House is vulnerable to a constitutional breakdown.

Consider this hypothetical scenario:

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The election yields a razor-thin margin in the House. After weeks of hotly contested, controversial recounts in several districts, the Silver Party has a 218 to 217 majority over the Purple Party.[1] *The House convenes on January 3 and narrowly elects a Silver Speaker of the House.*

But before the Speaker can administer the oath to the others, a Purple representative-elect unexpectedly steps forward to object to two Silvers swearing in. Challenging the election results—two of the closest and messiest contests in the country—the objector invokes House precedent that would force the two Silvers to stand aside while the rest of the representatives-elect take their oaths. Once sworn in, the 433 representatives would vote on who is entitled to the two disputed seats.

The Purple plan is obvious: the 433 seated members would have a 217 to 216 Purple majority. The Purple majority would vote to hold the two disputed seats open while the House conducts its own recount, or maybe even to seat the

1. Fictional party names are used here because everything could happen with either Democrats or Republicans in the majority.

two Purple challengers in the interim. Either way, the Purples would take over the House and replace the Silver Speaker with a Purple one.

On the other hand, if the precedent is rejected and the two challenged members are not *forced to stand aside . . .*

*

It would be outrageous for a party to try to seize control of the House this way. Unfortunately, if conditions were just so, it is not hard to imagine either party launching such an attempt.[2]

Things could unravel further. Contending for ultimate control, both sides could level motions, appeals, and tit-for-tat pre-oath challenges against each other's members-elect. The proto-House could degenerate into a chaotic mass of votes, meta-votes (about who gets to vote), and meta-meta-votes before anyone has even been sworn in. Instead of the House being controlled by the party that won the most seats in the election, it might go instead to the party that is more disciplined and unified—or, failing that, to the party that is more adept at parliamentary machinations.

Our hypothetical scenario is not completely hypothetical; the House once witnessed a power grab much like this, and it succeeded.[3] Shifting a few seats at the start of a term could also affect the resolution of a disputed presidential election.[4] But even an unsuccessful attempt could worsen the national partisan divide, weaken the House's legitimacy, and threaten the House's already dangerously low levels of comity.[5] So could an attempt by a majority to bolster its advantage by a seat or two.[6]

The root of the problem is House precedent, which empowers an individual unsworn member-elect to keep colleagues from being seated simply by leveling unsubstantiated objections against them. This Article rejects that practice and argues that, instead, everyone with valid credentials should take the oath. Only after that—when the House has fully become the House—should the House process objections regarding the elections and qualifications of its members.

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2. Nobody knows which party will control the House in the future, or by how much. As such, this Article makes its suggestions without any sense that one particular party would benefit from them. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971) (extolling the virtues of employing such "veils of ignorance").

3. *See infra* Section III.A.iv (describing 1839 case).

4. As the controversy over counting electoral votes in January 2021 showed, the House has an important role under the Electoral Count Act of 1887. *See* 3 U.S.C. § 15. An even higher-stakes situation would be a contingent election, in which nobody wins a majority in the Electoral College and the president is selected by the House. *See* U.S. CONST. amend. XII.

5. *Cf. infra* text accompanying notes 143–45 (describing 1863 case).

6. *Cf. infra* Sections III.D.i, III.D.iii (describing 1961 and 1985 cases).

Among other benefits, cementing this procedure would dissuade people from attempting the maneuvers described above.

This Article's proposal tracks the "Oaths First" process the House used successfully for many decades, starting with the First Congress in 1789. The current, problematic "Step Aside" process only arose in the 1860s, for reasons that were either ill-considered, are no longer applicable, or both.

The House has rarely used the Step Aside procedure, and has not used it at all in recent decades.[7] In 2021, the unsworn members-elect voted down a symbolic attempt to force dozens of members-elect to step aside, by a vote of 371–2.[8] But the Step Aside precedent hangs in the House chamber like Chekhov's gun, waiting inevitably to be employed.[9] It needs to be discarded, not just disused. This Article seeks to nudge the House into a more careful, considered, and consistent practice, throwing away the "gun" and re-embracing the Oaths First procedure officially and definitively.

Part I of the Article provides constitutional background information and describes the House's current procedures for seating members at the opening of each new term. Part II provides a detailed history: the House's initial embrace of the Oaths First process; its eventual descent into the Step Aside process; and recent practice that has stopped using—but not repudiated—the Step Aside process. Part III presents the proposal in more detail. Part IV concludes by examining some principles and practicalities that provide additional support for bolstering the Oaths First process.

II. BACKGROUND AND CURRENT PROCEDURES

A. The Inherent Problem

At the root of this Article's discussion is the chicken-and-egg problem presented for the House of Representatives by the Elections, Returns, and Qualifications Clause. That clause provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."[10] The fundamental question is, Who is the "House" here?

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7. *See infra* Sections III.D–E.

8. 167 CONG. REC. H7–8 (daily ed. Jan. 3, 2021).

9. Playwright Anton Chekhov famously advised, "If in Act 1 you have a pistol hanging on the wall, then it must fire in the last act." DONALD RAYFIELD, ANTON CHEKHOV: A LIFE 203 (1998).

10. U.S. CONST. art. I, § 5, cl. 1. The constitutional qualifications for office include age, citizenship, residency, and loyalty requirements. *See id.* § 2, cl. 2; *id.* amend. XIV, § 3.

Every two years, at noon on January 3, all 435 members of the old House see their terms end.[11] So how does each new House establish itself *ex nihilo*—like a phoenix from the ashes? When does the House of Representatives decide who is in the House of Representatives?[12] This part of the Article explains the House's current procedures.

B. Current Practice

The transitional time at the outset of a new term, during which the House of Representatives is not yet fully formed, is called "organization."[13] The new House has no formal rules at that point; it proceeds according to general parliamentary principles and past practices.[14] This allows unsworn members-elect—to some extent—to speak, make motions, and vote on those motions.[15]

In order to reconstitute itself, the House relies on the Clerk of the House of Representatives appointed by the previous House. Unlike the representatives who appointed the Clerk, the Clerk does not see her powers expire automatically on January 3 at noon.[16]

The Clerk's work in this regard actually begins back in September; before the election, their office communicates with state authorities about what the

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11. *Id.* art. I, § 2, cl. 1 (providing for biennial selection of House members); *id.* amend. XX, § 1 (indicating the time and hour of a term's end).

12. Unlike the House, the Senate is a continuing body; while all representatives see their terms expire at once, only one-third of senators do. *See id.* art. I, § 3. The Senate thus avoids the technical challenges of periodic rebirth that present the House with the challenges explored in this Article. *Cf.* Paul E. Salamanca & James E. Keller, *The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members*, 95 KY. L.J. 241, 294–95 & 295 n.345 (2006) (describing Senate's typical process as seating first and adjudging qualifications later). The House also avoids these problems when it decides on seating representatives elected in the middle of the term—another area this Article does not cover.

13. *See* CHARLES W. JOHNSON, JOHN V. SULLIVAN & THOMAS J. WICKMAN, JR., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE OF REPRESENTATIVES, ch. 5, § 4, at 158–60 (2017) [hereinafter HOUSE PRACTICE].

14. *See* THOMAS J. WICKHAM, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. DOC. NO. 115-177, § 60, at 27–28 (2019) [hereinafter HOUSE MANUAL]; *see also* 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, §§ 3383–85, at 829–31 (1935); 5 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, § 6761, at 888 (1907).

15. *See* HOUSE PRACTICE, *supra* note 13, ch. 5, § 4, at 159–60; *id.* § 7, at 162–63.

16. *See* 1 HINDS, *supra* note 14, § 187, at 110, 112; HOUSE PRACTICE, *supra* note 13, at ch. 5, § 4, at 158–59; 1 CHARLES W. JOHNSON, III, JOHN V. SULLIVAN & THOMAS J. WICKHAM, JR., PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. 115-62, ch. 1, § 3, at 21–23 (2017) [hereinafter HOUSE PRECEDENTS].

states must do to certify and submit their election results properly.[17] After the November election, states submit their certified results and the Clerk's office reviews them to ensure that they comply with state law.[18] If a certificate is inadequate, and if time permits, the Clerk's office notifies that state and directs it to correct and re-send its certification.[19]

Proper certification serves as the "credentials" for the person elected.[20] On January 3 (or a later day if the previous Congress has so legislated), the Clerk places on the "roll of the [r]epresentatives-elect" those people whose states have submitted proper credentials for them.[21] These credentials are the "returns" referred to in the Constitution when it empowers the House to judge the "elections, *returns*, and qualifications of its members."[22]

After noon on opening day, with the Clerk presiding, those on the roll vote to elect the Speaker of the House.[23] Next, a representative-elect (traditionally the most senior) administers the oath of office to the Speaker, who then administers the oath to the other representatives-elect.[24] When they have taken their oaths, they become seated representatives.[25] It is only at that point, with a quorum sworn in, that the House can "enter[] on any other business."[26]

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17. *See* Telephone Interview by Jane Meland with Robert Borden, Legal Couns., Off. of the Clerk, U.S. House of Representatives (Jan. 4, 2017) [hereinafter Borden Interview].

18. *See id.*

19. *See id.*

20. *See id.*

21. *See* 2 U.S.C. § 26; 1 HOUSE PRECEDENTS, *supra* note 16, ch. 2, § 2, at 174; U.S. CONST. amend. XX, § 2 (directing Congress to assemble on January 3, unless it chooses a different day). The Clerk's task is supposed to be ministerial; proper credentials should guarantee one a place on the roll. But the validity of someone's credentials may be in dispute, and the Clerk may need to exercise some discretion. *See infra* Section V.A.ii.a.

22. U.S. CONST. art. I, § 5, cl. 1 (emphasis added). The distinction between elections and returns can be confusing, but in essence, judging the "return" is evaluating the adequacy of the documentation certifying that one has been elected, while judging the "election" is determining who ought to have been named on the return as the winner. *See* CONG. GLOBE, 26th Cong., 1st Sess. 48 (1839) (comments of Rep.-Elect Crabb).

23. *See* U.S. CONST. amend. XX, § 2; HOUSE MANUAL, *supra* note 14, § 641, at 368; CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RL30725, THE FIRST DAY OF A NEW CONGRESS: A GUIDE TO PROCEEDINGS ON THE HOUSE FLOOR 3 (2020).

24. *See* 2 U.S.C. § 25. The statute, which dates back to 1789, refers to everyone here as a representative, not a representative-elect. *See also* DAVIS, *supra* note 23, at 4–5; 1 HOUSE PRECEDENTS, *supra* note 16, at ch. 2, § 3, at 180–81.

25. A representative is considered a representative-elect until sworn in. *See* 1 HOUSE PRECEDENTS, *supra* note 16, ch. 2, § 1, at 161–62. *Cf.* HOUSE MANUAL, *supra* note 14, § 300, at 145 ("[A] Member . . . cannot vote until he is sworn").

26. 2 U.S.C. § 25.

Having valid credentials is generally treated as prima facie evidence that one is entitled to take the oath of office.[27] Sometimes, though, there are challenges to someone's election or qualifications. In such cases, the most common practice—what this Article calls the Oaths First process—is to allow the person with valid credentials to take the oath, and to handle the challenge later, after the House has been constituted properly.[28] In other words, all members-elect take their oaths on the basis of the prima facie evidence, but their final right to hold their seats may be subject to later adjudication by the House.[29] Most challenges to a member's seat follow the procedures set out in the Federal Contested Elections Act (FCEA).[30]

On some such occasions, however, a member-elect has lodged an objection prior to the oath, and the challenged member-elect has been made to step aside as everyone else was sworn in.[31] Under current House precedent, this sort of objection is a way for the House to obtain jurisdiction outside the FCEA process.[32] The undesirability of this practice—the Step Aside process—is this Article's focus.

When a member-elect is forced to step aside, the newly sworn-in House decides what to do with the challenged member-elect, usually immediately.[33] In rare instances, the House has opted not to seat the person being challenged.[34] Typically, though, the House quickly seats challenged people, with an understanding that further review might unseat them.[35]

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27. L. PAIGE WHITAKER, CONG. RSCH. SERV., RL33780, PROCEDURES FOR CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES 2, 8, 10 (2016).

28. *See* 1 HOUSE PRECEDENTS, *supra* note 16, ch. 2, § 4, at 214; Borden Interview*, supra* note 17.

29. *See* 1 HOUSE PRECEDENTS, *supra* note 16, ch. 2, § 4, at 214.

30. 2 U.S.C. §§ 381–96; *see* WHITAKER, *supra* note 27, at 2–3.

31. *See* 6 CANNON, *supra* note 14 , § 3386, at 831–33; 1 LEWIS DESCHLER, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. 94-661, ch. 2, § 6.1, at 130–31 (1994); 2 *id.* ch. 7, § 9.1, at 747–48; HOUSE PRACTICE, *supra* note 13, ch. 33, § 3, at 652; 1 HOUSE PRECEDENTS, *supra* note 16, ch. 2, § 4, at 214; DAVIS, *supra* note 23, at 5; *see also* HOUSE MANUAL, *supra* note 14, § 203, at 88 (noting that "[i]t has been held, although not uniformly" that the Speaker can direct the challenged member-elect to step aside).

32. *See* HOUSE PRACTICE, *supra* note 13, ch. 22, § 2, at 492; WHITAKER, *supra* note 27, at 3–4, 9–11; *cf.* 2 DESCHLER, *supra* note 31, ch. 9, § 4, at 984 (saying that "the House may initiate an election investigation if a Member-elect's right to take the oath is challenged by another Member" but not saying that this is the only possible timing for a non-FCEA challenge); *id.* ch. 8, § 16, at 951 (making a similar statement). Since 1933, about 6% of contested elections have been handled this way. *See* WHITAKER, *supra* note 27, at 10.

33. *See* 1 DESCHLER, *supra* note 31, ch. 2, § 6, at 128; 2 *id.* ch. 7, § 9, at 743; 1 HOUSE PRECEDENTS, *supra* note 16, ch. 2, § 4, at 214; DAVIS, *supra* note 23, at 5.

34. *See* WHITAKER, *supra* note 27, at 10.

35. *See id.*

The Step Aside process should be disavowed. It serves no positive purpose. As a matter of history, law, order, and fairness, it is preferable—and potentially important—to use the Oaths First process consistently.

III. HISTORICAL PRACTICES

The House's historical seating practices reveal several things. First and foremost, the Oaths First process works just fine. It worked just fine for the first several decades of the Republic, and it has worked just fine since then on those occasions when the House has used it—which has been most of the time.

Second, the Step Aside process should be rejected. It solves no problems that could not be solved better by the Oaths First process. The Step Aside process arose out of confusion and was based on conditions that no longer apply. To the extent that the Step Aside process served any purposes in the past, it does not serve them today.

Third, the full panoply of cases offers lots of nuance, including some exceptional situations in which unsworn members-elect should make decisions, and in which it *is* appropriate not to seat people who have come to swear in. A survey of this history suggests some helpful details to add to flesh out the Oaths First process.

A. The Center Holds (1789–1859)

Starting in 1789, the first several decades of House practice showed how well the Oaths First process can work. This was true even though administering elections was more difficult back then than it is today. The antebellum period revealed the limits of the Oaths First process, but it also showed what can go wrong when the House takes a different approach.

i. The First Congress (1789)

When the First Congress assembled in 1789, it was an exercise in self-constitution. The new House had no incumbent members or leaders, no rules or statutes guiding its behavior, and no internal precedents.

The first thing the assembled representatives-elect did upon attaining a quorum on April 1 was to elect a Speaker.[36] Next, they appointed a Clerk.[37] Then, they submitted their credentials—the certifications of their elections—to that Clerk.[38]

36. *See* 1 ANNALS OF CONG. 96 (1789) (Joseph Gales ed., 1834).

37. *See id.*

38. *See id.*

It is understandable that the assembled members chose a Speaker and Clerk before doing anything else, because the orderly conduct of business required it. But at that point, nobody had verified the elections, returns, or qualifications of any of the members present, and none of those members had met the constitutional requirement of taking an oath to support the Constitution.[39] Having un-scrutinized, unsworn members select the Speaker made sense on that occasion, but it set a precedent which has been followed ever since despite being awkward.[40]

Soon after selecting a Speaker and a Clerk, the House appointed a committee to propose legislation regulating oaths.[41] It also passed a resolution on a preliminary oath that its members could take in the meantime, which they did on April 8.[42] On April 27, the House approved permanent legislation on oaths.[43] After the Senate agreed, President Washington signed the bill into law on June 1, the first federal law passed under the new Constitution.[44]

Under the law (still in force today in substantially the same form), at the start of a new term the Speaker administers the oath to all the members present, "previous to entering on any other business."[45] This cemented the practice of selecting a Speaker before anyone had been sworn in.

Significantly for this Article's purposes, there were disputes over representatives' elections and qualifications during this period, but these were treated as the sort of "other business" that was handled only after everyone had sworn in.

One case, involving South Carolina Representative William Smith, is not directly relevant to this Article; Smith did not appear until April 13, so he was

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39. *See* U.S. CONST. art. VI, § 3.

40. The Constitution says that "the House" selects "their Speaker and other Officers." *Id.* art. I, § 2, cl. 6. It is awkward when members-elect participate in the Speaker election only to be challenged and denied their seats later. *See, e.g.*, *infra* text accompanying notes 201–02 (describing 1877 organization). In subsequent Houses, moreover, the officers other than the Speaker—the Clerk, the Sergeant at Arms, and so on—are chosen only after organization. *See* DAVIS, *supra* note 23, at 6.

41. *See* 1 ANNALS OF CONG. 97 (1789) (Joseph Gales ed., 1834). Other actions the House took before anyone was sworn in (in the First Congress but not since) included making its standing rules, selecting its officers, and helping to count the electoral votes for President. *See id.* at 97–102.

42. *See id.* at 97 (resolving the preliminary oath's content); *id.* at 101–02 (resolving that the preliminary oath would be administered by the Chief Justice of New York, and taking the oath); David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 170 (1995).

43. *See* 1 ANNALS OF CONG. 207 (1789) (Joseph Gales ed., 1834).

44. Act of June 1, 1789, ch. 1, 1 Stat. 23 (1789); *see* 1 Stat. xvii (1789) (listing legislation chronologically); 1 HINDS, *supra* note 14, § 129, at 84.

45. 1 Stat. 23. *See* 2 U.S.C. § 25 and historical and statutory notes.

not part of the initial group that took the oath on April 8.[46] He bears mention, though, as his was the House's first qualifications case. On April 15, the House considered a petition alleging that Smith had not been a citizen for the required seven-year period.[47] The case was referred to the newly appointed Committee of Elections.[48] On April 18, the committee reported two things: it had examined the credentials of everyone serving in the House (presumably including Smith) and found them adequate; and it had come up with a procedure for handling Smith's qualifications case.[49] On May 22, after lengthy debate, the House rejected the petition against Smith and confirmed him in his seat.[50] In the meantime, Smith had had his credentials validated, sworn his oath, and participated in House business.[51] The "principle" of Smith's case, as a 1973 House committee put it, "is that the House decided that a member-elect was entitled to a seat on his prima facie right [i.e., because he had valid credentials], although knowing that his qualifications were under examination."[52]

A second case handled an election dispute the same way. The House received "sundry petitions" from New Jersey on April 28 challenging the elections of its representatives.[53] Over the next few months, the Committee of Elections and the full House wrestled with procedural questions and with the merits until, on September 2, the House accepted New Jersey's certified

46. *See* 1 ANNALS OF CONG. 102 (1789) (Joseph Gales ed., 1834) (recording those taking the initial oath on April 8, including William Smith of Maryland); *id.* at 121 (recording the appearance of William Smith of South Carolina).

47. *See id.* at 143; M. ST. CLAIR CLARKE & DAVID A. HALL, CASES OF CONTESTED ELECTIONS IN CONGRESS FROM THE YEAR 1789 TO 1834, INCLUSIVE 23–37 (Washington, D.C., Gales & Seaton 1834) (providing the details of Smith's case).

48. *See* 1 ANNALS OF CONG. 122–23 (1789) (Joseph Gales ed., 1834) (explaining Committee of Elections function and recording its appointment); *id.* at 143 (recording the referral of Smith's case to the committee).

49. *See id.* at 167–68.

50. *See id.* at 397–408; CLARKE & HALL, *supra* note 47, at 24–37; Currie, *supra* note 42, at 173–74.

51. *See* 1 ANNALS OF CONG. 160, 259–61, 286–87, 336, 351–52, 371–72, 376–77 (1789) (Joseph Gales ed., 1834) (showing Smith's participation); *id.* at 167–68 (showing approval of Smith's credentials); 1 HINDS, *supra* note 14, § 420, at 391 (noting that Rep. Smith had voted on May 16, "showing conclusively that he had taken the oath while the question as to his qualifications was pending").

52. JOINT COMM. ON CONG. OPERATIONS, 93D CONG., HOUSE OF REPRESENTATIVES EXCLUSION, CENSURE AND EXPULSION CASES FROM 1789 TO 1973, at 4 (Comm. Print 1973) [hereinafter EXCLUSION CASES].

53. 1 ANNALS OF CONG. 213 (1789) (Joseph Gales ed., 1834); *see id.* at 231, 343 (referring these and related petitions to the Committee of Elections). New Jersey's governor had certified that state's election results without counting any votes at all from Essex County. *See* EDWARD FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 35–40 (2016) (describing in detail the issues involved in the New Jersey dispute).

results.[54] With that, the House retroactively validated the seating of the four members of the New Jersey delegation, including two who had been present at organization on April 1.[55] As in Smith's qualifications case, nobody questioned these members' entitlement to their seats during the pendency of the investigation. They had appeared with valid credentials, however questionable the vote tallies underlying those credentials may have been. They participated in the business of the House, including both the debate on their own case,[56] and the vote on William Smith's qualifications case.[57]

The First Congress thus prescribed, through precedent and statute, a clear order of operations for the organization of the House. Those who show up with facially valid credentials choose a Speaker. Then they take the oath. Only after that, with the House properly constituted, does the House "enter[] on any other business" such as challenges to members' elections or qualifications.[58] This is the core of the Oaths First process.

ii. Other Early Precedents (1791–1831)

Every Congress from the Second (1791) through the Twenty-Second (1831) followed the same simple order of operations: the Clerk called the roll, the representatives-elect chose a Speaker, and the Speaker (sometimes after making a short speech) swore in the representatives-elect.[59] People with valid credentials were seated and only after organization did the House consider challenges to their elections or qualifications. In addition, until the practice fell into disuse, the Committee of Elections later examined everyone's credentials and reported on them.[60]

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54. *See* 1 ANNALS OF CONG. 835 (1789) (Joseph Gales ed., 1834); Currie, *supra* note 42, at 175–76.

55. *See* 1 ANNALS OF CONG. 96, 835 (1789) (Joseph Gales ed., 1834); Currie, *supra* note 42, at 175–76.

56. *See, e.g.*, 1 ANNALS OF CONG. 638–39 (1789) (Joseph Gales ed., 1834) (showing participation of Rep. Boudinot).

57. *See id.* at 408 (showing affirmative votes to seat Smith by all four New Jersey representatives (Boudinot, Cadwalader, Sinnickson, and Schureman)); *id.* at 406–07 (showing participation in the debate on Smith by Rep. Boudinot).

58. *See* 2 U.S.C. § 25.

59. *See* 3 ANNALS OF CONG. 141–42 (1791); 4 *id.* at 133–34 (1793); 5 *id.* at 125–26 (1795); 7 *id.* at 49–51 (1797); 10 *id.* at 185–87 (1799); 11 *id.* at 309–10 (1801); 13 *id.* at 369–70 (1803); 15 *id.* at 253–54 (1805); 17 *id.* at 781–83 (1807); 20 *id.* at 53–56 (1809); 23 *id.* at 329–31 (1811); 26 *id.* at 105–07 (1813); 29 *id.* at 373–75 (1815); 31 *id.* at 397–99 (1817); 35 *id.* at 701–03 (1819); 38 *id.* at 513–17 (1821) (requiring 2 days and 12 ballots to choose a Speaker); 41 *id.* at 793–96 (1823); 2 REG. DEB. 795–96 (1825); 4 *id.* at 811–12 (1827); 6 *id.* at 470–71 (1829).

60. *See* 1 HINDS, *supra* note 14, §§ 16–18, at 12 (1907) (describing the practice and its cessation around 1839).

These years saw numerous challenges—some successful—to members' elections[61] and qualifications,[62] but never before the oath was administered. This respect for the Oaths First precedent was especially significant given that most states held their House elections more than a year before the winners convened in Congress.[63] As such, the basis for any serious challenges would have been well known before the House convened.[64]

iii. Cracks Appear (1833–1837)

While the Oaths First precedent had a strong foundation, it had an inherent limit. Everyone with valid credentials takes the oath, but which credentials are valid? And who decides? An 1833 dispute raised this very issue, and eroded the clarity with which the Oaths First precedent had been observed in the previous four decades.

At the opening of the Twenty-Third Congress, Thomas Moore appeared on the roll for Kentucky's Fifth District, on the basis of a certificate transmitted by

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61. *See generally* CLARKE & HALL, *supra* note 47. One example sheds light on the House's order of operations. In 1793, two days after organization, the House received a petition from Henry Latimer challenging the election of John Patten (spelled in the record as "Patton") as Delaware's representative. *See* 4 ANNALS OF CONG. 135 (1793); *see also id.* at 140–41 (reporting the petition's referral to the Committee of Elections). Patten had not yet appeared. *See id.* at 133–35. On December 6, the Committee of Elections reported on everyone's credentials and, in the process, noted the petition against Patten. *See id.* at 138. But when Patten appeared a week later and produced his credentials, he was seated without any reported incident or delay, notwithstanding the preexisting petition against him. *See id.* at 142. The petition against him had merit—on February 13 the whole House agreed, voting to oust Patten and seat Latimer. *See* CLARKE & HALL, *supra* note 47, at 70–72. It was regarded as entirely proper, though, that Patten had been seated and had served in the meantime.

62. *See* CLARKE & HALL, *supra* note 47 (chronicling sixty-one House elections and qualifications cases up to 1834); EXCLUSION CASES, *supra* note 52 (chronicling thirty House qualifications cases before 1973). There were also incompatibility cases, though these too were dealt with only after the House was organized. *See*, *e.g.*, CLARKE & HALL, *supra* note 47, at 122–27, 284–314.

63. *See* Brian C. Kalt, *Of Death and Deadlocks: Section 4 of the Twentieth Amendment*, 54 HARV. J. ON LEGIS. 101, 113–14 (2017) (explaining the original timeline); *cf.* U.S. CONST. amend. XX, §§ 1–2 (changing this lengthy wait to the current, brief lame-duck period). At this point, states did not have a common day for House elections, though most voted in the summer or fall of even-numbered years. *See* MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788–1997: THE OFFICIAL RESULTS (1998) (listing dates of House elections by state); 1 HINDS, *supra* note 14, § 678, at 874 (discussing time limits for contesting elections).

64. One reason to use this process was that the Committee of Elections played an important role in resolving these challenges. *See* Jeffery A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789–2002*, 18 STUD. AM. POL. DEV. 113, 113–15 (2004) (describing the contested-election process in the antebellum House). *See generally* CLARKE & HALL, *supra* note 47. Committees could only be appointed after the House was organized, so it seemed pointless to initiate challenges before that.

Kentucky's governor.[65] Before the Speaker election, an objector argued that the certificate was invalid, because it lacked two signatures required by state law.[66] The election result was in dispute as well, and the other candidate, Robert Letcher, had also appeared to claim the seat.[67]

Moore objected to the dispute being considered before organization. First, he said, the members-elect had to take their oaths on the basis of their prima facie rights to their seats.[68] But that begged the question of whether Moore *had* that prima facie right.[69]

Moore and Letcher resolved the impasse by both voluntarily withdrawing.[70] The other members-elect then proceeded to choose a Speaker and take their oaths.[71] After several months of committee work, the House declared Kentucky's Fifth District vacant and ordered a new election, which Letcher won.[72]

Moore's case did not alter the Oaths First precedent so much as expose its outer bound: Moore's credentials had an obvious, fundamental defect.[73] The real lesson was that the Clerk should have been more careful before adding Moore to the roll—something that, later on, legislation would require the Clerk to do.[74]

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65. *See* CLARKE & HALL, *supra* note 47, at 717–18.

66. *See id.* at 719–20.

67. *See* 10 REG. DEB. 2130–31 (1833); CLARKE & HALL, *supra* note 47, at 716, 721.

68. *See* CLARKE & HALL, *supra* note 47, at 718.

69. *See id.* at 719–20 (statement of Rep. Allan) ("[H]e admitted that if that paper, according to the laws of Kentucky, had been certified and signed by the persons required to certify and sign it, then, by the usages of that House, the gentleman was entitled for the present to be recognised as the sitting member. But if the paper was not . . . then it was a nullity . . . .").

70. *See* 10 REG. DEB. 2135 (1833) ("Mr. LETCHER then proposed to Mr. MOORE, that they should both withdraw until after the election for Speaker had taken place. Mr. MOORE was understood as acquiescing in this proposal[.]"); *id.* at 2137 (noting that when the oath was administered to members, "when Mr. MOORE was called, it appeared that he and Mr. LETCHER had concurred in allowing the organization of the House to be completed before the question between them was again raised, and neither of them was sworn."); CLARKE & HALL, *supra* note 47, at 721. The *House Journal* reported more vaguely that "by general consent, it was agreed that Mr. Moore should not be called." H.R. JOURNAL, 23d Cong., 1st Sess. 3 (1833).

71. *See* 10 REG. DEB. 2136–37 (1833).

72. *See* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. 108-222, at 108 n.24 (2005) [hereinafter DIRECTORY]; CLARKE & HALL, *supra* note 47, at 747–850.

73. *See* CLARKE & HALL, *supra* note 47, at 742–43 (comments of Rep. Huntington) (noting that "[i]n all the cases which had heretofore come before the House, this subject had not been touched upon," because "[t]he objections had arisen subsequently").

74. *See infra* text accompanying note 139.

Significantly, that same year of 1833 marked the genesis of the Whig Party.[75] Since the demise of the Federalist Party in 1815, partisan politics had been muted. Now, however, interparty rifts and struggles would reemerge with a vengeance. While the Oaths First precedent itself remained relatively safe for nearly three more decades, the era of simple, orderly House organizations was over.

The next Congress in 1835 opened with dissension over procedures for the Speaker election.[76] In 1837, organization featured a constitutional controversy about two representatives elected only to serve in a special session.[77] Democratic Representative-Elect Francis Thomas called for adherence to the Oaths First precedent: "If this unvaried custom is now departed from, our difficulties will be interminable."[78] Oaths First prevailed in 1837,[79] but Thomas's warning would soon prove prophetic.

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75. *See* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY 20–28 (1999).

76. Before the Speaker election, there was an unprecedented interruption—a motion, debate, and voting—regarding whether the Speaker election should continue to be by secret ballot. *See* 12 REG. DEB. 1943–45 (1835). Secret balloting won out for the time being, but two Congresses later it was replaced by voting *viva voce*, a move that reflected the new drive toward party discipline. *See* JEFFERY A. JENKINS & CHARLES STEWART III, FIGHTING FOR THE SPEAKERSHIP: THE HOUSE AND THE RISE OF PARTY GOVERNMENT 14–15, 102–08 (2013).

77. The new House had convened three months early because President Van Buren had called a special session. *See* 14 REG. DEB. 558 (1837). Mississippi held its House elections in November of odd-numbered years, a month before Congress convened, instead of the more common practice of voting many more months before. *See* D.W. BARTLETT, CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM 1834 TO 1865 INCLUSIVE, H.R. MISC. DOC. 38-57, at 9–13 (1865). Because there would have been nobody to represent Mississippi at the special session, the governor called a special election to fill the seats in the special session, while the regularly scheduled election would fill the seats for the remainder of the term. *See id.* at 11. The objectors argued that the governor had no authority to break the term in two by calling a separate election for only the first part of the term, and fought not to seat Gholson and Claiborne, the two Mississippi representatives-elect in question. *See* 14 REG. DEB. 559–60 (1837). The fight turned on the same chicken-and-egg questions as this Article's elections, returns, and qualifications disputes. The representatives-elect being challenged said that they had just as much right to be there as anyone else with state credentials. *See* 14 REG. DEB. 560 (1837). An opponent said, "Let those, of whose right there was no reasonable doubt, pass on the claims of those whose right was doubtful." *Id.* at 562–63. This drew the obvious rejoinder, "[W]ho was to decide whether there was reasonable doubt in any case or not?" *Id.* at 563.

78. *See* 14 REG. DEB. 564 (1837).

79. The debate petered out without a vote, the Speaker was chosen, and Gholson and Claiborne were seated along with everyone else. *See id.* at 565–66; CONG. GLOBE, 25th Cong., 1st Sess. 3 (1837). The House debated the case further after organization and voted in October to affirm Gholson and Claiborne's seating. *See* BARTLETT, *supra* note 77, at 13. However, after the regular session began the House voted to rescind that determination and declare Mississippi's seats vacant. *See id.* at 15–16.

iv. The New Jersey Debacle (1839)

The Twenty-Sixth Congress featured the "Broad Seal War," perhaps the messiest organization in the House's history. Several representatives-elect with valid credentials were barred before the Speaker election and oath, thereby flipping partisan control of the House.[80] This first and most serious breach of the Oaths First process clearly revealed how valuable the precedent was—and how costly it could be to turn away from it.

In its 1838 congressional elections, New Jersey elected its six representatives at-large instead of by district.[81] One Whig representative won by a decisive margin.[82] According to the official results certified by the Whig governor, five other Whig representatives won too, but narrowly.[83] Democrats protested that the votes from two towns had been excluded, and that more complete totals showed the five Whigs had actually lost to five Democrats.[84] The New Jersey secretary of state (in opposition to the governor but with no real authority) issued the Democratic candidates a set of self-styled certificates of election.[85]

When the new House convened on December 2, 1839, both quintets of would-be New Jersey representatives were there. Under the Oaths First precedent, the Whigs should have been seated under their prima facie right, as they had the lawful returns (the certificate from the governor with the state's so-called broad seal on it). The challenge to their election should have waited until after organization.[86]

But the House Clerk, Hugh Garland, had other ideas. Garland had been selected by the previous, lame-duck, Democratic-controlled House with full knowledge that the New Jersey dispute would fall into his lap.[87] At organization, bucking prior practice, Garland did not add the New Jersey Whigs

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80. *See generally* JENKINS & STEWART, *supra* note 76, at 110–24; *cf.* CHESTER H. ROWELL, DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS, 1789–1901, at 109 (1901) ("The importance of this case is not derived from any particular novelty or importance in its issues, but simply from the fact that the political control of the House turned on its determination, and that on this account it received a more elaborate discussion, both in the committee and in the House, than has ever been given to any other case.").

81. *See* Ronald Becker, *Broad Seal War*, *in* ENCYCLOPEDIA OF NEW JERSEY 101, 101 (Maxine N. Lurie & Marc Mappen eds., 2004).

82. *See id.*

83. *See id.*

84. *See id.*

85. *See* BARTLETT, *supra* note 77, at 19; CONG. GLOBE, 26th Cong., 1st Sess. 31 (1839).

86. *See* JENKINS & STEWART, *supra* note 76, at 114.

87. *See id.* at 111–13. The Clerk was selected after the death of the previous Clerk, and after the New Jersey election. *See id.*

to the roll—instead he asked "the House" whether, given the disputed election, it was its pleasure that he pass over the five seats, deferring any decision on them until after the other members had been sworn in.[88]

A lengthy and contentious debate ensued.[89] The Whigs stood on precedent and principle: the New Jersey governor's certificate provided the same prima facie evidence as every other representative-elect's.[90] Further, the Whigs said, any disputes should wait until after the Speaker was elected and the House was organized; until then no one assembled had any more right to challenge a colleague than that colleague had to challenge them, and the Clerk was inviting tit-for-tat challenges and chaos.[91]

The Democrats retorted that the governor's decision was so obviously incorrect that it should not be respected, and that the other representatives-elect should not allow such blatant fraud to poison the organization of the House.[92] They said that it was either incumbent upon the Clerk, inherent in the authority of the assembled representatives-elect, or both, to promptly scrutinize the New Jersey governor's decision on the merits.[93]

This party lineup reversed the one in the previous Congress's organizational debate, lest anyone think that either side had been motivated by high-minded principles.[94] The Whigs were right in 1839, but that was a coincidence, just like it was when they were wrong in 1837. The only principle on display was the pursuit of partisan advantage.

Part of the debate concerned the Clerk's proper role.[95] But the immediate question was, now that the Clerk had made his choice, what could the

88. *See* CONG. GLOBE, 26th Cong., 1st Sess. 1 (1839).

89. *See id.* at 1–52.

90. Among many others, see *id.* at 2 (comments of Reps.-Elect Halstead, Hoffman, and Tillinghast).

91. Among many others, see *id.* at 2 (comments of Rep.-Elect Halstead and Tillinghast); *id.* at 11 (comments of Rep.-Elect Waddy Thompson).

92. Among many others, see *id.* at 8–9 (comments of Rep.-Elect Vanderpoel); *id.* at 10 (comments of Rep.-Elect Weller); *id.* at 13 (comments of Rep.-Elect Craig).

93. Among many others, see *id.* at 8 (comments of Rep.-Elect Vanderpoel); *id.* at 10 (comments of Rep.-Elect Weller); *id.* at 13 (comments of Rep.-Elect Pickens).

94. *See supra* notes 77–79 and accompanying text; *cf.* CONG. GLOBE, 26th Cong., 1st Sess. 8 (1839) (comments of Rep.-Elect Vanderpoel) (quoting an argument made in the previous Congress's consideration of Claiborne and Gholson by a member of the other party); *id.* at 26 (comments of Rep.-Elect White) (doing the same with previous arguments by Vanderpoel and others and asking sarcastically, "What has brought so radical a change in the gentleman's political creed?").

95. *But see* CONG. GLOBE, 26th Cong., 1st Sess. 16 (1839) (comments of Rep.-Elect Wise) (noting that even if the Clerk had not acted in this way, someone would have stepped forward and effected the same result of stopping the roll); *id.* at 30 (comments of Rep.-Elect Duncan) (claiming to have objected at the time the Clerk got to the New Jersey portion of the roll). Eventually, the unsworn

assembled members-elect do about it? Would they use the same rule of necessity that had allowed members-elect to organize the first House in 1789? If so, which set of five New Jerseyans would vote: the Whigs, the Democrats, neither, or both? Complicating matters, there was also a disputed election from Pennsylvania concerning Representative-Elect Charles Naylor.[96]

The Speakership and partisan control of the closely divided House hung in the balance. This was precisely the situation in which pre-commitment to precedent would have been helpful. But the stakes were too high; the Oaths First precedent was disregarded.

The debate quickly became mired in a tedious series of procedural questions. On December 11, for instance, there was a meta-vote on who should have been allowed to vote on a motion to table a motion about who should be able to vote.[97] The motion to table had failed 115–115, but one of the "No" votes had come from Charles Naylor.[98] A challenge to Naylor's right to vote seemingly passed, 118–112, but the already raucous proceedings degenerated further.[99] Another vote on Naylor contradicted the first and Naylor ended up participating, albeit on the losing side, in a 115–118 vote on whether to add the five New Jersey Whigs to the roll.[100] One more attempt to seat the Whig contenders failed 117–117 because of two Whigs who went missing.[101]

Ten days in, after powering through a thicket of dilatory motions, the assemblage finally began voting on the Speaker; none of the ten New Jersey disputants participated.[102] Three days and eleven ballots later, the House chose R.M.T. Hunter, a Whig with Democratic leanings, as a compromise Speaker.[103] The next day, after more wrangling, the oath was administered to everyone—except any of the disputed New Jerseyans.[104] Months after that, on March 16, 1840, the five Whig candidates were seated provisionally.[105] Then, on July

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members chose Whig Representative-Elect (and former President) John Quincy Adams to preside over the mess instead of the Clerk. *See id.* at 20.

96. *See id.* at 27.

97. *See id.* at 38–41.

98. *See id.* at 38.

99. *See id.* at 39 (depicting the colorful "[g]reat disorder . . . prevailing in the House").

100. *See id.* at 40–41.

101. *See id.* at 48; JENKINS & STEWART, *supra* note 76, at 115–16.

102. *See* CONG. GLOBE, 26th Cong., 1st Sess. 48–52 (1839). For a more complete account of these very complex and confusing proceedings, see 1 HINDS, *supra* note 14, § 103, at 68–74.

103. *See* JENKINS & STEWART, *supra* note 76, at 118–26.

104. *See* CONG. GLOBE, 26th Cong., 1st Sess. 56 (1839). Naylor of Pennsylvania slipped in, but because he had been the subject of voting before the oath this was not consistent with the Oaths First precedent.

105. *See id.* at 275; BARTLETT, *supra* note 77, at 22.

16—just five days before the session ended—the House decided that the Democrats were entitled to the seats.[106]

For this Article's purposes, the Broad Seal War is important for three reasons. First, the Oaths First precedent had been violated. For the first time, members-elect with valid credentials had been prevented from taking their oaths—and prevented by objectors who had not yet taken the oath and whose credentials were no more official. Second, the episode showed what a big mess pre-organization challenges can produce, especially when the House's party balance is close to even. Third and finally, even as it trashed the Oaths First precedent, the Broad Seal War produced a different helpful principle. In the midst of this messy process, Representative Naylor had voted on the New Jersey dispute (albeit based on a confusing and very narrow vote). This notion—that challenged members-elect should be able to vote on challenges to other members-elect—is central to this Article.[107]

v. The Quiet Aftermath (1841–1859)

Perhaps out of recognition of the damage the Broad Seal War had done, it was decades before the Oaths First precedent was again disrespected. Notably, this was so even though the House was closely divided on several occasions.

At the next two Congresses, House organization was interrupted only briefly by objections that were deferred for later consideration.[108] Most of the next several Houses proceeded directly from the roll to the Speaker election to the oath without any interruptions.[109]

Three organizations had contentious Speaker elections, but none of them featured pre-oath disputes over anyone's elections or qualifications. In 1849,

106. *See* CONG. GLOBE, 26th Cong., 1st Sess. 533 (1839); BARTLETT, *supra* note 77, at 19–33; JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 175 (2007).

107. *See infra* Section IV.E.

108. In 1841, someone made an inquiry about a disputed election, but the Clerk produced the governor's certificate under which one of the two contenders would be seated, at which point the group proceeded with the Speaker election and oath. *See* CONG. GLOBE, 27th Cong., 1st Sess. 2 (1841). The dispute was later resolved in favor of the challenger. *See* DIRECTORY, *supra* note 72, at 126 nn.67–68. In 1843, someone attempted to get the unorganized House to decide whether certain delegations—elected at large in contravention of a recently passed federal law requiring district-based representation—should be seated. *See* CONG. GLOBE, 28th Cong., 1st Sess. 2 (1843) (comments of Rep.-Elect Campbell of South Carolina). The attempt failed; the Speaker election and oath proceeded apace, and the challenge was addressed (and rejected) only later. *See id.* at 3–4; BARTLETT, *supra* note 77, at 47–69.

109. *See* CONG. GLOBE, 29th Cong., 1st Sess. 1–2 (1845); *id.*, 30th Cong., 1st Sess. 1–3 (1847); *id.*, 32d Cong., 1st Sess. 5–10 (1851) (showing delay because of colloquy about partisan matters, but no motions or other official action); *id.*, 33d Cong., 1st Sess. 1–2 (1853); *id.*, 35th Cong., 1st Sess. 1–2 (1857).

with the House riven by the slavery issue and the emergence of the Free Soil Party, it took three disorderly weeks and sixty-three ballots to elect a Speaker.[110] During that time, there were plenty of heated disagreements but no challenges to anyone's right to participate.[111] The 1855 Speaker election surpassed that, taking two months and a whopping 133 ballots to elect a Speaker.[112] There too, no one's seating was challenged until after the Speaker election and administration of the oath, despite the existence of several close or disputed elections.[113] Finally, in 1859, the presence of third parties and splinter factions, coupled with high tensions over slavery, contributed to a fiercely fought series of forty-four ballots over two months before a Speaker was chosen.[114] Yet again, multiple representatives' elections were challenged—two of them successfully—but only after the Speaker election and the oath.[115]

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110. *See* JENKINS & STEWART, *supra* note 76, at 156–67; CONG. GLOBE, 31st Cong., 1st Sess. 27 (1849) (describing one particularly raucous vignette).

111. *See* CONG. GLOBE, 31st Cong., 1st Sess. 2–67 (1849). There were several close races. *See* DUBIN, *supra* note 63, at 154–55 (listing multiple races decided by sub-1% margins, including Connecticut's First District (0.8%), Kentucky's Seventh District (0.5%), Maryland's Second District (0.8%), North Carolina's Eighth District (0.5%), Rhode Island's Western District (0.5%; twenty votes), and Tennessee's Eighth District (0.8%)). Two members were challenged later in the session, one successfully. *See* BARTLETT, *supra* note 77, at 118–41; DUBIN, *supra* note 63, at 157 n.2. A race being decided by less than 1% is a very rough proxy for contestability; most sub-1% results were not overturned, and many races that were overturned featured initial margins above 1%.

112. *See* JENKINS & STEWART, *supra* note 76, at 177–88.

113. Illinois's Seventh District election was decided by a single vote and after being contested was declared vacant. *See* CONG GLOBE, 34th Cong., 1st Sess. 427 (1855) (lodging protest only after the Speaker election); BARTLETT, *supra* note 77, at 169–76; DUBIN, *supra* note 63, at 169, 175. Other elections decided by less than 1% included: Georgia's Fourth District (0.5%); Iowa's First District (0.7%); Kentucky's Fourth District (0.1%); Maryland's Third District (0.4%); New York's Fourth District (0.2% between members of two Democratic factions); Pennsylvania's Fifth District (0.05%; eight votes); and Texas's First District (0.2%). *See id.* at 170–73. Another member was challenged later in the session. BARTLETT, *supra* note 77, at 176–77. Also noteworthy is an objection raised to the seating of the delegate from the Territory of Kansas—the objector noted his objection but restrained himself from pressing it before the oath was administered, in deference to the Oaths First process. *See* CONG. GLOBE, 34th Cong., 1st Sess. 353 (1856) (comments of Rep.-Elect Grow).

114. *See* JENKINS & STEWART, *supra* note 76, at 212–23.

115. *See* CONG. GLOBE, 36th Cong., 1st Sess. 655 (1860) (recounting resolution of the Speaker election deadlock and administration of the oath); BARTLETT, *supra* note 77, at 275–341; DUBIN, *supra* note 63, at 186 nn.4–5 (describing successful Howard and Blair contests). There were several elections with sub-1% margins: Connecticut's First District (0.3%); Kentucky's Fourth (0.02%; three votes) and Eighth (0.5%) Districts; Maine's Third District (0.4%); Maryland's Fifth District (0.8%); Michigan's First District (0.3%); New York's Ninth (0.08%; thirteen votes) and Eleventh (0.6%) Districts; Ohio's Third (0.96%), Fourth (0.4%), Ninth (0.6%), and Seventeenth (0.6%) Districts; Oregon's at-large district (0.2%; sixteen votes); Pennsylvania's Eighth (0.1%; nineteen votes) and Sixteenth (0.3%) Districts; Tennessee's First (0.4%) and Ninth (0.04%; seven votes) Districts; and Virginia's Third District (0.9%). *Id.* at 182–83, 185.

In sum, one could say that the Oaths First precedent remained strong throughout the seven decades between the Founding and the Civil War, even during difficult times. The sole exception, 1839's Broad Seal War, served as a cautionary example.

B. Things Fall Apart (1861–1897)

House organization processes changed in 1861—along with many other things in the United States. In short order, the Oaths First process would be supplanted by the Step Aside process. This shift was not carefully considered, and it served no positive purpose, but it stuck.

i. The Beginning of the End (1861–1867)

When the Thirty-Seventh Congress convened for a special session on July 4, 1861, eleven states had already seceded.[116] This avoided the partisan divides that had troubled so many recent Congresses; the Republican Party was firmly in control. But the 1861 organization would prove to be a muddle—and the beginning of the end of the Oaths First era.

During the call of the roll, Representative-Elect Thaddeus Stevens, a prominent Republican leader, made an announcement. After the Speaker election, Stevens said, he would object to his fellow Pennsylvanian, Democratic Representative-Elect William Lehman, taking the oath instead of J.M. Butler, who Stevens claimed was the properly credentialed representative-elect from the district.[117] Following his lead, several other representatives-elect announced their intentions to object later: to Representative-Elect Charles Upton, based on residency; to the entire Virginia delegation, based on Virginia's secessionist authorities having purported to cancel the election; to Representative-Elect A.J. Thayer, based on Oregon having held conflicting elections, with Thayer's allegedly being invalid; and to three representatives-elect who were military officers, based on the Incompatibility Clause.[118]

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116. The roll listed two members from the eleven seceded states. *See* CONG. GLOBE, 37th Cong., 1st Sess. 2 (1861). Both were from Virginia—unionists from what later became West Virginia. *See* DIRECTORY, *supra* note 72, at 93 n.21.

117. *See* CONG. GLOBE, 37th Cong., 1st Sess. 3 (1861). Stevens spoke up when he did, he said, to avoid being estopped from raising his challenge later. *See id.* at 3. It is unclear why Stevens thought he had to act when Lehman was first called on the roll. There was no precedent for anything of the sort in previous practice, and Stevens had been serving in the House since 1849. *See Stevens, Thaddeus*, UNITED STATES HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, https://history.house.gov/People/Listing/S/STEVENS,-Thaddeus-(S000887)/ [https://perma.cc/Y5G4-2G63].

118. *See* U.S. CONST. art. I, § 6, cl. 2 (Incompatibility Clause); CONG. GLOBE, 37th Cong., 1st Sess. 3 (1861); *see also id.* at 5–7 (providing more detail regarding Virginia).

Then, immediately after the Speaker election,[119] Stevens made a successful motion that only "those whose seats are uncontested be first sworn in."[120] By "contested" Stevens meant seats claimed by multiple people,[121] which would have excluded only Lehman and Thayer from taking the oath, not Upton or the others. Nevertheless, Upton and his objector began a back-and-forth about Upton's residency dispute.[122] This dawdling prompted an exchange that encapsulates the entire issue of this Article:

> Mr. CURTIS. I rise to a question of order. I submit that [Stevens's attempt to force Lehman and Thayer aside is] out of order. The House is still in an unorganized condition. It is our first business to perfect our organization; and I claim, therefore, until that shall have been done, these resolutions and motions, the effect of which must necessarily be to delay our organization, are not in order.
>
> The SPEAKER. The Chair overrules the question of order.[123]

Curtis was right that following the Oaths First precedent and leaving challenges until after everyone had sworn in—as the House had done for three generations at that point—would have been more expeditious. Contrary to Stevens's sense of urgency in making his objections early, the Oaths First process had always proven perfectly capable of leaving these matters until later. Stevens had not given any reason for his departure from past practice.

But Curtis was wrong to suggest that this precedent had some binding effect that required members-elect to refrain from speaking, making motions, and voting on those motions.[124] Members-elect *can* do those things. The point of the Oaths First process was only ever that members-elect *should not* use their pre-oath powers to argue about membership. In other words, the Oaths First precedent was only as strong as House members' continued desire to uphold it, and that desire faltered in 1861.

If Stevens was unwilling to save all of the membership hubbub until after the oath, he at least wanted to save most of it for then. But despite his intention to force only Lehman and Thayer to step aside, another objector had different

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119. All of the challenged members-elect besides Thayer and Brown (one of the challenged Virginians) participated in the Speaker election. *See* CONG. GLOBE, 37th Cong., 1st Sess. 4 (1861).

120. *See id.* at 5.

121. *See id.* (comments of Rep.-Elect Colfax) (reflecting this interpretation). Congress had passed laws, including one in 1851 that was in force at the time, to govern procedures for losing candidates to contest elections, so it was likely understood that "contested" referred to such cases. *See generally* Henry L. Dawes, *The Mode of Procedure in Cases of Contested Elections*, 2 J. SOC. SCI. 56 (1869).

122. *See* CONG. GLOBE, 37th Cong., 1st Sess. 5 (1861).

123. *Id.*

124. *See supra* text accompanying note 15.

plans. In that era, the Speaker administered the oath to one state delegation at a time.[125] When it was the Virginia delegation's turn to swear in, Representative Henry Burnett stepped forward to renew his objection to them, and moved that the question of the Virginians' right to swear in be referred to the Committee of Elections.[126]

Stevens protested that it was out of order to interrupt the swearing-in in this way, but Burnett noted that the Constitution gave the House the power to judge its membership, and that "[n]o time is prescribed at which the question shall be raised."[127] Burnett was right, but again the issue was not whether the proto-House *could* deal with these questions at that time. Rather, it was whether the House *should* do so. After some debate about the secession situation in Virginia, Burnett's motion was tabled.[128]

Next, after everyone else had taken their oaths, the Speaker made sure that Lehman and Thayer's cases were considered before the House did anything else.[129] After significant debate, both men were sworn in pending further investigation of their cases (Thayer would later be unseated).[130]

At first glance, it might appear that the Oaths First precedent had not been breached. Only Lehman and Thayer had been forced to step aside, and both of their cases purportedly entailed a challenge to their credentials.[131] As seen in 1833, the Oaths First process only guarantees that those with valid credentials be seated before they face objections to their membership; those who lack valid credentials are fair game.[132] But while Thayer's case involved dueling credentials,[133] Lehman's did not. Pennsylvania's governor had, in fact, certified Lehman as the winner of his election on the same document on which he

125. The practice of having the Speaker swear members in by state rather than en masse had begun in 1809 and 1813. *See* 20 ANNALS OF CONG. 56 (1809); 26 *id.* at 107 (1813). The practice ended in 1929. *See infra* text accompanying note 312.

126. *See* CONG. GLOBE, 37th Cong., 1st Sess. 5 (1861).

127. *Id.* at 5–6. Stevens conceded that if Burnett had been arguing that the Virginia members-elect lacked credentials, it would have been acceptable for him to object at that time. *See id.* Notwithstanding that concession, a later inquiry about their credentials was ruled out of order. *See id.* at 6.

128. *See id.*

129. *See id.* Consideration of a dispute regarding a territorial delegate was deferred until much later. *See id.* at 13; BARTLETT, *supra* note 77, at 402–14.

130. *See* CONG. GLOBE, 37th Cong., 1st Sess. 6–10 (1861); BARTLETT, *supra* note 77, at 349–66.

131. *See* CONG. GLOBE, 37th Cong., 1st Sess. 3 (1861) (comments of Reps.-Elect Stevens and McClernand).

132. *See supra* text accompanying notes 65–74.

133. *See* CONG. GLOBE, 37th Cong., 1st Sess. 9–10 (1861).

certified the rest of the Pennsylvania delegation (including Stevens himself).[134] Stevens's objection was rooted in a dispute over alleged deceit in the underlying count; in certifying Lehman as the winner, the governor had overruled a lower-level bureaucratic determination as fraudulent.[135] But there was no argument that the credentials themselves—the paperwork—were out of order.

Even if Lehman's case had been about credentials, though, Stevens had blazed a new trail. Things had not moved fully to the Step Aside process; Lehman and Thayer were forced aside by a vote of the unsworn assemblage, not merely by one member-elect's objection.[136] But this was unlike 1833, where the disputants had stepped aside voluntarily.[137] Moreover, Stevens had not said that he was forcing people aside only because their credentials were in question. To him, the key was that they were the subject of a contest, with someone else present and claiming their seat—something that could be true of any run-of-the-mill election dispute.[138]

In March 1863, just before the end of the term, Congress enacted legislation to formalize the Clerk's role in the House's organization. The new law required the Clerk of the old House to act before organization to make a roll of the representatives-elect, placing on it only those people "whose credentials show that they were regularly elected in accordance with the laws of their states respectively, or the laws of the United States."[139] This is what most Clerks had been doing all along, but the new law formalized both the Clerk's role and the legal standard.

The new law had a strategic purpose. Republicans had done poorly in the 1862 elections, and their control of the new House was tenuous.[140] Republicans wanted to empower the Clerk, Emerson Etheridge, to limit "bogus members" sent from the South who would weaken Republican control.[141] At the same

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134. *See id.* at 7.

135. *See id.* at 3, 5, 7–9.

136. *See id.* at 5. There was not a roll-call vote, so it is unclear who voted, and in particular whether Lehman and Thayer voted. *See id.*

137. *See supra* text accompanying notes 65–74.

138. *See* CONG. GLOBE, 37th Cong., 1st Sess. 5 (1861) (comments of Rep.-Elect Stevens) ("I make the motion that those whose seats are uncontested be first sworn in.").

139. Act of Mar. 3, 1863, ch. 108, 12 Stat. 804.

140. *See* JENKINS & STEWART, *supra* note 76, at 245 (noting that Republicans would need the support of non-Republican Unionists to control the House).

141. Herman Belz, *The Etheridge Conspiracy of 1863: A Projected Conservative Coup*, 36 J.S. HIST. 549, 553 (1970); *see* JENKINS & STEWART, *supra* note 76, at 245–46; HALBERT PAINE, A TREATISE ON THE LAW OF ELECTIONS 603 (1888) (describing the new statute's purpose as avoiding a "real and substantial danger that mere intruders might, by means of fictitious or forged credentials . . . participate in the organization of the house").

time, the law allowed the Clerk to enroll members elected in the Union-occupied (i.e., liberal, Republican-friendly) parts of the South.[142]

But Etheridge had come to oppose the Republican administration in the wake of its embrace of abolitionism.[143] With Democratic Representative Samuel Cox, Etheridge hatched a plan to scrutinize credentials hyper-strictly for the December 1863 organization, and to tip off only the Democrats in advance.[144] When the new House convened, Etheridge had kept sixteen liberal Republicans off the roll and added three conservative Republicans from Union-occupied Louisiana.[145]

The Republican members-elect got wind of the plot and were ready: they moved to add the first group of their omitted colleagues (those from Maryland) to the roll.[146] Despite their depleted numbers—none of the omitted members from other states were able to vote—the Republicans' motion passed; they had needed a total of two Democrats or Unionists to vote with them and they got eleven.[147] Triumphant, they proceeded to add the other omitted Republicans to the roll, and then to elect their preferred candidate for Speaker.[148]

Had the Democrats and Unionists stuck together and adhered to Etheridge's scheme, they could have controlled the majority and chosen the Speaker. It is doubtful that the Republicans would have taken this lying down, though—they had made contingency plans to choose a temporary Speaker and delay organization until the omitted Republicans could return with satisfactory credentials, or even to remove the Clerk by force if necessary.[149] Luckily for everyone concerned, it did not come to that.[150]

As the entire struggle concerned the validity of credentials, none of this implicated the Oaths First precedent as such. Everyone with clearly valid credentials was able to be sworn in at the outset. There was debate and voting before the oath, but only about whose credentials were valid, not about elections

142. *See* Belz, *supra* note 141, at 553.

143. *See* JENKINS & STEWART, *supra* note 76, at 245; Belz, *supra* note 141, at 555–56.

144. *See* JENKINS & STEWART, *supra* note 76, at 245–46; Belz, *supra* note 141, at 556–57.

145. *See* CONG. GLOBE, 38th Cong., 1st Sess. 4–6 (1863); JENKINS & STEWART, *supra* note 76, at 246; Belz, *supra* note 141, at 561–62.

146. *See* CONG. GLOBE, 38th Cong., 1st Sess. 4–5 (1863); JENKINS & STEWART, *supra* note 76, at 246; Belz, *supra* note 141, at 558–59.

147. These numbers are not from the vote on the motion itself but on an unsuccessful motion to table it, in which five Democrats and six Unionists joined with the Republicans in the 74–94 vote. *See* CONG. GLOBE, 38th Cong., 1st Sess. 5 (1863); JENKINS & STEWART, *supra* note 76, at 246–47; Belz, *supra* note 141, at 562.

148. *See* CONG. GLOBE, 38th Cong., 1st Sess. 5–6 (1863); JENKINS & STEWART, *supra* note 76, at 247; Belz, *supra* note 141, at 562.

149. *See* Belz, *supra* note 141, at 560–61.

150. *See id.* at 566.

or qualifications. The same was true later, when the three conservative Louisianans' questionable credentials were dealt with. By a party-line vote, the proto-House prevented the Louisianans from taking the oath and referred their case to the Committee of Elections.[151] The three were never seated.[152]

Still, the notion that members-elect should sit by passively until after the Speaker is chosen and everyone's oaths are administered had faded further. The Republican majority was willing to use its power to exercise closer control over the House's membership.[153] Soon, objections and debate during organization would be further normalized, and the Oaths First precedent would be thoroughly dismantled.

When the House next convened, in December 1865, the Civil War was over. None of the Confederate states had been readmitted and none of the people purportedly elected from them were seated.[154] A would-be member from Tennessee protested that he and his compatriots should be added to the roll,[155] but the Clerk ruled him out of order and nothing came of the protest.[156]

Addressing the 1865 Tennessee protest, and the Louisiana dispute from 1863, Congress amended the law on the roll of representatives-elect.[157] The new law limited the Clerk to enrolling only those representatives-elect "from States which were represented in the next preceding Congress."[158] This ensured that readmission would be effected by the House during the term, and not by a Clerk (conniving or otherwise) at organization.[159] Despite the solid hold on

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151. *See* CONG. GLOBE, 38th Cong., 1st Sess. 7–8 (1863). Representative-Elect Thaddeus Stevens withdrew an initial attempt to strike the Louisianans from the roll, and two of the three voted in the Speaker election. *See id.* at 5–7. But when it came time to administer the oath—after every other state's delegation had sworn in—Stevens renewed his objection. *See id.* at 7 (comments of Rep.-Elect Stevens). He argued that there was no legitimate state government in Louisiana to issue credentials, and that the conservatives' credentials were signed by "a man whom nobody in the United States ever heard of as Governor, and with his private seal attached." *Id.* at 7 (comments of Rep.-Elect Stevens).

152. *See* Frederick W. Moore, *Representation in the National Congress from the Seceding States, 1861–65*, 2 AM. HIST. REV. 461, 471 (1897).

153. *Cf.* Comment, *Legislative Exclusion: Julian Bond and Adam Clayton Powell*, 35 U. CHI. L. REV. 151, 157 (1967) (noting Radical Republicans' greater willingness after the Civil War to exclude "duly elected representative[s]," a change "brought about by the naked urgency of power" and that had "little doctrinal support").

154. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3–5 (1865).

155. *See id.* at 3 (comments of Mr. Maynard); DUBIN, *supra* note 63, at 201, 203 n.13.

156. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3–5 (1865).

157. *See* Act of Feb. 21, 1867, ch. 56, § 1, 14 Stat. 397.

158. *Id.*

159. The Clerk's actions in 1865 in not recognizing southerners had set a crucial precedent against their states' readmission—one for which the Clerk was handsomely rewarded with a "prime

Congress the Radical Republicans won in 1866, they were cautious in the wake of the Etheridge episode about ever again giving a Clerk that much discretionary power again.[160]

The Fortieth Congress opened in March 1867 with what would prove to be the last gasp of the Oaths First era.[161] There were many challenges to people's qualifications or elections, but none were made before the oath.[162]

ii. The End (1869)

The Oaths First process was repudiated definitively in the House's 1869 organization. Pre-oath objections abounded, and while their subjects retreated voluntarily rather than being forced not to take the oath, the stage was set for the birth of the current, inferior Step Aside precedent.

Things got raucous before the Speaker election,[163] but eventually order was restored and the large Republican majority voted James Blaine in as Speaker.[164] As Blaine swore in the state delegations one by one, several members-elect were met with objections.[165] One major issue was Section 3 of the recently ratified Fourteenth Amendment, which barred from federal office anyone who, as an officeholder, had supported the Confederacy.[166] Unfortunately, Section 3

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patronage tool." JENKINS & STEWART, *supra* note 76, at 252 & n.18. The new law did not rely on the Clerk, and so was a safer way for the Republicans to proceed.

160. *See* Belz, *supra* note 141, at 567.

161. *See* CONG. GLOBE, 40th Cong., 1st Sess. 2 (1867); Act of Jan. 22, 1867, ch. 10, 14 Stat. 378.

162. *See* CONG. GLOBE, 40th Cong., 1st Sess. 2–4 (1867). Election challenges began to be lodged soon after the oath. *See id.* at 5. Numerous cases arose later, when elected members with questionable loyalty arrived to be sworn in, but the House was already organized at this point. *See* EXCLUSION CASES, *supra* note 52, at 10–11 (members sworn in without the matter being referred to committee); *id.* at 16–18 (members not sworn initially, but sworn in after consideration by committee); *id.* at 91–93 (members not sworn in initially, and rejected permanently after consideration by committee).

163. At the outset, there was a dispute over Pennsylvania's Twenty-First District. The governor issued no credentials because of problems with the vote tallies, but he declared that, in his opinion, Republican John Covode had been elected. *See* CONG. GLOBE, 41st Cong., 1st Sess. 2–3 (1869); 1 HINDS, *supra* note 14, § 559, at 719–20. George Woodward, a Pennsylvania Democrat, moved to add the Democratic contender, Henry Foster, to the roll. *See* CONG. GLOBE, 41st Cong., 1st Sess. 3 (1869). The assemblage avoided the issue by voting to proceed to the Speaker election. *See id.* Next, conflict erupted when New York Democrat James Brooks complained that the Clerk had not enrolled anyone from Georgia or Louisiana. *See id.* at 4. The Clerk ruled Brooks out of order and the assemblage became disorderly. *Id.* At one point there were calls for Brooks to be arrested by the Sergeant-at-Arms, prompting Brooks to note that no Sergeant-at-Arms had been chosen yet. *Id.*

164. *See* CONG. GLOBE, 41st Cong., 1st Sess. 4–5 (1869).

165. *See id.* at 5–8.

166. *See* U.S. CONST. amend. XIV, § 3.

did not prescribe procedures for evaluating such cases, other than providing that a two-thirds vote in both Houses could remove any such disability.[167]

The first formal motion regarding disloyalty was leveled against a member of the Maryland delegation, Democrat Representative-Elect Patrick Hamill; the motion sought to refer Hamill's case to the Committee of Elections and to not swear him in in the meantime.[168] There were multiple problems with this, though. The main one was that the motion concerned qualifications, not credentials. As Representative-Elect Michael Kerr noted—following the Oaths First precedent—Hamill should have been allowed to take the oath given that his credentials were "prima facie evidence of title to his seat."[169]

But Kerr's attempt to revive the Oaths First process was buried in the shuffle. Instead, the debate centered on the timing of the vote. Republican Representative Henry Dawes insisted that it was inappropriate to take a vote in the middle of a state-by-state swearing-in process.[170] The people who had not yet taken their oaths were, he said, unqualified to take official action.[171] Only eight states' delegations had taken the oath at that point, and they were short of a quorum.[172] Dawes (among others) wanted Hamill to step aside until everyone else had taken their oaths.[173]

Democratic Representative Fernando Wood protested that under Dawes's suggested approach, a single objection could prevent someone from being sworn in—anyone could be kept out, including Dawes himself.[174] Dawes responded that an objection would need to be "made in good faith and upon some reasonable evidence," to which Wood gave the obvious reply: "Who is to tell that?"[175]

Dawes seemed to think that having Hamill stand aside was the only alternative to conducting an immediate vote of only those people who had sworn in already.[176] But Speaker Blaine negated this premise, noting that "precedents" supported participation by unsworn members-elect—there was no

167. *Id.*

168. *See* CONG. GLOBE, 41st Cong., 1st Sess. 5 (1869).

169. *Id.*

170. *See id.* at 6.

171. *See id.*

172. *See id.* at 5–6.

173. *See id.* (comments of Rep. Dawes). Others advocating for the Step Aside process instead of an immediate vote included Representative-Elect Farnsworth and Representative Butler. *See id.* at 5.

174. *See id.* at 6.

175. *Id.*

176. *See id.*

reason that they could not join their seated colleagues in voting on the motion against Hamill.[177]

Blaine's point was not; Hamill had already agreed to step aside, effectively giving Dawes what he had wanted.[178] But the debate—voting immediately on Hamill versus swearing in everyone but Hamill and then voting—overlooked a third possibility: the Oaths First process. The motion against Hamill did not need to be made before the oath. Everyone with valid credentials, including Hamill, could have taken the oath, and the objection to Hamill could have been initiated and disposed of right after that. Kerr and Wood had seemed to understand this, but their stray comments did not draw any responses.[179]

Shortly after Hamill stepped aside, two allegedly disloyal Kentuckians (Democrats Boyd Winchester and John Rice) and two Missourians whose elections were disputed (Republicans Robert Van Horn and David Dyer) faced similar motions.[180] The fact that Van Horn and Dyer were facing only an election dispute—and thus were not only credentialed but unquestionably qualified for office, unlike their allegedly disloyal colleagues—was briefly noted but made no difference.[181] Regardless, all four withdrew voluntarily and were not sworn in with their delegations.[182]

A final motion challenged both the citizenship and election of Arkansas Representative-Elect A.A.C. Rogers, but the assembly—still a mixture of sworn and unsworn—voted to table the motion and Rogers was sworn in without having to step aside.[183]

Even though Hamill, Winchester, Rice, Van Horn, and Dyer stepped aside voluntarily, this was the death knell for the Oaths First precedent. Objectors had prevented multiple people with unquestioned credentials from taking the oath at organization. All of these departures from the Oaths First process did not go unnoticed. In the Van Horn/Dyer discussion, Democratic Representative-Elect Samuel Marshall cited the 1839 Broad Seal War as precedent for what the House had done.[184] But Marshall was objecting to the practice; he used 1839 as a cautionary example. In particular, Marshall saw the

177. *See id.* Representative-Elect J. Proctor Knott objected to Blaine's assertion, but Blaine was correct that "precedents" supported this notion. *Id.*; *see supra* note 15; *supra* text accompanying note 124.

178. *See* CONG. GLOBE 41st Cong., 1st Sess. 6 (1869).

179. *See supra* text accompanying notes 169, 174–75.

180. *See* CONG. GLOBE 41st Cong., 1st Sess. 6–7 (1869).

181. *See id.* at 7 (comments of Reps. Boyd and Dawes).

182. *See id.* at 6–7.

183. *See id.* at 7–8.

184. *See id.* at 7.

danger in allowing unsworn representatives-elect to make membership decisions:

> [T]he correct position to be taken is just to swear in every gentleman who comes here with credentials in due form, properly authenticated, and to allow him to take a seat . . . . [T]here may come a time when the parties are so very nearly equally divided that cases may be got up by which the organization of the House may be thrown into the hands of a minority by a trick, as against the right of the majority. By getting up factious objection to two or three members the organization of the House may thus be taken away from the majority and given into the hands of the minority, thereby precipitating discord, anarchy, and probable ruin to the Government and the country.[185]

Marshall's comments encapsulate the darkest fear at the heart of this Article: a constitutional coup. But the battle was lost. Just as Kerr's and Wood's objections had fallen on deaf ears, nobody responded to Marshall.[186] The venerable Oaths First precedent, hobbled in 1861, had now been supplanted by the Step Aside precedent.

After everyone else took their oaths, the House voted to seat Dyer and Van Horn.[187] Soon after that, Hamill, Rice, and Winchester were seated and their cases were referred to the Committee of Elections for further consideration.[188] Nothing was gained from the delay; the Oaths First precedent had died for no good reason. Some might have claimed that the Step Aside process was expeditious, as it avoided clogging up the House's state-by-state oathtaking process, and minimized the awkwardness of voting on motions when only some states had been sworn in. But the oathtaking process *had* been clogged up, and a mixed vote *had* been taken.

More to the point, it would have been *much more* expeditious if the disputed members-elect had just taken their oaths without objection. No great affront would have occurred; their cases could have been referred to the Committee of Elections just as easily. Doing things the way they had been done for decades before 1861 would have yielded the same final result.

185. *See id.*

186. *See id.*

187. *See id.* at 10.

188. *See id.* at 10, 13.

iii. The Step Aside Process is Normalized (1871–1897)

The Step Aside precedent was bolstered at the 1871 organization. Blaine was reelected as Speaker.[189] Once again, as the members-elect assembled to take their oaths state by state, multiple objections were leveled.

First, Alfred Waddell, a member-elect from North Carolina, had his loyalty challenged, prompting Blaine to declare, "Following the course adopted in the organization of past Houses, the Chair will first swear in those members against whom no objection whatever is presented."[190] Despite his use of the plural "Houses," Blaine was presumably referring only to the 1869 organization. But the objected-to members-elect in that year stood aside voluntarily.[191] Waddell did not.

The entire Mississippi and Tennessee delegations faced challenges to their credentials. Apparently in recognition of that controversy, Blaine had put those states last in line to be sworn in.[192] The Tennessee delegation was seated provisionally, but the Mississippi delegation could not participate in that vote.[193] The Mississippi delegation was also seated provisionally and some of the just-sworn members of the Tennessee delegation voted on that motion.[194] It was odd that members of the two delegations had been good enough to participate in the Speaker election based on the Clerk's initial determination,[195] but were not good enough to participate in anything else until their would-be colleagues allowed it.

The same was true of Waddell—indeed, his case was worse given that his credentials had been unobjectionable. Once the House was organized and some other minor matters were handled, Waddell's case came up for discussion. After brief debate, the House voted to seat him provisionally and to refer his case to the Committee of Elections.[196] The House would have suffered no disadvantage from letting Waddell take the oath with the rest of his delegation.

The Step Aside precedent took a firmer hold in the following years: everyone with valid credentials (to the Clerk's satisfaction) voted for Speaker,

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189. *See* CONG. GLOBE 42d Cong., 1st Sess. 6 (1871).

190. *Id.* Blaine turned back a complaint that the objector had not yet been sworn in, noting that the complainer had not been sworn in either. *See id.* This was consistent with his statement in the previous Congress that unsworn members could participate in resolving membership challenges too. *See supra* text accompanying note 177.

191. *See supra* text accompanying notes 178, 182.

192. *See* CONG. GLOBE 42d Cong., 1st Sess. 6 (1871).

193. *See id.* at 7; H.R. JOURNAL 42d Cong., 1st Sess. 9 (1871).

194. *See* CONG. GLOBE 42d Cong., 1st Sess. 7–10 (1871); H.R. JOURNAL 42d Cong., 1st Sess. 9–10 (1871).

195. *See* CONG. GLOBE 42d Cong., 1st Sess. 5–6 (1871).

196. *See id.* at 11–12.

but then pre-oath objections forced members-elect to stand aside while everyone else took the oath and then decided the outcasts' fate. In 1875,[197] it was applied to a credentials dispute and a disputed election.[198] When all the other oaths had been administered, the House immediately debated the two cases and seated the disputed members.[199]

In 1877, the Clerk called the roll and explained his handling of various problematic credentials.[200] After the Speaker election,[201] as the delegations swore in state by state, three objectors forced six representatives-elect to stand aside—five due to questions about their credentials and one due to a disputed election.[202] Over the next three days, the House considered all of the cases and swore in all of the challenged members-elect.[203]

With only two exceptions, 1877 would be the last time anyone was made to step aside because of a challenge to their credentials.[204] Going forward, the

197. In 1873 everyone on the roll had had their oaths administered without incident. *See* 2 CONG. REC. 6 (1873).

198. Louisiana had two men claiming to be governor and Republican Representative-Elect Frank Morey bore the credentials of only one of them. *See* 4 *id.* at 167 (1875). There were two sets of credentials from Louisiana, but they named the same person in all but two districts—one district had two conflicting names, and one district had a winner listed in only one set. *Id.* Morey was made to stand aside. *See id.* So too was Virginia Democratic Representative-Elect John Goode, whose election was disputed (as well as his credentials, less seriously). *See id.*

199. *See id.* at 167–72.

200. *See* 6 CONG. REC. 51 (1877). In addition, Missouri had sent some sort of communication to the Speaker, but the Clerk rejected the suggestion that he should stand in for the Speaker and open it himself. *See id.* Later, ruling out of order a motion to amend the roll, the Clerk also made a strong (and seemingly incorrect) statement that only he, not the unsworn members-elect, had the statutory authority to decide who was on the roll. *See id.* at 53. *But see id.* at 61 (comments of Rep. Mills) (arguing that the House can revise the Clerk's decision).

201. *See id.* at 53.

202. *See id.* at 54.

203. *See id.* at 59–76, 85–93. In one case, that of California Representative-Elect Romualdo Pacheco, the objection was withdrawn before the House voted. *Id.* at 93. The most interesting of the cases concerned two African-American Representatives-Elect from South Carolina, Republicans Joseph Rainey and Richard Cain. Rainey, first elected in 1870, was the first African-American ever to serve in the House. *Rainey, Joseph Hayne*, UNITED STATES HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, https://history.house.gov/People/Listing/R/RAINEY,-Joseph-Hayne-(R000016)/ [https://perma.cc/U698-854Z]. He had the same sort of credentials to take his seat as the other members of the delegation, but Democratic state officials elected at the same time communicated to the House their challenge to the validity of Rainey's election, asserting that Rainey's opponent was entitled to the seat. *See* 6 CONG. REC. 60–61 (1877). Democrats in Congress used that challenge to cast doubt on the validity of Rainey's credentials. After lengthy discussion, the House decided that Rainey had a prima facie right to the seat, so he was sworn in. *See id.* at 60–65. Next, Cain's case was discussed and resolved in much the same terms, and he too was sworn in. *See id.* at 64–69.

204. *See infra* text accompanying notes 231–32, 316–18. (Richardson and Utterback cases).

Step Aside process was used more purely as a way to handle challenges regarding elections and qualifications.

In 1879, one representative-elect, Florida Democrat Noble Hull, was made to stand aside because his election had been highly questionable.[205] The House then seated Hull provisionally (albeit by a narrow, party-line vote), once again making the departure from the Oaths First precedent needless.[206] Near the end of the term, the Committee on[207] Elections unanimously favored Hull's opponent, and the House seated him in Hull's place.[208]

The 1881 organization saw the fullest debate about the shift to the Step Aside precedent. Republican Speaker J. Warren Keifer directed Alabama Democrat Joseph Wheeler[209] to stand aside, prompting a challenge from Pennsylvania Democrat (and former Speaker) Samuel J. Randall.[210] Randall noted that at its official birth in 1869, the Step Aside precedent had been premised on voluntariness.[211] Dudley Haskell responded that the Speaker was merely following the practice followed in the last two House organizations—when Randall himself was Speaker.[212] Haskell said the Step Aside precedent "has in it no hardship and debars no member of any right, but facilitates the organization of this House."[213]

Haskell was right that the Step Aside precedent sped things up—compared to a system in which debates and votes over objections would interrupt the oath-taking process. But if the point was to speed along organization, the Oaths First precedent would have been even faster. Haskell needed look no further than the Speaker election. There, everyone on the roll voted, preventing it from being delayed by objections to anyone's election. The House had no trouble with that practice.

More importantly, Haskell was wrong to say that the Step Aside precedent did not debar people like Wheeler of any rights. To be sure, if Wheeler were seated immediately after the others' oaths were taken, he would not have been

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205. *See* 9 CONG. REC. 5–7, 18–28 (1879).

206. *See id.* at 27–28.

207. The Committee of Elections was referred to predominantly as such until the 1880s, when it began to be called the Committee *on* Elections.

208. *See* ROWELL, *supra* note 80, at 341–42; DUBIN, *supra* note 63, at 249 n.2.

209. The *Congressional Record* makes it difficult to tell who had been sworn in and who was still a member-elect in 1881, so this Section will not refer to people as either one. The people with objections against them obviously were all still members-elect, though.

210. *See* 13 CONG. REC. 9 (1881).

211. *See id.*

212. *See id.*

213. *Id.*; *see also id.* at 10. Randall quibbled about the extent to which previous Speakers had actually ordered people to stand aside. *See id.*

prevented from voting on anything (other than his own case, which he would not have voted on anyway). But nothing guaranteed an immediate vote.[214] And if any other people were challenged (which they would be in 1881), Wheeler would be "debarred" from voting on their cases if they came up before his. Regardless, if Haskell really believed that Wheeler was not debarred of any right—that the Step Aside precedent made no real difference—then what was the point of using it instead of the Oaths First process?

Speaker Keifer ended the discussion when he characterized his action simply as deciding the order in which people took the oath, something that was wholly in his control.[215] Keifer had successfully answered the question of whether he could do this, but he ignored the question of whether he should. Unlike the Oaths First precedent, the Step Aside precedent prevents people with valid credentials from taking the oath until and unless their colleagues—people with credentials no better than theirs—had taken a vote on the question.

Wheeler's case was just the beginning of the 1881 ordeal. Seven other members-elect were ordered to stand aside.[216] Two of the objections were tit-for-tat: Republican John Van Voorhis forced Democrat J. Floyd King to stand aside, prompting King to force Van Voorhis to stand aside as well.[217] After Republican William Robert Moore forced Democrat James Chalmers aside, Democrat Edward Bragg—mockingly but officially—forced Moore aside.[218]

When everyone else had been sworn in, the House turned to Wheeler's case first and considered a motion to deny him his seat pending resolution of his case by the Committee on Elections.[219] The other members-elect who had been forced aside could not vote in Wheeler's case (contrary to what the Oaths First process would have wrought). Speaker Keifer had done more than just change the order in which the oaths were taken.

When it became apparent that Wheeler's credentials were, in fact, unobjectionable, his defenders made a strong (and even somewhat bipartisan[220]) case for seating him immediately.[221] Among other things, they cited a passage

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214. *See, e.g.*, *supra* text accompanying note 196 (Waddell case); *infra* text accompanying notes 320–22 (Shoemaker).

215. *See* 13 CONG. REC. 10–11 (1881).

216. *See id.* at 11.

217. *See id.* King's ability to object to Van Voorhis was one piece of evidence, at least, to support Haskell's notion that those forced to stand aside were not thereby prejudiced. *See supra* text accompanying note 213.

218. *See* 13 CONG. REC. 11 (1881). Bragg derisively imitated the grandiloquent language that Moore had used in objecting to Chalmers. *See id.*

219. *See id.* at 13.

220. *See id.* at 12–13 (comments of Rep. Robeson).

221. *See id.* at 11–13.

from *A Treatise on the American Law of Elections*, by George McCrary, a former chair of the Committee on Elections:

> If the party holding the ordinary credentials of an office can be kept out of the office by the mere institution of a contest . . . the relative strength of political parties in such a body might be changed by instituting contests against members of one or the other of such parties.[222]

A motion was made to keep Wheeler's seat vacant until the Committee on Elections could report on the dispute, the House tabled it, and Wheeler was sworn in.[223]

The fact that the other seven members-elect facing objections could not participate in Wheeler's case was made more galling by the fact that soon after Wheeler's case was resolved, five of them were sworn in without a fight after their objectors withdrew their objections.[224] A sixth objector persisted but his motion was quickly tabled.[225] The seventh objection presented a more complicated (and fascinating) constitutional question, but it too failed.[226]

While all eight challenged members-elect successfully took their seats, half of them were later unseated via successful election contests.[227] This underscored the pointlessness of the Step Aside precedent even further—it delayed organization (during and after the oath) without leading the House initially to displace even those members-elect who, it turned out later, really did not belong there.

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222. *See id.* at 12.

223. *See id.* at 11–13. Wheeler held the seat until June 1882 when, after investigation and debate, his opponent was awarded the seat. *Id.* at 4505 (1882); *see also* ROWELL, *supra* note 80, at 365–68.

224. *See* 13 CONG. REC. 13 (1881). One of the five, William Robert Moore, swore in with others to whom the objections had been dropped, but the *Congressional Record* does not record his objector's withdrawal of his objection.

225. *See id.* at 13–14.

226. South Carolina's Second District had initially gone to Democrat Michael O'Connor, in an election contested by the loser, Republican Edmund Mackey. *See* DUBIN, *supra* note 63, at 254, 256 n.23. Before the House could convene to consider Mackey's contest, O'Connor died. *See id.* at 256 n.23. The governor declared the seat vacant and called a special election, which Democrat Samuel Dibble won. *See id.* at 255, 256 n.23. The question thus presented was whether the governor had the power to declare the seat vacant when, given the existence of a live contest, the House had not definitively declared it to be O'Connor's seat to vacate. *See* 13 CONG. REC. 15 (1881). It was on this basis that the objector moved to leave the seat vacant pending resolution of the O'Connor/Dibble–Mackey contest. *See id.* The House voted to table that motion and thus to seat Dibble; it did not hold directly that O'Connor's credentials would have been good enough to get him seated (and thus that Dibble's were as well), but this was the upshot of its decision. *See id.* Mackey's contest was eventually successful, though, and he was seated in place of Dibble a few months later. *See* DUBIN, *supra* note 63, at 256 n.23.

227. *See supra* notes 223, 226; DUBIN, *supra* note 63, at 256 nn.2, 7, 13 & 23.

Relative simplicity returned in 1883. When the members-elect were sworn in only one representative-elect was forced aside, on grounds of his qualifications.[228] The objector withdrew his objection immediately after the oath, being satisfied merely to refer the issue to the Committee on Elections.[229] Going through the Step Aside dance was not necessary, though; between 1885 and 1897, there were scores of contested elections and all were handled without any pre-oath objections or stepping aside.[230]

There was one credentials case. In 1893, the Clerk added George Richardson to the rolls; when new credentials were issued subsequently for someone else, the Clerk declined to un-enroll Richardson and instead submitted the matter to the House for its consideration.[231] Richardson voted in the Speaker election, but was made to step aside before taking his oath; his case was considered extensively the next day before the House voted along party lines to seat him "on his prima facie case."[232]

Another noteworthy issue arose during this period. In 1897, there was some confusion over duly elected, unchallenged members whose credentials had not arrived in time to get them onto the roll.[233] Some of them requested to be added to the roll so that they could vote for Speaker, but they were not allowed to do so.[234] Later, the Speaker did not allow them to be sworn in until everyone else had been seated and could provide unanimous consent.[235] This represents an odd contradiction: An unsworn member can object and thereby prevent another unsworn member from taking his seat, but even if *all* of the unsworn members unanimously wish to add someone to the roll, they can only do so after taking their seats.

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228. *See* 15 CONG. REC. 5 (1883). The person at issue, Samuel Peters, had been elected while serving as a state judge, which violated the state constitution. *Id.* at 5–6.

229. *See id.* Several other seats were contested only after organization. *See* ROWELL, *supra* note 80, at 398–414 (noting numerous other challenges, many of them successful, including one filed the day after organization).

230. *See* 17 CONG. REC. 105–07 (1885); 19 *id.* at 4–7 (1887); 21 *id.* at 79–81 (1889); 23 *id.* at 4–5, 7–8 (1891); 28 *id.* at 2–5 (1895); 30 *id.* at 13–16 (1897); ROWELL, *supra* note 80, at 415–580 (surveying cases from 1885 through 1897).

231. *See* 25 CONG. REC. 200 (1893).

232. *Id.* at 237; *see id.* at 201–02, 226–38.

233. *See* 30 *id.* at 16 (1897).

234. *See id.*; *cf.* 1 HINDS, *supra* note 14, § 30, at 16–17 (explaining that the power to seat people with certain imperfections in their credentials rests with the House rather than the Clerk). A similar case of straggling credentials happened in 1889, though it appears that no attempt was made to seat those people until after everyone else's oaths had been administered. *See* 21 CONG. REC. 81 (1889).

235. *See* 30 CONG. REC. 16 (1897).

iv. The Lessons of History (1787–1897)

While House organization had evolved in the first fifty-four Houses, two consistent patterns emerged. The first was reliance on, and deference to, the Clerk in the first stage of organization. Other than in 1863—when the underhanded Clerk had plotted against the majority—and in two minor, isolated exceptions, the people who voted for Speaker were the people that the Clerk had put on the roll.[236] Membership objections only ever came later.

Having an orderly and expeditious Speaker election was more sacrosanct than policing the legitimacy of the participants in it. In the Broad Seal War in 1839, the non-seating of representatives-elect with bona fide credentials determined the result of the Speaker election. But 1839 was enshrined as a cautionary example rather than a respectable precedent. Subsequent House organizations featured extraordinarily contentious Speaker elections in which changing a small number of votes would have made a big difference, but the idea of using seating challenges as a way to sway the results was apparently off the table.[237] If such a laid-back attitude is appropriate for the Speaker elections, though, why would the House not stick with that approach all the way through organization?

The other lesson of history from 1789 through 1897 is that forcing people to stand aside from taking the oath does not accomplish anything. Virtually every time somebody was prevented from taking the oath of office at the outset, that person was allowed to be sworn in as soon as everyone else had taken the oath.[238] The only real counterexamples are discreditable: the 1839 Broad Seal debacle and the 1863 plot.[239] Other objections made without pre-oath objections worked just fine—many led to members being unseated—and caused no disruption to the House's organization.[240] There was thus no functional reason to employ the Step Aside process.

If the Step Aside precedent was so pointless, why was it embraced? The purported reason was that it allowed the swearing-in process to go more smoothly, and allowed decisions to be made by a sworn-in House instead of an

236. *See supra* text accompanying notes 143–48. The two exceptions were in 1833, when the Clerk should not have enrolled the person, and in 1861. *See supra* text accompanying notes 65–74; *supra* note 119.

237. *See supra* text accompanying notes 110–15.

238. *See supra* notes 104; *supra* text accompanying notes 129–30, 187–88, 196, 199, 203, 206, 219–26, 229.

239. *See supra* Section III.A.iv (1839 case); *supra* text accompanying notes 140–49 (1863 plot). An additional, partial counterexample occurred in 1833, in which the Clerk should not have added Moore to the roll in the first place, and Moore withdrew voluntarily. *See supra* text accompanying notes 65–74.

240. *See, e.g.*, *supra* text accompanying note 230.

unsworn or partially sworn one. But the administration of oaths would have gone even more smoothly if it had been treated like the Speaker election, with all objections deferred.

Deferring objections until after the oath has another subtler advantage. With the Step Aside process, when there are multiple objections the objected-to members-elect cannot vote on each other's cases. This increases the incentive for tit-for-tat objections, like the time-wasting ones executed in 1881.[241]

In sum, things went fine from 1789 through 1859 when pre-oath objections simply were not made. They would have remained fine had that practice been maintained from 1861 through 1897.

C. The Widening Gyre (1899–1957)

i. Roberts (1899)

With the Step Aside precedent now entrenched, the House took it to the next level in 1899 with the case of Representative-Elect Brigham Roberts. The House's actions were accompanied by more than the usual amount of discussion, but that discussion reflected the passions stirred up by the facts of Roberts's case, not any sort of technocratic hankering to devise optimal oath-taking procedures.

Two representatives objected to Roberts, who was made to step aside rather than swear in with the rest of the Utah delegation.[242] Unlike previous pre-oath objections, Roberts faced no questions about his credentials, his election, or his constitutional qualifications. Rather, the objections were based on Roberts being a polygamist.[243] Roberts's case was considered the next day by the

241. *See supra* text accompanying notes 217–18.

242. *See* 33 CONG. REC. 5 (1899).

243. The first objector, Robert Tayler, said that Roberts was ineligible for office because of his conviction for "cohabitation" under the Edmunds Law. *See* Act of Mar. 22, 1882, Pub. L. No. 47-47, 22 Stat. 30, 31–32; 33 CONG. REC. 5 (1899). Roberts had been convicted, and the law purported to make polygamists (whether or not they had been convicted) ineligible for election to federal office. Doubts were also raised about the validity of Roberts's naturalization, but this issue did not figure significantly in the subsequent debate. *See id.* at 43–44 (comments of Rep. Richardson) (noting that the anti-Roberts resolution did not raise the citizenship argument). The second objector, Thomas McRae, did not even speak about qualifications, instead railing against the "assault" that Roberts's election represented on "American womanhood" and "the sacred marriage system of one man to one woman." *Id.* at 5.

sworn-in House, with Representative Robert Tayler leading the charge against him.[244]

The discussion focused both on Roberts's provisional right to occupy his seat while the House deliberated and on his ultimate right to take his seat.[245] But the House also discussed the precise, narrower question that this Article considers—which Tayler put as "the right to halt [Roberts] at the bar of the House during the organization and refuse to administer the oath."[246]

Tayler started his argument with the Rice and Winchester case from 1869. As Tayler depicted it, the partially formed House was poised to vote not to seat the two men pending final resolution of their cases, but was prevented from doing so when Rice and Winchester voluntarily stepped aside.[247] Tayler described the House as "squarely in favor of halting at the bar of the House a person charged with ineligibility, and sending his case at once to committee."[248] But this was disingenuous. Besides ignoring the decades of pre-1869 precedent, Tayler ignored the fact that as soon as the House was sworn in, it seated Rice and Winchester pending the committee's consideration of their case.[249]

Indeed, from 1869 until 1899, Rice, Winchester, and *every other* similarly situated person were sworn in almost immediately after the House was organized.[250] Tayler tried to distinguish these other cases, saying that they were either dismissed on the merits (incorrect) or were about disputed election results rather than qualifications (also incorrect).[251] In the end, the precedents Tayler

244. *See* 33 CONG. REC. 38–53 (1899). Tayler's argument touched on many other issues. One was the validity of statutes that purported, as the Edmunds Act did, to add qualifications for office beyond those specified in the Constitution. Another was that, regardless of the validity of the Edmunds Act's disqualification provision, Congress could simply refuse to seat a criminal, effectively adding a qualification on the fly as it had done in pre-Fourteenth Amendment cases involving disloyal Southerners.

245. Among other things, Tayler argued that it was inappropriate to seat Roberts and then expel him, since Tayler said that expulsion should be limited to official misconduct, or at least to acts committed after one's election. *See id.* at 39.

246. *Id.* at 41.

247. *See id.*; *supra* text accompanying note 182.

248. *See* 33 CONG. REC. 42 (1899).

249. *See supra* text accompanying note 188.

250. *See supra* text accompanying notes 187–88, 196, 199, 203, 206, 219–26, 229. Indeed, as Tayler apparently realized, Rice and Winchester were seated before the House had elected its Clerk and other officers. *See* 33 CONG. REC. 42 (1899) (comments of Rep. Tayler).

251. *See* 33 CONG. REC. 42 (1899). Tayler also mentioned the 1871 cases of the Georgia delegation (which had not been enrolled and whose credentials were in question, though this all happened after organization) and Rep. Waddell. *See id.* at 42–43; *supra* text accompanying notes 190–91, 196 (discussing Waddell). Tayler's point about elections versus qualifications was that a disputed

cited provided no support for his notion that the unorganized House should refuse to seat people with valid credentials pending consideration of their qualifications.

Strikingly, Tayler did not cite the clearest example of people at organization actually being denied their seats pending consideration of their cases—the 1839 New Jersey debacle. That case represented (and still represents) the most potent act of an unorganized, unsworn House deciding membership, denying people with valid credentials their seats because of an electoral dispute, and doing so in a way that tipped the partisan control of the House.[252] Tayler's failure to cite the 1839 organization underscores just how discredited a precedent it was understood to be. As the leading election-law treatise at the time, George McCrary's, put it:

> The principal, and almost the only case, in which the lower house of Congress has ever denied to a person holding regular credentials, the right to be sworn and to take his seat pending the contest, is the celebrated *New Jersey Case* . . . . It is so clearly wrong and as a precedent, so exceedingly dangerous, that the House has not hesitated to disregard it entirely on every occasion since when the question has arisen.[253]

Representative James D. Richardson responded to Tayler. He made no effort to defend Roberts on the merits, saying that Roberts should not *retain* his seat if he was guilty of polygamy.[254] But, Richardson said, "[n]o severer condemnation can be pronounced against a member . . . than to deny him the right to be sworn when this House is being organized."[255] Richardson also noted that, like all other enrolled members-elect, Roberts had been enjoying the privileges of that status—including drawing a salary and enjoying the franking privilege—since the congressional term had begun nine months earlier.[256] (Roberts had also voted in the Speaker election.[257]) Richardson waved off the

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election was not reason enough to prevent someone with valid credentials from taking his seat, but that questionable qualifications were. But one 1869 objectee, A.A.C. Rogers, had been challenged regarding both his election and his citizenship. *See* CONG. GLOBE, 41st Cong. 1st Sess. 7 (1869); 33 CONG. REC. 45 (1899) (comments of Rep. Richardson making this point). And Waddell's 1871 case concerned his loyalty (a qualification). *See supra* text accompanying notes 190–91.

252. *See supra* Section III.A.iv.

253. GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 236 (Henry L. McCune ed., 4th ed., Chicago, Callaghan & Co. 1897).

254. *See* 33 CONG. REC. 44 (1899). Richardson won applause with his declaration that the American people were united in their belief that "the homes of our people and their domestic relations shall be forever preserved in all their loveliness, sweetness, and purity." *Id.*

255. *See id.*

256. *See id.*

257. *See id.* at 5.

precedents Tayler had cited and offered other, more pertinent precedents instead.[258]

Some members, while condemning Roberts's conduct, called for him to be seated pending any further action, based on the fact that he had valid credentials and met the constitutional qualifications for office.[259] This proceduralist position seemed sincere—nobody wanted Roberts in the House, but the question remained of how best to achieve that result. Seemingly more popular, though, were assertions like those from Representative John Fitzgerald. Fitzgerald (who focused only on whether to seat Roberts pending consideration of his case, and not on the issue of seating him at organization) thundered his opposition to Roberts sitting in the House "even for a minute."[260] Fitzgerald ranged back and forth regarding Mormonism itself,[261] but was clear in his notion that family values were paramount, and that there was ample precedent for refusing to seat someone for whom charges were pending.[262]

Tayler had the last word and sardonically disdained the Oaths First process's notion that anyone with facially valid credentials should be allowed to take the oath:

> Our friends upon the other side of the House . . . are here to-day worshiping as they have ever worshiped under other forms and for other purposes the fetich [sic] of a certificate. . . . If the King of the Cannibal Islands, panoplied with his club and with his feathers, marched down the aisle with a certificate of the governor of Tennessee, we must stand here appalled by the spectacle, and say, "Mr. Speaker, swear him in." [Laughter and applause on the Republican side.]
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> . . . .
>
> If a boy 10 years old walked down the aisle presenting a certificate as a member-elect from a district in the State of Arkansas, my friend from Arkansas who has just spoken would

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258. *See id.* at 44. One was the case of Joseph Rainey, which Richardson might have included as an appeal to Republicans; opposition to Rainey had likely been racially based and Richardson could quote good Republicans defending Rainey's prima facie right to a seat based on his credentials. *See id.* at 45; *supra* note 203. Another was the 1873 case of George Cannon, a non-voting delegate from what was then the Utah Territory. Like Roberts, Cannon was challenged because of his polygamy; unlike Roberts, he was seated pending further consideration of his case. *See* 33 CONG. REC. 44–45 (1899).

259. *See, e.g.*, 33 CONG. REC. 50 (1899) (comments of Rep. Dinsmore).

260. *Id.* at 51.

261. *Compare id.* at 50 ("I do not oppose Mr. Roberts on account of his religious views. Mr. King, who served so ably in the last House, was a Mormon."), *with id.* at 51 ("Mormonism is the curse of this country to-day. It is nothing else than legalized licentiousness and corruption.").

262. *See id.*

> say, "The absurdity of this certificate is manifest, but we must swear him in." If Li Hung Chang should march down this aisle with a certificate, that certificate must be respected.[263]

Tayler's assault on precedent was apparently a compelling one to his colleagues. The resolution to keep Roberts out pending final resolution of his case passed overwhelmingly, 304 to 32.[264] To seat someone with valid credentials at organization, leaving objections to them to be handled later, requires a high level of self-restraint. That self-restraint simply was not present in Roberts's case given the revulsion felt toward polygamy and given Roberts's failure to deny the charges against him.

In conjunction with the resolution, the House appointed a special committee to report on Roberts's case.[265] The committee's report focused mainly on Roberts's ultimate right to his seat, but it did pause to consider whether Roberts should have been able to take the oath with everyone else.[266] The report dismissed the objection that allowing pre-oath objections could lead to conflict, confusion, and the "arbitrary and unjust exercise of power" by the House.[267] The committee concluded that the House could bar Roberts at organization, because those with valid credentials can participate in the House's organization even before being sworn; the majority had the same power over Roberts before any oaths were taken as it did after.[268]

The committee was correct that when the will of the majority is clear, it will prevail regardless of when in the process the majority expresses that will. The committee relied entirely on this point, saying that if Roberts had been the first one called to swear in, and had faced an objection, all of the unsworn members could had voted on Roberts right then—the results would have been the same as in the actual case, in which those same people voted only after taking their oaths.[269] But this works both ways; if timing is irrelevant, then there is no reason *not* to wait until after the oath to make objections.

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263. *Id.* Li Hongzhang was a Chinese politician, general, and diplomat. *See Li Hongzhang*, VICTORIA'S CHINATOWN, https://chinatown.library.uvic.ca/index.html%3Fq=li_hongzhang.html [https://perma.cc/CS28-7LTA]. Elsewhere, notably, Tayler conceded that Roberts's facially valid credentials entitled him (and, by extension, the King of the Cannibal Islands et al.) to participate in the House's organization, including the Speaker election. *See* Robert W. Taylor [sic], *The Roberts Case As Illustrating a Great Prerogative of Congress*, 10 YALE L.J. 37, 44–45 (1900).

264. *See* 33 CONG. REC. 52–53 (1899). A more favorable vote had come just before on an unsuccessful amendment moved by Richardson that would have allowed Roberts to be seated pending consideration of his case. That vote was 59 to 247. *See id.* at 52.

265. *See id.* at 52–53.

266. *See* H.R. REP. NO. 56-85, at 6 (1900).

267. *See id.*

268. *See id.*

269. *See id.* at 7.

Moreover, timing is not irrelevant. The committee's claim to the contrary denigrated the significance of the oath. It ignored that objectionable people will have already voted in the Speaker election. And it ignored the fact that the Step Aside process changes who can vote when there are multiple members-elect facing objections.

More problematic, though, was the Roberts committee's claim that a majority had never used its power to wreak an injustice.[270] This is a meaningless point if the majority gets to define what constitutes an injustice. Worse, it overlooks the risk of a minority seeking to become a majority by manipulating the roll. Majority control had flipped in the 1839 debacle,[271] and it threatened to do so under the 1863 Etheridge conspiracy.[272] The point is not that the 1839 and 1863 organizations make it clear what the proper procedures should be. The point is that the committee did not address those obviously important precedents at all. By dodging the question, the committee made it appear that the Step Aside process was simple, obvious, and unproblematic. In fact, it is none of those things.

In the final part of its argument about votes at organization, the committee quoted George McCrary's treatise in support of the Step Aside process.[273] But as the committee itself noted, McCrary was describing the House's practice, not defending it.[274] If McCrary had published his treatise in 1855 instead of 1875, it would have said just as definitively that everyone with valid credentials swears in, with objections lodged only afterwards. But McCrary and the committee were correct that the Step Aside precedent was now entrenched.

ii. The Post-Roberts Era: Precedent, Resistance, and Silence (1901–1957)

The first objection of the post-Roberts era was not lodged until 1913; H. Olin Young of Michigan was forced to step aside.[275] After everyone else swore

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270. *See id.*

271. *See supra* Section III.A.iv.

272. *See supra* text accompanying notes 143–49.

273. *See* H.R. REP. NO. 56-85, at 7; MCCRARY, *supra* note 253, at 239 (containing the cited passage); *see also supra* text accompanying note 222; *supra* note 253 (noting other citations to McCrary).

274. *See* H.R. REP. NO. 56-85, at 7.

275. *See* 50 CONG. REC. 64 (1913). There were no pre-oath objections from 1901 through 1911. *See* 35 *id.* at 43–45 (1901); 37 *id.* at 146–48 (1903); 40 *id.* at 38–41 (1905); 42 *id.* at 3–5 (1907); 44 *id.* at 16–19 (1909); 47 *id.* at 4–7 (1911). In 1905, the Clerk turned away an attempt to add to the roll someone whose certificate had been lost, but whose presence was apparently not disputed; there was not unanimous consent for adding him to the roll, so he was made to wait until after everyone else had sworn in. *See* 40 *id.* at 40–41 (1905); *cf. supra* text accompanying notes 233–35 (describing situation in which such an addition was not permitted even with unanimous consent). In 1919, the same situation

in, the House voted by a strong majority to let Young take his oath pending consideration of his case.[276]

In 1919, Victor Berger was made to stand aside.[277] Once the oath had been administered to everyone else, the objector introduced a resolution to bar Berger from his seat pending consideration of his case, cited the Roberts case, and moved to end any debate.[278] The resolution was then adopted without any discussion; during this whirlwind Berger attempted unsuccessfully to speak.[279] With the Roberts case as an accepted precedent for excluding criminals—and not even seating them pending consideration of the case—Berger never had a chance.

At no point were the actual charges against Berger recited, let alone debated. Also undiscussed were any principles about the proper order of operations vis-à-vis objections, seating, and the oath. The objector said only that Berger was ineligible and that there were "public records and papers" supporting that conclusion.[280] But Berger's story surely was well known to all present: he had fervently and publicly opposed America's participation in World War I.[281] For this, Berger was indicted under the Espionage Act, but while under indictment he was elected to the House. Then Berger was tried, convicted, and sentenced to twenty years in prison (he was free pending appeal when the House convened).[282] The House later decided to deny Berger his seat as a final matter, and when he won the special election to fill the resulting vacancy, the House refused again to seat him.[283]

The Step Aside process continued to be used throughout the 1920s, though in each instance it occasioned some pushback. In 1921, after the Speaker election and during the oath, an objection was made to Kansas Republican Richard Bird, alleging that he had spent more money on his campaign than was allowed by law.[284] The Speaker directed Bird to stand aside, prompting Republican Representative (and House Minority Leader) James Mann to comment that he did not think anyone had the right to make someone stand

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arose, except this time there was unanimous consent to add the uncredentialed-but-uncontested members to the roll, after the Speaker election and before the oath. *See* 58 CONG. REC. 8 (1919).

276. *See* 50 CONG. REC. 65–67 (1913).

277. *See* 58 *id.* at 8 (1919). There were no pre-oath objections in 1915 or 1917. *See* 53 *id.* at 4–6 (1915); 55 *id.* at 105–08 (1917).

278. *See* 58 *id.* at 9 (1919).

279. *See id.* at 8–9.

280. *See* 58 CONG. REC. 9 (1919).

281. *See* EXCLUSION CASES, *supra* note 52, at 81–82.

282. *See id.* at 83.

283. *See id.* at 89.

284. *See* 61 CONG. REC. 80 (1921).

aside "because all Members with credentials are on an equal basis in the House."[285] Mann did not formally object to Bird standing aside temporarily, though.[286] The objector noted that Bird being made to stand aside was consistent with the Roberts, Young, and Berger precedents.[287] Mann replied that there had been acquiescence in those cases (a debatable point) but that, regardless, objections should wait until after the oath. "[O]therwise," he said, "I might object to the whole Democratic side of the House being sworn in."[288] Mann was right, but the question was rendered moot when Bird stepped aside consensually.[289]

Others tried to discuss the merits of the case, prompting the Speaker to say that precedent made it clear that Bird should be allowed to step aside, and his case decided after everyone else had sworn in.[290] That is what then happened: after everyone else took the oath, the House decided after a brief debate to seat Bird immediately.[291] During that debate, Mann spoke up against pre-oath objections, again warning against the possibility of tit-for-tat objections, and worrying that the Step Aside process might someday be used to change party control of the House.[292] He concluded with an apparently stirring defense of the Oaths First principle: "His credentials are as good as mine; they are as good as the credentials of the gentleman from Virginia [Mr. FLOOD]; they are as good as anybody else's credentials, and he is entitled to take his seat now."[293]

Probably because the issue was moot at that point, nobody responded to Mann's points in detail. One member did say, however, that the objection to Bird had to be made when it was, as there was no election contest in his case.[294] This notion (that in the absence of an election contest, objections must be made to a member before he or she swears in) pops up elsewhere in discussions of House organization.[295] There is, however, no obvious origin of this notion. More to the point, there is no obvious basis for it. Even if timeliness requires that an objection be registered before a member is sworn in, it does not follow

285. *Id.*

286. *Id.*

287. *See id.*

288. *Id.*

289. *See id.*

290. *See id*.

291. *See id.* at 80–82.

292. *See id.* at 81.

293. *See id.* The *Congressional Record* noted applause on the Republican side following Mann's statement.

294. *See id.* at 80.

295. *See supra* note 32 and accompanying text (discussing Step Aside process as an alternative to the formal election-contest process for the House to obtain jurisdiction over an election challenge).

that timeliness requires the objected-to member to stand aside during the oath.[296]

At organization in 1923,[297] an objection led a Republican member-elect from Illinois, Edward Miller, to stand aside.[298] Another Illinoisan, ten-termer Martin Madden, complained, saying that there was no reason for someone with proper credentials and no charges against him to be made to stand aside. The Speaker replied that this was "the custom that has always been followed."[299] He said that if Madden continued to object the House could take up the matter, but that very few people had sworn in at that point.[300] Madden continued to object but the discussion wound around, a Democrat from Illinois was also made to step aside, and the oath-taking proceeded without the two Illinoisans—and also without a vote on Madden's objection.[301] Once everyone else was sworn in, Madden immediately moved to seat Miller (permanently, not just pending consideration of his case) and successfully moved to end debate by a strongly party-line vote, without yielding to allow any discussion of Miller's case.[302] His motion to seat Miller passed.[303] At that point, the objection to Miller's Democratic colleague was withdrawn and he swore in as well.[304]

After an uneventful 1925,[305] there was a pre-oath objection in 1927 to Pennsylvania Republican James Beck.[306] Beck was asked to step aside instead of being ordered to, and he complied.[307] After everyone else had been sworn in, Beck's case was discussed and, just as in 1921 and 1923, a member spoke out against according members-elect the right to object to other members-elect

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296. *See infra* Section IV.B (critiquing current practice for this reason).

297. The Speaker's election was difficult, requiring nine ballots over three days. *See* 65 CONG. REC. 8–15 (1923). Nobody attempted during those three days to challenge any member-elect's place on the roll. Before the Speaker election, Member-Elect Edward Browne asked, "[B]efore casting a ballot, is it not necessary to swear in the Members?" *Id.* at 8. Browne should have known better; he was about to start his sixth term. Also before the Speaker election, during the Clerk's roll call, the Clerk noted several issues with the Texas delegation, which he passed along to the House. *Id.* at 7.

298. *See id.* at 16; H.R. JOURNAL, 68th Cong., 1st Sess. 11 (1923). The *House Journal* records Miller's action as voluntary, but the *Congressional Record* does not.

299. *See* 65 CONG. REC. 16 (1923).

300. *See id.*

301. *See id.* The Democrat, James Buckley, may have stood aside voluntarily. *See supra* note 298.

302. *See* 65 CONG. REC. 16, 18 (1923).

303. *See id.* at 18.

304. *See id.*

305. *See* 67 *id.* at 378–82 (1926).

306. *See* 69 *id.* at 8 (1927).

307. *See id.*; H.R. JOURNAL, 70th Cong., 1st Sess. 6 (1927).

taking the oath.[308] In the ensuing debate, Victor Berger chimed in that he had been treated similarly—he meant to needle the Republicans complaining now who had had no trouble treating Berger the same way eight years earlier.[309] Berger joined with the majority in seating Beck permanently without Beck's case even being referred to committee.[310]

There were no pre-oath objections in 1929, despite a controversy from Texas noted by the Clerk during the roll call.[311] Notably, though, Speaker Nicholas Longworth changed the oath-taking procedure so that all members would swear in at once instead of state by state.[312] Given that the Step Aside process was meant in part to expedite the state-by-state process,[313] this change could have prompted a move away from pre-oath objections. But it did not.

Pre-oath objections returned to the scene in 1933,[314] notwithstanding the newly en masse administration of the oath, and notwithstanding the pressing New Deal legislation awaiting Congress. John Utterback and Francis Shoemaker, Democrats from Maine and Minnesota respectively, were asked to step aside.[315]

Utterback was the subject of an election contest and did not have regular credentials.[316] In the debate after the oath, the objector conceded that the Democrats had a large majority with which to exert their will, but asked for the sake of future precedent that the House adhere to its tradition and not seat somebody who lacked valid credentials.[317] But the Democratic majority did

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308. *See* 69 CONG. REC. 9 (1927).

309. *See id.*; *supra* text accompanying notes 277–79.

310. *See* 69 CONG. REC. 9–10 (1927).

311. *See* 71 *id.* at 21–25 (1929).

312. *See id.* at 25. Longworth may have done this as a way to head off Southern objections to seating Illinois Representative Oscar De Priest, the first African-American representative elected in thirty years. *See* OFFICE OF HISTORY & PRES., BLACK AMERICANS IN CONGRESS, 1870–2007, H.R. DOC. NO. 108-224, at 280 (2008).

313. *See supra* text accompanying 215 (showing the Speaker's depiction of the Step Aside process as just changing the order in which oaths are taken).

314. There were no objections in 1931. *See* 75 CONG. REC. 6–9 (1931).

315. *See* 77 *id.* at 71 (1933). The *Congressional Record* gives no indication that the men stood aside voluntarily, but the *House Journal* reported that they did. *See* H.R. JOURNAL, 73d Cong., 1st Sess. 6 (1933).

316. *See* 77 CONG. REC. 71 (1933). It is unclear why the Clerk put Utterback on the roll. The governor and three of the seven members of the state canvassing board believed Utterback to be the winner, but without a majority of the canvassing board backing him the governor would not issue him credentials. The governor sent the Clerk a tabulation of the election results, with a conclusion that Utterback was "apparently elected." *See id.*; L. PAIGE WHITAKER, CONG. RSCH. SERV., 98-194, CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES: 1933 TO 2009, at 5 (2010).

317. *See* 77 CONG. REC. 72 (1933).

exert its will, and Utterback was seated pending review of the election contest despite his imperfect credentials.[318]

The objection to Shoemaker was that he was a convicted felon, which allegedly made him ineligible for public office under Minnesota law.[319] The objection apparently surprised Shoemaker's defenders, so while they maintained that his credentials should have entitled him to swear in, they asked that the matter be put off until the next day.[320] This delay was unusual when compared to the relatively swift consideration these cases had historically gotten, but there was another factor: the urgency of President Roosevelt's agenda.[321] The next day, the House eventually returned to the Shoemaker matter and, after a surprisingly lengthy debate, decided to seat him pending final consideration of his case.[322]

The next pre-oath objection was in 1937.[323] Once again it occasioned a complaint about such objections, followed by a successful motion immediately after the oath to seat the objectee without reservation.[324]

Perhaps because of the futility of the seven pre-oath objections made after Berger's case in 1919, and perhaps because of the resonance of the grumbling about the Step Aside process that followed those objections, there were no pre-oath objections between 1939 and 1957.[325] There was no shortage of post-oath objections during this time, though.[326] As such, it might have been tempting to think that the Oaths First process had been restored. Alas, that was not the case.

D. The Modern Era Part I: The Chambers, Powell, and McIntyre Messes (1959–1985)

The state of affairs in 2021 has two features: (1) maintaining that members-elect can be forced to stand aside while everyone else takes the oath, and (2) not ever actually doing that. The first part of this formula was cemented with

318. *See id.* at 72–73.

319. *See id.* at 74.

320. *See id.*

321. *See id.*

322. *See id.* at 111–39.

323. There were no pre-oath objections in 1935. *See* 79 *id.* at 9–12 (1935).

324. *See* 81 *id.* at 13 (1937). The objection was to Arthur Jenks, apparently based on an election contest; Jenks's credentials were fine, though the contest eventually succeeded and Jenks was later unseated. *See id.*; WHITAKER, *supra* note 316, at 11–12.

325. *See* 84 CONG. REC. 9–12 (1939); 87 *id.* at 5–7 (1941); 89 *id.* at 4–7 (1943); 91 *id.* at 6–9 (1945); 93 *id.* at 33–37 (1947); 95 *id.* at 7–9 (1949); 97 *id.* at 5–8 (1951); 99 *id.* at 11–14 (1953); 101 *id.* at 7–10 (1955); 103 *id.* at 44–46 (1957).

326. *See* WHITAKER, *supra* note 316, at 12–21 (collecting dozens of cases).

three troubling cases between 1961 and 1985: Chambers, Powell, and McIntyre. The second part has come in the thirty-six years since then.

i. Chambers (1961)

1959 saw a return to the practice of pre-oath objections after a twenty-two-year lull. Thomas Dale Alford, an independent Democrat from Arkansas facing an election contest, was made to step aside.[327] Immediately after the oath, and without debate, he was seated pending consideration of his final right to the seat.[328]

The 1961 organization broke new ground. Three representatives-elect were made to stand aside: Indiana Republican George Chambers, Oklahoma Democrat Victor Wickersham, and Missouri Democrat Morgan Moulder.[329] Consistent with recent practice, after everyone else swore in, Wickersham and Moulder were seated without any debate, after successful motions to seat them.[330]

But Chambers was the victim of a surprising breach of precedent: not only was he forced to step aside despite having valid credentials and despite having voted for Speaker, he was not seated right after the oath either.[331] Previous similar cases—most notably Brigham Roberts's—were justified on grounds that they concerned qualifications, not an election challenge.[332] A member whose election is questionable may or may not belong in the House; in contrast, an unqualified person has no place in the House, by definition. But Chambers's case was a mere election challenge.

Before Chambers, the only other representatives-elect with valid credentials who were denied their seats pending an election challenge were the ones involved in the discredited 1839 New Jersey case.[333] Despite the highly unusual character of Chambers's treatment, though, there was no discussion. The House voted along party lines to have no debate and then decided (by a sparse vote of 205 to 95) to leave the contested seat unoccupied pending further investigation.[334]

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327. *See* 105 CONG. REC. 14 (1959); WHITAKER, *supra* note 316, at 21–22.

328. *See* 105 CONG. REC. 14 (1959).

329. *See* 107 *id.* at 22–23 (1961).

330. *See id.* at 24–25. It is unclear what the nature of the objections to Wickersham and Moulder were. *See* WHITAKER, *supra* note 316, at 23.

331. *See* H.R. REP. NO. 87-513, at 3 (1961); 107 CONG. REC. 23–24 (1961).

332. *See supra* note 251.

333. *See supra* Section III.A.iv.

334. *See* 107 CONG. REC. 23–24 (1961).

Months later, the committee recounted the ballots and recommended reversing Chambers's state-certified victory in favor of his opponent, J. Edward Roush.[335] While the committee accepted this new count unanimously, the Republican members of the committee appended "additional views" to the report that decried the decision to leave the seat empty for five months instead of seating Chambers provisionally based on his credentials.[336] They also recounted how the Clerk, at the behest of Democratic leaders, had prepared and circulated (only to Democrats) a document that contradicted the state returns and showed that Roush was the rightful winner.[337] This, they argued convincingly, was unseemly, especially when juxtaposed with the party-line vote to prevent debate on the Chambers motion.[338]

When the full House considered the committee's report, the debate mainly centered on the question of which candidate should have the final right to the seat, but Republicans did repeat their complaints about the Clerk's conduct, and about the failure to seat the credentialed Chambers at organization or to allow any debate.[339] Allegedly, the document that the Clerk had circulated had led at least some Democrats to think that both Chambers and Roush had credentials; had that been the case, the decision to deny Chambers his seat both before and after the oath would have made sense, even under the Oaths First process.[340] But it was not the case, and the lack of debate at the time made it impossible for anyone to dispel any such misconceptions.

On the Democratic side, some members tried to justify the departure from precedent. One stated, weakly, that the final result of the recount justified the decision not to seat Chambers.[341] Another, Majority Leader McCormack, pointed to the suspicions that had been raised about the election results at the time the House convened.[342] In a perfunctory way, McCormack also distinguished the precedents the minority had cited, saying that they related to qualifications rather than elections—ignoring that this distinction made the case for seating Chambers at organization not weaker but stronger.[343]

In the end, the House approved the resolution to seat Roush 138 to 51.[344] Not only had the debate failed to engage—let alone refute—the precedents that

335. *See* H.R. REP. NO. 87-513, at 1–2.

336. *See id.* at 65–67.

337. *See id.* at 68–69.

338. *See id.* at 67–69.

339. *See* 107 CONG. REC. 10,379, 10,382–84, 10,386–87, 10,389–90 (1961).

340. *See id.* at 10,383.

341. *See id.* at 10,382.

342. *See id.* at 10,386.

343. *See id.*; *see supra* note 251; *supra* text accompanying note 332.

344. *See* 107 CONG. REC. 10,391 (1961).

the House's actions contravened, most of the House apparently was not even there.

ii. Powell (1967)

The 1965 organization saw a return to form.[345] The entire Mississippi delegation (because of a dispute over an alternate election) and one Democratic member-elect from New York (because of campaign-finance issues) were challenged before the oath. Consistent with recent practice, the objectors did not state the nature of their objections, saying only that they based them "upon facts and statements which [they] consider[ed] . . . reliable."[346] The others then swore in, and Democratic leader Carl Albert successfully moved to seat the five Mississippians on grounds that their credentials had been filed in due form.[347] Then, the New Yorker, Richard Ottinger, was seated by a vote with no debate.[348]

At 1967's organization, all of the previous history discussed in this Article came to a head with the case of New York Democrat Adam Clayton Powell. There were actually two members-elect forced to stand aside that day: Powell and Georgia Republican Benjamin Blackburn. Blackburn, whose election was being contested, was treated in the conventional manner: after Powell's case was resolved Blackburn was seated pending final consideration of his election, without debate.[349]

By contrast, Powell's case occasioned significant discussion. There was no debate when California Democrat Lionel Van Deerlin "demand[ed]" that Powell step aside—the whole point of forcing people to stand aside was to avoid debate so that the oath could be administered promptly.[350] But after everyone else (other than Blackburn) had taken their oaths, Powell's colleagues had plenty to say.

Representative Morris Udall introduced the sort of resolution that, in most other Step Aside cases, would quickly pass (and in Blackburn's case, would soon pass): he simply called for Powell's case to be sent to committee for further consideration, and for Powell to be seated in the meantime.[351] Udall did

345. There were no pre-oath challenges in 1963. *See* 109 CONG. REC. 10–13 (1963).

346. 111 *id.* at 18–19 (1965); WHITAKER, *supra* note 316, at 24–26.

347. *See* 111 CONG. REC. 19–20 (1965).

348. *See id.* at 20.

349. *See* 113 *id.* at 27 (1967).

350. *See id.* at 14.

351. *See id.* at 14–15.

not defend Powell's conduct—indeed, nobody did that day besides Powell himself.[352]

But Powell's opponents resisted. They argued that the record was clear and that the House had the power to declare Powell's criminality a disqualification from taking his seat.[353] While they conceded that precedent supported initially seating credentialed members-elect pending election challenges, they said that it was entirely appropriate to deprive a credentialed member-elect of his seat based on qualifications.[354] One representative, in making an argument of this sort, confidently but erroneously asserted, "[t]here are no precedents—no precedents—for seating a Member and putting him in limbo pending investigation."[355] In fact, there were multiple precedents for seating a member pending further investigation, including at organization.[356] These precedents also belied another expressed concern—that seating Powell would mean it would require expulsion to unseat him.[357]

The Step Aside process had become fully accepted. While Powell's advocates argued that he should be sworn in pending final consideration of his case,[358] nobody (except perhaps Powell) argued that he should have been able to swear in with everyone else.[359]

After a long debate, the House voted by a wide margin to defeat Udall's resolution and instead to leave Powell's seat empty pending final disposition of his case.[360] Later, the committee investigated and recommended seating

352. *See id.* at 23. Powell had corruptly abused his position as a committee chairman and the Democratic caucus had already decided to strip him of that post. *See id.* at 16. There were also questions raised about his residency: in an apparent effort to evade service of process in New York, Powell resided in Bimini and returned to his district only on Sundays (taking advantage of the state law that precluded serving process on Sundays). *See id.* at 21 (comments of Rep. Kupferman); *Powell, Adam Clayton, Jr.*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/People/Detail/19872 [https://perma.cc/JG3C-GRC5].

353. *See* 113 CONG. REC. 18–19 (1967).

354. *See, e.g.*, *id.* at 18 (comments of Rep. Ford); *id.* at 21 (comments of Rep. Goodell).

355. *Id.* (comments of Rep. Goodell); *see also id.* (comments of Rep. Goodell) ("There is not a single precedent in the annals of the House for seating a man whose qualifications have been questioned under these circumstances before his trial.").

356. *See, e.g.*, *supra* text accompanying notes 168–80, 188, 193–94, 196, 228–29, 318, 322.

357. *See* 113 CONG. REC. 19 (1967) (comments of Rep. Van Deerlin) (advocating for excluding Powell because the alternative was expulsion, which would be impossible); *id.* at 21 (comments of Rep. Goodell) (same).

358. *See, e.g.*, *id.* at 16 (comments of Rep. Udall); *id.* at 18 (comments of Rep. Albert); *id.* at 20 (comments of Rep. Scheuer); *id.* at 22 (comments of Rep. Ryan).

359. Powell said, "You talk about my qualifications. There has been no bill of particulars. Someone can rise 2 years from now and use the same phrase, 'qualifications' on any of you without a bill of particulars and you would not be seated." *Id.* at 23.

360. *See id.* at 24, 26–27.

Powell—they found that he met all of the constitutional qualifications for office, including residency—but punishing him.[361] The full House rejected that recommendation, and voted instead to exclude Powell.[362] The district held a special election to fill the vacancy; Powell won it, but given the House's obvious predisposition against seating him he did not bother to show up.[363]

Powell was elected again in 1968 and appeared for the 1969 organization.[364] He again was made to step aside,[365] and again the House, once sworn in, debated what to do with him. This time, tracking the recommendations of the committee that the House had rejected two years earlier, the House decided to seat Powell but fine him and strip him of his seniority.[366]

A few months later, the Supreme Court announced its decision that the House's 1967 exclusion of Powell had been illegitimate.[367] The Court held that while the Constitution made the House the judge of the elections, returns, and qualifications of its members (so that the Court would not review House decisions on such matters), the Constitution did not allow the House to create new qualifications.[368] Given that Powell's constitutional qualifications were undisputed, the Court said, the House should have seated him.[369]

The Supreme Court did not speak to whether Powell should have been made to stand aside at organization. This made perfect sense, as nothing in Powell's case turned on whether he should have been pushed out immediately before or immediately after the other members took their oaths. Moreover, the Court probably would have considered the House's timing a political question, and left it to the House to resolve.[370] Nevertheless, the *Powell* decision made important changes to the landscape this Article contemplates.

The Court's decision undermined several key exclusion precedents. By holding that the House could not exclude a duly elected representative-elect for being a criminal, the *Powell* Court essentially rejected the decision to exclude

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361. *See* H.R. REP. NO. 90-27, at 32–33 (1967).

362. *See* 113 CONG. REC. 5019–20, 5037–38 (1967).

363. *See Powell, Adam Clayton, Jr.*, *supra* note 352.

364. *See* 115 CONG. REC. 12 (1969).

365. *See id.* at 15.

366. *See id.* at 23–24 (likening similar resolution to committee's recommendations); *id.* at 33–34 (introducing and approving slightly modified resolution).

367. Powell v. McCormack, 395 U.S. 486, 489 (1969).

368. *See id.* at 550.

369. *See id.*

370. *Cf.* McIntyre v. O'Neill, 603 F. Supp. 1053 (D.D.C.), *vacating as moot* 766 F.2d 535 (D.C. Cir. 1985). The court in *McIntyre* rejected plaintiff's case as a nonjusticiable political question. The plaintiff was credentialed as the winner of his House race, and was challenging the House's refusal to seat him pending its resolution of the election contest. *See id.*; *infra* Section III.D.iii.

not only Adam Clayton Powell, but also Brigham Roberts and Victor Berger. Roberts, Berger, and Powell are the only three people ever excluded at organization (that is, denied their seats on qualifications grounds) pending final consideration of their cases.[371] Everyone else who was ever forced to step aside on qualifications grounds was seated by the House shortly after it was organized.[372] As such, while an objector at organization can say that it is House practice for representatives-elect not to take the oath when someone objects to their qualifications, every such precedent was either a waste of time (because the objectee was seated immediately after the oath) or was invalidated by the *Powell* Court.

This aspect of *Powell* had a prospective effect as well: going forward, it greatly reduced the scope of possible qualifications-based objections to would-be representatives.[373] In the fifty years since *Powell*, there have not been any serious qualifications-based challenges leveled at representatives, let alone any brought during organization.[374]

The fact that qualifications-based challenges are unlikely cuts both ways, though. A well-designed procedure would cover qualifications challenges, even if they are unlikely to occur. But infrequency makes it much more difficult to construct routines or build institutional memory.

There was another development during this period: passage of the Federal Contested Elections Act of 1969 (FCEA).[375] This statute updated the formal process through which a losing candidate can contest the election result and seek to be seated in the winner's stead. Filing an FCEA contest puts the ball in the House's court; even if the contestee has been sworn in without objection, the contest can later lead the House to unseat the contestee and seat the contestant in his place.[376] Almost all election challenges follow FCEA procedures.[377] But not all of them do, and objecting to a member-elect's

371. A complete compilation of exclusion cases to 1973 is available in EXCLUSION CASES, *supra* note 52, at 2–116. The compilation shows that other than Roberts, Berger, and Powell, the only people excluded pending consideration of their case were ones who had not shown up until after the House was already organized.

372. *See supra* text accompanying notes 168–82, 188, 190–91, 196, 228–29, 284–91, 298–303, 306–10, 319–22, 346–48.

373. *See supra* note 10 (listing constitutional qualifications for representatives).

374. *See Known House Cases Involving Qualifications for Membership*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Institution/Qualifications/Qualifications-for-Membership-Cases [https://perma.cc/6QHV-5J7B].

375. 2 U.S.C. §§ 381–96.

376. *See* WHITAKER, *supra* note 27, at 5.

377. *See id.* at 9.

swearing in is cited as an additional way to give the House jurisdiction to consider a challenge.[378]

iii. McIntyre (1985)

The Step Aside process was not deployed at any House organization between 1971 and 1983.[379] But in 1985, after the Speaker election and before the oath, Indiana Republican Richard McIntyre and Idaho Democrat Richard Stallings were objected to and ordered to step aside while everyone else took their oaths.[380]

McIntyre had narrowly defeated Frank McCloskey, according to the credentials issued by Indiana, and for some reason McCloskey had not filed an FCEA contest.[381] Nevertheless, Democratic soon-to-be Majority Leader Jim Wright moved for the seat to be declared vacant pending a House-run recount of the district.[382] Wright tried to make his resolution sound routine, but it actually flouted precedent, following only the 1961 disputed-election case (also from Indiana) of Chambers and Roush, which Wright characterized as "very similar, in fact almost identical" to McIntyre's case.[383] Wright conceded that McIntyre's credentials would ordinarily entitle him to be seated, but he complained that Indiana's counting and recounting process had been so inadequate that it was appropriate to disregard McIntyre's credentials.[384]

Soon-to-be-Minority Leader Robert Michel pushed back, citing *Powell v. McCormack* for the notion that qualified, credentialed members should not be turned away.[385] Republican Representative William Thomas noted that in eighty-one of the eighty-two elections contested since 1933, the credentialed member-elect was seated at organization; Chambers was the sole exception.[386]

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378. *See supra* note 32 and accompanying text; *supra* text accompanying notes 294–95; *infra* Section IV.B.

379. *See* 117 CONG. REC. 9–13 (1971); 119 *id.* at 11–13 (1973); 121 *id.* at 16–19 (1975); 123 *id.* at 49–52 (1977); 125 *id.* at 3–6 (1979); 127 *id.* at 93–97 (1981); 129 *id.* at 29–33 (1983).

380. *See* 131 *id.* at 380 (1985). The objection to Stallings may have been a tit-for-tat response to the objection to McIntyre. *See id.* at 390–91.

381. *See id.* at 382 (comments of Rep. Michel) (complaining that McCloskey had not filed an FCEA contest).

382. *See id.* at 381.

383. *Id.*; *see supra* Section III.D.i.

384. 131 CONG. REC. 381 (1985).

385. *See id.* at 382.

386. *See id.* Thomas tried to distinguish the Chambers case by saying that in Chambers's case "there was a question of the certification," because the Indiana secretary of state had changed his mind and sent in a statement that the original certification had been in error. *Id.* at 382–83. But Chambers's credentials were not clouded in that way; Thomas was simply incorrect in his characterization of the

But neither cited the distinction between challenges to qualifications and challenges to election contests, the latter of which was supposed to be a less appropriate basis for refusing to seat a credentialed member-elect at organization.[387]

The Republicans were clearly angry.[388] One even offered that the Republicans "came very close to asking the entire House to stand aside from the swearing-in," a reminder that the Step Aside process plays with fire (or at least disorder).[389] But in the end all that mattered was that the Democrats had the votes. McIntyre's seat was left vacant pending the House's final resolution of the recount.[390] For the purposes of this Article, the point is that McIntyre being forced to stand aside at organization was not the issue; the battle lines had moved entirely to the fight over whether credentialed members should be seated pending committee proceedings, or if instead the Chambers and McIntyre precedents were the new norm.

Stallings's case came up next. The Republicans, surely realizing that they lacked the votes needed to exact any sort of recompense, took the higher ground and joined with Democrats to unanimously approve Stallings's immediate seating.[391] Doing so gave them an opportunity to highlight all of the reasons why they thought Stallings's election was more questionable than McIntyre's while nevertheless calling for consistency with precedent, which meant seating Stallings pending final consideration of his case.[392] It also meant tweaking Democrats for their inconsistency and partisanship that day.[393]

1961 case. *See supra* Section III.D.i. A later committee report set the record straight on this point. *See* H.R. REP. NO. 99-58, at 3 n.5 (1985). Before that, though, several other representatives repeated Thomas's error. *See* 131 CONG. REC. 383–86 (1985) (comments of Reps. Myers, Hunter, Vander Jagt, and Frenzel). Representative Vander Jagt compounded his error by saying, "Never before in history has a candidate certified by the duly constituted authority of that State as a winner been asked to stand aside pending the outcome of an admittedly controversial recount." *Id.* at 385. As Part III of this Article has described, numerous people had been forced to step aside during the oath because of election contests—most recently Blackburn in 1967. *See supra* text accompanying note 349. Even if by "asked to stand aside" Vander Jagt meant the House voting to declare the seat vacant, that had happened before too, in the infamous 1839 New Jersey case. *See supra* Section III.A.iv.

387. *See supra* note 251; *supra* text accompanying notes 332, 343, 354.

388. *See, e.g.*, 131 CONG. REC. 385–86 (1985) (comments of Rep. Vander Jagt) (calling the Democratic action "an act of injustice so grievous that it will permeate our deliberations throughout the rest of this 99th Congress" and saying that it "would create a stench that will permeate our every deliberation").

389. *Id.* at 386 (comments of Rep. Frenzel).

390. *See id.* at 387–88.

391. *See id.* at 391–92.

392. *See id.* at 388–91.

393. *See id.* at 388–89.

In the end, after a lengthy and controversial recount, the House awarded the seat to McCloskey.[394] The fight over the "Bloody Eighth" did a lot of damage, and it was an important episode in Congress's descent from its previous (relative) collegiality to the increasingly bare-knuckled partisanship of recent decades.[395] To be sure, the damage was probably done more by the final recount than by the House's failure to provisionally seat McIntyre at organization. But the latter certainly did not help. As a group, politicians are not known for being eager to own up to their mistakes. Nevertheless, it is striking that in the three decades since the Bloody Eighth nobody has forced a representative-elect to step aside from the oath at organization.[396]

E. The Modern Era Part II: The Second Coming?

The dormancy of the Step Aside process has not been because of a lack of opportunities; there have been numerous election contests in the House since 1985.[397] In its current form, the Step Aside process is used only when the race being challenged is not the subject of an election contest under the FCEA, which is rare.[398] There have also been challenges to the qualifications of a member-elect, but none were raised before the oath, let alone as the basis for demanding that a member-elect step aside.[399] Indeed, since 1985 there have been more kerfuffles about Speaker elections than about letting members-elect take their oaths.[400]

At the 2021 organization, Representative-Elect Chip Roy challenged the seating of sixty-seven representatives-elect: the entire delegations of Arizona,

394. *See* WHITAKER, *supra* note 316, at 40.

395. *See* Meet the Press Daily (MSNBC television broadcast, May 26, 2017) (transcript available at *MTP Daily, Transcript 5/26/2017*, MSNBC, https://www.msnbc.com/transcripts/mtp-daily/2017-05-26-msna1011106) [https://perma.cc/77RD-272J] (calling the Bloody Eighth the "Patient Zero" of the hyper-partisan win-at-all-costs environment on Capitol Hill).

396. *See* 133 CONG. REC. 1–3 (1987); 135 *id.* at 66–71 (1989); 137 *id.* at 35–38 (1991); 139 *id.* at 45–48 (1993); 141 *id.* at 439–46 (1995); 143 *id.* at 114–20 (1997); 145 *id.* at 41–45 (1999); 147 *id.* at 19–23 (2001); 149 *id.* at 1–6 (2003); 151 *id.* at 36–41 (2005); 153 *id.* at 1–5 (2007); 155 *id.* at 1–5 (2009); 157 *id.* at 74–79 (2011); 159 *id.* at 20–24 (2013); 161 *id.* at 28–33 (2015); 163 *id.* at H1–6 (daily ed. Jan. 3, 2017); 165 *id.* at H1–7 (daily ed. Jan. 3, 2019); 167 *id.* at H7–8 (daily ed. Jan. 3, 2021).

397. *See* WHITAKER, *supra* note 316, at 41–48 (describing cases up to 2009).

398. In 1997, it was noted that an FCEA challenge had been filed against Representative-Elect Loretta Sanchez, "[i]n lieu of requesting [her] to step aside." 143 CONG. REC. 120 (1997). A similar non-objection—noting before the oath that there was a contest, but pointedly not asking the contestee to stand aside—occurred in 2007. *See* 153 *id.* at 5 (2007).

399. *See, e.g.*, WHITAKER, *supra* note 316, at 32, 46 n.29 (describing Stokes and McCrery cases).

400. *See, e.g.*, 143 CONG. REC. 115–16 (1997); 145 *id.* at 43 (1999).

Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin.[401] Roy, a Republican, was calling out his fellow Republicans who intended to challenge the presidential-election results in those states—he was implying that if the presidential results could not be trusted then neither could the House results.[402] Roy was only trying to make a point; the unsworn members immediately voted 371–2, with Roy in the majority, to direct the Speaker to swear in all members-elect.[403] No one was forced to step aside. Nevertheless, Roy's objection ended the House's longest stretch without pre-oath objections since the initial one from 1789 through 1833.

Perhaps this lengthy lull reflects that the House now appreciates the awkwardness, pointlessness, and incorrectness of forcing representatives-elect with valid credentials to step aside. As this Article has shown, the Step Aside process was born at a time when members swore in state-by-state; they no longer do. It flourished in a time when the House thought that it could exclude people from office for reasons other than the constitutional qualifications of age, residency, and citizenship; the Supreme Court has made clear that it cannot. It is used as an alternative to the FCEA process for contesting elections—something for which no alternative is really needed. In short, the Step Aside process is useless, and maybe the House finally recognizes that.

That said, the House has shown many times before that its past performance is no guarantee of future results. And regardless, the dearth of members-elect being forced to step aside presents a good opportunity to pause and reflect. What should the House do the next time a serious challenge does arise to a member-elect's election or qualifications? Specifically, how might the Step Aside process be rejected and buried?

IV. PROPOSAL

This Article proposes that the House reestablish the Oaths First process: the House should exercise its membership-judging powers only after *all* members with valid credentials have been seated and sworn in. More to the point, the House should repudiate any attempt to use the Step Aside process. This would protect the legitimacy and promote the efficiency of the seating process. It would conform best to historical practice, and it would be consistent with the text and structure of the Constitution.

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401. *See* 167 *id.* at H7 (daily ed. Jan. 3, 2021).

402. *See* Ryan Autullo, *Responding to Challenges of Biden's Victory, Chip Roy Objects to Seating of Fellow Representatives*, AUSTIN AMERICAN-STATESMAN (Jan. 3, 2021), https://www.statesman.com/story/news/2021/01/03/rep-chip-roy-objects-representatives-challenging-bidens-win/4122566001 [https://perma.cc/6PZV-H5PX].

403. *See* 167 CONG. REC. H7–H8 (daily ed. Jan. 3, 2021).

A. The Baseline

This Article's proposed process for House organization is simple and tracks what the House almost always does anyway. The Clerk places all people with valid credentials on the roll of representatives-elect. At organization, those on the roll vote for Speaker.[404] Then, those appearing on the roll take the oath of office, and with that take their seats. If anybody wishes to challenge a member-elect's election or qualifications, they can do so after that, when the House has fully become the House.

B. The Federal Contested Elections Act

Some accounts of the Step Aside process depict it as a way to give the House jurisdiction over an election challenge when there is not a formal contest under the Federal Contested Elections Act (FCEA).[405] This is particularly relevant for qualifications challenges, which the FCEA does not cover.

But there is no inherent reason to employ the Step Aside process this way. Election challenges outside the FCEA process are rare[406]—and should be, given that the FCEA is an adequate system for adjudicating election disputes. There is no compelling need to allow an alternative avenue for election challenges. And regardless, being sworn in does not make a member's election (or qualifications) unchallengeable. Indeed, under House Rule IX, such challenges are privileged and can be raised at any time as a matter of top priority.[407] While it might be marginally less disruptive to limit non-FCEA challenges to those announced before the oath, disruption is already minimized by the House's presumption that credentialed people will hold their seat until and unless a contestant proves that they should not.

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404. In some ways it is problematic for unsworn members-elect to vote for Speaker. *See supra* text accompanying note 40. But that is a topic for another day given that the Step Aside Process typically (and weirdly) is applied only after objected-to members-elect have already voted in the Speaker election. If the House follows the procedures suggested by this Article, it will not make any functional difference when the Speaker vote occurs, because the voting population will be the same immediately before and immediately after the oath is administered. Moreover, an unbroken line of precedent, dating back to the very First Congress, has seen organizing Houses vote for Speaker before doing anything else. *See supra* note 40 and accompanying text. While the cautionary example of 1839 did not prevent the Step Aside process from taking hold, it was the last time the Speaker election was disrupted by membership disputes in that way. *See supra* Section III.A.iv.

405. 2 U.S.C. §§ 381–96; *see supra* text accompanying notes 32, 378.

406. *See supra* note 32.

407. *See* CHERYL L. JOHNSON, RULES OF THE HOUSE OF REPRESENTATIVES 6 (2021), https://rules.house.gov/sites/democrats.rules.house.gov/files/117-House-Rules-Clerk.pdf [https://perma.cc/F6YN-CFGP]; HOUSE MANUAL, *supra* note 14, § 701, at 425; *see also* 3 HINDS, *supra* note 14, §§ 2579–87, at 1068–72.

Disrupting the House's organization never needs to be part of the challenge process. If it wanted to, the House simply could require non-FCEA objections to be registered immediately after the oath in order to be timely. Finally, and perhaps most importantly, even if there were a good reason to make pre-oath objections a way to give the House jurisdiction over a matter, there is no logical reason to require that the challenged member-elect step aside. In other words, if the point is that there must be a timely objection, then the objection alone should be enough.[408]

C. Making it Happen

The problem with the Step Aside process is not that it happens every two years; it doesn't. The problem is that it lingers as a possibility. House precedent is that unsworn members *can* force individual colleagues to step aside, regardless of how often they actually use that power. As such, establishing this Article's proposal will require affirmatively repudiating the Step Aside process, not just continuing the current streak of dormancy. Such a repudiation will require the majority party to be ready and willing to act the next time a member-elect attempts to force another member-elect to step aside.

When a challenger requests someone to step aside, precedent—which the parliamentarian and the Speaker will almost certainly follow[409]—will dictate that the Speaker ask the objected-to member-elect to do so. This could be prevented by someone else moving to proceed immediately to the administration of the oath,[410] but that would not undo the precedent. What would undo it is someone appealing the Speaker's ruling, arguing that all members-elect with facially valid credentials stand on equal ground and should take the oath together.[411] An appeal would allow for discussion (with the appellant's side following the arguments raised in this Article) and a positive vote by the assemblage to overturn the Step Aside precedent and restore the Oaths First precedent.

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408. *See supra* text accompanying note 296.

409. *See* Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1965 (2020) (noting that the presiding officer in the House unfailingly follows the Parliamentarian's rulings); *id.* at 1982–84 (explaining that the Parliamentarian adheres to a strict form of stare decisis regarding House precedent).

410. *See, e.g.*, *supra* text accompanying note 403.

411. *See* Gould, *supra* note 409, at 1966, 1999 (explaining that a House vote on an appeal from the chair's ruling represents the highest level of House precedential weight); *cf.* GAIL E. BAITINGER, CONG. RSCH. SERV., RL30787, PARLIAMENTARY REFERENCE SOURCES: HOUSE OF REPRESENTATIVES 3 (2019) (noting infrequency of successful appeals).

A precedent like this is not binding in the same way that, say, legislation is (not that legislation is a viable option).[412] There would be nothing preventing a future majority from repudiating the Oaths First precedent again in the future. But a vote of the entire body carries greater precedential weight than does the sort of ad hockery associated with the construction and use of the Step Aside process.[413] Making a clear, firm statement against the Step Aside process and in favor of the Oaths First process would improve the precedential landscape considerably.

D. Credentials

Saying that everyone with proper credentials should take the oath presumes that it is obvious who has proper credentials. It might not be obvious, though, and robust procedures have to account for that possibility.

Two people might appear at organization, both claiming their credentials are valid.[414] If two people seem to have credentials for the same seat—credentials that would suffice if only one person appeared with them—then neither can claim a right to take the oath. In such a situation, neither claimant should be added to the roll, and the seat should remain vacant until the House can resolve the dispute.

But the mere presence of a second person waving around documents need not keep a legitimate winner off of the roll. Sometimes the case will be clear enough for the Clerk (or failing that, the proto-House) to recognize as a ministerial matter that one and only one set of valid credentials has been properly executed under state law. The current process—featuring dialogue between the Clerk's office and the state well in advance of organization—usually provides more than enough time for state officials and courts to sort out who the winner is and convey that information to the Clerk.[415] Certification is

412. Legislation, while providing more clarity, is a tricky proposition here. It probably cannot "govern the House as to its rules or its organization." 5 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 6765, at 889 (1907). Procedural matters that are given to the House alone to judge (as the elections, returns, and qualifications of House members are) are probably up to the House alone to decide via its internal rules. Regardless, this is not the sort of issue that would be likely to spur a successful, proactive legislative effort anyway.

413. *See supra* note 411.

414. The most recent such case occurred in 1893. *See supra* text accompanying notes 231–32.

415. *See supra* Section II.B. Elections are sometimes close or disputed enough that the state has not declared a winner by the time the House term begins. *See, e.g.*, Luis Ferré-Sadurní, *New York Republican Wins Final House Seat*, N.Y. TIMES, Feb. 8, 2021, at A14 (discussing New York's Twenty-Second District in the 2020 election).

a matter of the state's communication with the Clerk, not a matter of individuals appearing in the Capitol wielding papers and making claims.[416]

E. Multiple Disputes

The most significant complication is when multiple seats are in dispute. As a practical matter, this is the only situation in which there is any practical difference between the Step Aside process and the Oaths First process. If there is only one person being challenged, the decision-making body is the same under either procedure: everyone except the person being challenged. The timing is almost identical as well. But if there are multiple challenges, the Oaths First process allows challenged members to vote on other challenged members' cases. By contrast, the Step Aside process precludes the subjects of some challenges from voting on other challenges.

To be precise, a challenged member's voting power could be limited under the Oaths First process too. The precise difference is important. Under the Step Aside process, those who fend off a challenge successfully will be seated and can then vote on subsequent challenges. They would be precluded only from voting on challenges decided before their own. But the House's decision to seat them suggests that their presence is unobjectionable, so it is problematic that they will have been barred from voting on other challenges handled just minutes earlier. This also incentivizes tit-for-tat challenges, because challenges under the Step Aside process are considered in the order in which they were made.[417] Because the subject of Challenge 2 is not able to vote on Challenge 1, leveling Challenge 2 (and 3 and 4 . . .) is a way to stack the deck for the vote on Challenge 1.

By contrast, under the Oaths First process, those who *lose* a challenge are unseated and precluded from voting on challenges decided *after* their own. This is unproblematic, as they have just been adjudged unworthy. If there is a problem, it is that they were able to participate in previous votes. But if the latter is a problem, it has plenty of company—under both the Oaths First and Step Aside processes, unseated members will have voted for Speaker.[418] Moreover, in cases where members are seated provisionally and unseated much later after a lengthy investigation, they will have been voting on all manner of legislation in the meantime. By comparison, the effect of the Oaths First process is much milder.

The presence of multiple challenges also raises some technical issues. One is the question of how far the principle against voting on one's own dispute

416. *See supra* Section II.B.

417. *See* 1 HINDS, *supra* note 14, § 149, at 91–92; HOUSE MANUAL, *supra* note 14, § 203, at 88.

418. *See supra* note 40 and accompanying text.

extends. It is a venerable principle of Anglo-American law that a person should not be a judge in his or her own case.[419] The most basic consequence of this tenet is that a member should not vote on whether he or she should be seated.[420]

But this principle may extend to votes on other members' cases, particularly when those other cases are rooted in the same set of facts. For example, suppose that the government of a state is accused of improperly excluding a certain category of ballots from its vote totals, with the result that three U.S. House districts flip from the Purple Party to the Silver Party. When it considers the dispute, the House might consider the three disputed districts en masse, with none of the three challenged Silver representatives participating. But if the House considers the disputes one district at a time, all three should still be precluded from voting in any of the three cases. Having them vote in each other's cases would be tantamount to having them vote in their own, because they would be ruling on the very facts at issue in their own cases. (There is, admittedly, analogous precedent to the contrary, allowing such participation.[421]) Other than that, though, challenged members should be able to vote on challenges to other members' qualifications, election results, or credentials.

A second technical issue concerns the timing of challenges and votes. If there is ever again a case of inadequate credentials, the House should decide it first, before the oath if necessary. Valid credentials are the foundation of the entire system. By deciding these cases first, the House can ensure that the decision-making body is properly constituted.

What comes first after the oath—qualifications cases or election cases—matters much less, and it is probably fine to adapt the current practice of considering cases in the order in which they are raised. That said, it might make sense to handle qualifications cases first. These will typically involve simpler issues of fact (such as the date on which a member was born or became a citizen) than disputed elections (which tend to be highly fact-intensive and entail examining large numbers of ambiguous votes). Moreover, a member

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419. *See* Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardon*, 106 YALE L.J. 779, 806–07 (1996) (discussing this presumption).

420. *See* 5 HINDS, *supra* note 14, § 5949, at 502; HOUSE MANUAL, *supra* note 14, § 376, at 200. To be precise, House precedent dictates that it is up to individual representatives themselves to decide whether their personal interest in a vote is such that they should not participate; the House's power to limit such an individual's power to vote is "doubtful." 5 HINDS, *supra* note 14, §§ 5950–52, at 503–04; HOUSE PRACTICE, *supra* note 13, ch. 58, § 8, at 943–44; *cf.* Kalt, *supra* note 419, at 796 & n.105 (collecting examples of self-restraint in expulsion cases).

421. *See* 5 HINDS, *supra* note 14, § 5958, at 508 (presenting an 1844 case in which members of a state delegation facing a common legal challenge were able to vote on seating each other); *see also* BARTLETT, *supra* note 77, at 47–69 (providing a full account of the case).

voting, but later being unseated, is more objectionable when the problem was qualifications (such that the member's presence was objectively illegitimate) versus a disputed election (in which case the member's presence was officially certified based on preliminary data to be entitled to the seat).

F. A Concluding Caveat

No political system is completely incorruptible, so it still would be possible for undemocratic results to take place under this Article's proposal. For example, if a corrupt state government certifies candidates who did not actually win, there is no guarantee that a House majority will later vote to unseat the bogus members. On the flip side, a House majority might exclude and unseat members by falsely "judging" them to be unqualified.

But no system can guarantee that it will avoid such problems. More to the point, this Article's proposal is only about the timing of the House's membership decisions, not the merits of those decisions. Compared to the Step Aside process, the Oaths First process adds protection against abuses by self-dealing representatives. To the extent that the Oaths First process does not prevent shenanigans, neither does the Step Aside process. No House rule—on any subject—can eliminate the possibility that a majority of the House will choose to do the wrong thing.

V. PRINCIPLES

This Article's notion that all representatives-elect with valid credentials should take the oath together, and that challenges to anyone's qualifications or electoral victory should wait until after that, touches on several principles. Among them are constitutional doctrines like federalism and the House's authority over judging its own membership, as well as more practical principles such as precedent, pre-commitment strategies, and restraint.

A. Constitutional Principles

i. Federalism

There is a federalist tension inherent in the system of House elections. States have general authority to administer the elections and certify the winners, but Congress can swoop in however it sees fit to regulate the elections' time, place, and manner.[422] Similarly, while Congress has chosen largely to leave it to the states to count votes and declare winners, the House's authority to judge

422. *See* U.S. CONST. art. I, § 4, cl. 1.

its own elections allows it to overrule state results using standards of its own choosing.[423]

The House almost never does this, of course.[424] One reason is that recounts require tremendous energy and resources, so it makes sense to avoid redundancy by relying on the states to the greatest extent possible. But another reason is simply that the House respects the role of the states. This is especially so at organization. From the First Congress through today, members-elect vote for Speaker and swear in based on their states having declared that they won their elections. While the House can and does second-guess state determinations, it must have a starting point—and it relies on states to provide that starting point.

Even if Congress decided to fully federalize the election process, taking election administration completely out of the states' hands, the House still would not have control over its initial membership list. Rather, that control would likely go to whatever federal executive-branch entity was put in charge of administering congressional elections. The House would rely on the executive branch, not the states; there is no way to avoid the need to rely on some agent external to Congress.

In sum, there is no federalism-based imperative in the Constitution that requires the states to play such a crucial role in determining who will swear in on the day the House organizes itself. There is, however, a requirement that *somebody* play that role. That it is the states who do so is consistent with federalism—constitutionally comfortable even if not constitutionally mandated.

ii. The House's Constitutional Authority

After all members with facially valid credentials have been seated, and thus the House has been properly constituted, the House can turn to judging the elections, returns and qualifications of its members. At that point, it has unquestionably become the "House" that is the judge "of its own Members."[425] Using this power, it can unseat members by a simple majority vote; it need not rely on its expulsion power, which requires a two-thirds majority.

423. *See id.* § 5, cl. 1; *cf.* Lisa Marshall Manheim, *Judging Congressional Elections*, 51 GA. L. REV. 359 (2017) (noting ambiguity and tensions surrounding the role of state courts vis-à-vis Congress in adjudicating election disputes).

424. *But see supra* Sections III.D.i and III.D.iii.

425. U.S. CONST. art. I, § 5, cl. 1.

a. Judging Elections, Returns, and Qualifications

Any system for determining the House's proper membership will necessarily rely on the states and on the House's unelected Clerk. The states administer elections and certify the winners. The Clerk assembles the roll of representatives-elect, and represents the eternal flame of House authority that provides for some continuity at organization. But the Constitution unambiguously designates the House—not the states, and not the Clerk—as the judge of the elections, returns, and qualifications of its members.[426] It is thus critical that the House retain ultimate authority.

The role of the states in forming the House's initial set of members was discussed above.[427] There is an important distinction between members' initial right to swear in and take a seat, and their final right to that seat. The House has always recognized this distinction, and it is entirely consistent with the notion of the House as judge. When functioning properly, the states' electoral apparatuses supply that which the House judges. Even though the Oaths First process defers so much to states in the first instance, the House's proper role is preserved as long as the House gets the last word and can scrutinize, recount, or undo the states' determinations as it sees fit.[428]

The Clerk's role requires some intermediate judging in cases where the credentials forwarded by a state are not perfectly regular. When the Clerk exercises her statutory authority to draw up the roll of representatives-elect, marginal cases may require her to exercise discretion. At the very least, she must scrutinize credentials enough to determine if they represent such a marginal case. Here too, though, the answer is that this is acceptable as long as the Clerk is only affecting the initial right to swear in and the House retains the *ultimate* authority to judge.

To be sure, there is still room for trouble and mischief. States could administer their elections and recounts malevolently or ineptly. A scheming or bumbling Clerk could tip the balance of power in Congress by including or omitting people from the roll that she should not. The House's ability to redress such things would be hampered by the fact that the "House" making the decisions would be the skewed one that the states and the Clerk constituted incorrectly. In fending off the Etheridge Plot in 1863, the proto-House got around this by holding votes to amend the roll, before anyone had taken the oath.[429] While crucial in such cases, such votes are problematic, as they open

426. *Id.*

427. *See supra* Section V.A.i.

428. *Cf.* Roudebush v. Hartke, 405 U.S. 15, 25–26 (1972) (expressing similar sentiments regarding the Senate's power to judge the elections of its members).

429. *See supra* text accompanying notes 146–48.

the door to all manner of undesirable second-guessing of honest election results.[430]

To the extent that the House cannot help but rely on the states and the Clerk, it can at least make the process of forming the roll of representatives-elect as well-defined as possible—so that the states' and Clerk's roles are as purely ministerial as possible. The current process achieves this goal fairly well.[431]

This still leaves open the question of who the "House" is that judges the elections, returns, and qualifications of its members. The Step Aside process defines the House as newly elected members whose elections, returns, or qualifications have not been challenged by anyone. This standard is problematic. It relies on the good faith of those present—reliance that will not always be reasonable. One unsworn member's decision to level a challenge should not help define who the "House" is here. And it might not be just one challenge; there could be a cascade.[432] A system in which individuals can keep out members simply by registering an objection is undemocratic.

To be sure, no would-be House majority is likely to sit back and allow a minority to take over via the Step Aside process. The majority would likely hold pre-oath votes to fend off such a challenge, as it did in 1863.[433] But resorting to such votes is suboptimal, especially given that the House is not supposed to "enter[] on any other business" before the oath is administered.[434] Rather than say blithely that the majority can clean up such a mess if push comes to shove, it is better to use a process that avoids the mess, the pushing, and the shoving in the first place.

When the Constitution says that the House judges its own membership, at organization the "House" should include all of its credentialed members, sworn in. This means minimizing judging and challenges before that point. That, in turn, means giving equal treatment to everyone with valid credentials, and not letting individual objections remove anybody from the group—the Oaths First process, in other words.

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430. One possible alternative would be for the lame-duck House to oversee the compilation of the succeeding House's roll. The old House would be a full, sworn, legitimate body, unlike the unsworn proto-House and unlike the unelected Clerk. But relying on the outgoing House would fit uncomfortably in our democratic system. In particular, if the lame-duck House had the power to rule on incoming legislators, members could illegitimately entrench themselves in power by corruptly "judging" disputed election returns in their own favor.

431. *See supra* Section II.B.

432. *See, e.g.*, *supra* text accompanying notes 209–18 (describing 1881 organization, in which eight members-elect had to step aside, including two tit-for-tat challenges).

433. *See supra* text accompanying notes 146–48.

434. 2 U.S.C. § 25.

b. Exclusion Versus Expulsion

Some of the difficulty in timing votes on exclusion—a term generally used to refer to qualifications challenges but not election challenges[435]—has stemmed from the awkwardness of seating members only to unseat them later. This awkwardness stems in part from the House's parallel power to "punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a Member."[436] In some exclusion cases, it was argued that once members take their seats only expulsion can turn them out, and that expulsion can only reach conduct during the term, not before the election.[437] As such, this argument claims, if members lack some qualification, it is essential that they not be seated in the first place.

This understanding was never correct, and its incorrectness was powerfully reinforced by the Supreme Court in *Powell v. McCormack*.[438] It was never correct because the House, from its very beginning, has judged the qualifications (and elections) of its members after they had been seated, and done so by simple majority vote.[439] Seated members have always been subject to being unseated later upon a demonstration that they were unqualified (or that their election opponent was the rightful winner).[440] This never required expulsion by a two-thirds majority.

The false dichotomy between exclusion and expulsion broke down even further in *Powell* when the Court clarified that the House cannot erect its own, new qualifications for office.[441] If the House can turn out someone like Brigham Roberts, Victor Berger, or Adam Clayton Powell for being a criminal, it matters a lot if the Constitution restricts the timing of that action. It also matters whether it is done through exclusion by a simple majority or expulsion by a two-thirds majority. Once *Powell* made it clear that exclusion was not available to keep criminals out of Congress, these problems melted away; it became clear that expulsion by two-thirds was the only option (it also appeared that expulsion could reach beyond acts committed during the term[442]).

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435. *See* 2 DESCHLER, *supra* note 31, at ch. 9, § 17, at 1023; WHITAKER, *supra* note 27 at 9.

436. U.S. CONST. art. I, § 5, cl. 2.

437. *See supra* note 245; *supra* text accompanying note 357.

438. 395 U.S. 486, 550 (1969).

439. *See, e.g.*, *supra* text accompanying notes 47–51 (detailing the first such case).

440. *See, e.g.*, *supra* text accompanying notes 130, 227 (noting some such cases, among many others); Salamanca & Keller, *supra* note 12, at 296 (describing this as the typical practice of legislatures).

441. *See Powell*, 395 U.S. at 550; *supra* text accompanying notes 367–69.

442. *See* HOUSE PRACTICE, *supra* note 13, at ch. 25, § 20, at 533 (noting that the House's expulsion power "has been said to be unlimited" and can extend to acts that are "[]related to status as a Member [and] to public trust and duty" but not noting any timing limits).

While it seems as though only someone who has been seated can be expelled (one must be in before one can be thrown out),[443] the converse is not true for exclusion. Nowhere does the Constitution say that exclusion is limited only to those who have not yet been seated. True, the word "exclusion" might carry that connotation (i.e., one cannot be kept out if one is already in). But the Constitution does not actually use the word "exclusion" here. What the Constitution says is that each house judges the qualifications of its members.[444] It provides no guidance, let alone restrictions, regarding the proper timing of that judging.

It would be strange if the House had no power to unseat a person who took the oath of office as a representative and was discovered only later to be underage, or a noncitizen, or the beneficiary of a massive electoral tallying error. It would also be strange to protect such a person with the supermajority requirement reserved for cases of expulsion. If disqualifying facts come to light after a representative takes office, the House can exercise its constitutional duty and judge the member's election or qualifications as applicable. Should the House believe that the member is not entitled to the seat, it makes sense for that the member to be turned out by a simple majority vote.

One additional objection regarding the exclusion of already seated members is that they might have participated in the legislative process already. They even might have cast the deciding vote on a bill. If, a few months into a term, a representative is excluded because all along he or she lacked the required qualifications, would the House have to re-vote on all of the bills that had been approved? No. Given that the House is the judge of the qualifications of its members, a duly enrolled representative presumptively is qualified and duly elected until the moment that the House declares otherwise and excludes him or her. The House has never undone legislative acts on grounds that a member who participated was later unseated.

B. Practical Considerations

i. Precedent

Congressional precedent does not function in the same way as judicial precedent, and congressional practice regarding the timing of seating challenges at organization is a good example of that. As described in Part II of this Article, the Step Aside process evolved through the disregard of precedent

443. *But see* 2 HINDS, *supra* note 14, § 1262, at 813 (describing case of John B. Clark, expelled without having shown up to be sworn in).

444. *See* U.S CONST. art. I, § 5, cl. 1.

(or, when precedent was considered, through under-explained and poorly reasoned applications of it).

In some sense, the main concern at present is the opposite: an unthinking overreliance on precedent. The past three decades have seen the House do things right. When there have been objections to a member-elect's election, the objectors have noted those objections but not forced the members-elect to stand aside during the oath.[445] The problem is that inaction does not register as a precedent in the same way that action does. If, in the future, an objector wants to force another member-elect to stand aside, the objector will still be able to cite dozens of Step Aside precedents.[446]

But if the House carefully evaluates those precedents it will have good reason to reject them. In part, this is because of how many of the precedents are discredited: the 1839 debacle;[447] the Roberts,[448] Berger,[449] and Powell[450] cases; and most recently the destructive McIntyre case.[451] The only cases that are not (in retrospect) obvious mistakes are those in which the objectee was forced to stand aside, but was voted on and seated immediately after the oath. While those precedents are not discredited as such, they reveal the uselessness of pre-oath objections—in all of those cases, nothing was accomplished but delay.

The Step Aside process's origin is also rooted in a problem that no longer exists. It used to be that members-elect were sworn in by state delegation.[452] When there were challenges to individual members-elect, some of their would-be colleagues had been sworn in already, but others had not been. By putting the challenged people at the end of the line, the House ensured that everyone else would be sworn in before any votes were taken. This was never as good a solution as the Oaths First process would have been, but it has made no sense at all since members began swearing in en masse in 1929.[453] Now that everyone swears in at once instead of state by state, pre-oath objections offer no benefit. They can only slow things down.

445. *See supra* Section III.E.
446. *See supra* Section III.B-III.D.
447. *See supra* Section III.A.iv.
448. *See supra* Section III.C.i.
449. *See supra* text accompanying notes 277–83.
450. *See supra* Section III.D.ii.
451. *See supra* Section III.D.iii.
452. *See supra* note 125.
453. *See supra* note 312.

ii. Pre-Commitment and Restraint

From a policy standpoint, one great advantage of the Oaths First process is the value of pre-commitment. If both sides are bound in advance to allow anyone with valid credentials to swear in, then neither side will have any reason to manipulate the House organization process or to fear that the other side will do so. If the Step Aside process lingers as a possibility, by contrast, both sides will have an incentive to make strategically timed objections. Particularly when the House is closely divided, the possibility of rancor and chaos will loom over every organization.

In the long history of the House, parties have almost always restrained themselves from such strategic actions. At best, this could be a result of a sense of honor, decorum, and fairness prevailing. But when things have broken down—as in 1839, 1863, 1961 and 1985—the limits of those virtues have become suddenly and painfully evident. Currently, levels of partisanship in Congress are so high that it is hard to have much confidence in the parties' self-restraint.

Sometimes, extreme division actually encourages restraint, of the "mutually assured destruction" variety. Tit-for-tat objections would be easy to perpetrate and hard to repair, and both parties know that the other side stands ready to defend itself. But while this mitigates the risk of disaster, it does not eliminate it. More to the point, it does nothing to actually justify the Step Aside process, given that the Oaths First process *would* eliminate the possibility of any such shenanigans. In other words, however low one thinks the risk posed by the Step Aside process is, it is a needless risk.

VI. CONCLUSION

Anyone making a list of problems to solve in the House of Representatives surely would have no shortage of priorities to list ahead of the Step Aside precedent. But restoring the Oaths First precedent and returning the House to its first, best practice would require little effort. It would pose no disadvantage. The risk presented by the Step Aside process might seem remote, but it is still worth dispelling at the next opportunity.