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Sent: 1/5/2021 6:16:08 AM
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Lengthy, but discusses the various arguments fairly comprehensively.

I think it fair to say that there are very credible arguments on both sides.

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UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 80 | Number 5 Article 4

6-1-2002

Is the Electoral Count Act Unconstitutional

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IS THE ELECTORAL COUNT ACT UNCONSTITUTIONAL?

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This Article takes on one of the most unasked questions of Bush v. Gore*—whether the Electoral Count Act, the federal statutory scheme at issue in that case, is constitutional. Enacted in 1887 and hardly discussed for the past 114 years, the Electoral Count Act sets forth complicated regulations for counting (and not counting) electoral votes. This Article argues that Section 15 of Title 3 of the United States Code, the heart of the Electoral Count Act, is unconstitutional.*

Since 1800, Congress has attempted to enact legislation regulating the electoral count, finally succeeding in 1887. This Article traces these principal congressional efforts to regulate the electoral count and the surrounding constitutional text and structure to show why the Electoral Count Act is unconstitutional. The Electoral Count Act may seem like a good statutory scheme to deal with the problems of the electoral count, but not every good statutory scheme is a constitutional one. Some problems may only be remedied by constitutional amendment, not by statute. Anyone who wishes to argue that the Electoral Count Act is constitutional bears a very high burden of proof.

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The first three of these questions might seem downright outlandish, and prior to the presidential election of 2000, the fourth was too. Now is a good time to remember that these four questions were not at all outlandish in the spring of 1800 when America faced her first electoral crisis of "*Jefferson v. Adams*."[3] These four

3. The presidential election of 1800 and the electoral count of 1801 were truly a constitutional crisis of the first magnitude, leading to the adoption of the Twelfth Amendment in 1804. The electoral count on February 11, 1801 was inconclusive because there were two persons who had the requisite majority of the whole number of electors appointed. (The original Constitution did not require or even permit electors to cast separate votes for President and Vice President). Democrat-Republican and then-Vice President Thomas Jefferson and Democrat-Republican Aaron Burr each received seventy-three votes; Federalist and then-President John Adams and Federalist Charles C. Pinckney received sixty-five and sixty-four votes, respectively; Federalist John Jay received one vote.

The choice of President thus devolved on the House of Representatives. U.S. CONST. art. II, § 1, cl. 3 provides:

> The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President .... But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote ....

The House, controlled by Federalists, was forced to choose between Democrat-Republicans Jefferson and Burr. On February 11, the House balloted nineteen times with no success: each time eight states voted for Jefferson, six for Burr, and two were divided. On February 12, the House balloted nine times with no success; on February 13, once; February 14, four times; and February 16, once. On February 17, after another such round, the House chose a President-elect on the thirty-sixth round of balloting: ten states voted for Jefferson, four for Burr and two did not vote. For the basic facts of the election of 1800 and the electoral count of 1801, see BERNARD A. WEISBERGER, AMERICA AFIRE: JEFFERSON, ADAMS, AND THE REVOLUTIONARY ELECTION OF 1800, at 227–77 (2000).

To complicate this saga further, Democrat-Republicans Jefferson and Burr only had a majority of the whole number of electors appointed because Vice President Jefferson, presiding over the electoral count, decided to count four "improper" votes from the State of Georgia in favor of Jefferson-Burr. *See infra* note 230 and accompanying text. Without these votes, Jefferson and Burr would have had sixty-nine votes each, exactly one half and not a majority of the whole number of electors appointed, and the choice of President would have devolved on the House of Representatives. But importantly, the original Constitution provided that "if no Person have a Majority, then from the *five* highest on the List the said House in like Manner chuse the President." U.S. CONST. art. II, § 1, cl. 3 (emphasis added). There is little doubt that the Federalist-controlled House would have elected Federalists John Adams and Charles C. Pinckney as President and Vice President, respectively.

Perhaps most intriguingly, the Federalist-controlled Legislature of Maryland, aware of the popular support for Democrat-Republicans Jefferson-Burr,

> seriously contemplated that the legislature should repeal the law under which the electors were chosen by the people, and should choose them by the legislature; and this on the avowed ground that it was necessary to defeat the candidate whom it was supposed that the majority of the people preferred.

HOUSE SPECIAL COMMITTEE, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-

INTRODUCTION

Bush v. Gore[1] is history. We all have plenty to think about. So here are four questions that are well worth considering before Election Day 2004, or at least January 6, 2005, the date specified by federal law for counting electoral votes.[2] What if an elector votes for a presidential or vice presidential candidate who is not a natural born citizen, at least thirty-five years of age, and who has not been a resident of the United States long enough? What if an elector who is constitutionally ineligible to be an elector votes? What if an elector votes for inhabitants of her state for both President and Vice President? What if two sets of electors from the same state both claim that they are the lawfully appointed electors of the state?

1. 531 U.S. 98 (2000) (per curiam).
2. *See* 3 U.S.C. § 15 (2000) ("Congress shall be in session on the sixth day of January succeeding every meeting of the electors.").

questions were the paradigm problems of the electoral count debated in the Sixth Congress.[4] Federalist Senator Ross of Pennsylvania firmly stated that "such cases might happen and were very likely to happen."[5] Democrat-Republican Senator Pinckney of South Carolina, more sanguine, stated that these cases "may not happen once in a century."[6] In addition to these four problems of the electoral count, a fifth problem has proved much more likely throughout history: What if an elector is "faithless" and votes for a President or Vice President in contravention of the popular vote?[7]

13, at 443 (1877) [hereinafter COUNTING ELECTORAL VOTES] (remarks of Sen. Anthony). This should sound familiar. This action was not carried out, but had it been, Maryland's ten electoral votes would have been given solely to Federalists Adams and Pinckney, instead of having been given equally to Jefferson and Adams. Adams would have received 70 votes; Pinckney 69 votes; Jefferson 68 votes; Burr 68 votes; and Jay 1 vote. Adams and Pinckney would have become President and Vice President respectively. According to Senator Anthony, "[T]he election would have been strictly and unquestionably legal and constitutional." *Id.* This point is subject to serious debate today. There may be a constitutional right to vote for presidential and vice presidential electors, at least in some cases. *See* U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. XXIV; Michael C. Dorf, We Need A Constitutional Right To Vote in Presidential Elections (Dec. 13, 2000), *at* http://writ.findlaw.com/dorf/20001213.html (on file with the North Carolina Law Review). *But see Bush*, 531 U.S. at 104 ("The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.") (citation omitted).

The presidential election of 1800 and the electoral count of 1801 is currently the subject of a fascinating, timely, and forthcoming book by Professor Bruce Ackerman. BRUCE ACKERMAN, AMERICA ON THE BRINK: THE CONSTITUTIONAL CRISIS OF THE EARLY REPUBLIC (forthcoming 2002) (on file with the North Carolina Law Review). For two rich discussions of the election of 1800, see generally Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959 (1999); John J. Janssen, *Dualist Constitutional Theory and the Republican Revolution of 1800*, 12 CONST. COMMENT. 381 (1995). For a recent book-length treatment, see WEISBERGER, *supra*.

4. For specific reference to these four questions, see, for example, 10 ANNALS OF CONG. 29 (1800) (remarks of Sen. Ross); *id.* at 131 (remarks of Sen. Pinckney); *id.* at 133 (remarks of Sen. Pinckney).

5. *Id.* at 29.

6. *Id.* at 132.

7. Thankfully, the problem has been a very small one, with approximately a dozen electors of over 25,000 casting votes in opposition to the wishes of the voters in the course of 213 years. *See* Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 667 (1996). There is no consensus on the exact number of faithless electors since the Founding. The paradigm case is that of Samuel Miles, a Federalist elector from Pennsylvania, who in 1796, just eight years after the adoption of the Constitution and in the third presidential election, voted for Democrat-Republican Jefferson instead of Federalist Adams. This action prompted a Federalist voter to exclaim: "Do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to act, not to think." E. STANWOOD, A HISTORY OF THE PRESIDENCY 51 (August M. Kelley Publishers 1975) (1928).

The faithless elector problem was of particular concern in the presidential election of 2000: Any two faithless votes by Bush electors would have thrown the election into the House of Representatives, and any three faithless votes would have thrown the election to

What does the Constitution say about these potential problems? The relevant text of the Constitution simply provides that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."[8] It ought to be obvious that the Constitution does not provide any answers to these tricky problems of the electoral count.[9] The Framers and Ratifiers simply did not contemplate the possibilities of unconstitutional or faithless electoral votes.

The critical question is whether we can fix the *casus omissus* of the Constitution short of constitutional amendment. The counting of the electoral votes is no trivial matter. It is the critical step in the election of the President and Vice President. As one leading scholar has stated, it seems to be "the magic, formal moment of vesting in which the winning candidate is elected as 'President.' "[10] Some might quibble with this formalist point, but at the founding, when there were no telegraphs, telephones, or television, and when electoral

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former Vice President Gore. Going into December 18, 2000 (the date specified by federal law for the giving of electoral votes by the electors), the expected electoral count was 271 votes for Bush and 267 votes for Gore. The final electoral count for President was 271 votes for Bush and 266 votes for Gore. *See* 147 CONG. REC. H44 (2001). One Gore-Lieberman elector from the District of Columbia, protesting the District's lack of statehood, refused to cast her votes for President and Vice President. *See* Charles Babington, *Electors Reassert Their Role; Bush Wins Vote; Protest Costs Gore*, WASH. POST., Dec. 19, 2000, at A1. For additional discussion of the faithless elector problem, see *infra* notes 176–191, 590–592 and accompanying text.

8. U.S. CONST. amend. XII. The only differences between this text of the Twelfth Amendment and the text of the original Constitution are in punctuation and capitalization. *See* U.S. CONST. art. II, § 1, cl. 3 ("The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted."). The Twelfth Amendment overwrote U.S. CONST. art. II, § 1, cl. 3, but not two other clauses that relate to the Electoral College mode of presidential election, U.S. CONST. art. II, § 1, cls. 2, 4. For ease of exposition, I will variously refer to these clauses as the "Electoral College Clauses."

9. As Justice Joseph Story described:

> In the original plan, as well as in the amendment, no provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes, or the right of the persons, who gave the votes, or the manner, or circumstances, in which they ought to be counted. It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary, than to open the certificates, which were produced, in the presence of both houses, and to count the names and numbers, as returned.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1464, at 327 (1833) [hereinafter STORY'S COMMENTARIES]; *see also* 17 CONG. REC. 815 (1886) (remarks of Sen. Sherman) (discussing specific problems of the electoral count); 18 CONG. REC. 50–51 (1886) (remarks of Rep. Adams) (same).

10. Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 217 (1995).

votes were more secret, there was no way of knowing the identity of the winning candidates until the electoral votes were formally counted. Recent history should be a powerful reminder of the significance of the electoral count. One key lesson of the presidential election of 2000 is that the President-elect is not elected by "We the People" on election day, or even by the electors on the day they cast their votes, but by the joint convention of the Senate and House of Representatives on the day the electoral votes are formally counted.

The counting function appears to be a ministerial duty of tabulation imposed by the Constitution because each of the electoral colleges meet in their respective states instead of at some central location. Conventional wisdom holds that the joint convention of the Senate and House of Representatives does the counting, and not the President of the Senate, but this is not at all clear from the text of the Electoral College Clauses. But does the counting function subsume the power not to count? What about unconstitutional votes? What about faithless votes?

As is now somewhat well known, Congress has answered the question whether the counting function subsumes the power not to count affirmatively. The relevant statute is the Electoral Count Act of 1887,[11] presently codified at 3 U.S.C. §§ 5–6, 15–18. The heart of the Electoral Count Act is undisputedly 3 U.S.C. § 15, a complicated provision that sets forth rules for counting (and not counting) electoral votes. In a nutshell, this section provides that in a case of single returns, the joint convention may only reject electoral votes that are not "regularly given" if both Houses of Congress concur.[12] In a case of multiple returns from the same state, this section provides that the joint convention may only accept electoral votes as "regularly given" if both Houses of Congress concur (with a few important wrinkles to be discussed later).[13] The meaning of the phrase "regularly given"[14] in § 15 is far from clear. The precedents of the electoral count, however, strongly suggest that the joint convention will not count unconstitutional votes, and possibly not faithless votes either.

While 3 U.S.C. § 15 sets forth the rules for counting (and not counting) electoral votes, 3 U.S.C. § 5, the specific federal statutory provision at issue in *Bush v. Gore*, sets forth the so-called "safe

11. Act of Feb. 3, 1887, ch. 90, 24 Stat. 373 (codified as amended at 3 U.S.C. §§ 5–6, 15–18 (2000)).

12. *See* 3 U.S.C. § 15 (2000).

13. *See id.*

14. *Id.*

harbor" provision for counting electoral votes with respect to a state's determination of any controversy or contest concerning the appointment of its electors.[15] *Bush v. Gore* indicates that there must be nine votes on the Supreme Court for the proposition that 3 U.S.C. § 5 is constitutional. Although neither party briefed or argued the constitutionality of this provision of the Electoral Count Act, each of the Justices must have reached an independent, antecedent determination that 3 U.S.C. § 5 passes constitutional muster.[16] Curiously, *Bush v. Gore*, for all that it did address regarding presidential election, did not address the heart of the Electoral Count Act—3 U.S.C. § 15. Only Justice Breyer, with Justices Stevens and Ginsburg concurring, even mentioned this key section, and he did so approvingly.[17] The prevailing wisdom, in the Supreme Court and elsewhere, is that the Electoral Count Act is constitutional.[18]

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15. *Id.* § 5.

16. Needless to say, this assumes that each of the Justices was doing his or her job, and not violating his or her oath to support the Constitution, *see* U.S. CONST. art. VI, cl. 3, which is an assumption that may beget controversy, depending on one's jurisprudential (political?) preferences.

17. *See* 531 U.S. 98, 153–54 (2000) (Breyer, J., dissenting) ("[T]he Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. A federal statute, the Electoral Count Act, enacted after the close 1876 Hayes-Tilden presidential election, specifies that, after States have tried to resolve disputes (through 'judicial' or other means), Congress is the body primarily authorized to resolve remaining disputes."); *id.* at 155 (Breyer, J., dissenting) ("Given this detailed, comprehensive scheme for counting electoral votes [3 U.S.C. § 15], there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court."). Others have similarly argued that the "political question doctrine," *see, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962), counsels (if not requires) that the Supreme Court should not have entered the fray in the presidential election of 2000. *See, e.g.*, Laurence H. Tribe, Erog v. Hsub *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 276–87 (2001); *id.* at 277 n.433 (citing argument made by Professors Charles Fried and Einer Elhauge in Brief of the Florida Senate and House of Representatives as Amici Curiae in Support of Neither Party at 7, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836)); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 273–300 (2002). Whether *Bush v. Gore* presented a non-justiciable political question is beyond the scope of this Article.

18. Only a handful of scholars have addressed the constitutionality of the Electoral Count Act since its initial adoption more than one hundred and twenty years ago. Professor Spear, writing in 1877, concluded that the Electoral Count Act of 1877 was unconstitutional. *See* Samuel T. Spear, D.D., *Counting the Electoral Votes*, 15 ALB. L.J. 156, 156–61 (1877). Professor Burgess, writing in 1888, concluded that the Electoral Count Act of 1887 was constitutional. *See* John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633, 653 (1888). More recently, Professor Ross and Mr. Josephson have apparently concluded that the Electoral Count Act is constitutional. *See* Ross & Josephson, *supra* note 7, at 704–40.

Two other scholars have obliquely addressed the constitutionality of the Electoral Count Act in recent years. Professor Glennon, in his primer on the Electoral College,

Yet there has been virtually no scrutiny of this conventional wisdom in the wake of *Bush v. Gore*. One of the most unasked questions regarding the presidential election of 2000 is whether the federal statutory scheme at issue in that case is constitutional.

This Article argues that the Electoral Count Act, specifically 3 U.S.C. § 15, is unconstitutional. The Electoral Count Act violates the text and structure of the Constitution in multiple ways. For example, where is the font of express or implied power to pass the Electoral Count Act? Where does Congress have the power to regulate the manner of presidential election? Where do the Electoral College Clauses provide for bicameralism in counting electoral votes? What gives the 49th Congress the authority to bind future Congresses and joint conventions in counting electoral votes?

More generally: What gives the joint convention the power to *judge* the validity of electoral votes? The counting function seems to be arithmetic and ministerial. If the joint convention could judge electoral votes, it could reject enough votes to thwart the electors' will or trigger a contingency election for President in the House of Representatives and for Vice President in the Senate, thereby arrogating to the two Houses of Congress the power to appoint the Nation's two highest executive officers.[19] The tight margin of the

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somewhat casually concludes that the Electoral Count Act is constitutional. *See* MICHAEL J. GLENNON, WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION 35–43 (1992). Professor Amar, in an article on presidential succession, assumes that the Electoral Count Act is constitutional in the course of proposing an improvement to the process of presidential election. He suggests that "Congress should provide by statute that an electoral vote for any person who is dead at the time of the congressional counting is a valid vote, and will be counted, so long as the death occurred on or after Election Day." Amar, *supra* note 10, at 222.

Most recently, after *Bush v. Gore*, several commentators have assessed the constitutionality of the Electoral Count Act, but only in passing. *See, e.g.*, SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 98 (2001) ("Questions about the constitutionality of the Electoral Count Act have been raised but never fully addressed."); Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 860–71, 909–16 (2002) (concluding that the Electoral Count Act is constitutional and that congressional power to enact such legislation should support national-ballot and voting equipment legislation); Jesse H. Choper, Why the Supreme Court Should Not Have Decided the Presidential Election of 2000, at 15 (stating that "the Electoral Count Act is not free of certain ambiguities and possible constitutional problems") (unpublished manuscript, on file with the North Carolina Law Review), *available at* http://papers.ssrn.com/abstract=281869.

19. For an excellent articulation of this point, see 17 CONG. REC. 1059 (1886) where Sen. Wilson stated:

> Can we conclude that the [F]ramers of our Constitution, when they conferred on the respective Houses of Congress these extraordinary powers, intended to invest them with the still more extraordinary power of rejecting the votes of

presidential election of 2000—in both the popular vote and electoral vote—demonstrates that these possibilities are not necessarily remote. In a close presidential election, every electoral vote counts. As Chancellor Kent put the point in his treatise on the Constitution first published over 175 years ago, "In the case of questionable votes, and a closely contested election, this [counting] power may be all-important."[20] As bizarre as it may seem, the joint convention must count the electoral votes—including unconstitutional or faithless votes. As unfortunate as it may be, a solution to the problem of unconstitutional or faithless electoral votes requires constitutional amendment. The constitutional infirmities of the electoral count are yet additional reasons to scrap the Electoral College mode of presidential election altogether.

This Article proceeds in three parts. Part I presents the history of the electoral count, addressing the principal congressional efforts to regulate presidential election and the electoral count, and the actual problems of the electoral counts from the Founding to today. Part II contains the constitutional argument against the constitutionality of Electoral Count Act and sets forth "interpretivist" arguments from constitutional text and structure.[21] Part III considers

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> electors appointed by the several States, and thereby creating by themselves and for themselves the contingency which alone gives them the right and power to elect a President and Vice-President?

See also 18 CONG. REC. 74 (1886) (remarks of Rep. Baker) (similar).

Early commentators on the Constitution, writing in the wake of the electoral crisis of 1800–01, were quick to point out the evils of presidential election by the House of Representatives. *See, e.g.*, 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA, app. at 327 (1803) [hereinafter TUCKER'S COMMENTARIES]. St. George Tucker stated:

> Then, indeed, intrigue and cabal may have their full scope: then, may the existence of the union be put in extreme hazard: then might a bold and desperate party, having the command of an armed force, and of all the resources of government, attempt to establish themselves permanently in power, without the future aid of forms, or the control of elections.

Id.; *see* WILLIAM ALEXANDER DUER, COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 82 (Lenox Hill Pub. & Dist. Co. 1971) (1843) [hereinafter DUER'S COMMENTARIES] (noting that "on one memorable occasion . . . much riotous and violent conduct was exhibited in the House of Representatives, when, upon an equality of electoral votes between two of the persons voted for, the choice devolved upon that body"); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *279 [hereinafter KENT'S COMMENTARIES] ("All elections by the representative body are peculiarly liable to produce combinations for sinister purposes.").

20. KENT'S COMMENTARIES, *supra* note 19, at *276.

21. The methodological approach taken in this Article—one that places almost exclusive reliance on constitutional text and structure and one that may be described as "interpretivist" or "originalist"—may be criticized by some as out of touch with the

what should happen if the Electoral Count Act is unconstitutional, and electors go bananas and cast unconstitutional or faithless votes. This Part suggests answers to the paradigm problems of the electoral count and considers where we should go from here.

I. THE HISTORY OF THE ELECTORAL COUNT

The history of the electoral count is woefully understudied.[22] This is especially problematic because "[d]isputes concerning presidential electors and their votes are more common than one may think."[23] Although the electoral count's history does not directly (or necessarily) bear on the constitutionality of the Electoral Count Act, it is worth studying for at least a few reasons. First, there is much we can learn about our electoral past. Given the risk that history might repeat itself, the history of the electoral count furnishes important precedent for future electoral disputes, in much the same way as cases furnish precedent for future cases.[24] Second, participants in the Electoral Count Act debates referred to the history of the electoral

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subject matter. The arguments run as follows: the electoral college mode of presidential election has worked in ways never contemplated by the Framers and Ratifiers—with the advent of political parties, not to mention the perfunctory role of electors themselves in presidential election. Indeed, one might say that the electoral college mode of presidential election has (ironically or not) worked in a way positively antithetical to the original expectations of the Framers and Ratifiers. Moreover, as we shall see, the constitutional lacunae seem to be especially large when it comes to the thorny issues of the electoral count—these issues were under-specified from the start. And so the argument concludes that constitutional meaning should be determined by subsequent practice—what works, or has been accepted as if valid—more than by constitutional text and structure. Nevertheless, this Article's methodological approach does yield (I submit) a definitive result as to the constitutionality of the Electoral Count Act. It is rather difficult to see why non-constitutional developments in electoral politics relating to presidential election—however stark when compared to the Founding—create congressional power to regulate the electoral count when none existed. In any case, this Article's methodological approach is far from useless even for those who choose to ignore its results. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 207–08 n.7 (1985) (discussing the value of "interpretivist" methodology whether or not one subscribes to its results).

22. The *vade mecum* in the study of the history of the electoral count is a House Special Committee report issued after the Hayes-Tilden presidential election of 1872. *See* COUNTING ELECTORAL VOTES, *supra* note 3; *see also* 3 HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 209–67 (Alfred C. Hinds ed., 1907) (discussing the electoral counts of 1789 to 1905). Two scholars have also nicely summarized the relevant history. *See generally* C.C. Tansill, *Congressional Control of the Electoral System*, 34 YALE L.J. 511 (1924–25); L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321 (1961).

23. John Harrison, *Nobody for President*, 16 J.L. & POL. 699, 699 (2000).

24. Indeed, *Bush v. Gore* provides two excellent examples. For references to the Hayes-Tilden Incident of 1877, see *infra* notes 157–64 and accompanying text. For references to the Hawaii Incident of 1961, see *infra* notes 165–75 and accompanying text.

count in debating the constitutionality of the Electoral Count Act. A familiarity with the history of the electoral count better informs these legislative debates. Third, participants in the Electoral Count Act debates referred to the history of the electoral count—and specifically the actual problems of the electoral count—in debating the necessity and expediency of the Electoral Count Act. A critical examination of this history better affords a basis to assess whether the Electoral Count Act is necessary and expedient to address these historical problems and whether there may be other non-statutory solutions.

This Part seeks to fill this void in scholarship and proceeds in two sections. The first section summarizes four principal congressional efforts—three successful, one not—to regulate presidential election and the electoral count, including the Act of 1792, the Grand Committee Bill, the Twenty-second Joint Rule, and finally the Electoral Count Act. The second section summarizes the actual problems of the electoral count. In the course of fifty-four electoral counts in the history of the Republic, there have been only a dozen or so problems of the electoral count, most of which occurred in the nineteenth-century.[25]

A. Congressional Efforts to Regulate Presidential Election and the Electoral Count

1. Act of March 1, 1792

On March 1, 1792, the Second Congress passed "An Act relative to the election of a President and Vice-President of the United States and declaring the officer who shall act as President in case of vacancies in the offices both of President and Vice-President."[26] The Act thus regulated presidential election and presidential succession, the latter pursuant to Article II, Section 1, Clause 6.[27]

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25. As of 1886, Senator Sherman observed that "[s]ince [the Founding] there have been eleven cases of disputes as to electoral votes, and twenty-one objections have been made to the electoral votes of different States, presenting a great variety of questions," though he did not elaborate. 17 CONG. REC. 815 (1886).

26. Act of Mar. 1, 1792, ch. 8, 1 Stat. 239. For the relevant part of the act relating to presidential election, see COUNTING ELECTORAL VOTES, *supra* note 3, at 9.

27. U.S. CONST. art. II, § 1, cl. 6 provides:

> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The Act did a number of things with respect to presidential election. Sections 1 and 2 of the Act, pursuant to Article II, Section 1, Clause 4,[28] established the time of choosing the electors by the States as thirty-four days before their meeting, and the day on which the electors were to give their votes as the first Wednesday in December of each presidential election year.[29] Section 1 also clarified Article II, Section 1, Clause 2[30] by providing that each state shall appoint a number of electors equal to the number of Senators and Representatives to which the state is entitled at the time when the President and Vice President to be chosen would come into office.[31]

Section 2 also clarified Article II, Section 2, Clause 3[32] by specifying the manner of certifying and transmitting the electoral certificates to the President of the Senate. It provided that the electors in each state shall make and sign three electoral certificates—one to be sent by messenger appointed by a majority of the electors, a second by post to the President of the Senate, and the third to be delivered to the judge of the district in which the electors in each state

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With respect to presidential succession, the Act provided that, after the Vice President, the President *pro tempore* and the Speaker of the House of Representatives would next be in line to act as President. For a strong and persuasive claim that this mode of presidential succession is unconstitutional because Members of Congress are not "Officer[s]" within the meaning of the Presidential Succession Clause, see Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995).

28. *See* U.S. CONST. art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.").

29. For the modern codification, see 3 U.S.C. § 1 (2000) ("The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."); *id.* § 7 ("The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.").

30. U.S. CONST. art. II, § 1, cl. 2 provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

31. A proviso to section 1 provided: "That where no apportionment of Representatives shall have been made after any enumeration, at the time of choosing electors, then the number of electors shall be according to the existing apportionment of Senators and Representatives." For the modern codification, see 3 U.S.C. § 3.

32. *See* U.S. CONST. art. II, § 2, cl. 3 ("And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate.").

shall assemble.[33] Section 3 further specified the manner of certifying and transmitting the electoral certificates, but well beyond the text of Article II, Section 2, Clause 3. It provided that

> the executive authority of each State shall cause three lists of the names of the electors of such State to be made and certified and to be delivered to the electors on or before the said first Wednesday in December; and the said electors shall annex one of the said lists to each of the lists of their votes.[34]

These provisions of sections 2 and 3 are noteworthy because the Electoral College Clauses do not expressly grant Congress the power to specify the manner of certifying or transmitting the electoral certificates. Interestingly, a draft of Article II, Section 1, Clause 4 at the Philadelphia Convention of 1787 provided that "[t]he Legislature may determine the time of choosing the Electors, and of their giving their votes; *and the manner of certifying and transmitting their votes*—But the election shall be on the same day throughout the U—States."[35] The italicized language was inexplicably dropped by the time the Framers referred the draft Constitution to the Committee of Style and Arrangement.[36] It is a slippery exercise to infer the meaning of this clause from language rejected in predecessor drafts. Perhaps the Framers intended to deny Congress the power to legislate on the manner of certification and transmission of electoral votes. Or perhaps the Framers intended that Congress could enact

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33. For the modern codification, see 3 U.S.C. § 11 and 3 U.S.C. § 9, which provides:
> The electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President, and shall annex to each of the certificates one of the lists of the electors which shall have been furnished to them by direction of the executive of the State.

34. For the modern codification, see 3 U.S.C. § 6.

35. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 529 (Max Farrand ed., 1911) [hereinafter FARRAND] (emphasis added); *see also* David P. Currie, *The Constitution in Congress: The Second Congress, 1791–1793*, 90 NW. U. L. REV. 606, 617–18 (1996) (noting this point). Alexander Hamilton's draft of the Constitution contained a broader grant of law-making power. *See* 3 FARRAND, *supra*, at 624 ("The Legislature shall by permanent laws provide such further regulations as may be necessary for the more orderly election of the President, not contravening the provisions herein contained.").

36. Contrary to Professor Currie's view, *see* Currie, *supra* note 35, at 617–18, this language was not dropped by the Committee of Style, but was dropped by the Framers themselves. *See* 2 FARRAND, *supra* note 35, at 573 (draft Constitution referred to Committee of Style and Arrangement) ("The Legislature may determine the time of chusing the Electors and of their giving their votes—But the election shall be on the same day throughout the United States.").

these sections either pursuant to Article II, Section 1, Clause 4 itself or pursuant to the Necessary and Proper Clause.[37]

In any case, it is difficult to see how section 3 and its modern codification at 3 U.S.C. § 6 are constitutional, strictly speaking. When section 3 of the Act of 1792 was read in the House of Representatives, Representative Niles, joined by Representative Hillhouse, objected to it on constitutional grounds, questioning Congress's ability to impose duties on the executive authority of each state and calling the section "degrading to the Executives of the several States."[38] Speaker Sedgwick responded that "if Congress were not authorized to call on the Executives of the several States, he could not conceive what description of persons they were empowered to call upon,"[39] and Representative Niles's motion to strike the clause was negatived.

Democrat-Republican Senator Charles Pinckney, a Framer and leading delegate to the South Carolina ratifying convention, probably would have agreed with Representative Niles's constitutional objection. In a speech before the Senate in March of 1800, Senator Pinckney observed that the Act of 1792 may "in one or two particulars of no importance" go "farther than the Constitution warrants," though he did not identify any particular sections.[40] In modern constitutional parlance, the duties imposed on State Executives by section 3 of the Act of 1792 and 3 U.S.C. § 6, do not seem quite like "purely ministerial reporting requirements,"[41] but those who have a broader view of "executive commandeering" are unlikely to question seriously the constitutionality of section 3 of the Act of 1792 and 3 U.S.C. § 6.[42]

Other provisions of the Act of 1792 are much less questionable. Section 4 provided that if the electoral certificate of a state shall not have been received at the Seat of Government by the first Wednesday in January, then the Secretary of State shall send a special messenger to the district judge of the State who held one of the three electoral

37. These two possible fonts of power for the Electoral Count Act are discussed in Part II.A.2 *infra*.

38. 3 ANNALS OF CONG. 279 (1791).

39. *Id.* at 279.

40. 10 ANNALS OF CONG. 134 (1800).

41. *See* Printz v. United States, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) (suggesting that "purely ministerial reporting requirements imposed by Congress on state and local authorities" may be constitutionally valid).

42. *See, e.g., id.* at 939 (Stevens, J., dissenting); *id.* at 970–71 (Souter, J., dissenting); *id.* at 976–77 (Breyer, J., dissenting); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1990–2007 (1993) (presenting extensive early historical evidence of "executive commandeering").

certificates.[43] Section 5 provided that Congress shall be in session on the second Wednesday in February for the purpose of opening the electoral certificates and counting the electoral votes.[44] Section 6 provided that if the President of the Senate were absent when the electoral certificates arrived, they would be given to the Secretary of State for safekeeping, to be delivered as soon as practicable to the President of the Senate. Section 7 provided for the compensation of messengers who would carry one of the three electoral certificates from each of the states to the Seat of Government at the rate of twenty-five cents a mile. Section 8 prescribed a $1,000 penalty (no small sum in those days) for messengers who failed to perform the service.[45]

Whatever we think about the constitutionality of section 3 of the Act of 1792, the Act did not in any way assert any congressional control over the electoral count itself. As one early scholar of the Electoral Count Act noted, "There is no attempt here, legislatively, to interpret the Constitution, or devise any counting machinery other than that which appears on its face, or establish any rule for its action.

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43. The modern codification provides:

> When no certificate of vote and list mentioned in sections 9 and 11 of this title from any State shall have been received by the President of the Senate or by the Archivist of the United States by the fourth Wednesday in December, after the meeting of the electors shall have been held, the President of the Senate or, if he be absent from the seat of government, the Archivist of the United States shall request, by the most expeditious method available, the secretary of state of the State to send up the certificate and list lodged with him by the electors of such State; and it shall be his duty upon receipt of such request immediately to transmit same by registered mail to the President of the Senate at the seat of government.

3 U.S.C. § 12 (2000). Additionally:

> When no certificates of votes from any State shall have been received at the seat of government on the fourth Wednesday in December, after the meeting of the electors shall have been held, the President of the Senate or, if he be absent from the seat of government, the Archivist of the United States shall send a special messenger to the district judge in whose custody one certificate of votes from that State has been lodged, and such judge shall forthwith transmit that list by the hand of such messenger to the seat of government.

Id. § 13.

44. For the modern codification, see 3 U.S.C. § 15 ("Congress shall be in session on the sixth day of January succeeding every meeting of the electors.").

45. For the modern codification (with the same $1,000 penalty), see 3 U.S.C. § 14 ("Every person who, having been appointed, pursuant to section 13 of this title, to deliver the certificates of the votes of the electors to the President of the Senate, and having accepted such appointment, shall neglect to perform the services required from him, shall forfeit the sum of $1,000.").

It was assumed that the Constitution interprets itself, and executes itself by its own provisions."[46]

2. The Grand Committee Bill of 1800

In early 1800, the Federalist-controlled Sixth Congress attempted to regulate the electoral count.[47] The impetus for the regulation was plainly corrupt: The upcoming presidential election between President and Federalist John Adams and Vice President and Democrat-Republican Thomas Jefferson commanded the nation's attention, and the Federalist-controlled Congress desired to deal Vice President Jefferson's electoral chances a "crippling blow."[48] Historian John Bach McMaster explained that

> [t]he leaders of the [Federalist] party were determined that, if the presidential election could not be carried by fair means, it should by foul. Adams's electors might be defeated in the Legislatures and at the poles [sic], but the votes of the Jefferson electors should, if possible, be thrown out by Congress. With this for its purpose, an electoral-count bill appeared in the Senate.[49]

On January 23, 1800, Federalist Senator James Ross moved "[t]hat a committee be appointed to consider whether any, and what, provisions ought to be made by law for deciding disputed elections of President and Vice President of the United States, and for determining the legality or illegality of the votes given for those officers in the different States" and that the committee be authorized to report a bill.[50] This motion was the subject of significant debate, much of which we shall uncover in Part II. On February 14, 1800, Senator Ross reported "A bill prescribing the mode of deciding disputed elections of President and Vice-President of the United

46. Spear, *supra* note 18, at 158.

47. For an easily accessible account of this history, see DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 288–291 (1997).

48. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 263 (1996).

49. 2 JOHN BACH MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES: FROM THE REVOLUTION TO THE CIVIL WAR 462 (1928); *see id.* at 463 ("The purpose of this shameful bill was plain to all."); *see also* 2 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 452–53 (1916) (describing Federalist effort to regulate electoral count as "in reality a high-handed attempt to control the [coming] presidential election, regardless of the votes of the people"); Wroth, *supra* note 22, at 326 & n.24 (describing Federalist effort to regulate electoral count as "a last ditch effort to stem the tide of Jeffersonian Republicanism").

50. 6 ANNALS OF CONG. 29 (1800).

States."[51] This bill is commonly known as the "Grand Committee" Bill.[52]

As its shorthand name suggests, this bill featured the appointment of a "Grand Committee" on the day before the second Wednesday in February. This Committee would have thirteen members: six Representatives chosen by ballot in the House, six Senators chosen by ballot in the Senate, and the Chief Justice of the United States who was to act as chairman (if the Chief Justice were absent then the next most senior Justice would attend).[53] This committee was to have power to examine, and finally to decide, all disputes relating to the election of President and Vice President including the:

> power to inquire, examine, decide, and report upon the constitutional qualifications of the persons voted for as President and Vice-President of the United States; upon the constitutional qualifications of the electors appointed by the different States, and whether their appointment was authorized by the State Legislature or not; upon all petitions and exceptions against corrupt, illegal conduct of the electors, or force, menaces, or improper means used to influence their votes; or against the truth of their returns, or the time, place or manner of giving their votes.[54]

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51. COUNTING ELECTORAL VOTES, *supra* note 3, at 16.

52. Historian Albert Beveridge writes that the bill was "aimed particularly at the anticipated Republican presidential majority in Pennsylvania which had just elected a Republican Governor over the Federalist candidate." 2 BEVERIDGE, *supra* note 49, at 463. It should come as no surprise that the losing Federalist candidate was Senator Ross of Pennsylvania, the principal proponent of the Grand Committee Bill.

53. The idea for a committee of thirteen may have its roots in a proposal by Elbridge Gerry at the Philadelphia Convention of 1787 who proposed that, in case of electoral deadlock, "the eventual election should be made by six Senators and seven Representatives chosen by joint ballot of both Houses." 2 FARRAND, *supra* note 35, at 514. This proposal failed by a vote of two to eight. *Id.* Note that Gerry's proposal decidedly favors the House of Representatives—the People's branch of the national legislature—both in committee representation and committee election given the joint ballot procedure. Under a joint ballot, the Members of the House of Representatives, at the founding, would be entitled to sixty-five of ninety-one votes. For a mathematical depiction of Gerry's thinking, see *id.* at 99 (proposing the selection of President by a randomly chosen subset of members of Congress taken together).

54. COUNTING ELECTORAL VOTES, *supra* note 3, at 18. The one exception to this grant of power was that

> no petition, or exception, shall be granted, allowed, or considered by the sitting grand committee which has for its object to dispute, draw into question the number of votes given for an elector in any of the States, or the fact whether an elector was chosen by a majority of votes in his State or district."

Id. In other words, the Grand Committee was not to *judge* the elections or returns of the electors.

The committee was "to sit with closed doors." It was to have the "power to send for persons, papers, and records to compel the attendance of witnesses,"[55] and its report was to be made "on the first day of March next after their appointment." This report was to be "a final and conclusive determination of the admissibility or inadmissibility of the votes given by the electors for President and Vice-President of the United States."[56]

Republican Senator Charles Pinckney delivered a "closely reasoned attack"[57] on the Grand Committee Bill, which occupies some twenty-one pages in the *Annals of Congress*.[58] It is not surprising that Senator Pinckney led the effort in the Senate against the Grand Committee Bill. Some historians place him as the campaign manager in South Carolina for Democrat-Republican and Vice President Thomas Jefferson, who had everything to lose with the passage of the Grand Committee Bill.

In his introductory remarks, Senator Pinckney described the Grand Committee Bill as more dangerous than the Alien and Sedition Acts of 1798 because, unlike the latter, the former was perpetual.[59] Relying on his experience as a Framer and a leading delegate at the South Carolina ratifying convention, Senator Pinckney forcefully articulated his principal objection to the bill:

> Knowing that it was the intention of the Constitution to make the President completely independent of the Federal

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55. *Id.* at 17.

56. *Id.* at 18.

57. Tansill, *supra* note 22, at 517.

58. *See* 10 ANNALS OF CONG. 126–46 (1800). In his remarks opposing the Grand Committee Bill, Senator Pinckney described it thus:

> [W]hat is the mode [of electing President] proposed by this bill? That the Senate and House of Representatives of the United States shall each of them elect six members, who with a chairman, to be appointed by the latter from a nomination of the former, would form a *grand committee* who should, sitting with *closed doors*, have a right to examine all the votes given by the Electors in the several States for President and Vice President, and all the memorials and petitions respecting them; and have power finally to decide respecting them, and to declare what votes of different States shall be rejected, and what admitted; and, in short, that this committee, thus chosen, and sitting with closed doors, shall possess complete, uncontrollable, and irrevocable power to decree, without appeal from their decision, who has been returned, and who shall be proclaimed President of the United States.

Id. at 129. Professor Ross and Mr. Josephson suggest that, given the length of Senator Pinckney's speech, it was not extemporaneous. *See* Ross & Josephson, *supra* note 7, at 711 n.252.

59. 10 ANNALS OF CONG. 126. Recall that the Alien and Sedition Acts were set to expire on June 25, 1800 and March 3, 1801 respectively. *See* Alien Act of June 25, 1798 § 6, 1 Stat. 570, 572; Sedition Act of July 14, 1798 § 4, 1 Stat. 596, 597.

> Legislatures, I well remember it was the object, as it is at present not only the spirit but the letter of that instrument, to give to Congress no interference in, or control over the election of a President. It is made their duty to count over the votes in a convention of both Houses, and for the President of the Senate to declare who has the majority of the votes of the Electors so transmitted. It never was intended, nor could it have been safe, in the Constitution, to have given to Congress thus assembled in convention, the right to object to any vote, or even to question whether they were constitutionally or properly given.... To give to Congress, even when assembled in convention, a right to reject or admit the votes of States, would have been so gross and dangerous an absurdity, as the [F]ramers of the Constitution never could have been guilty of. How could they expect, that in deciding on the election of a President, particularly where such election was strongly contested, that party spirit would not prevail, and govern every decision?[60]

According to Senator Pinckney, the animating principle of the Electoral College Clauses was to remove Congress from the business of electing the President as much as possible. Despite Senator Pinckney's strong and well reasoned objections, many of which we shall uncover in Part II, in the course of the argument against the constitutionality of the Electoral Count Act, the Senate passed the Grand Committee Bill by a "strict party vote"[61] of sixteen to twelve on March 28, 1800.[62]

Three days later the bill reached the House. In the House, Federalist Representative John Marshall—soon to be Chief Justice Marshall—broke with his party, and much to the Federalists' dismay, lobbied very hard against the Grand Committee Bill.[63] He was

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60. 10 ANNALS OF CONG. 130. Senator Pinckney also observed that the Framers "well knew, that to give to the members of Congress a right to give votes in this election, or to decide upon them when given, was to destroy the independence of the Executive and make him the creature of the Legislature." *Id.* at 131. The potential for party spirit in Congress to dominate the choice of President was well recognized. In the Second Congress, Speaker of the House Sedgwick "descanted on the pernicious consequences which might result from the collision of parties, and the working of passions in the breasts of men whose ardor would probably be excited to the greatest degree" if the House of Representatives were to choose the President. 3 ANNALS OF CONG. 278 (1791). During the Wisconsin Incident of 1857, Senator Collamer made similar remarks. *See* COUNTING ELECTORAL VOTES, *supra* note 3, at 132–33 (remarks of Sen. Collamer).

61. 2 BEVERIDGE, *supra* note 49, at 454.

62. 10 ANNALS OF CONG. 146.

63. *See* 2 BEVERIDGE, *supra* note 49, at 455. ("In these cloak-room talks, Marshall, to the intense disgust and anger of the Federalist leaders, was outspoken against this attempt to seize the Presidency under the forms of a National law."); SMITH, *supra* note 48, at 264

appointed chairman of a select committee to redraft the bill. Marshall reported the Senate bill in the House of Representatives on April 25, 1800 with significant amendments.[64] Under the amended bill, the committee's report was not to be the final and conclusive determination on the electoral votes. Instead, this determination would devolve upon the two Houses after receiving the committee's report. The House bill provided that, upon objection to any elector's vote in a joint meeting of the two Houses, the vote was to be counted unless the two Houses, meeting separately, *concurred* in rejecting it. Indeed, as we shall see, the Electoral Count Act bears significant resemblance to this amended bill.[65]

These amendments "gutted" the Grand Committee Bill.[66] The Senate considered this amended bill on May 8, 1800, and rejected the House amendments by a "strict party vote."[67] The Senate then passed an amendment striking out the word "rejecting" and inserting the word "admitting." The effect of this change was to create a "one-House veto" over electoral votes. When the two Houses could not agree on the amended bills, the bill died.[68] According to John Marshall scholar Albert J. Beveridge, if Marshall had not waged his campaign against the Grand Committee Bill, the election of Thomas Jefferson would have been impossible.[69]

It is extremely difficult to see how the original Grand Committee Bill was constitutional.[70] In addition to the constitutional argument that will be explored in detail in Part II, there are at least four additional attacks on this bill. First, what gives Congress the

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("Marshall worked the cloakrooms and corridors assiduously, voicing his objections and lining up the opposition vote.").

64. *See* COUNTING ELECTORAL VOTES, *supra* note 3, at 23–26.

65. *See* Part I.A.4 *infra*.

66. SMITH, *supra* note 48, at 264.

67. 2 BEVERIDGE, *supra* note 49, at 456.

68. *See* Wroth, *supra* note 22, at 327 ("The House, less aggressively partisan than the Senate, refused to accept a measure which would permit rejection by vote of the Senate alone.").

69. 2 BEVERIDGE, *supra* note 49, at 456. Thomas Jefferson, for his part, was less than fully appreciative of John Marshall's efforts, suggesting that the Marshall amendments did not make the Grand Committee Bill constitutional. In a private letter, he wrote:

> Marshall made a dexterous manoeuver; he declares against the constitutionality of the Senate's bill, and proposes that the right of decision of their grand committee should be controllable by the *concurrent* vote of the two [H]ouses of [C]ongress; but to stand good if not rejected by a concurrent vote. You will readily estimate the amount of this sort of controul.

Id. (quoting Letter from Thomas Jefferson, to Robert Livingston (Apr. 30, 1800)).

70. The amended Grand Committee Bill largely parallels the Electoral Count Act. *See* Part I.A.4 *infra*.

authority to delegate the counting function to a committee, if Congress has counting authority at all?[71] Second, what gives Congress the authority to take the Chief Justice (or other Justices) away from her judicial duties?[72] Third, what gives Congress the authority to delay the counting of the electoral votes in violation of the immediacy principle of the Electoral College Clauses?[73] Fourth, what gives Congress the authority to secretly count electoral votes in violation of the publicity principle of the Electoral College Clauses?[74]

In sum, one should seriously doubt the constitutionality of the Grand Committee Bill. It is far from clear that Representative John Marshall's amendments removed the multiple constitutional infirmities. Arguably, the failure of the Second Congress to address congressional regulation of the electoral count after significant constitutional debate suggests the unconstitutionality of the Grand Committee Bill; Senator Pinckney certainly thought so.[75]

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71. Apparently, John Marshall also questioned Congress's ability to delegate authority to the Grand Committee. 2 BEVERIDGE, *supra* note 49, at 457 (citing Letter from Speaker Sedgwick, to Sen. Rufus King (May 11, 1800)).

72. The Constitution carefully circumscribes the Chief Justice's judicial duties under Article III, with one exception. *See* U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside . . . .").

It might be argued that the Chief Justice's role in the Grand Committee is quasi-judicial and that the foregoing clause invites the Chief Justice to play a special role with respect to the Presidency. For an expression of this claim, see Amar, *supra* note 10, at 223 n.16. Notably, however, the Framers rejected other non-judicial roles for the Chief Justice and other Justices of the Supreme Court. *See, e.g.*, 2 FARRAND, *supra* note 35, at 75, 298 (rejecting participation in "[r]evisionary power" or veto power); *id.* at 342 (rejecting participation in "Council of State" or Privy Council).

73. *See* text accompanying *infra* notes 267–74.

74. *See* text accompanying *infra* notes 276–86.

75. Senator Pinckney remarked:

> Were not the then Executive, and a number of the members of both Houses, members of the Convention which framed the Constitution; and if it intended to give to Congress, or to authorize them to delegate to a committee of their body, powers contemplated by this bill, could the Congress or the President of 1792, have been so extremely uninformed, and indeed ignorant of its meaning and of their duty, as not to have known it?

10 ANNALS OF CONG. 136 (1800). However, it must be noted that, during the debate over the Act of 1792, Speaker of the House Sedgwick did mention the possibility of a "contested election" and "left it to the consideration of the Committee" to address the solution. *See* 3 ANNALS OF CONG. 279 (1791).

3. The Twenty-second Joint Rule of 1865

The third principal congressional effort to regulate the electoral count came sixty-five years later in 1865.[76] On January 30, 1865, the House of Representatives passed a resolution now commonly referred to as the "Twenty-second Joint Rule." A few days later, on February 6, 1865, after minor amendment, the Senate passed the House resolution. Sparsely attended Houses of Congress passed the Twenty-Second Joint Rule with no debate.[77] As Dean Wroth has observed, it was "a political measure, passed and used by Republican majorities of both Houses to assure control over the votes of the recently rebellious southern states."[78] The purpose of the Twenty-Second Joint Rule was thus to exclude the electoral votes of putative states as needed, not to exclude the electoral votes of electors. It provided in relevant part:

> If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same, having been stated by the Presiding Officer, shall be submitted, first by the President of the Senate to that body, and then by the Speaker to the House of Representatives, and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses, said votes of the two houses to be reported to and declared by the Presiding Officer, and upon any such question there shall be no debate; and any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner.[79]

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76. Three other interim and unsuccessful congressional efforts to regulate the electoral count deserve brief mention. First, on December 12, 1820, Senator Wilson submitted a resolution entitled *Attempt to Remedy the Uncertainty as to Counting the Electoral Vote by Legislation*. *See* COUNTING ELECTORAL VOTES, *supra* note 3, at 48. Second, on March 4, 1824, Senator Van Buren—soon to be President Van Buren in 1837—reported a bill similar to Representative John Marshall's Grand Committee Bill. This bill passed the Senate on April 19, 1824, but died without having been considered by the House of Representatives. *See id.* at 57–60; *see also* Spear, *supra* note 18, at 158 (describing the historical background); Wroth, *supra* note 22, at 327 (same). Third, on May 10, 1828, Representative Wilde moved a resolution entitled "*A Proposition to Inquire into the Legality of the Certificates of the Votes of the Previous Presidential Election.*" COUNTING ELECTORAL VOTES, *supra* note 3, at 63–65.

77. *See* Spear, *supra* note 18, at 158; Wroth, *supra* note 22, at 328 n.33.

78. Wroth, *supra* note 22, at 328; *see also* Tansill, *supra* note 22, at 522 ("[T]he occasion for this assertion of jurisdiction was the breach between the Executive and Congress relative to the reconstruction of the southern states.").

79. COUNTING ELECTORAL VOTES, *supra* note 3, at 148 (House version); *see also* Tansill, *supra* note 22, at 523 (describing the surrounding history); Wroth, *supra* note 22, at 328 (citing same passage).

As the text of the Joint Rule indicates, "no vote objected to shall be counted, except by the concurrent votes of the two houses." Any Member of Congress could object to an electoral vote for any reason, and each House was to have a "one-House veto" as to which votes were to be counted.[80] Thus, each House could, by rejecting enough votes, trigger a contingency election in the House of Representatives for the President and in the Senate for the Vice-President.[81] As we shall see shortly, even the Electoral Count Act does not go this far.

A report by the House Committee on Privileges and Elections in 1874 called the Twenty-Second Joint Rule "the most dangerous contrivance to the peace of the nation that has ever been invented by Congress."[82] Indeed, the consensus view during the Electoral Count Act debates was that the Twenty-Second Joint Rule was unconstitutional.[83] Unsurprisingly, scholars who have studied the

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80. Sen. Morton offered an analysis:

> Under the rule as it now exists, when the votes for President and Vice-President are counted, any formal objection, no matter how trifling or insufficient or even contemptible in its character, has the effect to separate the two houses, and they are to vote upon this objection, and unless both houses concur in voting it down the electoral vote of that State is lost. In that way, by the dissent of either house, any State may be disfranchised; the vote of the State of New York or of Indiana may be rejected by the most foolish and trivial objection unless both houses shall concur in voting down that objection. The vote of every State may be rejected in this way.

COUNTING ELECTORAL VOTES, *supra* note 3, at 444.

81. A report by the Committee on Privileges and Elections in 1874 stated: "Here is a powerful temptation to the House of Representatives by non-concurrence to throw the election into its own body, and thus, perhaps, secure the election of a candidate who may have been overwhelmingly beaten at the polls." COUNTING ELECTORAL VOTES, *supra* note 3, at 417.

82. *Id.*

83. *See, e.g.*, *id.* at 444 (remarks of Sen. Morton) ("[T]he existence of this rule imperils the peace of the nation and subjects the Government to great danger.... It requires no argument, therefore, to prove the absurdity, the unconstitutionality, and the danger of this rule."); *id.* (remarks of Sen. Bayard) ("I have for a long time been of opinion that the constitutionality of this rule altogether may well be doubted."); *id.* at 472 (remarks of Sen. Bayard) ("That such a rule was without constitutional warrant, I cannot doubt; and I do not think I am going too far when I say that the unconstitutionality of that rule is generally admitted."); *id.* at 526 (remarks of Sen. Morton) ("It was absurd, wickedly and dangerously unconstitutional."); *id.* at 540 (remarks of Sen. Maxey) ("It is a blot upon the mode and manner of counting the votes of the electoral college. It gives to either [H]ouse of Congress the right to stab to the death a sovereign State of this Union."). Sen. Bayard remarked:

> Then, under the maleficent working of a rule adopted without regard to the Constitution, under the assumption of powers utterly unwarranted by the two [H]ouses of Congress, there came the assumption of a veto power by either branch of Congress, in silence, without debate, without reason, to throw out the electoral vote and disfranchise one or more communities at will.

Id. at 665.

Rule have identified it as the apex of congressional control over the electoral count.[84] Simply put, the Twenty-second Joint Rule was unconstitutional.[85]

4. The Electoral Count Act of 1887

The legislative history of the Electoral Count Act of 1887 is complex, and much of this history has been well catalogued elsewhere.[86] The heart of the Electoral Count Act is currently codified at 3 U.S.C. § 15, titled "Counting electoral votes in Congress."[87] This section sets forth a complicated set of provisions for counting electoral votes.

Two noticeable differences exist between the Electoral Count Act and the Twenty-second Joint Rule. First, the Electoral Count Act is a *law* and not a *joint rule*. Second, the Electoral Count Act does not have the "one-House veto" provision of the Twenty-second Joint Rule. It is not clear that these two significant changes cure the constitutional infirmities of the Twenty-second Joint Rule.

Charting the basic workings of the Electoral Count Act is a good place to begin. The Act provides for the reading of the electoral votes by state and the objection to an electoral vote. Unlike its predecessors, the Electoral Count Act requires an objection to an electoral vote to have the signature of at least one Senator *and* at least one Representative.[88] After all the objections to the electoral votes from a state have been received and read, the Senate and the House of Representatives withdraw for separate deliberations.

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84. *See* Tansill, *supra* note 22, at 522 ("In 1865, the climax of congressional control [over the electoral vote] was reached, ..."); Wroth, *supra* note 22, at 328 ("Congress asserted total power over the electoral vote with the adoption of the Twenty-second Joint Rule in 1865.").

85. The "one-House veto" of the Twenty-second Joint Rule bears a remarkable resemblance to the scheme held unconstitutional in *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding a "one-House veto" provision unconstitutional).

86. In a nutshell, the precursor bill to the Electoral Count Act was introduced in the Republican Senate in May 1878. "Spurred by two close presidential elections, the Senate repassed the bill three times in the next decade, but each time could not win the agreement of the House." Wroth, *supra* note 22, at 334 (footnotes omitted). The two Houses of Congress finally agreed in 1887, after "the passions of Reconstruction had cooled." *Id.* For a comprehensive summary of the legislative history of the Electoral Count Act, see Ross & Josephson, *supra* note 7, at 722–30, and Wroth, *supra* note 22, at 334–35.

87. 3 U.S.C § 15 (2000).

88. *Id.* ("Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received.").

Unless there is a case of "double returns," the applicable provision is as follows:

> [N]o electoral vote or votes from any State which shall have been *regularly given* by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so *regularly given* by electors whose appointment has been so certified.[89]

In the case of "double returns" with "more than one return or paper purporting to be a return from a State,"[90] the applicable statutory provision is considerably more complex. The joint convention first looks to see if the state has determined the controversy, and if it has, that determination is binding.[91] If, however, there should be multiple state authorities which claim to have decided the controversy, then the two Houses of Congress, acting separately, must decide concurrently which set to count. If the two Houses disagree, then the Electoral Count Act provides that "the votes of the electors whose appointment shall have been certified by the executive of the state, under the seal thereof, shall be counted."[92] The Electoral Count Act does not address what happens if the same executive authority certifies different electors or if multiple executive authorities certify different electors.

B. The Problems of the Electoral Count

Fortunately, Senator Ross's doomsday prediction in the Sixth Congress that the thorny problems of the electoral count "might happen, and were very likely to happen"[93] has not been borne out in

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89. *Id.* (emphasis added). Note that the referred to section 6, 3 U.S.C. § 6 (2000), is the modern codification of section 3 of the Act of 1792.

90. 3 U.S.C. § 15.

91. *Id.* § 5 ("Determination of controversy as to appointment of electors") provides:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

92. *Id.* § 15.

93. 6 ANNALS OF CONG. 29 (1800); COUNTING ELECTORAL VOTES, *supra* note 3, at

the course of two hundred and thirteen years of the Republic. There have been a dozen or so problems of the electoral count and consequent challenges to electoral votes, almost all of which occurred in the nineteenth-century. This section summarizes the historical problems of the electoral count.

1. The Massachusetts Incident of 1809

The first congressional objection to the votes of electors occurred in the electoral count of 1809.[94] On December 26, 1808, Representative Barker introduced a memorial from some disgruntled inhabitants of Hanover, Massachusetts that the appointment of Massachusetts electors was "irregular and unconstitutional"[95] relative to the Massachusetts Constitution, and praying that Congress look into the matter during the electoral count. When a resolution was called to appoint a committee of the House to investigate, Representative Randolph spoke in very strong terms against it:

> He said it appeared to him that, under color of redress of grievances, the resolution might go in a very alarming and dangerous manner to enlarge the sphere of action of the General Government at the expense of the dearest rights of the States. In what manner, asked he, is the General Government constituted? We, as one of the branches of the Legislature, are unquestionably the judges of our own qualifications and returns. The Senate, the other branch of the Legislature, is in like manner the judge without appeal of the qualifications of its own members. But with respect to the appointment of President on whom is that authority devolved in the first instance? On the electors, who are to all intents and purposes, according to my apprehension, as much the judges of their own qualifications as we are of ours . . . .[96]

Representative Rowan also spoke strongly against the resolution. He thought that "Congress did not possess a superintending power over the acts of the States in general cases" and doubted that Congress had any power in this case; he recommended that the petitions of the Massachusetts citizens not be placed on the files of the House "because they related to a subject on which the House had no power to legislate."[97] The resolution passed nevertheless, but

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94. COUNTING ELECTORAL VOTES, *supra* note 3, at 37–42.
95. *Id.* at 37–38.
96. *Id.* at 38.
97. *Id.* at 39.

there is no record that anything further was done. No one objected during the electoral count, and all Massachusetts electoral votes were counted.

2. The Indiana Incident of 1817

The second congressional objection to the votes of electors occurred in the electoral count of 1817.[98] On February 11, 1817, the two Houses gathered in the House of Representatives. During the electoral count, Representative Taylor, "compelled" to speak "by his sense of duty,"[99] objected to the counting of the electoral votes from Indiana because the Indiana electors were elected before Indiana joined the Union. The Speaker of the House interrupted him and stated that, when assembled in joint convention, the two Houses "could consider no proposition, nor perform any business not prescribed by the Constitution."[100] Accordingly, the Senate withdrew to its chamber by their unanimous consent. Representative Taylor then repeated his argument that, because the Indiana electors were chosen before Indiana was admitted into the Union, "the votes of that State were no more entitled to be counted than if they had been received from Missouri or any other Territory of the United States."[101] In his view, the votes of the Indiana electors were "illegal."[102]

Although Representative Taylor did not refer to it, the improper appointment of the Indiana electors was in violation of section 1 of the Act of 1792. However, the votes of Indiana's electors were cast after Indiana was admitted into the Union. Indiana was admitted into the Union as the nineteenth State effective December 11, 1816. This date was after the date set by Congress for the meeting of the electoral colleges but before the date set by Congress for the electoral count.

Representative Cady countered. He

> thought that the matter had been settled by the admission of Senators and Representatives from Indiana to their seats, and that it was too late on that account to question her right to participate in the election of President; and that from the moment the constitution of the State was assented to, she

98. *See id.* at 44–47.
99. *Id.* at 46.
100. *Id.*
101. *Id.* at 47.
102. *Id.*

was entitled to all the privileges of an independent member of the Union.[103]

A joint resolution to settle the question was indefinitely postponed by the House of Representatives.[104] The Senate re-entered the House Chamber and the electoral count resumed. According to the record of congressional debate, "[n]o one appeared to question the power of Congress to reject the vote of Indiana if that State was not a State in the Union at the time the electoral votes were cast."[105] In the end, the votes of Indiana's three electors were counted.

3. The Missouri Incident of 1821

The third congressional objection to the votes of electors occurred in the electoral count of 1821.[106] In early February of 1821, Congress passed a resolution appointing a joint committee "to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election."[107] On February 13, 1821, the Senate resolved that if any objection was made to the electoral votes of Missouri *and* if the result of the electoral count did not turn on counting or omitting the Missouri votes, then the President of the Senate would announce the winners of the presidential and vice presidential electoral vote, plus a conditional tally—that is to say, if Missouri's votes were counted, the tally would be *x*; if Missouri's votes were not counted, the tally would be *y*. In the Senate, a "long debate" took place on this resolution and four Senators strongly opposed it "principally for the reason that it was not competent in the Senate to decide such a question in anticipation."[108]

When the resolution was read in the House of Representatives, Representative Randolph stated he would rather have seen no votes counted at all than a "special verdict" announced:

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103. *Id.*

104. *Id.* When Representative Sharp offered the joint resolution, Representative Bassett objected, stating that the resolution should not be joint because a joint resolution might establish a precedent which would "deprive [the] House of one of its powers, by permitting the Senate to participate in this question." *Id.* at 47. There is no record of any Representative supporting this erroneous view. There is no textual reason to conclude that the House has judicial power during the electoral count but that the Senate does not, or vice versa.

105. *Id.*

106. *See id.* at 48–56.

107. *Id.* at 48 (Senate Resolution); *id.* at 51 (House Resolution).

108. *Id.* at 49.

> He could not recognize in this house or the other house, singly or conjointly, the power to decide on the votes of any State.... He maintained that the electoral college was as independent of Congress as Congress of them; and we have no right, said he, to judge of their proceedings.... Suppose a case, in which some gentlemen of one house or the other should choose to turn up his nose at the vote of some State, and say that if it be so and so, such a person is elected; and if so and so, what-you-call-'im is elected—did not everybody see the absurdity of such a proposition?[109]

Representative Floyd also objected to the special verdict. He stated,

> If they had any power over the votes of Missouri at all, it was when her votes were first received; but no such power existed. He protested against this assumption of authority on the part of Congress, and wished to show his disapprobation of the resolution in the strongest manner.[110]

Representative Rhea agreed, finding that the Constitution was not designed to be expedient and that "it was not in the power of this House, or of both Houses, by resolution, to remedy a defect in the Constitution."[111]

Soon afterwards, during the electoral count, Senator Livermore objected to the electoral votes from Missouri because Missouri was not a State of the Union. He was right. Missouri was admitted into the Union as the twenty-fourth State effective August 10, 1821. In the House, Representative Floyd submitted a resolution "[t]hat Missouri is one of the States of this Union, and her votes for President and Vice-President of the United States ought to be received and counted."[112]

After extended comments by Representatives Randolph and Archer against the resolution on the ground that it was not within the power of the House, a motion to table the resolution passed, and the Senate reassembled in the House Chamber for the electoral count.[113] The President of the Senate proceeded to announce the result of the vote conditionally, as provided in the Senate resolution:

> The whole number of electors appointed by the several States was 235. One elector in each of the States of Pennsylvania, Tennessee, and Mississippi having died before the meeting of the electoral college of which he was a

109. *Id.* at 51.
110. *Id.* at 52.
111. *Id.*
112. *Id.* at 53.
113. *Id.* at 50–53.

> member, made the whole number of votes actually cast 232, including the vote of Missouri, of which 117 make a majority; or, excluding the vote of Missouri, 229, of which 115 make a majority; but in either event James Monroe is elected President, and Daniel D. Tompkins, Vice-President.[114]

When Representative Floyd asked the President of the Senate if Missouri's votes were in fact counted, the joint convention broke into disorder. Representative Randolph tried to speak but was pronounced out of order by the Speaker of the House. The President of the Senate concluded and the Senate withdrew to its Chamber.[115]

Thereafter, Representative Randolph introduced two resolutions in the House declaring that the electoral count was illegal. The first resolution provided that the electoral votes of Missouri were counted. The second resolution provided

> [t]hat the whole number of electors appointed, and of votes given for President and Vice-President, has not been agreeably announced by the presiding officer of the Senate and House of Representatives, agreeably to the provision of the Constitution of the United States, and that therefore the proceeding has been *irregular* and *illegal*.[116]

As he was putting his resolutions into writing, the House voted to adjourn and did not act upon either resolution.[117]

4. The Postmaster and Michigan Incidents of 1837

The fourth congressional objection to the votes of electors occurred during the electoral count of 1837.[118] The electoral count of 1837 actually involved two separate incidents: the Postmaster Incident and the Michigan Incident. In late January of 1837, the Senate and the House of Representatives resolved to appoint a joint committee "to ascertain and report a mode of examining the votes of President and Vice President of the United States, and of notifying

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114. *Id.* at 50. As this pronouncement makes clear, the electoral count of 1821 is unique for another reason: this was the first (and only) time when electors who were appointed died before the meeting of the electoral colleges. It appears that the President of the Senate miscalculated the number necessary for a majority of the votes. The Electoral College Clauses provide that the needed majority be "a majority of the whole number of Electors *appointed*." U.S. CONST. amend. XII (emphasis added); *see* U.S. CONST. art. II, § 1, cl. 3. Thus, the correct majority was either 116 or 118 votes, depending on the exclusion or inclusion of Missouri.

115. COUNTING ELECTORAL VOTES, *supra* note 3, at 56.

116. *Id.* (emphasis added).

117. *Id.* at 56.

118. *See id.* at 70–76.

the persons of their election."[119] Senator Grundy, who was one of three Senators on the joint committee, reported to the Senate on February 4, 1837 that some electors may have been constitutionally ineligible to be electors because "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an elector."[120] He reported that Isaac Waldron, an elector from New Hampshire, was the "president of a deposit-bank at Portsmouth, and was appointed and acting as pension-agent, without compensation, under the authority of the United States" and the two North Carolina electors held the "offices of deputy postmasters under the General Government."[121] In addition, the appointment of three other electors (from New Hampshire, Connecticut, and North Carolina, respectively) was in question.[122] The Committee concluded that the Electoral Incompatibility Clause "excludes and disqualifies deputy postmasters from the appointment of electors; and the disqualification relates to the time of the appointments, and that a resignation of the office of deputy postmaster after his appointment as elector would not entitle him to vote as elector under the Constitution."[123]

The Senate took no further action on the issue. Debate in the House of Representatives was minimal. One Representative pointed out that all of these electors probably resigned from their offices before the day on which they cast their votes,[124] but was quickly corrected by another who noted that the ineligibility under the Electoral Incompatibility Clause extended to the time of the appointment.[125] These issues were not raised during the electoral count, and all of these electoral votes were counted.

The Michigan Incident was similar to the Indiana and Missouri Incidents. Michigan was admitted into the Union as the twenty-sixth State effective January 26, 1837. This date was *after* the date Congress set for the meeting of the Electoral Colleges, but *before* the date Congress set for the counting of electoral votes. On February 4, 1837, the Senate proposed a resolution to count Michigan's electoral votes in the same manner as Missouri's. Senator Norvell objected to

119. *Id.* at 70 (Senate Resolution).
120. U.S. CONST. art. II, § 1, cl. 2.
121. COUNTING ELECTORAL VOTES, *supra* note 3, at 71 (remarks of Sen. Grundy).
122. *See id.* (noting that "five or six votes only would in any event be abstracted from the whole number").
123. *Id.*
124. *Id.* at 73 (remarks of Rep. Cambreling).
125. *Id.* (remarks of Rep. Thomas).

this resolution, arguing that the Michigan question was exactly the same as that of the Indiana Incident.[126]

Senator Calhoun also opposed the resolution, stating that "Michigan was a State *de facto* at the time she formed her constitution; and if her electors were not legally appointed, *neither were her Senators, who were admitted upon this floor.*"[127] The Senate adopted this resolution by a vote of thirty-four to nine.[128] The House adopted the same resolution on February 6, 1837, although Representative Crary of Michigan also "thought the position of his State was analogous to that of Indiana, and that her vote should be received and counted."[129]

On February 8, 1837, the President of the Senate announced the result of the electoral count in the same way as in the Missouri Incident. Martin Van Buren of New York was declared the President-elect.[130] If Michigan's votes were counted, he had 170; if not, he had 167 votes. In either event, Martin Van Buren had a majority of the whole number of electors appointed. However, a different situation presented itself in the case of the Vice President-elect. Richard M. Johnson of Kentucky had the most electoral votes. If Michigan's votes were counted, he had 147 votes; if not, he had 144 votes. In either event, he did not have the requisite majority to be the Vice President-elect, and thus, the choice devolved upon the Senate.[131] The Senate elected Johnson as Vice President.

5. The Wisconsin Incident of 1857

The fifth congressional objection to the votes of electors occurred during the electoral count of 1857.[132] In the election of 1856, the five electors of the State of Wisconsin did not cast their votes on the day prescribed by federal law because of a snowstorm.[133] The President of the Senate counted Wisconsin's electoral votes over the objections of both Representatives and Senators assembled in

126. *Id.* at 72 (remarks of Sen. Norvell). Senator Lyon agreed and "contended that Michigan was as much entitled to count her vote as was the State of Indiana." *Id.* Senator Clay disagreed. *Id.*

127. *Id.* (second emphasis added).

128. *Id.*

129. *Id.* at 73.

130. *Id.* at 75.

131. *Id.* at 75–76.

132. *See id.* at 86–144.

133. *See, e.g., id.* at 117 (remarks of Sen. Seward) (referring to "accidental delay produced by the interposition of Providence preventing the vote being cast at the prescribed time").

convention.[134] When Representative Lechter objected to Wisconsin's electoral votes and moved to exclude them, the presiding officer (the President of the Senate) simply stated that no debate was in order when the votes were being read by the tellers or even after they were finished.[135] When Senator Crittenden then asked the presiding officer, "Do I understand the Chair to decide that Congress, in no form, has power to decide upon the validity or invalidity of a vote?,"[136] the presiding officer replied that it was his constitutional duty to announce the result of the electoral count and that "[w]hat further action may be taken, if any further action should be taken, will devolve upon the properly-constituted authorities of the country–the Senate or House of Representatives, as the case may be."[137]

While the final result did not turn on the decision to count Wisconsin's electoral votes, several Members of Congress were concerned that the decision to count Wisconsin's electoral votes would set a dangerous precedent.[138] According to Senator Pugh, unlike the Missouri Incident which was "never likely to happen again," the Wisconsin Incident "may occur one hundred times again, if the Government should stand that many years."[139] Senator Crittenden made the point that the electoral votes of Wisconsin were not really "votes" at all, by stating: "Here is a vote tendered us from a State given on another day. We call it a vote in common parlance; but in the constitutional sense is it a vote at all? Is it not merely null? Unquestionably, it seems to me, it is null and void."[140] This statement attracted considerable support. Almost every Member of Congress who spoke on the subject agreed that the votes of Wisconsin should not have been counted.[141]

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134. *Id.* at 87–89.

135. *Id.* at 89.

136. *Id.*

137. *Id.*; *see also id.* ("The Presiding Officer would state that, the votes having been counted and announced, the functions of the two houses, assembled for the purpose of counting the votes, are discharged.").

138. *See, e.g.*, *id.* (remarks of Rep. Marshall); *id.* (remarks of Sen. Toombs); *id.* at 90 (remarks of Sen. Butler); *id.* at 110 (remarks of Sen. Nourse).

139. *Id.* at 137 (remarks of Sen. Pugh).

140. *Id.* at 131.

141. Senators Hale and Houston were the sole exceptions in the Senate. Senator Hale urged that Wisconsin's votes should be counted because the people of Wisconsin ought not to be disenfranchised because of an "accident" of their agents. His cry was very much one of substance over form. *See id.* at 119. Senator Houston argued that any resolution that Wisconsin's votes should not have been counted was unconstitutional. In his view, the electoral count of 1857 was "good, constitutional, and lawful." *Id.* at 122–23.

Ultimately, resolutions were introduced in each House of Congress that Wisconsin's electoral votes were null and void and ought not to have been included in the electoral count, but these resolutions failed.[142]

6. The Greeley Incident and the Other Incidents of 1873

The sixth congressional objection to the votes of electors occurred during the electoral count of 1873.[143] In the election of 1872, three Georgia electors cast votes for Horace Greeley of New York. Greeley had died after the November popular election but before the electors met in the electoral colleges. These three electors voted for Greeley anyway, feeling bound by the wishes of their constituents. Senator Hoar objected to these three votes and stated that they could not be counted because Greeley was not a "person" within the meaning of the Constitution when the electors voted.[144] Representative Banks objected on the basis that "we have no power to decide on the eligibility of any man voted for for President."[145] The question of whether to count these votes was a very close one. The House voted 101 to 99 (with forty not voting) *not* to count the Greeley votes.[146] The Senate voted forty-four to nineteen to count them.[147] Because the two Houses did not concur, the Greeley votes were not counted pursuant to the Twenty-second Joint Rule.[148]

The electoral count of 1873 presented at least three other important challenges to electoral votes. First, two objections were made to Mississippi's electoral votes. The Mississippi electors did not certify that they voted by ballot.[149] One of the electors from that state, A.T. Morgan, was absent and the electors appointed an alternate, J.J. Spellman. Spellman's appointment was not signed by the Governor of Mississippi as required by the laws of that state.[150] The House and the Senate voted to count all Mississippi electoral votes, including Spellman's.[151]

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142. *See id.* at 132 (proposed joint House and Senate resolution); *id.* at 144 (House).
143. *See id.* at 357–408.
144. *Id.* at 366.
145. *Id.* at 368.
146. *Id.*
147. *Id.* at 377.
148. *Id.* at 380. The Greeley precedent almost certainly affected the electoral vote of 1912. In that year, the defeated Republican candidate for Vice President died *before* the meeting of the electoral colleges, and the pledged electors voted for someone else. *See* 115 CONG. REC. 148 (1969) (remarks of Rep. McCulloch).
149. *See* COUNTING ELECTORAL VOTES, *supra* note 3, at 380.
150. *See id.*
151. *Id.*

Second, Senator Morton objected to Georgia's votes for a different reason. Apparently two votes were cast for Charles J. Jenkins of Georgia for President, and five votes for Alfred H. Colquitt of Georgia for Vice President.[152] This vote distribution revealed a mathematical certainty: at least one of the electors from that State had violated the constitutional requirement that he vote for at least one person who is not an inhabitant of his State.[153] Because the objection was made after the electoral votes from Georgia were read, the Chair decided that it came too late and no decision was made on this objection.[154]

Third, two objections were made to Texas's electoral votes. The executive authority of Texas had failed to certify that its electors were properly appointed. Moreover, four of the electors (less than a majority of those elected) themselves appointed four persons to take the place of four elected, but absent, electors.[155] Nonetheless, both the House and the Senate voted to count all of Texas's electoral votes.[156]

7. The Hayes-Tilden Incident of 1877

The seventh and most important objection to the votes of electors occurred during the electoral count of 1877—the "never again" incident that directly led to the passage of the Electoral Count Act roughly a decade later. Undoubtedly, the electoral count of 1877 is the most objectionable electoral count in history, having been described by one of our leading scholars as "the most violent, fraudridden, and tumultuous in history."[157]

In 1876, Democrat Samuel J. Tilden squeaked out a majority of the total number of popular votes for President, defeating Republican Rutherford B. Hayes by just 250,000 votes.[158] Hayes, however,

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152. *Id.*
153. *Id.*
154. *Id.* at 380–81.
155. *Id.* at 382–83.
156. *Id.* at 389.
157. Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 127 (1994).
158. For an excellent summary of the incident, see McConnell, *supra* note 157, at 127–33. For the principal historical scholarship on this incident, see CHARLES FAIRMAN, FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 (Paul A. Freund & Stanley N. Katz eds., 1988); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 575–87 (1988); PAUL LELAND HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION (1906); KEITH POLAKOFF, THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION (1973). For a discussion of this incident by those who have written on the Electoral Count Act, see, for

claimed a one-vote majority of the electoral votes with 185 votes to Tilden's 184. The problem was that rival Republican and Democratic state governments in three states—Florida, Louisiana, and South Carolina—each had sent rival electoral certificates to Congress, presenting the standard case of "double returns" from these states.[159]

After mediation failed, Congress created an "Electoral Commission" to resolve the disputed double returns from these states.[160] This Commission was to consist of fifteen persons: five Senators, five Representatives, and five Justices of the Supreme Court. As ought to be apparent, the Commission has some very eerie similarities to the Grand Committee of 1800. The plan was to appoint seven Republicans and seven Democrats; the fifteenth person would be a Justice of the Supreme Court picked by the other four "partisan" Justices. Justice David Davis, an Independent, initially received the nod to be this fifteenth person, but he declined the offer after the Illinois Legislature appointed him to fill a vacancy in the Senate. Justice Joseph P. Bradley, a Republican, then received the thankless job.

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example, GLENNON, *supra* note 18, at 16–17, and Wroth, *supra* note 22, at 331–34 & 331 n.46 (collecting other sources).

159. There was a problem with one electoral vote from Oregon as well: one of the Oregon electors for Hayes was a postmaster, and was therefore ineligible to the office of elector, *see* U.S. CONST. art. II, § 1, cl. 2. Oregon's Democratic Governor, refusing to certify the electoral certificate, struck the name of the postmaster-elector for Hayes and substituted that of an elector for Tilden, who received the next most votes. This account is briefly recollected in Harrison, *supra* note 23, at 700 n.2 (citing ARI HOOGENBOOM, THE PRESIDENCY OF RUTHERFORD B. HAYES 30–31 (1988)).

160. During the Electoral Count Act debates, at least one Senator noted that the Electoral Commission of 1877 was constitutionally suspect, though he noted that it was "a wise solution to a great difficulty." *See* 17 CONG. REC. 817 (1886) (remarks of Sen. Sherman). In his book on Reconstruction, Professor Bruce Ackerman calls this Electoral Commission "extraconstitutional." 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 247 (1998). Perhaps this is a clever attempt to avoid calling it "unconstitutional." Other scholars have firmly taken the position that the Electoral Commission was unconstitutional. I agree. *See, e.g.*, Harrison, *supra* note 23, at 700 n.3 ("Under now-current separation of powers doctrine the commission was almost certainly unconstitutional. Its members exercised significant government power but were not appointed consistently with the Appointments Clause, as *Buckley v. Valeo* says they should have been.") (citation omitted); Tribe, *supra* note 17, at 278 & n.438. Professor Tribe states:

> Today, of course, the service on such a body by members of Congress would be understood to violate the separation of powers as construed by *Buckley v. Valeo*, and the reservation of a veto power in Congress acting by anything less than full legislation presented to the President for signature or veto would be understood to violate the nonparliamentary structure of our government.

(citation omitted) (citing INS v. Chadha, 462 U.S. 919, 959 (1983)).

Interestingly, the Commission was to have "the same powers, if any, now possessed . . . by the two Houses."[161] The Commission was only to have jurisdiction over the cases of double returns; objections to electoral votes in cases of single returns would be handled as later provided by the Electoral Count Act (the two Houses, meeting separately, would need to concur to reject a vote). The decisions of the Commission, like that of the Grand Committee, were to be final, but with one exception: the two Houses could overturn the decision of the Commission if they so concurred.[162]

Given the political composition of the Commission, it is not surprising that the Commission secured a victory for Hayes. In each case of double returns, the Commission voted eight to seven to count the votes of the Republican electors by a strict party vote, with Justice Bradley casting the decisive vote in each case. This perceived partisanship had huge political costs. The Democrats controlled the House of Representatives and threatened a filibuster to delay the counting of electoral votes. A constitutional crisis loomed: if no President was elected by March 4, 1877, then the Presidential Succession Clause might kick in.[163]

The famous "Compromise of 1877," announced on March 1, 1877, served to avert this crisis. Southern Democrats would proceed with the formal counting of the electoral votes, allowing Republican Hayes to be elected President, but would extract several substantial concessions from him. Among other things, congressional Republicans, speaking for Hayes, agreed to cease federal military support for the Reconstruction governments of the South, sealing the end of Reconstruction. The upshot of the Hayes-Tilden Incident is that Hayes became President although he was the clear loser in the popular vote and the likely loser of the electoral vote.[164]

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161. Act of Jan. 29, 1877, ch. 37, § 2, 19 Stat. 227, 229; *see* Wroth, *supra* note 22, at 331.

162. This "two-House veto" provision is constitutionally problematic. *See* INS v. Chadha, 462 U.S. 919, 944–51 (1983); Tribe, *supra* note 17, at 278 (noting same point).

163. *See* text accompanying *infra* note 476.

164. The modern view is that Samuel Tilden should have garnered the electoral votes of Florida, thus giving him a several vote majority of the electoral votes. *See, e.g.*, C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 19 (2d. ed. 1966); Jerrell H. Schofner, *Florida Courts and the Disputed Election of 1876*, 48 FLA. HIST. Q. 26, 46 (1969); Jerrell H. Schofner, *Florida in the Balance: The Electoral Count of 1876*, 47 FLA. HIST. Q. 122, 148–50 (1968).

8. The Hawaii Incident of 1961

The eighth congressional objection to the votes of electors occurred during the electoral count of 1961.[165] This incident, involving the validity of the electoral certificate(s) of Hawaii, was the most significant problem of the electoral count of the twentieth century, and the one most relevant given recent history.

The initial election results in Hawaii showed Republicans Richard M. Nixon and Henry Cabot Lodge as the winners of the popular vote for President and Vice President. A slate of Nixon-Lodge electors was appointed on November 16, 1960, certified by the acting Governor of Hawaii on November 28, 1960. A recount was ordered to begin on December 13, 1960. On December 19, 1960, a slate of Nixon-Lodge electors cast their votes for President and Vice President.[166] This electoral certificate was previously certified by the Acting Governor of Hawaii.[167] However, on December 19, 1960, a slate of Kennedy-Johnson electors also cast their votes for President and Vice President, *without* any previous certification from the executive authority of Hawaii.[168] On December 30, 1960, the Circuit Court of the First Judicial Circuit of the State of Hawaii determined that the Kennedy-Johnson electors won the popular vote in Hawaii.[169] A few days later, on January 4, 1961, the newly-elected Governor of Hawaii certified the electoral certificate of the Kennedy-Johnson electors.[170] The Administrator of General Services received this certification on January 6, 1961—the day of the electoral count.

During the electoral count, President of the Senate Richard Nixon stated that "[t]he Chair has received three certificates from persons claiming to be the duly appointed electors from the State of Hawaii."[171] These three certificates were (1) the Nixon-Lodge electoral certificate of December 19, 1960, certified by the executive authority of Hawaii as of November 28, 1960; (2) the Kennedy-Johnson electoral certificate of December 19, 1960; and (3) the Kennedy-Johnson electoral certificate of December 19, 1960, certified by the newly-elected executive authority of Hawaii as of January 4, 1961.[172] After these three electoral certificates were opened and read,

165. *See* 107 CONG. REC. 288–91 (1961).
166. *See id.* at 289.
167. *See id.*
168. *See id.*
169. *See id.* at 290.
170. *See id.* at 289–90.
171. *Id.* at 289.
172. *Id.* at 289–90.

Nixon stated that "[t]he Chair has knowledge, and is convinced that he is supported by the facts" that the third electoral certificate "properly and legally portrays the facts" with respect to the popular election in Hawaii.[173] Accordingly, he stated that

> [i]n order not to delay the further count of the electoral vote here, the Chair, *without the intent of establishing a precedent*, suggests that the electors named in the certificate of the Governor of Hawaii dated January 4, 1961, be considered as the lawful electors from the State of Hawaii.[174]

No one objected and all three of Hawaii's electoral votes were counted.[175]

9. The Bailey Incident of 1969

The ninth and most recent congressional objection to the votes of electors occurred during the electoral count of 1969.[176] It was well known before the joint convention convened for the purposes of the electoral count that Dr. Lloyd W. Bailey, a Republican elector from North Carolina, had been "faithless" in giving his two electoral votes—instead of following the popular vote for Richard M. Nixon for President and Spiro Agnew as Vice President, Dr. Bailey voted for George C. Wallace for President and Curtis Lemay as Vice President. The Governor of North Carolina certified the state's electoral certificate with knowledge of Dr. Bailey's faithlessness.

A few days before the electoral count, some Senators, led by Senator Muskie (who was then running for Vice President), introduced a memorandum in the Senate recommending that Dr. Bailey's vote be rejected, and that it be recast in accordance with the popular vote in North Carolina.[177] This memorandum announced the authors' intention to object to the vote of North Carolina on January 6, 1969.[178] During the electoral count on January 6, 1969, Representative O'Hara objected to the electoral votes of North

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173. *Id.* at 290.

174. *Id.* (emphasis added).

175. The result of the electoral count did not even come close to turning on the legal status of Hawaii's three electoral votes. Democrats Kennedy and Johnson prevailed in the electoral count by a margin of eighty-four votes. *See id.* at 291.

176. *See* 115 CONG. REC. 9–11 (1969); *id.* at 146–72 (House debate); *id.* at 209–46 (Senate debate); *see also* GLENNON, *supra* note 18, at 37–40 (discussing history); Ross & Josephson, *supra* note 7, at 731–37 (same).

177. *See* 115 CONG. REC. 11.

178. Interestingly, the memorandum cited the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, as the font of power to pass the Electoral Count Act. *See* 115 CONG. REC. 11.

Carolina and presented a written objection signed by him and Senator Muskie in which thirty-seven Representatives and six Senators joined.[179] The objection proposed simply that Dr. Bailey's vote be rejected (and not recast in accordance with the popular vote in North Carolina).[180]

The debate in each House of Congress was extensive, with over forty Representatives and over twenty-five Senators speaking on the objection. The House of Representatives debated the objection for a full two hours—the maximum time allowed by the Electoral Count Act. The rationale in the House for sustaining the objection and rejecting Dr. Bailey's vote was mixed. Some Representatives argued that only Congress could check faithless electors.[181] Representative Edmondson stated that the "power of Congress to count the electoral vote" is "the only constitutional power specifically granted to anybody [sic] or agent to protect the electoral system against arbitrary or unlawful action to thwart the popular will of the people of the States in electing the President of the United States."[182] Other Representatives argued that Dr. Bailey's faithless vote was not "regularly given" within the meaning of the Electoral Count Act.[183] Yet others rested their justification to sustain the objection on more lofty constitutional arguments of "one man, one vote"[184] and "justice."[185]

The Representatives who spoke against the objection were more unified. They argued that Congress had no power not to count Dr. Bailey's faithless vote because that power was not within the meaning of the Electoral Count Act,[186] or because Congress had no such power under the Constitution.[187] Representative Rarick put the latter point best:

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179. *See id.* at 146.

180. *See id.*

181. *See, e.g., id.* at 147 (remarks of Rep. Wright) (stating that Congress has "the legal and constitutional power, and indeed the duty, to prevent faithless electors from corrupting the election of a President"); *id.* at 158 (remarks of Rep. Corman) (stating that "Congress sits as a court of last resort"); *id.* at 170 (remarks of Rep. O'Hara) ("Only the Congress can see to it that the elector respects his obligations . . . .").

182. *Id.* at 148.

183. *See, e.g., id.* at 169 (remarks of Rep. Schwengel).

184. *See, e.g., id.* at 146–47 (remarks of Rep. Wright); *id.* at 158 (remarks of Rep. Rodino).

185. *See id.* at 165 (remarks of Rep. Hosmer).

186. *See, e.g., id.* at 151 (remarks of Rep. Anderson) (arguing that Electoral Count Act was "intended to circumscribe to the very narrowest limits the power of the Congress to do anything other than to certify the results in the States"); *id.* at 168 (remarks of Rep. Fish).

187. *See, e.g., id.* at 148–49 (remarks of Rep. McCulloch) (arguing that electors are

> Under the Constitution and our oath of office we, as Congressmen, are not election supervisors nor given discretion to recompute the vote received from a sovereign state. The Constitution clearly proscribes our duty as "to count the electoral votes," the ministerial function of a central collecting agency and a tabulating point.[188]

Ultimately, the House of Representatives voted to reject the objection, but not by an overwhelming margin. The vote was 170 to 228, with thirty-two not voting and four not yet sworn.[189] Among the Representatives voting for the objection were future Presidents George H.W. Bush and Gerald R. Ford.[190] The Senate debate was similar but briefer. Ultimately, the Senate also voted to reject the objection not by an overwhelming margin. The vote was thirty-three to fifty-eight, with seven not voting and two live pair.[191] Because both Houses of Congress did not vote to sustain the objection and reject Dr. Bailey's vote, the vote was counted.

II. THE ARGUMENT AGAINST THE CONSTITUTIONALITY OF THE ELECTORAL COUNT ACT

In Part I, we examined the principal congressional efforts to regulate the electoral count. The fact that Congress did not pass the Electoral Count Act until 1887, and only after several failed attempts to enact legislation regulating the counting of electoral votes is (perhaps surprisingly) of minimal consequence in assessing the constitutionality of the Electoral Count Act.[192] The better clue relates

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independent under the Electoral College Clauses and concluding that Congress could not "tamper" with Dr. Bailey's vote). Representative Poff argued that

> [i]f the Congress can look behind the solemn certificate of the Chief Executive of a State, reject that certificate and by a simple majority vote decide what electoral votes were "regularly given" and which were given irregularly, then the Congress can expropriate from the people their power to elect their President.

Id. at 157; *see also id.* at 162 (remarks of Rep. Henderson) (arguing that Congress's role is like a local board of elections whose "function is solely to receive the votes, count them, and certify the result . . . not to determine whether votes were properly cast"); *id.* at 164 (remarks of Rep. Eckhardt) (stating that it was "beyond question in the Constitution . . . that the joint session of the House and the Senate has no power whatsoever other than to hear the returns of the electors read"); *id.* at 166–67 (remarks of Rep. Fountain) (calling Congress "powerless").

188. *Id.* at 168.

189. *Id.* at 170.

190. For Representative Gerald Ford's statement in support of the objection, see *id.* at 163–64.

191. *Id.* at 246.

192. The converse is not true. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 980 (1991) (opinion of Scalia, J.) (stating that "[t]he actions of the First Congress . . . are of course persuasive evidence of what the Constitution means") (citations omitted); Powell v.

not to timing, but to tone. As we saw somewhat in Part I and as we shall see in more detail in this Part, the constitutionality of legislation regulating the counting of electoral votes was controversial from the start. In particular, the constitutionality of the Electoral Count Act was considered and debated by several Congresses that considered such legislation in the Reconstruction Era. This level of extended debate should raise a red flag as to the possible unconstitutionality of the Electoral Count Act.

An "interpretivist" resolution of the constitutionality of the Electoral Count Act must, however, be based on arguments from constitutional text and structure. This Part sets forth these two arguments. The textual argument carefully parses the words of the Electoral College Clauses, and shows how the Electoral Count Act clashes with the Constitution. In addition, the textual argument, unlike conventional "clause-bound" textual arguments, examines the text of the Constitution as a coherent whole, invoking a host of other clauses, in order to squeeze yet additional meaning from the Electoral College Clauses, and shed additional light on the unconstitutionality of the Electoral Count Act. The structural argument identifies a number of structural principles of the Constitution that relate to presidential election and to legislation, and shows how the Electoral Count Act violates these principles.

Anyone who wishes to argue that the Electoral Count Act is constitutional bears a high burden of proof, in light of the arguments presented, and in light of the asymmetry of constitutional proofs. In order to prove that a statute is unconstitutional, one need only find *one* reason why a statute is unconstitutional, whereas in order to prove that a statute is constitutional, one must defend a statute against all possible constitutional attacks and find that there is *no possible reason* why a statute is unconstitutional.[193] There is more than one reason why the Electoral Count Act is unconstitutional.

McCormack, 395 U.S. 486, 547 (1969) ("[T]he precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787."); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (stating that an act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning"). Even then, however, a statute is only *presumed* to be constitutional.

193. This part presents, in my view, many if not most of the arguments against the constitutionality of the Electoral Count Act. There may be others.

A. The Textual Argument

1. Some Basics: Who, What, When, and Where?

The relevant clause of the Twelfth Amendment provides that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."[194] Careful parsing of these twenty-seven words yields surprisingly rich clues into the mode and manner of the electoral count. These words and the rest of the Twelfth Amendment (and their counterparts in the original Constitution) are, not surprisingly, woefully understudied.[195] As Professors Levinson and Young recently put it, "[t]he Twelfth Amendment is a Rodney Dangerfield of the Constitution: it gets no respect."[196] At the same time, these words of the Twelfth Amendment are incredibly important in assessing the constitutionality of the Electoral Count Act: the Constitution is supreme to conflicting federal statutory law.[197] In order to determine whether the Electoral Count Act is constitutionally permissible, we must examine the Constitution itself.

This sub-section addresses the following five basic questions relating to counting electoral votes: (1) Who is the presiding officer of the electoral count? (2) Who opens the electoral certificates and counts the electoral votes? (3) What is counting and what is to be counted? (4) When is the counting done? (5) Where is the counting done?

a. Who Is the Presiding Officer of the Electoral Count?

The relevant clause of the Twelfth Amendment provides that "[t]he President of the Senate shall, in the presence of the Senate and

194. U.S. CONST. amend. XII. The only differences between the text of the Twelfth Amendment and the text of the original Constitution are in punctuation and capitalization. *See* U.S. CONST. art. II, § 1, cl. 3.

195. No full-scale law review article dissects the text of the Twelfth Amendment. Two recent articles explore the so-called "Habitation Clause" of the Twelfth Amendment which provides that Electors must not vote for a President and Vice President of the same state as themselves. U.S. CONST. amend. XII ("The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; . . . ."); *see* James C. Ho, *Much Ado About Nothing: Dick Cheney and the Twelfth Amendment*, 5 TEX. REV. L. & POL. 227 *passim* (2000); Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 932–54 (2001).

196. Levinson & Young, *supra* note 195, at 925.

197. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States *which shall be made in Pursuance thereof* . . . shall be the supreme Law of the Land . . . .") (emphasis added); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

House of Representatives, open all the certificates and the votes shall then be counted."[198] This clause does not explicitly answer the question of who is the presiding officer during the electoral count.[199] Because the President of the Senate is the only named individual in the clause, it may be tempting to conclude that the President of the Senate is the presiding officer of the electoral count, but this is far from clear. There are three possibilities with respect to the President of the Senate: (1) the President of the Senate *shall be* the presiding officer of the electoral count; (2) the President of the Senate *may be* the presiding officer of the electoral count; and (3) the President of the Senate *shall not be* the presiding officer of the electoral count.

As a textual matter, nothing in the clause suggests that the President of the Senate shall be the presiding officer of the electoral count.[200] As a structural matter, the President of the Senate is the presiding officer of the Senate, not the presiding officer of the joint convention of Senators and Representatives (or the joint assemblage of the Senate and House of Representatives), which needless to say is not the Senate. It seems only logical that there must be a presiding officer of the electoral count. Every parliamentary body needs a presiding officer in order to function smoothly.[201] What then is the answer to the constitutional question?

If historical practice is any guide, the President of the Senate or the President pro tempore shall be (or at least may be) the presiding officer of the electoral count. One of these two officers has been the presiding officer of every electoral count since the beginning of the Republic—before and after the adoption of the Electoral Count Act. Not surprisingly, 3 U.S.C. § 15 provides that

> Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the

198. U.S. CONST. amend. XII.

199. This simple point was not lost during the Electoral Count Act debates. *See, e.g.*, 17 CONG. REC. 865 (1886) (remarks of Sen. Morgan) ("We frequently hear it stated that the President of the Senate is the president of the joint meeting. If he is, it is only by reason of some rule or agreement between the two Houses. The Constitution is silent upon that point. The Constitution speaks of no officer who is to preside over the joint meeting.").

200. *But see* COUNTING ELECTORAL VOTES, *supra* note 3, at 541 (remarks of Sen. Maxey) ("By the Constitution [the President of the Senate] is the presiding officer over the joint assemblage of the Senate and the House.").

201. *Cf.* 17 CONG. REC. 865 (remarks of Sen. Morgan) (discussing presiding officer of the electoral count) ("To be a house in parliamentary law and in constitutional law it must be organized under the presidency of its rightful officer.").

> afternoon on that day, *and the President of the Senate shall be their presiding officer.*[202]

This unbroken historical practice is entitled to great weight in constitutional interpretation.[203]

This is not to say, however, that historical practice necessarily settles the meaning of the Electoral College Clauses. The text of the Constitution is the first-best and hence authoritative source of constitutional meaning, not extra-textual sources of constitutional meaning. To the extent that the text of the Constitution is clear, it may not be trumped by extra-textual history. The Electoral College Clauses are not quite as ambiguous as they may appear when we read the Constitution as a coherent whole. Although it may seem bizarre, it may be downright unconstitutional for the President of the Senate to be the presiding officer of the electoral count upon a closer reading of the text of the Constitution.[204]

No less than the Office of President of the United States is at stake during the electoral count. Likewise, no less than the Office of President of the United States is at stake during presidential impeachment. Yet, with respect to the latter, the Senate Impeachment Clause carefully provides that "[w]hen the President of the United States is tried, the Chief Justice shall preside," not the President of the Senate.[205] Should the electoral count be any different when no less may be at stake?

The Senate Impeachment Clause demonstrates that the Framers were quite sensitive to the obvious conflict of interest problem when they focused on it.[206] To be sure, the Framers did not focus on the

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202. 3 U.S.C. § 15 (2000) (emphasis added).

203. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) (stating that "an unbroken practice . . . is not something to be lightly cast aside" in constitutional interpretation); The Pocket Veto Case, 279 U.S. 655, 689 (1929) (stating that a "[l]ong-settled and established practice is a consideration of great weight in a proper interpretation" of the Constitution); *cf.* Marsh v. Chambers, 463 U.S. 783 (1983) (holding that legislative prayer, which began in the First Congress, is constitutional).

204. This statement may be surprising, but I ask the reader to suspend his or her skepticism.

205. U.S. CONST. art. I, § 3, cl. 6. But this clause is not nearly as careful as it should be—the Framers forgot to specify that the Vice President cannot preside at her own impeachment trial, leaving the matter to necessary implication. For thoughtful commentaries, see Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849 (2000); Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENT. 245 (1997).

206. *See* THE FEDERALIST NO. 10, at 47 (James Madison) (Clinton Rossiter ed., Mentor 1999) (1961) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity.");

similar but less obvious conflict of interest problem when drafting the Electoral College Clauses. But the Framers did seem to understand and appreciate the general conflict-of-interest problem. When the Framers discussed direct presidential election by Congress, they considered and agreed to a joint ballot procedure that would require a majority of Senators and Representatives who are present considered together, in lieu of one that would require the concurrence of the two Houses of Congress voting separately.[207] James Wilson, supporting the joint ballot procedure, suggested that the Senate might have a conflict of interest problem, remarking that "as the President of the Senate was to be the President of the U—S. that Body in cases of vacancy might have an interest in throwing dilatory obstacles in the way, if its separate concurrence should be required."[208] If this interest were true of the Senate, it would be particularly true of the Vice President.

More generally, the founders likely understood that the Vice President would oftentimes be a candidate for President or Vice President in the next election. During the Electoral Count Act debates, Senator Hoar, discussing the mood at the founding, stated:

> The President of the Senate would almost always be and would be expected to be one of the chief candidates for the presidential office. He would have been one of the two principal candidates four years before, and it was the fashion of those days very much more than of these to continue the same person in public trusts and in political candidacy, and several times in our history the Vice-President of the United States has succeeded to the Presidency, Adams to Washington, Jefferson to Adams, Van Buren to Jackson.[209]

Even if the Framers and Ratifiers of the original Constitution did not understand that the Vice President would be a candidate for President or Vice President in the next election, the Framers and Ratifiers of the Twelfth Amendment—which overwrote the relevant

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WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 206 (1825) ("As the vice president succeeds to the functions and emoluments of the president of the United States whenever a vacancy happens in the latter office, it would be inconsistent with the implied purity of a judge that a person under a probable bias of such a nature, should participate in the trial, and it would follow that he should—wholly to retire from the court."); 2 FARRAND, *supra* note 35, at 493.

207. *See* 2 FARRAND, *supra* note 35, at 401–03.

208. *Id.* at 402–03; *see also id.* at 403 (remarks of James Madison) (supporting the joint ballot procedure and observing in passing that "[t]he President of the *Senate* also is to be occasionally President of the U.S.").

209. 17 CONG. REC. 1019 (1886).

provision of the original Constitution—understood the conflict-of-interest problem well, especially given the imbroglio of the electoral count of 1801 where Vice President and presidential candidate Thomas Jefferson not only presided over the electoral count but also assumed the counting function.[210] It is thus possible to say that the conflict-of-interest principle applies to the Twelfth Amendment if not to the original Constitution.

There is no evidence from the Electoral College Clauses that the President of the Senate shall be the presiding officer of the electoral count. In the absence of such evidence, the Senate Impeachment Clause supplies a strong argument that the President of the Senate shall not be the presiding officer of the electoral count. The difference—and perhaps the constitutionally significant difference—between presidential impeachment and counting electoral votes may be that the Vice President *necessarily* has a conflict of interest in the former because the Vice President is to act as President,[211] whereas the Vice President does not *necessarily* have a conflict of interest in the latter because the Vice President may or may not be a candidate in the next presidential or vice presidential election. Nevertheless, the better reading of the Electoral College Clauses, when read in light of the Senate Impeachment Clause and of conflict-of-interest principles generally, is that the Vice President, the President of the Senate, shall not be the presiding officer of the electoral count.[212] The Electoral Count Act may be unconstitutional for this reason alone.[213]

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210. *See supra* note 3 and text accompanying *infra* note 230.

211. *See* U.S. CONST. art. II, § 1, cl. 6; U.S. CONST. amend. XXV, § 1.

212. An interesting question arises whether a Senator or Representative—who may also be a presidential or vice presidential candidate—may be the presiding officer of the electoral count, even though the Vice President shall not be. The better answer is "Yes." Before opening the electoral certificates and inspecting the electoral votes, the identities of the presidential or vice presidential candidates are (at least theoretically) unknown, and hence it would be impossible to know which Senators or Representatives to exclude from the presiding officer's chair. The argument is that the Constitution implicitly assumes that the Vice President—more than any other person present at the electoral count—would be a presidential or vice presidential candidate, and hence makes the Vice President uniquely ineligible to be the presiding officer. As a prudential matter, of course, the presiding officer should be someone who is not known to be a presidential or vice presidential candidate.

213. There is one more reason why the "Presiding Officer Clause" of 3 U.S.C. § 15 may be unconstitutional. That clause provides that "the President of the Senate *shall* be their presiding officer." 3 U.S.C. § 15 (2000) (emphasis added). What gives Congress the authority to *super-add* to the Vice President's duties specified by the Constitution? *See, e.g.*, U.S. CONST. art. I, § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."); U.S. CONST. art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the

If the President of the Senate shall not be the presiding officer of the electoral count, who then is the presiding officer? The answer to this question is simpler than it appears: One of the Senators and Representatives then and there present at the electoral count. Each parliamentary body has, almost by definition, the right to choose its presiding officer and other officers from one of its own, at least in the absence of any explicit declaration to the contrary.[214] Whether Congress may exercise this choice on behalf of the joint convention of Senators and Representatives is an entirely different question, and one to be discussed later.[215]

b. Who Opens the Electoral Certificates and Counts the Electoral Votes?

With respect to who does the opening of electoral certificates and the counting of electoral votes, the relevant clause of the Twelfth Amendment provides that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."[216] The critical question to ask is whether the counting function belongs to the President of the Senate or to the Senate and House of Representatives. The interpretive stakes are high: If the counting function belongs to the President of the Senate, the Electoral Count Act is unconstitutional because it vests the counting function in the two Houses of Congress, and under the Constitution, Congress may not strip the President of the Senate of her constitutional duty.[217]

Same shall devolve on the Vice President . . . ."); U.S. CONST. amend. XXV, § 1 (similar); U.S. CONST. amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."). If Congress may add to the Vice President's duties, why not the President's duties or the Chief Justice's duties? If "shall" means "must," the Presiding Officer Clause of the Electoral Count Act would seem to be, strictly speaking, unconstitutional.

214. *Compare* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers."), *and* U.S. CONST. art. I, § 3, cl. 5 ("The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States."), *with* U.S. CONST. art. I, § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.").

215. *See infra* notes 498–525 and accompanying text.

216. U.S. CONST. amend. XII.

217. Others have made this obvious point. *See, e.g.*, 17 CONG. REC. 1059 (1886) (remarks of Sen. Wilson) (arguing that the counting function is vested in the President of the Senate and that the Necessary and Proper Clause "does not confer on Congress the power to assume unto itself the duty which the Constitution imposes on that officer"); 18 CONG. REC. 74 (remarks of Rep. Baker) ("If the Constitution . . . does . . . by fair implication, vest in the President of the Senate the power and duty not only to open, but also to count, the votes, then Congress can not, by this or any other legislation, take away

We begin with the first part of the clause: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates."[218] It is clear that the opening of the certificates function belongs to the Vice President, who is the President of the Senate.[219] The Constitution provides no wiggle room: the President of the Senate shall open *all* the certificates, not some.[220]

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or transfer to any other person or officer that power and duty."); Paulsen, *supra* note 205, at 245 (noting that each House of Congress may not use the Rules of Proceedings Clause to strip the Vice President of constitutional duties); Spear, *supra* note 18, at 156 ("The Constitution says that 'the votes shall then be counted,' and if this mandate be addressed to the President of the Senate, that ends the question so far as the counting is concerned. The Constitution has then trusted him with the whole power, and any legislation to direct him, would be an impertinent intrusion upon his prerogative."); *cf.* Harrison, *supra* note 23, at 703 ("Neither House nor Senate is given any authority over the President of the Senate when it comes to opening the certificates, and Congress by statute may no more control the exercise of this constitutionally granted authority than it may tell the President whom to pardon.").

218. U.S. CONST. amend. XII.

219. *See* U.S. CONST. art. I, § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."). It does appear that the President *pro tempore* acted in place of the Vice President in at least the electoral counts of 1809, 1825, 1857, 1877, and most recently 1969 when Vice President Hubert H. Humphrey "recused" himself from the electoral count.

220. There is the rather tricky question whether the President of the Senate must open all certificates in a case of multiple returns from the same state, as in the Hayes-Tilden incident of 1887, or in a case of a return from a putative state (say for example, a certificate from Puerto Rico). The best answer is that the opening-of-the-certificates function contains no power of discretion because any discretion in the opening of certificates would interfere with the counting-of-electoral-votes function. Translated into the recent past: if two certificates had come from Florida during the electoral count of 2001, the Vice President could not, constitutionally speaking, have refused to open both of them.

In a recent essay, Professor Harrison takes a contrary view on the specific question of multiple (putative) electoral certificates. In his view, "[t]he certificates that the President of the Senate is to open, however, are those of the electors, not those of non-electors. Hence in order to know which certificates to open, the President of the Senate must know which of competing slates of electors were validly appointed." Harrison, *supra* note 23, at 702–03. This is a clever (and obvious) textual argument. He continues: "If the Twelfth Amendment is assumed to be a dispute resolution mechanism, a natural reading of it thus indicates that in one especially important context the dispute is to be resolved by a single individual." *Id.* at 703. The vice of this reading, as Professor Harrison acknowledges, is that one person has the power to resolve at least one kind of dispute in presidential election, a conclusion that is generally to be avoided. Indeed, he acknowledges in his very next paragraph that "[i]t would be much easier to believe that this important decision was vested in a collective body, were there not serious problems with the operation of the collective body, the joint session of Congress (if it is to be called that)." *Id.* Notwithstanding the latter "problems" (which are overstated in my view), Professor Harrison ignores the point that in the case of multiple putative electoral certificates, the opening of the certificates function interferes with the counting-of-electoral-votes function. The former enables the latter; the former is more of an

The counting function is, however, noticeably ambiguous: "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates *and the votes shall then be counted.*" There are two plausible readings of this oddly phrased text employing the passive voice.[221] The counting function may be read as one vested in the President of the Senate, or jointly in the Senate and House of Representatives.[222] If the President of the Senate is to count the votes, the clause easily could have been written to provide that "[t]he President of the Senate shall . . . open all the certificates and

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"exercise" whereas the latter is more of a "function." Moreover, the former is simply less important than the latter—a President and Vice President elect are determined after the electoral votes are actually counted, not when the electoral certificates are opened. The better answer, I submit, is that the President of the Senate has discretion in the opening-of-electoral-certificates function only if she also has the counting-of-electoral-votes function, and even then, that discretion would follow as a matter of the latter function, not the former.

This scenario of multiple putative electoral certificates was the subject of discussion during the Electoral Count Act debates, given the cases of double returns in the electoral counts of 1873 and 1877. For statements that the President of the Senate has no discretion in opening the certificates in the case of multiple returns, see, for example, COUNTING ELECTORAL VOTES, *supra* note 3, at 446–47 (remarks of Sen. Bayard); *id.* at 449–50 (remarks of Sen. Thurman). *But see id.* at 454 (remarks of Sen. Morton) (arguing that President of the Senate's discretion in opening certificates "shows the necessity for an amendment of the Constitution").

221. "The famous phrase of the Constitution 'the votes shall then be counted' has been like an apple of discord almost since the beginning of Government." J. HAMPDEN DOUGHERTY, THE ELECTORAL SYSTEM OF THE UNITED STATES 254 (1906); *see also* Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 27 (1968) (noting that the passive voice of this phrase breaks one of the "cardinal rules of draftsmanship"); Tribe, *supra* note 17, at 279 ("The Framers should have listened to the time-honored injunction to avoid the passive voice. 'Shall be counted'—by whom?").

During the Electoral Count Act debates, Representative Herbert carefully examined the grammar of this patch of constitutional text:

> Here is a duty imposed upon the President of the Senate. He shall, in the presence of the Senate and House of Representatives, open the certificates. Then the first person is dropped and the third person is taken up; there the sentence changes its construction; there the duty imposed upon the President of the Senate ceases, and afterwards a new part of speech is used—the third person is adopted, and a verb relating to a noun in the third person, "the votes," employed, and a new duty imposed by the words, "and the votes shall then be counted."

18 CONG. REC. 75 (1886).

222. The ambiguity is well-evidenced in the congressional debate over the electoral count. *See, e.g.*, COUNTING ELECTORAL VOTES, *supra* note 3, at 48 (remarks of Sen. Wilson) ("It is not said who shall count the votes, nor who shall decide what votes shall be counted."); *id.* at 451 (remarks of Sen. Frelinghuysen) ("So when the Constitution says the vote shall be counted, it says that a decision shall be made by some one, and it must be made either by the presiding officer of the Senate or by the Senate and House, who are required to be present."); *see also* Spear, *supra* note 18, at 156 (noting a similar point).

shall then count the votes."[223] If the Senate and House of Representatives are to count the votes, the clause easily could have been written to provide that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted by the Senate and House of Representatives."[224]

The text does not equally support these two plausible readings once we escape a narrow "clause-bound" interpretivism. When read in light of the conflict-of-interest principle of the Senate Impeachment Clause, the better answer (again, but by no means an unassailable one) is that the counting function of the Electoral College Clauses is vested in the Senate and House of Representatives, not the President of the Senate. To be sure, the Constitution does not explicitly address *how* the Senate and House of Representatives is to exercise the counting function—by the two Houses acting separately

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223. This obvious point was made during the Electoral Count Act debates. *See, e.g.*, 18 CONG. REC. 46 (remarks of Rep. Dibble).

224. These are the two most obvious readings, but there are at least four other readings. A third reading is that the Clause is simply silent as to who shall count the votes and that Congress may specify the counting agent.

A fourth reading, suggested by Representative Dibble during the Electoral Count Act debates, is that the counting function is split between the House of Representatives and the Senate: the House is to count the presidential votes and the Senate the vice presidential votes, because, in case of deadlock, the House chooses the President and the Senate the Vice President. *See* 18 CONG. REC. 46. There is no textual or historical support whatsoever for this reading. Moreover, this reading would have been impossible before the adoption of the Twelfth Amendment which required Electors to cast separately marked votes for President and Vice President, and it is unlikely that the Twelfth Amendment added to the evident textual ambiguity.

A fifth reading, suggested by Senator Thompson during the electoral count of 1857, makes even less sense. He suggested that the counting function is vested solely in the Senate, with the House only present as witnesses. *See, e.g.*, COUNTING ELECTORAL VOTES, *supra* note 3, at 126 ("The Constitution, in my judgment, is that these votes are to be returned to us and counted by us, and the House of Representatives are admitted to be present at the count to prevent a combination, a clandestine operation, a secret session, a *coup d'etat*."); *id.* at 130 ("When we are counting the votes, (for the President of the Senate only counts them in his official capacity, and in the session of the Senate, because he cannot count them as a private individual,) it is improper for the House members to be anything but listeners."); *id.* at 136 ("The members of that House of Representatives are to sit by, and whether we put them in the gallery, or the reporters' desks, or in niches—wherever they are placed they are to look on.").

Finally, a sixth reading, suggested by Senator Call in 1876, is equally nonsensical. He suggested that the counting function is vested solely in the House of Representatives, because the Constitution vests in that body the duty to choose the President in case there is no winner in the Electoral College mode of presidential election, *see* U.S. CONST. amend. XII, and only that body may determine whether there is such a winner. *See* 17 CONG. REC. 1061 (1886); *see also id.* at 1019 (remarks of Sen. Hoar) (acknowledging and dismissing as incorrect this view of the counting function).

in their corporate capacities, or by the two Houses acting conjointly as one "House" of Senators and Representatives.[225] In addition, when we consider early state constitutions,[226] we see that early state constitutions did not vest the counting of electoral votes in any one person.[227]

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225. The Constitution only requires that the Senate and House of Representatives, as separately organized bodies, be present as witnesses for the opening of electoral certificates and (probably) the counting of electoral votes (to the extent that the "in presence of the Senate and House of Representatives" phrase modifies the counting phrase, "the votes shall then be counted," *see infra* notes 278–86 and accompanying text), but does not address whether the counting of electoral votes is to be done by the Senate and House of Representatives as such or by Senators and Representatives on a per capita vote basis (equivalent to the Senate and House of Representatives voting by joint ballot). Other scholars have noted similar points. *See, e.g.*, Tribe, *supra* note 17, at 279 ("Is any such [counting] authority reposed instead in one or another House, or in the two Houses acting concurrently, or in the two Houses acting as a single organ even though not precisely as the Congress of the United States?"); and Harrison, *supra* note 23, at 703. Professor Harrison states:

> How is the joint session [of the Senate and House of Representatives] to make decisions? The Constitution provides no explicit rule, and certainly does not indicate that the House and Senate are to be put together into one body that will act by majority vote. Rather, the two chambers appear to retain their separate identities: the certificates are to be opened in the presence, not of the Senators and Representatives, but of the Senate and the House.

Id. For various textual and largely structural reasons, I conclude that the counting of electoral votes is to be done by joint ballot of Senators and Representatives. *See infra* notes 291–313 and accompanying text (discussing unicameralism principle); *infra* notes 429–45 and accompanying text (discussing anti-Senate principle of presidential election); *infra* notes 526–53 and accompanying text (discussing *Chadha* principle of law-making).

226. For a classic use of early state constitutions to inform the meaning of provisions in the Constitution, see THE FEDERALIST NO. 47, at 271–76 (James Madison) (Clinton Rossiter ed., Mentor 1999) (1961) (surveying the early state constitutions in discussing the separation of powers).

227. During the Electoral Count Act debates, Senator Hoar made this point, though he did not cite specific provisions from early state constitutions. *See* 17 CONG. REC. 1019. For specific provisions, see, for example, the constitutions of the following states:

Delaware: "A president or chief magistrate shall be chosen by joint ballot of both houses, to be taken in the house of assembly, and the box examined by the *speakers of each house* in the presence of the other members . . . ." DEL. CONST. OF 1776, art. 7 (emphasis added). Maryland:

> That a person of wisdom, experience, and virtue, shall be chosen Governor, . . . by the joint ballot of both Houses (to be taken in each House respectively) deposited in a conference room; the boxes to be examined by a *joint committee of both Houses*, and the numbers severally reported, that the appointment may be entered . . . .

MD. CONST. OF 1776, art. XXV (emphasis added). Massachusetts:

> The *selectmen* of the several towns shall preside at such meetings impartially, and shall receive the votes of all the inhabitants of such towns, present and qualified to vote for senators, and shall sort and count them in open town meeting, and in presence of the town clerk, who shall make a fair record, in presence of the selectmen, and in open town meeting, of the name of every person voted for, and of the number of votes against his name . . . .

The history, however, undercuts these fundamental textual and structural considerations. The Framers clearly thought that the counting function was vested in the President of the Senate alone. In a unanimous resolution attached to the final Constitution, the Framers described the procedures for electing the first Chief Executive, recommending in relevant part "that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President."[228] The records of the First Congress confirm this construction. On April 6, 1789, Senator John Langdon was elected as President of the Senate "for the sole purpose of opening and counting the votes for President of the United States."[229] This early practice should be of limited precedential value, however, because they relate to the creation of the Government of the United States before a President and Vice President were ever elected.

The dangers of this initial construction soon appeared when Presidents of the Senate were also candidates for President or Vice President. In the electoral count of 1797, President of the Senate John Adams purportedly counted "improper votes" from Vermont,

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MASS. CONST. OF 1780, pt. 2, ch. 1, § II, art. II. Also Massachusetts:

> Those persons who shall be qualified to vote for Senators and Representatives . . . shall . . . give in their votes for a Governor to the Selectmen, who shall preside at such meetings; and *the Town Clerk, in the presence and with the assistance of the Selectmen*, shall, in open town meeting, sort and count the votes, and form a list of the persons voted for, with the number of votes for each person against his name; . . . .

MASS. CONST. OF 1780, pt. 2, ch. 2, § I, art. III (emphasis added). Vermont:

> [A]t the opening of the General Assembly, *there shall be a committee* appointed out of the Council and Assembly, who, after being duly sworn to the faithful discharge of their trust, shall proceed to receive, sort, and count, the votes for the Governor, and declare the person who has the major part of the votes, to be Governor, for the year ensuing.

VT. CONST. OF 1777, ch. 2 § XVII (emphasis added). Virginia:

> A Governor, or chief magistrate, shall be chosen annually by joint ballot of both Houses (to be taken in each House respectively) deposited in the conference room; the boxes examined jointly by a *committee of each House*, and the numbers severally reported to them, that the appointments may be entered . . . .

VA. CONST. OF 1776, cl. 29 (emphasis added). Other early state constitutions providing for the election of the executive authority by the legislature (for example, Georgia, North Carolina, New Jersey, Pennsylvania, and South Carolina) or by direct popular election (for example, New York) did not address the counting of such votes. *See, e.g.*, GA. CONST. OF 1777, art. XXIII; N.C. CONST. OF 1776, art. XV; N.J. CONST. OF 1776, art. VII; PA. CONST. OF 1776, § 19; S.C. CONST. OF 1776, art. III.

228. 2 FARRAND, *supra* note 35, at 666; *see also* Burgess, *supra* note 18, at 647 ("The [F]ramers of the constitution undoubtedly meant that the president of the Senate should count the electoral votes . . . .").

229. 1 ANNALS OF CONG. 16–17 (Joseph Gales ed., 1789).

and in the electoral count of 1801, President of the Senate Thomas Jefferson purportedly counted dubious electoral votes from Georgia.[230] By 1800, some members of the Senate of the Sixth Congress interpreted the counting language as vesting the counting function in the "members composing" the Senate and the House of Representatives,[231] and to the extent there is any difference, Senator Pinckney interpreted the counting language as vesting the counting function in "Congress."[232]

The Twelfth Amendment, adopted in 1804, did not resolve the textual ambiguity between the first two readings of the counting function. In fact, it contains language identical to that found in Article II, Section 1, Clause 3. However, as Dean Wroth has suggested, it is arguable that, with the later precedents, the Twelfth Amendment changed the original understanding of the counting function, shifting this function from the President of the Senate to the Senate and House of Representatives.[233] But early commentators on

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230. *See* Tansill, *supra* note 22, at 516; Wroth, *supra* note 22, at 326 n.23; *see also* COUNTING ELECTORAL VOTES, *supra* note 3, at 116 (remarks of Sen. Reid) ("It has often happened that the Vice-President is a candidate for re-election; and we can scarcely suppose that the Constitution intended to confer on him the power of declaring himself elected by the votes he may count, without an appeal from his decision."). For more on the history of self-counting, see COUNTING ELECTORAL VOTES, *supra* note 3, at 533 (remarks of Sen. Morton) (presenting history of self-counting in 1797, 1801, 1821, 1837, 1841, and 1861); Harrison, *supra* note 23, at 703 n.12 (providing more examples).

231. *See* 10 ANNALS OF CONG. 120 (1800). The bill stated:

> And the constitution of the United States having directed that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and that the votes shall then be counted," *from which the reasonable inference and practice has been, that they are to be counted by the members composing the said Houses*, and brought there for that office, no other being assigned them; and inferred the more reasonably, as thereby the Constitutional weight of each State in the election of those high officers is exactly preserved in the *tribunal* which is to judge of its validity: the number of Senators and Representatives from each State, composing the said tribunal, being exactly that of the Electors of the same State . . . .

Id. (emphasis added).

232. 3 FARRAND, *supra* note 35, at 386 (remarks of Sen. Pinckney, Mar. 28, 1800) ("It is made *their* [Congress's] duty to count over the votes in a convention of both Houses, and for the President of the Senate to declare who has the majority of the votes of the Electors so transmitted.") (emphasis added). Indeed, there is an important difference between the "Congress" and the "Senate and the House of Representatives." The word "Congress" necessarily implies the two Houses of Congress acting independently in their corporate capacities, whereas the text of the Constitution is more ambivalent—allowing for the two Houses of Congress acting independently in their corporate capacities or for the two Houses of Congress acting conjointly in one corporate capacity.

233. *See* Wroth, *supra* note 22, at 327 & n.28 (examining language of implementing Act of Twelfth Amendment, Act of March 26, 1804, ch. 50, 2 Stat. 295, and language used in the electoral count of February 13, 1805).

the Constitution, such as Chancellor James Kent and Professor William Duer, writing in the wake of the Twelfth Amendment, thought that the counting function still belonged to the President of the Senate.[234]

The Wisconsin Incident of 1857[235] probably stands as a paradigm case in support of the proposition that the counting function belongs to the Senate and House of Representatives and not to the President of the Senate. During the Wisconsin Incident, Senator Pugh noted the obvious conflict-of-interest problem if the President of the Senate had sole responsibility for counting, calling it a "power higher than the veto."[236] During the Electoral Count Act debates, Senator Bayard keenly observed that the President of the Senate "cannot even count" the electoral votes; that "[h]e cannot even inspect them, except in the incidental and casual manner that is implied by the fact that his hand shall open the sealed envelope which contains the list of the electoral vote."[237] Representative Caldwell recalled the President of the Senate's unsuccessful attempts to assume the counting function in the Wisconsin Incident of 1857 and the Hayes-Tilden Incident of 1877,[238] and described the primary purpose of the Electoral Count Act as "decid[ing], first, that the power to count the vote is not in the President of the Senate."[239]

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234. Chancellor Kent stated:

> I presume, in the absence of all legislative provision on the subject, that the President of the Senate counts the votes, and determines the result, and that the two houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors.

2 KENT'S COMMENTARIES, supra note 19, at *276–77; *see* DUER'S COMMENTARIES, *supra* note 19, at 88–89 (similar). Note that Chancellor Kent seems to believe that Congress may by *law* take the counting function away from the President of the Senate; the source of Congress's power to do so is unclear. The question of Congress's source of power to enact legislation regulating the counting function is discussed in Part II.A.2 *infra*.

235. *See supra* notes 132–42 and accompanying text.

236. COUNTING ELECTORAL VOTES, *supra* note 3, at 135. Representative Humphrey Marshall stated his belief that "I am sure that the duty of determining whether a vote shall be counted belongs to the Senate and House, and not to the President of the Senate." *Id.* at 96; *see also id.* at 113 (remarks of Sen. Butler) (noting obvious conflicts of interest problem). However, as late as the Wisconsin Incident of 1857, some Members of Congress believed that the President of the Senate had the sole power to decide what to count and what not to count. *See, e.g.*, *id.* at 134 (remarks of Sen. Stuart).

237. *Id.* at 445 (remarks of Sen. Bayard).

238. *See* 18 CONG. REC. 30 (1886) (remarks of Rep. Caldwell); *see also* 17 CONG. REC. 815 (1886) (remarks of Sen. Sherman) (noting the President of the Senate's attempt to assume the counting function in the electoral count of 1857); 18 CONG. REC. 75 (remarks of Rep. Herbert) (noting the President of the Senate's attempt to assume the counting function in the electoral count of 1877).

239. 18 CONG. REC. 30.

The best interpretation as a matter of text and the better interpretation as a matter of history is that the counting function is vested in the Senate and House of Representatives. This does not answer, however, whether the counting function is delegable. The relevant text of the Constitution is best read to exclude counting by unnamed agents, notwithstanding general constitutional limits to the delegation of powers. The consensus view of the Members of Congress during the Electoral Count Act debates was that the counting function is not delegable.[240] Moreover, the related textual considerations of the "when" and "where" of counting electoral votes strongly militate against the delegation of the counting function to unnamed agents—including coordinate branches of government such as the federal judiciary.[241]

A final consideration is whether the President of the Senate has a vote in the counting function when questions arise. Although the counting of electoral votes takes place in the presence of the President of the Senate, the President of the Senate participates no more in the counting function than she participates in trial of impeachment—in neither case does the Vice President have a vote.[242] The Constitution carefully circumscribes the participation of the Vice President in the business of the Senate: "The Vice President of the United States shall be President of the Senate, but shall have no Vote,

240. For the historical view, see, for example, COUNTING ELECTORAL VOTES, *supra* note 3, at 445 (remarks of Sen. Bayard) ("That you could not delegate that power to another body I cannot doubt."); *id.* at 531 (remarks of Sen. Boutwell) ("Congress must exercise the power and perform the duty, and it is not possible under the Constitution to transfer it to anybody else."); 18 CONG. REC. 51 (remarks of Rep. Adams) ("I can not conceive that any statute can take away from either of these two legislative bodies the power to come to a yes or no on any question relating to the business they then have in hand under the provisions of the Constitution.").

The scholarly view also supports the non-delegation of the counting function. *See, e.g.*, Ross & Josephson, *supra* note 7, at 715 ("We agree with Pinckney that the Grand Committee procedure proposed in 1800 was unconstitutional because we do not believe Congress could delegate its joint power to count to a committee of selected members."); Spear, *supra* note 18, at 157 (observing that if the counting power is lodged in the two Houses of Congress, Congress cannot delegate the counting power to a committee "any more than it can establish a commission to levy taxes, or declare war").

241. *See* text accompanying *infra* notes 267–313.

242. *But cf.* RAWLE, *supra* note 206, at 206. Rawle argued that:

> It is not stated in the Constitution whether the president of the senate is on the trial of an impeachment restricted, as in legislative cases, to the casting vote. As he is constituted one of the judges by being appointed to preside without any restriction, the fair inference would be, that he is entitled to vote like the other judges, but on the trial last mentioned of a judge of the Supreme Court, the vote of the vice president does not appear in the printed journal.

Id.

unless they be equally divided."[243] The joint convention of the Senate and House of Representatives—assembled for the purpose of the electoral count—is most decidedly not the Senate. To be sure, the Electoral Count Act provides that, upon any objection to an electoral vote, the Senate shall separately withdraw to consider the objection.[244] Notwithstanding constitutional objections to this bicameralism,[245] neither textual nor structural reasons suggest that the President of the Senate's tie-breaking vote in the Article I business of the Senate applies to any Article II business of the Senate in counting electoral votes.[246]

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243. U.S. CONST. art. I, § 3, cl. 4.

244. *See* 3 U.S.C. § 15 (2000).

245. *See infra* notes 287–313, 526–53 and accompanying text.

246. As a related matter, it is not at all clear that the Vice President may cast a tie-breaking vote in a contingency election for Vice President in the Senate should there be no winner under the electoral college mode of vice presidential election. U.S. CONST. amend. XII provides:

> The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

Some scholars have suggested that the Vice President could cast such a tie-breaking vote. *See, e.g.*, Ho, *supra* note 195, at 239 n.47; Levinson & Young, *supra* note 195, at 934 n.37. At least one scholar has raised the possibility that the Vice President could not cast such a tie-breaking vote. *See* Akhil Reed Amar, *President Thurmond?* (Nov. 2, 2000), *at* http://slate.msn.com/?id=1006401 (on file with the North Carolina Law Review).

There are some very good reasons to seriously doubt that the Vice President could cast such a tie-breaking vote. As a textual matter, the Vice President is not a "Senator" and the Twelfth Amendment ostensibly requires a majority of the whole number of *Senators*—today, fifty-one Senators. If there is no majority of *Senators* in a contingency election for Vice President in the Senate, the Senate would have to choose again. Note that the same is true in the House of Representatives where there is no arbiter to cast a tie-breaking vote. If there is no majority of *states* in a contingency election for President in the House of Representatives, the House would have to choose again. We have seen this done before: In the contingency election for President in 1801, the House of Representatives completed *thirty-five* rounds of balloting before choosing a President, *see supra* note 3.

More generally: The Framers generally understood and appreciated the conflict of interest problems of the Vice Presidency, *see supra* notes 204–13 and accompanying text. It is worth hesitating before concluding that *one person* has the power to determine an election, particularly (but not only) when that one person would be likely to benefit from the decision. While it is true that other Senators may have conflict of interest problems because they too could be candidates for Vice President, it is one thing to say that a Senator may vote for himself or herself along with other Senators, and quite another to give the decisive vote to one man or woman. The Vice President's tie-breaking vote is decisive in a way that the votes of Senators are not. Interestingly, when the Framers contemplated direct presidential election by Congress, they rejected without discussion

c. What Is Counting and What Is To Be Counted?

Two significant and interrelated questions remain. First, what is counting? Second, what is to be counted? Again, the relevant constitutional text provides that "[t]he President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, *and the Votes shall then be counted.*"[247] As has been documented extensively, the word "shall" is a word of obligation.[248]

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giving the Vice President a tie-breaking vote. *See* 2 FARRAND, *supra* note 35, at 403 ("Mr[.] Read moved 'that in case the numbers for the two highest in votes should be equal, then the President of the Senate shall have an additional casting vote,' which was disagreed to by a general negative.").

Finally, if the theory is that the Vice President's power to cast tie-breaking votes only applies to Article I business (legislation and the internal matters of the Senate, including the election of Senate officers and the appointment of Senate committees) and not to Article II or Twelfth Amendment business, then it would also follow that the Vice President would not have a tie-breaking vote under the Treaty Clause or the Appointments Clause, which both appear in Article II. *See* U.S. CONST. art. II, § 2, cl. 2. This appears to be the case, reinforcing the arguments above. It is not possible for the Vice President to cast a tie-breaking vote with respect to treaties which require a two-thirds majority of Senators, *see id.*, but it is possible for the Vice President to do so with respect to presidential nominations under the Appointments Clause, which only require a majority of Senators. Notwithstanding, Alexander Hamilton intimated early on that the Vice President could not cast a tie-breaking vote on presidential nominations under the Appointments Clause. *See* THE FEDERALIST NO. 69, at 389 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (1961) ("In the national government, if the Senate should be divided, no appointment could be made; in the government of New York, if the council should be divided, the governor can turn the scale and confirm his own nomination."). The lack of mention of the Vice President is surprising given that he discussed the Vice President (and her tie-breaking vote) in the immediately preceding essay, *see* THE FEDERALIST NO. 68, at 47 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (1961), but perhaps he thought that the Vice President would not necessarily act in accordance with the President's interests (recall that prior to the development of the party system, the Vice President was merely the runner-up in the presidential election and oftentimes the chief opponent of the President). Only once in our nation's history, to my knowledge, has a Vice President cast a tie-breaking vote on a presidential appointment. In 1832, President Andrew Jackson nominated Senator Martin Van Buren as ambassador to Great Britain. The Senate split evenly, and Vice President Calhoun broke the tie by voting *against* President Jackson's nomination. *See* Vice Presidents of the United States, Martin Van Buren (1833–1837), *at* http://www.senate.gov/learning/stat_vp8.html (last visited Apr. 17, 2002) (on file with the North Carolina Law Review). Vice President Calhoun's negative vote was unnecessary of course, as a tie vote is widely considered to be defeated, though some accounts treat his vote as the "deciding vote." *See, e.g., id.*

247. U.S. CONST. amend. XII (emphasis added).

248. *See* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 782 & n.147 (1984) (stating that the Framers used "shall" as a word of obligation and "may" as a word of discretion and providing numerous examples in the Constitution); *see also* 2 FARRAND, *supra* note 35, at 485–86 (stating that the Framers carefully distinguished between the words "ought," "shall," and "may" in the drafting of the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1). Indeed, the Electoral College Clauses make the point amply: the

The Electoral College Clauses do not say "and the Votes *may* then be counted."

Ardent textualists will readily notice two points. First, what is the significance of the difference between "Certificates" and "Votes"? The Constitution says that only the "Votes" are to be counted. Second, what is the significance of the word "all" and its selective use and seeming disuse? The Constitution says that "all" of the certificates are to be opened but does not say that "all" of the votes shall then be counted. Are these subtle textual distinctions a grant of power to the counting agent not to count all votes?

The ultimate question is whether counting is, on balance, a ministerial or judicial act. If counting is a ministerial act, it is one of ascertainment and aggregation—Congress is simply a "central collecting agency" and a "tabulating point."[249] This view has some support in the purpose of the Electoral College Clauses. There would be no need for Congress to aggregate electoral votes if the electors met at some central location, but it was precisely to avoid the potential for cabal and corruption that the Electoral Colleges Clauses provide that the electors should meet in their respective states.[250] We shall call this the "thin" conception of the counting function.[251]

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word "shall" is used some eighteen times and the word "may" is used once. *See* U.S. CONST. art. II, § 1, cl. 4 ("The Congress *may* determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.") (emphasis added).

249. 115 CONG. REC. 168–69 (1969) (remarks of Rep. Rarick during the Bailey Incident of 1969).

250. *See, e.g.*, THE FEDERALIST NO. 68, *supra* note 246, at 380 ("Nothing was more to be desired [in the use of the Electoral College mode of presidential election] than that every practicable obstacle should be opposed to cabal, intrigue, and corruption."); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 122 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (remarks of William Davie at North Carolina ratifying convention) ("He is elected on the same day in every state, so that there can be no possible combination between the electors."). At the North Carolina ratifying convention, James Iredell remarked:

> Had the time of election been different in different states, the electors chosen in one state might have gone from state to state, and conferred with the other electors, and the election might have been thus carried on under undue influence. But by this provision, the electors must meet in the different states on the same day, and cannot confer together. They may not even know who are the electors in the other states. There can be, therefore, no kind of combination. It is probable that the man who is the object of choice of thirteen different states, the electors in each voting unconnectedly with the rest, must be a person who possesses, in high degree, the confidence and respect of his country.

4 *id.* at 105. Sen. Rufus King later remarked:

> [M]embers of the General Convention . . . did indulge the hope, by apportioning, limiting, and confining the Electors within their respective States, and by the guarded manner of giving and transmitting the ballots of the Electors to the Seat

If counting is a judicial act, then Congress sits as a court of sorts—a "court of last resort"[252]—checking the actions of electors in the electoral colleges. We shall call this the "thick" conception of the counting function. As Professor Spear nicely summarized, counting, "in so far as it is a mere enumeration and aggregation of units, is a purely *ministerial* act; but, in so far as it involves any judgment as to *what* votes shall be counted, it is a *judicial*, or, at least, *quasi judicial* act."[253] Clearly, there is no clean break between the "thin" and "thick" conceptions of the counting function. Even the "thin" conception requires some ascertainment of *what* is to be counted.[254]

The debates over the drafting of the Electoral College Clauses at the Philadelphia Convention of 1787 suggest that the Framers had the ascertainment issue in mind. The Framers rejected a proposal by James Madison and Hugh Williamson to insert the phrase "who shall have balloted" after the word "Electors." The purpose of this proposal was "so that the non voting electors not being counted might not increase the number necessary as a majority of the whole—to decide the choice without the agency of the Senate."[255] John Dickinson successfully moved to insert after "Electors" the word "appointed." Thus, under the Electoral College Clauses, the requisite number of electoral votes needed for victory is "a Majority of the whole Number of Electors appointed."[256] This drafting history suggests that the Framers considered the possibility that there might not be a "vote"—but only if an elector shall not have balloted. They did not consider the possibility that an electoral vote might be unconstitutional. While silence is difficult to interpret, the Framers'

> of Government, that intrigue, combination, and corruption, would be effectually shut out, and a free and pure election of the President of the United States made perpetual.

3 FARRAND, *supra* note 35, at 461 (Mar. 18, 1824); *see also* 1 KENT'S COMMENTARIES, *supra* note 19, at *280 ("These electors assemble in separate and distantly detached bodies, and they are constituted in a manner best calculated to preserve them free from all inducements to disorder, bias, or corruption.").

251. Professor Amar has suggested, albeit in passing, that the counting function is ministerial. *See* Amar, *supra* note 10, at 229 ("In counting votes, Congress performs in effect a ministerial function, registering the will of the voters in the electoral college.").

252. 115 CONG. REC. 158 (remarks of Rep. Corman during the Bailey Incident of 1969).

253. Spear, *supra* note 18, at 156.

254. *See id.* (noting that the counting function "must, to some extent, be judicial, in order that it may be ministerial and declarative. It is not possible to count, . . . without deciding what shall be counted").

255. 2 FARRAND, *supra* note 35, at 515.

256. U.S. CONST. art. II, § 1, cl. 3; U.S. CONST. amend. XII.

probable conception of the counting function was more "thin" than "thick."

Members of Congress have debated the nature of the counting function intensely over the past 210 years. The issue was first debated during the Missouri Incident. Representative Clay stated his belief that counting necessarily involved judging:

> In a case of votes coming forward which could not be counted, the Constitution was silent; but, fortunately, the end in that case carried with it the means. The two Houses were called on to enumerate the votes for President and Vice-President; of course they were called on to decide what are votes.[257]

This was a fairly "thick" conception of the counting function. Representative Randolph disagreed. " 'Your office,' said he, 'in regard to the electoral vote is merely ministerial. It is to count the votes, and you undertake to reject votes.' "[258] Representative Archer, responding to Representative Randolph's argument, thought that counting could not exist without judging:

> He was a little surprised . . . that the House had no power to pass any judgment on any return. He always thought that, wherever was lodged the power to receive a return, there was also a power to pass judgment on the validity of that return. Suppose any Territory not within the limits of the United States at the time, Florida, for example, to send votes here for electors; was there no authority by which these votes could be rejected? Suppose a State entitled to twenty-seven votes should send thirty-seven votes, would any gentlemen contend that there was no power in this House to judge of the proper number?[259]

This is not necessarily a "thick" conception of counting at all; as we shall see, many of Representative Archer's concerns come before Congress meets for the purpose of the electoral count. For instance,

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257. COUNTING ELECTORAL VOTES, *supra* note 3, at 52 (1821). Just two years later, Senator Benton observed:

> Two questions of great delicacy now present themselves:
> 1. If electors are not appointed according to the Constitution, can their votes be counted?
> 2. If objected to, who shall judge them?
> It is the duty of the two houses of Congress to count the votes. Can they count unconstitutional votes? If they cannot, shall they not judge every vote before it is counted?

Id. at 57 (1823).

258. *Id.* at 54.

259. *Id.*

prior to the electoral count, each House of Congress would have resolved whether or not to recognize Florida as a member of the Union in considering whether to seat any of Florida's Senators or Representatives.

During the Wisconsin Incident, Representative Marshall also advocated a "thick" conception of the counting function. He bluntly asked, "What is to count? What faculty does it involve? I say not only the faculty of enumerating, but the faculty of judging whether it is a vote or not."[260] In a speech directed to the President of the Senate during the electoral count, Representative Marshall sought to justify his conception of the counting function upon the textual distinction between the word "Certificates" and the word "Votes":

> Whether that is a vote or not must depend upon the determination of this convention, and if you will regard the verbiage of the Constitution, you will find that your function goes no further than to open the certificates. The language of the Constitution is that "the President of the Senate, in the presence of the House of Representatives, shall open all the certificates," and then the phraseology changes, and proceeds, "and the votes shall be counted," not by you, but by us; and whenever a vote is challenged, this is the time, and this the only place, where a determination can be formed whether it is a vote.[261]

This argument does not withstand a close examination of the Electoral College Clauses. The Constitution employs the word "Certificates" instead of "Votes" for a simple reason. Each of the Electoral Colleges sends a "List" (now two lists with the adoption of the Twelfth Amendment)—which contains the "Votes" of the electors—to the President of the Senate. The Constitution requires that each "List" be signed and certified by the electors in each State; when the "List" is so signed and certified, it becomes a "Certificate." Thus, the contradistinction between "Certificates" and "Votes" is of little interpretive value.

Other Members of Congress agreed with Representative Marshall. For example, Representative Orr asked, "Does not the requisition to be present at the counting necessarily carry the right to

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260. *Id.* at 142.

261. *Id.* at 89. Representative Marshall misquoted the constitutional text. He also did not notice the textual significance in the use and seeming disuse of the word "all." In a later remark, he came close: "The President of the Senate has to open *all* the certificates, and then *his* function is performed; and after *all* the certificates have been opened, the counting of the votes is *then to commence and be concluded.*" *Id.* at 95 (emphasis in original).

determine what votes offered are legal, and what votes may be void, as an inseparable incident to the power of counting?"[262] He concluded that the "Constitution makes us the managers or canvassers to count the electoral votes, and in doing so gives us the power to say whether a vote presented is or is not legal."[263] Those who advocated a "thin" conception of the counting function were in the minority. Senator Toucey put the point best in his statement that "[t]he whole proceeding of counting is based on the idea merely of disclosing to the public in a safe, authentic way, the actual state of the vote; and when that is ascertained truly, the President who is chosen by that vote is President, let Congress do what it may."[264]

Finally, the nature of the counting function occupied a prominent position in the debates over the Electoral Count Act. The positions taken are well summarized by the statements of Senator Edmunds, who supported the Electoral Count Act, and Senator Bayard, who opposed it. Senator Edmunds was of the view that a vote

> must mean a legal vote, a vote which is in accordance with the provisions of the Constitution of the United States and in accordance with the laws which have existed for so many years respecting the method by which and the time within which the vote of each State is to be expressed and returned.[265]

Senator Bayard pointed out the implications of Senator Edmunds's view. He asked:

> Were the two houses of Congress ever intended to become the judges of the electoral vote of the people of this country? Apparently by the Constitution their duties would seem to be of a ministerial character only. They were to stand by and witness the counting, and their presence in that way as witnesses was supposed to be a security. Now you change this from a merely ministerial power into a judicial power of the very gravest and most important character. Is there a warrant for that in the Constitution of the United States?[266]

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262. *Id.* at 140; *see also id.* at 112 (remarks of Sen. Toombs) ("When we are called upon to see these votes counted, it becomes our first duty to know what are the votes to be counted.").

263. *Id.* at 140.

264. *Id.* at 134.

265. *Id.* at 456; *see also id.* at 531 (remarks of Sen. Boutwell) (stating his belief that "the counting of the votes, in the language of the Constitution, means something more than a mere examination of the certificates returned from the electors of the respective States").

266. *Id.* at 523 (remarks of Sen. Bayard).

In sum, there is considerable historical support for both the "thin" and "thick" conceptions of the counting function. An answer to the scope of Congress's counting power is informed by the "when" and "where" of counting, issues which we shall take up next.

d. When Is the Counting Done?

The Electoral College Clauses contain an immediacy principle and for good reason. The relevant text of the Constitution provides that once the President of the Senate has opened all of the Certificates, "the votes shall *then* be counted."[267] This is the immediacy principle of the Electoral College Clauses. Another part of this clause reinforces this immediacy principle. In case of electoral deadlock, the House of Representatives is to "immediately" choose the next President from those on the list.[268]

The word "immediately" has special significance in the Electoral College Clauses.[269] According to Senator Pinckney, the word "immediately" in this Clause means "instantly, and on the spot, without leaving the House in which they are then assembled, and without adjournment."[270] He explained that the word was inserted to guard against the possibility of domestic intrigue and foreign influence at the Seat of Government of the United States:

> [T]he election by the House of Representatives taking place *immediately* after the votes have been opened and counted, that body would go to the election free and uninfluenced [by leaders of domestic intrigue and foreign emissaries], as they ought. And is not this, sir, safer; is it not better than that the smallest delay should take place in determining it? . . . [I]t will be less dangerous to the public interest, that even one who may not be the most qualified of the five, should be elected, than that Congress should adjourn to deliberate on it, and thus expose themselves, and the best interests of their constituents, to the secret and artful attacks that will be made on their integrity.[271]

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267. U.S. CONST. amend. XII (emphasis added).

268. *Id.*

269. The word "immediately" is rare in the original Constitution, and is used in only one other clause of the original Constitution. *See* U.S. CONST. art. I, § 3, cl. 2 ("Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes.").

270. *See* 10 ANNALS OF CONG. 137 (1800).

271. *See id.* at 138 (emphasis added). The Twelfth Amendment, adopted in 1804, also contains a requirement that the House of Representatives shall "immediately" choose a President. However, the Twelfth Amendment seems to significantly soften—and perhaps quash—Senator Pinckney's immediacy principle. The Twelfth Amendment, unlike the

At the Philadelphia Convention of 1787, James Wilson echoed Senator Pinckney's observation and his underlying rationale. He noted that "if the election be made as it ought as soon as the votes of the electors are opened & it is known that no one has a majority of the whole, there can be little danger of corruption."[272] In a letter to the Washington Federalist, "Horatius" advised that

> [t]he choice is required to be *immediately made*, in order that the result may be declared in the presence of the Senate, and to prevent the possibility of intrigue and corruption. The choice must be therefore made before the house adjourns or disperses, and after the convention of the Senate and House of Representatives terminates, the house cannot at a future day act upon this subject.[273]

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original Electoral College Clauses, provides that "if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President." U.S. CONST. amend. XII, *amended by* U.S. CONST. amend. XX, § 3. Federal law, at the time of the adoption of the Twelfth Amendment, specified that the counting of electoral votes would take place on the second Wednesday in February. Thus, the Twelfth Amendment seems to countenance up to two weeks of deliberation by the House of Representatives. William Alexander Duer made the point that

> [a]lthough the Constitution directs that when no person is found to have a majority of the Electoral votes, the choice shall be *immediately* made by the House of Representatives, yet it is not held obligatory upon that House to proceed to the election directly upon the separation of the two Houses; but that it may proceed either at that time and place, or omit it until afterwards. This construction was adopted before the [Twelfth Amendment], and there can now be no doubt of its correctness, as the amendment expressly declares the choice of the House to be valid, if made before the fourth of March following the day on which the Electoral votes are counted.

DUER'S COMMENTARIES, *supra* note 19, at 89–90.

If we read the immediacy principle as loosely as Professor Duer suggests, the current Constitution seems to countenance exactly seventeen days of deliberation by the House of Representatives. *See* U.S. CONST. amend. XX, § 1 ("The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, . . . and the terms of their successors shall then begin.").

It should be noted that the Twelfth Amendment does not specify when the Senate shall choose the Vice President should the choice devolve upon it. Could it be that the framers of the Twelfth Amendment simply forgot to add comparable language for the Senate? *See also* 1 KENT'S COMMENTARIES, *supra* note 19, at *278 ("The [C]onstitution does not specifically prescribe when or where the [S]enate is to choose [V]ice-[P]resident, if no choice be made by the electors; and, I presume, the [S]enate may elect by themselves, at any time before the fourth day of March following."). It goes without saying that the current Constitution seems to countenance exactly seventeen days of deliberation by the Senate. *See* U.S. CONST. amend. XX, § 1.

272. 2 FARRAND, *supra* note 35, at 502.

273. Horatius, *The Presidential Knot*, WASH. FEDERALIST, Jan. 6, 1801 [hereinafter Horatius Letter]. I am grateful to Professor Ackerman for providing me with a copy of

The immediacy principle implies that the counting agent may not delay in counting the electoral votes. The "then" requirement militates against the deliberative aspects of counting and the judging of the electoral votes. After all, judicial determinations take time.

The Electoral Count Act does not violate the immediacy principle. 3 U.S.C. § 17 puts strict time limits on the electoral count: when the two Houses separate to debate an objection to an electoral vote, each Member of each House may only speak once on the objection for a maximum of five minutes, and total debate in each House is limited to two hours.[274] Although this provision does not violate the immediacy principle, it is *patently* unconstitutional—Congress may not bind by statute either House in the rules of its proceedings.[275] As we shall see next, the "then" requirement also has

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Horatius's letter. Professor Ackerman believes that "Horatius" is John Marshall, a conclusion which he (tentatively) reaches based on a computer analysis of Marshall's writings (performed with his linguist friend, Roger Shuy), and based on other "old-fashioned circumstantial evidence," including a snippet from Marshall historian Albert J. Beveridge. *See* Email from Bruce Ackerman to Vasan Kesavan (Apr. 17, 2002) (on file with author).

274. 3 U.S.C. § 17 (2000) provides that

> When the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.

275. *See* U.S. CONST. art. I, § 5, cl. 2 (Rules of Proceedings Clause) ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two[-]thirds, expel a Member."). Anyone who wishes to argue that the Electoral Count Act is constitutional faces the most difficult task in justifying the constitutionality of 3 U.S.C. § 17.

During the Electoral Count Act debates, Senator Christiancy noted the constitutional problem. "I notice," said Christiancy,

> that this bill, which it is proposed to make an act of Congress, provides for the length of the time that any Senator or Representative may speak when the Senate is acting separately and the House is acting separately. I wish to know if that is not trenching upon the constitutional power of each house to make its own rules to regulate its own proceedings.

COUNTING ELECTORAL VOTES, *supra* note 3, at 688 (1876). Senator Thurman responded to the point with an entirely unconvincing answer:

> The joint rule heretofore adopted prohibited all debate, and it seems to have been held good. No question was ever made in respect of that rule. If we have the right to legislate upon this subject, as I think we have—and this whole bill goes upon that foundation—then I think we have a right to regulate the mode of procedure so that it shall not be defeated, as it otherwise might be, by the consumption of time in speaking."

Id. Senator Edmunds, for his part, rightly noted that "[t]hen you might pass a law as to all bills." *Id.*

an implication for *where* the counting (and any potential judging) of electoral votes takes place.

e. Where Is the Counting Done?

The Electoral College Clauses provide that the lists of electoral votes from the several states are to be "directed to the President of the Senate"[276] and that "[t]he President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted."[277] These clauses are the font of two mutually reinforcing "where" principles: the publicity principle and the unicameralism principle.

The publicity principle is easy to identify. The President of the Senate is not supposed to open all of the certificates behind closed doors, but is only to do so "in the *presence* of the Senate and House of Representatives."[278] Although this phrase does not necessarily modify the subsequent vote counting phrase as a grammatical matter, the Constitution almost certainly requires that the counting of the votes take place in an equally public manner.[279] Moreover, there is an

276. U.S. CONST. art. II, § 1, cl. 3. This language is likely a vestige of early drafts of the Electoral College Clauses which vested the choice of a President and Vice President in case of electoral deadlock in the Senate. *See, e.g.*, 2 FARRAND, *supra* note 35, at 497–98. There is a reasonable functional explanation as to why the Framers kept this requirement. The Framers believed that the Senate would be in *almost* constant session anyway, unlike the House of Representatives. *See, e.g.*, *id.* at 274 (remarks of George Mason) (observing that Senators "will probably settle themselves at the seat of Govt." unlike Representatives "chosen frequently and obliged to return frequently among the people"); *id.* at 523 (remarks of James Wilson) ("The Senate, will moreover in all probability be in constant Session."); *id.* at 537 (remarks of George Mason) (supporting privy council of six members to the President on basis that it would "prevent the constant sitting of the Senate which he thought dangerous"); *id.* at 639 (remarks of George Mason) (referring to "long continued sessions of the Senate"); GEORGE MASON, OBJECTIONS TO THE CONSTITUTION OF GOVERNMENT FORMED BY THE CONVENTION (1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 11 (Herbert J. Storing ed., 1981) (referring to Senate as "a constant existing Body almost continually sitting"); Essay XVI of Brutus (Apr. 10, 1788), *reprinted in id.* at 444 (stating that Senators "will for the most part of the time be absent from the state they represent" and that Senators will be inhabitants of the "federal city").

277. U.S. CONST. art. II, § 1, cl. 3.

278. U.S. CONST. amend. XII (emphasis added). Interestingly, an early draft of the Electoral College Clauses at the Philadelphia Convention provided that "[t]he President of the Senate shall *in that House* open all the certificates; and the votes shall be then & there counted." 2 FARRAND, *supra* note 35, at 497–98 (emphasis added).

279. Indeed, the secret drafting history of the Constitution shows that when the "in presence" phrase was agreed to, it was inserted *after* the word "counted" in the draft of the Electoral College Clauses, thus modifying both the opening of certificates and the counting of votes. *See* 2 FARRAND, *supra* note 35, at 518, 526. When the report was produced, however, the text was re-ordered and read: "The President of the Senate shall in the presence of the Senate and House of Representatives open all the certificates & the votes shall then be counted." *Id.* at 528; *see also* COUNTING ELECTORAL VOTES, *supra*

excellent functional reason why the Senate and the House of Representatives are required to be present for the electoral count: if there should be no winner under the electoral college mode of presidential and vice presidential election, the duty of choosing the President devolves upon the House of Representatives, and the duty of choosing the Vice President devolves upon the Senate.[280]

Under the publicity principle, the secret proceeding contemplated by the Grand Committee Bill would have been grossly unconstitutional.[281] During the Wisconsin Incident of 1857, Senator Thompson thought the idea of the publicity principle "was that we were not to go into executive session, nor, by some secret cabal or clandestine arrangement, get together here and have a *coup d'etat*, and make a President."[282] Thus, the elections of 1801 and 1825, in which the House of Representatives chose the President in closed-door proceedings, were also grossly unconstitutional.[283]

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note 3, at 451 (1875) (remarks of Sen. Frelinghuysen) ("The Constitution says that the votes shall then in the presence of the Senate and House of Representatives be counted."); 1 TUCKER'S COMMENTARIES, *supra* note 19, app. at 327 ("The certificates . . . are to be publicly opened, and counted in the presence of the whole national legislature: . . . ."); Horatius Letter, *supra* note 273 ("The constitution has enjoined that the certificates of the electors shall be opened, and their votes counted *in the presence of the Senate, and House of Representatives.*") (emphasis in original); 18 CONG. REC. 45 (1886) (remarks of Rep. Dibble) (noting that the counting of electoral votes takes place in the presence of the Senate and House of Representatives).

280. *See* U.S. CONST. amend. XII. For an eloquent expression of this point, see 18 CONG. REC. 30 (remarks of Rep. Caldwell).

281. For an eloquent expression of the publicity principle, see 10 ANNALS OF CONG. 145 (1800) where Senator Pinckney remarked:

> Give, however, the power of deciding on their votes, and of rejecting or receiving them, as they please, to thirteen men, all of the same political description, all wishing the same men, sitting with closed doors, and whose deliberations are removed from the public eye, and you will find it difficult to avoid just suspicion; your jealous citizens will remember that secrecy always accompanies corruption, and that even if this committee were to act in the most honorable manner, yet still that the friends of the candidate whose votes have been refused, if such refusal cost him his election, will never cease to suspect that all has not been fair, and that some improper reason had influenced the decision.

282. COUNTING ELECTORAL VOTES, *supra* note 3, at 126 (1857); *see also id.* at 452 (remarks of Sen. Frelinghuysen) ("Why, sir, are the House and the Senate present? It is because they represent the sovereignty of the Government at that most critical moment when the executive power is to be transmitted, and they are there that the transmission may be under their watchful guardianship.").

283. Professor Glennon seems to think that closed proceedings are constitutionally permissible, but not constitutionally desirable. *See* GLENNON, *supra* note 18, at 48 (discussing question of "Open or Closed Proceedings?"). This is a seriously flawed reading of the Electoral College Clauses, which emphasize publicity, and of the original Constitution in its entirety, which emphasizes the same. *See, e.g.*, U.S. CONST. art. I, § 5, cl. 3 (Journal of Proceedings Clause); U.S. CONST. art. I, § 7, cl. 2 (Veto Clause); U.S. CONST. art. I, § 9, cl. 7 (Receipts and Expenditures Clause); U.S. CONST. art. II, § 2, cl. 1

The publicity principle probably extends to the choosing of a President and a Vice President in case of electoral deadlock as well. Although the Constitution does not explicitly specify, it probably requires that the House of Representatives "immediately" choose the President in the presence of the Senate,[284] and that the Senate "immediately" choose the Vice President in the presence of the House.[285] This mode of presidential and vice presidential selection maximizes legitimacy.

The question is what the publicity principle implies for the *judging* of electoral votes. A narrow view of the publicity principle is that the Members of Congress come together to ensure the proper aggregation of the electoral votes. During the Wisconsin Incident of 1857, Representative Orr urged a broader view, arguing that the publicity principle is the font of congressional power to reject "illegal" electoral votes:

> Suppose the result of the election would depend on the vote of [Wisconsin]: how would it be possible to declare who was elected until it had been decided whether or not that vote was to be received? Who is to decide that? The Constitution and the laws require that the two houses shall

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(Opinion Clause); U.S. CONST. art. II, § 2, cl. 3 (Commissions Clause); U.S. CONST. art. III, § 3, cl. 1 (Treason Clause); *see also* Harrison, *supra* note 23, at 705 (noting that "a public occasion for the [electoral] count will inspire public confidence in the probity of the process"); *cf.* PA. CONST. OF 1776, § 13 ("The doors of the house in which the representatives of the freemen of this state shall sit in the general assembly, shall be and remain open for the admission of all persons who behave decently, except only when the welfare of this state may require the doors to be shut.").

284. *See, e.g.*, 10 ANNALS OF CONG. 137 (remarks of Sen. Pinckney) (describing immediacy principle as "instantly, and on the spot, *without leaving the House in which they are then assembled*, and without adjournment") (emphasis added); 2 FARRAND, *supra* note 35, at 518–19 (describing motion of James Madison that, in case of electoral deadlock, two-thirds of Senators be present *in presence of the Senate and the House of Representatives* to choose the President; motion passed by a vote of six to four and was subsequently rendered moot by motion to vest choice of President in case of electoral deadlock in House of Representatives); Horatius Letter, *supra* note 273 ("The choice is required to be immediately made, *in order that the result may be declared in the presence of the Senate*, and to prevent the possibility of intrigue and corruption.").

Although the Twelfth Amendment relaxed the immediacy principle (giving the House of Representatives additional time to choose a President in case of electoral deadlock, *see supra* note 271), it is much less clear that it also relaxed the publicity principle. It appears that the House of Representatives chose the President in the presence of the Senate in 1801 and 1825. *See* 1 KENT'S COMMENTARIES, *supra* note 19, at *277 (noting that the Senate was "admitted to be present as spectators"); DUER'S COMMENTARIES, *supra* note 19, at 90 (similar).

285. This principle was violated in the electoral count of 1837. The Senate chose the Vice President because of electoral deadlock but did so in the Senate Chamber and not in the presence of the House of Representatives in joint convention.

> meet in joint convention, and that the votes of the electors of the several States shall be opened and counted before them.
>
> This, in my judgment, confers upon them the *power* to determine whether a vote be valid or invalid. Otherwise it is a mere farce if they are called on only to witness the counting. The counting might just as well be done by the Vice-President or the President of the Senate, without the presence of the two houses. But it is to guard against an illegal vote being counted that the two houses are required to be assembled together.[286]

This brings us to the second "where" principle: unicameralism. The Constitution requires that the two Houses of Congress come together for the purpose of opening all the electoral certificates and counting the electoral votes. This practice has been followed for all of our electoral count history. In the first and second presidential elections, the Senate and the House of Representatives assembled in the Senate Chamber for the opening and counting of the electoral votes, and in all subsequent elections, the Senate and the House have assembled in the House Chamber.[287]

The unicameralism principle suggests that any power to judge electoral votes is vested in the one body which is present when the electoral certificates are opened and when the electoral votes are counted[288] and is to be resolved on a per capita vote basis.[289] The

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286. COUNTING ELECTORAL VOTES, *supra* note 3, at 90 (emphasis added); *see also id.* at 114 (remarks of Sen. Butler) ("The Senate of the United States is called into the other house as a corporate body, an imposing corporate body, to be a witness to the election of the Chief Magistrate of this country, and to see that the votes are counted fairly."); *id.* at 452 (remarks of Sen. Frelinghuysen) (supporting amendment to Twenty-second Joint Rule) ("Why, sir, are the House and the Senate present? It is because they represent the sovereignty of the Government at that most critical moment when the executive power is to be transmitted, and they are there that the transmission may be under their watchful guardianship.").

287. Under the current Electoral Count Act, the President of the Senate and Members of Congress are to meet in the Hall of the House of Representatives. *See* 3 U.S.C. § 15 (2000). During the Wisconsin Incident of 1857, Senator Thompson declared his belief that the intent of the Framers was to make the House of Representatives present as witnesses in the Senate Chamber. *See* COUNTING ELECTORAL VOTES, *supra* note 3, at 126.

288. In congressional debate, this one body has been repeatedly referred to as a "convention" or a "joint convention" of the two Houses, although the Constitution does not employ this word. There were, of course, those who disagreed with this term. *See, e.g.*, COUNTING ELECTORAL VOTES, *supra* note 3, at 111 (remarks of Sen. Stuart).

289. The unicameralism principle, without more, does not require that the counting function be exercised by the Senators and Representatives in the unicameral body on a per capita vote basis. The Senate and House of Representatives could, presumably without undue trouble, organize themselves and vote as separate bodies while convened

Electoral Count Act violates the unicameralism principle because it provides that, upon objection to an electoral vote in the joint assembly, the two Houses of Congress shall separate and independently decide on the legality of that electoral vote,[290] thereby giving *equal* weight to the decision of the Senate and House of Representatives. One implication of the unicameralism ("where") principle and the immediacy ("when") principle is that the resolution of any electoral count questions cannot be vested in any judicial tribunal. Senator Morton put this point nicely in debates over the Electoral Count Act:

> Then and there. You cannot refer to any other tribunal; you cannot get the case before the Supreme Court of the United States or before any special court to be created for that purpose. These votes are then to be opened, and then and there they are to be counted.[291]

The secret drafting history of the Constitution suggests the unicameralism principle. When the Committee of Eleven proposed the electoral college mode of presidential election, the draft provided that, "The President of the Senate shall in that House open all the certificates; and the votes shall be *then & there* counted" by the Senate.[292] This clause was later amended to include the phrase "in the presence of the Senate and House of Representatives" and the "& there" language was dropped.[293] However, there is very little reason to suppose that the counting was not to occur in that single body of Senators and Representatives.[294]

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together in one room. For present purposes, I define the unicameralism principle as counting electoral votes on a per capita vote basis (equivalent to the Senate and House of Representatives voting by joint ballot), thereby giving Representatives a decisive advantage over Senators in resolving disputes in the counting of electoral votes. As we shall see presently, this conception of the counting function makes better sense of constitutional structure.

290. 3 U.S.C. § 15.

291. COUNTING ELECTORAL VOTES, *supra* note 3, at 529. Also, Senator Boutwell remarked that:

> There can be, under the Constitution, no tribunal to decide that or any other question arising in the course of counting the votes, because it is a duty imposed upon the two [H]ouses of Congress. They alone can perform it, and they have not the power to transfer its performance to anybody else.

Id. at 531.

292. 2 FARRAND, *supra* note 35, at 497–98 (emphasis added).

293. *See id.* at 528.

294. As a background principle, it might be said that the Framers shied away from separate action by the two Houses in electing the President when both Houses were involved. Before the Framers agreed to the electoral college mode of election, the President was to be elected by the Legislature—not the two Houses of Congress acting separately—but by *joint ballot*. 2 FARRAND, *supra* note 35, at 401–03. The rationale was

There is ample historical support for the unicameralism principle. In the Sixth Congress, Representative and Framer Albert Gallatin moved to amend the Grand Committee Bill to provide that any decision on the legality of an electoral vote would be made by a majority of the Members of Congress *then* present at the electoral count.[295] After a long debate, this motion fell just two votes shy of passing.[296] Senator Baldwin, in his remarks on January 23, 1800, recognized that the Senators and Representatives would "me[e]t together in one room" to receive the electoral votes and "to judge only of its authentication."[297] Senator Pinckney, in his remarks on March 28, 1800, also recognized the unicameralism principle, but nevertheless argued that Congress had no power to reject electoral votes.[298] Other senators also supported the unicameralism principle. The preamble of their proposed alternative to the Grand Committee Bill provided that the Senators and Representatives assembled for the purpose of the electoral count form a single tribunal, with the number of Senators and Representatives from each state equal to the number of electors from each state.[299]

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to avoid the "[g]reat delay and confusion [which] would ensue if the two Houses shd [sic] vote separately, each having a negative on the choice of the other." *Id.* at 402 (remarks of Nathaniel Gorham).

The Framers thought that a joint ballot was particularly important in one other area. Both the draft of the Constitution referred to the Committee of Style and its report provided for the appointment of the Treasurer of the United States by joint ballot of the Congress. *See id.* at 570 (draft referred to Committee of Style) (stating that Congress shall have power "[t]o appoint a Treasurer by joint ballot"); *id.* at 594 (report of Committee of Style) (first provision of precursor to U.S. CONST. art. I, § 8) ("The Congress may by joint ballot appoint a treasurer."). This provision was subsequently deleted on September 14, 1787, just three days before the Philadelphia Convention of 1787 completed its business. *See id.* at 614.

295. Specifically,

> A motion of Mr. Gallatin was under consideration to insert, instead of the principle that in cases of doubt the Houses should divide to their respective Chambers to consider the qualification or disqualification of a vote or votes, from their joint meeting, if such question should arise at counting the votes, the following words: "And the question of the exception shall *immediately*, and without debate, be taken by yeas and nays, and decided by a majority of the members of both Houses then present."

COUNTING ELECTORAL VOTES, *supra* note 3, at 26 (emphasis added).

296. *Id.* During the Electoral Count Act debates, Representative Adams made note of Representative Gallatin's motion in 1800 in support of his argument for unicameral action. *See* 17 CONG. REC. 51 (1886) (remarks of Rep. Adams).

297. COUNTING ELECTORAL VOTES, *supra* note 3, at 16.

298. *See* 10 ANNALS OF CONG. 139 (1800) ("Congress shall not themselves, even in joint convention, have the smallest power to decide on a single vote."); *id.* ("[H]ow utterly unconstitutional it would be for Congress, either acting in their separate chambers or in convention, to attempt to assume to themselves the power to reject a single vote.").

299. *See* 10 ANNALS OF CONG. 120.

In later years, those who have supported congressional control over electoral votes have voiced the unicameralism objection to the Electoral Count Act. For example, during the Missouri Incident, Representative Archer, emphasizing the "then" immediacy requirement of the electoral count, stated:

> He was opposed to this House undertaking to proceed in any manner as to the legality of the electoral votes. He could recognize no power in the House of Representatives on this subject separate from the Senate.... Does it not follow that the votes must be counted in the presence of the two Houses? For what purposes do they assemble together unless it be to determine on the *legality* of the votes. If not for this purpose, the joint meeting is for form and show and nothing else. We must, in my apprehension, determine the question in joint meeting, and in no other way.[300]

However, Senator Rufus King disagreed, stating that he was "opposed to the settlement of any litigated question in joint meeting, where the Senate, as a body, would be lost; and argued that whenever any such should arise, it would be always proper that the two Houses should separate."[301]

During the Wisconsin Incident, Senator Pugh made a strong argument in favor of the unicameralism principle. He believed that the joint convention was the proper forum to settle the Wisconsin problem because:

> The whole number of Senators and Representatives taken together is equal to the whole number of electors in all the colleges. It is exactly the same body of men in number, equal to all of them. All the States, if they had voted there yesterday through their Senators and Representatives, would have exercised the precise power which they exercised in the election of President.[302]

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300. COUNTING ELECTORAL VOTES, *supra* note 3, at 54; *see also id.* at 52 (remarks of Rep. Henry Clay) (implying joint action by the two Houses because the two Houses might disagree if they met separately and "then the votes would be lost altogether").

301. *Id.* at 49.

302. *Id.* at 137. Senator Cass presented the argument against the unicameralism principle:

> I wish to submit a single remark to the President and to the Senate, for I do not consider that this convention can be addressed. We can take no vote. How are we to vote? *Per capita* or by States? Are we to vote as representatives of the people or representatives of States? If we cannot vote here, we cannot discuss. The only thing which remains for us to do, if there are insuperable difficulties in the way, is to adjourn immediately to our respective halls. Then let the Senate or the House of Representatives bring up the matter for action. By the present proceeding we are overturning the Government—we are making this a national

Even if the joint convention was a single tribunal—a court of last resort, according to Senator Pugh—the question remained as to how the voting should take place within the joint convention. Senator Pugh stated his belief that the voting should be *per capita*.[303] Representative Orr, speaking before the House of Representatives, concurred: "Who was to decide on the validity of the challenged vote? The two [H]ouses in joint convention by a *per capita* vote."[304] However, the textual argument against this position is that the Electoral College Clauses provide that the counting take place "in the Presence of the Senate and House of Representatives"—not "in the Presence of Senators and Representatives," suggesting that the counting function is to be exercised by the Senate and the House of Representatives acting separately in their corporate capacities, not by Senators and Representatives acting together in a single corporate capacity.

Representative Orr, however, offered one additional structural argument in support of the per capita vote in the joint convention, an argument that answers Senator King's objection during the Missouri Incident that the power of the Senate would be "lost" in the joint convention. He pointed out that the "[s]enatorial electors" in the electoral colleges "possess[ed] no power or dignity superior to those representing the congressional districts."[305] Given this observation, the per capita vote made perfect sense: the Senate would have the same power in the joint convention that the senatorial electors had in the electoral colleges.

During the Electoral Count Act debates, Senator Thurman succinctly expressed the unicameralism principle: "The Constitution is 'and the votes shall then be counted;' that is, shall be counted right there, in the presence of the two [H]ouses. That is what the Constitution requires .... They are not to be counted elsewhere.

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convention.

Id. at 91. Senator Toucey remarked that "[i]f there is to be any action, or deliberation with a view to action, the two houses must separate, deliberate, and act separately." *Id.* at 121.

303. *Id.* at 137.

304. *Id.* at 140. Representative Humphrey Marshall—Justice John Marshall's cousin—agreed:

> We have a constitutional duty to see that the count is properly made, and a separate resolution passing from this House to the Senate, and from the Senate back to this House, does not, according to my view, meet the requirements of the Constitution. The examination must be made, and the proclamation must be made, in the presence of the two houses.

Id. at 141.

305. *Id.* at 140.

They are to be counted then and there."[306] Several years later, Senator George made a particularly compelling structural argument for unicameral action in judging electoral votes. His argument was that the counting function "is not a legislative function which ought to be considered separately by the two Houses, but it is rather in the nature of a judicial function,"[307] and therefore the two Houses of Congress "should adopt that form in the performance of that [judicial] duty which would enable us to discharge it."[308] Invoking the image of a court, he stated:

> Why, certainly, sir, it would be an anomaly in jurisprudence, it would be an anomaly surely in Anglo-Saxon jurisprudence, that for the ascertainment of a single fact, the rendering of an operative judgment upon the ascertainment of a fact should be committed to two separate tribunals, each acting independently of the other, and each having a veto upon the other. By that sort of tribunal no judicial function has ever been performed. We require unanimity in juries, that twelve men shall agree to a verdict, but they are one body; they consult and confer with each other, and they arrive at a conclusion as the result of that conference; but nobody ever proposed to have two juries to try a case. We have a court sometimes composed of an even number of judges, and the result may be a division between the judges, and there may be a provision or there may be none, for one or the other to rule the case; but it has never been that two courts having equal power can be charged with the determination of the same case.[309]

Under Senator George's structural analogy, the number of jurors in the single body is precisely equal to the number of electors. This argument has some intuitive appeal. Indeed, the Democratic House of Representatives in 1884 passed a substitute version of the Electoral Count Act bill, which provided for the unicameral resolution of issues during the electoral count on a per capita vote basis, but the Democratic Senate did not agree.[310] This is not to say that the unicameralism principle was uncontroversial. During the Electoral Count Act debates, there were Members of Congress who strongly objected to the unicameralism principle,[311] and who believed that the

306. *Id.* at 465.
307. 17 CONG. REC. 2429 (1886) (remarks of Sen. George).
308. *Id.*
309. *Id.*
310. *See* 15 CONG. REC. 5460–68, 5547–51 (1884); 16 CONG. REC. 1618 (1885).
311. *See, e.g.*, 17 CONG. REC. 1058 (remarks of Sen. Evarts) (stating that the joint

counting function should be exercised by the two Houses acting separately in their corporate capacities.[312]

In sum, the unicameralism principle makes better sense, especially as a matter of immediacy, publicity, and jury-like structure. As we shall soon see, the unicameralism principle also avoids the presentment problem of the Electoral Count Act.[313]

2. Where Is the Font of Power?

As we have seen, the Electoral College Clauses are best interpreted as vesting the counting function in the joint convention and not the President of the Senate. Let us assume for present purposes that Congress may by law bind the joint convention in counting electoral votes—this assumption, as we shall see, is no small assumption.[314] Where is the font of power to pass the Electoral Count Act? In a Constitution of enumerated and hence limited powers,[315]

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convention would be "wholly an unconstitutional assemblage" and that "I can find no ground to support this extra assemblage of the two Houses voting per capita"); Representative Caldwell remarked:

> It will be perceived that this bill is not predicated upon the idea of throwing the two Houses into convention and merging the smaller body, the Senate, into the larger body, the House of Representatives, and voting *per capita*. It is submitted that no constitutional warrant can be found for such an idea.

18 CONG. REC. 31 (1886). Representative Herbert remarked:

> The words are not in the presence of the members of the Senate, or in the presence of the members of the House of Representatives, but in the presence of the Senate, which can only mean the organized Senate, and the House of Representatives, which can only mean the organized House of Representatives.

Id. at 75.

312. For example, Representative Caldwell stated that

> the action of the two Houses shall be separate and concurrent upon all questions of contest arising under the count, but joint as to results, thus preserving the dignity and rights of the two bodies by conceding to each equal and concurrent powers in counting and judging of the validity of electoral votes without merger of the lesser body into the numerically greater.

18 CONG. REC. 31. Addtionally,

> [t]he separate concurrent action of both Houses provided for in the bill preserves the constitutional identity, rights, and dignity of each. This concession of each House to the other of equal and concurrent power to decide on informalities and illegalities appearing on the face of returns, upon objection of a Senator or Representative, is necessary to the determination of results.

Id.; *see also id.* at 50 (remarks of Rep. Adams) ("[M]y theory is that the two Houses of Congress, acting each in its own individual capacity, each voting by itself, have absolute control of the entire subject.").

313. *See infra* notes 526–53 and accompanying text.

314. For the structural argument that Congress may not bind the joint convention in counting electoral votes, much less future joint conventions, see *infra* notes 498–525 and accompanying text.

315. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This

we must ask ourselves under what clause or clauses Congress has the express or implied power to pass the Electoral Count Act. A dedicated constitutionalist cannot escape from asking this most basic question of the Electoral Count Act.

There is, of course, no express power enabling Congress to pass the Electoral Count Act.[316] There must therefore be some implied power enabling Congress to pass the Electoral Count Act; otherwise, it must be unconstitutional. There are only two options: the Necessary and Proper Clause[317] and the Electoral College Clauses themselves.[318] Will either of these clauses bear the constitutional load?

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government is acknowledged by all to be one of enumerated powers."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("[T]hat those limits may not be mistaken, or forgotten, the constitution is written.").

316. This easy textual point was, of course, made during the Electoral Count Act debates. For example, Senator Jones remarked that

> [t]he authority proposed to be given to the Senate and House of Representatives by this bill cannot surely be derived from any of the express powers of the Constitution. There is not a word said in the article which contains the delegated powers on this subject of counting the electoral votes. All that the Constitution says in regard to the electoral vote is to be found embodied in the second article.

COUNTING ELECTORAL VOTES, *supra* note 3, at 596.

317. U.S. CONST. art. I, § 8, cl. 18.

318. The most recent scholars to address the Electoral Count Act state that "Congress probably has the power, when explicit constitutional requirements are violated, not to count elector votes" because Members of Congress take an oath or affirmation to support the Constitution. Ross & Josephson, *supra* note 7, at 713. This argument does not support the constitutionality of the Electoral Count Act unless the Oath or Affirmation Clause is the font of power for the Electoral Count Act—an interpretation that is devoid of any textual, historical, or structural support.

It is also not at all clear whether Ross and Josephson believe that the Oath or Affirmation Clause is the font of congressional *power* or congressional *duty* to reject unconstitutional electoral votes. Their foregoing statement suggests the former, but two other statements suggest the latter. *See id.* ("Depending on the type of constitutional requirement and whether rejection of the vote would change the result of the election, Congress might have a duty, under the oath of office to which its members swear, to reject an elector vote that does not conform to the Constitution."); *id.* at 739 ("Under the oath each member takes, Congress *must* uphold constitutional requirements for presidential elections, particularly those that lie at the heart of the constitutionality of the process.") (emphasis added). If the Oath or Affirmation Clause is the font of congressional duty to reject unconstitutional electoral votes, they cannot be correct that that duty possibly turns "on the type of constitutional requirement and whether the rejection of the vote would change the result of the election." The duty to support the Constitution is absolute, not conditional.

Moreover, the argument from the Oath or Affirmation Clause has almost no historical support: only one Member of Congress, to my knowledge, pointed to the Oath or Affirmation Clause as a font of congressional power over the electoral count. *See* COUNTING ELECTORAL VOTES, *supra* note 3, at 142 (remarks of Rep. Marshall) ("You are under oath to support the Constitution, and you cannot count a vote which violates that instrument, and is a breach of the privileges of the electoral colleges."). The

a. The Necessary and Proper Clause

The first possible font of congressional power to pass the Electoral Count Act is the Necessary and Proper Clause. The Necessary and Proper Clause provides that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[319] Scholars are split as to whether the Necessary and Proper Clause is a font of power for the Electoral Count Act.[320]

A careful parsing of the Necessary and Proper Clause reveals that there are three prongs of power. Under the Clause, Congress has power for carrying into execution (1) "the foregoing Powers," (2) "all other Powers vested by this Constitution in the Government of the United States," and (3) "all other Powers vested by this Constitution . . . in any Department or Officer thereof."[321] Which of these three prongs of the Necessary and Proper Clause will support Congress's power to enact the Electoral Count Act?

We begin with the first prong. The phrase "foregoing Powers" obviously refers to the seventeen enumerated powers of Article I,

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argument has even less textual support: when we consult the text of the Oath or Affirmation Clause, we see that Members of Congress take an oath or affirmation to support the Constitution, but so do members of the state legislatures and executive and judicial Officers of the United States and of the several states. U.S. CONST. art. VI, cl. 3. Indeed, Senator Pinckney pointed to the oaths or affirmations taken by members of the state legislatures and state executives to argue against any congressional power to judge electoral votes. *See, e.g.*, 10 ANNALS OF CONG. 131 (1800) ("Is not the Constitution the supreme law of the land, and must not the State Legislatures conform their directions in the appointment of Electors to the directions of the Constitution?"). Senator Pinckney also remarked:

> Another serious objection to this bill, or to the exercise of this power, either by Congress or committee, is, that the Executives of the States and the State Legislatures are equally bound with Congress, by oath, "to support the Constitution;" it is an oath they all take at the commencement of each new Legislature.

Id. at 144–45. The important point is that there is no textual justification for supposing that the Oath or Affirmation Clause gives Congress any special constitutional duty in the counting of the electoral vote. *Cf.* U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation.").

319. U.S. CONST. art. I, § 8, cl. 18.

320. *Compare* Burgess, *supra* note 18, at 646 (concluding that the Necessary and Proper Clause is the font of power for the Electoral Count Act), *with* Ross & Josephson, *supra* note 7, at 714–15 (reaching opposite conclusion).

321. As a matter of grammar and punctuation, it is arguable that there is no standalone second prong of the Necessary and Proper Clause, and that the second prong and third prong together constitute one prong.

section 8,[322] and the Electoral College Clauses of the original Constitution are not "foregoing Powers" in any way given their placement in Article II. The first prong of the Necessary and Proper Clause will not suffice as a font of power for the Electoral Count Act.

Let us, for the moment, skip over the second prong and consider the third prong. The question is whether Congress (more precisely, the assemblage of the Senate and House of Representatives for the purposes of the electoral count) is a "Department [of the United States]" whose members are "Officer[s] [of the United States]."[323] The answer to this question is "No." Congress is not a "Department" and the Members of Congress are not "Officer[s]" within the meaning of the Necessary and Proper Clause.

It is well settled that the Members of Congress are not "Officers of the United States."[324] The best textual argument for this proposition is that Members of Congress are not subject to impeachment by the House of Representatives and conviction by the Senate because they are not "civil Officers of the United States."[325] Furthermore, the Ineligibility Clause of Article I, Section 6 provides that "no Person holding any *Office under the United States*, shall be a *Member* of either House during his Continuance in Office."[326] Thus,

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322. U.S. CONST. art. I, § 8, cls. 1–17; *see also* INS v. Chadha, 462 U.S. 919, 983–84 (1983) (White, J., dissenting) (stating that "the Necessary and Proper Clause vests Congress with the power 'to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers [the enumerated powers of § 8]' ") (alteration in original).

323. Technically, the third prong of the Necessary and Proper Clause refers to "Department" or "Officer" and not to "Department of the United States" or "Officer of the United States." The phrase "of the United States" is fairly and necessarily attributed to both given the last word in the clause "thereof." *See* U.S. CONST. art. I, § 8, cl. 18 (stating that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). At least one scholar agrees that the word "Officer" in the Necessary and Proper Clause is "a synonym for the term of art 'Officer of the United States.' " Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 161 (1995).

324. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-17, at 290 (2d ed. 1988); Amar & Amar, *supra* note 27, at 114–17 (presenting textual proof); Calabresi, *supra* note 323, at 158–63 (same); Vasan Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 133 n.46 (2001) (same).

325. *See* U.S. CONST. art. II, § 4 ("The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."). For early statements supporting this point, see, for example, 4 ELLIOT'S DEBATES, *supra* note 250, at 33 (remarks of Gov. Samuel Johnston at North Carolina ratifying convention); *id.* at 34 (remarks of Archibald Maclaine at North Carolina ratifying convention); *id.* at 127 (remarks of James Iredell at North Carolina ratifying convention).

326. U.S. CONST. art. I, § 6, cl. 2 (emphasis added); *see also* 2 FARRAND, *supra* note 35,

the Members of Congress are not "Officer[s]" within the meaning of the Necessary and Proper Clause.

The question remains whether Congress is a "Department [of the United States]" within the meaning of the Necessary and Proper Clause, even if Members of Congress are not "Officer[s] [of the United States]" within the meaning of the same. This is a trickier question, but not one without an answer. The word "Department" in the Necessary and Proper Clause has a technical, term of art meaning. It does not refer to the generic legislative, executive, and judicial departments of the United States—as used in *The Federalist*[327] or in the early United States Reports[328]—but only refers to the specific executive and judicial departments of the United States. The Constitution itself suggests as much. The word "Department" does not appear elsewhere in Article I (which appertains to the legislative department in the colloquial sense) but in the Necessary and Proper Clause; the word does appear in two other clauses—the Opinion Clause[329] and the second part of the Appointments Clause[330]—which refer to "executive Departments" and "Heads of Departments" respectively. Nowhere is the word "Department" used in the Constitution to refer to the legislative, executive, or judicial department in the colloquial sense.

There are at least a few other considerations which militate against finding that Congress is a "Department" within the meaning of the Necessary and Proper Clause. First, it would be very strange

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at 492 ("The last clause rendering a *Seat* in the Legislature & an *office* incompatible was agreed to nem: con:.") (emphasis added).

327. *See, e.g.*, THE FEDERALIST NO. 49 (James Madison) (entitled "Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention"); THE FEDERALIST NO. 49, at 282 (James Madison) (Clinton Rossiter ed., Mentor 1999) (1961) (describing "perfectly co-ordinate" legislative, executive, and judicial departments); *see also* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1156 n.6 (1992) (noting similar point).

328. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329 (1816) (Story, J.) ("The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments."); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 272–73 (1796) (Iredell, J.) (referring to the "Legislative, Executive, and Judicial Departments" and the "Legislative department"); Calder v. Bull, 3 U.S. (3 Dall.) 386, 398 (1789) (Iredell, J.) (referring to "a government, composed of Legislative, Executive and Judicial departments").

329. U.S. CONST. art. II, § 2, cl. 1 ("[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . .").

330. U.S. CONST. art. II, § 2, cl. 2 ("[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

(but perhaps not unthinkable) for Members of Congress not to be "Officer[s]," but for Congress to be a "Department" within the meaning of the Necessary and Proper Clause. The logical argument is that "If Department, then Officer" is true, then "If not-Officer, then not-Department" is also true. The Necessary and Proper Clause ostensibly relates to "Officers" who are "Officers of Departments" who are, in turn, "Officers of Departments of the United States," or simply "Officers . . . of the United States." Second, if Congress is a "Department" within the meaning of the Necessary and Proper Clause, then Congress would be able to legislate with respect to itself on matters concerning its own powers.[331] Such legislation flies in the face of constitutional text. The Rules of Proceedings Clause makes explicit that "[e]ach House may determine the Rules of its Proceedings."[332] Congress may not therefore enact rules of proceedings for Congress or each House thereof by statute.[333] Such legislation also violates constitutional structure. The separation of the two Houses of Congress in the exercise of its powers—in a word, bicameralism—is a critical structural feature of Article I designed to check legislative tyranny.[334] Moreover, constitutional structure suggests that Congress may not bind itself or future Congresses in the exercise of its own powers.[335] Third, the prevailing interpretation of the third prong of the Necessary and Proper Clause appears to be that it only refers to the executive and judicial departments of the United States.[336] Thus, Congress (more precisely, the assemblage of the

331. Such legislation is to be sharply distinguished from legislation enacted pursuant to Congress's enumerated powers operating on, for example, the federal government (including Congress) as well as the governments of the several States as well as the people (citizens and aliens) of the United States.

332. U.S. CONST. art. I, § 5, cl. 2.

333. For a contrary view taken in passing, see Calabresi, *supra* note 323, at 160 n.31 (noting that the "Necessary and Proper Clause empowers Congress to carry into execution its own powers, including the rule-making powers of both Houses").

334. *See, e.g.*, THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., Mentor 1999) (1961) ("In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on society will admit."); 1 FARRAND, *supra* note 35, at 254 (similar); 2 STORY'S COMMENTARIES, *supra* note 9, §§ 547–557, at 27–36 (discussing importance of bicameralism in constitutional structure); *see also* INS v. Chadha, 462 U.S. 919, 947–51 (1983) (same).

335. *See infra* notes 498–525 and accompanying text.

336. *See, e.g.*, Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274 n.23 (1993) (reading third prong of the Necessary and Proper Clause as giving Congress power to pass laws " 'horizontally' to implement the constitutionally vested powers of federal

Senate and House of Representatives for the purposes of the electoral count)[337] is not a "Department" whose members are "Officers" within the meaning of the Necessary and Proper Clause. The third prong of the Necessary and Proper Clause also will not suffice as a font of power for the Electoral Count Act.[338]

Only the second prong of the Necessary and Proper Clause remains: Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States."[339] The question is thus whether the counting function is one

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executive and judicial officers"); William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS., 102, 107–120 (1976).

337. Although this body is technically not "Congress," the argument that this body is not a "Department" whose members are "Officer[s]" within the meaning of the Necessary and Proper Clause is largely analogous to the argument set forth above concerning Congress. The members of this body are the Members of Congress, and this body is not an executive or judicial department of the United States whose officers (with the exception of the President and Vice President) are appointed pursuant to the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2.

338. Professor Rosenthal believes the Necessary and Proper Clause is the font of congressional power not to count the electoral votes of faithless electors. *See* Rosenthal, *supra* note 221, at 32. His fatal mistake is that he believes that Members of Congress are "Officers of the United States." *See id.* ("The power to count electoral votes is a power vested in the President of the Senate and the members of both [H]ouses of Congress, all of whom are officers of the United States.").

Similarly, during the Electoral Count Act debates, Senator Edmunds believed that Congress was a "Department" within the meaning of the Necessary and Proper Clause. His words leave no doubt on this construction:

> The Constitution of the United States vests powers and duties in all the three great departments of the Government. It then provides that Congress shall have the power to pass all laws necessary to carry into effect the provisions of the Constitution and the powers invested in any of its several departments.
>
> . . . [I]f under your general power of regulation which the Constitution gives you of carrying into effect its powers you may provide how the Supreme Court shall exercise its functions, how the Executive shall exercise his functions carrying out the duties that the Constitution has imposed upon him, may you not also do the same thing when, assuming that to be the true construction of the Constitution, the two houses are to meet and witness the counting of these votes and to decide upon them? It seems to me that no man can considerately answer that question in the negative.

COUNTING ELECTORAL VOTES, *supra* note 3, at 455.

339. Again, this begs the question whether there is a standalone second prong of the Necessary and Proper Clause. *See supra* note 321. The only power vested by the Constitution in the "Government of the United States" as an undifferentiated whole (in contrast to powers vested in specific parts thereof) is that (arguably) under the Guarantee Clause. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature

of the "Powers vested by this Constitution in the Government of the United States."

The textual evidence strongly militates against such a finding. Consider again the text of the Electoral College Clauses: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates *and the votes shall then be counted.*"[340] Obviously, the Electoral College Clauses do not employ the word "Power," unlike two other clauses outside of Article I, section 8 which do employ the word "Power" with respect to Congress—the Treason Clause and Territories Clause.[341] Moreover, the text and tenor of the Electoral College Clauses suggest duty and not discretion implied by the word "Power"—hence the use of the word "shall," and more interestingly, the use of passive voice.

There are, however, several clauses outside of Article I, section 8 where Congress has "Power" in the Article I, section 8 sense of the word, but which do not employ the word "Power." But these clauses make clear that Congress has legislative power by employing the phrase "may by law" or the phrase "shall by law" or their close variants. In the original Constitution, we need only to look to the Times, Places, and Manner Clause,[342] Presidential Succession Clause,[343] the second part of the Appointments Clause,[344] the Jury

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cannot be convened) against domestic Violence."). Nonetheless, for present purposes, I assume that there are other "Powers vested by this Constitution in the Government of the United States" that are not "Powers vested by this Constitution . . . in any Department or Officer [of the Government of the United States]." U.S. CONST. art. I, § 8, cl. 18.

340. U.S. CONST. amend. XII (emphasis added).

341. *See* U.S. CONST. art. III, § 3, cl. 2 (Treason Clause) ("The Congress shall have *Power* to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.") (emphasis added); U.S. CONST. art. IV, § 3, cl. 2 (Territories Clause) ("The Congress shall have *Power* to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .") (emphasis added).

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

343. *See* U.S. CONST. art. II, § 1, cl. 6 (Presidential Succession Clause) ("Congress *may by Law* provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President . . . .") (emphasis added).

344. *See* U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause) ("[B]ut the Congress *may by Law* vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.") (emphasis added).

Trial Clause,[345] and the Full Faith and Credit Clause[346] as examples of the former; and to the Census Clause,[347] the Congress Meeting Clause,[348] and the first part of the Appointments Clause[349] as examples of the latter. But, unlike these several clauses, there is no "may by law" or "shall by law" provision modifying the counting function.[350]

When the Constitution commits "Power" to Congress outside of Article I, Section 8, it says so. It is more than doubtful that the seven word phrase "and the votes shall then be counted" is one of the "Powers vested by this Constitution in the Government of the United States" within the meaning of the Necessary and Proper Clause.[351] As

345. *See* U.S. CONST. art. III, § 2, cl. 3 (Jury Trial Clause) ("[B]ut when not committed within any State, the Trial shall be at such Place or Places as the Congress *may by Law* have directed.") (emphasis added).

346. *See* U.S. CONST. art. IV, § 1 (Full Faith and Credit Clause) ("And the Congress *may by general Laws* prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.") (emphasis added).

347. *See* U.S. CONST. art. I, § 2, cl. 3 (Census Clause) ("The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they *shall by Law* direct.") (emphasis added).

348. *See* U.S. CONST. art. I, § 4, cl. 2 (Congress Meeting Clause) ("The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they *shall by Law* appoint a different Day.") (emphasis added).

349. *See* U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause) ("[The President] by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which *shall be established by Law* . . . .") (emphasis added).

350. Another example that does not neatly fit into the "may by law" or "shall by law" categories is the Congress Compensation Clause. U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained *by Law*, and paid out of the Treasury of the United States.") (emphasis added).

351. Nevertheless, a few scholars recently describe the counting phrase of the Electoral College Clauses as the "congressional counting power," *see* Coenen & Larson, *supra* note 18, at 909–16, or the "counting power," *see* Barkow, *supra* note 17, at 278–79, 284, 286, 288 (2002). This phraseology is wrong, at least insofar as the word "Power" is used in the Constitution. The word "power" implies discretion to do or not do something. The Electoral College Clauses are devoid of "power"; they direct the counting agent to count what-are-the-electoral-votes *and* not to count what-are-not-the-electoral-votes—nothing less and nothing more. (The scope of what-are-the-electoral-votes is discussed in Part III *infra*.) The phraseology is also odd considering that Professors Coenen and Larson acknowledge that "[t]here is not . . . a congressional *power* to count votes; there is a congressional *duty*," Coenen & Larson, *supra* note 18, at 910, emphasizing the word "shall" and the passive voice of the phrase "be counted" in the text of the counting phrase, *see id.* at n.298. Notably, Professors Coenen and Larson reject the argument that the counting phrase of the Electoral College Clauses is one of the "Powers vested by this Constitution in the Government of the United States," U.S. CONST. art. I, § 8, cl. 18, and hence not within the meaning of the Necessary and Proper Clause:

a matter of principled textual interpretation, the second prong of the Necessary and Proper Clause also will not suffice as a font of power to enact the Electoral Count Act.

* * *

What about the historical interpretation of the Necessary and Proper Clause? To be sure, the questions of whether the counting function is one of the "Powers vested by this Constitution in the Government of the United States" within the meaning of the Necessary and Proper Clause and whether the Necessary and Proper Clause is the font of power for congressional regulation of the electoral count has been the subject of significant debate by Members of Congress. These questions were controversial from the first.

The Senate of the Sixth Congress first debated these questions in considering the Grand Committee Bill.[352] After Federalist Senator Ross moved to appoint a committee authorized to report a bill, Senator Brown disagreed. He "was of opinion that this was a subject on which Congress had no right to legislate. When the Constitution undertook to make provisions on a subject, if they were found incomplete, or defective, they must be remedied by recommending an amendment to the Constitution."[353] Federalist Senator Dexter expressed no doubt that the Necessary and Proper Clause authorized legislation on the subject. "The law now proposed," said Dexter,

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> We would reject this first argument on the theory that the vesting of a duty, particularly one as important as determining the identity of our President, inescapably carries with it the grant of a "power" in the sense that the word is used in the Necessary and Proper Clause. Indeed, we think that there is a strong *a fortiori* argument to be made here. If Congress can do anything appropriate to carry into effect powers it may (but need not) exercise, does it not logically follow that it can do anything appropriate to carry out those powers it has no choice but to wield? The recognition of the existence of less urgently needed powers logically dictates the recognition of more urgently needed powers as well.

Coenen & Larson, *supra* note 18, at 910 (footnotes omitted). This argument fails to persuade for at least a few reasons. First, this argument overlooks the linguistic meaning of the word "Power" as employed in the Necessary and Proper Clause and the rest of the original Constitution. Second, this argument does not grapple with the argument that Congress may not legislate with respect to itself under the Necessary and Proper Clause, *see* text accompanying *supra* notes 331–38. Third, this argument mischaracterizes the Necessary and Proper Clause as a broad-based grant of power to carry into effect all duties imposed on Congress, or for that matter, on the executive and judicial departments of the federal government. If Congress "can do anything appropriate to carry into effect powers *it* may (but need not) exercise," Coenen and Larson, *supra* note 18, at 910 (emphasis added), what about Congress doing anything appropriate to carry into effect those "powers" (read duties) that the executive and judicial departments possess but have no choice but to wield?

352. *See* 10 ANNALS OF CONG. 29–32 (1800).

353. *Id.* at 29.

"appears to be necessary to carry into effect the power of appointing the President; it is therefore clearly Constitutional."[354] His argument may be that just as certain powers may give rise to implied powers, certain duties may give rise to implied powers reasonably necessary to give effect to those duties.

Was Senator Dexter correct? Is there a "power of appointing the President" in the Electoral College Clauses? So too Federalist Senator Livermore "never felt less doubt on any subject that the one now under consideration: the Constitution has given many directions to the appointment of the President, some of which he read."[355] Unfortunately, the recorded debate does not indicate what provisions Senator Livermore read—perhaps for good reason. There is nothing in the Electoral College Clauses that suggests that Congress has any power to regulate the electoral count. Senator Baldwin, who was a Framer at the Philadelphia Convention, disagreed with the Federalists on virtually every point. In a detailed speech, much of which we shall uncover in the course of the structural argument, Senator Baldwin stated that the Federalists' efforts to regulate the electoral count "must be made by proposing an amendment to the Constitution to that effect; and that they could not be made by law, without violating the Constitution."[356] In other words, there was no express or implied power in the Constitution to regulate the electoral count by law. Senator Baldwin took particular issue with Senator Dexter's conception of the Necessary and Proper Clause. Senator Baldwin explained that the Necessary and Proper Clause

> speaks of the use of the powers *vested* by the Constitution—this resolution relates to the formation of a competent and essential part of the Government itself: that speaks of the movements of the Government after it is organized; this relates to the organization of the Executive branch, and is therefore clearly a Constitutional work, and to be done, if at all, in the manner pointed out by the Constitution, by proposing an article of amendment to the Constitution on that subject.[357]

Senator Baldwin's statement is a particularly fine textual meditation based on the word "vested" in the Necessary and Proper Clause. If we look intratextually, we see that the word "vested" appears alongside the word "Power" in each of the Vesting Clauses of

354. *Id.* at 30.
355. *Id.*
356. *Id.* at 32.
357. *Id.* (emphasis added).

Articles I, II, and III.[358] If the second prong of the Necessary and Proper Clause is a placeholder of sorts for the legislative, executive, and judicial powers of the United States read as a whole, then the second prong cannot support the Electoral Count Act. The Electoral College Clauses are not a part of the legislative power or the judicial power, and as Senator Baldwin keenly observed, they are not a part of (and are antecedent to) the executive power.

The Necessary and Proper Clause resurfaced some twenty years later in the regulation of the electoral count. In December of 1820, approximately two months before the electoral count of 1821, Senator Wilson introduced a resolution entitled, "*Attempt to Remedy the Uncertainty as to Counting the Electoral Vote by Legislation.*"[359] He discussed the Necessary and Proper Clause as the font of congressional power to regulate the electoral count and stated that

> Congress has unquestionably the power, under the last clause of the eighth section of the first article of the Constitution, and he thought they ought to exercise it by vesting the authority to decide upon doubtful, disputed, or unlawful votes, either in the President of the Senate, the Senate itself, the House of Representatives, or the two houses conjointly or separately.[360]

This statement reflects some serious problems with the scope of congressional power to regulate the electoral count under the Necessary and Proper Clause. Even if Congress may enact counting legislation under the Necessary and Proper Clause vesting the "counting power" in both Houses of Congress (conjointly or separately), how may Congress vest such power in either House alone? And how may Congress vest such power in the President of the Senate, possibly expanding the constitutional duties of the Vice President? The Committee of the Judiciary, which considered Senator Wilson's resolution, seemed to think that counting legislation was constitutional but merely inexpedient, and hence Senator Wilson's resolution was not acted upon.[361]

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358. *See* U.S. CONST. art. I, § 1 ("All legislative *Powers* herein granted shall be *vested* in a Congress of the United States, which shall consist of a Senate and House of Representatives.") (emphasis added); U.S. CONST. art. II, § 1, cl. 1 ("The executive *Power* shall be *vested* in a President of the United States of America.") (emphasis added); U.S. CONST. art. III, § 1 ("The judicial *Power* of the United States, shall be *vested* in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.") (emphasis added).

359. COUNTING ELECTORAL VOTES, *supra* note 3, at 48.

360. *Id.*

361. *Id.* (remarks of Sen. Smith, member of Committee of the Judiciary) (reporting

Little was said about the application of the Necessary and Proper Clause to counting electoral votes in the years immediately following 1820. Senator Van Buren introduced a bill in the Senate in 1824 that was very similar to the Electoral Count Act.[362] Senator Macon did not think that this bill was necessary or constitutional and argued that "Congress had no power to legislate upon the subject" of Senator Van Buren's bill.[363] This bill passed the Senate but the House never considered it.

During the Wisconsin Incident of 1857, Senator Hunter invoked the Necessary and Proper Clause as the font of power "to regulate by law the details of the mode in which the votes are to be counted."[364] But Senator Collamer expressed his serious doubts that Congress could legislate on the Wisconsin problem: "I very much doubt whether the [F]ramers of the Constitution ever intended to leave the subject of the presidential election to the House of Representatives, or the Senate, or either, or both of them."[365] This statement echoes Senator Wilson's observations on the scope of congressional power to regulate the electoral count under the Necessary and Proper Clause.

During the Electoral Count Act debates, the Members of Congress repeatedly pointed to the Necessary and Proper Clause as the font of power to pass the Electoral Count Act. It does appear that these Members of Congress relied on this clause as the font of power to pass the Electoral Count Act.[366] As Professors Issacharoff,

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"[t]hat the committee have had the resolution under their consideration, and are of opinion that it is inexpedient at this time to legislate on this subject").

362. *Id.* at 57–58.

363. *Id.* at 58.

364. *Id.* at 129.

365. *Id.* at 132.

366. *See, e.g.*, 15 CONG. REC. 5461 (1884) (remarks of Rep. Springer) ("If Congress may make all laws which are necessary to carry into effect the powers granted by the Constitution, it may make such laws as it may deem necessary to carry out that express provision of the Constitution, to count the votes for President and Vice-President."). Senator Sherman argued:

> Congress has undoubted power under the residuary clause in the Constitution giving powers to Congress to pass all laws suitable and necessary to carry into execution the express grants of power. Here is a provision in the Constitution for the election of electors, and therefore the mode and manner by which the votes of electors may be counted may be pointed out, but Congress shall not provide that the votes shall *not* be counted, because the Constitution says that the votes shall be counted then and there.

17 CONG. REC. 817 (1886); *see* 18 CONG. REC. 30 (1886) (remarks of Rep. Caldwell) ("This bill is to prescribe the mode in which this count shall be made, and supply the omission that exists[,] under the first article of the Constitution, which gives Congress all power to make all laws necessary to carry out these provisions."); *id.* at 74 (remarks of Rep. Baker) ("It is conceded that [the Necessary and Proper Clause] is a delegation to

Karlan, and Pildes conclude, "A majority of Congress was persuaded by the argument that the Act was permitted under the Necessary and Proper Clause to give substance to the provisions of the Twelfth Amendment."[367]

There were, of course, those who disagreed with this interpretation of the Necessary and Proper Clause. For example, Representative Browne explicitly denied that the counting function was a "power" in the Article I, Section 8 sense of the word—a point that would implicitly apply to the word "power" in the Necessary and Proper Clause as well:

> The [F]ramers of the Constitution withheld from Congress the power to interfere with this count; they withheld it by not committing the power to do it. When the Constitution confers a power it does so in express words, as Congress shall have power to borrow money, collect taxes, regulate commerce, coin money, and the like. By no words, by no implication, has the power been given Congress to settle questions concerning the electoral count.[368]

Congress of power to provide for carrying into effect the power to open and count the votes of the electors lodged in the President of the Senate."). Representative Eden remarked:

> In providing by law a method to insure a fair count of the electoral vote we need exercise no doubtful powers. The Constitution requires the vote to be counted. I assume that Congress has the authority under the Constitution to pass all laws necessary to carry into effect that mandate of the Constitution.

Id. at 50. Representative Herbert made the point that

> [T]he Constitution vests in the Federal Government the power to count the votes; and the exercise of that power is a Federal function, to be controlled by the Federal Government . . . . A power has been given, and it is perfectly plain that the Constitution vests in Congress the power to enact what legislation is necessary and proper to carry out the purposes of the provision granting the power.

Id. at 75.

367. ISSACHAROFF ET AL., *supra* note 16, at 98.

368. 15 CONG. REC. 5465; *see also* 18 CONG. REC. 45 (remarks of Rep. Dibble). Representative Dibble, carefully parsing the Necessary and Proper Clause, stated:

> It is true there is a clause which says that Congress has the right to pass all laws necessary to carry out certain powers; but those powers are defined. It has the power to carry out its own express grants of power. It has the right to pass laws concerning any act of the Federal Government; but the election of a President is not an act of the Federal Government, but is the action of the State Government. It has the right to pass laws concerning what any Federal officer shall do or what any Federal department shall do; but there its power is exhausted. So that Congress has no power in relation to the electoral vote except to count, in the sense of enumeration.

Id.

And Senator Wilson made known his belief that "defects in the Constitution of the United States can not be remedied by acts of Congress."[369] At a minimum, several Members of Congress, including those who voted for the Electoral Count Act, had significant doubts with respect to its constitutionality.

The Necessary and Proper Clause is not a font of power for the Electoral Count Act. The counting function is neither one of the "foregoing Powers," nor "Powers vested by this Constitution in the Government of the United States," nor "Powers vested by this Constitution . . . in any Department or Officer [of the United States]" within the meaning of the Necessary and Proper Clause. Put differently, congressional regulation of the electoral count, however "necessary," is not "proper"—and hence not within Congress's domain or jurisdiction—within the meaning of the Necessary and Proper Clause.[370] In case there should be any doubt on this point, the structural argument makes clear that doubt should be resolved against Congress in the specific context of presidential election.[371] The Electoral Count Act treads on terribly thin textual ground vis-à-vis the Necessary and Proper Clause, and to the only remaining possible font of implied power, we now turn.

b. The Electoral College Clauses

The second possible font of congressional power to enact the Electoral Count Act is the Electoral College Clauses themselves. There are at least two historical precedents for this supposition. First, the First Congress encountered the very tricky problem of specifying the oath or affirmation for state legislators and officers under the

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369. 17 CONG. REC. 1058; *see also id.* at 1059 (arguing that "a power vested by the Constitution [cannot] be divested by legislative action"). Senator Ingalls fervently stated in words that ring true today:

> Careful consideration of this subject will convince any thoughtful student of the Constitution that the scheme which has been devised and which now remains in our organic law is fatally defective, and that nothing can be done by way of legislation to cure the inevitable evils by which it is surrounded, and the more we proceed by legislation to patch, to bridge over apparent difficulties, to abbreviate the number of perils which surround it, by so much we retard and delay the exercise of the power which the people must ultimately be called upon to perform in adopting some system that shall remove the perils in which it is now environed.

Id. at 1026.

370. For an illuminating discussion of the "jurisdictional meaning" of the word "proper" in the Necessary and Proper Clause, see Lawson & Granger, *supra* note 336, at 297–326.

371. *See infra* notes 428–554 and accompanying text.

Oath or Affirmation Clause.[372] None of the three prongs of the Necessary and Proper Clause was thought to apply. The Oath or Affirmation Clause is not a foregoing power or one of the powers vested by the Constitution in the government of the United States, and state legislators and officers are by definition not officers of the United States. The First Congress simply concluded that the Oath or Affirmation Clause was "self-executing," and prescribed an oath or affirmation for these persons anyway.[373] Second, much later, the Supreme Court affirmed Congress's ability to enact legislation under the Fugitive Slave Clause which appears to be self-executing.[374] The rationale for this decision was that the Fugitive Slave Act is a "direct implementation" of the Fugitive Slave Clause and therefore does not go beyond the provisions of the clause.[375]

What does this mean for the Electoral Count Act? Two questions arise: whether some congressional regulation of the electoral count may be sustained under the Electoral College Clauses and whether the Electoral Count Act may be sustained under the Electoral College Clauses.[376]

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372. *See* U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

373. *See* David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 169–71 (1995); *see also* Kent Greenfield, *Original Penumbras: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79, 111–15 (1993) (building on Professor Currie's then-unpublished manuscript).

374. U.S. CONST. art. IV, § 2, cl. 3 provides:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon Claim of the Party to whom such Service or Labour may be due.

Id.; *see* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 596–97 (1842) (holding that the Fugitive Slave Act of 1793 was constitutional).

375. *See* Printz v. United States, 521 U.S. 898, 909 (1997). But oddly, and in what is a most tortured interpretation of the Constitution, the Supreme Court has held that legislation which is not a "direct implementation" of the Fugitive Slave Clause—that is, legislation that goes beyond the substance and procedure of the clause—is a constitutional exercise of congressional power under the Full Faith and Credit Clause which provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1; *see* Printz, 521 U.S. at 909 n.3 (1997) (citing California v. Superior Court of Cal., San Bernardino Cty., 482 U.S. 400, 407 (1987)).

376. Indeed, Professor Currie has suggested that some congressional regulation of the electoral count may be supported on this "implicit" view of the Electoral College Clause. *See* Currie, *supra* note 35, at 620 n.73.

Article II, Section 1, Clause 3 and the Twelfth Amendment seem to be at least as self-executing as the Oath or Affirmation Clause or the Fugitive Slave Clause. Indeed, Article II, Section 1, Clause 3 is by far the longest "clause" in the original Constitution, containing approximately 290 words, compared to the next longest clause with approximately 165.[377] These two clauses look more like technical rules than the open-textured provisions such as the Privileges and Immunities Clause, Due Process Clause, and Equal Protection Clause of the Fourteenth Amendment.[378] These two clauses could hardly be more prolix for constitutional provisions. Professor Gardner offers the following account:

> Presumably, these detailed instructions reflect society's determination that the use of the particular process set forth will assure a result sufficiently accurate to justify society's consent to the winner.... This provision of the Constitution is unusual: it is rare for the people to dictate in such detail the manner in which they would like things done. More typical is article I, section 4, governing congressional elections....[379]

In addition to this point of prolixity, consider also that the Electoral College Clauses, and especially the Twelfth Amendment, contain no special provision empowering Congress to enforce it by appropriate legislation, in contrast to a host of other (and admittedly later) amendments to the Constitution.[380]

Apparently, the Second Congress did not think that Article II, Section 1, Clause 3 was fully self-executing given the regulations on the manner of certifying and transmitting electoral votes.[381] However, it is unclear whether the Second Congress based these regulations on the implied power of Article II, Section 1, Clause 4 and or of Article II, Section 1, Clause 3. Recall that the draft of Article II, Section 1, Clause 4 at the Philadelphia Convention provided that "[t]he Legislature may determine the time of choosing the electors, and of their giving their votes; *and the manner of certifying and transmitting their votes*—But the election shall be on the same day throughout the

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377. *See* U.S. CONST. art. I, § 2, cl. 3.

378. *See* U.S. CONST. amend. XIV, § 1.

379. James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 229 (1990).

380. *See* U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2; U.S. CONST. amend. XVIII; § 2; U.S. CONST. amend. XIX, § 2; U.S. CONST. amend. XXIV, § 2; U.S. CONST. amend. XXVI, § 2.

381. *See supra* notes 32–34 and accompanying text.

U—States"[382] and that the italicized language was inexplicably dropped.[383] To be sure, regulations on the manner of certifying and transmitting their votes do not support regulations on the electoral count.

The problem of binding future joint conventions aside,[384] some congressional regulation of the electoral count may easily be supported under the Electoral College Clauses. For example, a regulation providing that the joint convention count electoral votes in the alphabetical order of States in the Union probably would be constitutionally acceptable. The real issue is whether Congress had the legislative authority to pass the Electoral Count Act in the first place.

The Electoral Count Act goes well beyond the text of the Electoral College Clauses. The Electoral Count Act is by no means a "direct implementation" of the Electoral College Clauses. During the Electoral Count Act debates, Senator Jones made the argument from prolixity that Congress did not have the power to legislate:

> That [second] article provides the mode and manner of returning and counting that vote. If it was intended that Congress should exercise authority over this subject by general legislation, why is it that the Constitution, instead of giving as in other cases a general power to Congress, has anticipated such legislation by a lengthy provision specifying particularly the manner in which the voice of the electors shall be ascertained? It was not the intention of the Constitution to leave to Congress the power to determine how the President and Vice-President should be elected. This is clearly indicated by the express words of the first section of the second article.[385]

It is more than doubtful that the Electoral Count Act could be sustained as a direct implementation of the Electoral College Clauses. If the Electoral Count Act passes constitutional muster as a direct implementation of the Electoral College Clauses, it is most difficult to see what would constitute an indirect—and constitutionally-impermissible—implementation of those clauses.

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382. 2 FARRAND, *supra* note 35, at 529 (emphasis added).
383. *See supra* note 36 and accompanying text.
384. *See infra* notes 498–525 and accompanying text.
385. COUNTING ELECTORAL VOTES, *supra* note 3, at 596–97.

c. Textual Arguments from Negative Implication

Two textual arguments from negative implication cast additional doubt upon any font of congressional power for the Electoral Count Act, and particularly the implied font of congressional power of the Electoral College Clauses itself. When the Constitution contemplates a legislative role for Congress with respect to the Presidency, it says so—twice.

First, consider Article II, Section 1, Clause 4 which provides that "[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."[386] This clause contains the sole grant of power to Congress in the Electoral College Clauses. The argument from negative implication gains momentum when we remember that the Electoral College Clauses were drafted as a whole. Indeed, the original draft of Article II, Section 1, Clause 4 was a part of Article II, Section 1, Clause 3 which contains the counting function.[387] There is little reason to believe that the omission of any express legislative power in Article II, Section 1, Clause 3 was accidental.

Senator Eaton made much of the negative implication during the Electoral Count Act debates:

> Turn over to paragraph 3 of the same section and what do you find there? The only *power* that Congress has is here: "The Congress"—may do what? After the state has done its duty, "The Congress may determine"—what? "The time of choosing the electors and the day on which they shall give their votes; which day shall be the same throughout the United States." That is all the *power*. The very keeping of that *power* excludes every other idea of *power*. Every other idea of *power* belongs to the states, is in the states.[388]

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386. U.S. CONST. art. II, § 1, cl. 4.

387. *See* 2 FARRAND, *supra* note 35, at 497–98.

388. Burgess, *supra* note 18, at 636 (emphasis added). Senator Jones made a similar point:

> This clause shows that they weighed this subject with great care, and that they thought it necessary not to leave to Congress any implied power over the election of President.
>
> Now, sir, the power to decide whether the votes of two or ten States shall or shall not be counted is a far more important and delicate power than that given to Congress in express terms to fix the time of choosing the electors. And am I not warranted in saying that, if the Constitution intended that Congress should have any more extended power than is conferred by this clause, it would have said so in plain language?

COUNTING ELECTORAL VOTES, *supra* note 3, at 597.

Second, consider the Presidential Succession Clause of Article II which provides that

> [i]n Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.[389]

This clause too was placed alongside the Electoral College Clauses in the Framers' draft Constitution and was later rearranged by the Committee of Style.[390] There is little reason to believe that the omission of any express legislative power in Article II, Section 1, Clause 3 was accidental.

The prolix Electoral College Clauses provide that "the Votes shall then be counted"—not, "the Votes shall then be counted as Congress may by Law have directed." The Framers could have so provided but they did not.

3. The Intratextual Argument

There is more to the textual argument against the Electoral Count Act than the sparse words of the Electoral College Clauses—much more. An Article II-centric focus on presidential election is too narrow. We can squeeze yet more meaning from the Electoral College Clauses and Congress's role in presidential election when we consider the text of the Constitution as a coherent whole. When we do so, we see that Congress has a role in presidential election, but Congress has a role in congressional elections as well. We may obtain important clues about Congress's role in presidential election by comparing and contrasting it with Congress's role in congressional elections. This intratextual analysis reveals two arguments that strongly militate against the constitutionality of the Electoral Count Act. These two arguments relate to two clauses in Article I: the Times, Places, and Manner Clause and the House Judging Clause.

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389. U.S. CONST. art. II, § 1, cl. 6.

390. *See* 2 FARRAND, *supra* note 35, at 573 (draft referred to the Committee of Style); 2 *id.* at 598–99 (report of the Committee of Style).

a. The Times, Places, and Manner Clause

When the Constitution contemplates a "regulating" role for Congress in elections, it says so. The Times, Places, and Manner Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[391]

The Times, Places, and Manner Clause is the font of significant congressional power over congressional elections—so significant that Alexander Hamilton devoted three essays of *The Federalist* to the clause in order to defend it from criticism from Anti-Federalists and Federalists alike.[392] Indeed, several State ratifying conventions proposed amendments to the Constitution to amend the Times, Places, and Manner Clause so as to eliminate the proviso empowering Congress to regulate congressional elections.[393]

Importantly, no such clause empowering Congress to regulate presidential election appears in Article II. A careful reading of the Electoral College Clauses reveals an important point. As we have seen, Article II, section 1, clause 4 provides that "[t]he Congress may determine the *Time* of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."[394] This clause supplies the only grant of power to

391. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

392. For example, Alexander Hamilton wrote:

> This provision has not only been declaimed against by those who condemn the Constitution in the gross; but it has been censured by those who have objected with less latitude and greater moderation; and, in one instance, it has been thought exceptionable by a gentleman who had declared himself the advocate of every other part of the system.

THE FEDERALIST NO. 59, at 330 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (1961). *See generally* THE FEDERALIST NOS. 59–61 (Alexander Hamilton) (discussing the regulation of congressional elections).

393. *E.g.*, 3 ELLIOT'S DEBATES, *supra* note 250, at 661 (Virginia ratifying convention) ("Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same."); *see* 2 *id.* at 552 (Maryland ratifying convention) (similar); 2 *id.* at 545 (Pennsylvania ratifying convention) (similar); 3 *id.* at 246 (North Carolina ratifying convention) (similar).

394. U.S. CONST. art. III, § 1, cl. 4 (emphasis added). This clause may be the font of congressional power to regulate the manner of presidential election. For example, Professor Amar has suggested that, pursuant to this clause and general "electioneering" rules, "Congress could prohibit—either directly, or through conditional funding rules for any party that seeks federal election funds—any direct effort to lobby electors between Election Day and Electoral College Meeting Day by anyone other than the candidates

Congress in presidential election and the clause empowers Congress only with respect to "Time." The Constitution itself fixes the "Places" with the electors "meet[ing] in their respective States."[395] What about "Manner"? In stark contrast to congressional election, Congress has no power with respect to the "Manner" of presidential election. Article II, section 1, clause 2 provides that "[e]ach State shall appoint, in such *Manner* as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." Interestingly, Alexander Hamilton's private, unadopted draft of the Constitution provided that "[t]he Legislature shall by permanent *laws* provide such further *regulations* as may be necessary for the more orderly election of the President, not contravening the provisions herein contained,"[396] but no such provision was the subject of recorded debate at the Philadelphia Convention of 1787.

What does the Times, Places, and Manner Clause mean for the Electoral Count Act? The implications of the intratextual argument are incredibly straightforward. There is little reason to suppose that the word "Manner" in the Times, Places, and Manner Clause has a substantially different meaning from the word "Manner" in Article II, Section 1, Clause 2.[397] Whatever the scope of Congress's power to prescribe the manner of congressional elections, Congress has no such power in presidential election.

The marked silence of the founding generation on the issue of presidential election in contrast to congressional election strongly suggests that they understood presidential election to be free from congressional regulation. Unsurprisingly, the intratextual argument featured prominently in the constitutional debate over the Grand Committee Bill. In March of 1800, Senator Pinckney seized the intratextual argument from the Times, Places, and Manner Clause in his lengthy speech against the Grand Committee Bill. Read carefully his intratextual argument:

> Let us for a moment compare [the Times, Places, and Manner Clause] with the directions of the Constitution

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themselves, or their direct agents." Amar, *supra* note 10, at 231 n.22. Such laws further the independence of electors and moreover do not operate on electors directly. But the existence of a constitutional power in one direction does not imply the existence of a power in the equal-and-opposite direction.

395. U.S. CONST. amend. XII; U.S. CONST. art. II, § 1, cl. 3.

396. 3 FARRAND, *supra* note 35, at 624 (emphasis added).

397. *Cf.* U.S. Term Limits v. Thornton, 514 U.S. 779, 827 (1995) (holding that neither Congress nor the States may alter the constitutional qualifications for congressional office).

> respecting the Electors of a President, and then permit me to call your attention to the remarkable difference there is between them, and the reasons for this difference.
>
> By the Constitution, Electors of a President are to be chosen in the manner directed by the State Legislatures—that is all that is said. In case the State Legislatures refuse to make these directions there is no power to compel them; there is not a single word in the Constitution which can, by the most tortured construction, be extended to give Congress, or any branch or part of our Federal Government, a right to make or alter the State Legislatures' directions on this subject. The right to make these directions is complete and conclusive, subject to no control or revision, and placed entirely with them, for the best and most unanswerable reasons.[398]

Senator Pinckney argued that the Grand Committee Bill was unconstitutional because it was an impermissible congressional regulation of the manner of presidential election. If Senator Pinckney is correct, it follows that the Electoral Count Act is also unconstitutional. Senator Pinckney is correct. Congressional regulation of the electoral count is a regulation on the manner of presidential election. The two key sections of the Electoral Count Act—3 U.S.C. § 5 and 3 U.S.C. § 15—regulate the manner in which the acts of the electors will be given effect.

The intratextual argument also has powerful implications for the question of whether there is a font of power for Congress to enact the Electoral Count Act. Imagine for a moment that the amendments proposed by several state ratifying conventions eliminating the proviso of the Times, Places, and Manner Clause empowering Congress to regulate congressional elections[399] had been adopted. There would be no question that Congress would then have zero power over the manner of congressional election. The power to implement this amended Times, Places, and Manner Clause is not a "Power vested in this Constitution in the Government of the United States" under the Necessary and Proper Clause. In other words, Congress derives its sole power to regulate congressional elections from the proviso of the Times, Places, and Manner Clause. Congress

398. 10 ANNALS OF CONG. 128–29 (1800).

399. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 250, at 552 (Maryland ratifying convention); 2 *id.* at 545 (Pennsylvania ratifying convention); 3 *id.* at 246 (North Carolina ratifying convention); 3 *id.* at 661 (Virginia ratifying convention).

may not claim that the Necessary and Proper Clause is the font of power for regulating the manner of presidential election.

In sum, the intratextual argument from the Times, Places, and Manner Clause makes clear that Congress has near zero power over the manner of presidential election and raises serious doubts as to Congress's font of power to enact the Electoral Count Act.

b. The House Judging Clause

When the Constitution contemplates a judging role for each House of Congress in elections, it says so. The House Judging Clause provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members."[400] The House Judging Clause is the font of awesome powers and duties. Under this clause, each House is a judicial tribunal with the judicial power to investigate the elections of its Members,[401] and has the duty to refuse to seat members who are constitutionally ineligible to the office of Representative or Senator.[402]

Importantly, no such clause appears in Article II concerning presidential election.[403] The negative implication is made more stark by the fact that the House Judging Clause was considered immediately after the drafting of the Electoral College Clauses at the Philadelphia Convention of 1787, but no Framer thought to extend the principle of the House Judging Clause to presidential election.[404]

What does the House Judging Clause mean for the Electoral Count Act? The negative implication of the House Judging Clause is that the joint convention does not have the authority to judge the elections, returns, and qualifications of electors. The joint convention is not a judicial tribunal with the power to investigate the manner of appointment and qualifications of electors, and may not refuse to count electoral votes contained in authentic electoral certificates for

400. U.S. CONST. art. I, § 5, cl. 1.

401. *See, e.g.*, Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 613 (1928) (holding that the Constitution confers upon Congress certain powers that are "judicial in character," including the "power to judge of the elections, returns and qualifications of its own members," and "[i]n exercising this power, the Senate may, of course, devolve upon a committee of its members the authority to investigate and report; and this is the general, if not the uniform, practice").

402. *See* U.S. CONST. art. I, § 2, cl. 2 (House Qualifications Clause); U.S. CONST. art. I, § 3, cl. 3 (Senate Qualifications Clause); U.S. CONST. art. VI, cl. 3 (Oath or Affirmation Clause).

403. At least one other scholar has noted this obvious point. *See* Harrison, *supra* note 23, at 702.

404. *See* 2 FARRAND, *supra* note 35, at 502–03.

reasons relating to the manner of appointment or qualifications of electors.[405]

These conclusions find support in the purpose of the House Judging Clause. Justice Story, in his *Commentaries on the Constitution of the United States*, explained that the power to judge the elections, returns, and qualifications of the members of each House must be lodged somewhere in order to safeguard the liberties of the people.[406] The only question was where to place such a power. Justice Story concluded that the power is best lodged in the body whose elections, returns and qualifications are to be judged and not in some other body. "If lodged in any other, than the legislative body itself," wrote Justice Story,

> its independence, its purity, and even its existence and action may be destroyed, or put into imminent danger. No other body, but itself, can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights, and sustain the free choice of its constituents.[407]

The House Judging Clause strongly suggests that the power to judge the elections, returns, and qualifications of electors is committed to the individual electoral colleges who compose their own "Houses," but we need not decide this in order to conclude that the power most emphatically does not belong to Congress.[408] On Justice

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405. For additional discussion, see *infra* notes 582–89 and accompanying text.

406. *See* 2 STORY'S COMMENTARIES, *supra* note 9, § 831, at 294–95.

407. 2 *id.* § 831, at 295.

408. Representative Randolph clearly made the point that each of the Electoral Colleges retained the power to judge the qualifications of electors in the Massachusetts Incident of 1809. *See* text accompanying *supra* note 96. The point was also suggested during the Postmaster Incident of 1837, which squarely presented the elector ineligibility problem of the electoral count. *See supra* notes 118–25 and accompanying text. Senator Grundy raised the issue thus:

> Should a case occur in which it became necessary to ascertain and determine upon the qualifications of electors of President and Vice-President of the United States, the important question would be presented, what tribunal would, under the Constitution, be competent to decide? Whether the respective colleges of electors in the different States should decide upon the qualifications of their own members, or Congress should exercise the power, is a question which the committee are of opinion ought to be settled by a permanent provision upon the subject.

COUNTING ELECTORAL VOTES, *supra* note 3, at 71; *see also id.* at 73 (remarks of Rep. Thomas) (reporting to the House of Representatives that the joint committee "had proposed a remedy, by either giving the power to reject to the college or to Congress, as might be deemed most expedient"). For the structural argument supporting the power of

Story's logic, the power, if vested in Congress, would risk the "independence" and "purity" of the electoral colleges, and "put [them] into imminent danger." Note too how the House Judging Clause eschews bicameralism, with each House of Congress acting independently of the other, only with respect to its own Members.

The intratextual argument from the House Judging Clause enjoys a rich pedigree in the constitutional debates over Congress's ability to regulate the electoral count. As early as 1800, Senator Baldwin, a Framer at the Philadelphia Convention of 1787, made precisely this intratextual argument in his speech against the Grand Committee Bill. "[W]hat are the questions which can arise on the subject intrusted to [electors], to which they are incompetent, or to which Congress is so much more competent?," he asked.[409] One set of questions were "[t]hose which relate to the elections, returns, and qualifications of their own members," and on this issue he concluded, "[S]hall these be taken away from that body [of electors], and submitted to the superior decision and control of Congress, without a particle of authority for it from the Constitution?"[410] Senator Baldwin clearly invoked the language of the House Judging Clause to make the intratextual argument, for the phrase "elections, returns and qualifications" appears but once in the Constitution.

During the electoral count of 1857, Senator Collamer expressed very serious constitutional doubts about whether the two Houses of Congress could by joint resolution express any opinion that the electoral votes of the State of Wisconsin were null and void because these votes had been given on a day different from that prescribed by law.[411] He "very much doubt[ed] whether the [F]ramers of the Constitution ever intended to leave the subject of presidential election to the House of Representatives, or the Senate, or either, or both of them."[412] Evidently pointing to the House Judging Clause, he stated, "The Constitution vested in each house the power to decide upon the election of its members; it provided *carefully* that it would not trust to the two houses to elect a President."[413]

In May of 1874, the House Committee on Privileges and Elections employed the intratextual argument in a lengthy report

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each Electoral College "House" to judge the qualifications of Electors, see *infra* notes 479–97 and accompanying text.

409. 10 ANNALS OF CONG. 31 (1800).

410. *Id.*

411. COUNTING ELECTORAL VOTES, *supra* note 3, at 132.

412. *Id.*

413. *Id.* (emphasis added).

supporting a proposed amendment to the Constitution. The proposed amendment provided for the abolition of the Electoral College mode of presidential election in favor of direct, popular election and empowered Congress "to provide for holding and conducting elections of President and Vice-President, and to establish tribunals for the decision of such elections as may be contested."[414] In a section of the report captioned "Congress is not a Canvassing Board," the report provided in relevant part:

> The proposition that Congress has power to sit as a canvassing board upon the electoral votes of the States, admitting or rejecting them for reasons of its own, subverts the whole theory by which their appointment was conferred upon the States; *makes Congress the judge of the election and qualifications of President and Vice-President*, and, by the operation of the twenty-second joint rule, gives that power to each house separately, as in case of its own members. There is no such express power given to Congress in the Constitution, nor is it necessary to carry out any express power therein given, and its exercise would be in direct conflict with the known purpose of the [F]ramers to make the executive and legislative departments as nearly independent of each other as possible.[415]

The intratextual argument from the House Judging Clause did not lose any vigor in the Electoral Count Act debates. Senator Burnside put the intratextual point bluntly, stating that

> it was never the intention of the [F]ramers of the Constitution to make Congress the judge of the qualifications of the electors. If it had been so, the Constitution would have distinctly stated it. It makes each house the judge of the qualifications of its own members in express terms, but it does not imply even that Congress has any right to judge of the qualifications of the electors.[416]

So too Senator Edmunds made the intratextual argument, but a considerably more complex one. He pointed to the Vesting Clause of Article III[417] and three clauses of Article I—the House Judging Clause, the House Expulsion Clause,[418] and the Senate Impeachment

414. *Id.* at 409.

415. *Id.* at 418 (emphasis added).

416. *Id.* at 658.

417. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

418. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, Punish its Members for disorderly Behavior, and, with the Concurrence of

Clause[419]—as the sole grants of "judicial power" to individual Houses of Congress, and concluded that "no judicial power is invested in either or both Houses of Congress that is not especially named and imputed to them as such and in such terms."[420]

Importantly, as the foregoing statements suggest, the intratextual argument is not just a narrow textual point from negative implication. The intratextual argument gains its strength from the context of its application. The House Judging Clause merely makes explicit an implicit idea that a body has judicial power over the privileges of its own members.[421] The important question for present purposes is whether Congress has judicial power over the privileges of non-member electors, especially in light of the "known purpose of the [F]ramers to make the executive and legislative departments as nearly independent of each other as possible."[422]

In sum, the intratextual argument from the House Judging Clause strongly suggests that Congress has no judicial power over the elections, returns, and qualifications of electors.

* * *

The intratextual arguments from both the Times, Places, and Manner Clause and the House Judging Clause are textual arguments from negative implication. These two clauses carefully empower Congress and each House of Congress, respectively, in congressional elections, and the Electoral College Clauses contain no analogues concerning presidential election. As a brute textual matter, the intratextual argument raises doubt as to Congress's ability to regulate the manner of presidential election and to judge the elections, returns, and qualifications of electors.

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two[-]thirds, expel a Member.").

419. U.S. CONST. art. I, § 3, cl. 5 ("The Senate shall have the sole power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside . . . .").

420. 17 CONG. REC. 1063–64 (1886) (remarks of Sen. Edmunds); *see also* 18 CONG. REC. 45 (1886) (remarks of Rep. Dibble) ("There [referring to House Judging Clause] you find judicial power of a certain kind expressly granted to the two Houses of Congress, making an exception to the general provision which confines judicial power to the Supreme Court and the subordinated Federal courts."); *id.* at 46 (remarks of Rep. Dribble) (noting the absence of language analogous to the House Judging Clause in the Electoral College Clauses).

421. *See* 2 FARRAND, *supra* note 35, at 503 (remarks of James Wilson) ("[He] thought the power involved, and the express insertion of it needless. It might beget doubts as to the power of other public bodies, as Courts &c. Every Court is the judge of its own privileges.").

422. COUNTING ELECTORAL VOTES, *supra* note 3, at 418.

Of course, textual arguments from negative implication need to be applied sensitively and contextually in order to avoid wooden readings of the Constitution.[423] A sensitive and contextual interpretation of the intratextual argument reveals a strong case against Congress's ability to regulate the manner of presidential election and to judge the elections, returns, and qualifications of electors. As a matter of sensitive interpretation, the intratextual arguments from negative implication deserve special weight given the prolixity of the Electoral College Clauses, relative to other clauses of Article II which mark the grand contours of executive power, and more importantly, relative to the clauses of Article I which empower Congress in congressional elections. It hardly seems that the Framers simply forgot to draft clauses in Article II analogous to the Times, Places, and Manner Clause or the House Judging Clause, or understood Article II impliedly to contain such congressional power over presidential election.

As a matter of contextual interpretation, we should be especially chary of Congress's role in presidential election. The intratextual argument deserves special weight in light of the structural features of presidential election, namely the repudiation of Congress in the process of presidential election.[424] As we shall see, the Framers instituted an electoral college mode of presidential election as a replacement for the election of the President by the Congress. The Elector Incompatibility Clause also expresses the anti-Congress principle in presidential election by prohibiting Members of Congress from even serving as electors.[425] As Senator Wilson put the point, "When the [F]ramers of the Constitution expressly prohibited Senators and Representatives from appointment as electors, they clearly indicated their purpose to exclude them from all power in or over the matter of the election of a President by the electors appointed by the States."[426]

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423. *See* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 653 n.30 (1996); Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 HARV. L. REV. 701, 702–08 & n.6 (1995). For a classic exposition of the *expressio unius* principle of textual interpretation, see THE FEDERALIST NOS. 32, 83 (Alexander Hamilton).

424. *See supra* note 60 and accompanying text; *infra* note 447 and accompanying text.

425. *See* U.S. CONST. art. II, § 1, cl. 2 ("[B]ut no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

426. 17 CONG. REC. 1059 (1886) (remarks of Sen. Wilson).

In sum, the intratextual argument, when interpreted sensitively and contextually, strongly militates against the constitutionality of the Electoral Count Act.

4. Conclusions

Taken together, the textual arguments—traditional and intratextual—expose the unconstitutionality of the Electoral Count Act. What may seem to be expedient is not necessarily what is constitutional. First and foremost, the textual argument makes clear that there is no source of power, express or implied, for Congress to pass the Electoral Count Act. A careful analysis of the Necessary and Proper Clause and the Electoral College Clauses reveals that neither clause supports Congress's power to enact the Electoral Count Act. In the absence of an implied grant of power to Congress to enact such a statute, the Electoral Count Act is unconstitutional. Anyone who wishes to argue that the Electoral Count Act is constitutional must grapple with the threshold question of whether and where Congress has the power under the Constitution to enact such a statute. Other textual arguments relate to specific provisions of the Electoral Count Act. The constitutionality of the "Presiding Officer Clause" of 3 U.S.C. § 15 is in serious doubt given conflict-of-interest principles relating to the vice presidency. The constitutionality of 3 U.S.C. § 17 is beyond all serious doubt. This provision, which limits (or purports to limit) the proceedings in each House of Congress in debating objections to electoral votes, is patently unconstitutional. Other textual arguments are holistic, even quasi-structural. The nature of the counting function by the counting agent is more "thin" than "thick," relating more to the ascertainment and aggregation of electoral votes, than to the judging of electoral votes. The bicameral counting procedure of 3 U.S.C. §15 violates the unicameralism principle of the Electoral College Clauses. And the intratextual argument from the Times, Places, and Manner Clause and the House Judging Clause strongly militates against the constitutionality of the Electoral Count Act, at least to the extent that the counting agent is to judge electoral votes contained in authentic electoral certificates.

These textual arguments must also be considered in light of great care that the Framers took to remove Congress as much as possible from the business of electing the President. The fact that Congress has thrice failed to pass constitutional amendments giving Congress "power to provide for holding and conducting the elections of President and Vice President and to establish tribunals for the

decision of such elections as may be contested"[427] is another clue that militates against the constitutionality of the Electoral Count Act. Moreover, these three attempts at constitutional amendment occurred in the 1880s, just a few years before Congress passed—with no enabling constitutional amendment—the Electoral Count Act in 1887.

B. The Structural Argument

In addition to textual argument, the interpretivist resolution of the Electoral Count Act is based on a structural argument. The structural argument illuminates a number of important themes that emerge from the Constitution as a whole.[428] In the present context, the structural argument provides some of the most satisfying arguments that the Electoral Count Act is unconstitutional. This section proceeds in three sub-sections. The first sub-section presents five principles of presidential election. The second sub-section presents two principles of rule-making and law-making. The final sub-section assesses the conclusions of the structural argument.

1. Five Principles of Presidential Election

a. The Anti-Senate Principle

First and foremost, the Constitution mistrusts the Senate in the process of presidential election. This is the anti-Senate principle of presidential election. The Electoral Count Act is unconstitutional because the Senate has equal agency with the House of Representatives in counting electoral votes. As we have seen, in a single return case, the joint convention may not reject electoral votes without the concurrence of the Senate, and in a multiple return case, the joint convention may not accept electoral votes without the concurrence of the Senate.[429] And as Representative Caldwell explained during the Electoral Count Act debates:

> The separate concurrent action of both Houses provided for in the bill preserves the constitutional identity, rights, and dignity of each. This concession of each House to the other of *equal and concurrent power* to decide on informalities and

427. COUNTING ELECTORAL VOTES, *supra* note 3, at 345–57 (Senate); *id.* at 408–44.

428. For an extensive classic discussion of this species of constitutional argument, see generally CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). For a pithy modern discussion, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 74–92 (1982).

429. *See* Part I.A.4 *supra*.

> illegalities appearing on the face of returns, upon objection of a Senator or Representative, is necessary to the determination of results.[430]

Whatever may be said about the involvement of both Houses of Congress in the process of counting electoral votes, it is clear that the Senate as a separate and distinct body is to have no agency in electing the President. The Electoral College Clauses make clear that the Senate and the House of Representatives are not created equally in the process of presidential election. Under the original Constitution and the Twelfth Amendment, if the electors shall have failed to make a choice, the House of Representatives chooses the President, not the Senate. Under the Twelfth Amendment, if the electors shall have failed to make a choice, the Senate only chooses the Vice President.[431]

The logic behind the anti-Senate principle of presidential election is incredibly clear once we consult the entire text of the Constitution and its legislative history. Under the Constitution, the Senate assumes, in addition to its equal share of the Article I legislative power, three distinct powers. First, the Senate has judicial power as a court of impeachment for the President, Vice President, and all civil Officers of the United States.[432] Second, the Senate shares executive-legislative power with the President in the business of treaty-making.[433] Third, the Senate shares executive power with the President in the business of appointing Officers of the United

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430. 18 CONG. REC. 31 (1886) (emphasis added).

431. The Senate has exercised this function only once in our history. In the electoral count of 1837, the Senate elected Richard M. Johnson as Vice President. *See supra* note 127 and accompanying text. Note that the Senate's role in choosing the Vice President was even more circumscribed under the original Constitution, further removing the Senate from the business of electing the nation's two top executive officers. Article II, Section 1, Clause 3 provided that

> [i]n every Case, after the Choice of the President [by the House of Representatives], the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

U.S. CONST. art. II, § 1, cl. 3.

432. *See* U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."); *see also* THE FEDERALIST NO. 66, at 370 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (1961) (referring to the Senate as a "court of impeachments").

433. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two[-]thirds of the Senators present concur."). To be sure, the founding generation seriously debated whether the treaty-making power was executive, legislative, or neither. For one view, see THE FEDERALIST NO. 75, at 419 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (1961) ("The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive.").

States.[434] It is important to remember that the Committee of Eleven's Report of the Electoral College Clauses at the Philadelphia Convention provided that, if the electors failed to make a choice, the Senate would elect the President and the Vice President. The House of Representatives was to have no role whatsoever. The Report provided in relevant part:

> [A]nd they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify and transmit sealed to the Seat of the[] Genl. Government, directed to the President of the Senate—The President of the Senate shall in that House open all the certificates; and the votes shall be then & there counted. The Person having the greatest number of votes shall be the President, if such number be a majority of that of the electors; and if there be more than one who have such a majority, and have an equal number of votes, then the *Senate* shall immediately choose by ballot one of them for President: but if no person have a majority[,] then from the five highest on the list, the *Senate* shall choose by ballot the President. And in every case after the choice of the President, the person having the greatest number of votes shall be vice-president: but if there should remain two or more who have equal votes, the *Senate* shall choose from them the vice-president.[435]

The Framers feared that the totality of these powers was simply too much. They feared that the Senate, already powerful, would become a dangerous aristocracy, and that the President, already dependent on the Senate in treaty-making and appointments, would be a mere creature of that body.[436] Consequently, on September 6,

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434. U.S. CONST. art. II, § 2, cl. 2.

435. 2 FARRAND, *supra* note 35, at 497–98 (emphasis added).

436. For a classic statement to this effect, see *id.* at 522 where James Wilson remarked:

> They will have in fact, the appointment of the President, and through his dependence on them, the virtual appointment to offices; among others the offices of the Judiciary Department. They are to make Treaties; and they are to try all impeachments. In allowing them thus to make the Executive & Judiciary appointments, to be the Court of impeachments, and to make Treaties which are to be laws of the land, the Legislative, Executive & Judiciary powers are all blended in one branch of the Government.... [T]he President will not be the man of the people as he ought to be, but the Minion of the Senate. He cannot even appoint a tide-waiter without the Senate.

See also, e.g., *id.* at 501 (remarks of Charles Pinckney) (objecting to the Report because "it threw the whole appointment in fact into the hands of the Senate" and "makes the same body of men which will in fact elect the President his Judges in case of an impeachment"); *id.* (remarks of Hugh Williamson) (noting "objection to such a dependence of the President on the Senate for his reappointment"); *id.* at 502 (remarks of James Wilson)

1787, on a motion by Roger Sherman, the Framers rejected the contingent election of the President and Vice President by the Senate, providing instead for the choice by the House of Representatives.[437] This change passed by a vote of ten to one.[438]

In *The Federalist No. 66*, Alexander Hamilton explained the logic for this change in the context of the balance of powers between the House of Representatives and the Senate, carefully struck by the Constitution:

> [T]o secure the equilibrium of the national House of Representatives, the plan of the convention has provided in its favor several important counterpoises to the additional authorities to be conferred upon the Senate. The exclusive privilege of originating money bills will belong to the House of Representatives. The same house will possess the sole right of instituting impeachments; is not this a complete counterbalance to that of determining them? The same house will be the umpire in all elections of the President

(suggesting that the contingent election should be made by Congress and not the Senate because "the House of Reps. will so often be changed as to be free from the influence & faction to which the permanence of the Senate may subject that branch"); *id.* at 511 (remarks of Charles Pinckney) (objecting to Report because "the dispersion of the votes would leave the appointment with the Senate, and as the President's reappointment will thus depend on the Senate he will be the mere creature of that body"); *id.* (remarks of John Rutlidge) (objecting to Report because "[i]t would throw the whole power [of presidential election] into the Senate"); *id.* at 512 (remarks of George Mason) (objecting to Report because "[i]t puts the appointment in fact into the hands of the Senate" and that "[t]he great objection with him would be removed by depriving the Senate of the eventual election"); *id.* at 512 (remarks of Hugh Williamson) ("Referring the appointment to the Senate lays a certain foundation for corruption & aristocracy."); *id.* at 513 (remarks of Governor Randolph) ("He dwelt on the tendency of such an influence of the Senate over the election of the President in addition to its other powers, to convert that body into a real & dangerous Aristocracy"); *id.* (remarks of John Dickinson) ("[He] was in favor of giving the eventual election to the Legislature, instead of the Senate—It was too much influence to be superadded to that body "); *id.* at 515 (remarks of George Mason) ("As the mode of appointment is now regulated, he could not forebear expressing his opinion that it is utterly inadmissible. He would prefer the Government of Prussia to one which will put all power into the hands of seven or eight men, and fix an Aristocracy worse than absolute monarchy."); *id.* at 522 (remarks of Elbridge Gerry) (proposing eventual election of President to be made by Congress and not Senate so as to "relieve the President from his particular dependence on the Senate for his continuance in office"); *id.* at 522 (remarks of Gouverneur Morris) (supporting Gerry's proposal because "[i]t would free the President from being tempted in naming to Offices to Conform to the will of the Senate, & thereby virtually give the appointments to office, to the Senate"); *id.* at 524 (remarks of Hugh Williamson) ("The aristocratic complexion [of the Senate] proceeds from . . . the mode of appointing the President which makes him dependent on the Senate.").

437. *See id.* at 527 ("To strike out the words 'The Senate shall immediately choose &c.' and insert 'The House of Representatives shall immediately choose by ballot one of them for President, the members of each State having one vote.' ").

438. *Id.*

> which do not unite the suffrages of a majority of the whole number of electors; a case which it cannot be doubted will sometimes, if not frequently, happen. The constant possibility of the thing must be a fruitful source of influence to that body.[439]

As this passage demonstrates, it was simply beyond question at the founding that the Senate as a separate and distinct body would have any agency in the process of presidential election.[440] St. George Tucker, in his canonical "American Blackstone," first published in the wake of the constitutional crisis of the presidential election of 1800, summarized the anti-Senate principle of presidential election thus:

> [The Senate's] exclusion from any participation in the election of a president, is certainly founded upon the wisest policy: being associated with him in the exercise of his most important powers, and being chosen for a much longer period than the representatives, the presumption of undue influence, where the contest might be between a president in office, and any other person, would be altogether unavoidable.[441]

The anti-Senate principle of presidential election was not lost in the Electoral Count Act debates. Senator Bayard thought it dispositive in urging the repeal of the Twenty-second Joint Rule.[442] "I do not think," said Bayard, "that anywhere in the Constitution can be found language in any degree constituting the Senate of the United States a factor or an actor in the election of the President of the United States."[443] He asked, "But will any Senator show me any clause of the Constitution, any implication which can be argued from any clause of the Constitution, which gives the Senate one particle of lawful power in controlling the choice of a President or a Vice-President of the United States?"[444] Senator Whyte thought the anti-Senate principle so strong an objection to the Electoral Count Act that he stated, "I would rather vote for a bill leaving it to the House of Representatives to interfere than a bill which provided that the

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439. THE FEDERALIST NO. 66, *supra* note 432, at 371–72 (Alexander Hamilton).

440. *See also* 4 ELLIOT'S DEBATES, *supra* note 250, at 122 (remarks of William Davie at North Carolina ratifying convention) ("[The President] is perfectly independent of [the Senate] in his election."); Letter from James Madison to George Hay (Aug. 23, 1823), *reprinted in* 3 FARRAND, *supra* note 35, at 458 ("The Agency of the H. of Reps. was thought safer also than that of the Senate, on account of the greater number of its members.").

441. 1 TUCKER'S COMMENTARIES, *supra* note 19, app. at 328.

442. COUNTING ELECTORAL VOTES, *supra* note 3, at 444.

443. *Id.*

444. *Id.* at 445.

Senate should have anything to do with the election of President of the United States."[445]

The Electoral Count Act, like the Twenty-second Joint Rule, violates the anti-Senate principle of presidential election. The involvement of the Senate as a separate and distinct body in the process of counting electoral votes runs seriously afoul of constitutional structure. The equal agency of the Senate with the House of Representatives in the Electoral Count Act impermissibly infringes upon the constitutional prerogatives of the House of Representatives in "umpir[ing]" presidential election, and consequently, unduly strengthens the powers of the Senate in presidential election. Moreover, the equal agency of the Senate violates the Framers' deliberate choice to exclude the Senate altogether from the process of presidential election.

This is not to say that the anti-Senate principle of presidential election requires that Senators must not participate in counting electoral votes. There is a constitutionally significant difference between the Senate as a separate and distinct body, and Senators as members of a joint convention of Senators and Representatives, where Representatives greatly outnumber Senators. The counting function is committed to the joint convention and all questions of the electoral count must be resolved by it on a per capita basis, not by two separate and distinct legislative bodies.

b. The Anti-Congress Principle

Second, the Constitution mistrusts Congress in the process of presidential election. This is the anti-Congress principle of presidential election. The joint convention violates the anti-Congress principle to the extent that it rejects electoral votes contained in authentic electoral certificates as not "regularly given."[446] Two parts of the Electoral College Clauses carefully reflect the anti-Congress principle of presidential election.

First, the electoral college mode of presidential election itself is an instantiation of the anti-Congress principle. We should remember that of all the methods to elect the President considered by the Framers the one most emphatically rejected was election of the President by the legislature.[447] The Framers rejected the

445. *Id.* at 538.

446. 3 U.S.C. § 15 (2000).

447. *See* 2 FARRAND, *supra* note 35, at 497–502. A few years later, Senator Pinckney remarked:

He remembered very well that in the Federal Convention great care was used to

parliamentary system for good reason: to create an independent and firm Executive.[448]

The Electoral College Clauses further reflect the rejection of the parliamentary system. In the event the electors fail to make a choice, *Congress* does nothing in choosing the President or Vice President. In such a case, the House of Representatives chooses the President and the Senate chooses the Vice President.[449] There is no possible instance in which the two Houses of Congress act concurrently in choosing the President or Vice President.[450] Representative Randolph seized upon this point during the Missouri Incident:

> What was the theory of this Constitution? It is that this House, except upon a certain contingency, has nothing at all to do with the appointment of President and Vice-President of the United States. What was to be the practice of the Constitution, as now proposed? That an informal meeting of this and the other house is to usurp the initiative, the nominative power, with regard to the two first officers of the Government, in despite and contempt of their decision. Is there to be no limit to the power of Congress? no mound or barrier to stay their usurpation? Why were the electoral bodies established?[451]

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provide for the election of the President of the United States, independently of Congress; to take the business as far as possible out of their hands.... Nothing was more clear to him than that Congress had no right to meddle with it at all; as the whole was entrusted to the State Legislatures, they must make provision for all questions arising on the occasion.").

10 ANNALS OF CONG. 29 (1800).

448. *See, e.g.*, 2 FARRAND, *supra* note 35, at 103 (remarks of Gouverneur Morris) ("Of all possible modes of [presidential] appointment that by the Legislature is the worst. If the Legislature is to appoint, and to impeach or to influence the impeachment, the Executive will be the mere creature of it."); 10 ANNALS OF CONG. 131 (remarks of Sen. Pinckney) (stating that Framers "well knew, that to give to the members of Congress a right to give votes in this election, or to decide upon them when given, was to destroy the independence of the Executive, and make him the creature of the Legislature"); KENT'S COMMENTARIES, *supra* note 19, at *279 (noting that legislative selection of the President "would have rendered him too dependent upon the immediate authors of his elevation to comport with the requisite energy of his own department; and it would have laid him under temptation to indulge in improper intrigue, or to form a dangerous coalition with the legislative body...."); 3 STORY'S COMMENTARIES, *supra* note 9, § 1450, at 313–14.

449. *See* U.S. CONST. amend XII. For an eloquent expression of this point, see 18 CONG. REC. 46 (1886) (remarks of Rep. Dibble).

450. *See also* Letter from James Madison to Henry Lee (Jan. 14, 1825), *reprinted in* 3 FARRAND, *supra* note 35, at 464 ("If, in the eventual choice of a President, the same proportional rule had been preferred [as in the Electoral Colleges], a joint ballot by the two [H]ouses of Congress would have been substituted for the mode which gives an equal vote to every State, however unequal in size.").

451. COUNTING ELECTORAL VOTES, *supra* note 3, at 54.

Indeed, if we look at the Constitution as a whole, we see that it is a clause-by-clause rejection of the parliamentary system.[452] The clear constitutional baseline is that congressional election of the President is prohibited. The concurrence of the House of Representatives and the Senate required by the Electoral Count Act runs afoul of constitutional structure.[453] The fact that Congress does not elect the President or Vice President, however, does not necessarily mean that Congress shall have no role in judging electoral votes.

Second, the Elector Incompatibility Clause provides that "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."[454] The Elector Incompatibility Clause is a substantial structural guarantee of independence from Members of Congress. The clause "is a provision which goes . . . to show how extremely guarded the Constitution is in preventing the members of Congress from having any agency in the election, except merely in counting the votes."[455] When Members of Congress are prohibited from even giving electoral votes, what gives them the constitutional authority to judge electoral votes? But again, the fact that Members of Congress are prohibited from even giving electoral votes does not necessarily mean that Members of Congress shall have no role in judging electoral votes.

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452. The single clause which best expresses this separation-of-powers vision is U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."). For a rich discussion of this clause's significance as a repudiation of the parliamentary system, see generally Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994). *See also* Amar & Amar, *supra* note 27, at 118–25 (providing additional discussion of separation-of-powers structure of Constitution).

453. One corollary of this argument is that if there is no power for concurrent action then it follows *a fortiori* that there is no power for either House of Congress alone. For example, Senator Wilson remarked:

> [I]f no such power rests with the two Houses for concurrent action, how much more preposterous does it seem to be to claim that it rests with either House alone, and especially with the House of Representatives, with which body to elect a President abides in the event of a failure of the electors to elect?

17 CONG. REC. 1059 (1886).

454. U.S. CONST. art. II, § 1, cl. 2.

455. 10 ANNALS OF CONG. 131 (1800); *see also* 17 CONG. REC. 1059 (1886) (remarks of Sen. Wilson) ("When the [F]ramers of the Constitution expressly prohibited Senators and Representatives from appointment as electors, they clearly indicated their purpose to exclude them from all power in or over the matter of the election of a President by the electors appointed by the States."); 18 CONG. REC. 46 (remarks of Rep. Dibble) ("The idea was that the President must go into office without being under any obligation of any sort to the National Legislature, and the [F]ramers of the Constitution went so far as to provide even that a member of Congress should not be an elector—that to be a member of either House of Congress should be a disqualification.").

The anti-Congress principle should bear on the overall interpretation of the Electoral Count Act. The anti-Congress principle stands for the thinnest conception of congressional regulation in counting electoral votes. As Senator Pinckney explained:

> How could [the Framers] expect, that in deciding on the election of a President, particularly where such election was strongly contested, that party spirit would not prevail, and govern every decision? Did they not know how easy it was to raise objections against the votes of particular elections, and that in determining upon these, it was more than probable, the members would recollect their *sides*, their favorite candidate, and sometimes their own interests? Or must they not have supposed, that, in putting the ultimate and final decision of the Electors in Congress, who were to decide irrevocably and without appeal, they would render the President their creature, and prevent his assuming and exercising that independence in the performance of his duties upon which the safety and honor of the Government must forever rest?[456]

Simply put, the joint convention may not judge the acts of electors—that is, their electoral votes.

c. The Anti-President Principle

Third, the Constitution does not provide any role for the President in the process of presidential election. The Electoral Count Act, however, did involve the President. The Electoral Count Act is a law, not a rule of proceeding like the Twenty-second Joint Rule. Laws require bicameralism and presentment to the President, whereas rules (including joint rules) do not.[457] The Electoral Count

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456. 10 ANNALS OF CONG. 130–31. Professor Harrison recently put the point in the context of old and recent history:

> As the experiences of 1876–1877 and 2000 indicate, giving Congress power to resolve an electoral dispute is very close to giving it power to choose the President; indeed, electoral disputes could be trumped up for that very purpose. It is unlikely that the Constitution allows through the back door what it bars the front door against.

Harrison, *supra* note 23, at 705.

457. U.S. CONST. art. I, § 7, cl. 2 provides that:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two[-]thirds of that House shall agree to pass the Bill, it shall be

Act was presented to and approved by President Cleveland. Is it not absurd to give the President an agency in counting the electoral votes of her successors? During the Wisconsin Incident of 1857, Senator Pugh objected to a mere joint resolution stating that Wisconsin's electoral votes should not have been counted because it would require presentment to the President. "Now, confessedly," said Pugh, "the President has nothing to do with counting the votes for his successor."[458] Whether President Cleveland's approval of the Electoral Count Act presents an incurable constitutional problem of the past for the Electoral Count Act is beyond the scope of the present analysis.

What is important for present purposes, however, is that a law cannot be repealed without presentment to and approval by the President, or by a two-thirds super-majority of both Houses of Congress. This is a constitutional problem for the Electoral Count Act because the President has a significant agency in the law of the status quo. During the Electoral Count Act debates, Senator Hager put this point best:

> But, as I said suppose this bill becomes a law signed by the President, how are you to get rid of it in the future? If it is binding upon the Senate and House that meet next it requires, in order to repeal it, not only the vote of the Senate and the House, but the approval of the President. Thus the President enters into the consideration, when the Constitution never contemplated any such thing. It is a duty imposed entirely upon the Senate and House of Representatives; and if you pass this bill in order that it may be a law it requires the approval of the President, and hereafter to repeal it and get rid of it also requires the approval of the President, so that a future Senate and a future House of Representatives may be entirely under the control of the President of the United States.... Did the [F]ramers of the Constitution contemplate any such state of things as that when the twelfth article of amendment was adopted? It was the intent that the people should control the election of the President, and not the President of the United States.... The President has nothing to do with it.[459]

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sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two[-]thirds of that House, it shall become a Law.

See also U.S. CONST. art. I, § 7, cl. 3 (similar).

458. COUNTING ELECTORAL VOTES, *supra* note 3, at 135.

459. *Id.*; *see also id.* at 523 (remarks of Sen. Bayard) ("[F]or this is not a law for to-day only; it is to become a settled law, a fixed rule, requiring for its repeal the assent of a

To be sure, the President has an agency in presidential succession under the Presidential Succession Clause,[460] but the President is behind a veil of ignorance when it comes to presidential succession—unlike presidential election.

d. The Pro-States and Pro-State Legislatures Principle

Fourth, the Constitution trusts the states and state legislatures in the process of presidential election. This is the pro-states and pro-state legislatures principle of presidential election. This principle makes clear that Congress has no role over some of the problems of the electoral count.

Let us once again turn to Senator Pinckney's famous speech against the Grand Committee Bill. Invoking the Tenth Amendment, Senator Pinckney argued that the Grand Committee Bill trampled on the rights of the states: he considered the right of the states to be free from congressional interference in the election of the President as sacred as the right of the states to be free from congressional interference in matters of religion and the press.[461] Senator Pinckney then observed:

> This right of determining on the *manner* in which the Electors shall vote; the inquiry into the qualifications, and the guards necessary to prevent disqualified or improper men voting, and to insure the votes being legally given, rests and is exclusively vested in the State Legislatures. If it is necessary to have guards against improper elections of Electors, and to institute tribunals to inquire into their qualifications, with the State Legislatures, and with them alone, rests the power to institute them, and they must exercise it.[462]

Nearly three-quarters of a century later, the House Committee on Privileges and Elections in 1874 similarly reported:

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majority of each house and the President of the United States.").

460. U.S. CONST. art. II, § 1, cl. 6.

461. 10 ANNALS OF CONG. 127 ("[The States] supposed they had placed the hand of their own authority on the rights of religion and the press, and the as sacred right of the States in the election of the President.").

462. *Id.* at 130 (emphasis added). Senator Pinckney largely dismissed problems with respect to the validity of an Elector's appointment. In answering an objection that Electors might be appointed in violation of the Elector Incompatibility Clause, he stated, "[W]here is the necessity of this bill? Is not the Constitution the supreme law of the land, and must not the State Legislatures conform their directions in the appointment of Electors to the directions of the Constitution?" *Id.* at 131; *see also id.* at 132 ("Why this anxiety, why these unnecessary efforts to take from the State Legislatures their exclusive and most valuable right?").

> It will thus be seen that the *mode* of choosing the electors is placed entirely beyond the power and jurisdiction of the National Government; and whatever disorders, irregularities, or failures in the appointment of electors may occur in any of the States, they are entirely without remedy or redress upon the part of the Government of the United States.[463]

How did Senator Pinckney and the House Committee on Privileges and Elections reach this conclusion? The italicized words ought to provide a strong clue. Senator Pinckney expressly invoked the Times, Places, and Manner Clause in his argument against the Grand Committee Bill,[464] and the use of the word "mode" by the House Committee on Privileges and Elections is merely a synonym for the word "Manner" in the Times, Places, and Manner Clause.

As we saw earlier, the intratextual implications of the Times, Places, and Manner Clause are potentially powerful. In sum, with respect to presidential election, the Constitution fixes the "Place" (with the electors meeting in their respective states), empowers Congress to fix the "Time," and empowers the state legislatures to determine the "Manner." Unlike Article I, the state legislatures have the final word on that important subject; Congress has no power to determine on the "Manner" of presidential election.

But what is the breadth of power textually committed to state legislatures in presidential election? Does the word "Manner" in the Times, Places, and Manner Clause include the power to investigate the qualifications of electors? To determine an answer to this question, let us begin by looking to *The Federalist No. 59* in which Alexander Hamilton brilliantly defends the Times, Places, and Manner Clause, which was the subject of much criticism by both Federalists and Anti-Federalists alike. Hamilton correctly notes "that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former."[465] Consider Alexander Hamilton's justifications for reposing *ultimate* power over congressional elections in Congress:

> If the State legislatures were to be invested with an exclusive power of *regulating* these [House of Representatives] elections, every period of making them would be a delicate

463. COUNTING ELECTORAL VOTES, *supra* note 3, at 414 (emphasis added).
464. 10 ANNALS OF CONG. 128.
465. THE FEDERALIST NO. 59, *supra* note 392, at 330 (Alexander Hamilton).

> crisis in the national situation, which might issue in a dissolution of the Union, if the leaders of a few of the most important States should have entered into a previous conspiracy to prevent an election.[466]

Two points should become immediately apparent. First, as the italicized word indicates, Alexander Hamilton read the "Manner" in the Times, Places, and Manner Clause as a type of regulation by the state legislatures. This ought to come as no surprise given the text of that clause which provides that "Congress may at any time by Law make or alter such *Regulations*, except as to the Places of chusing Senators."[467]

Second, what is sauce for the goose is sauce for the gander. Hamilton's defense of the Times, Places, and Manner Clause is no less applicable to presidential election. When we consult the Electoral College Clauses, we see textually that the "Manner" of appointing electors is vested *wholly* in the state legislatures; it is not vested *primarily* in the state legislatures and *ultimately* in the Congress. If Congress had a role in regulating presidential election, Hamilton likely would have said so in *The Federalist No. 68*.

What does all of this mean for questions of the electoral count? As Senator Pinckney and the House Committee on Privileges and Elections in 1874 noted, state legislatures might have jurisdiction (perhaps exclusive jurisdiction) to decide on questions with respect to the validity of an elector's appointment.[468] Dean Wroth adopts this view. He has written that "[t]he plain implication of the original scheme is that the states in their control of the manner of appointment were to provide for the settlement of whatever controversies might arise.... Local authorities would naturally resolve any contest."[469]

The problem with this view is that it reads into the Times, Places, and Manner Clause some judicial power to look into the qualifications of an office holder. This would analogously imply that Congress has the judicial power to look into qualifications of

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466. *Id.* at 365 (emphasis added).

467. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

468. Senator Pinckney had a much broader conception of the judicial power of State Legislatures, including the power "to insure the votes being legally given." *See* text accompanying *supra* note 462. However, it is especially hard to see how state legislatures have any jurisdiction over questions with respect to an elector's *vote* (whether, for example, that vote is constitutional or not). The "Manner" power of state legislatures is textually limited to the *appointment* of electors. Moreover, electors, once selected, are arguably independent of state legislatures.

469. Wroth, *supra* note 22, at 324.

Members of Congress because Congress has the ultimate control over the "Manner" of congressional election. The problem with this view is that such a power of Congress stands in seemingly direct violation of the power vested in each House of Congress to judge the qualifications of its members under the House Judging Clause.[470]

It is also difficult to see how state legislatures (and their tribunals) would have *exclusive* jurisdiction to settle whatever controversies might arise in the appointment of electors; the proper appointment of electors is very clearly a federal question which may be adjudicated by federal courts.

The most important problem, however, is a temporal one. Given the immediacy principle of the Electoral College Clauses,[471] there is simply no time to investigate—by the state legislatures and their tribunals or by federal courts—the validity of an elector's appointment once the electoral votes are being counted. Indeed, the better reading of the Electoral College Clauses may be that federal courts are vested with the judicial power to inquire into the proper appointment of electors between the "time of chusing the Electors" and "the Day on which they shall give their Votes." The problem here is that Members of Congress are not supposed to know who the electors in each state are in advance of the meeting of the electoral colleges, so that the electors may be as free and detached as possible. Moreover, Congress could easily make the time of choosing the electors the same day on which the electors shall give their votes,[472] leaving no time for the judicial investigation of electors' appointments.

Finally, in addition to the argument made by Senator Pinckney and the House Committee on Privileges and Elections in 1874, there is a broader argument that Congress should have no role in regulating presidential election. In reviewing Hamilton's justification for the Times, Places, and Manner Clause, we see that there could be no analogous "delicate crisis in the national situation"[473] if the state legislatures had the last word on determining "Manner." This is because our Constitution ensures that we will never be without a President.

One view is that the Electoral College Clauses were carefully crafted to provide for the election of a President should the states fail

470. U.S. CONST. art. I, § 5, cl. 1.

471. *See supra* notes 269–74 and accompanying text.

472. During the debate on the Act of 1792, Representative White expressed his wish that this be done "[i]f it had been possible." 3 ANNALS OF CONG. 278 (1791).

473. THE FEDERALIST NO. 59, *supra* note 392, at 333 (Alexander Hamilton).

in performing their constitutional duties. For example, Dean Wroth has written:

> The method for electing a President may be contrasted with the provisions for congressional elections. In the latter instance, as Hamilton pointed out in the *Federalist*, Congress must have ultimate control over the manner of election of its own members, lest the states, by refusing to elect Congressmen, cause the whole structure to fall. In the case of the presidency, since the House was ready to carry out the election if the states failed, congressional control was not only undesirable but unnecessary.[474]

Dean Wroth is clearly alluding to the provision of the Electoral College Clauses which empowers the House of Representatives to choose the President in case of electoral deadlock. While Dean Wroth is correct in his intuition that we will not be without a President, he is incorrect as a matter of text. The choice of President by the House of Representatives is not unconstrained, but is limited—to five persons by the original Constitution and now three persons by the Twelfth Amendment. If no states appoint electors and hence no electors vote, the House of Representatives could not elect a President (nor the Senate a Vice President).

In the case posited by Dean Wroth, however, it may be that under the original Constitution, the Presidential Succession Clause of Article II would kick in to ensure that we are not without a President.[475] This was the view of "Horatius" in a letter to the *Washington Federalist* on January 6, 1801—just five weeks before the troublesome election of then Vice-President Thomas Jefferson by the House of Representatives. In Horatius's view, the case of no election of President and Vice President by the electors fit squarely within the "removal" provision of the Presidential Succession Clause:

> The words used here [in the Presidential Succession Clause] are comprehensive enough to embrace every vacancy, and if they are construed not to embrace the case of removal by virtue of the constitutional terms of the offices of President and Vice-President, they will not embrace the vacancy most probable to happen, while they are admitted to embrace vacancies that are very improbable.[476]

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474. Wroth, *supra* note 22, at 325.

475. U.S. CONST. art. II, § 1, cl. 6.

476. Horatius Letter, *supra* note 273; *see also id.* (observing that the word "removal" "comprehends the case where neither the electors nor the [H]ouse of [R]epresentatives shall elect a successor to the President whose time expires by virtue of the constitutional limitation").

We need not overly concern ourselves with the scope of "removal" in the Presidential Succession Clause because the Twentieth Amendment removes any ambiguity.[477] A critic would argue that this reading of the Presidential Succession Clause does not remove Congress from the business of electing the President when the states fail to fulfill their constitutional duties. Indeed, the Presidential Succession Clause explicitly invites *Congress* to legislate on the subject of presidential succession. However, under that clause, Congress specifies who shall *act as President* until a special, intervening presidential election, and not *who is President* as under the Electoral College Clauses. Moreover, prospective legislation under the Presidential Succession Clause—enacted behind a veil of ignorance well before any constitutional crisis—provides a much more legitimate solution than allowing the House of Representatives to choose the President based on the circumstances at hand, when party spirit is likely to govern the choice.

e. The Pro-Electors Principle

Fifth, the Constitution trusts electors in the process of presidential election. More precisely, the Constitution trusts electors with the last word on the persons receiving votes—period. This is the pro-electors principle of presidential election. The Electoral Count Act is unconstitutional to the extent that the joint convention may reject electoral votes in authentic electoral certificates as not "regularly given."[478] In other words, the joint convention may not examine the contents of electoral certificates and reject electoral votes because of the persons receiving votes.

As a structural matter, the electoral colleges constitute a separate and coordinate branch of the Government of the United States[479] (although as an "architextural" matter,[480] the electoral colleges occupy textual space in Article II along with the executive branch of the Government of the United States). What gives Congress or the joint convention the authority to judge electoral votes?

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477. For the relevant text of the Twentieth Amendment, see text accompanying *infra* note 605.

478. 3 U.S.C. § 15 (2000).

479. Elsewhere, I have set forth a proof for the proposition that Electors occupy a "public Trust under the United States" because they are not Members of Congress, Members of the several State Legislatures, Officers of the United States, or Officers of the several States. *See* Kesavan, *supra* note 324, at 128–35; *cf.* 18 CONG. REC. 30 (1886) (remarks of Rep. Caldwell) (stating that "the elector is a Federal functionary, as much so as a Senator or Representative").

480. *See generally* Akhil Reed Amar, *Architexture*, 77 IND. L.J. (forthcoming 2002).

The electoral colleges are *inferior* neither to Congress nor to the joint convention. The numbers suggest as much: the number of electors is equal to the number of Senators and Representatives.[481] As a separate and coordinate branch of government, the electors should have interpretive authority of the Constitution with respect to the powers committed to them.[482] The founding generation understood that electors would be among the most virtuous citizens of the Republic.[483] The electors in the electoral college "houses" do "meet" and deliberate like Members of Congress.[484] They probably

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481. *See* U.S. CONST. art. II, § 1, cl. 2.

482. For similar statements with respect to constitutional interpretation by the President, see Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 *passim* (1993); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 *passim* (1994). For a similar statement with respect to constitutional interpretation by Congress, see Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 *passim* (2001).

483. For example, John Jay argued:

> As the select assemblies for choosing the President, as well as the State legislatures who appoint the senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence.... If the observation be well founded that wise kings will always be served by able ministers it is fair to argue that as an assembly of select electors possess, in a greater degree than kings, the means of extensive and accurate information relative to men and characters, so will their appointments bear at least equal marks of discretion and discernment.

THE FEDERALIST NO. 64, at 359 (John Jay) (Clinton Rossiter ed., Mentor 1999) (1961); *see* 10 ANNALS OF CONG. 30–31 (1800) (remarks of Sen. Baldwin) ("Experience had proved that a more venerable selection of characters could not be made in this country than usually composed that electoral body."). To be sure, this understanding began to change in the first decade after the founding. *See, e.g.*, STANWOOD, *supra* note 7, at 51.

484. *See, e.g.*, U.S. CONST. amend. XII ("The Electors shall *meet* in their respective states, and vote by ballot for President and Vice-President ....") (emphasis added); THE FEDERALIST NO. 68, *supra* note 246, at 380 (Alexander Hamilton) ("It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to *deliberation*, and to a judicious combination of all the reasons and inducements which were proper to govern their choice.") (emphasis added). Hamilton further argued:

> [A]s the electors, chosen in each State, are to *assemble* and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.

Id. (emphasis added); *cf.* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1089 n.233 (2000) ("[T]he electoral college, like Congress and an Article V proposing convention, is truly a national group whose existence owes entirely to the Constitution. On the other hand, the electoral college does not 'meet' and deliberate like Congress or an Article V proposing

enjoy the same privileges and immunities as Members of Congress, including immunity from arrest and freedom of speech and debate.[485]

Importantly, the electors also enjoy considerable structural independence from Congress. Electors receive no compensation from Congress for their federal service, nor has any Congress, to my knowledge, ever compensated electors for such service.[486] Electors are also not subject to impeachment by the House of Representative or conviction by the Senate because they are not "civil Officers of the United States."[487]

The structural coordinacy of electors and their structural independence is destroyed if Members of Congress may second-guess the electors' judgments. Unlike inferior courts whose decisions may be judged by the Supreme Court,[488] the electors are not inferior to the joint convention of Senators and Representatives and may not be judged by them. As Representative Randolph put the point in 1821, "[T]he electoral college was as *independent* of Congress as Congress of them; and we have no right, said he, to *judge* of their proceedings."[489]

A simple counterfactual underscores the structural principles of coordinacy and independence. Imagine that the Framers gave Members of Congress, instead of electors, the choice of electing the President and Vice President. Would there be any question that Members of Congress would have the last word on the persons voted for in the presidential and vice presidential election? Would the Chief Justice of the United States refuse to administer the presidential oath or affirmation if the Members of Congress acted unconstitutionally? Would that matter?

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convention.").

485. *See* U.S. CONST. art. I, § 6, cl. 1 ("They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech of Debate in either House, they shall not be questioned in any other Place."). For a claim that the President enjoys similar privileges although the Constitution does not so textually specify, see Amar & Katyal, *supra* note 423, at 702–08.

486. The Framers briefly considered the compensation of electors. *See* 2 FARRAND, *supra* note 35, at 73 ("Mr. Williamson moved that the Electors of the Executive should be paid out of the National Treasury for the Service to be performed by them. Justice required this: as it was a national service they were to render. The motion was agreed to nem.–con."). The provision was inexplicably dropped on subsequent debate.

487. *See* Kesavan, *supra* note 324, at 133 & n.46.

488. *See* U.S. CONST. art. III, § 2, cl. 2 ("In all other cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to law and fact . . . .).

489. COUNTING ELECTORAL VOTES, *supra* note 3, at 51 (emphasis added).

There is considerable historical support for the pro-electors principle of presidential election. Senator Baldwin, in his remarks against the Grand Committee Bill in January of 1800, succinctly observed

> that the Constitution in directing *Electors* to be appointed throughout the United States equal to the whole number of the Senators and Representatives in Congress, for the express purpose of entrusting this Constitutional branch of power to them, had provided for the existence of as respectable a body as Congress, and in whom the Constitution on this business has more confidence than in Congress.[490]

Senator Baldwin's statement highlights two important points: in absolute terms, the Constitution trusts electors, and in relative terms, the Constitution trusts electors *more* than Members of Congress.

Senator Baldwin then posed a powerful counterfactual: What if the Constitution had provided that the electors meet at some central location instead of meeting in their respective states?[491] The answer was obvious—the electors, not some other body, would resolve the problems of the electoral count.[492] It therefore followed, according to Senator Baldwin, that the joint convention of Senators and Representatives had no additional power to judge electoral votes just because the electors meet in their respective states and not at some central location. He stated, "It having been deemed more safe by the Constitution to form them into different Electoral colleges, to be assembled in the several States, does not at all alter the nature or distinctness of their powers, or subject them any more to the control of the other departments of the Government."[493] In his closing remarks, he observed that:

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490. 10 ANNALS OF CONG. 30 (1800).

491. The Framers considered and rejected this idea. *See* 2 FARRAND, *supra* note 35, at 525; *id.* at 526 ("Mr. Spaight said if the election by Electors is to be crammed down, he would prefer their meeting altogether and deciding finally without any reference to the Senate and moved 'That the Electors meet at the seat of the General Government.' "). This motion failed with all States in the negative except North Carolina. *Id.* Senator Baldwin, a Framer, no doubt remembered this history.

492. Senator Baldwin argued:

> If this body of the Electors of all the States had been directed by the Constitution to assemble in one place, instead of being formed into different Electoral colleges, he took it for granted none of the questions on which this [Senator Ross's] resolution has been brought forward, would have occurred; every one would have acknowledged that they were to be settled in that assembly.

10 ANNALS OF CONG. 31.

493. *Id.* at 31–32.

> [A]ll the questions which had been suggested were as safely left to the decision of the assemblies of Electors as of any body of men that could be devised; and that the members of the Senate and House of Representatives, when met together in one room, should receive the act of the Electors as they would the act of any other Constitutional branch of the Government, to judge only of its authentication, and then to proceed to count the votes, as directed in the second article of the Constitution.[494]

This statement underscores the critical distinction in the problems of the electoral count. The joint convention of Senators and Representatives should "judge only of [the] authentication" of the acts of electors (that is, their electoral certificates), but not judge the acts of electors (that is, their electoral votes).[495]

Senator Pinckney, in his lengthy speech against the Grand Committee Bill in March of 1800, elaborated on the pro-electors principle of presidential election in the specific context of the presidential ineligibility problem of the electoral count—that is, the elector who votes for a President who is not constitutionally qualified. He believed that virtuous electors simply would not vote for a President of doubtful constitutional qualifications given the "immense power" of the President.[496] If they did, however, he had a forcible answer:

> It is true they, as well as any other Constitutional branch of this Government acting under that instrument, may be guilty of taking unconstitutional or corrupt steps, but they do it at their peril. Suppose either of the other branches of the Government, the Executive, or the Judiciary, or even Congress, should be guilty of taking steps which are unconstitutional, to whom is it submitted, or who has control over it, except by impeachment? *The Constitution seems to have equal confidence in all the branches on their own proper ground, and for either to arrogate superiority, or a claim to greater confidence, shows them in*

494. *Id.* at 32.

495. This critical distinction in the problems of the electoral count is explained in Part III.A *infra*.

496. Senator Pinckney argued:

> Who, when he reflects on the immense power the President possesses, can suppose that any man, honorably selected by his fellow-citizens as an Elector, could for a moment be so lost to a sense of his own and his country's welfare, as to vote for a man as the Supreme Executive, whose citizenship or residence were doubtful, and who were not of sufficient age?

10 ANNALS OF CONG. 132.

particular to be unworthy of it, as it is in itself directly unconstitutional.[497]

In sum, in the process of presidential election, the Constitution trusts electors with the last word on the persons receiving votes. The joint convention does not sit in judgment of the acts of electors—that is, their electoral votes. At a minimum, the point is a relative one: the Constitution trusts electors more than Members of Congress. It is thus unconstitutional for the joint convention to reject electoral votes contained in authentic electoral certificates—even when those electoral votes are unconstitutional.

2. Principles of Rule-Making and Law-Making

The Electoral Count Act violates two critical structural principles of our Constitution: the anti-binding principle of rule-making and the *Chadha* principle of law-making. These structural arguments create a rather compelling case that the Electoral Count Act is unconstitutional.

a. The Anti-Binding Principle of Rule-Making

The anti-binding principle of rule-making prevents one Congress from binding another with respect to the rules of proceedings.[498] Moreover, one Congress cannot bind each House of Congress in a current Congress (let alone that of future Congresses) with respect to the rules of proceedings. Article I, Section 5, Clause 2 expressly reflects this principle by providing that "[e]ach House may determine

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497. *Id.* at 31 (emphasis added).

498. For a brilliant article on this general (and generally neglected) subject, see Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986). A starting point is Blackstone's maxim: "Acts of Parliament derogatory from the power of subsequent Parliaments bind not." 1 WILLIAM BLACKSTONE, COMMENTARIES *90. For an extensive collection of British sources on this point, see Brett W. King, *Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U. CHI. L. SCH. ROUNDTABLE 133, 188 n.248 (1999).

Professor Kahn's argument is that there are two types of statutes: "first-order rules" and "second-order rules." The former type addresses behavior directly, and includes most laws; the latter type addresses other rules, imposing burdens on constitutionally assigned functions (for example, legislation), and necessarily raises questions as to what Congress may accomplish by statute versus by constitutional amendment. According to Kahn, the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as Gramm-Rudman, is a second-order rule, and therefore raises interesting and significant constitutional problems. He further argues that a future Congress's freedom to repeal a second-order rule does not cure the constitutional infirmities of such legislation. *See* Kahn, *supra*, at 190–204.

the Rules of its Proceedings."[499] Indeed, as a formal matter, the rules of proceedings in the House of Representatives expire at the end of the term of each House and are re-enacted by the next House.[500] (In contrast, the rules of proceedings in the Senate do not expire because the Senate is a continuing body.[501])

The Electoral Count Act clearly violates the anti-binding principle of rule-making. The Electoral Count Act is a law of proceeding for the electoral count, not a rule of proceeding like the Twenty-second Joint Rule.[502] As such, the Electoral Count Act

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499. U.S. CONST. art. I, § 5, cl. 2. Professor Kahn usefully relates that "the House [of Representatives] has taken the position that it is free to abandon statutory provisions that purport to regulate internal House procedures." Kahn, *supra* note 498, at 226. He discusses an early precedent within the first decade after the founding concerning a subject relevant to the one at hand: determining the outcome of disputed *congressional* elections. He observes:

> When Congress passed in 1797 a statute designed to regulate disputed elections, members in the House objected to the statute as an infringement on each house's rules powers. The statute was defended as legitimate because it did not prescribe rules for the House but rather procedures binding on the general public, outside of Congress. The House later adopted the position that no power constitutionally committed to one House by the Constitution could be abridged by an earlier statute.

Id. at 226 n.149 (citing 7 ANNALS OF CONG. 683–84 (1797) (statement of Rep. Sitgreaves); 1 AMERICAN STATE PAPERS CLASS 10, No. 99, 5th Cong., 2d Sess. 159–60 (1797); 36 CONG. REC. 231–35 (1902) (contested election statute); CONG. GLOBE, 35th Cong., 1st Sess. 725–34 (1858) (same)).

500. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 245 n.373 (1997) (citing RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 103-342, at 768 (1995)); *see also* Gojack v. United States, 384 U.S. 702, 706 n.4 (1966) ("Neither the House of Representatives nor its committees are continuing bodies.").

501. *See* Julian Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 408; Fisk & Chemerinsky, *supra* note 500, at 245 n.375 (citing SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 102-25, at 4 (1992)).

502. There should be no question that the Electoral Count Act is a law that regulates a particular proceeding. To be sure, Members of Congress identified it as a "permanent rule" or "fixed rule" during the Electoral Count Act debates. *See, e.g.*, COUNTING ELECTORAL VOTES, *supra* note 3, at 520 (1876) (remarks of Sen. Bayard) (referring to "framing of such a permanent rule in the shape of law upon this subject as would be satisfactory to the American people"); *id.* at 523 (remarks of Sen. Bayard) ("[F]or this is not a law for to-day only; it is to become a settled law, a fixed rule, requiring for its repeal the assent of a majority of each house and the President of the United States."); 18 CONG. REC. 30 (1886) (remarks of Rep. Caldwell) ("This bill is to prescribe the mode in which this count shall be made . . . ."); *id.* at 49 (1886) (remarks of Rep. Eden) ("The object of the bill of the Senate is to fix certain rules by which the two Houses shall be governed in counting the electoral vote."); *id.* at 50 (similar). Not surprisingly, some Members of Congress put the terms "law" or "joint rule" on the same constitutional plane in discussing the counting of electoral votes. *See, e.g.*, 17 CONG. REC. 815 (1886) (remarks of Sen. Sherman) (noting that "this most important duty of counting the electoral vote . . . is now without law or rule to govern the mode and manner of its procedure"); 18 CONG. REC. 30

impermissibly binds the actions of future joint conventions. During the Electoral Count Act debates, Members of Congress naturally recognized that the Electoral Count Act would be used to bind the actions of future joint conventions by settling questions of counting electoral votes in advance.[503] Indeed, in describing Congress's motivation in passing the Electoral Count Act, Professors Issacharoff, Karlan, and Pildes state that "Congress needed a *binding rule*, because the previous approach of counting electoral votes under a joint procedural rule that could be revoked by either house had led to the rule being revoked whenever one house disapproved of the results it would produce."[504]

Two sections of the Electoral Count Act—3 U.S.C. §§ 5 and 15—impermissibly bind (or purport to bind) the joint convention in counting electoral votes. The former section, the one at issue in *Bush v. Gore*, provides:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, *shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution*, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.[505]

The latter section, as we have seen, binds the joint conventions with an intricate set of rules for counting electoral votes.[506] This

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(1886) (remarks of Rep. Caldwell) ("Congress may provide by law or joint rule the manner of counting the [electoral] vote."); *id.* at 46 (1886) (remarks of Rep. Dibble) ("[I]t is competent for Congress, by statute or by joint agreement, joint resolution, or joint rule, to name individuals to exercise the duty of making the [electoral] count.").

503. *See, e.g.*, 18 CONG. REC. 30 (remarks of Rep. Caldwell) ("[T]his bill if passed will be an authoritative expression of the Constitution erected into law in advance of any complication which may again arise, as it has in the past, as to the counting the electoral votes of the States and the declaration of the result."); *id.* ("The passage of this bill will settle all the questions which have arisen from time to time as to the electoral count.").

504. ISSACHAROFF ET AL., *supra* note 18, at 97 (emphasis added). For expressions of this concern during the Electoral Count Act debates, see 17 CONG. REC. 815 (remarks of Sen. Sherman), *id.* at 2427 (remarks of Sen. Hoar), and 18 CONG. REC. 50 (remarks of Rep. Eden).

505. 3 U.S.C. § 5 (2000) (emphasis added).

506. *See* Part I.A.4 *supra*.

section binds the joint conventions with even the most minor of rules, including a rule that "certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A."[507] Thus, unless the Electoral Count Act is repealed or amended, future joint conventions could not proceed with counting electoral votes in reverse alphabetical order of states in the Union without acting *illegally*.

Two constitutional problems should be apparent. First, Congress might not have the authority to determine the rules of proceedings for *its* joint convention. The joint convention is decidedly not Congress, but a distinct parliamentary body with constitutionally-assigned functions.[508] Indeed, under our Constitution, Congress may not even determine the rules of proceedings of the House of Representatives or the Senate.[509] It would seem to follow that the joint convention has the constitutional prerogative to determine the rules of its proceedings when it meets once every four years. Second, even if Congress may bind its joint convention, Congress may not bind the joint convention *of future Congresses* in the exercise of constitutionally-assigned functions.

The anti-binding principle of rule-making should be a conclusive structural argument that the Electoral Count Act is unconstitutional. It is a formalist argument, however, and undoubtedly will be criticized as such.

Consider the writings of one of our leading constitutional scholars on the very question of the anti-binding principle, and in the very context of counting electoral votes. Professor Amar, in an essay on presidential succession originally prepared and submitted as testimony before the Senate Judiciary Subcommittee on the Constitution on February 2, 1994, recommended that "Congress should provide by statute that an electoral vote for any person who is dead at the time of the congressional counting *is a valid vote, and will be counted*, so long as the death occurred on or after Election Day."[510] Recall the Greeley incident of 1872[511]—the specific case that

507. 3 U.S.C. § 15.

508. Even if one believes that the counting function is committed to Congress and not to the joint convention, it is not at all clear that one Congress may bind itself in advance with respect to rules of proceedings of the electoral count. For a thoughtful discussion of one Congress binding itself with respect to rules of proceedings of legislation, see John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 506 n.109 (1995).

509. *See supra* notes 498–501 and accompanying text.

510. Amar, *supra* note 10, at 222.

511. *See supra* notes 143–48 and accompanying text.

Professor Amar sought to remedy by statute.[512] To be sure, Professor Amar defended his proposal against the formalist argument of the anti-binding principle of rule-making:

> Spoilsports might argue that, strictly speaking, any legislation passed today could not conclusively bind a future result-oriented Congress, which would be free to replace the earlier law after [President-elect] Smith's death but before the official vote counting in Congress. (One Congress cannot generally bind a successor Congress.) *And worrywarts might fret over whether our proposed legislation should be enacted as a law rather than a joint or concurrent resolution, since it seeks to regulate how votes will be counted in Congress itself.* (Sections 15 through 18 of Title 3, however, do provide a clear precedent for regulating congressional vote-counting by law.)
>
> The spoilsports and worrywarts largely miss the point. *The key function of our proposed legislation is to serve as a precommitment and focal point.* With our proposed legislation on the books, it will be much more difficult, politically, for a future result-oriented Congress to change the rules and discount the votes for Smith. The principled precedent will be our legislation, not the Greeley affair. Citizens, pundits, reporters, and politicians will be able to point to the plain language, in black and white, in the United States Code, answering the question of the hour. Any deviation from this clear focal point will obviously smack of changing the rules in the middle of the game—indeed, after the game has ended.[513]

Call me a worrywart, but not a spoilsport. Indeed, if we are to "take text and structure seriously" and not follow "free-form" methods of constitutional interpretation,[514] call me a worrywart again. Professor Amar's statement leaves little doubt that the Electoral Count Act is *formally* unconstitutional. But does worrywart formalism make the Electoral Count Act any less unconstitutional?

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512. *See, e.g.*, Amar, *supra* note 10, at 218–19, 226–27, 228–29.

513. *Id.* at 227 (emphasis added); *cf.* Harrison, *supra* note 23, at 714 (discussing ad hoc solutions to problems of the electoral count and describing the strength of having a rule, even if not the right one, as "enabl[ing] the country to avoid total political gridlock or even violence").

514. *See generally* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (criticizing the "free-form" method of constitutional interpretation as an assault on the coherent and constrained character of the legal enterprise and calling for a method that is attentive to the "stubborn truths" of text, history, and structure).

Is the Electoral Count Act a "law" that only has political but not legal force?

More recently, the anti-binding problem of rule-making is coming to the fore in the burgeoning literature on *Bush v. Gore.* Scholars from both sides of the political aisle have taken notice of the point (at least in passing) in their discussions of 3 U.S.C. § 5, the so-called "safe harbor" provision. In an article published after the case, Professor Tribe, a member of Vice President Gore's legal team, states, "There is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way."[515] And in a very brief discussion of 3 U.S.C. § 15, he states, "It is true that even that procedure, untested in the 114 years during which it has been in place, was shadowed by constitutional doubt over the power of one Congress to bind its successors in such matters."[516]

Likewise, in a forthcoming article, Professor Lund, a defender of *Bush v. Gore* and a proponent of Bush-*pere* states:

> This statute, 3 U.S.C. § 5, purports to bind Congress in exercising its constitutional duty to count electoral votes. I doubt that this can constitutionally be accomplished by a statute. Each house of Congress has the authority to determine its own rules of proceeding, and it is far from clear that a statute can override that authority. But even if 3 U.S.C. § 5 is unconstitutional in this sense, that has no bearing on the legal issues that arose in *Bush v. Gore.*[517]

Not surprisingly, the anti-binding principle of rule-making featured prominently in the Electoral Count Act debates. Several Senators made the point that Congress cannot bind the joint convention,[518] and that even if Congress could bind its joint

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515. Tribe, *supra* note 17, at 267 n.388 (citing 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-3, at 125–26 n.1 (3d ed. 2000)). The Gore legal team did not make this argument in any of the briefs filed in *Bush v. Gore.*

516. *Id.* at 277.

517. Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. (forthcoming 2002) (manuscript at 61 n.140, on file with the North Carolina Law Review) (citation omitted). For an extended discussion of the point with respect to 3 U.S.C. § 5, see Michael J. Glennon, *Nine Ways to Avoid a Train Wreck: How Title 3 Should Be Changed*, 23 CARDOZO L. REV. (forthcoming 2002) (manuscript at 9–15, on file with the North Carolina Law Review).

518. On the former point that Congress cannot bind the joint convention by law or joint rule, Senator Stockton remarked:

> If a constitutional amendment is not necessary, then those two bodies there assembled have the power to regulate the way they shall count the vote, and if they have not the power it certainly does not exist in these two bodies sitting before the Congress meets, before the body to whom the Constitution of the

convention, Congress cannot bind future joint conventions. Senator Hager put the latter point best. The counting of electoral votes was a self-executing constitutional duty, and according to Senator Hager, "[W]e cannot here establish a rule by which we dictate to another Congress how they shall perform a constitutional duty."[519] He believed that neither the Twenty-second Joint Rule nor the Electoral Count Act would have "any binding force upon the Congress that must act in this matter under the Constitution."[520] He colorfully continued:

> Can you say, sir, that you may limit your powers or add to them by any legislation here? Can you bind your successors in any matter of constitutional legislation? Turn to the powers that Congress has. Congress may "lay and collect taxes, duties, imposts, and excises." You might just as well undertake to pass a law here pointing out how Congress shall levy taxes and imposts, as to undertake to regulate them in the performance of a constitutional duty in regard to this matter. As well might one supreme court undertake to bind their successors as for one Congress to undertake to bind their successors. It cannot be done either by legislation or by any rule that you may see fit to adopt.
>
> I admit that there is an imperfection in this part of the Constitution as to how the joint body when assembled together shall proceed to act and determine the result of the election. *But as the duty is imposed upon the Senate and the House of Representatives it is for them and each body that is called upon to act in that capacity to regulate rules for themselves.*[521]

Thus, the joint convention was to determine the rules of its own proceedings. But Senator Hager advanced a fallback position. He reluctantly admitted that Congress could regulate the proceedings of its own joint convention by law, but strenuously maintained that Congress could not regulate the proceedings of future joint conventions. He stated:

United States has committed the power to count the next vote of presidential electors has convened. At a session before they are elected, you are here making laws to prevent them from doing that which was committed to them alone, and not to you, by the Constitution of the United States.

COUNTING ELECTORAL VOTES, *supra* note 3, at 500; *see also id.* at 515 (remarks of Sen. Stockton) ("The truth is and the honest truth is that the twenty-second joint rule ought never to have been passed. The whole power rested in the joint assembly when it met.").

519. *Id.* at 510 (remarks of Sen. Hager).

520. *Id.*

521. *Id.* (emphasis added).

> I admit we could pass a law here to regulate the election if we were to act in the matter. If we were to meet next week to count the electoral vote we could by the concurrence of both houses pass a law to regulate our action in the matter; *but we cannot, I say, pass a law to regulate the action of a future House or future Senate when they meet to perform a constitutional duty.*[522]

Senator Hager thus concluded that the Electoral Count Act bill "will be clearly unconstitutional."[523] Other Members of Congress made similar statements.[524]

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522. *Id.* (emphasis added). Senator Hager also remarked:

> I am satisfied that we cannot bind our successors by any legislation in regard to a constitutional duty that they have to perform. They themselves must judge how they shall perform it; and you might as well undertake to dictate that they should do it in a particular way to accomplish a particular result as to undertake to say that they shall do it according to the provisions of this bill.

Id.

523. *Id.* at 511.

524. Senator Sherman argued:

> Sir, if we put our joint rule, the whole of it, in the form of law, the Constitution gives to each house the power to make rules for its own government and the power to make joint rules for the government of the two houses. That is a constitutional power, and this Forty-third Congress cannot deprive the next Congress of the power of making rules for the government of the two houses or for the government of either house. There the constitutional privilege overrides all your laws.

Id. at 516 (remarks of Sen. Sherman). Senator Boutwell stated:

> Here is a duty imposed upon Congress by the Constitution; it is a duty to be exercised at stated periods. The provision of the Constitution does not operate upon every Congress, but it operates upon particular Congresses. Now, can a Congress to which or upon which the provision of the Constitution does not attach at all legislate and bind the conscience and the judgment of a Congress that is to perform a duty imposed by the Constitution especially upon itself? I have great doubt upon that point, whether, if the exigency should arise when it would be thought desirable, so desirable as to be expedient, for one branch or the other of Congress to disregard the law, (and that would be just the exigency when probably the law should be observed,) we should not find one body or the other willing to take the responsibility and, upon the argument that could be presented, to go to the country for justification.

Id. at 531. Senator Ingalls remarked:

> I shall be instructed far beyond my expectations if some great constitutional lawyer . . . can assure me how any legislative enactment that we may adopt now or at any time can in any manner whatever bind that great political tribunal which is to meet to declare the result of the presidential election in 1888 . . . . [W]hether the President of the Senate is to count the vote, whether the vote is to be counted by the Senate and House of Representatives separately or jointly, whether it is to be counted by the tribunal proposed by the Senator from Ohio, the fact still remains that the vote is to be counted, and that no act can be passed by any antecedent Congress that can deprive either of the persons or any of those great constituent bodies of the powers that they possess and which they are directed to exercise under and by virtue of the twelfth article of the amendments

In sum, the Electoral Count Act violates the anti-binding rule of rule-making because it is a law and not a rule. Ironically, the Electoral Count Act would be closer to constitutionality if it were a rule like the Twenty-second Joint Rule. If, however, the Electoral Count Act were repealed and readopted as a joint rule, the constitutional problem would remain whether Congress may bind the joint convention. Constitutional structure strongly suggests that the joint convention has the constitutional prerogative of determining the rules of its own proceedings.[525]

b. The *Chadha* Principle of Law-Making

The Electoral Count Act's requirement that the two Houses of Congress concur in rejecting electoral votes in the single return case and to accept electoral votes in the multiple returns case is strange and complicated.[526] This requirement is by design—recall that one purpose of the Electoral Count Act was to eliminate the "one House veto" of the Twenty-Second Joint Rule. Senator Morton, the original sponsor of what was to become the Electoral Count Act, stated,

> If we are to have a rule at all, if Congress is to interfere, let it be upon the ground on which a law is passed or a resolution is passed. It requires the vote of the two houses to pass a law, no matter how small or unimportant that law may be.[527]

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to the Constitution.

17 CONG. REC. 1025 (1886). Representative Adams remarked:

> [T]he real question will arise when the two Houses meet here to pass upon the electoral votes in the next Presidential election; and those Houses, in my judgment, when they meet here to discharge a duty which is expressly imposed upon them by the Constitution, will not be bound by the action of the Senate and House of the Forty-ninth Congress and the President, when he signs this bill, if it shall pass. It is their duty, conferred on them by the Constitution, to count the votes. If for any reason whatever a single return shall appear to both Houses of Congress to be an invalid return they have the right so to determine; and if they do so determine, that vote will not be counted, however many statutes we may pass like this.

18 CONG. REC. 51 (1886); *see also id.* at 51–52 (remarks of Rep. Adams) (similar).

525. The critic would argue (persuasively) that the joint convention should not waste time determining the "shape of the table" on the important day of the electoral count. The two Houses of Congress are free to create a joint rule purporting to bind the joint convention. But the requirement of formalism remains. As the first matter of business, the joint convention should (and will in all likelihood) formally adopt the joint rule as *its* rule of proceeding.

526. *See* 3 U.S.C. § 15 (2000).

527. COUNTING ELECTORAL VOTES, *supra* note 3, at 453.

Ironically, the concurrence of the two Houses raises significant constitutional problems. Consider one of the most important structural features of Article I:

> Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two[-]thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.[528]

When the two Houses of Congress concur in rejecting or accepting electoral votes, the vote is not presented to the President—and, as we have seen, for good reason.[529] The question is whether this lack of presentment is constitutional.

Scholars who have addressed this presentment problem in the wake of *INS v. Chadha*[530] have doubted the existence of a presentment problem in the Electoral Count Act because the concurrent action of the two Houses in counting electoral votes is not legislative in nature.[531] Clearly, the counting of the electoral votes is not legislative in nature.[532] However, this conclusion does not dispose

528. U.S. CONST. art. I, § 7, cl. 3.

529. *See supra* notes 457–60 and accompanying text (presenting structural argument of anti-President principle in presidential election).

530. 462 U.S. 919, 958 (1983) (holding that section of Immigration and Nationality Act authorizing one House of Congress, by resolution, to invalidate decision of Executive Branch to allow a particular deportable alien to remain in the United States is unconstitutional, because such action is legislative and is therefore subject to the bicameralism and presentment requirements of Article I of the Constitution).

531. *See, e.g.*, GLENNON, *supra* note 18, at 43 ("While such an action is technically within the scope of the *Chadha* test, it is doubtful that the Constitution requires that a congressional objection be presented to the president" because the counting of electoral votes is not a "lawmaking function."); Ross & Josephson, *supra* note 7, at 727 n.317 ("The suggestion that Congress cannot exercise its counting function bicamerally without presidential action is probably not well taken. The [Presentment Clause] has been interpreted to refer only to legislative action. Whatever the houses are doing when they are counting electors' votes, they are not enacting laws.") (citations omitted).

532. During the Electoral Count Act debates, some Members of Congress made this point. Senator George made this point with ample frequency. *See, e.g.*, 17 CONG. REC. 1063 (1886) (stating that "whoever does determine what votes shall be counted performs a judicial act"); *id.* at 2429 (1886) ("What kind of business is [counting electoral votes]? It certainly is not legislative business. It is the ascertainment of a fact and a very important fact to this country."); *id.* (stating that counting electoral votes "is not a legislative function which ought to be considered separately by the two Houses, but it is rather in the nature of a judicial function"). Senator Hoar also made the point that counting electoral votes was not a legislative act. *See, e.g.*, *id.* at 1020 (remarks of Sen. Hoar) (judicial act). Senator

of the *Chadha* problem. Contrary to what Professor Ross and Mr. Josephson have suggested, the Presentment Clause is not solely about legislative action.[533]

The text of the Presentment Clause itself suggests as much. The single exception identified in the clause—"except on a question of Adjournment"[534]—is not legislative but procedural in nature. If the Presentment Clause is only about legislative action, why does the clause specify this non-legislative exception?[535] There are at least two other exceptions to presentment in the non-legislative context, each with a strong justification. Presentment is not required when Congress proposes amendments to the Constitution under Article V,[536] or when Congress removes an office-holding disability under Section 3 of the Fourteenth Amendment because, in each case, the two-thirds vote requirement is precisely that needed to override a

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Edmunds stated that "this act of receiving and counting these votes is not a legislative act, and I say with equal emphasis that, in my opinion, it is not a judicial act, because the Constitution of the United States has not imputed any such judicial power to either or both of the Houses." *Id.* at 1064. In his view, the counting of electoral votes "is an administrative act, the same sort of administrative act that every State which existed at the time of the formation of the Constitution imputed to its executive and election officers in the canvassing and return of votes and in the final ascertainment of them by some body, for the institution of every officer of a State from a justice of the peace or an overseer of the poor up at least to its governor." *Id.*

533. *See* Ross & Josephson, *supra* note 7, at 727 n.317 ("The [Presentment] Clause has been interpreted to refer only to legislative action.").

534. U.S. CONST. art. I, § 7, cl. 3.

535. It is arguable that the exception was inserted to simply clarify the meaning of the clause or out of an abundance of caution. *See generally* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998) (asserting that "[a] considerable number of constitutional clauses are redundant in a certain sense; they illuminate and clarify what was otherwise merely implicit"). The secret drafting history of the Presentment Clause suggests otherwise. For example, the Committee of Style inexplicably dropped the italicized language in the proposed clause:

> Every order, resolution or vote, to which the concurrence of the Senate and House of Representatives may be necessary (*except on a question of adjournment and in the cases hereinafter mentioned*) shall be presented to the President for his revision; and before the same shall have force, shall be approved by him, or, being disapproved by him, shall be repassed by the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

2 FARRAND, *supra* note 35, at 569 (emphasis added); *see* 2 *id.* at 594. During the Electoral Count Act debates, Senator Hoar asserted that "[t]here are all through the Constitution, among the powers of these two Houses, powers which require the concurrence of the two Houses for their exercise, but which, not relating to legislation, are never held to require the assent of the President or to be presented to the President," but failed to present any examples other than Article V. 17 CONG. REC. 2429.

536. *See* INS v. Chadha, 462 U.S. 919, 955 n.20 (1983); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 381 (1798).

presidential veto under the second part of the Presentment Clause.[537] Clearly, the Electoral Count Act lacks this justification: a simple majority vote of each House is sufficient to reject an electoral vote. Moreover, the Impeachment Clauses furnish an important background lesson. Impeachment is a paradigmatic non-legislative activity and presentment in case of impeachment would be silly—much like the case of counting electoral votes. The impeachment powers are finely wrought and intended to avoid concurrent action of the two Houses: only the House may institute an impeachment;[538] only the Senate may try one;[539] and a two-thirds super-majority of Senators is required for a conviction of impeachment.[540]

This presentment problem was raised at least once during the Electoral Count Act debates as an argument against its constitutionality. Senator George called the presentment problem a "conclusive objection" to separate action of the two Houses.[541] "[I]t is impossible," said Senator George, "to escape from the express language of the Constitution that 'every order,' not every bill, not every act, not every statute, but every 'order,' every 'resolution,' every 'vote,' in the language of the Constitution, to which the concurrence of the two Houses is necessary, shall be presented to the President for his signature."[542] Senator Hoar responded that the Presentment Clause only related to legislative matters.[543]

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537. Senator George made precisely this response to Senator Hoar during the Electoral Count Act debates with respect to the Article V presentment question. *See* 17 CONG. REC. 2429. Senator Hoar then asked if "the joint rules of the two Houses must be presented to the President because to their validity they require the concurrence of the two Houses?" *Id.* Senator George, relying upon the Rules of Proceedings Clause, responded that each House, in addition to making its own rules, "may also make rules besides its own separate rules for its joint action with the House, and in the same way the House may perform that function, and in that way reach joint rules." *Id.*

538. *See* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.").

539. *See* U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

540. *See id.* ("And no Person shall be convicted without the Concurrence of two[-]thirds of the Members present.").

541. *See* 17 CONG. REC. 2428–29. Professor Ross and Mr. Josephson note that Representative Adams also addressed the presentment problem in Electoral Count Act debate in the House of Representatives in late 1886, but I fail to find any such evidence. *See* Ross & Josephson, *supra* note 7, at 727 n.317 (citing 18 CONG. REC. 51–52 (1886) (remarks of Rep. Adams)).

542. 17 CONG. REC. 2428–29.

543. *See id.* at 2429 ("[The Presentment Clause] never has been held anywhere, so far as I know, to apply to anything but legislative matters which are to take effect upon the people by the authority of the Congress. There are all through the Constitution, among

A close reading of *Chadha*, unavailable of course to the participants in the Electoral Count Act debates, fortifies the basic argument made by Senator George and casts further doubt upon the constitutionality of the Electoral Count Act. The *Chadha* Court carefully explained why the "one-House veto" provision of the Immigration and Nationality Act was subject to the requirements of bicameralism and presentment in Article I.[544] The Court began by noting that "[w]hether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative *in its character and effect.*"[545] The Court then described the one-House veto provision in that case as one that "had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch,"[546] which was the first of a series of four arguments in the Court's conclusion that the provision was subject to the bicameralism and presentment requirements of Article I.[547]

The counting (and not counting) of electoral votes by a simple majority of the two Houses of Congress, acting separately and concurrently, sounds like an action that has "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch,"[548] if there ever was one. This bicameral procedure in counting electoral votes would therefore require presentment. Even if the counting of electoral votes is more properly described in the first instance as a "judicial act," this conclusion would not be changed under the *Chadha* Court's conception of legislative power.[549] If the Electoral Colleges Clauses require (or permit) bicameralism but not presentment in counting electoral votes, the Court simply did not mention it.[550]

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the powers of these two Houses for their exercise, but which, not relating to legislation, are never held to require the assent of the President or to be presented to the President.").

544. *See* 462 U.S. at 952–58.

545. *Id.* at 952 (emphasis added) (citation omitted).

546. *Id.*

547. *See id.* at 956–57.

548. *Id.* at 952.

549. *See id.* at 957 n.21 (discussing Justice Powell's position that the one-House veto provision is a "judicial act" and concluding that "[w]e are satisfied that the one-House veto is legislative in purpose and effect and subject to the procedures set out in Art. I").

550. In a footnote, the Court identified one exception to the Presentment Clause, and suggested another. *See id.* at 955 n.20. The exception was for the proposal of constitutional amendments by two-thirds of both Houses of Congress under Article V. *Id.* (citing Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798)). The Court then suggested

Furthermore, if the two-House veto provision of the Electoral Commission of the Hayes-Tilden Incident of 1877—which enabled the two Houses of Congress to overturn the findings of that commission without presentment—is constitutionally problematic under *Chadha*[551] as Professor Tribe has recently suggested,[552] it would surely seem to follow that the two-House veto provision of the Electoral Count Act—which enables the two Houses of Congress to overturn the "findings" of electors without presentment—is equally if not more constitutionally problematic under *Chadha*.[553]

We must interpret exceptions to the Presentment Clause faithfully. The word "every" in the Presentment Clause means every and not some. Under our Constitution, there is no other instance where a simple majority of both Houses of Congress may affect the legal rights, duties, and relations of persons outside of the legislative branch without presentment to the President. There is no textual or structural reason why the counting function of the Electoral College Clauses should constitute an exception to this important constitutional rule, especially when the stakes are an *entire branch* of government. The bicameral procedure for counting electoral votes in the Electoral Count Act is unconstitutional under the *Chadha* principle of law-making.

There is, however, a solution to the presentment problem in counting electoral votes: the unicameralism principle avoids the

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that "[o]ne might also include another 'exception' to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses" by pointing to the Rules of Proceedings Clause, U.S. CONST. art. I, § 5, cl. 2, as giving to each House "the power to act alone in determining specified internal matters." *Chadha*, 462 U.S. at 955 n.2. The Court was careful to note that "this 'exception' only empowers Congress to *bind itself* and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a close circumscribed legislative arena, except in specific and enumerated instances." *Id.* (emphasis added). Actually, the Court incorrectly framed the point: the Rules of Proceedings Clause does not apply to "Congress" but each House of Congress. The important point is that the Court nowhere suggested that any rule-making authority *of Congress* could be used to affect the legal rights, duties, and relations of non-Members of Congress without presentment to the President. *See also* McGinnis & Rappaport, *supra* note 508, at 495 n.60 (stating that "when the [*Chadha*] Court stated that the Rules of Proceedings Clause gave Congress the power to 'bind itself,' it meant simply that the rules were binding on members of Congress as opposed to individuals or institutions outside Congress").

551. *See supra* note 162 and accompanying text.

552. *See* Tribe, *supra* note 27, at 278 & n.438.

553. Indeed, the argument is an even stronger one to the extent that electors in the electoral colleges constitute a separate and co-ordinate branch of the federal government, *see* Kesavan, *supra* note 324, at 131–35, unlike the Electoral Commission of 1877 which was a quasi-legislative body largely drawn from Members of Congress.

presentment problem entirely. The Presentment Clause cannot be said to apply to the joint convention of Senators and Representatives assembled for the purpose of the electoral count, where neither the Senate nor the House of Representatives acts in their corporate capacity.

3. Conclusions

The structural argument reveals that the Electoral Count Act is unconstitutional, at least it if it is anything more than merely precatory. As a prima facie matter, the Electoral Count Act, to the extent that it is a law that has legal force, clearly violates the anti-binding principle of rule-making. This is perhaps the strongest structural argument against the constitutionality of the Electoral Count Act. In addition, the Electoral Count Act is also unconstitutional in its potential operation in counting electoral votes. The bicameral procedure of 3 U.S.C. § 15 violates the anti-Senate principle of presidential election, the *Chadha* principle of law-making, and the anti-President principle of presidential election. Finally, to the extent that the joint convention rejects electoral votes contained in authentic electoral certificates as not "regularly given,"[554] the Electoral Count Act violates the anti-Congress principle of presidential election, the pro-states and pro-state legislatures principle of presidential election, and the pro-electors principle of presidential election.

III. WHAT SHOULD WE DO IF ELECTORS GO BANANAS?

Assume that the Electoral Count Act is unconstitutional as argued in Part II. What happens if electors go bananas and vote for Professor Paulsen's dog, Gus, as President?[555] What happens if electors go bananas and also vote for Dean Ely's dog, Portland, as Vice President?[556] To make things even worse, suppose there is a case of double (or more) such returns from the same state?

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554. 3 U.S.C. § 15 (2000).

555. *See* Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217, 222 (1996).

556. For Portland's claim to fame in the legal academy, see, for example, JOHN HART ELY, ON CONSTITUTIONAL GROUND 399 n.251 (1996); John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 581–84 (1997); John Hart Ely, *Another Spin on* Allegheny Pittsburgh, 38 UCLA L. REV. 107, 108 n.6 (1990). Dean Ely's other dog, Buffo, featured prominently in some of his earlier work, *see, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 182 (1980), where she almost became Secretary of Agriculture, but Dean Ely informs me that Buffo has since "passed on to the other side." *See* Email from Dean John Hart Ely, to Vasan Kesavan (Mar. 2, 2001) (on file with

The Electoral Count Act sounds like a good statutory scheme to deal with these and less preposterous problems, but needless to say, not every good statutory scheme is a constitutional one.[557] An argument that the Electoral Count Act is unconstitutional may (sadly) not be enough. The critic would argue that we deserve to know what should happen when inauthentic electoral certificates are transmitted to the seat of government, or when authentic electoral certificates containing unconstitutional or faithless electoral votes are transmitted to the same. Of course, with or without the Electoral Count Act, the potential problems of the electoral count remain.

This Part seeks to placate the critic and provide answers to these questions. This Part proceeds in three sections. The first section addresses the paradigm problems of the electoral count and provides (or at least suggests) answers in the absence of the Electoral Count Act. As we shall see, the Electoral Count Act is not necessary to address any of the potential problems of the electoral count that may arise because the Constitution itself (implicitly) provides answers (however undesirable they may be). The second section argues that the Twentieth Amendment, adopted in 1933, provides a constitutional solution to the thorniest problem of the electoral count—the problem of presidential or vice presidential ineligibility. Given the Twentieth Amendment, the Electoral Count Act is not needed to address this potential problem of the electoral count. Finally, the third section considers where we should go from here in revising the current statutory scheme, assuming that some statutory scheme relating to counting electoral votes would be constitutional.

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author).

557. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 421 (1998) (holding cancellation procedures in the Line Item Veto Act unconstitutional under the Presentment Clause); Printz v. United States, 521 U.S. 898, 935 (1997) (holding interim provisions of the Brady Handgun Violence Prevention Act unconstitutional as violating the "constitutional system of dual sovereignty"); New York v. United States, 505 U.S. 144, 149 (1992) (holding the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act unconstitutional under the Tenth Amendment); INS v. Chadha, 462 U.S. 919, 957–58 (1983) (holding a "one-House veto" provision of the Immigration and Nationality Act unconstitutional under the Presentment and Bicameralism Clauses). By citing these cases, I do not mean to signify my agreement or disagreement with their holdings. *Cf. Chadha*, 462 U.S. at 944 ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .").

A. *Answers to the Paradigm Problems of the Electoral Count*

In Part I, we examined the paradigm problems of the electoral count as experienced in the electoral counts in the history of our Republic. It is now time to provide (or at least suggest) some answers. The paradigm problems fall easily into two categories: (1) problems relating to the electoral certificate, and (2) problems relating to the electoral vote. The paradigm problems within each category are not of equal difficulty. Let us consider the paradigm problems in some rough order of increasing difficulty within each category.

1. The Problems of the Electoral Certificate

The problems of the electoral certificate share two distinguishing characteristics. First, they are antecedent to the problems of the electoral vote. Second, they, as a prima facie matter, do not require any knowledge of the persons receiving votes, and may therefore be resolved without ever looking at the names of the persons receiving votes. In sum, the problems of the electoral certificate relate to judging the authenticity or validity of the acts of electors, whereas the problems of the electoral vote relate to judging the acts of electors—that is, their electoral votes.

a. The Unsigned, Uncertified, or Unsealed Electoral Certificate Problem

A first problem of the electoral certificate relates to the three simple elements of the electoral certificate that attest to its authenticity. Suppose a state should transmit an electoral certificate to the seat of government that is not (i) signed, (ii) certified, and (iii) sealed. The result would be that the joint convention must not count the electoral votes in this electoral certificate.

The relevant clause of the Twelfth Amendment provides that "[the Electors] shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate"[558] the electoral certificate. Under even the "thinnest" conception of the counting function, the joint convention must judge the authenticity of the electoral certificate, distinguishing between what is merely the legal equivalent of a Publishers Clearinghouse sweepstakes entry and what is a bona fide electoral certificate. Indeed, the word "certify" in the Twelfth Amendment is a signal of

558. U.S. CONST. amend. XII.

legal significance.[559] The rejection of inauthentic electoral certificates preserves authenticity in the process of presidential election. The Electoral College Clauses contain an authenticity principle for good reason: authenticity is the principal safeguard to the risk of cabal and corruption in the election of the President.[560]

b. The Puerto Rico, or Unrepublican State, Electoral Certificate Problem

A second problem of the electoral certificate relates to the authenticity of its sender. Suppose Puerto Rico should transmit an electoral certificate to the seat of government. Or suppose that an unrepublican State should transmit an electoral certificate to the seat of government.[561] Obviously, the result would be that the joint convention must not count the electoral votes contained in this electoral certificate.

The Constitution makes clear that only states and the District of Columbia are entitled to appoint electors,[562] and are thereby entitled to transmit electoral certificates. The political branches of the federal government have the right to recognize states in the Union.[563]

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559. *See, e.g.*, 2 OXFORD ENGLISH DICTIONARY 1054 (2d. ed. 1989) (defining "certify" as "[t]o declare or attest by a formal or legal certificate").

560. *See, e.g.*, THE FEDERALIST NO. 68, *supra* note 246, at 380 (Alexander Hamilton) ("Nothing was more to be desired [in Electoral College mode of presidential election] than that every practicable obstacle should be opposed to cabal, intrigue, and corruption."). Senator King remarked:

> [M]embers of the General Convention . . . did indulge the hope, by apportioning, limiting, and confining the Electors within their respective States, and by the guarded manner of giving and transmitting the ballots of the Electors to the Seat of Government, that intrigue, combination, and corruption, would be effectually shut out, and a free and pure election of the President of the United States made perpetual.

3 FARRAND, *supra* note 35, at 461 (remarks of Sen. Rufus King).

561. *See, e.g.*, 18 CONG. REC. 31 (1886) (remarks of Rep. Caldwell) ("Suppose some State should enthrone a king, constitute a house of lords, and they should appoint electors, and send up but one return properly certified and finally determined as required under the second section of the bill proposed by the minority. Shall an American Congress count such a vote?").

562. *See* U.S. CONST. art. II, § 1, cl. 2 (States); U.S. CONST. amend. XXIII, § 1 (District of Columbia).

563. *See generally* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (holding that the recognition of a state government lies with Congress, not the courts); *see also* U.S. CONST. art. IV, § 3 ("New States may be admitted by the Congress into this Union . . . ."); U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

We have seen this problem before as well as its resolution. The Thirty-eighth Congress resolved not to count the electoral votes from eleven Southern States.[564] When Congress sent the resolution to President Lincoln for his signature, he replied in the third person:

> The joint resolution entitled "Joint resolution declaring certain States not entitled to representation in the electoral college" has been signed by the Executive in deference to the view of Congress implied in its passage and presentation to him. In his own view, however, the two Houses of Congress, convened under the twelfth article of the Constitution, have complete power to exclude from counting all electoral votes deemed by them to be illegal; and it is not competent for the Executive to defeat or obstruct that power by a veto, as would be the case if his action were at all essential in the matter. He disclaims all right of the Executive to interfere in any way in the matter of canvassing or counting electoral votes, and he also disclaims that, by signing said resolution, he has expressed any opinion on the recitals of the preamble or any judgment of his own upon the subject of the resolution.[565]

President Lincoln's reply suggests that Congress's power not to count electoral votes is quite broad, but we should be careful not to take it out of context of the Northerners' (Republicans') exclusion of Southern senators, representatives, and electors pursuant to the Guarantee Clause of Article IV, Section 4.

c. The Number of Electoral Votes Problem

A third problem of the electoral certificate relates to the aggregate number of electoral votes in the electoral certificate. Suppose a state should transmit an electoral certificate to the seat of government that contains more electoral votes than the number of electors to which that state is then entitled.[566] During the Electoral Count Act debates, Senator Frelinghuysen distinctly noted this possibility that "[a] State may claim a larger representation than has been assigned her and may appoint more electors than she is entitled

564. *See* COUNTING ELECTORAL VOTES, *supra* note 3, at 147–49 (House); *id.* at 149–223 (Senate and House); *see also* Wroth, *supra* note 22, at 328–29 n.34.

565. COUNTING ELECTORAL VOTES, *supra* note 3, at 229–30; *see also* Wroth, *supra* note 22, at 328–29 n.34.

566. *See* U.S. CONST. art. II, § 1, cl. 2; 3 U.S.C. § 3 (2000). For ease of exposition, I will simply refer to electoral votes instead of two distinct lists of electoral votes for President and Vice President, respectively.

to, and all their votes may be returned."[567] His answer was clear: "[I]f a State should send as votes a larger number than it was entitled to . . . it would be a direct violation of the Constitution and an act of revolution for any one to count them."[568] The result would be that the joint convention must not count the electoral votes in this electoral certificate.[569]

Translated into a counterfactual: Suppose Florida's electoral certificate on January 6, 2001 contained twenty-six votes instead of the twenty-five votes to which Florida was then entitled. The State of Florida would be disenfranchised in the presidential election.

It may be tempting to conclude that the joint convention must exclude one of the twenty-six votes, but which one? Must they exclude a randomly selected vote? It hardly seems more constitutional to exclude a randomly selected vote than to exclude all votes. What about a particular vote? In order to exclude a particular vote, the resolution of this problem would require knowledge of the persons voted for, thereby transforming a problem of the electoral certificate (a problem of judging the authenticity of the acts of electors) into a problem of the electoral vote (a problem of judging the acts of electors). And which vote would be excluded? There is no constitutional requirement that all electoral votes in an electoral certificate must be given for the same person.[570] The joint convention may not exclude a particular electoral vote without affirmatively voting against a person voted for—an action that goes well beyond judging the authenticity of the acts of electors.

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567. COUNTING ELECTORAL VOTES, *supra* note 3, at 451.

568. *Id.*

569. This counting principle does not hold in the equal-and-opposite direction: a state may transmit an electoral certificate containing less electoral votes than the number of electors to which that state is then entitled, and these votes must be counted by the joint convention. Indeed, the Framers contemplated that electors would be appointed but would not give votes. *See* 2 FARRAND, *supra* note 35, at 515 (rejecting the motion of James Madison and Hugh Williamson "to insert after 'Electors' the words 'who shall have balloted' so that the non voting electors not being counted might not increase the number necessary as a majority of the whole.").

570. The choice is reserved to the states. For example, only Maine and Nebraska have proportional voting instead of "winner-take-all" voting in their electoral colleges. *See* ME. REV. STAT. ANN. tit. 21-A, § 805.2 (West 1993); NEB. REV. STAT. § 32-714 (1998). But even in "winner-take-all" states, the possibility looms that faithless electors will give votes in contravention of the popular vote. *See supra* notes 7, 176–91 and accompanying text; *infra* notes 590–92 and accompanying text.

d. The Multiple Electoral Certificates Problem

A fourth problem of the electoral certificate relates to the aggregate number of electoral certificates (returns) from a putative state. Suppose two or more sets of electors from the same state should transmit an electoral certificate to the seat of government. Recall the Hayes-Tilden Incident of 1877.[571] One and only one of the following two propositions must be true as a matter of logic: (1) one of the electoral certificates is authentic and all others are not; or (2) none of the electoral certificates are authentic. Needless to say, the result would be that all of the electoral votes contained in the authentic electoral certificate must be counted and all of the electoral votes contained in the inauthentic electoral certificates must not be counted.

The multiple returns problem may seem complicated, but it is not analytically different from the Puerto Rico problem of the electoral certificate. The authentic electoral certificate (if any) is one from the state; the others, insofar as the Constitution is concerned, are merely legally equivalent to Publishers Clearinghouse sweepstakes entries transmitted to the seat of government by non-states. If multiple state authorities should claim to be the lawful authority of a state, the joint convention must choose which state government is the lawful one, but, importantly, this choice is no more difficult than the choice (previously) made by each House in deciding to seat Members of Congress from a putative state, or the choice made by the President when she sends in the troops under the Guarantee Clause to protect one of multiple authorities that request the interposition of military force.[572] Most importantly, the multiple returns problem is one of the electoral certificate and not of the electoral vote and should be treated as such. The joint convention should be able to determine which electoral certificate contains the legitimate set of electors without examining the names of the persons receiving votes.

e. The Misdated Electoral Certificate Problem

A fifth problem of the electoral certificate relates to its date. Suppose a state should transmit an electoral certificate to the seat of government that contains electoral votes given on a day different

571. *See supra* notes 157–64 and accompanying text.

572. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; *and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*") (emphasis added).

from that specified by federal law for the giving of electoral votes.[573] Recall the Wisconsin Incident of 1857[574] and the Hawaii Incident of 1961.[575] The result would be that the votes contained in this certificate must not be counted by the joint convention, except perhaps in one narrow circumstance to be discussed shortly.

Article II, Section 1, Clause 4 provides that "[t]he Congress may determine the Time of chusing the electors, and the Day on which they shall give their Votes; *which Day shall be the same throughout the United States.*"[576] This is a rule, inasmuch as the Constitution's requirement that the President be thirty-five years of age upon entering office is a rule;[577] this is not a standard. It may be tempting to conclude that the joint convention could exercise discretion as to whether to count electoral votes given on a day different from that specified by federal law, especially in cases of force majeure such as the Wisconsin Incident of 1857. Indeed, the Constitution, to the extent that it is to be interpreted against the background of the common law, might recognize an exception for force majeure.[578] This one narrow circumstance aside, however, the language of the Constitution is unmistakably clear—adherence to the date chosen is mandatory. More importantly, the requirement that electoral votes be given on the same day throughout the Union is a particularly important part of the authenticity principle of the Electoral College Clauses.[579] The joint convention has the duty to support the

573. *See* 3 U.S.C. § 7 (2000) ("The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.").

574. *See supra* notes 132–42 and accompanying text.

575. *See supra* notes 165–75 and accompanying text.

576. U.S. CONST. art. II, § 1, cl. 4 (emphasis added). Admittedly, there is nothing in the Electoral College Clauses that expressly provides that the electors shall date the electoral certificate, but the requirement is fairly subsumed by that of certification. *See* U.S. CONST. amend. XII ("[The Electors] shall sign, and *certify*, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.") (emphasis added). Who ever heard of a legal certificate without a date?

577. *See* U.S. CONST. art. II, § 1, cl. 5.

578. During the Electoral Count Act debates, Representative Dibble thought otherwise:

> [A]s in the election of any of us, if a man who is a voter does not go to the polls on election day and within the hours fixed by law and cast his vote, the vote is lost, and it makes no difference whether he was sick, or whether he was prevented from casting his vote by some necessity, or mischance, or design, or whether his vote might have changed the complexion of the election; his vote is lost if his right to vote is not exercised on the day designated.

18 CONG. REC. 46 (1886) (remarks of Rep. Dibble).

579. *See, e.g.*, 2 FARRAND, *supra* note 35, at 500 (remarks of Governor Morris) ("As

authenticity principle of the Electoral College Clauses, not the power to exercise its discretion in the matter.

Translated into the past: Wisconsin's electoral votes in 1857 (perhaps) should not have been counted and Hawaii's electoral votes in 1961 should not have been counted. Translated into a counterfactual: Florida's electoral votes in 2001—if given on a day other than December 18, 2000—should not have been counted,[580] though Justice Ginsburg in *Bush v. Gore* implied otherwise.[581]

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the Electors would vote at the same time throughout the U.S. and at so great a distance from each other, the great evil of cabal was avoided. It would be impossible to corrupt them."); 4 ELLIOT'S DEBATES, *supra* note 250, at 122 (remarks of William Davie at North Carolina ratifying convention) ("He is elected on the same day in every state, so that there can be no possible combination between the electors."). At the North Carolina ratifying convention James Iredell remarked:

> Had the time of election been different in different states, the electors chosen in one state might have gone from state to state, and conferred with the other electors, and the election might have been thus carried on under undue influence. But by this provision, the electors must meet in the different states on the same day, and cannot confer together. They may not even know who are the electors in the other states. There can be, therefore, no kind of combination. It is probable that the man who is the object of choice of thirteen different states, the electors in each voting unconnectedly with the rest, must be a person who possesses, in high degree, the confidence and respect of his country.

Id. at 105.

580. One leading scholar agrees. *See* Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657, 676 n.93 (2001). After quoting the Constitution's provision that the "Day [for giving electoral votes] shall be the same throughout the United States," *see* U.S. CONST. art. II, § 1, cl. 4., Professor McConnell concludes, "December 18 was so designated by statute. It would be *unconstitutional* for Congress to allow the electors from a single state to give their votes on a later date." *Id.* (emphasis added). He then discusses the Hawaii Incident of 1961, *see supra* notes 165–75 and accompanying text, and concludes, "That should not be treated as a precedent. In that election, the votes of Hawaii were not necessary to the result, and on the suggestion of the losing candidate, Vice President Richard Nixon, in his capacity as President of the Senate, were recognized as a courtesy." McConnell, *supra*, at 676 n.93.

This is not to say that December 18, 2000 was a magic point in time for the electoral count of January 6, 2001. Political difficulties aside, there is no reason why Congress could not have amended 3 U.S.C. § 7 to provide that electors shall give their votes on a date later than December 18, 2000 and, if needed, amended 3 U.S.C. § 15 to provide that the joint convention shall count their votes on a date later than January 6, 2001. Both dates, of course, could be no later than January 20, 2001 at the time of noon, when the terms of the President and Vice-President expired. *See* U.S. CONST. amend. XX, § 1. The important point is that the Constitution demands that electoral votes be given on the same day throughout the Union—not forty-nine states on December 18, 2000 and one state on some other date. When Congress could have amended 3 U.S.C. § 7 is a more difficult question. The spirit of the Constitution suggests that, in order to minimize undue congressional interference and manipulation in presidential election, Congress could not amend 3 U.S.C. § 7 after the electors shall have given their votes on December 18, 2001 pursuant to then-existing federal law.

581. *See* Bush v. Gore, 531 U.S. 98, 144 (Ginsburg, J., dissenting) ("But none of these dates [including December 18, 2000, the date set by 3 U.S.C. § 7 (2000)] has ultimate

f. The Elector Ineligibility Problem

A sixth problem of the electoral certificate relates to the qualifications of the electors. Suppose that an electoral vote is given by an elector who is constitutionally ineligible to the office of elector.[582] Recall the Postmaster Incident of 1837.[583] The result would be that the votes of an elector who is constitutionally ineligible to hold the office of elector must be counted.

The joint convention may not judge the manner of appointment or qualifications of electors.[584] Once the vote of a constitutionally ineligible elector is transmitted in the electoral certificate, that vote is final and must be counted. A congressional analogy is illuminating. Imagine that a Representative-elect does not meet the constitutional qualifications prescribed by the House Qualifications Clause.[585] The Representative is seated, performs legislative business, and is only subsequently expelled from the House. Are the votes of this Representative any less valid?[586]

Most importantly, the elector ineligibility problem is impossible to resolve without knowing the persons voted for and the joint convention may not judge the acts of electors. In particular, the votes of a constitutionally-ineligible elector must be counted because of the anonymity principle of the Electoral College Clauses.

The Electoral College Clauses protect the anonymity of electors in two important ways: (i) voting in the Electoral Colleges shall be by ballot, and (ii) the electoral certificate shall contain lists of the

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significance in light of Congress' detailed provisions for determining, on 'the sixth day of January,' the validity of electoral votes.").

582. There are only two clauses that specify the qualifications of electors. *See* U.S. CONST. art. II, § 1, cl. 2 ("[B]ut no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."). U.S. CONST. amend. XIV, § 3 provides:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds in each House, remove such disability.

583. *See supra* notes 118–25 and accompanying text.

584. *See supra* notes 400–22 and accompanying text (presenting intratextual argument from House Judging Clause).

585. *See* U.S. CONST. art. I, § 2, cl. 2.

586. *Cf.* THE FEDERALIST NO. 53, at 303 (James Madison) (Clinton Rossiter ed., Mentor 1999) (1961) (suggesting that the votes of an "illegitimate member" of Congress would be valid before that member is "dispossessed" of his or her seat).

persons voted for, signed and certified by the electors as a whole.[587] The votes of individual electors are not to be known in order to preserve the independence of the electors and the President. Senator Pinckney put these points brilliantly in the specific context of the elector ineligibility problem:

> [H]ow are [sic] Congress . . . to proceed to find how these unduly or disqualified Electors voted, particularly if they should belong to a State having a number of Electors? As the Constitution directs they are to vote by ballot, the votes of the election ought to be secret. You have no right to require from an Elector how he voted, nor will you be able to know for whom he did vote, particularly if in the return from that State different candidates have been voted for. In this dilemma, I ask, what is to be done? You cannot discover for whom this disqualified or improperly returned Elector voted; and you would not certainly, in a State having sixteen or twenty-one votes, reject the whole, because one or two illegal votes have been supposed to be given.[588]

Of course, it is possible to determine the persons voted for by a constitutionally-ineligible elector in a case of mathematical certainty—when all of the electoral votes for President or Vice President are given for the same person. But, as we have seen, there is no constitutional requirement that all electoral votes must be given for the same person.[589] A non-constitutional common practice of "winner-take-all" voting in the electoral colleges that makes mathematical certainty the norm and not the exception does not change the answer to this constitutional question.

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587. U.S. CONST. amend. XII states that:

> The Electors shall meet in their respective States and *vote by ballot* for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their *ballots* the person voted for as President, and in distinct *ballots* the person voted for as Vice-President, and they shall make distinct *lists* of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which *lists* they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.

Id. (emphasis added).

588. 10 ANNALS OF CONG. 144 (1800). During the Electoral Count Act debates, Senator Sherman also discussed the elector ineligibility problem and the consequent difficulty of rejecting a "part" of the electoral votes contained in an authentic electoral certificate. *See* 17 CONG. REC. 815–16 (1886).

589. *See supra* note 570.

2. The Problems of the Electoral Vote

The problems of the electoral vote share two distinguishing characteristics: they are problems subsequent to the problems of the electoral certificate and they require knowledge of the persons for whom the votes are cast. These problems relate to judging the acts of electors.

a. The Faithless Elector Problem

Suppose that an electoral vote is faithless—that is, in contravention of the known popular vote. Recall the Bailey Incident of 1969.[590] The result would be that the votes of faithless electors must be counted.

Again, the joint convention may not judge the acts of electors. Moreover, there is no constitutional requirement of faithfulness.[591] Frankly, it is shameful that 174 Representatives (including future Presidents George H.W. Bush and Gerald R. Ford) and thirty-three Senators who took an oath or affirmation to support the Constitution voted not to count Dr. Bailey's faithless vote. The answer to the faithless elector problem does not depend on whether state laws purporting to bind electors to vote in accordance with the popular vote are constitutional.[592] Once the faithless vote is transmitted in the electoral certificate, that vote is final and must be counted.

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590. *See supra* notes 176–91 and accompanying text.

591. *See* Ray v. Blair, 343 U.S. 214, 232 (1952) (Jackson, J., dissenting) (explaining that the original understanding is that electors "would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices"); THE FEDERALIST NO. 68, *supra* note 246, at 380 (Alexander Hamilton); Amar, *supra* note 10, at 230 ("The Constitution plainly contemplates that, at least formally, the electors must themselves decide upon their votes."). It is an open question whether the original understanding of 1787–1788 is the right original understanding on the requirement of faithfulness. The Twelfth Amendment significantly rewrote the Electoral College Clauses and that amendment was adopted in part with the intention of vindicating majoritarian popular will. *See* Lolabel House, Twelfth Amendment of the Constitution of the United States 20–40 (1901) (unpublished Ph.D. dissertation, University of Pennsylvania). More importantly, it does not follow that if there is no constitutional requirement of faithfulness that there is a constitutional requirement of faithlessness (that is, absolute discretion). It is an open question whether state laws that purport to bind electors to vote in accordance with the popular vote are constitutional. *Compare, e.g.*, Amar, *supra* note 10, at 219 ("[T]he constitutionality of [elector-binding] laws seems highly dubious if we consult constitutional text, history, and structure."), *with* Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1089 n.233 (2000) (describing the question as an "open one").

592. *See* Ross & Josephson, *supra* note 7, at 690–91 (providing examples of elector-binding laws).

b. The Presidential or Vice Presidential Ineligibility Problem

Suppose that an electoral vote is for a dead person—that is, in violation of the Presidential or Vice Presidential Eligibility Clauses.[593] Recall the Greeley incident of 1873.[594] The result would be that the votes for a dead presidential or vice presidential candidate must be counted.[595]

The joint convention may not judge the acts of electors. This answer applies with equal force to the other qualifications of the Presidential and Vice Presidential Eligibility Clauses—natural born citizen, thirty-five years of age, and fourteen years a resident within the United States.[596] The presidential or vice presidential ineligibility problem is perhaps the thorniest problem of the electoral count.

c. The Inhabitants of the Same State Problem

Suppose that an elector votes for inhabitants of her state for both President and Vice President—that is, in violation of the Twelfth Amendment.[597] This is the hypothetical Bush-Bentsen problem—recall that Republican Vice President George H.W. Bush and Democrat Senator Lloyd Bentsen were both inhabitants of the State of Texas in the presidential election of 1988.[598] The Bush-Bentsen

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593. *See* U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen . . . shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."); U.S. CONST. amend. XII ("But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.").

594. *See supra* notes 143–48 and accompanying text.

595. As a prudential matter, Professor Amar has stated that "[Congress] should simply count the votes of a dead man as if he were alive." Akhil Reed Amar, *Presidents Without Mandates (With Special Emphasis on Ohio)*, 67 U. CIN. L. REV. 375, 388 (1999).

596. U.S. CONST. art. II., § 1, cl. 6; U.S. CONST. amend. XII; *see also* Ross & Josephson, *supra* note 7, at 706–07 (suggesting that Greeley precedent applies to entirety of Presidential Eligibility Clause).

597. *See* U.S. CONST. amend. XII ("The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves.").

598. Senator Ross misstated the problem in the Sixth Congress when he asked, "Suppose they should vote . . . for two persons who were both citizens of the same State . . .?" 10 ANNALS OF CONG. 29 (1800); *see also* COUNTING ELECTORAL VOTES, *supra* note 3, at 451 (remarks of Sen. Frelinghuysen) (making same mistake). There is no constitutional requirement that an elector shall not vote for two persons of the same state—the constitutional requirement is that an elector shall not vote for two persons of the same state as herself. Translated into the recent past: Electors from forty-nine states could constitutionally vote for both George Bush as President and Lloyd Bentsen as Vice President; only Texas electors could not.

The Bush-Bentsen problem resurfaced in the presidential election of 2000. *See*

problem appears to have actually occurred once in our history—in the presidential election of 1872—but was discovered too late in the electoral count for any debate.[599] During the Wisconsin Incident of 1857, Representative Humphrey Marshall pointed to the Bush-Bentsen problem as the paradigm case for congressional power to exclude unconstitutional electoral votes. The Bush-Bentsen problem is undoubtedly the least discussed problem of the electoral count in the Electoral Count Act debates or in the legal academy, and yet the trickiest problem of all.

There are only four possible answers for the joint convention to deal with the Bush-Bentsen problem during the electoral count: (1) count both votes, (2) reject both votes, (3) count the vote for President and reject the vote for Vice President, or (4) count the vote for Vice President and reject the vote for President. It is not at all difficult to winnow the set of answers by eliminating answer number four—the Office of President is simply more important than the Office of Vice President.[600] This argument, however, would have been impossible before the adoption of the Twelfth Amendment which requires electors to cast "distinct ballots" for President and Vice President and to prepare "distinct lists" of the persons voted for as President and Vice President.[601] Assuming that the Twelfth Amendment did not expand the range of possible answers to the Bush-Bentsen problem, we may further winnow the set of answers by eliminating answer number three. This leaves us with the rather

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Jones v. Bush, 122 F. Supp. 2d 713, 715 (N.D. Tex. 2000), *aff'd*, 2000 U.S. App. LEXIS 34148 (5th Cir. Tex. Dec. 7, 2000), *cert. denied*, 531 U.S. 1062 (2001) (dismissing suit by three registered voters in Texas who alleged that Richard B. Cheney was an "inhabitant" of Texas and that, under the Twelfth Amendment, Texas electors were prohibited from voting for both George W. Bush and Richard B. Cheney). For two recent discussions in the legal literature of this (putative) problem, see Ho, *supra* note 195, *passim*, and Levinson & Young, *supra* note 195, at 932–54.

599. *See* text accompanying *supra* note 154.

600. Under our Constitution, we are *never* without a President, but we may be without a Vice President. *See* U.S. CONST. amend. XXV, §§ 1–2. Moreover, the President, unlike the Vice President, wields the power of an entire branch of Government. *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."). At least two commentators seem to agree that electoral votes for President are to be preferred to those for Vice President. Levinson and Young argue that:

> Common-sensically, the correct outcome is most certainly [to count the electoral votes for President and throw out the electoral votes for the Vice President], since it would seem obvious that preferences for President should be preferred over preferences for Vice President.... But this answer is hardly the only plausible resolution, and it is certainly not derived from the barebones text [of the Twelfth Amendment].

Levinson & Young, *supra* note 195, at 935 n.37.

601. *See* U.S. CONST. amend. XII.

binary choice of counting both electoral votes for Bush and Bentsen or rejecting both electoral votes for Bush and Bentsen. Which is the correct answer?

The Bush-Bentsen problem is not different in kind than the other two problems of the electoral vote. The joint convention must count both votes for Bush and Bentsen. The joint convention may not judge the acts of electors—period. There are two additional points to consider. First, the anonymity principle of the Electoral College Clauses indicates that the Bush-Bentsen problem is uniquely directed to electors, not to the joint convention.[602] It would be impossible for the joint convention to even detect the Bush-Bentsen problem, except in rarest cases of mathematical certainty. Second, the Presidential and Vice Presidential Eligibility Clauses do not require that the President and Vice President be inhabitants of different states. The command of the Electoral College Clauses is violated the moment a *Texas* elector votes for both Bush and Bentsen, but the Presidential and Vice Presidential Eligibility Clauses are not violated if Bush becomes President and Bentsen becomes Vice President. We might therefore think about the Bush-Bentsen problem in a broader context, just as we might think about presidential impeachment in a broader context.[603] The command of the Electoral College Clauses probably was inserted to enhance the legitimacy of presidential election by lessening the probability that the ultimate choice would be made by the House of Representatives, but the Framers thought that most presidential elections would be decided by the House anyway.[604]

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602. *See supra* notes 587–88 and accompanying text (discussing anonymity principle of Electoral College Clauses).

603. *See, e.g.*, Akhil Reed Amar, *An(Other) Afterword on the Bill of Rights*, 87 GEO. L.J. 2347, 2358–59 (1999) (criticizing application of "blinkered textualism" to standard for presidential impeachment and arguing that presidential impeachment requires a higher standard than that for judges or cabinet officers, although the Constitution lumps presidential impeachment with all other impeachments).

604. *See, e.g.*, 2 FARRAND, *supra* note 35, at 500 (remarks of George Mason) ("[N]ineteen times in twenty the President would be chosen by the Senate."); *id.* at 512 (remarks of George Mason) ("[I]t will rarely happen that a majority of the whole votes will fall on any one candidate."); THE FEDERALIST NO. 66, *supra* note 432, at 372 (Alexander Hamilton) ("The same house [House of Representatives] will be the umpire in all elections of the President which do not unite the suffrages of the majority of the whole number of electors; a case which it cannot be doubted will sometimes, if not frequently happen."). *But see* 2 FARRAND, *supra* note 35, at 501 (remarks of Abraham Baldwin) ("The increasing intercourse among the people of the States, would render important characters less & less unknown; and the Senate [under the Constitution as adopted and amended, the House of Representatives] would consequently be less & less likely to have the eventual [presidential] appointment thrown into their hands."). History has proved Mr. Baldwin to be correct.

Alexander Hamilton, for his part, probably did not think the Bush-Bentsen

3. Conclusions

What shall we make of this rearrangement of the deck chairs on the Titanic? The problems of the electoral certificate relate to judging the authenticity of the acts of electors, whereas the problems of the electoral vote relate to judging the acts of electors. The Constitution trusts the joint convention to do the former, but not the latter.

The counting function inherently requires some sort of a rule of recognition for deciding what is to be counted and what is not (this is the "thinnest" conception of judging). The President of the Senate receives a lot of mail, and the joint convention must be able to decide what mail contains an authentic electoral certificate and must be counted, and what mail contains the legal equivalent of a Publishers Clearinghouse sweepstakes entry and must be discarded. The Constitution specifies the criteria for authenticity and trusts the joint convention to judge the authenticity of the acts of electors. Moreover, the problems of the electoral certificate may be resolved without any knowledge of the persons receiving votes. We should therefore be less suspicious of undue interference or manipulation by the joint convention because the joint convention could (and should) be behind a veil of ignorance as to the problems of authenticity of the acts of electors.

The problems of the electoral vote are of a fundamentally different order. The rule of recognition does not address these problems which require knowledge of the persons voted for in the presidential election in order to be solved. The threat of undue interference or manipulation by the joint convention is hence more pressing. The Constitution does not trust the joint convention to judge the acts of electors, but plainly contemplates that the electors shall have the last word on *who* shall receive votes.

B. The Twentieth Amendment

Although the joint convention may not solve problems of the electoral vote, we are not resigned to the possibility of unconstitutional Presidents or Vice Presidents (if electors do truly go bananas). It turns out that We the People remedied (without really knowing it) the thorniest problem of the electoral count—the

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requirement to be all-important. His private, unadopted draft of the Constitution contains a provision providing that electors "shall proceed to vote by ballot for a President, who shall not be one of their own number, *unless the Legislature upon experiment should hereafter direct otherwise.*" 3 FARRAND, *supra* note 35, at 622–23 (emphasis added).

presidential or vice presidential ineligibility problem—with the adoption of the Twentieth Amendment in 1933. Section 3 of that amendment provides:

> If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, *or if the President elect shall have failed to qualify*, then the Vice President elect shall act as President until a President shall have qualified; *and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified*, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.[605]

Section 3 contains a "textually demonstrable commitment"[606] of power to Congress to remedy the situation when electors go bananas: "Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified . . . ."[607] The text of this section of the Twentieth Amendment does not declare who decides whether the President-elect or Vice President-elect have failed to qualify or when they shall have qualified. Constitutional structure strongly suggests that neither the President nor Congress makes these determinations.[608] These determinations seem very much like judicial ones subject to the province of the judicial department.[609] These determinations are surely no less

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605. U.S. CONST. amend. XX, § 3 (emphasis added).

606. Baker v. Carr, 369 U.S. 186, 217 (1962).

607. U.S. CONST. amend. XX, § 3. Section 3 of the Twentieth Amendment embarrassingly does not specify who shall act as Vice President when electors go bananas. The Twenty-fifth Amendment only complicates this problem: "Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress." U.S. CONST. amend. XXV, § 2. The spirit of section 3 of the Twentieth Amendment suggests that this person is to act as Vice President until a Vice President shall have qualified.

608. *See supra* notes 400–24 and accompanying text (presenting intratextual argument of House Judging Clause); *supra* notes 447–56 and accompanying text (presenting structural argument of anti-Congress principle of presidential election); *supra* notes 457–59 and accompanying text (presenting structural argument of anti-President principle of presidential election).

609. *See also* Amar, *supra* note 10, at 222–23 & 231 n.22 (noting that question of whether presidential or vice presidential candidate dies or becomes incapacitated shortly before election day is a judicial question).

justiciable than deciding whether a Representative-elect has met all of the qualifications set forth in Article I, Section 2, Clause 2.[610]

The Twentieth Amendment provides a constitutional solution to the presidential or vice presidential ineligibility problem of the electoral vote. The Twentieth Amendment guarantees that we will not be without a constitutionally-qualified President when electors go bananas.[611] What does the Twentieth Amendment mean for the counting of electoral votes? The Twentieth Amendment "preempts" the joint convention in judging the acts of electors. The joint convention must count electoral votes contained in authentic electoral certificates.

There is an important difference between the constitutional solution provided by the Twentieth Amendment and any rough-and-ready solution that may be provided by the joint convention. Take a much less silly case than Professor Paulsen's Gus-the-Dog hypothetical.[612] Imagine that in the next presidential election a majority of the whole number of electors appointed vote for presidential candidate Smith. Smith is exactly thirty-four years of age as of noon on January 20, 2005, the date fixed by the Constitution for the beginning of the next presidential term,[613] and is therefore not constitutionally-qualified to be President.[614] If the joint convention rejected these electoral votes for thirty-four year old Smith as not "regularly given," the joint convention would trigger a contingency election in the House of Representatives, and Smith would be excluded from the Office of President for the next four years. But if these unconstitutional electoral votes were counted, then Smith's running-mate (who we will assume is constitutionally-qualified to be Vice President) would simply act as President, until Smith shall have qualified for the Office of President on January 20, 2006. To be sure,

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610. *See* Powell v. McCormack, 395 U.S. 486, 516–49 (1969).

611. There is one truly exceptional situation that the Twentieth Amendment solves that the joint convention could not. Imagine that all of persons voted for by the electors for President and Vice President were unconstitutional. Even though the joint convention could pursuant to the Electoral Count Act reject enough of these unconstitutional votes to trigger contingency elections for President in the House of Representatives and for Vice President in the Senate, the House and the Senate would be required to choose the President and Vice President, respectively, from a list of unconstitutional candidates.

612. *See* Paulsen, *supra* note 555, at 222.

613. *See* U.S. CONST. amend. XX, § 1 ("The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.").

614. *See* U.S. CONST. art. II, § 1, cl. 5.

this hypothetical situation could never apply to the cases when electors really go bananas—when they vote for dead persons or law professors' dogs as President or Vice President. The important point for present purposes is that the joint convention must count electoral votes contained in authentic electoral certificates because the Twentieth Amendment carefully prescribes the result when the electors shall have made an unconstitutional choice.

C. *Revising the Electoral Count Act*

Assume that Congress may by law bind the joint convention and future joint conventions in counting electoral votes, and that Congress has the font of implied power to enact such a law. In other words, assume that *some* electoral count act is constitutional. If we are to revise the Electoral Count Act to make it constitutional (and better), what should it look like?[615]

The Electoral Count Act should be revised in the following ways. First, some Senator or Representative then and there present at the electoral count shall be the presiding officer of the joint convention, not the Vice President as the President of the Senate. Second, the quorum for the joint convention shall be two-thirds of the total number of Senators and Representatives, keeping in spirit with the Constitution's requirement that a quorum in the House of Representatives for choosing the President be a Member or Members from two-thirds of the states.[616] Third, the phrase not "regularly given" shall be narrowly construed only to include problems of the electoral certificate and to exclude problems of the electoral vote, clarifying that the joint convention may judge the authenticity of the electors' acts, but not the electors' acts themselves. Fourth, any and all objections in counting electoral votes shall be addressed by the joint convention voting on a per capita basis, thereby avoiding the presentment problem of the Electoral Count Act. Fifth, the proceedings of the joint convention shall be public. Sixth, in the event the electors fail to make a choice for President or Vice President, the choice of the President by the House of

615. Other commentators have taken initial stabs at this question. *See* Glennon, *supra* note 517; L. Kinvin Wroth, *Election 2000: The Disease and the Cure*, VT. B.J. 53, 53–54 (2001); L. Kinvin Wroth, *Congress Can Clean Up Its Electoral Act*, CHI. SUN-TIMES, Jan. 5, 2001, at 31.

616. *See* U.S. CONST. amend. XII; *see also* 2 FARRAND, *supra* note 35, at 518 (describing James Madison's motion at the Philadelphia Convention that a quorum in the Senate for choosing the President in a contingent election be two-thirds of the Members).

Representatives and the choice of the Vice President by the Senate shall be made in the presence of the joint convention.

CONCLUSION

Just because a certain constitutional problem is peculiar and rare is no reason to ignore it—especially when the stakes are an entire branch of government. To borrow the words of Senator Morton describing the Twenty-second Joint Rule, the Electoral Count Act is a "a torpedo planted in the straits with which the ship of state may at some time come into fatal collision."[617] When this happens, it will happen, by definition, at a worse time. We should be thinking about the constitutionality of the Electoral Count Act now—well in advance of a constitutional crisis—when the political facts of the moment are least likely to distort our considered legal judgment. Both Houses of Congress should immediately hold hearings on the constitutionality of the Electoral Count Act and perhaps on the desirability of the electoral college mode of presidential election more generally.

Consider that we came perilously close to facing the constitutionality of 3 U.S.C. § 15 head on just a short while ago. Imagine the following hypothetical:

The Supreme Court does not intervene in *Bush v. Gore* on December 10, 2000 or on December 12, 2000. The recount in Florida proceeds. A slate of Bush-Cheney electors, appointed by the Florida Legislature on December 12, 2000, gives its votes on December 18, 2000. This electoral certificate is certified by Florida Secretary of State Katherine Harris. The recount in Florida proceeds. Vice President Gore and Senator Lieberman are declared the winners of the popular vote for President and Vice President respectively. A slate of Gore-Lieberman electors, appointed under Florida election law, gives its votes on some day after December 18, 2000, but before January 6, 2001. And now the important twist—this electoral certificate is also certified by Florida Secretary of State Katherine Harris.

The joint convention convenes on January 6, 2001 for the purpose of counting the electoral votes. The electoral count proceeds smoothly until Vice President Gore opens both certificates from the State of Florida and hands them to the teller for reading, when the joint convention borders on disorder. Objections are made, received, and read before the joint convention by Vice President Gore. Some objections state that this is a case of single returns, and pointing to 3

617. COUNTING ELECTORAL VOTES, *supra* note 3, at 525.

U.S.C. § 5, state that the electoral votes contained in the Bush-Cheney electoral certificate must be counted, unless both Houses concur in rejecting them. Some objections state that this is a case of single returns, and pointing to the precedent of Hawaii in 1961, state that the electoral votes contained in the Gore-Lieberman electoral certificate must be counted unless both Houses concur in rejecting them. Some objections state that this is a case of double returns, and pointing to § 15, state that none of the electoral votes contained in either the Bush-Cheney or Gore-Lieberman electoral certificates must be counted unless the two Houses concur in accepting one of them. Both Houses will likely not concur, with the House controlled by the Republicans and the Senate evenly split among Republicans and Democrats (put aside, for the moment, the legal fiction of Vice President Gore breaking any tie in the Senate in favor of himself and the Democrats). If none of Florida's electoral votes are counted, the result of the electoral count will likely be 268 votes for Vice President Gore and Senator Lieberman and 246 votes for Governor Bush and Mr. Cheney. Gore and Lieberman will not have a majority of the whole number of electors appointed if Florida's twenty-five electors are counted as properly appointed electors, but will comfortably have more than a majority of the whole number of electors appointed if Florida's twenty-five electors are not counted. The Senate and House immediately withdraw to decide on the objections not at all knowing what will happen when they reconvene. What result?

We need not wait for the Supreme Court to decide the constitutionality of the Electoral Count Act in a moment of constitutional crisis. Members of Congress take an oath or affirmation to support the Constitution. A conscientious legislator should vote to repeal the Electoral Count Act and a conscientious President should sign such legislation. This will not be enough. The problems of the electoral count are festering sores in our Constitution. A very conscientious legislator should vote to propose a constitutional amendment to solve the problems of the electoral count once and for all.

Message

From: Eastman, John [jeastman@chapman.edu]
Sent: 1/5/2021 6:01:42 AM
To: Jacob, Gregory F. EOP/OVP [/o=Exchange Organization/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=40577960ec86419f8614b2bb31c5c621-Ja]
Subject: [EXTERNAL] Here's the key article discussing the VP's 12th Amendment authority
Attachments: 51LoyUChiLJ309.pdf

I'll be in my Georgia hearing beginning at 9, but can we chat by phone before then, and then schedule a meeting for 10:30 or so?

John

Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management

*Edward B. Foley**

This Article considers the possibility that a major dispute over the outcome of the 2020 presidential election could arise, even without foreign interference or some other extraordinary event, but rather just from the ordinary process of counting ballots. Building upon previous research on the "blue shift" phenomenon, whereby adjustments in vote tallies during the canvassing of returns tends to advantage Democratic candidates, it is easy to imagine a dispute arising if this kind of "blue shift" were consequential in the presidential race. Using examples from both Pennsylvania and Arizona, two states susceptible to significant "blue shifts" in previous elections, the article shows how the dispute could reach Congress, where it potentially might metastasize into a full-fledged constitutional crisis. The most frightening scenario is where the dispute remains unresolved on January 20, 2021, the date for the inauguration of the new presidential term, and the military is uncertain as to who is entitled to receive the nuclear codes as commander-in-chief. In order to avoid this risk, Congress should amend the relevant statute, 3 U.S.C. § 15.

* Ebersold Chair in Constitutional Law and Director, *Election Law @ Moritz*, Ohio State University Moritz College of Law. Many thanks to all who provided feedback on previous drafts.

INTRODUCTION

It is Election Night 2020. This time it is all eyes on Pennsylvania, as whoever wins the Keystone State will win an Electoral College majority. Trump is ahead in the state by 20,000 votes, and he is tweeting "The race is over. Another four years to keep Making America Great Again."

The Associated Press (AP) and the networks have not yet declared Trump winner. Although 20,000 is a sizable lead, they have learned in recent years that numbers can shift before final, official certification of election results. They are afraid of "calling" the election for Trump, only to find themselves needing to retract the call—as they embarrassingly did twenty years earlier, in 2000. Trump's Democratic opponent, _____ (fill in the blank with whichever candidate you prefer; I will pick Elizabeth Warren since at the moment she is the front-runner according to prediction markets),[1] is not conceding, claiming the race still too close to call. Both candidates end the night without going in front of the cameras.

In the morning, new numbers show Trump's lead starting to slip, and by noon it is below 20,000. Impatient, Trump holds an impromptu press conference and announces:

1. *See Who Will Win the 2020 Democratic Presidential Nomination?*, PREDICTIT, https://www.predictit.org/markets/detail/3633/Who-will-win-the-2020-Democratic-presidential-nomination (last visited Oct. 22, 2019) [https://perma.cc/KC2R-WAH8] (showing that would-be bettors may wager thirty-nine cents per dollar of potential winnings should Senator Elizabeth Warren win the Democratic nomination, while twenty cents must be wagered on former Vice President Joseph Biden to win a dollar).

> I've won reelection. The results last night showed that I won Pennsylvania by over 20,000 votes. Those results were complete, with 100 percent of precincts reporting. As far as I'm concerned, those results are now final. I'm not going to let machine politicians in Philadelphia steal my reelection victory from me—or from my voters!

Despite Trump's protestations, the normal process of canvassing election returns continues in Pennsylvania, and updated returns continue to show Trump's lead slipping away. First, it drops below 15,000. Then 10,000. Then 5,000. As this happens, Trump's tweets become increasingly incensed—and incendiary. "STOP THIS THEFT RIGHT NOW!!!" "DON'T LET THEM STEAL THIS ELECTION FROM YOU!!!"

Protestors take to the streets, in Pennsylvania and elsewhere. So far, the demonstrations, while rancorous, have remained nonviolent. Amid police protection, the canvassing process in Pennsylvania has continued, and Trump's lead in the state diminishes even further.

Then, several days later, the lead flips. Now, Warren is ahead in Pennsylvania. First by only a few hundred votes. Then, by a couple of thousand votes. Although the AP and networks continue to declare the race "too close to call," it is Warren's turn to take to the cameras declaring victory.

Trump insists, by tweet and microphone, "THIS THEFT WILL NOT STAND!!!" "WE ARE TAKING BACK OUR VICTORY."

So begins the saga over the disputed result of the 2020 presidential election.

This scenario is certainly plausible. Pennsylvania is, indeed, a pivotal state in the 2020 presidential election—and potentially poised to be the single state upon which the entire election turns. That role could also fall to Wisconsin, or Florida again, or even Arizona. But it just as easily could be Pennsylvania.[2]

Moreover, if the idea of a 20,000-lead on Election Night evaporating entirely during the canvassing of returns seems implausible, think again. Trump's lead over Hillary Clinton in Pennsylvania did not disappear completely, but it did drop by over 20,000 votes—23,659, to be precise—between Election Night and the final, official certification of the result in the state.[3] Nor was that a fluke. In 2018, the Democratic candidates for

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2. Analysis of which state(s) might be pivotal to the Electoral College outcome are based on various political websites, including 538, Cook Political Report, and 270 to Win. *See, e.g.*, *2020 Presidential Election Interactive Map*, 270TOWIN, https://www.270towin.com/ [https://perma.cc/V73N-DL5L] (listing Arizona, Florida, Nebraska's 2nd Congressional District, North Carolina, Pennsylvania, and Wisconsin as toss-ups).

3. *Compare Presidential Results*, WASH. POST, Nov. 10, 2016, at A43 (evidencing a 67,951-vote margin between Mr. Trump and Secretary Clinton), *with* GOVERNOR'S OFFICE OF THE COMMONWEALTH OF PA., CERTIFICATE OF ASCERTAINMENT OF PRESIDENTIAL ELECTORS (Dec.

both governor and United States senator in Pennsylvania increased their leads over their Republican opponents by over 28,000 votes during the equivalent canvassing period in that midterm election.[4] Moreover, in each of the three presidential elections before 2016 (2004, 2008, and 2012), the Democratic candidate gained over 22,000 votes in Pennsylvania between Election Night and final certification of the official results.[5]

Thus, it is not unreasonable to expect Trump's Democratic opponent in 2020 to gain on Trump by over 20,000 votes in Pennsylvania during the period between Election Night and the final, official certification of the canvass. The key question is whether this kind of gain simply extends a lead that the Democratic candidate already has, comparable to what occurred in two statewide races in 2018. Or whether, instead, it cuts into a lead that Trump starts with on Election Night—and, if so, whether it is enough of a gain for Trump's Democratic opponent to overcome Trump's Election Night lead. In 2016, Hillary Clinton's gain of 23,659 votes during the canvassing process was not enough to flip Pennsylvania to her column. Instead, it reduced a Trump lead of 67,951 in the state to "only" 44,292.[6] But in 2020 a comparable gain for the Democrat could erase entirely a 21,000-vote Election Night lead for Trump, converting the result into a 2,500-vote margin of victory for the Democrat.

Pennsylvania is hardly aberrational in producing this kind of gain for Democratic candidates during the canvassing process. Although this phenomenon is still not widely understood by the electorate generally, scholars and even the media have begun to take notice. In 2014, I published an article entitled *The Big Blue Shift* to draw attention to this development, hypothesizing that it is best explained as an unintended byproduct of electoral reforms adopted in the wake of the 2000 fiasco,

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12, 2016), *available at* https://www.archives.gov/federal-register/electoral-college/2016-certificates/pdfs/ascertainment-pennsylvania.pdf [https://perma.cc/EJ37-V2SP] (proclaiming a 44,292-vote margin between the major-party candidates).

4. *Compare U.S. Senate Results*, WASH. POST, Nov. 8, 2018, at A26 (evidencing a 629,473-vote margin between Senator Casey and Representative Barletta), *with Official Returns Statewide: 2018 General Election*, COMMONWEALTH PA. (Nov. 6, 2018) https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=63&ElectionType=G&IsActive=0 [https://perma.cc/PFL8-UVB2] (illustrating a 657,589-vote margin between the major-party candidates).

5. The Democratic vote swings were 22,790-, 23,863-, and 26,146-votes, respectively. Edward B. Foley, *A Big Blue Shift: Measuring an Asymmetrically Increasing Margin of Litigation*, 28 J.L. & POL. 501, 537 (2013) [hereinafter *Big Blue Shift*], *available at* http://files.www.lawandpolitics.org/content/vol-xxvii-no-4/Foley_Color_116.pdf [https://perma.cc/NF3L-B9TV].

6. Trump's final official total for Pennsylvania was 2,970,733, and Clinton's was 2,926,441. PA 2016 CERTIFICATE OF ASCERTAINMENT, *supra* note 3. According to the initial returns reported in the Washington Post, Trump had 2,912,442, and Clinton has 2,844,491. *Presidential Results*, *supra* note 3. The difference between Trump's initial lead of 67,951 and his final victory margin of 44,292 is a shift towards Clinton of 23,659.

most specifically the advent of provisional ballots and the increased use of absentee voting.[7] (One possible factor is that provisional ballots, which became nationally mandated by the Help America Vote Act of 2002 and which are necessarily counted during the canvassing process after Election Night once their validity has been verified, tend to be cast by voters of demographic groups who support Democratic candidates. But while this factor undoubtedly contributes to the phenomenon, the number of provisional ballots generally is not large enough to account for the entirely of the "blue shift" phenomenon, and the remainder of the explanation is still uncertain.) Whatever the exact causal mechanism—we are still in the early stages of studying the phenomenon—this kind of "overtime" gain by Democrats, after Election Night and before final certification of the canvass, achieved national salience in the 2018 midterms.[8]

Indeed, this blue shift flipped the result of one major election: the Arizona US Senate race. Martha McSally, the Republican candidate, held a lead of 15,403 votes a day after Election Day.[9] But by the time the canvassing of returns was complete, her Democratic opponent, Kyrsten Sinema had won by 55,900—a gigantic overtime gain of 71,303 votes during the canvassing process.[10]

But most consideration of the blue shift in 2018 focused on Florida. Both the United States Senate and governor's races in that perennial battleground ended up extremely close. A day after Election Day, the Republican candidates were ahead in both, but by only 30,264 votes in the Senate race and only 50,879 in the gubernatorial election.[11] As the

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7. *Big Blue Shift*, *supra* note 5.

8. *See* Edward B. Foley & Charles Stewart III, *The Election Might Not End on Tuesday Night — And That's Okay*, WASH. POST (Nov. 4, 2016), https://www.washingtonpost.com/opinions/the-election-might-not-end-on-tuesday-night—and-thats-okay/2016/11/04/b93e6ca4-a294-11e6-a44d-cc2898cfab06_story.html?utm_term=.8906211a1be5 [https://perma.cc/U88Y-VCLV] (discussing the phenomenon of the "overtime" vote ahead of the 2018 midterm general election); *see also* Edward B. Foley & Charles Stewart III, *Research Paper 2015-21: Explaining the Blue Shift in Election Canvassing* (Sept. 12, 2015) (unpublished manuscript) (on file with the Massachusetts Institute of Technology Political Science Department), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653456 [https://perma.cc/YDR9-APMU] (empirically analyzing the "overtime" vote phenomenon).

9. *U.S. Senate Results*, *supra* note 4 (demonstrating McSally's lead over her opponent the day after the election).

10. Official results are available on the Arizona Secretary of State's website. ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS (Nov. 30, 2018), *available at* https://azsos.gov/sites/default/files/2018%201203%20Signed%20Official%20Statewide%20Canvass.pdf. [https://perma.cc/V7WW-GHUV].

11. *U.S. Senate Results*, *supra* note 4 (evidencing the Republican Senate candidate ahead of his Democratic opponent the day after the election); *Governor Results*, WASH. POST, Nov. 8, 2018, at A27.

blue shift started to erode these leads, Republicans became fearful that their leads, like McSally's in Arizona, might disappear completely. Trump himself took to Twitter, proclaiming: "The Florida Election should be called in favor of Rick Scott and Ron DeSantis in that large numbers of new ballots showed up out of nowhere, and many ballots are missing or forged. An honest vote count is no longer possible-ballots massively infected. Must go with Election Night!"[12]

Ultimately, the GOP held on to win both these statewide races. The Democratic candidate for Senate, incumbent Bill Nelson, gained 20,231 votes during the canvass, but that still left Rick Scott with a narrow 10,033-vote margin of victory.[13] Likewise, the Democratic candidate for governor, Andrew Gillum, gained 18,416, leaving Ron DeSantis with a somewhat more comfortable 32,463-vote margin.[14]

Still, 2018 made this much clear: If the blue shift in a prominent midterm election can cause Trump to tweet about sticking with the Election Night tally in order to preserve a Republican lead, it is easy to imagine him doing something similar in the context of his own reelection effort in 2020. Thus, if Pennsylvania were to end up the pivotal state in the presidential election, and if Trump were to have a narrow lead there on Election Night, we can expect him to do whatever he can—tweeting and more—to freeze that lead in place and prevent a blue shift from erasing it.

We can endeavor to contemplate all the different ways Trump might try to stop an Election Night lead from slipping away, whether through litigation or otherwise. Fundamentally, however, it makes sense to focus on the possibility that there remains a basic conflict over the outcome of a pivotal state, like Pennsylvania. On the one hand, Trump keeps insisting that only the Election Night results, which show him in the lead, are valid. On the other hand, if the canvassing process does show that lead evaporating, thereby putting Trump's Democratic opponent ahead (or even just potentially so), then the Democrats will insist that the results shown by the canvass are the valid ones. The key question, then, is how this basic dispute plays out—and ultimately gets resolved.

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12. Michael Burke, *Trump Says Florida Elections Should Be Called for Scott, DeSantis*, HILL (Nov. 12, 2018), https://thehill.com/homenews/administration/416183-trump-says-florida-elections-should-be-called-for-scott-desantis [https://perma.cc/H4L8-CW8S].

13. *Compare U.S. Senate Results*, *supra* note 4, *with November 6, 2019 General Election: Official Results*, FLA. DEP'T ST. DIV. ELECTIONS (Nov. 6, 2018) [hereinafter *Florida General Election Results*], https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018& [https://perma.cc/R9AB-HUW8].

14. *Compare Governor Results*, *supra* note 11, *with Florida General Election Results*, *supra* note 13.

I. FROM NOVEMBER 3, 2020 THROUGH DECEMBER 14, 2020

A. What Could Happen

Despite protests and counter-protests, and lawsuits and counter-lawsuits—each side accusing the other of attempting to steal an election that is rightfully theirs—Pennsylvania's election officials certify the result as a miniscule 2,500-vote victory for Warren, based on the strength of the "overtime" votes counted during the canvassing process. This official certification, of course, is not technically that Warren herself has won Pennsylvania's electoral votes, but rather than the slate of presidential electors pledged to Warren have won, based on the popular vote, the right to serve as the state's electors. Pennsylvania's governor so certifies pursuant to state law.[15] Also, as required by Congress, the governor sends this "certificate of ascertainment" to the National Archives, thereby notifying the federal government who has been officially appointed the state's electors.[16] These electors then meet on the day appointed by Congress (Monday, December 14) and indeed cast their 20 electoral votes for Warren. These electors then dutifully transmit a certificate of their votes to "the President of the Senate," as well as sending a copy to the National Archives, both submissions as specified by Congress.[17]

But this is not all that happens in Pennsylvania during this time. At Trump's urging, the state's legislature—where Republicans have majorities in both houses—purports to exercise its authority under Article II of the Constitution to appoint the state's presidential electors directly. Taking their cue from Trump, both legislative chambers claim that the certified popular vote cannot be trusted because of the blue shift that occurred in overtime. Therefore, the two chambers claim to have the constitutional right to supersede the popular vote and assert direct authority to appoint the state's presidential electors, so that this appointment is in line with the popular vote tally as it existed on Election Night, which Trump continues to claim is the "true" outcome. The state's Democratic governor refuses to assent to this assertion of authority by the state's legislature, but the legislature's two chambers proclaim that the governor's assent is unnecessary. They cite early historical practices in

15. *See* 25 PA. STAT. AND CONS. STAT. ANN. § 3166 (West 2019) ("[O]n receiving and computing the returns of the election of presidential electors . . . the Governor . . . shall enumerate and ascertain the number of votes given for each person so voted for, and shall cause a certificate of election to be delivered . . . .").

16. 3 U.S.C. § 6 (2018).

17. *See* 3 U.S.C. § 11 (2018) ("They shall forthwith forward by registered mail one of the [certificates so made by them] to the President of the Senate at the seat of government.").

which state legislatures appointed presidential electors without any involvement of the state's governor.[18] They argue that like constitutional amendments, and unlike ordinary legislation, the appointment of presidential electors when undertaken directly by a state legislature is not subject to a gubernatorial veto.[19]

Although the governor refuses to certify this direct legislative appointment of presidential electors, the Republican-pledged electors who have been purportedly appointed by the legislature proceed to conduct their own meeting on the day that Congress has specified for the casting of electoral votes (again, Monday, December 14). At this meeting, they cast "their" 20 electoral votes for Trump. They, too, purport to certify these votes by sending a certificate to the President of the Senate and a copy to the National Archives, according to the procedures specified by Congress.

Thus, when Congress meets on January 6, 2021 to count the electoral votes from the states, there are two conflicting certificates of electoral votes from Pennsylvania. One submission, from the Democratic electors and reflecting the governor's certificate of ascertainment, records Pennsylvania's 20 electoral votes for Warren. The other, from the Republican electors and reflecting the legislature's purported direct appointment, records Pennsylvania's electoral votes for Trump.

And so, the controversy over Pennsylvania has reached Congress.

B. Analysis

It might seem far-fetched to think that the Pennsylvania legislature would attempt to negate the popular vote of the state's electorate in the

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18. *See* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DECLINE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 16–26, 55–61 (2019) (recounting practices of state legislatures both before and after adoption of the Twelfth Amendment).

19. One could consider the possibility that Pennsylvania's governor, or judiciary, might attempt to prevent the two chambers of the state's legislature meeting for this purpose. For this analysis, I shall assume that any such attempt would either not occur or not be successful. At the extreme, the Republican members of the state legislature would likely be able to find a place to assemble, even if it were not the official statehouse even if their meeting otherwise lacked the appearance of an official session of the state's legislative chambers. Even so, these Republican members of the state legislature could purport to be engaged in an official legislative session, even if meeting in unusual circumstances, and thus could purport to be appointing the state's presidential electors pursuant to the state legislature's constitutional authority to do so. The Trump-pledged Republican electors then could assert that they were meeting pursuant to this purported legislative appointment. (Moreover, even if these irregular legislative sessions never occurred, the Trump-pledged Republican electors might themselves meet, saying that they would have been appointed by the state's legislature if the legislature had not unlawfully been denied the opportunity to assemble, and thus their electoral votes should be considered by Congress as valid as if the legislature has successfully met to appoint them.)

2020 presidential election. Even with Trump urging Republicans to make this move, it might be too much of a power grab. One would hope that American politics have not become so tribal that a political party is willing to seize power without a plausible basis for doing so rooted in the actual votes of the citizenry.[20]

Thus, ultimately, the likelihood of this scenario occurring may depend upon how much doubt can be cast upon the officially certified canvass of the popular vote—and thus the plausibility of the claim that the blue shift in the overtime count amounts to a theft of an Election Night victory that was rightfully Trump's. If during the canvass itself, Trump can gain traction with his allegation that the blue shift amounts to fraudulently fabricated ballots—along the lines of his 2018 tweet about Florida—then it becomes more politically tenable to claim that the legislature must step in and appoint the state's electors directly to reflect the "true" will of the state's voters, who otherwise would be deprived of the result they mandated as reflected on Election Night. (In 2000, Florida's legislature was preparing to take this kind of step, which became unnecessary once the Supreme Court halted the recount.)[21]

Unless and until we are in the midst of the situation itself, we can only speculate the kind of allegations that might be raised in an effort to cast doubt on overtime votes counted during the canvass. Presumably provisional ballots would be attacked as ineligible for counting, as would any absentee ballots not previously counted, because when one is ahead and attempting to preserve a lead, the goal is to shut down the counting process as much as possible. Heavily Democratic precincts would be closely scrutinized for any voting irregularities. An effort might be made to invalidate entire precincts, especially in urban areas, based on slight discrepancies—as often occur for innocent reasons—between the number of voters who sign the precinct's pollbooks and the number of ballots cast in the precinct.[22] Drawing upon the historical legacy of improper

20. But there is increasing concern that both major political parties in the U.S. do not share a commitment to conduct their electoral competition by means of a fair democratic process. *See, e.g.*, Michael Tomasky, *Do the Republicans Even Believe in Democracy Anymore?*, N.Y. TIMES (July 1, 2019), https://www.nytimes.com/2019/07/01/opinion/republicans-trump-democracy.html [https://perma.cc/A5T4-ZK5J] ("[R]ather than simply playing the game, the Republicans are simultaneously trying to rig the game's rules so that they never lose.").

21. Edward B. Foley, Bush v. Gore*: The Court Stops the Recount*, *in* ELECTION LAW STORIES 541, 542–43 (Joshua A. Douglas & Eugene Mazo eds., 2016).

22. There is some statutory and judicial authority in Pennsylvania that could be cited in an effort to support such invalidation of the votes from entire electoral districts. *See* 25 PA. STAT. AND CONS. STAT. ANN. § 3154 (West 2019); *see also In re* Dunmore Burrough Election, 42 Pa. D. & C. 215, 218–19 (Ct. Com. Pl. Lackawanna Cnty. 1941). Citing these sources here is not to endorse the idea that, correctly understood, they properly would support any such invalidation of votes in 2020, but rather only to observe that a litigant could endeavor to so cite them in an effort to prevail on this point.

practices conducted by big-city machine politicians, including in Philadelphia, one can easily imagine Trump and his Republican supporters pointing to any evidence that might support a narrative of Philadelphian misdeeds undermining his victory. It would not take much to set this tale spinning. Remember what happened in Florida in 2018, specifically in Broward County: There, the local election administrator acted improperly with respect to the handling of ballots, and that became a potential basis for challenging the entire result statewide. If something similar happened in Philadelphia, one can imagine that Republicans would invoke it as grounds for discarding the results of the canvass and substituting instead directly appointed presidential electors.

Undoubtedly, Trump would go to court in an effort to prevent certification of the canvass based on the blue shift "overtime" vote. He would certainly be in a more favorable posture if a judicial decree blocked the counting of these extra votes and required, instead, that the canvass be certified with a result showing Trump having won the popular vote in the state. Even better, from Trump's perspective, would be a court order requiring the state's governor to certify a popular vote victory for his Republican slate of electors. Then there would be no need for the state legislature to appoint the Republican electors directly, and no conflicting submissions to Congress of two separate certificates of electoral votes from Pennsylvania. Instead, the President of the Senate would receive a single submission, based on this judicial decree, showing only Trump to have won the state's 20 electoral votes. Thus, Trump almost certainly would try to obtain this kind of court decree, either from state or federal court—or even both.

But Trump need not win in court in order to press his case to Congress. As long as he gets the state legislature to appoint his presidential electors directly, and those electors submit their purported electoral votes to the President of the Senate—who happens to be his vice president, Mike Pence—he has a fighting chance. His position is much weaker than if Pennsylvania sends Pence only one certificate of electoral votes that supports him. But Trump has no chance at all if Pennsylvania sends only one certificate that supports Warren.[23] Thus, if Trump cannot get a court to block the governor's certificate of ascertainment showing Warren's electors as duly appointed based on their popular-vote victory, then it is imperative from Trump's perspective that the state legislature purport to supersede this popular vote with its own direct appointment of the state's

23. This point assumes that the Democrats will control the House of Representatives, which will vote to accept the 20 electoral votes from Pennsylvania in favor of Warren. Only if Mike Pence could get away with nullifying those votes solely on his own (without any conflicting electoral votes from the state in favor of Trump)—an exceedingly implausible scenario—could Trump prevail in preventing Pennsylvania from giving Warren an Electoral College majority.

presidential electors—and for Pence to receive from Pennsylvania a second certificate of electoral votes, ones cast for Trump based on this purported legislative appointment.

There is good reason to think that this purported legislative appointment of electors would be invalid as a matter of state or federal law, or both. To be sure, the federal Constitution unquestionably gives state legislatures the authority to engage in direct appointment of presidential electors. Moreover, it is also true that when exercising this federal constitutional authority there is no need for the state legislature to provide for gubernatorial involvement.[24] Thus, one might think that the two houses of the Pennsylvania legislature, without any legal obstacle, could supersede a popular vote with direct appointment of electors. While it might be undemocratic, it would not seem unlawful.

But that conclusion would be too quick. While it is undoubtedly true that for future elections a state legislature could change the method of appointing presidential electors from a popular vote to direct appointment, there are at least two significant legal obstacles to consider with respect to an attempt by a state legislature to assert direct appointment authority after a popular vote to appoint electors has already taken place.

First, insofar as this popular vote occurred pursuant to state legislation enacted using ordinary state legislative procedures, including presentment to the governor for possible veto, a strong argument can be made that this method of appointing electors cannot be undone except by a new state statute enacted using the same ordinary methods of legislation. In other words, even if the state legislature wants to return to a method of appointment with no gubernatorial involvement, the legislature first would need to repeal—by ordinary legislative methods—the statute that authorized appointment by means of a popular vote. Second, the legislature would need to change in this appointment method before, not after, electors had already been appointed by means of a popular vote. The legislature is always free to make this move for next time, but it cannot—at least not without violating the due process clause of the Constitution—undo an appointment of electors already made.[25]

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24. In the early days to the Republic, when state legislatures choose to appoint electors directly, they debated whether to do so in joint sessions of both legislative chambers, or separate sessions, but they did not view this legislative appointment as requiring gubernatorial assent. *See* FOLEY, *supra* note 18, at 17.

25. *See* Roe v. Alabama, 43 F.3d 574, 580–81 (11th Cir. 1995) (first quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); and then quoting Curry v. Baker, 802 F.2d 1302, 1315 (11th Cir. 1986)) ("The right of suffrage is 'a fundamental political right . . . .' If, however, 'the election process itself reaches the point of a patent and fundamental unfairness, a violation of the due process clause may be indicated . . . .'"). For a discussion of the election that gave rise to this *Roe v. Alabama*

While these legal arguments are powerful, they ultimately may not matter. As we shall shortly see, what matters is whether or not Congress receives a submission of electoral votes from a state, not whether that submission is legally valid according to some standard that Congress might not recognize as binding. Thus, the two houses of Pennsylvania's legislature may not be legally entitled to negate popular appointment of the state's presidential electors after that appointment has occurred. The legislature may require concurrence of the governor before any such move could be considered a valid rescission of the statute authorizing popular appointment. Even so, if the two houses of the state legislature purport to do this, and if the electors purportedly appointed meet and cast their electoral votes—and, most importantly, if these electors send their electoral votes to the President of the Senate—then the President of the Senate has these electoral votes in hand. That is enough for Congress to consider the votes and potentially accept those votes as the authoritative electoral votes from Pennsylvania.

Also, it is worth noting that the strength of any argument against direct legislative appointment of presidential electors may depend heavily on the specific factual context in which such direct legislative appointment is attempted. In a genuine emergency, for example, it would not raise serious due process concerns for a state legislature to step in and appoint presidential electors directly when otherwise the state would risk losing its opportunity to participate in the presidential election altogether. Indeed, Congress itself has explicitly recognized that "the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct" if and when "any State has held an election for the purpose of choosing electors, and has failed to make a choice."[26] Thus, if there were a successful cyberattack on Pennsylvania's electoral infrastructure, thereby preventing the state from appointing presidential electors by means of a popular vote on Tuesday, November 3, there is

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precedent, as well as related rulings in the litigation, see EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 267–77 (2016) [hereinafter BALLOT BATTLES]. More recently, the American Law Institute (ALI) has developed principles for the resolution of ballot-counting disputes that identifies this "due process" concern as a paramount principle that all elections should follow. Specifically, section 201 of these ALI principles provides: "Whenever the state's rules and procedures for the counting of ballots have been prescribed in advance of an election . . . those rules and procedures shall be followed as prescribed, unless doing so would violate the U.S. Constitution or other federal law." The Reporters' Notes to Section 201 provide additional analysis of the relationship of the *Roe v. Alabama* due process precedent to this basic principle. A.L.I., PRINCIPLES OF THE LAW, ELECTION ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES § 201, at 77–78 (2019) (discussing the *Roe* case in relation to principles of due process).

26. 3 U.S.C. § 2 (2018).

little doubt that the state's legislature could appoint electors directly as its chosen method for a backup method of appointment.[27]

In this particular circumstance, moreover, the governor would have no basis for standing in the way of this direct legislative appointment without any gubernatorial involvement; nor would due process pose any obstacle. Accordingly, as a matter of how persuasive a Trump effort at direct legislative appointment of electors would be, it might well depend on how successfully he could draw an analogy to a genuine emergency situation, like a cyberattack. If he were unable to convince anyone that the blue shift in the overtime count was anything other than the normal process of canvassing election returns, his argument for direct legislative appointment of electors would be correspondingly weak. Conversely, if he was able to convince at least his own Republican supporters that the blue shift was an electoral calamity comparable to a cyberattack, thereby nullifying the validity of the canvass and the overtime count, his argument that direct legislative appointment was necessary to fill the void left by the invalid blue shift would strengthen correspondingly at least in the eyes of his own supporters.

In any event, this analysis will proceed on the assumption that Mike Pence, as President of the Senate, receives two sets of electoral votes from Pennsylvania: one reflecting the count of the canvass, certified by the governor; and the other reflecting the legislature's assertion of its authority to directly appoint the state's electors.

II. FROM JANUARY 6, 2021, THROUGH JANUARY 20, 2021

A. What Could Happen

As January 6, 2021 approaches, the two parties take to cable news and social media to test various arguments as to why their candidate is the winner entitled to be inaugurated as president on January 20. Some Republicans take the especially aggressive position that Mike Pence, as President of the Senate, has the unilateral authority under the Twelfth Amendment to decide which certificate of electoral votes from Pennsylvania is the authoritative one entitled to be counted in Congress and that he, accordingly, will count the certificate from the electors appointed by the state legislature because the Constitution authorizes the state legislature to choose the method of appointing electors.

These Republicans point to the historical pedigree of this position, observing that Republicans made the same argument during the disputed

27. *See id.* ("Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.").

election of 1876 and that at least some recent law journal scholarship has supported this position.[28] Unembarrassed by the apparent conflict of interest caused by Mike Pence simultaneously being a candidate for reelection and arbiter of the electoral dispute, these Republicans observe that Thomas Jefferson was in essentially the same position during the disputed election of 1800 and yet the Twelfth Amendment left this provision in place when Congress rewrote the procedures for the Electoral College afterwards. While it is true that an incumbent Vice-President might have a direct personal stake in the electoral dispute to be resolved, the Republicans argue, at least the glare of the spotlight is focused on whatever the vice president does in this situation, and everyone will be able to judge whether the vice president acted honorably or dishonorably in resolving the dispute.

Other Republicans offer an alternative argument, which would still lead to Trump's reelection. They contend that, under the proper interpretation of the operative federal statute—the Electoral Count Act of 1887—Pennsylvania's electoral votes must be discarded because both conflicting submissions of electoral votes from the state purport to be timely and authoritative under state law.[29] Because neither submission has inherently higher status from a federal vantage point, according to this alternative argument, both submissions in effect cancel each other out, and there are no electoral votes from Pennsylvania to be counted. Moreover, this argument continues, Pennsylvania's failure to appoint electors in a manner capable of recognition by Congress alters the arithmetic for determining which candidate won an Electoral College majority. Because Pennsylvania did not validly appoint any electors, only a total of 518 electors were appointed (the usual 538 minus Pennsylvania's 20). Trump won an undisputed 260 Electoral College votes apart from the controversy over Pennsylvania. Because 260 is a bare majority of 518, these Republicans contend that Trump has secured "a majority of the whole number of electors appointed," within the meaning of the Twelfth Amendment, and thus must be recognized as the duly elected president for a second term.

Democrats will have none of this. They contend that the constitutional argument that would give Mike Pence the power to declare himself and Trump reelected is preposterous and that, to the contrary, Congress has the authority to enact a law to govern the resolution of a dispute over the proper electoral votes from a state. The Electoral Count Act of 1887 is

28. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1688–90, 1699–1701 (2002).

29. 3 U.S.C. § 15 (2018).

that law, they argue. They further contend that, properly interpreted, the statute requires the certificate bearing the governor's signature to be accepted by Congress as authoritative.[30] Even if one chamber of Congress wishes to repudiate the validity of that gubernatorial certificate, the Electoral Count Act requires its votes for Warren to be counted as long as one house of Congress considers it valid.[31] The Democrats observe that Speaker Nancy Pelosi already has made clear that *on January 6* a majority in the House of Representatives will vote to accept electoral votes from Pennsylvania as certified by the state's governor and thus America should be preparing for the inauguration of Elizabeth Warren as its next president on January 20.

As a fallback position, other Democrats argue that if the dispute over Pennsylvania remains unresolved on January 20, then no candidate shall have been "qualified" for either president or vice-president within the meaning of the Twentieth Amendment. Therefore, they argue, under the succession statute enacted by Congress, Nancy Pelosi, upon resignation as Speaker, is to serve as acting president until such time as the dispute is resolved and a president shall have "qualified" as recognized by Congress. While Pelosi herself has made abundantly plain her preference that Warren be recognized and inaugurated as the duly elected president, she is prepared to assume the responsibilities of acting president for as long as necessary, which is for as long as Republicans refuse to acknowledge the lawfulness and legitimacy of Warren's election. Since Republicans cannot prevail in this contest, these Democrats argue, they should acquiesce in Warren's election and thus avoid the extra complications associated with Pelosi operating as an Acting President.

Republicans, in turn, scoff at these arguments made by Democrats. They continue to claim that Trump is the one duly elected. They and Trump himself assert that the country must move forward toward the inauguration of Trump's second term on January 20.

B. Analysis

The procedures for handling a disputed presidential election that reaches Congress are regrettably, and embarrassingly, deficient. The country was spared the agony of having to suffer the invocation of these procedures in 2000. The dispute over that year's presidential election did not last all the way to Congress. Instead, Al Gore refused to carry that dispute forward—despite the contrary urging of his advisers, including

30. For further details of this statutory analysis, *see infra* pp. 351–61.
31. *Id.*

Ron Klain—after the United States Supreme Court ruled against him in *Bush v. Gore*.[32]

There is absolutely no guarantee, however, that a disputed presidential election in 2020 would not reach Congress. Indeed, as explained above, the analysis here is premised on the assumption that Trump easily could take a dispute over an outcome-determinative blue shift in the overtime count all the way to Congress. Trump could do so by having the state legislature send a second certificate of electoral vote, ones supporting him, to "compete" in Congress against a conflicting certificate of electoral votes from the same state, these other ones supporting his Democratic opponent based on the blue shift count in overtime. Thus, as part of an effort to prepare for the risk of a disputed presidential election in 2020, it is imperative to consider how the embarrassingly deficient procedures might operate if they were actually called into play.

The Constitution itself says remarkably little relevant to this topic, and what it does say is shockingly ambiguous. Here is the applicable text of the Twelfth Amendment:

> [T]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—
>
> The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.[33]

The first thing to observe about this constitutional language is that the critical sentence is written in the passive voice: "the votes shall then be counted." Here, thus, is the first frustrating ambiguity. It could be the "President of the Senate" who does the counting; or, after the President of the Senate has finished the role of "open[ing] the certificates" then the whole Congress, in this special joint session, collectively counts the electoral votes.

Either way, this language contains no provision for what to do in the event of a dispute, whether with respect to the "certificates" to be "open[ed]" or with respect to the "votes" contained therein. It certainly says nothing about what to do if the President of the Senate has received two conflicting certificates of electoral votes from the same state, each

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32. *See generally* Bush v. Gore, 531 U.S. 98 (2000) (per curiam); *see also id.* at 110 ("Because it is evident that any recount . . . will be unconstitutional . . . we reverse the judgement of the Supreme Court of Florida ordering a recount to proceed.").

33. U. S. CONST. amend. XII.

certificate purporting to come from the state's authoritatively appointed electors. As the distinguished jurist Joseph Story observed early in the nineteenth century, this crucial constitutional language in the Twelfth Amendment appears to have been written without imaging that it might ever be possible for this sort of dispute to arise.[34]

Despite its ambiguity, or perhaps because of it, the peculiar passive-voice phrasing of this crucial sentence opens up the possibility of interpreting it to provide that the "President of the Senate" has the exclusive constitutional authority to determine which "certificates" to "open" and thus which electoral votes "to be counted." This interpretation can derive support from the observation that the President of the Senate is the only officer, or instrumentality, of government given an active role in the process of opening the certificates and counting the electoral votes from the states. The Senate and House of Representatives, on this view, have an observational role only. The opening and counting are conducted in their "presence"—for the sake of transparency—but these two legislative bodies do not actually take any actions of their own in this opening and counting process. How could they? Under the Constitution, the Senate and the House of Representatives only act separately, as entirely distinct legislative chambers. They have no constitutional way to act together as one amalgamated corpus. Thus, they can only watch as the President of the Senate opens the certificates of electoral votes from the states and announces the count of the electoral votes contained therein.

This interpretation of the Twelfth Amendment is bolstered, moreover, by the further observation that the responsibility to definitively decide which electoral votes from each state are entitled to be counted must be lodged ultimately in some singular authority of the federal government. If one body could decide the question one way, while another body could reach the opposite conclusion, then there inevitably is a stalemate unless and until a single authority is identified with the power to settle the matter once and for all. Given the language of the Twelfth Amendment, whatever its ambiguity and potential policy objections, there is no other possible single authority to identify for this purpose besides the President of the Senate.

This role could have been vested in the chief justice of the United States, as is the constitutional authority to preside over the trial of an impeachment of the president. Or disputes of this nature could have been referred directly to the Supreme Court, as a singular corporate body, for definitive resolution there. But the Constitution does neither; nor does it make any other such provision. Thus, according to this argument, the

34. *See* BALLOT BATTLES, *supra* note 25, at 72 ("It seems to have been taken for granted that no question could ever arise on the subject.") (citations omitted).

inevitable implication of the Twelfth Amendment's text is that it vests this ultimate singular authority, for better or worse, in the President of the Senate. Subject only to the joint observational role of the Senate and House of Representatives, the President of the Senate decides authoritatively what "certificates" from the states to "open" and thus what electoral votes are "to be counted."

Whatever each of us personally thinks of this interpretative argument, it is necessary to acknowledge that it has a significant historical pedigree.[35] It routinely had its advocates in the years leading up to the disputed election of 1876. During that intense dispute, it was conveniently invoked by Republicans, since the President of the Senate was one of their own at the time.[36] After the resolution of that ugly dispute, the argument was resurrected by some during the congressional debates that led to passage of the Electoral Count Act of 1887, including the claim that this Act is unconstitutional because it interferes with the exclusive authority vested in the President of the Senate to determine which electoral votes from the states to count. That claim was repeated after passage of this Act.[37] Indeed, it has been repeated recently—and forcefully—in a law review article written after *Bush v. Gore* in contemplation of what might transpire if and when another disputed presidential election ever reaches Congress.[38] Trump and his supporters would almost certainly invoke this argument if and when it was to his advantage to do so.

For as long as this argument has been made, however, it has had its vociferous detractors. The Necessary and Proper Clause, the counterargument goes, gives Congress ample legislative authority to fill the gaps and clarify the ambiguities that exist in the text of the Twelfth Amendment itself.[39] It would be unseemly (or worse) to leave the exclusive power to resolve disputes over the electoral votes of a state in the hands of the Senate president—especially when the Senate president is one of the candidates directly involved in the dispute, as has been the case multiple times, including Gore in 2000 and Nixon in 1960. Thus, it should be clear that Congress may invoke its Necessary and Proper Clause power to enact a statute that provides for an alternative mechanism for resolving a dispute over the electoral votes from a state.

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35. For a discussion of this history, see generally Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475 (2010).

36. Not the vice-president of the United States, who had died, but Thomas Ferry, President pro tempore.

37. *See* BALLOT BATTLES, *supra* note 25, at 151–60 (recounting the historical debates surrounding whether or not the Electoral Count Act of 1887 is constitutional).

38. *See generally* Kesavan, *supra* note 28.

39. *See* BALLOT BATTLES, *supra* note 25, at 125–32 (discussing the arguments and counterarguments surrounding the textual ambiguities of the Twelfth Amendment).

According to this counterargument, the Electoral Count Act of 1887, as imperfect as it may be as a policy and legislative drafting matter, is an entirely appropriate exercise of this Necessary and Proper power as a matter of constitutional authority. Thus, there can be no constitutional objection to the procedures set forth in this Act on the ground that they deprive the Senate President of what otherwise would be exclusive authority to resolve this kind of dispute.

It is fair to say that this counterargument, on behalf of congressional power under the Necessary and Proper Clause, has had more adherents throughout history than the argument on behalf of exclusive constitutional power lodged in the President of the Senate. We shall momentarily turn to the Electoral Count Act of 1887 as an exercise of this Necessary and Proper Clause power, on the assumption that it is constitutionally valid no matter its statutory deficiencies. Nonetheless, it must be recognized that the argument on behalf of exclusive Senate President authority has never been thoroughly vanquished. How could it be unless and until there is a new constitutional amendment superseding the ambiguity of the Twelfth Amendment on this point? Thus, one must prepare for the possibility that this constitutional debate will recur, if and when the outcome of a presidential election potentially turns on which side of the argument prevails.

Before turning to the statute, there is another constitutional provision to consider. The Twentieth Amendment provides:

> If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.[40]

This provision contemplates the possibility that the time for inaugurating the new president—at noon, on January 20—may arrive without a new president having yet "been chosen." The most straightforward textual way this might occur is if it is abundantly clear to all that no candidate has received a majority of electoral votes. In that event, under the Twelfth Amendment the House of Representatives is supposed to elect a president by means of a special procedure in which each state's delegation to the House has one vote. But the Twelfth Amendment provides that an absolute majority of all states "shall be

40. U.S. CONST. amend. XII.

necessary to a choice" and thus it is possible that the House will have failed to achieve this choice by the required majority vote before noon arrives on January 20. In this case, if the Senate has successfully exercised its parallel authority under the Twelfth Amendment to elect a new vice president (when no vice presidential candidate received an Electoral College majority), then this provision of the Twentieth Amendment makes clear that the vice president newly elected by the Senate under the Twelfth Amendment becomes "acting president" until such time as the House of Representatives manages to elect a president by the required majority vote.

But what if the Senate has also failed to perform its function under the Twelfth Amendment and has not yet elected a vice president? In this case, it would seem that the Twentieth Amendment invokes the statutory line of succession that Congress has the power to adopt—although the Amendment does so somewhat ambiguously by switching to the word "qualified" from the previously used "chosen": "the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified."[41] Presumably, then, if all agree that no new president or vice president has yet been elected under the Twelfth Amendment by the time noon on January 20 arrives, then"[t]he Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President."[42] Assuming that Nancy Pelosi is reelected Speaker on January 3, 2021, then she would be in the position to become acting president if no new president or vice president has been elected by noon on January 20.

But what if it is disputed whether or not a new president has been "elected," "chosen," or "qualified" within the meaning of the Twentieth Amendment? Suppose Republicans claim that President Trump has been reelected, while at the same time Democrats argue that either Warren has been elected or, if not, then no one has (at least not yet). Thus, according to the Democrats, under the Twentieth Amendment it devolves to Nancy Pelosi, upon resignation as Speaker and from the House, to act as president.[43] The Twentieth Amendment does not seem to speak

41. U.S. CONST. amend. XX.

42. 3 U.S.C. § 19 (2018). I put aside the arguments made by the Amar brothers that it is unconstitutional for the Speaker of the House to be in the line of presidential succession. *See generally* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Unconstitutional?*, 48 STAN. L. REV. 113 (1995). Even if that argument is sound with respect to the circumstance of a presidential death (in the middle of the president's term), it would seem inapplicable with respect to the operation of the Twentieth Amendment, which does not limit whom Congress may choose to act as President in the event of no "qualified" President-elect and Vice President-elect.

43. Republicans would be claiming that Pence had been reelected as vice president. Democrats

specifically to this circumstance. It seems to assume that either it is clear that there is a new president-elect to be inaugurated at noon on January 20, or it is clear that there is not (and equally clear that there is no new vice president), in which case the need for an acting president is unambiguously triggered. The Twentieth Amendment does not seem to contemplate that it might be unclear, and thus disputed, whether there is a newly elected president to be inaugurated or, instead, whether an acting president is required for the time being.

How might this particular kind of ambiguity or dispute arise? For that, we turn to the astonishingly messy language of the Electoral Count Act of 1887.[44]

1. The Electoral Count Act

The key section of the Act is codified as 3 U.S.C. § 15. This section is itself a monstrosity, amounting to a virtually impenetrable maze of 807 words. It starts innocuously enough, requiring the opening and counting of electoral votes from the states—as required by the Twelfth Amendment—to commence at 1:00 p.m. on January 6, with both the Senate and the House of Representatives present in "the Hall of the House of Representatives" and the President of the Senate serving as "their presiding officer."[45] The section then provides that the opening and counting of each state's electoral votes will proceed state-by-state in alphabetical order. If there is only one submission of electoral votes from a state, the operation of the statute is acceptably straightforward and comprehensible: this submission must count according to electoral votes contained therein unless both houses of Congress, acting separately, agree to reject those electoral votes.[46]

The section's interpretative difficulties arise only if there are two or more conflicting submissions of electoral votes from the same state. To be sure, there is no difficulty under the section if both chambers of Congress agree to accept the same submission as the authoritative one

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would be disputing this as well, arguing instead that either Warren's running mate had been elected or that there was no new vice president yet, thereby requiring the responsibility of acting president to devolve upon Nancy Pelosi.

44. *See* BALLOT BATTLES, *supra* note 25, at 150–77 (analyzing the statute's genesis and legislative history).

45. 3 U.S.C. § 15 (2018).

46. This is why Trump cannot prevail if there is only one submission of electoral votes from Pennsylvania, and those are for Warren—as long as the Democrats retain control of the House (since it will be the new House sworn in on January 3, 2021). Only by Pence, as still President of the Senate on January 6, willing to declare the clear operation of the Electoral Count Act, 3 U.S.C. § 15, entirely irrelevant in this situation, could Pennsylvania's electoral votes not count for Warren in this situation. But, as indicated earlier, that seems so far-fetched to beyond the stretch of imagination.

containing the valid votes to be counted. As one portion of this section puts it, "those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State."[47]

Thus, in the 2020 scenario we are contemplating—where the President of the Senate has received two submissions from Pennsylvania, one with the governor's certificate and the other based on the purported legislative appointment—if both the Senate and the House accepted the electoral votes bearing the governor's certificate as the proper ones (because they were cast by electors duly appointed pursuant to an accurate count of the state's popular vote according to the canvassing and other electoral laws of the state), the controversy would end in terms of what the statute provides. True enough, as a political matter, the fight may remain unsettled depending on exactly the nature of the Senate's vote. If only a few renegade Republicans—like Mitt Romney and Lisa Murkowski—joined all the Democrats to concur with the acceptance of the Warren electoral votes from Pennsylvania, thereby agreeing with the Pelosi-led vote in the House to do the same, Mike Pence might be tempted to assert a constitutional prerogative to supersede the provisions of the Electoral Count Act and, despite this joint agreement of the two congressional chambers, declare the legislatively appointed electors to be the authoritative ones from Pennsylvania.[48] But if Mitch McConnell leads the Republican-controlled Senate to agree with the Democratic-controlled House that the governor-certified electoral votes from Pennsylvania are the valid ones, it would seem impossible as a practical matter for Pence to prevail on his constitutional claim that he is entitled to overrule this bicameral (and bipartisan) determination of which electoral votes from Pennsylvania to count. For this reason, it makes all the difference in the world how Mitch McConnell chooses to lead the Republican conference in the Senate if this kind of situation occurs.

But what if the Senate and House disagree? What if, in other words, the Pelosi-led House votes to accept the electoral votes for Warren, while simultaneously the McConnell-led Senate votes to accept the electoral votes for Trump? Here is where the statutory morass of 3 U.S.C. § 15 becomes an interpretative quagmire. As scholars have recognized ever

47. 3 U.S.C. § 15.

48. The political tenability of a fight in this circumstance might depend on the mood of the country. If Trump's so-called "base" voters are relatively acquiescent in the outcome, then it would seem politically infeasible for Pence to override the judgment of both the House and the Senate even if the Senate's vote (like the House's) is mostly made up of Democrats. But if the Republican base is especially agitated, then it might embolden Pence to try to make this kind of move, knowing that he would have the support of Mitch McConnell and other Republican leaders—although he would lack the support of the Senate institutionally.

since the adoption of the Electoral Count Act in 1887, its opaque and contorted text is susceptible to two different understandings of what is supposed to happen in this inherently fraught situation—a circumstance for which statutory clarity, rather than ambiguity, is acutely required.[49] This point is not to say that the two alternative interpretations are equally valid, or would appear so to a disinterested tribunal endeavoring to be genuinely nonpartisan in resolving a dispute of this kind. It is only to say that the two alternative interpretations are at least superficially tenable, with advocates for each among scholars and in the historical record. Thus, in an actual dispute either side would be able to invoke one of these alternative interpretations to support its position in the particular controversy at hand.

We can easily see how Democrats could forcefully apply this point and argue that, once the Senate and House have diverged on which submission of electoral votes from Pennsylvania should be counted, the operation of 3 U.S.C. § 15 requires that the submission bearing the governor's certificate is the one that must be accepted. The Democrats would quote this sentence in the statute: "But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted." The Democrats would also cite a comprehensive post-2000 law review article, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, which makes the case for counting the electoral votes in the submission from the state that bears the governor's signature is the correct reading of the statute.[50]

It is harder, but not impossible, to make the counterargument that the proper reading of the statute as applied to this specific situation requires the rejection of both submissions of electoral votes from Pennsylvania. This counterargument takes the position that a gubernatorial certificate does not act as a tiebreaker when two (or more) certificates of submission of electoral votes from the same state claim "safe harbor" status under another section of the Electoral Count Act of 1887.[51] Those who followed, or have studied, the saga of the 2000 presidential election will remember this statutory section described as the "safe harbor provision." This section purports to bind Congress when a state has settled a dispute over its own electoral votes by a specified deadline—six days before the scheduled meeting of the electors—and according to rules existing in

49. *See generally* A.L.I., *supra* note 25 (identifying this "due process" concern as one that should be of utmost importance in all elections).

50. *See generally* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004).

51. 3 U.S.C. § 5 (2018).

state law prior to the day for appointing electors by means of a popular vote in the state. Several scholars, including one from the Congressional Research Service, assert that when multiple submission of electoral votes from the same state all claim "safe harbor" protection, none can be counted—not even one bearing a gubernatorial certificate—unless *both* houses of Congress agree upon which submission is entitled to this "safe harbor" status.[52] These scholars quote a separate portion of the impenetrable text of 3 U.S.C. § 15:

> [I]n case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law . . . .

This language, these scholars contend, means that both Houses must agree to count electoral votes claiming safe-harbor status when other electoral votes from the same state are also making the same safe-harbor claim. In support of their contention that the electoral votes bearing the governor's signature cannot be counted in this situation, as long as one chamber of Congress objects, these scholars offer this reasoning:

> If the Houses cannot agree on the authoritative determination . . . no vote from the state in question is counted. This result follows regardless of the governor's action. Congress in this case looks to the executive certificate only as evidence of the decision reached by a tribunal authorized by the state legislature. If the decision of the authorized tribunal cannot be made out, then there is no valid return for the governor to certify.[53]

This interpretation of the statutory language may not be especially convincing; readers can judge for themselves. The important point is that that this interpretative reasoning exists, both in law review literature and Congressional Research Service analysis. It is available to be championed when doing so serves a partisan purpose. It cannot be dismissed as nonexistent, however much one might wish that to be the case.

In the context of the specific scenario under consideration, one can see how the electoral votes bearing the governor's signature would claim safe-harbor status. This would be especially true if the Pennsylvania Supreme Court affirmed them as the lawful electoral votes of the state and did so in a decision issued at least six days before Monday, December

52. Memorandum from Jack Maskell, Legislative Att'y, Am. L. Div., Cong. Research Serv. 9 (Jan. 2, 2001) [hereinafter Congressional Research Service Memorandum] (on file with author); L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321, 343 (1961).

53. Congressional Research Service Memorandum, *supra* note 52, at 8–9 (quoting Wroth, *supra* note 52).

14. As part of this safe-harbor claim, the state supreme court would assert that it was acting pursuant to statutory authority adopted prior to Tuesday, November 3, the day for appointing the state's electors by means of a popular vote.

It is more difficult to see how an argument for safe-harbor status could be made for the electoral votes cast by the electors purportedly appointed by the state legislature directly, sometime after Tuesday, November 3, in response to the blue shift. It would seem that this kind of retroactive legislative move is precisely the kind of change in law that is not supposed to receive safe-harbor status.

And, yet, it is not entirely impossible to make the contrary argument, especially if the state legislature acts to make its direct appointment of electors before the safe-harbor deadline of six days before Monday, December 14. This argument would depend, again, on the claim that the state legislature was responding to an emergency analogous to a cyberattack. Surely, if there were a cyberattack—this argument would go—a direct legislative appointment of electors would be entitled to safe-harbor status if made within the requisite deadline, in order to avoid depriving the state of an opportunity to participate in the presidential election. This direct legislative appointment would occur pursuant to residual emergency authority that existed in state law prior to Tuesday, November 3. There is always such residual legislative authority in the context of a genuine emergency, this argument might add. Because the state legislature viewed the blue shift during the canvass as a theft of the popular will of the state, comparable to a cyberattack and thus an equivalent emergency, the direct legislative appointment of electors is entitled to safe harbor status in the one emergency situation as much as the other.

This argument might not seem especially strong, but it is enough to claim that under 3 U.S.C. § 15 neither of Pennsylvania's electoral vote submissions may be counted when the House has voted to count one and the Senate has voted to count the other. Because it is an argument that in this context supports Trump's claim to reelection, one would expect Republicans to make it in the run-up to January 6. The argument depends on the further proposition that, once it is determined that Pennsylvania has failed to appoint any electors capable of being recognized as authoritative by Congress, then Trump has a majority of votes from all electors authoritatively appointed: 260 of 518. One would thus expect Republicans to make that claim as well.[54] Thus, January 6 approaches in

54. This issue is also debatable, as has been recognized at least since the congressional debates on the Electoral Count Act. *See* BALLOT BATTLES, *supra* note 25, at 150–77 (discussing the

this hypothetical scenario, the speculative chatter on cable and Twitter is that if the House and Senate divide over which electoral votes from Pennsylvania to accept, then Mike Pence as President of the Senate will proclaim that neither counts and will use that proclamation as the basis for declaring Trump re-elected by a majority of electors appointed.

Anticipating this move, Democrats in turn explore ways to prevent it. They argue that if the House refuses to continue participating in the procedure specified in 3 U.S.C. § 15 after Pence makes this erroneous and unlawful proclamation regarding Pennsylvania, then the opening of certificates and the counting of electoral votes from all remaining states cannot continue. They quote the very last sentence of 3 U.S.C. § 15: "No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of."[55] With the process stuck at Pennsylvania, and the count incomplete, there is no president-elect, the Democrats argue. Nor is there a vice president-elect. This means, they say, Nancy Pelosi is entitled to serve as acting president for as long as the stalemate remains, by virtue of the Twentieth Amendment.

Nonsense, Republicans retort. Democrats cannot trigger the Twentieth Amendment simply by walking out of the procedure for counting electoral votes under 3 U.S.C. § 15, these Republicans respond. They point to the very next section of the statute: "Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared."[56] Mike Pence, as President of the Senate, therefore can

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legislative history of the Electoral Count Act). The other side of this argument is that the denominator does not change, despite a state's failure to appoint electors able to be recognized as authoritative by Congress. The Constitution itself does not directly speak to this point, and the Electoral Count Act did not attempt to resolve this debate. Richard Posner addressed this issue in his book on *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), arguing that it was one of many reasons that justified the Court's involvement in that disputed election. *See generally* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001). Note: if the denominator-does-not-change side of the debate were to prevail, it would mean that no candidate receives a majority of electoral votes, and the election goes to the House of Representatives pursuant to the special one-vote-per-state procedure.

55. 3 U.S.C. § 15 (2018).

56. *Id.* § 16. Demonstrating a legislative intent that the electoral count be completed, this section continues:

> [N]o recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this subchapter, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of 10 o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.

Id.

simply resume the process, with the next state (Rhode Island) and proceed to the end (Wyoming) even if the only members of the House and Senate remaining to watch are Republicans. In this way, the process of counting electoral votes under 3 U.S.C. § 15 could end with this basic dispute still remaining. Republicans would claim that Trump has been reelected, by virtue of Mike Pence's assertion to this effect pursuant to his understanding of § 15 as the presiding officer of its proceeding. Meanwhile Democrats would claim that the counting of electoral votes remains incomplete because of the attempted usurpation of authority by Pence in refusing to count the electoral votes from Pennsylvania bearing the governor's certificate, as required by the proper interpretation and operation of 3 U.S.C. § 15.[57]

Which position is correct under the Twentieth Amendment? Who decides, and how? If the election remains unsettled at this stage, what then?

III. JANUARY 6, 2021, THROUGH JANUARY 20, 2021

A. What Could Happen

At 1:00 p.m. on January 6, 2021, pursuant to 3 U.S.C. § 15 and the Twelfth Amendment, the Senate and House of Representatives gather in the House chamber for the counting of electoral votes of the states. Mike Pence presides in his role as President of the Senate, as specified by both the statute and the Constitution. Starting with Alabama, and continuing alphabetically, the counting proceeds smoothly until Pennsylvania. Pence announces that he is in receipt of two submissions purporting to be the state's electoral votes and under 3 U.S.C. § 15 he must submit both to the Senate and House for their separate consideration. The Senate then withdraws from the House chamber and, as expected, votes to accept the submission of electoral votes from the electors appointed by the state's legislature, while simultaneously the House votes to accept the submission certified by the state's governor.

When the Senate returns to the House chamber for the resumption of the joint session, Pence announces that because neither submission has

57. In this posture, the Democrats analytically would be making two distinct arguments, one statutory and the other constitutional. Their statutory argument would come first, and it would be that the proper interpretation of 3 U.S.C. § 15 requires the Senate President to recognize the Pennsylvania submission bearing the governor's signature as legally authoritative. If the Senate President errs in this statutory respect, then the Democrats would turn to their constitutional argument as a secondary line-of-defense: namely, under the Twelfth and Twentieth Amendments, properly interpreted in tandem, the electoral count cannot be complete without the institutional participation of the House; thus, if the House refuses to acquiesce in the process, it is an "Acting President" situation under the Twentieth Amendment.

been accepted as authoritative by both houses of Congress, neither submission's electoral votes can be counted. At this there are howls of protests by Democrats in the chamber, who clamor their insistence that the electoral votes bearing the governor's certificate must be counted under the express terms of 3 U.S.C. § 15.[58] After much commotion, Pence manages to gavel the proceedings to order and repeats that his understanding of § 15, contrary to the views expressed by the Democrats, is that neither submission of electoral votes from Pennsylvania can be counted because of the split votes of the two congressional chambers. That is his ruling as presiding officer, and he is prepared to move on to the next state, Rhode Island.

The Democrats erupt in protest again and demand an opportunity to overrule Pence's patently erroneous interpretation of § 15. Pence again gavels the proceeding to order and announces that there is no method under 3 U.S.C. § 15, or the Twelfth Amendment, to overrule his rulings and announcements as presiding officer. The Senate and House do not act jointly as a unified combined body.[59] Under both 3 U.S.C. § 15 and the Twelfth Amendment, their joint role is solely as observers of the process. Each chamber has made its separate determination regarding Pennsylvania, and accordingly it is his role—Pence asserts—to announce the consequence of those separate determination. Based on his understanding of both the statute and the Constitution, and as advised by counsel, he had performed this necessary function, declaring both submissions from Pennsylvania ineligible to be counted, and now under the statute and Constitution he must move the proceedings on to the next state.

Then, Nancy Pelosi rises, demanding to speak. (Under 3 U.S.C. § 16, she sits "immediately upon [the Senate president's] left."). She announces that the joint meeting of two chambers is over, or at least suspended, unless and until Mike Pence is prepared to change his ruling and accept the electoral votes from Pennsylvania bearing the governor's signature. Absent that, the Senators are no longer welcome in the House chamber. When Pence insists that Pelosi has no authority to suspend the proceedings in this way, Pelosi declares that she will call upon the sergeant-at-arms of the House of Representatives to forcibly remove the senators from the House chamber unless the senators leave voluntarily. In order to avoid that spectacle, and in the hope that Republicans will

58. For a historical precedent of comparable howling, see BALLOT BATTLES, *supra* note 25, at 117–49 (discussing the dispute over the process of counting electoral votes in the 1876 election).

59. 3 U.S.C. § 18 (2018) ("While the two Houses shall be in meeting as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.").

eventually triumph after cooler heads prevail, Pence reluctantly agrees to lead the Senators out of the House chamber.[60]

With the House now alone in its own chamber, and Speaker Pelosi presiding, the House (in a party-line vote) passes a resolution stating that the joint proceeding under the Twelfth Amendment and 3 U.S.C. § 15 is hereby suspended unless and until Vice President Pence publicly announces that he is prepared to count the electoral votes from Pennsylvania as certified by the governor. Until then the House has ordered its sergeant-at-arms to bar the reappearance of Pence or any other Senator in the House chamber. Pelosi, however, does not go so far as to bar Republican members of the House from leaving the chamber, and they do.[61]

With Pelosi and the Democrats refusing to budge, Pence and the Republicans decide they need to do what they can to continue the counting of electoral votes, even if they cannot return to the House chamber. Consequently, Pence invites senators and representatives to crowd into the Senate's chamber for this purpose. Only Republican senators and representatives show up, except for one designated Democratic Senator to protest the purported continuation of the proceedings as unlawful under 3 U.S.C. § 15 and the Twelfth Amendment.

Among other objections, this Democratic senator points out that 3 U.S.C. § 15 specifically requires that there be two "tellers" from each

60. *Id.* § 17 contemplates the possibility of the House demanding a "recess" of the electoral count proceedings on January 6, based on an objection to how the process is being handled: "no recess shall be taken unless a question shall have arisen in regard to counting any such votes." Thus, although "the President of the Senate shall have power to preserve order" during the joint session itself, *see* 3 U.S.C. § 18, the Senate President cannot insist that no such "recess" occur, if the House has raised a question "in regard to counting any such votes." Consequently, Speaker Pelosi would be within her rights to insist upon suspension of the joint session, at least for a short period in which the House may wish to deliberate or "recess" while it determines its institutional position as a legislative chamber regarding the situation. In any event, if the House Speaker orders the House Sergeant-at-Arms to clear the House chamber, it would seem evident that the Sergeant-at-Arms would obey this direct order from the head of the House, rather than taking any contrary direction from the Senate President, whose presence in that chamber is at the invitation of the House. *See also* BALLOT BATTLES, *supra* note 25, at 142 (discussing a historical example of the House Speaker invoking the House Sergeant-at-Arms, although not during the deliberations of the joint session itself).

61. As against the argument that the Electoral Count Act precludes this kind of unilateral withdrawal from the counting process by the House, Speaker Pelosi asserts the House's inherent constitutional authority to govern its own conduct. In support of this argument, Speaker Pelosi can quote a recent law review article: "This plenary authority requires that the House and Senate be free to debate, make motions, and withdraw from the count at any time as they wish, the [Electoral Count Act] notwithstanding, subject, of course, to motions passing by the requisite majority of that house." Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 RUTGERS J.L. & PUB. POL'Y 340, 374 (2016).

chamber to participate in the opening and counting of electoral votes from the states: "said tellers, having then read the [the submission of electoral votes from the states] in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates."[62] Because the House of Representatives is no longer participating, as declared in its formal resolution, there no longer are two tellers from the House to perform this statutory function. Because the two House tellers must have been "previously appointed" by the House, according to the explicit terms of 3 U.S.C. § 15, there is no authority vested in the President of the Senate or elsewhere to appoint substitute tellers from the House. In other words, this Democrat asserts, there can be no continuation of the joint proceeding under 3 U.S.C. § 15 without the institutional participation of the House, and the House has resolved that institutionally it will not invite the Senate back to its chambers for the continuation of the joint proceeding unless and until the President of the Senate announces that the electoral votes bearing the certificate of Pennsylvania's governor will be counted, per the terms of 3 U.S.C. § 15.

Notwithstanding this objection from the Democratic senator, Pence purports to proceed with the counting of electoral votes from Rhode Island to Wyoming. At the end, Pence announces that Trump has been re-elected president with a majority of votes, 260 out of 518 electors appointed, because Pennsylvania failed to appoint electors in a manner Congress could recognize as authoritative given the procedures set forth in 3 U.S.C. § 15. Later, with Pence and other Republicans at his side, including Mitch McConnell, Trump announces that he is proceeding to prepare to be inaugurated for a second term on January 20.

Meanwhile, with Warren and other Democrats at her side, Pelosi asserts that she is prepared to be inaugurated and sworn in as acting president, taking the presidential oath of office specified in Article II, serving as such until the counting of electoral votes is completed (with Pennsylvania's votes counted as cast by the electors certified by the state's governor). Pelosi makes clear her belief that Warren is the duly elected president, based on a proper counting of electoral votes. But she is prepared to serve as acting president, and fully expects to do so starting at noon on January 20, unless and until Pence beforehand—during the remainder of his term as vice president, which expires at noon on January 20—announces his recognition of Warren as president-elect. Pelosi further declares that, once it is noon on January 20, with Pence no longer President of the Senate, it will fall to the president pro tempore (Senator Chuck Grassley) to declare his willingness to accept Warren as president-elect in order for her to end her service as acting president.

62. 3 U.S.C. § 15 (2018).

As the clock ticks toward noon on January 20, all of D.C.—indeed all of America—is in turmoil over what will happen. Neither Trump nor Pelosi is backing down. Both insist that at noon on January 20 they will take the presidential oath and begin to assert the powers of commander in chief. Both demand the full support and obedience of America's armed forces upon taking the presidential oath.

Attorney General William Barr announces that he believes the position of Trump and Pence is legally and constitutionally sound that they should be recognized as reelected for second terms. Pelosi dismisses Barr's announcement as nothing more than Trump's lawyer saying whatever Trump wants said. She argues that it is patently evident that Warren won the popular vote of Pennsylvania, and thus the election, and she is not going to let Trump, Pence, Barr, and the rest of the Republicans steal this election from Warren and the American people. She explains that she is prepared to serve as acting president solely to vindicate democracy and the proper counting of votes cast by the American people. While calling for calm among the public during these difficult times, Pelosi says that if the military, the FBI, and other federal security forces refuse to obey her orders as acting president starting at noon on January 20, then the American people must take to the streets in a massive nationwide demonstration of "people power" to show that their democracy will not be stolen from them.

Given this situation, what is the military to do starting at noon on January 20? Who should the military recognize as commander-in-chief? Who should get the "nuclear football" with the launch codes, Trump or Pelosi? On what basis should the military make this decision? How does the nation get out of this predicament? How can the nation avoid it in the first place?

B. Analysis: The Arizona Alternative

As important as it is to think through all the ramifications of the foregoing scenario based on Pennsylvania, it is equally important to recognize that something similar could happen with respect to another state. But if so, the scenario does not necessarily play out in exactly the same way. Indeed, the differences could prove significant.

Suppose, then, that the outcome-determinative blue shift occurs, not in Pennsylvania, but in Arizona. In other words, in 2020 the presidential election in Arizona undergoes the same phenomenon as the 2018 Senate race in Arizona, when the blue shift caused the lead to switch from McSally to Sinema. For the entire Electoral College to turn on Arizona, assume that the Democrat (Warren again, for sake of illustration) wins Pennsylvania on Election Night, and apart from Arizona's electoral votes Trump has 259 and Warren has 268. In this alternative scenario, assume

Trump wins Wisconsin on Election Night. The previous scenario was based on Warren winning Wisconsin. Either outcome is possible, as Wisconsin is potentially the Electoral College "tipping state." A key point here, however, is that because the blue shift varies in magnitude in different states (with Wisconsin's historically small), the outcome in Wisconsin might be settled on Election Night even though it ends up mathematically the "tipping state" because another state—like Pennsylvania or Arizona—ends up shifting past the tipping point during the counting of "overtime" votes in the canvass.

With Arizona substituted for Pennsylvania in this way, we can imagine the scenario unfolding similarly in many respects. Trump would tweet apoplectically about the blue shift robbing him of a victory he won Election Night. Democrats, in turn, would demand the proper counting of votes during the canvass—just as occurred in 2018, when Sinema overtook McSally.

But we can imagine one crucial difference. It involves the state's governor. Pennsylvania's governor is a Democrat. Arizona's governor is a Republican. Why might this matter? Suppose the governor signs a new state law providing for direct appointment of the state's electors by the legislature—and then the governor certifies the appointment of these electors as authoritatively those of the states. Suppose, too, the governor refuses to certify the appointment of electors as shown by the final count of the popular vote, after the blue shift during the canvass.

Then, on January 6, the electoral votes from Arizona bearing the governor's certificate are the ones for Trump, cast by the electors appointed directly by the state legislature. The second submission of electoral votes from Arizona, those for Warren cast by the electors purportedly appointed by means of the state's popular vote, lack a gubernatorial certificate.

Suppose the Senate and House again disagree on which electoral votes from Arizona to accept. The Senate accepts the ones with the governor's certificate. The House accepts the ones reflecting the popular vote.

Now, under this scenario, Pence rules that the votes with the governor's certificate must be counted. Now, Pelosi and the Democrats take the more dubious statutory position that neither submission of electoral votes from Arizona can be counted (because both are claiming safe-harbor status). Now, too, it is Pelosi and the Democrats who claim that, with Arizona having failed to appoint electors able to be recognized as authoritative by Congress, Warren has a majority of votes from the electors appointed: 268 of 527 (538 minus Arizona's 11).

When this impasse arrives, what happens? Does Pelosi kick Pence and the senators out of the House chamber, insisting that the counting of electoral votes cannot proceed with the next state (Arkansas) until Pence

recognizes the correctness of her interpretation of 3 U.S.C. § 15? Does she make the same declaration that she is prepared to serve as acting president unless and until Pence and the Republicans are willing to accept Warren as president-elect based on the validity of the blue-shifted popular vote in Arizona?

From the perspective of the military, attempting to determine what to do in this impasse, does it make any difference whether it is the Pennsylvania or Arizona scenario? In other words, from the military's perspective, does it matter which side—Trump or Pelosi, Republicans or Democrats—has the benefit of the governor's certificate from the dispute state? Or, put yet another way, is it necessary for the military to make its own independent judgment of the correct interpretation of 3 U.S.C. § 15? Or, instead, is the military supposed to pass judgment on the democratic legitimacy of the blue-shifted popular vote in the disputed state, regardless of whether the governor of the state sides with the popular vote (as in the Pennsylvania scenario) or with direct legislative appointment (as in the Arizona scenario)? Or must the military take its legal orders from the attorney general, however patently partisan those legal orders might appear to be?

Given the uncertainties involved, and precariousness of the situation if the nation were to find itself in this position, perhaps Congress can undertake to clarify 3 U.S.C. § 15 in advance of the 2020 election. From this pre-election vantage point in 2019, it is equally uncertain whether it might be Pennsylvania or Arizona (or Florida, or maybe even North Carolina) that experiences this outcome-determinative blue shift. Thus, there is an advantageous "veil of ignorance" before the election occurs. Perhaps on a bipartisan basis, Congress can hammer out a new procedure to operate if it unfolds that there are multiple submissions of electoral votes from the same state. With a new and improved procedure from Congress to handle this situation, the goal would be no ambiguity on the potentially decisive issue of whether the submission bearing the governor's certificate is controlling, or instead whether none of the submissions can be counted unless both houses of Congress agree upon which one.

As contemplation of these scenarios demonstrate, this issue is one for which ambiguity is especially detrimental—and dangerous—to the nation.

IV. The Role of the Supreme Court in Potential Electoral Count Controversies

Thus far, I have largely left the judiciary out of my description of what might happen in Pennsylvania, or Arizona, as a dispute over "blue shift" ballots counted during the canvass unfolds in the aftermath of Election

Night and on toward January 20, 2021. I have wanted to describe the issues as they might appear to various non-judicial actors, including the state's legislature, the state's governor, the President of the Senate, the Speaker of the US House, the military, and so forth. Whether or not the state or federal judiciary becomes involved in this type of dispute, each of these other institutional actors will need to consider the constitutional and statutory issues involved and will need to decide what action to take in the exercise of official responsibilities. The legal ambiguities so far considered are potentially important, and disconcerting, for all of these non-judicial actors.

Even so, it is worth considering more systematically what potential role courts might play, especially the Supreme Court at the apex of the nation's judicial system, and how judicial involvement might affect various non-judicial actors. Indeed, as a dispute over "blue shift" ballots gets closer and closer to noon on January 20, while remaining unresolved and thus increasingly tense, more and more eyes will look to the judiciary in the hope that it can get the nation out of this mess. Thus, is there some point at which the Supreme Court might find itself compelled to intervene, however reluctant it might be to do so given the widespread perception that its intervention in *Bush v. Gore* was not successful in achieving a solution recognized as rooted in law rather than politics? In other words, even if the Supreme Court were inclined to stay out of a dispute over the 2020 election, for fear of becoming politicized all over again, is there a point at which it would be forced to accept jurisdiction over a disputed issue and to adjudicate as best as it could according to its understanding of the applicable law (even if some might perceive its opinion as politically motivated)? After considering what the Court itself might do, one can then address how various non-judicial actors, including Vice President Pence and Speaker Pelosi, might react to the Court's ruling, including whether or not they would obey a direct judicial order from the Court. But first it is necessary to consider what the Court itself might do.

To conduct this analysis, it is best to divide the time period of a potential dispute into three distinct segments. First, there is the time prior to the meeting of the Electoral College on Monday, December 14, which we can characterize as the part of the overall process dominated by state law and the institutions of state government. Second, there is the time between this meeting of the Electoral College and the joint session of Congress on January 6, pursuant to the Twelfth Amendment and the Electoral Count Act, for receipt of the electoral votes from the states. This intermediary period is after the state government's role is complete but before the crucial congressional process begins. Third, there is the time between 1:00 p.m. on January 6, when the opening and counting of

electoral votes from the states begins in the joint session of Congress and noon on January 20, when the transfer of power from one presidential term to the next occurs automatically by virtue of the explicit language of the Twentieth Amendment.[63] This two-week period is one in which federal law dominates and the institutions of the federal government control what happens. It would be possible to consider a fourth period, the time after noon on January 20; but insofar as it is of paramount importance to resolve any dispute before the clock strikes noon on January 20—so that there is no doubt who is constitutionally commander in chief at that moment and thus capable of activating the nuclear codes (among other military powers)—it is worth focusing on the possibility of judicial involvement, however reluctant, prior to this critical moment.

A. Before the Electoral College Meets on Monday, December 14

Article II of the Constitution requires that the presidential electors of every state meet on the same day to cast their votes for president.[64] Congress has specified that date as Monday, December 14, as Congress is entitled to do. Up until that time, state law may determine the method of appointing a state's electors, as Article II also provides.

Both state and federal courts can become involved in the process of determining the identity of the state's electors prior to when they meet to cast their electoral votes. State courts can do so pursuant to express delegations of power from the state's legislature, or pursuant to a purported exercise of authority derived from the state's constitution. In this respect, state court involvement would be similar to what occurred in Florida in 2000: As all will remember or can review the history, Florida's judiciary became actively involved in the fight over which political party's slate of presidential electors were to become the ones entitled to cast their state's official electoral votes. Whether or not these Florida state-court decisions were faithful interpretations of existing state law at the time was, and remains, debatable. There is no doubt that many observers, including some members of the federal Supreme Court, viewed the Florida Supreme Court as a lawless and partisan institution, because its purported "interpretation" of relevant state statutes was so aberrant from their text. But there is no doubt that Florida's judiciary had jurisdiction to address the various state-law issues that arose over the counting of votes in the 2000 election. Thus, Florida courts issued decrees against Florida election officials, like the secretary of state, that were

63. U.S. CONST. amend. XX ("The terms of the President and Vice President shall end at noon on the 20th day of January . . . and the terms of their successors shall then begin.").

64. U.S. CONST. art. II, § 1, cl. 4 (emphasis added) ("The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; *which day shall be the same throughout the United States*.").

within their judicial authority. In the same way, we can foresee state courts—in Pennsylvania, Arizona, or elsewhere—similarly issuing judicial decrees concerning the counting of "blue shift" votes. These courts could rule for or against either candidate's position on these issues, depending on the specific issues raised and evidence presented, and potentially depending also on the degree to which a state court might render rulings that to some could appear surprisingly lawless and partisan.[65]

Likewise, federal courts could become involved in the counting of ballots cast by citizens in presidential elections prior to the day on which the electors meet. The Supreme Court itself may become involved insofar as issues of federal law are raised by the way the state courts handle their own involvement in these cases. Again, the 2000 presidential election in Florida is illustrative: twice the Supreme Court granted certiorari review over federal constitutional questions arising from how the Florida Supreme Court conducted itself on appeal from lawsuits filed initially in state court.[66] Separate federal-court lawsuits were also filed in an effort to challenge vote-counting conduct undertaken by Florida officials. Although these lawsuits did not become dispositive at the Supreme Court in 2000, in the future this type of lawsuit could become the vehicle by which the Supreme Court makes a pronouncement on what federal law requires in terms of the counting of popular-vote ballots by state officials. Thus, the 2020 election could see federal-court involvement, including the Supreme Court's involvement, equivalent to what occurred in 2000.

But whatever that involvement might be, assuming that it does occur, it would not result in injunctions directed against the President of the Senate, or the Congress as a whole, concerning the conduct at the joint session of Congress on January 6. Nor, in all likelihood, would any judicial orders be directed to the presidential electors themselves or their meeting on December 14. Instead, the judicial orders would be directed to state and/or local election administrators, ordering them to count—or not to count—particular "blue shift" ballots. These judicial orders could prove crucial in determining which party's slate of presidential electors, Republican or Democratic, is officially certified the winner of the popular vote in the state. Potentially, too, these judicial orders might purport to bind and direct the governor to certify one of these two slates of electors as the officially authoritative ones.

65. The ALI project is designed, in part, to reduce the likelihood that state courts in this type of situation would render rulings that appear lawless and partisan.

66. *See* BALLOT BATTLES, *supra* note 25, at 279–305 (reviewing the presidential election of 2000 and the Supreme Court's involvement).

But it is difficult to foresee a judicial decree, from either a state or federal court, purporting to ban a party's slate of presidential electors from assembling on Monday, December 14. Perhaps there would be a declaratory judgment ordering that the meeting lacked any official status. But would the court order these individuals not even to assemble together to engage in discourse? Apart from raising questions regarding whether such an order would intrude upon congressional prerogatives under the Electoral Count Act (and the Twelfth Amendment), it would raise so many First Amendment and related difficulties as to seem unfathomable.

Thus, while state and federal courts may play significant roles in shaping the dynamics of a dispute that reaches Congress, by declaring who is the lawful winner of the state's popular vote and which slate of presidential electors the state's governor must certify as authoritative, ultimately neither the state nor federal judiciary can prevent a party's slate of presidential electors from purporting to meet on December 14 and acting as if they can cast the state's electoral votes—even if those individuals lack any indicia of authority under state law. As long as these individuals do meet and do purport to send their electoral votes to the President of the Senate, then even the intervention of the Supreme Court cannot stop a dispute regarding a state's electoral votes from reaching Congress.

B. Between December 14 and January 6

Once it is known that both the Republican and Democratic slates of electors in a particular state have met on December 14 and purported to cast their electoral votes and send them to the President of the Senate, then it is possible to envision a lawsuit attempting to order the President of the Senate, or Congress collectively, to accept one of these two submissions as the valid one. This lawsuit would attempt to have the court declare the lawfully correct interpretation of the Electoral Count Act and the Twelfth Amendment as applied to the particular situation, and to have the court order the President of the Senate (and Congress collectively) to act in accordance with this judicial interpretation. What is the chance of such a lawsuit being successful, meaning that it would result in the court issuing the decree requested (putting aside whether the decree would be obeyed)?

First, it is worth briefly mentioning that no state court would have authority to issue such a judicial order. Even if the state court purports to have a state-law reason for declaring one submission of electoral votes from the state as valid, and the other submission as invalid, the state court would be powerless to bind the President of the Senate or Congress to act in accordance with that state-law declaration. To be sure, the state court could render an official judgment, which could (and would) be presented

along with the electoral votes it validates as a matter of state law. But if Congress decided to repudiate that state-court judgment and count the alternative submission of electoral votes from the state instead, the state court would be powerless to order Congress in contempt of its judicial decree and mandate that Congress comply instead. To sharpen the point: imagine both houses of Congress rejecting the position of the Arizona Supreme Court and deciding to count the electoral votes from Arizona that the state supreme court considered invalid. It remains possible, of course, that the state supreme court is correct about what is the position of state law on the matter, but it is within the constitutional prerogative of Congress to reach the opposite conclusion. The Arizona Supreme Court cannot issue an injunction against Congress demanding that Congress comply with its judicial decree. That would be constitutionally preposterous even if the Arizona Supreme Court is correct and Congress incorrect on the relevant issues of Arizona law.

What about the federal Supreme Court in this situation? Suppose, to use the Pennsylvania scenario, that the Democratic electors from Pennsylvania have the governor's certificate as well as a ruling from the Pennsylvania Supreme Court that they are the state's authoritative electors. These electors also were the winners of the popular vote, as determined by the canvass of returns pursuant to state law. The submission of these electors comes to Congress with as strong a pedigree in state law as imaginable. Meanwhile, the conflicting submission from the Republican electors is especially weak, having no gubernatorial certificate, no imprimatur of the state's judiciary, no popular-vote pedigree, and having only the assertion of direct appointment by the state legislature. Suppose further that these Democratic electors file suit in federal court, asking for an injunction that the president of the Senate and Congress accept their submission of electoral votes as the valid ones from Pennsylvania. Does the federal judiciary have the power to issue this injunction, given the strength of the submission on behalf these electoral votes?

This question is a tricky one. There is a strong argument that this injunction would be beyond the jurisdiction of the federal court, as a matter of either statutory or constitutional law. Justice Breyer took this position in his *Bush v. Gore* dissent, on the basis that Congress considered but declined to vest authority in the federal courts when deciding the procedures of the Electoral Count Act.[67] Justice Breyer also viewed this congressional judgment as consistent with the delegation of authority in the Twelfth Amendment itself:

67. *See generally* Bush v. Gore, 531 U.S. 98, 144–58 (2000) (Breyer, J., dissenting).

> The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal Presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court.[68]

Justice Breyer is certainly correct that the congressional authors of the Electoral Count Act considered but rejected a role for the federal courts in the process of conducting the electoral count. They were disappointed, or even angered, at the role five justices played during the Hayes-Tilden dispute, and they wanted no more such judicial involvement.[69] Nor is there any reason to think that the authors of the Twelfth Amendment envisioned a role for the federal judiciary in the resolution of a dispute over the counting of electoral votes. Thus, despite the strength of the Democratic electors' claim on the underlying merits of their authoritative status, it would be a giant stretch to say that a federal court would grant them the judicial relief they (hypothetically) request.

Similarly, even if there is no absolute barrier to federal judicial relief in this posture, it is difficult to imagine Chief Justice Roberts wanting to lead the federal judiciary into intervening in the electoral dispute. The issue is in some sense unripe or premature. Until the joint session of Congress occurs on January 6, there has not yet been any action in violation of federal law. Even if pundits on cable news and Twitter speculate about what may happen on January 6—indeed, even if Mike Pence himself says what he is going to do—until it happens there is nothing to complain about. When the time actually comes to count Pennsylvania's electoral votes, both the Senate and the House may agree that it is the Democratic electors whose votes should count, and Mike Pence as President of the Senate may accept that result, in which case there is no basis or need for a federal-court injunction. Given this possibility, and given an inclination to exercise what Bickel called the "passive virtues,"[70] it seems unimaginable that a majority of the Supreme Court under the chief justice's leadership would permit a lower federal court to order what must happen at the January 6 joint session before that session actually occurs. The Court's pronouncement could come in the form of "balancing the equities" as a justification for denying preliminary injunctive relief, rather than as a categorical pronouncement regarding the political question doctrine or a similar limitation. Either way, the

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68. *Id.* at 155.

69. *See* BALLOT BATTLES, *supra* note 25, at 132–39 (discussing the history surrounding the Hayes-Tilden dispute).

70. *See generally* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

Democratic electors as plaintiffs would come away empty-handed, without the requested judicial relief.

C. Between January 6 and January 20

The considerations become more complicated if the January 6 proceedings take a turn that appears to many as abusively unlawful. To continue with the same example, we can imagine that the House of Representatives has voted to accept the Democratic electors as authoritative—based on the governor's signature, among other indicia—while the Senate does the opposite. Rather than ruling in favor of the Democrats, Pence as President of the Senate invalidates both conflicting certificates. At this point, the Democrats go straight to federal court, seeking an injunction to reverse Pence's ruling and rule the Democratic electors' votes as the valid ones from Pennsylvania. Does the Supreme Court now authorize this judicial remedy, even if it would not do so before January 6?

The case for this judicial decree is much stronger in this posture, particularly as the calendar moves closer to January 20 with the situation unresolved and both Trump and Pelosi announcing that they are prepared to assume the powers of commander-in-chief (in Pelosi's case as acting president) at noon that day. There still remains the force of Justice Breyer's dissent in *Bush v. Gore*—that neither the Constitution nor the Electoral Count Act contemplate a role for the judiciary even in this deadlocked posture. But the balance of equities shift increasingly in favor of judicial intervention as the conflict continues, and the practical need for an answer becomes imperative as January 20 approaches.

One way to increase the odds of judicial intervention would be to change the nature of the lawsuit. Instead of a claim brought by Democratic electors seeking an injunction against the president of the Senate or Congress, imagine a lawsuit brought by an individual whose personal rights would be affected if Nancy Pelosi is acting president, instead of Donald Trump being president, starting at noon on January 20. Suppose Pelosi has announced that right at noon her first executive order as acting president will be to permit transgendered individuals to serve in the military, thereby repudiating President Trump's executive order to the contrary. Suppose a transgendered individual sues, seeking the right to join the military based on this executive order on the assumption that Pelosi will be entitled to issue it at noon.

One can imagine a federal court adjudicating the validity of this executive order, in order to decide whether to grant the plaintiff the requested injunctive relief against the Department of Defense. Ordinarily, this kind of case would be a routine exercise of the federal judiciary's

powers under *Marbury v. Madison*.[71] In this instance, the case is complicated by the fact that determination of the validity of the executive order requires a judicial pronouncement on the federal question whether Pelosi is—or will be—acting president as of noon on January 20. But this is a question of federal law that the Court must consider as part of the exercise of its ordinary jurisdiction. It does not require the Court to issue an injunction directly against the president of the Senate or Congress, with respect to the specific function of counting the electoral votes. Thus, it is easier to envision the Court issuing this kind of judicial decree, which at least would instruct the military as to who to obey as commander in chief starting at noon on January 20: Pelosi as acting president, or Trump as re-inaugurated. The military could then rely on this determination more broadly, including for the purposes of deciding who gets access to the nuclear codes, even if access to the nuclear codes is not itself a directly justiciable issue.

It is important to note, however, that this kind of judicial decree is not the same as telling Pence and Congress what to do under the Electoral Count Act and/or the Twelfth Amendment. This is potentially significant. If the hypothetical lawsuit brought by the Democratic electors were successful, it would lead to the consequence of the Democratic nominee (in this hypothetical, Elizabeth Warren) being declared president-elect. In other words, if the Court did order the president of the Senate to accept the electoral votes from Pennsylvania bearing the governor's certificate, then—assuming those 20 electoral votes are in favor of Warren and make the difference in the Electoral College outcome—this judicial decree would result in Warren taking the oath of office as president by virtue of the Twelfth Amendment.

By contrast, if the Court embraces Justice Breyer's view and refuses to issue a judicial order concerning the electoral count directly, but the Court accepts the proposition that Nancy Pelosi becomes acting president as long as the electoral count remains unfinished without the institutional participation of the House of Representatives in the Twelfth Amendment procedure, then the consequence is Pelosi become acting president, rather than Warren becoming president. That distinction could become significant in many ways, not merely the initial superficial ones.

Moreover, depending on how the Court views its role, its involvement might be unrelated to the "merits" of the presidential election itself. This point emerges if we compare the Pennsylvania and Arizona versions of the hypothetical we have been considering. The distinction between the two scenarios may be extremely significant for determining the correct

71. *See generally* Marbury v. Madison, 5 U.S. 137 (1803) (establishing the now-widely accepted concept of judicial review).

application of the Electoral Count Act—especially if one takes the view that the governor's certificate is dispositive under the correct interpretation of the statute. But that point about the proper meaning of the Electoral Count Act may be irrelevant if the Court is deciding, not what Pence or Congress must do under the proper interpretation of that statute, but instead whether or not there is an acting president given solely the brute fact that the count of electoral votes under the Twelfth Amendment remains incomplete because of the institutional non-participation of the House of Representatives. The House might be entirely unjustified under the Electoral Count Act for the position it takes, but if the Court has no power to control the Twelfth Amendment proceeding and has only the power to declare the consequence of its being incomplete, then the judicial role may be limited to acknowledging that there is no president-elect under the Twelfth Amendment, even if the cause of that reality was some form of improper conduct.

The contemplation of this possibility only underscores the point made earlier: it would be so much better if Congress, in advance of the election, would eliminate, as much as possible, the ambiguities that exist in the Electoral Count Act process in order to diminish the likelihood that some of these difficult scenarios might arise.

CONCLUSION

We must hope that none of what is described in this article comes to pass. Instead, the nation will be well served if the outcome of the 2020 presidential election is so lopsided as to be impossible to dispute. Even if President Trump were inclined to resist a result that everyone else, including all Republican Senators accept, it would be impossible for him to cling to power as long as Congress conclusively concludes that his opponent is the winner. America's military will recognize Trump's opponent as the new commander in chief once Congress authoritatively declares this electoral outcome, and any protests from Trump to the contrary will be utterly ineffectual.

The problem would occur, if it does, when the two houses of Congress cannot agree as to which candidate won the presidential election. This kind of disagreement is unlikely to develop unless something happens that gives Republicans and Democrats in Congress a plausible basis for disputing the outcome. But a key premise of this article is that it would not take an extraordinary calamity, like a foreign cyberattack, for there to be conditions enabling partisans to dispute the result. Instead, a dispute engulfing Congress could arise from a situation as routine as the kind of "blue shift" described at the outset.

Given this possibility, it is truly irresponsible that Congress has not attempted to eliminate—in advance of the 2020 election—the

ambiguities that plague the Electoral Count Act. The purpose of the statute is to handle the circumstance in which Congress is divided over the outcome of a presidential election. But the statute is woefully inadequate for its intended purpose. If Congress fails to remedy this inadequacy before ballots are cast, then the nation will have to cope as best as it can if the two houses of Congress disagree when they meet on January 6, 2021, to officially declare the result of the 2020 election. And the more it appears that Congress is unable to resolve this disagreement before noon on January 20, when the new president is to be inaugurated, the more it will appear necessary that the Supreme Court must settle the matter again, despite whatever reluctance it might have for a repetition of its role in 2000.

APPENDIX

Because the body of this article is written in the form of narrative scenarios, this Appendix is included to provide a more conventional analysis of the relevant legal provisions.

A. Text of the Electoral Count Act

3 U.S.C. § 15 is very long and best considered in chunks. It begins straightforwardly:

> Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer.

It also acknowledges the fact that Congress may receive submissions of "purported" electoral votes of dubious status, and that this special joint session will consider each state in alphabetical order:

> Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates . . . .

At this point the language of the statute starts to get a bit opaque:

> [A]nd the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President

> of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.

I suppose the immediately preceding passage is straightforward enough when there is no dispute: the votes will be counted and the result announced. But when there is a dispute the remainder of this statute provides for some pretty rough sledding. Of course, the existence of a dispute will be apparent if raised at the joint session:

> Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received.

Once this kind of objection exists, the key structural feature of the process is that the two chambers of Congress—the Senate and the House—are supposed to deliberate about the objection separately; no decisions are to be made by the combined joint session of the two bodies:

> When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision . . . .

It is the consequence of potentially divergent decisions by the Senate and the House that could cause trouble—because there is a need to know what happens if and when the Senate and House disagree over an objection of this nature.

At this point, the statute bifurcates its consideration of the situation depending on whether there is one or more "return" of electoral votes submitted for a state. If there is only one such return, the statute provides:

> No electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.

This passage immediately raises some questions: for example, what does it mean by "regularly given"? What does the cross-reference to 3 U.S.C. § 6 entail? It turns out that this latter question can be handled fairly easily. Section 6 provides that the "executive" of each state—presumably the governor—must give to the state's electors, as well as to the "Archivist of the United States"—official copies "under the seal of the State" of a document, called a "certificate of ascertainment," which shows those electors to be the individuals duly appointed as the state's electors "under

and pursuant to the laws of such State." This certificate of ascertainment must include, insofar as is applicable, "the number of [popular] votes given or cast for each person for whose appointment any and all votes have been given or cast." Section 6 even provides that, in the event of a dispute over the appointment of a state's electors, the state's "executive" must send to the archivist an additional certificate showing the "final determination" of the "controversy or contest" according to the laws of the state. Thus, this passage of the statute contemplates that there might be disputation over a single "return" of electoral votes from a state, but fairly clearly seems to provide that this single return must be accepted as valid—"no electoral vote . . . shall be rejected"—unless *both chambers of Congress* agree to reject that return (and its electoral votes) as invalid. While neither chamber should reject the electoral votes of this single return unless they "have not been so regularly given," as a practical matter it doesn't seem that it would make a difference if there was confusion or disagreement over what "regularly given" means. If both chambers independently determine that they are not regularly given, then those electoral votes are rejected. If one chamber thinks they are regularly given, while the other does not, then those electoral votes must be accepted and counted when the joint session resumes.

It is now, when the statute begins to address the possibility that Congress receives multiple returns of electoral votes from the same state, that the rough interpretative terrain really begins:

> If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State . . . .

This portion of the statute, by its cross-reference to 3 U.S.C. § 5 (which is the so-called "Safe Harbor" provision), seems to require the counting of whichever return—and only that single return—that is compliant with Safe Harbor status, as defined in 3 U.S.C. § 5. The last clause of this portion acknowledges the possibility that the electors who cast a state's electoral votes may be "successors or substitutes" to those whose appointment complied with Safe Harbor status; but we can set aside this "successors or substitutes" qualification. The key point is the identification of which "return" of electoral votes, among multiple from the same state, is the single one that complies (if any does) with Safe Harbor status.

To recall (as many may remember these points from *Bush v. Gore*), there are two key components to satisfying Safe Harbor status according to 3 U.S.C. § 5. The first is a timing prerequisite that has been dubbed the "Safe Harbor Deadline": the "final determination of any controversy or contest concerning the appointment of all or any of the electors of such State" must occur "at least six days before the time fixed for the meeting of the electors." In 2020, the Safe Harbor deadline is Tuesday, December 8. Given the way Congress has structured the relationship between Election Day in November and the meeting of the electors in December, the Safe Harbor deadline falls exactly five weeks after Election Day, which in 2020 is Tuesday, November 3.

The second crucial prerequisite to Safe Harbor status under 3 U.S.C. § 5 is that this "final determination" of any dispute over the appointment of a state's electors must be made "pursuant" to "laws enacted prior to the day fixed for the appointment of the electors," meaning enacted before Election Day (in 2020, November 3). It is not enough to meet the Safe Harbor *deadline* with the resolution of the dispute. If the basis for the resolution is new law adopted after Election Day, then the resolution fails to achieve Safe Harbor status even if the resolution occurs before December 8.

But if both key prerequisites are satisfied, it seems to follow that the return of electoral votes from the state that embodies this two-part compliance is the controlling return from the state, which must be counted by Congress to the exclusion of any other conflicting return from the same state. This consequence seems to be mandated by the explicit language of both 3 U.S.C. § 5 and 3 U.S.C. § 15. Section 5 states that a "final determination" meeting the two Safe Harbor prerequisites "shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." And § 15, as set forth above, says that "those votes, and only those, shall be counted which shall have been regularly given by" those electors whose appointment satisfies Safe Harbor status. Thus, both chambers of Congress seem obligated to count the one return (if there is more than one submitted) that is Safe Harbor compliant.

The problem arises, however, if the two chambers of Congress purport to disagree about which return (if any), among multiple returns, has achieved Safe Harbor status. This disagreement may be sincere, or it may be pretextual based on partisan posturing on one side or the other. Whatever the case may be, the acute question exists: what to do if the two chambers of Congress institutionally announce a disagreement over which, if any of multiple returns, is Safe Harbor compliant? It is on this

crucial point that the ambiguity of the statute becomes especially vexing and distressing:

> [B]ut in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law . . . .

This portion of the statute seems to provide that, if more than one return from a state claims Safe Harbor status, then *neither* can count unless *both* chambers of Congress agree on which one is the single return truly entitled to Safe Harbor status. The words say "only" those electoral votes "shall be counted" which were cast by electors "the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law," meaning compliant with the Safe Harbor prerequisites.

Yet there is more to the statute, and it horribly complicates the matter. The next clause provides:

> [A]nd in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State.

This clause seems to address the circumstance in which no return from a state claims Safe Harbor status but there is still the question of which among the multiple returns, if any, should be counted in Congress. The clause seems to say that in this circumstance the only return that can be counted is one accepted as valid by both houses of Congress. The clause, rather confusingly, seems to distinguish between valid appointment of electors and valid votes cast by validly appointed electors—recognizing that the two chambers of Congress (at least theoretically) might agree that duly appointed electors might for some reason cast unlawful votes (perhaps bribed), or that the purported returns of undeniably valid electors were fraudulent concoctions. But once that bit of confusion is cleared up, this clause seems to be saying that "only" those votes from electors that both Houses considered valid can be counted (when none of the multiple returns from the state has Safe Harbor pedigree).

But, wait, there's more (to invoke the spirit of Marisa Tomei's immortal performance in "My Cousin Vinny"). Immediately after the just-considered clause, 3 U.S.C. § 15 starts a new sentence:

> But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

The troublesome question is how this new sentence relates to what preceded it. It seems to contradict everything that comes before insofar those earlier clauses seemed to require both chambers of Congress to agree in order for one of several disputed returns to count. Now it seems that, if the two chambers of Congress disagree, then to be counted is whichever return of electoral votes from a state (if any) were cast by electors "whose appointment shall have been certified by the executive of the State," meaning governor.

One conceptual possibility is that this new sentence operates upon the immediately preceding clause, the one concerning what to do when none of multiple returns are claimed to have Safe Harbor status. The other conceptual possibility is that this new sentence operates upon all preceding clauses involving multiple returns, both when none claim Safe Harbor status and when more than one so claim. Given the separation of this new sentence from what precedes it by a period rather than semi-colon, it can be argued—as it has been—that this punctuation is reason to favor the latter, broader interpretation, namely that the new sentence affect both circumstances, and not just the situation in which none of multiple returns claims Safe Harbor status. But whatever the strength of this interpretative argument based on the bare text of the statute alone, the fact is that the text is not sufficiently clear to rule out the possibility of alternative interpretations. And, what is especially troublesome, is that the existing literature on this point contains advocates for conflicting interpretations.

B. Existing Interpretations of 3 U.S.C. § 15

In 1961, a law professor named Kinvin Wroth (who later was dean at two different law schools, University of Maine and University of Vermont) wrote a law review article on the interpretation of the Electoral Count Act. In this article, Wroth took the position that under the proper interpretation of 3 U.S.C. § 15 the governor's certification was not controlling in the specific situation where two returns purport to claim Safe Harbor status.[72] Instead, according to Wroth, in this situation "no vote from the state is counted."[73] Wroth's reasoning was that a governor's

72. *See* Wroth, *supra* note 52, at 343 ("If the Houses cannot agree on the authoritative determination, or, if, as in the case of Louisiana in 1873, they agree that no determination was authoritative, the principle of the Twenty-second Joint Rule is applied and no vote from the state in question is counted. This result follows regardless of the governor's action.").

73. *Id.*

certification can only be "evidence" of a return having Safe Harbor status; the governor's certification cannot give the return Safe Harbor status. Thus, if two (or more) returns purport to have Safe Harbor status, but the two Houses of Congress cannot agree on which one, then neither return (or none of them) is capable of superior status and each return must be rejected. In Wroth's own words: "If the decision of the authorized tribunal cannot be made out, then there is no valid return for the government to certify."[74] By contrast (under Wroth's interpretation of the statute), if no return claims Safe Harbor status, then the governor's certificate is in in a position for conveying which return from the state is authoritative.

In 2001, as Congress was preparing to receive the electoral votes in the 2000 presidential election, a report of the Congressional Research Service (CRS) embraced Wroth's view of the statute, citing and quoting Wroth's article extensively.[75] The CRS report added more arguments of its own, claiming that the legislative history of the Electoral Count Act supported Wroth's interpretation. The CRS reports quotes a Senator who played a particularly influential role in the drafting of the statute: "In the debates and final report of the Conference Committee, it is clear that the provision for the governor's certificate to control in the disagreement of the Houses was to apply only in the case of double returns without a state determination."[76] The CRS report adds its own gloss to this point: "it appears that the [legislative] intent was . . . to give a deferential position to the governor's certification only where there is *no* [timely] determination from a state authority under an election contest procedure."[77]

In 2004, however, a different law professor—Stephen Siegel—wrote a lengthy law review article that contradicted the Wroth-CRS interpretation and instead argued that the governor's certificate controls whenever the two Houses of Congress disagree over multiple returns from the same state, including when the two chambers disagree on which of multiple returns claiming Safe Harbor status is the one entitled to that status.[78] Siegel premised his alternative interpretation both on the punctuation of the statute's text—the period, rather than semi-colon, was a strong indication (in his view) that the new sentence concerning the

74. *Id.*

75. *See generally* Congressional Research Service Memorandum, *supra* note 52, at 9; Wroth, *supra* note 52, at 344–45 (asserting that when multiple submissions of electoral votes from the same state all claim "safe harbor" protection, none can be counted unless both houses of Congress agree upon which submission is entitled to this "safe harbor" status).

76. Congressional Research Service Memorandum, *supra* note 52, at 10 n.32.

77. *Id.* at 11.

78. *See generally* Siegel, *supra* note 50.

governor's certificate applied to all of the preceding sentence, and not just its final clause—as well as his own differing view of the statute's legislative history. Based on his comprehensive analysis of what he acknowledged was an extensive and convoluted legislative record, involving a decade of debate between the disputed Hayes-Tilden election of 1876 and the eventual enactment of the statute in 1887, Siegel argued that the final compromise endeavored to minimize the circumstances in which a state would have no electoral votes counted because of a disagreement between the two chambers of Congress over which, of multiple returns, should be counted. Given this congressional preference for counting at least something from a state whenever possible, the congressional compromise settled on making the governor's certificate the tiebreaker in all circumstances in which the two chambers of Congress disagreed over which of multiple returns from the same state to count. In Siegel's own words: "[T]he governor's certificate as a fail-safe to prevent state disenfranchisement was a very conscious, if controversial, choice. Without it, the ECA would not have passed. . . . [G]ranting the state governor his tie-breaking authority clearly was the choice Congress made."[79] One question for consideration is whether it is possible to develop a nonpartisan scholarly consensus in advance of November 2020 on whether Siegel or Wroth-CRS has the better of this interpretative debate—and thus whether at least this potential source of disputation can be set aside.

C. Other Ambiguities Concerning 3 U.S.C. § 15

Even if the debate between Siegel and Wroth-CRS could be resolved, there are still other uncertainties concerning the application of 3 U.S.C. 15. Here are two worth considering:

First, a state's supreme court definitively resolves a dispute over the appointment of a state's electors prior to the Safe Harbor deadline, thereby seemingly giving these electors Safe Harbor status, *but* the state's governor does not certify this appointment. Instead, the state's legislature purports to override the state supreme court and appoint a different set of electors, and the governor certifies this legislatively appointed set. There is no pretense that the legislatively appointed electors have Safe Harbor status, but there is a question whether the legislative act deprives the state supreme court's decision of its authoritativeness under state law. What does 3 U.S.C. § 15 require in this instance? What if the House wants to count one set of electoral votes (those backed by the judicial decision), whereas the Senate wants to count the other set of electoral votes (those backed by the legislative act and the governor's certificate)?

79. *Id.* at 633.

Notwithstanding the debate between Siegel and Wroth-CRS, is this an instance where the governor's certificate controls, or instead that neither return can be counted (or that the one backed by the judicial decision must count, notwithstanding the disagreement between the two chambers, because it is the only return capable of Safe Harbor status)?

Second, prior to the Safe Harbor deadline the governor certifies the appointment of the state's electors after completion of the state's procedures for counting the state's popular vote, *but* after the Safe Harbor deadline has passed (but before the meeting of the state's electors), evidence is discovered that the previously certified result is incorrect (perhaps it was absentee ballot fraud, as in North Carolina's congressional district in 2018, or some form of foreign cyberattack, or some other cause). The state's supreme court overturns the previous certification and declares the opposing set of electors the true winner of the state's popular vote, and the governor certifies this new result. But Congress has received both gubernatorial certificates, and the party favored by the first one is arguing that it is the only valid one because it is the only one with Safe Harbor status. What does 3 U.S.C. § 15 require in this situation. And if the House and Senate disagree, what happens given that both returns have the governor's certificate?

D. The Consequence of Not Counting Any Electoral Votes from a State?

Suppose, because of a cyberattack or otherwise, it is determined pursuant to 3 U.S.C. § 15, that a state has failed to appoint any electors and therefore has not valid electoral votes to count. How is that state to be considered in the calculation of whether any candidate has won a "majority" of electoral votes, as required by the Twelfth Amendment? The amendment states: "the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed." Normally, the number necessary for a majority is 270 because 538 is the total number of electors nationally. But if a state chose not to participate, then presumably its number would be subtracted from the denominator of 538. Is the same true if the state wanted to participate but was prevented from doing so because of a cyberattack? What if the state thought it appointed electors, but there was a dispute about this appointment, with the consequence that Congress refused to count any electoral votes from the state? Is this latter situation the same as a cyberattack that prevents appointment, or different for purposes of calculating the Twelfth Amendment denominator? In other words, is this denominator issue a unitary one, or is it instead variable depending on the particular circumstances that causes problems with the appointment of a state's electors? And, relatedly, what if the

Senate and House diverge on how to handle this issue; is there a mechanism for determining an answer in the event of a bicameral divergence on this point?

E. Completion or Incompletion of the Electoral Count?

Given that 3 U.S.C. § 15 requires the counting process to consider one state at a time in alphabetical order, what happens if Congress appears to be stuck on a particular state (before any candidate has reached an indisputable majority of all electoral votes in the count)? Does the vice president of the United States, as President of the Senate and thus presiding officer over the special electoral count procedure under the Twelfth Amendment and 3 U.S.C. § 15, have constitutional or statutory authority to insist upon completion of the count in a timely manner (before noon on January 20), if the two chambers of Congress otherwise would remain mired in a dispute over a particular state?

There are various provisions of the Electoral Count Act that endeavor to move the count along, so that it does not become stuck or bogged down. 3 U.S.C. § 15 itself provides: "When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted." This provision seems to authorize the vice president to make some definitive pronouncements in light of disagreement between the two chambers. But the extent of the vice president's authority is unclear in this regard. And the very next (and last) sentence of 3 U.S.C. § 15 arguably cuts against permitting the vice president to take up the next state if there are unresolved matters concerning the state under immediate consideration: "No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of."

The next section of the United States Code, 3 U.S.C. § 16, contains additional provisions designed to achieve a timely completion of the electoral count:

> Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this subchapter, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of 10 o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.

And, in the same vein, the following section, 3 U.S.C. § 17, provides:

> When the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.

Perhaps most significantly, the next section, 3 U.S.C. § 19, states:

> While the two Houses shall be in meeting as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.

This provision, more than any other, would seem to empower the vice president to move the proceedings along if they are stuck because of a disagreement between the Senate and the House. Even so, "the power to preserve order" is not exactly the same as the power to render a final and definitive judgment concerning a consequential dispute of statutory interpretation; and if the House of Representatives is insisting that the electoral votes of a state must be counted, while the Senate is insisting that that they must be rejected—and if 3 U.S.C. § 15 is itself unclear on the consequence of this dispute under the particular circumstances (perhaps it is the situation when both returns have the governor's certificate)—then is it clear that the vice president can unilaterally announce a position on the matter and insist upon moving on to the next state? If the House of Representatives refuses to move on to the next state, because it does not consider the previous state resolved (despite the vice president's pronouncement), is it part of the vice president's authority "to preserve order" to insist that the count continue with the next state?

F. The Relevance of the Twentieth Amendment?

The Twentieth Amendment seems to contemplate the possibility that the counting of electoral votes may be incomplete and thus there might be neither a president-elect nor a vice president elect at noon on January 20, when the terms of the previous president and vice president expire, and thus there would need to be an acting president to be identified in a statute enacted by Congress:

> If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person

> shall act accordingly until a President or Vice President shall have qualified.

But what if there is a debate on whether or not the situation exists where "a President shall not have been chosen"? Suppose the House of Representatives thinks the electoral count remains incomplete because of an intractable dispute, and thus in its view the situation calls for an acting president until the dispute is resolved, whereas the outgoing vice president (before noon on January 20) believes that the electoral count has been brought to a conclusion despite the House's objection, and thus the declared president-elect is entitled to all the powers of the office starting at the beginning of the new term. Does the Constitution, properly interpreted, provide an answer on whether the situation is one involving an acting president, as the House contends, or a president-elect, as the outgoing vice president contends?

Related, if there were to exist the situation at noon on January 20 of two simultaneous claims to the status of commander-in-chief—one from previously incumbent president claiming to have been declared re-elected by the outgoing vice president, and the other from the Speaker of the House claiming to assume the status of acting president given the House's declaration that there is no president-elect because the electoral count remains disputed and incomplete—do military officials, including those responsible for control of nuclear weapons, wishing to obey the lawful commander-in-chief know how to decide who is the lawful commander-in-chief?