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The Conscientious Congressman's Guide to the Electoral Count Act of 1887

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THE CONSCIENTIOUS CONGRESSMAN'S GUIDE TO THE
ELECTORAL COUNT ACT OF 1887

*Stephen A. Siegel**

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I. INTRODUCTION

Electoral vote counting is the oldest activity of the national government and among the oldest questions of constitutional law.¹ It was Congress’s first task when a quorum appeared in the nation’s new legislature on April 6, 1789.² It has happened every four years since then. Yet, electoral vote counting remains one of the least understood aspects of our constitutional order.

The Electoral Count Act of 1887 (ECA) lies at the heart of this confusion. In enacting the ECA, Congress drew on lessons learned from its twenty-five previous electoral counts;³ it sorted through innumerable

1. Given how states’ rights influenced the eighteenth- and nineteenth-century Congresses’ approach to electoral vote counting, *see infra* text accompanying notes 196, 278-79, 710, we might say that electoral vote counting is the specific instance of Justice O’Connor’s claim that federalism is “perhaps our oldest question of constitutional law.” *New York v. United States*, 505 U.S. 144, 149 (1992).

2. 1 ANNALS OF CONG. 15-18 (Joseph Gales & William W. Seaton eds., 1789).

3. *See, e.g.*, 18 CONG. REC. 48 (1886) (statement of Rep. Cooper) (discussing previous electoral vote counts); 15 *id.* at 5453 (1884) (statement of Rep. Hart) (same); 13 *id.* at app. 539 (1882) (statement of Rep. Updegraff) (same); *see also* SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 521-22, 533 (1877) (statement of Sens. Bayard and Morton).

H.R. MISC. DOC. NO. 44-13 is a compendium of all congressional floor debates and action involving electoral counts and electoral count reform proposals up to early 1876. *Id.* at VII-VIII. It is drawn verbatim from the Annals of Congress, the Register of Debates, the Congressional

proposals⁴ floated before and after the disastrous presidential election of 1876,⁵ and it thrashed out the ECA's specific provisions over fourteen years of sustained debate.⁶ Still, the law invites misinterpretation. The ECA is turgid and repetitious. Its central provisions seem contradictory.⁷ Many of its substantive rules are set out in a single sentence that is 275 words long.⁸ Proponents of the law admitted it was "not perfect."⁹ Contemporary commentators were less charitable. John Burgess, a leading political scientist in the late nineteenth century, pronounced the law unwise, incomplete, premised on contradictory principles, and expressed in language that was "very confused, almost unintelligible."¹⁰ At least he thought the law was constitutional;¹¹ others did not.¹²

Globe, and the Congressional Record. It was produced by order of Congress to help it approach the task of counting the 1876 electoral vote. *Id.* Congress's interest in publishing and distributing this volume indicates a substantial degree of interest in the history of electoral vote counting. For convenience, this Article cites to H.R. MISC. DOC. NO. 44-13 rather than the Annals, Register, Globe, and Record when discussing congressional electoral vote counting activity prior to 1877.

4. *See, e.g.*, H.R. REP. NO. 47-1207 (1882) (discussing alternate legislative proposal); 13 CONG. REC. 5143-49 (1882) (same); 10 *id.* at 3652-63, 3682-704, 4386-507, 4540-41 (1880) (discussing joint rule proposal); HERMAN AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 88-89, 91, 94-98, 104-05, 110-11, 113, 118-22, 123-25, 128 (photo. reprint 1970) (1897) (discussing proposed constitutional amendments). Of the many constitutional and statutory proposals, the Electoral Count Act (ECA) was the only one enacted into law. *See* Electoral Count Act of 1887, ch. 90, 24 Stat. 373 (current version at 3 U.S.C. §§ 5-6, 15-18 (2000)).

5. In the 1876 presidential election, Samuel Tilden and Rutherford Hayes were separated by one electoral vote. *See* CHARLES FAIRMAN, FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 xv-xvi (1988). Four states sent Congress multiple electoral returns. *Id.* at xvi; PAUL HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 at 57-168 (1906). Congress created an Electoral Commission, composed of five senators, five representatives, and five Supreme Court justices, to help sort through the mess. FAIRMAN, *supra*, at xv; HAWORTH, *supra*, at 220-21. The election was not resolved until March 2, 1877, two days before Inauguration Day. HAWORTH, *supra*, at 280-82. For recent discussions, see ROY MORRIS, JR., FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876 (2003); WILLIAM REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).

6. *See infra* notes 38-39 (tracing the effort to pass the ECA).

7. Compare Electoral Count Act of 1887 § 2 (a state's "final determination" of its electors binds Congress), with Electoral Count Act of 1887 § 4 (Congress may reject any state's electoral vote).

8. See section 4 of the ECA, which is a mammoth section some 814 words in length.

9. 17 CONG. REC. 1060 (1886) (statement of Sen. Teller); *see also* 18 *id.* at 50 (statement of Rep. Eden); 17 *id.* at 1019 (statement of Sen. Hoar).

10. John W. Burgess, *The Law of the Electoral Count*, 5 POL. SCI. Q. 633, 643 (1888). For Burgess's other criticisms, *see id.* at 637-39, 645-46, 648, 650-51. For another contemporary commentator's criticisms, *see* J. HAMPDEN DOUGHERTY, THE ELECTORAL SYSTEM OF THE UNITED STATES 214-49 (1906) (mixing description with criticism). Judge Richard Posner recently described the ECA as "maddeningly complex." RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 141 n.88 (2001).

11. Burgess, *supra* note 10, at 634.

12. *See, e.g.*, 18 CONG. REC. 828 (1887) (statement of Sen. Wilson); 17 *id.* at 1058-59 (1886)

Over the nearly 120 years since the ECA's adoption, the criticisms faded, only to be renewed whenever there was a close presidential election.¹³ Our ability to misunderstand the ECA has grown over time. During the 2000 presidential election dispute, politicians, lawyers, commentators, and Supreme Court justices seemed prone to misstate or misinterpret the provisions of the law, even those provisions which were clear to the generation that wrote them. The Supreme Court, for example, mistakenly believed that the Supreme Court of Florida's erroneous construction of its election code would deny Florida's electors the ECA's "safe harbor" protection;¹⁴ Florida Governor Jeb Bush's hasty submission of his state's Certificate of Ascertainment was untimely under the Act;¹⁵ and Democratic members of Congress framed their objections to accepting Florida's electoral vote on the wrong grounds.¹⁶ Even Al Gore, the

(statement of Sen. Wilson); DOUGHERTY, *supra* note 10, at 241, 246.

13. See Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C.L. REV. 1653, 1694-1792 (2003) (finding that the ECA is unconstitutional); L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321 & n.2, 344-53 (1961) (finding that the ECA is constitutional, but defective).

Viewed empirically, the ECA seems to be a complete success. During the hundred years before enacting the ECA, Congress frequently faced problems with electoral vote counting which, at times, dissolved into bitter wrangling and expedient solutions. These controversies occurred not only when the vote was close, as in 1877, but, more often, when the outcome did not matter in the slightest. See *infra* text accompanying notes 66, 69, 198, 562 (discussing the 1857, 1869, 1873, and 1877 vote counts). Since the ECA's adoption, Congress's electoral vote counts have been smooth and free from conflict. Objections to counting particular votes have been dealt with in an orderly fashion and there have been no controversies over the counts. JACK MASKELL, ET AL., CONG. RESEARCH SERV., ELECTORAL VOTE COUNTS IN CONGRESS: SURVEY OF CERTAIN CONGRESSIONAL PRACTICES 23-29 (2000) (surveying all electoral vote counts from 1889 to 1997); Kesavan, *supra*, at 1691-94 (describing smooth handling of electoral vote objections in 1961 and 1969); Wroth, *supra*, at 337 (noting no objections to electoral votes from 1887 to 1961).

Underneath the surface, all is different. Perhaps there have been no disputes in Congress because no election has turned on Congress's electoral vote counting. One wonders what would have happened had the 2000 presidential election not been settled by the Supreme Court before it went to Congress. One of the few compliments for the Supreme Court's intervention and opinion in *Bush v. Gore*, 531 U.S. 98 (2000), is that the Court took a bullet by preventing Congress from embarrassing itself. See, e.g., POSNER, *supra* note 10, at 4, 137-45, 184; Michael J. Glennon, *Nine Ways to Avoid a Train Wreck: How Title 3 Should Be Changed*, 23 CARDOZO L. REV. 1159, 1160 (2002).

14. See *Bush*, 531 U.S. at 120-21; *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 77-78 (2000); see also *infra* note 303 (discussing effect of mistakes in judicial conduct of election contests). This assumes the Supreme Court of Florida was incorrectly interpreting the state's election code. I take no position on that question.

15. See *infra* notes 420, 549 (discussing Governor Bush's action and the time for submitting certificates of ascertainment).

16. See *infra* note 462 (discussing the objections of members of Congress to counting Florida's electoral votes).

presidential candidate contesting the election's outcome, misread the federal deadline for seating Florida's electors.¹⁷

The purpose of this Article is to explain the provisions of the Electoral Count Act of 1887 as it was understood by the Congresses that debated and enacted it. Although the ECA has been the subject of scholarly interpretation,¹⁸ no prior work has studied the Act by embedding it in a comprehensive exploration of its legislative history, the history and theory of electoral vote counting, and the legal and political assumptions of the Congresses that framed it. No prior study has focused on the interplay between the ECA's various sections and its substantive and procedural provisions. Indeed, the ECA's procedural provisions have never before been subject to sustained analysis.

As a foundation for interpreting the ECA, Part II of this Article sets forth the background assumptions and experiences of the Congresses that struggled, for fourteen years, with electoral count reform.¹⁹ Part III then, explicates the ECA in light of its legislative history, its underlying assumptions, and the history of Congress's previous electoral counts.

In undertaking this analysis, the Article does not discuss whether the ECA is constitutional²⁰ or whether congressional action under it is subject to judicial review.²¹ Neither does it discuss the related question of whether the ECA is a statute that binds Congress or simply a joint rule adopted in statutory form to give it greater prominence and political, but not legal, permanence.²² This Article does discuss the complex views the framers of

17. See *Contesting the Vote: Comments from Gore on the Florida Election*, N.Y. TIMES, Nov. 29, 2000, at A28 (Vice President Gore saying December 12 was the "deadline for seating electors"); *infra* notes 319, 687 (discussing the federal deadline); see also JACK MASKELL, CONG. RESEARCH SERV., COUNTING ELECTORAL VOTES IN CONGRESS—MULTIPLE LISTS OF ELECTORS FROM ONE STATE 8-11 (2001) (mistaking, as discussed *infra* in Appendix II, when to turn to the governor's certificate); *Contesting the Vote: Update; Matter of Dates and Disputes*, N.Y. TIMES, Nov. 29, 2000, at A25 (New York Times's editors saying "Mr. Gore . . . is facing a Dec. 12 federal deadline for selecting Florida's 25 electors"); Jeffrey Rosen, *The Supreme Court Puts Itself in Harm's Way*, NEW REPUBLIC, Dec. 11, 2000, at 16 (mistaking 3 U.S.C. § 2 (2000) for part of the ECA).

18. See Burgess, *supra* note 10, and Wroth, *supra* note 13, for particularly insightful explorations and critiques.

19. These Congresses also experienced and settled the most fractious presidential election this country has ever witnessed, the 1876 Hayes-Tilden election. See HAWORTH, *supra* note 5 (discussing the Hayes-Tilden election dispute).

20. For an extensive analysis of the ECA's constitutionality, see Kesavan, *supra* note 13. Kesavan says the Act is unconstitutional, while admitting that the "prevailing wisdom, in the Supreme Court and elsewhere, is that the Electoral Count Act is constitutional." *Id.* at 1660.

21. It may well be a "political question" committed to Congress's discretion. See ERWIN CHERMERINSKY, FEDERAL JURISDICTION 143-67 (4th ed. 2003) (discussing the political question doctrine). This Article does not discuss issues dependent on the political question doctrine, like who might have standing to bring these questions into court and when it might be ripe to do so. See *id.* at 56-125 (discussing standing and ripeness doctrines).

22. See *infra* text accompanying notes 42, 107 (defining "joint rule" and discussing

the ECA had on these subjects to the extent they impact the Act's interpretation.

The focus of this Article is on what the ECA's framers meant by its various provisions. This issue is preliminary to assessing many questions concerning the ECA's constitutionality and whether there is judicial review. Determining whether the ECA is unconstitutional because it purports to bind Congress, for example, turns on whether the Act does in fact bind Congress on any issue.²³ How the ECA's framers understood the Act is also preliminary to any instance of judicial review because it helps determine whether Congress's application of the ECA complies with its mandates.²⁴

The issue of whether the Act is a binding statute or only a joint rule enacted in statutory form matters, of course, if Congress or either House wishes to alter or rescind it. If the ECA is a binding statute, altering or rescinding it requires a majority vote in both houses of Congress and the President's approval, or passage over his veto.²⁵ If the ECA is a joint rule, it can be altered by congressional action without presidential presentment, or it can be rescinded by unilateral action of one house.²⁶ But whether Congress, or one of its houses, should amend or rescind the ECA turns, in part, on what it provides.

Moreover, to members of Congress, until a majority of at least one house wishes to amend or rescind the ECA, the issue of whether it is a statute or a joint rule does not matter. Whether the ECA is a statute or a joint rule, it provides the regulations that currently govern Congress when it is called upon to count electoral votes. Until a majority of at least one house votes to rescind it, members of Congress are bound by it as they are bound by any other rule of congressional practice.

Consequently, this Article is written for the conscientious congressman who wishes to know what the ECA provides for purposes of applying it, should the occasion arise. Members of Congress can implement the ECA only if they understand its provisions. The interested public, as well as the judiciary, can assess Congress's compliance only if they too understand its terms. Assuming the ECA is constitutional, this Article provides a guide

congressional rules adopted in statutory form).

23. See, e.g., *infra* text accompanying notes 383, 644 (discussing whether section 2 of the ECA binds Congress to accept a state's slate of electors and discussing the Senate President's power to rule objections and motions out of order).

24. This Article does not assert that the framers' intent determines its current meaning. See *infra* text accompanying note 685 (discussing statutory interpretation).

25. U.S. CONST. art. I, § 7, cl. 2.

26. MASKELL, *supra* note 17, at 3 (explaining the Senate's and House's ability to depart from various aspects of the ECA); *infra* text accompanying notes 67, 92 (discussing the Senate's unilateral rescission of Congress's 22d Joint Rule).

to the current rules that govern Congress when, every four years, it is called upon to count electoral votes in a presidential election.

II. THE PREMISES OF THE ELECTORAL COUNT ACT

The Congresses that debated and passed the ECA appreciated that few matters of statecraft were more important than public “confidence”²⁷ in the “legitima[cy]”²⁸ of the “transmission of the supreme executive authority from one person to another.”²⁹ Yet, in enacting a statute for “a quiet, orderly, accepted, lawful method of deciding [the] vexed and troublesome question” of electoral vote counting,³⁰ Congress faced a fundamental dilemma. On the one hand, in determining the outcome of a closely contested presidential election, Congress knew that there had to be a final decision-maker, be it a person, tribunal, or institution. As Senator Thomas Bayard reminded his colleagues near the outset of Congress’s long struggle to enact the ECA, “[e]very human dispute, every human right, however important, must reach a finality to be controlled by human methods.”³¹ On the other hand, Congress also knew that in a close presidential election, no decision-maker, be it a person, tribunal, or institution, could be trusted to render a neutral decision according to rules laid down in advance.³²

Fundamental to the difficulty in framing the ECA was the knowledge that:

It has been demonstrated time and again that the political conscience is a flexible and elastic rule of action that readily yields to the slightest pressure of party exigencies When

27. 8 CONG. REC. 161 (1878) (statement of Sen. Bayard).

28. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. 44-13, at 346 (1877) (statement of Sen. Morton).

29. 8 CONG. REC. 72 (1878) (statement of Sen. Morgan); *see also* H.R. MISC. DOC. NO. 44-13, at 346 (statement of Sen. Morton); 17 CONG. REC. 1058 (1886) (statement of Sen. Evarts); 15 *id.* at 5462 (1884) (statement of Rep. Springer); *id.* at 5076 (statement of Rep. Eaton); 8 *id.* at 161 (1878) (statement of Sen. Bayard).

30. 8 CONG. REC. 161 (1878) (statement of Sen. Bayard).

31. *Id.* at 159; *see also id.* (“We must have finality at some point or time, and in some human hand and some human heart and brain the power of decision must ultimately be reposed.”); *id.* at 73 (statement of Sen. Edmunds) (“You must elect a President; you must count the vote; and if the question arises on counting of the vote somebody must decide it.”); George Edmunds, *Presidential Elections*, 12 AM. L. REV. 1, 9 (1877).

32. *See* 17 CONG. REC. 1022 (1886) (statement of Sen. Sherman) (governors); *id.* (statement of Sen. Hoar) (President of the Senate); 15 *id.* at app. 311 (1884) (statement of Rep. Findlay); *id.* at 5462 (statement of Rep. Springer) (state tribunals); *id.* at 5079 (statement of Rep. Browne) (Congress); *id.* at 5078 (statement of Rep. Eaton) (state judges); 13 *id.* at 5144 (1882) (statement of Rep. Bowman) (judiciary); *id.* 2646-47 (statement of Sen. Pugh) (state legislatures and Congress); 8 *id.* at 168 (1878) (statement of Sen. Hoar) (Congress); *id.* at 167 (statement of Sen. Hill) (state judiciary).

the great office of President is at stake, with the immense patronage at its disposal, it would be expecting too much of human nature, under the tyranny of party, to omit any opportunity to accomplish its ends, more especially under that loose code of morals which teaches that all is fair in politics, as in war or in love.³³

From recent, firsthand experience, Congress knew that when the presidency hung in the balance, all were partisan. Senator Benjamin Hill, a Democrat from Georgia, reminded his colleagues that during the Hayes-Tilden election dispute of 1876-77:

[Rather than] rise above party and remember [their] country and only [their] country, . . . [a]ble men, learned men, distinguished men, great men in the eyes of the nation, seemed intent only on accomplishing a party triumph, without regard to the consequences to the country. That is human nature. That is, unfortunately, party nature.³⁴

Representative Thomas Browne, a Republican from Indiana, was equally convinced that whether final authority was held by state or federal legislators, judges, executive officials, or administrators, when a presidential election was disputed, all were affected by party spirit.³⁵ When the issue was “the title to the Presidential office, the incumbent of which holds within his grasp more than 100,000 offices, with hundreds of millions of patronage,” Browne

assum[ed] the fact to have been demonstrated that, whether in a legislative body or in a judicial tribunal, we shall find judges and legislators on the side of their party—not always; but it is tendency of human nature. I am not attacking anybody; I am not attacking the providence or wisdom of almighty God that has created us with our feelings of prejudice and sympathy.³⁶

Browne concluded that he would even “fear myself . . . if I were supreme judge upon such a question. I should fear to take upon myself the responsibility of settling a question of this character; I should fear that my judgment might be found in the line of my political convictions and party prejudices.”³⁷

33. 15 *id.* at app. 311 (1884) (statement of Rep. Findlay).

34. 8 *id.* at 168 (1878) (statement of Sen. Hill).

35. 13 *id.* at 5145 (1882) (statement of Rep. Browne).

36. *Id.*

37. *Id.*

Resolving this dilemma took Congress fourteen years of sustained effort.³⁸ During that time, the Senate passed five bills and one proposed joint rule, only to see them die in the House of Representatives.³⁹ Congressmen from both houses and both parties universally described the ultimately successful law as a bipartisan measure⁴⁰ and as a matter in

38. The effort to pass the ECA dates from January 6, 1873, when, in response to the various problems stemming from the 1872 election, Senator Oliver Morton offered a resolution “[t]hat the Committee on Privileges and Elections be instructed to examine and report . . . upon the best and most practicable mode of electing the President . . . and providing a tribunal to adjust and decide all contested questions connected therewith.” SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 335 (1877). Senator Morton gave a lengthy speech on the subject eleven days later. *Id.* at 345-55. The proposals that Morton guided through the Senate in 1875 and 1876 contained many aspects of the eventually successful law. Wroth, *supra* note 13, at 334-35. When Morton died in 1877, leadership on the issue passed to Senator George Edmunds. *See, e.g.*, 17 CONG. REC. at 122 (1885) (Edmunds introducing the bill that was enacted into law); 8 *id.* at 51 (1878) (Sen. Edmunds introducing electoral count legislation). Edmunds’s 1878 bill was in most respects the proposal that passed the Senate in 1878, 1882, 1884, and 1886. *See, e.g.*, 15 *id.* at 430 (1884) (Sen. Hoar saying the bill is the same as passed by the Senate in the last Congress); 13 *id.* at 859 (Sen. Hoar saying “this bill is the one originally . . . reported by the Senator from Vermont [Edmunds] . . . in 1878”). In guiding the ECA through the Senate, Edmunds eventually shared leadership with Senator George Hoar, with whom he had a widespread political and personal affinity. 18 *id.* at 133 (1886) (Sen. Edmunds and Sen. Hoar appointed two of the three Senate conferees on the bill); 17 *id.* at 863 (1886) (Sen. Morgan saying that Sens. Edmunds and Hoar are in charge of the bill); 15 *id.* at 430 (1884) (Sen. Hoar introduces bill).

39. Bills passed the Republican Senate in 1876, 1878, 1882, and 1884, only to die in the Democratic House of Representatives. Wroth, *supra* note 13, at 330-31, 334 n.58. In 1875 and 1884, both houses were Republican, but still, Senate bills failed to pass in the House. *Id.* In 1880, both houses were Democratic, but a Democratic joint rule that passed the Senate was filibustered by House Republicans. 10 CONG. REC. at 4386-99, 4487-4507, 4540-41 (1880) (House debates joint rule, which is eventually tabled); *id.* 3052 (Sen. Morgan introducing joint rule); Wroth, *supra* note 13, at 334 n.58. All during this time, there were proposed constitutional amendments, none of which passed either House. *See* AMES, *supra* note 4, at 106-11.

The effort to pass a law to govern electoral vote counting actually dates back to 1800 when different measures passed both houses of Congress but could not be reconciled. H.R. MISC. DOC. NO. 44-13, at 16-29, 691-702. In 1824, a Senate bill died in the house. *Id.* at 57-60. A consequence of Congress’s failure to pass legislation was that from the founding until 1865, Congress governed electoral counts by adopting a concurrent rule for each count. *See, e.g., id.* at 44-46, 65-66, 86-87 (the concurrent rules for 1817, 1829, and 1857). In 1865, Congress adopted a joint rule that continued to govern electoral counts until it was unilaterally rescinded by the Senate in early 1876. *Id.* at 223-38, 782-94. The electoral count in 1877 was governed by a statute enacted for just that year. *See* Act of Jan. 29, 1877, ch. 37, 19 Stat. 227. From 1880 until 1887, Congress reverted to the practice of adopting a concurrent rule for each count. *See* 16 CONG. REC. 622, 1037, 1052, 1073, 1220 (1885); 11 *id.* at 1129-41, 1257-62 (1881).

40. *See, e.g.*, 18 CONG. REC. 75 (1886) (statement of Rep. Herbert) (commenting on near-unanimity in the Senate); *id.* at 47 (statement of Rep. Dibble) (commenting on unanimity of House committee on most aspects of the bill); 17 *id.* at 1019 (statement of Sen. Hoar) (commenting that the bill has passed Senate three times almost unanimously); *id.* at 867 (statement of Sen. Morgan) (commenting that electoral count bills have passed the Senate in both Democratic and Republican

which all sides compromised on deeply held principles.⁴¹ Those compromises, and the ECA as enacted, rely on a network of premises about the role and powers of Congress in relation to the electoral system—premises which are useful to review before exploring the ECA in detail. In addition, the compromises and the ECA as enacted reflect certain preconceptions about election law and administrative law that were widely shared by nineteenth-century lawyers and politicians. As these nineteenth-century views are not widely known to modern legal commentators, it is useful to review them as well.

A. *Congress's Role in the Presidential Electoral System*

In enacting the ECA, Congress relied on three fundamental premises concerning its role in presidential elections: Congress, organized as two independent houses, has the right to count electoral votes; Congress's right to count votes includes the right to settle disputes over whether a vote is entitled to be counted; and Congress can regulate how it counts electoral votes through legislation, concurrent rule, or joint rule.⁴² Throughout the nineteenth century, these premises were quite controversial. Many nineteenth-century congressmen doubted them, including some who voted for the ECA.⁴³

hands, and have "never been a party question"); 15 *id.* at 5547 (1884) (statement of Rep. Herbert) (commenting on bipartisan genesis of bill). When the bill finally passed, the House was Democratic and the Senate was Republican. Wroth, *supra* note 13, at 334.

41. 17 CONG. REC. 868 (1886) (statement of Sen. Morgan); 15 *id.* at 5077 (1884) (statement of Rep. Eaton); 13 *id.* at 2650 (1882) (statement of Sen. Morgan).

42. By concurrent rule, this Article means a rule that is passed by each house of Congress under the Constitution's Rule Making Clause, U.S. CONST. art. I, § 5, cl. 2, for the particular Congress in which it is adopted. A concurrent rule is distinct from a concurrent resolution which, according to the Constitution, is a form of statute requiring presidential approval. *Id.* art. II, § 7, cl. 3.

When this Article refers to a rule adopted by both houses, which is intended to continue from Congress to Congress until amended or repealed, it will be called a joint rule because that is how nineteenth-century Congresses denominated it. *See, e.g.*, H.R. MISC. DOC. NO. 44-13, at 223-25 (adopting the 22d Joint Rule); 10 CONG. REC. 3052 (1880) (Sen. Morgan introducing a proposed joint rule to govern the electoral counts). A joint rule is, in effect, a continuing concurrent rule.

When this Article refers to an enactment that requires presidential presentment, it will be called a statute or concurrent resolution. That comports with constitutional usage. *See* U.S. CONST. art. I, § 7, cls. 2-3. In conventional parlance, a concurrent resolution is also called a joint resolution, but the use of this latter term will be avoided to prevent confusing it with a joint rule, as the term is used in this Article.

43. 18 CONG. REC. 51 (1886) (statement of Rep. Adams); 17 *id.* at 868 (statement of Sen. Morgan); 13 *id.* at 2650 (1882) (statement of Sen. Morgan).

1. Congress's Power to Count Electoral Votes

That Congress, organized as two independent houses, has the right to count the states' electoral votes was the subject of intense controversy and debate throughout the nation's first century.⁴⁴ The Constitution treats several aspects of the presidential election system with clarity and detail. For example, the Constitution clearly commits the power to appoint presidential electors to "Each State" to be exercised "in such Manner as the Legislature thereof may direct."⁴⁵ It specifies the electors' qualifications⁴⁶ and narrates at length when, where, and how they are to exercise their office,⁴⁷ including the requirement that each state's electors "transmit" the result of their balloting "sealed to the seat of the government of the United States, directed to the President of the Senate."⁴⁸ But when it comes to collating and counting the electors' votes, the Constitution turns remarkably cryptic: "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."⁴⁹

Over the course of the nation's first century, five strongly defended interpretations developed around this enigmatic provision. According to these varying views, the power to count electoral votes was lodged in: (1) the President of the Senate;⁵⁰ (2) the House of Representatives (for presidential electoral votes) and the Senate (for vice-presidential electoral votes);⁵¹ (3) the House and Senate with each congressman having one vote;⁵² (4) the House and Senate with each chamber having one vote;⁵³ and

44. It still is subject to dispute. See Kesavan, *supra* note 13, at 1709-10, 1723-29 (arguing that the Constitution requires Congress to count electoral votes organized as a unicameral legislature with each senator and congressman having one vote).

45. U.S. CONST. art. II, § 1, cl. 2.

46. *Id.* ("[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

47. *Id.* art. II, § 1, cls. 2-4.

48. *Id.* art. II, § 1, cls. 2-4; *id.* amend. XII.

49. *Id.* amend. XII. The text of the original Constitution was identical. See *id.* art. II, § 1, cl. 3.

50. See SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 694 (1877) (statement of Sen. Pinckney); 18 CONG. REC. 74 (1886) (statement of Rep. Baker); 17 *id.* at 1058 (statement of Sen. Wilson); *id.* at 1057 (statement of Sen. Evarts); *id.* at 1025 (statement of Sen. Ingalls); 15 *id.* at 5465-68 (1884) (statement of Rep. Browne).

51. See, e.g., 17 CONG. REC. 817 (1886) (statement of Sen. Sherman); 15 *id.* at 5076-79, 5548 (1884) (statement of Rep. Eaton). This theory is my favorite—not that I agree with it—because of the surprising force of its argument and logic: The House is there to witness whether it needs to elect a President because no one received an electoral college majority. Similarly, the Senate's power to elect a Vice President arises whenever no one has a majority of the vice-presidential electoral vote.

52. See, e.g., 17 *id.* at 1063, 2428-29 (1886) (statement of Sen. George); 15 *id.* at app. 311

(5) no one, until Congress designates a vote counter by concurrent rule or legislation.⁵⁴

The standard history of electoral vote counting is that the “President of the Senate” theory⁵⁵ prevailed in the early years of the Republic, that the “*casus omissis*” theory⁵⁶ prevailed from 1821 to 1861, and that the “Congress organized as two separate houses” theory⁵⁷ has prevailed since 1865.⁵⁸ I believe that Congress asserted control and the right to count electoral votes from very early on, certainly by 1800.⁵⁹ But whatever the history of the dominant theory, two points are clear. First, all of the theories had staunch defenders in and out of Congress until the passage of the ECA in 1887.⁶⁰ The proponents of the ECA had to contend with advocates of all of these theories and their many variants.

Second, although each theory had substantial arguments in its favor, by the 1880s, history and politics had awarded the palm of victory to the theory that Congress, organized as two independent houses, had ultimate vote counting authority.⁶¹ In 1865, Congress had swept aside all ambiguity about the locus of the counting power with the passage of the 22d Joint

(1884) (statement of Rep. Findlay) (citing 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 184 (New York, D. Appleton & Co. 1882)); *id.* at 5096 (statement of Rep. Pryor); Alexander H. Stephens, *The Count of the Electoral Vote for President and Vice-President*, 5 INT’L REV. 102, 107 (1878). Stephens was a congressman from Georgia before and after the Civil War, and the Vice President of the Confederacy during that War. eHistory.com, *Alexander Hamilton Stevens*, at www.ehistory.com/world/PeopleView.cfm?PID=69 (last visited Feb. 15, 2004).

53. 18 CONG. REC. 75 (1886) (statement of Rep. Herbert); *id.* at 50 (statement of Rep. Adams); *id.* at 46 (statement of Rep. Dibble); 15 *id.* at 5547 (1884) (statement of Rep. Herbert). This is the ECA’s theory.

54. *See, e.g.*, H.R. MISC. DOC. NO. 44-13, at 52 (statement of Rep. Clay). This theory originates with Henry Clay’s analysis of electoral vote counting in 1821 when there was a dispute over whether Missouri was a state entitled to participate in presidential elections at the time of the 1820 election. *See id.* at 51-56 (reporting the debate).

55. *See supra* text accompanying note 50.

56. *See supra* text accompanying note 54.

57. *See supra* text accompanying note 53.

58. *See* DOUGHERTY, *supra* note 10, at 58, 76-77.

59. THE PRESIDENTIAL COUNTS ix-xliii (New York, D. Appleton & Co. 1877) presents a good summary of the evidence; *see also* DOUGHERTY, *supra* note 10, at 61-62 (quoting THE PRESIDENTIAL COUNTS, *supra*, at xi). Congress asserted its authority by 1800 because both houses passed different versions of the “Grand Committee” bill. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 at 288-91 (1997) (providing an overview of the bill); *see also* 18 CONG. REC. 50 (1886) (statement of Rep. Adams) (stating that within a decade of the adoption of the Constitution the “President of the Senate” theory was supplanted).

60. Electoral vote counting is a remarkably important and sustained example of nonjudicial, constitutional interpretation.

61. 13 CONG. REC. 2645 (1882) (statement of Sen. Pugh).

Rule.⁶² The 22d Joint Rule provided that “no [electoral] vote objected to shall be counted, except by the concurrent votes of the two houses [of Congress].”⁶³ With the 22d Joint Rule, the two houses of Congress unmistakably asserted their power to determine all questions regarding electoral votes.

Congress adopted the 22d Joint Rule specifically to allow itself to refuse to count electoral votes which might be proffered by the southern states that were just then ending their rebellion.⁶⁴ Although Louisiana and Tennessee submitted packets of electoral votes, Vice President Hannibal Hamlin did not present them to Congress when it met to count the vote.⁶⁵ Thus, Congress did not have occasion to use the 22d Joint Rule to exclude any votes in the year of its adoption. But in 1873, with the 22d Joint Rule still in effect, the two houses did reject electoral votes from the fully reconstructed states of Georgia, Louisiana, and Arkansas on the following

62. Wroth, *supra* note 13, at 328.

63. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 148 (1877) (House of Representatives); *id.* at 224 (Senate).

64. Wroth, *supra* note 13, at 328 n.34.

65. Vice President Hamlin's refusal to submit the electoral votes of Louisiana and Tennessee relied on a Joint Resolution which President Lincoln had just signed (giving it the force of law) stating that the Confederate states were “not entitled to representation in the electoral college . . . and no electoral votes shall be received or counted from said States.” H.R. MISC. DOC. NO. 44-13, at 149. President Lincoln's comments are also set out in 10 CONG. REC. 3654 (1880). When questioned by Congressman Yeaman, Vice President Hamlin said he would submit the Louisiana and Tennessee votes if “either branch of Congress shall be disposed.” H.R. MISC. DOC. NO. 44-13, at 228. In the end, no one objected to Vice President Hamlin's decision because it would have unnecessarily prolonged the meeting by requiring a separation of the two houses to discuss and vote on the issue. *Id.* at 228.

In light of the Joint Resolution on which Vice President Hamlin relied, Congress enacted the 22d Joint Rule as a backup measure to ensure that no Confederate states participated in the 1864 presidential election. *See id.* at 416. Congress's concern was that President Lincoln might not sign the Joint Resolution, or might not sign it in time for that year's electoral count. *Id.* at 229-30 (message from Pres. Lincoln discussing his qualms about signing the Joint Resolution). President Lincoln did sign it at the very last minute, so late that his action had not been officially promulgated. *Id.* at 228. Vice President Hamlin knew about the President's action on his own knowledge. *Id.* at 228.

This is significant for the question of whether Congress regulates its electoral vote counting by law (and therefore whether the ECA is a binding statute). In signing the Joint Resolution, Lincoln stated his view:

[T]he two houses of Congress . . . 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.

Id. at 229-30. Lincoln indicated that he signed the Joint Resolution “in deference” to Congress and he denied “any opinion” on whether his signature was required. *Id.*

grounds: Georgia's electors had voted for a constitutionally disqualified candidate; the Louisiana electors' credentials were not based on a canvass by the state's lawful returning board; and there had been no lawful election in Arkansas.⁶⁶

The Senate unilaterally rescinded the 22d Joint Rule in early 1876, well before that year's close and controverted election.⁶⁷ After the election, Congress was faced with multiple sets of returns from Florida, Louisiana, South Carolina, and Oregon, and objections to a number of electoral votes from other states.⁶⁸ In response, Congress not only reasserted its right to determine which votes were proper, but also created a bipartisan Electoral Commission, composed of five senators, five representatives, and five Supreme Court justices, to help settle the multiple-return disputes.⁶⁹ By the 1880s, congressmen who located the counting power somewhere other than in Congress (organized as two independent houses) were a noisy and persistent lot, albeit a distinct minority.⁷⁰

Proponents of the "Congress organized as two separate houses" theory knew the practical shortcomings of their approach. The theory Congress adopted was problematic because of the frequency in which a final tribunal composed of two decision-makers might disagree and, therefore, produce a tie result.⁷¹ The effect of a tie, or how to avoid a tie, became one of the major issues of the ECA debate.⁷² Bicameralism was a blessing in the slow

66. H.R. MISC. DOC. NO. 44-13, at 335-408. Georgia's electors had voted for Horace Greeley who had died after election day but before elector balloting day. *Id.* at 365-67.

Later Congresses, wishing to minimize the import of Congress's action in the 1873 Arkansas dispute, claimed that its action was predicated on an alternative ground: the mistaken claim that the Arkansas vote was certified with an improper seal. *Id.* at 395-95, 399-406.

67. *Id.* at 782-94.

68. 5 CONG. REC. 1195-98, 1503-05, 1703-04, 1720-23, 1728-31, 1917-19, 1938-39, 1945-46, 2021-22, 2055 (1877) (counting objections raised to electoral votes from Florida, Louisiana, Michigan, Nevada, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, and Wisconsin, respectively). It should be mentioned that Congress dealt with the multiple-return states with the help of a statutorily created Electoral Commission, and that in dealing with objections to votes from the single-return states, Congress always decided to count the vote. *See Burgess, supra* note 10, at 642.

69. *See* Act of Jan. 29, 1877, ch. 37, 19 Stat. 227. The Electoral Commission is recounted in HAWORTH, *supra* note 5, at 220-84.

70. In 1881, the Senate adopted a joint resolution officially rejecting the "President of the Senate" theory. 11 CONG. REC. 1160-74, 1205-11 (1881); *see also* 17 *id.* at 1019 (1886) (statement of Sen. Hoar) (stating that it is "settled for this generation . . . that the President of the Senate is not clothed by the Constitution with the power to count the electoral vote"); 13 *id.* at 2645 (1882) (statement of Sen. Pugh).

71. 17 *id.* at 2427 (1886) (statement of Sen. Hoar); *id.* at 1063 (statement of Sen. George); *id.* at 818 (statement of Sen. Sherman) (pointing out that more than half the time Congress's two Houses have been controlled by different political parties); Edmunds, *supra* note 31, at 16.

72. *See* 18 CONG. REC. 50 (1886) (statement of Rep. Eden); 17 *id.* at 867 (statement of Sen. Morgan); 15 *id.* at 5547 (1884) (statement of Rep. Herbert); Edmunds, *supra* note 31, at 16; Wroth,

and deliberate process of law creation, but it was a curse in electoral vote counting when dispatch and clear results were needed.

Also troubling was the effect of giving final decision-making authority to an institution with insufficient time and organizational capacity for exacting inquiry into the many factual and legal matters on which the legality of an electoral vote might turn. This problem, too, shaped the ECA debate.⁷³ Indeed, it is unclear whether the failure to legislate some tribunal other than Congress as the ultimate arbiter of the electoral count was because Congress believed, as a matter of policy, it should not move it elsewhere, or because Congress believed that in the absence of a constitutional amendment, it could not move the responsibility elsewhere.

In light of Congress's institutional shortcomings, many of the ECA's proponents longed for an arbiter armed with "judicial" procedures and powers to referee disagreements between the houses.⁷⁴ Others did not want an arbiter, believing that the nation's two ultimate representative political bodies were the appropriate forum of last resort for contested presidential elections.⁷⁵ They regarded the only arbiter that had ever been appointed—the Electoral Commission of 1877 on which five Supreme Court justices held the deciding votes—as a dismal failure never to be repeated.⁷⁶ As Senator George Hoar, one of the ECA's main proponents, concluded: "[I]n the present state of political and public sentiment," it was "impossible to expect an agreement on . . . an arbiter between the two branches" of Congress.⁷⁷ There was simply no person or institution that could be trusted.⁷⁸

supra note 13, at 344-45.

73. See 18 CONG. REC. 50 (1886) (statement of Rep. Eden) (commenting on problem of Congress making "spur of the moment" decisions about electors "amid the excitement of party contests"); Edmunds, *supra* note 31, at 18 (commenting on Congress's inability to fairly adjudicate the elections of its own members).

74. See, e.g., 17 CONG. REC. 1019 (1886) (statement of Sen. Hoar); Edmunds, *supra* note 31, at 17-18, 19-20.

75. See, e.g., 17 CONG. REC. 864-68 (1886) (statement of Sen. Morgan); 15 *id.* at 5455 (1884) (statement of Rep. Hart).

76. 17 *id.* at 1024 (1886) (statement of Sen. Ingalls) (describing the Electoral Commission of 1877 as "a contrivance that will never be repeated in our politics. It was a device that was favored by each party in the belief that it would cheat the other, and it resulted, as I once before said, in defrauding both."); 13 *id.* at 5144 (statement of Rep. Browne) (describing the party-line vote); 13 *id.* at 2647 (1882) (statement of Sen. Pugh); 8 *id.* at 69 (1878) (statement of Sen. Morgan).

77. 17 *id.* at 1020 (1886). Hoar's comments were against his interest as he personally favored designating the senior Supreme Court justice as arbiter, and his comments were made in that context. *Id.*

78. See *id.* at 2647 (statement of Sen. Pugh) (observing that Congress could find no uncorruptible institution); 13 *id.* at 5145 (1882) (statement of Rep. Browne).

In sum, despite prudential concerns, the theory that the Constitution designated Congress, organized as two independent houses, to count the states' electoral votes predominated by the 1860s, if not much earlier. That theory was a premise of the ECA.⁷⁹

2. Congress's Power to Determine Which Electoral Votes to Count

Closely related to the issue of who had the power to count electoral votes, and even more contentious, was the issue of the scope of the vote-counting power.⁸⁰ That the power to count electoral votes included the power to determine whether a vote ought to be counted was a subject of sharp dispute during the nation's first century. Throughout that time, some congressmen claimed that Congress had to count whatever electoral votes came in from the states with the appropriate authenticating documentation.⁸¹ These congressmen argued that the electors would authenticate their own acts and the states' right to appoint electors included the power to determine all questions regarding the legality of their vote.⁸² Congress's duty as vote counter was ministerial;⁸³ it was simply an arithmetical endeavor.

Throughout the same period, there were other congressmen with a more nationalist perspective who conceived presidential elections as a federal matter.⁸⁴ According to these congressmen, Congress properly had a role in

79. This premise of the ECA has been disputed recently by Kesavan, *supra* note 13, at 1709-10, 1723-29 (arguing for unicameralism with each congressman having one vote). If the "Congress organized as two separate houses" theory is wrong, the ECA may be unconstitutional and of no effect. *Id.* at 1723-29. I say "may" be unconstitutional because it is possible that the Constitution *ab initio* lodges the vote counting power somewhere else—for example, with the President of the Senate—but allows Congress to move it elsewhere by subsequent legislation. See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 258-59 (photo reprint 1971) (1826).

As stated, *supra* text accompanying note 20, this Article does not explore whether the ECA is constitutional. It assumes the post-Civil War Congresses' view was correct and that the Constitution does lodge, or permits subsequent legislation to lodge, the electoral vote counting power in Congress organized as two separate houses.

80. The two questions are quite integrated because concerns about who counts electoral votes might well depend on the scope of that power. For example, one might allow the President of the Senate to count the vote if the power is purely ministerial.

81. See, e.g., SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 691-702 (statement of Sens. Baldwin and Pinckney in 1800); 18 CONG. REC. 46-47 (1886) (statement of Rep. Dibble); 10 *id.* at 4390 (1880) (statement of Rep. Updegraff); *id.* at 3683 (statement of Rep. Teller); 8 *id.* at 72-73 (1878) (statement of Sen. Jones).

82. See sources cited *supra* note 81.

83. Even under the "ministerial" theory, Congress still had the power to determine: (1) whether a submitted vote came from a state rather than from some other entity not entitled to vote; and (2) whether the person certifying the vote actually was the state's governor. See 18 CONG. REC. 47 (1886) (statement of Rep. Dibble); Kesavan, *supra* note 13, at 1795-96.

84. See, e.g., 18 CONG. REC. 30 (1886) (statement of Rep. Caldwell); 15 *id.* at 5461 (1884)

assessing the legality of the electoral votes that came before it, even to the extent of going behind the returns to ensure that the true voice of the people of a state was properly heard, and to prevent fraud in one state from marring or determining an election where all the states were concerned.⁸⁵ Some congressmen went so far as to assert that in all cases “it was the intention of the framers . . . to leave it to the discretion of the two Houses, who represent the States and the people, to count the vote at every election in such manner as they may think accords with justice on the particular occasion.”⁸⁶ Still other congressmen were more circumspect, arguing that Congress’s power varied with the type of objection raised against the reception of a particular electoral vote.⁸⁷

Because the question implicated controversial issues of states’ rights and national power, Congress spent the larger part of the nineteenth century avoiding taking a stand on the scope of its vote counting power.⁸⁸ Up until 1865, Congress governed electoral counts by passing concurrent resolutions for each count.⁸⁹ Frequently framed with the anticipated problems of each count in mind, the resolutions sought to sidestep problems rather than resolve them.⁹⁰ In 1865, with the adoption of the 22d Joint Rule, Congress asserted unfettered discretion to reject electoral votes when only one house of Congress objected to receiving the votes.⁹¹ In the

(statement of Rep. Springer); *id.* at 5099 (statement of Sen. Pryor).

85. *See, e.g.*, 18 *id.* at 48 (1886) (statement of Rep. Cooper); 13 *id.* at 2650 (1882) (statement of Sen. Morgan); *id.* at 2645 (statement of Sen. Pugh); 10 *id.* at 4492 (1880) (Rep. Hutton).

86. 13 *id.* at 2650 (1882) (statement of Sen. Morgan); *see also* 15 *id.* at 5099-101, 5105 (1884) (statement of Sen. Pryor).

87. *See, e.g.*, 18 *id.* at 50-51 (1886) (statement of Rep. Adams) (discussing various types of objections). *See infra* text accompanying note 97, for a discussion of the types of objections.

88. Twice, Congress almost took a stand. In 1800, substantially similar bills passed the House of Representatives and the Senate, but failed to be reconciled over the issue of whether rejecting electoral votes should require the vote of one or both houses. *See* SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 16-28, 691-702 (1877); CURRIE, *supra* note 59, at 288-91; DOUGHERTY, *supra* note 10, at 62-73. In 1824, a bill that allowed the rejection of electoral votes only when both houses agreed passed the Senate, but was not acted upon in the House. H.R. MISC. DOC. NO. 44-13, at 65-68; DOUGHERTY, *supra* note 10, at 73.

89. *See, e.g.*, H.R. MISC. DOC. NO. 44-13, at 35, 76 (reprinting the resolutions for 1805 and 1841).

90. *See, e.g.*, *id.* at 71-75 (avoiding the issue of whether Michigan was entitled to electoral votes by providing an alternate count); *id.* at 49-56 (avoiding the same issue for Missouri). The Houses also chose to ignore various problems entirely. *Id.* at 73 (ignoring whether some Michigan electors were disqualified); *id.* at 46-47 (ignoring whether Indiana was entitled to electoral votes); *id.* at 37-38 (ignoring whether electors from Massachusetts were properly elected).

91. *Id.* at 223-25. In 1872, Congress had asserted its authority under the 22d Joint Rule by rejecting votes from Georgia, Louisiana, and Arkansas. *Id.* at 357-406. In each instance, however, both houses concurred in rejecting the votes. *See id.*, for a recount of Congress’s proceedings during the 1873 electoral count.

mid-1870s, however, Congress drew back from the prudence, if not the constitutionality, of the 22d Joint Rule's approach.⁹² Post-Reconstruction congressmen saw themselves as attempting to strike the proper balance between the states' right to appoint electors and have their electoral votes counted, and the federal interest in counting only "legal votes."⁹³ The ECA debates show Congress struggling to flesh out a more nuanced approach to its power to reject electoral votes.⁹⁴ That approach turned on whether Congress received single or multiple sets of electoral votes from a state, on whether the state had attempted to resolve any controversy over its electors' election, and on the type of objection made to the acceptance of electoral votes by Congress.⁹⁵

Thus, understanding the ECA turns on differentiating among the different types of disputes that might arise when Congress meets to count electoral votes. The Congresses that debated the ECA were familiar with the full range of electoral vote counting disputes because they all had arisen either during the twenty-five vote counts that preceded the ECA's adoption or were anticipated by congressmen debating the Act.⁹⁶ Generically, there are four types of disputes:

- 1) whether the electoral votes come from individuals entitled to hold the office of presidential and vice-presidential elector;
- 2) whether the individuals entitled to the office of elector have properly performed their duties;
- 3) the consequences of rejecting an electoral vote on the number of votes required to elect a President or Vice-President; and
- 4) the procedures of the joint meeting that counts the electoral vote.⁹⁷

92. In 1876, the Senate refused to renew the 22d Joint Rule, effectively repealing it. *See id.* at 444-58, 782-94. Senator Morton described the Rule's approach as unconstitutional. *Id.* at 444 (statement of Sen. Morton). He thought that rejecting single returns from a state required a concurrent vote of both houses. *Id.* Only in the presence of multiple returns was Congress required to accept a return by concurrent vote. *Id.* at 527.

93. 18 CONG. REC. 30 (1886) (statement of Rep. Caldwell); *see also* 10 *id.* at 4388 (1880) (statement of Rep. Bicknell); 8 *id.* at 70-71 (1878) (statement of Sen. Morgan).

94. *See* sources cited *supra* note 93.

95. *See infra* text following notes 402, 445.

96. Twelve of the twenty-five electoral counts had some problem that was either addressed or ignored. *See* MASKELL ET AL., *supra* note 13, at 7-23; *infra* note 599 and accompanying text (discussing 1797 and 1801 electoral count). Only four vote counts since the adoption of the ECA had similar problems. MASKELLE ET AL., *supra* note 13, at 23-29; *infra* text accompanying notes 661-64 (discussing the 2001 electoral count).

97. *See* 18 CONG. REC. 50-51 (1886) (statement of Rep. Adams) (mentioning all of these types of disputes except the last because he was talking about receiving electoral votes).

More specifically, disputes over an individual's title to the elector's office might involve questions concerning: (1) whether the territory he or she represents was a state of the American union entitled to participate in presidential elections;⁹⁸ (2) whether the individual elector was actually elected to that position according to the laws of the state in a free and fair election;⁹⁹ and (3) whether the individual, even though appointed according to the laws of the state, was constitutionally qualified to hold the electoral office.¹⁰⁰

Disputes over whether electors have properly exercised their office include issues as to whether the electors conducted themselves as the Constitution or federal statute requires,¹⁰¹ and whether they acted free from monetary corruption or physical intimidation.¹⁰² Controversies over the consequences of rejecting an electoral vote involve the issue of whether the number of votes required to elect a President or Vice President is reduced when Congress rejects an electoral vote.¹⁰³ Conflict over the procedures of

The latter two types of disputes do not involve the issue of accepting electoral votes, per se. But they are disputes that may arise during the joint session counting the votes. Disputes over the consequences of rejecting a vote were anticipated by Congress, but never resolved. *See infra* text accompanying note 678. In contrast, disputes over procedures were quite notorious, as some of the sharpest prior controversies had involved the President of the Senate's conduct of the joint meeting. *See* H.R. MISC. DOC. NO. 44-13, at 237-334 (recounting a three-day debate on the conduct of the 1869 vote count); *id.* at 87-144 (a two-day debate over the conduct of the 1857 vote count); *infra* text accompanying notes 561-65, 633-39 (discussing procedural conflicts).

98. *See, e.g.*, H.R. MISC. DOC. NO. 44-13, at 230-36, 244-63 (questioning Georgia's status in 1869); *id.* at 149-228 (questioning same for the Confederate states in 1864); *id.* at 70-75 (questioning same for Michigan in 1836); *id.* at 49-56 (questioning same for Missouri in 1820); *id.* at 46-47 (questioning same for Indiana in 1816).

99. *See, e.g., id.* at 357-407 (questioning the appointment of electors in Louisiana and Arkansas in 1872); *id.* at 237-44 (questioning the validity of the electors' election in Louisiana in 1868); *id.* at 37-38 (questioning the appointment of electors from Massachusetts in 1808); 5 CONG. REC., pt. 4 (1877) (questioning the same for Florida, Louisiana, South Carolina, and Oregon in 1876).

100. *See, e.g.*, H.R. MISC. DOC. NO. 44-13, at 72-73 (questioning constitutional eligibility of a Michigan elector in 1836); 5 CONG. REC., pt. 4, 249-51, 264-66 (1877) (questioning same of an Oregon elector in 1876).

101. *See* H.R. MISC. DOC. NO. 44-13, at 395-401 (discussing the failure of governor to certify Arkansas's certificate); *id.* at 87-144 (questioning whether Wisconsin's electors balloted on the proper day in 1856); *id.* at 63-65 (questioning the certificates submitted by electors in 1824); 10 CONG. REC. 1386-87 (1880) (discussing the same for Georgia in 1880); *see also* 115 *id.* at 145-71, 197-246 (1969) (recounting the debate on whether to count the vote of a "faithless elector").

102. *See* 8 CONG. REC. 163 (1878) (statement of Sen. Merrimon) (raising the possibilities of bribery, intimidation, fraud, material irregularity, and ineligibility); *see also* 10 *id.* at 3691 (1880) (colloquy between Sens. Morgan and Edmunds debating whether majority requirement was reduced when three electors died before balloting in 1820).

103. *See* 18 *id.* at 49 (1886) (statement of Rep. Cooper); 17 *id.* at 820, 1057, 1061, 2428 (1886) (statement of Sens. Evarts, Hoar, and George); *see also infra* text accompanying note 678

the meeting involve the President of the Senate's conduct of the meeting, parliamentary practice when the houses separate to discuss an objection to receiving an elector's vote, and the meaning of the result of the houses' decisions.¹⁰⁴

The ECA provides clear answers to some of these types of disputes, while it responds to others ambiguously or not at all.¹⁰⁵ Appreciating the ECA's elements of clarity and ambiguity involves, however, appreciating two more premises of the Congress that adopted that law.

3. Congress's Power to Regulate How It Counts Electoral Votes Through Legislation, Joint Rule, or Concurrent Rule, and the Consequences of Equality Between the House of Representatives and the Senate

It is a postulate of constitutional law that one Congress cannot bind another.¹⁰⁶ An application of this maxim is that Congress's internal rules are not binding, even when expressed in legislation that has received presidential approval.¹⁰⁷ The difference between binding legislation and a nonbinding internal rule given statutory form is not always distinct,¹⁰⁸ and it was less clear to nineteenth-century legislators. Nevertheless, it was clear enough to provoke wide-ranging discussion in the Congresses that debated the ECA. Many congressmen spoke in opposition to the ECA on the grounds that legislating the matter was an unconstitutional attempt to bind Congress's discretion.¹⁰⁹ It was unconstitutional, they said, because

(discussing the denominator problem).

104. See, e.g., H.R. MISC. DOC. NO. 44-13, at 367-80 (documenting procedural wrangling in the houses when meeting separately to discuss objections to the vote of several states); *id.* at 237-334 (discussing conduct of 1869 electoral count session, including the presiding officer's refusal to allow an appeal from his ruling that a motion was out of order).

105. See Electoral Count Act of 1887, ch. 90, 24 Stat. 373 (current version at 3 U.S.C. §§ 5-6, 15-18 (2000)).

106. See Kesavan, *supra* note 13, at 1779; John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation*, 91 CAL. L. REV. 1773, 1775 (2003).

107. Examples of such "legislation" are: Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974); Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812. See Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 731 n.26 (1989); Roberts & Chemerinsky, *supra* note 106, at 1793-94.

108. See generally *Metzenbaum v. Fed. Energy Regulatory Comm'n*, 675 F.2d 1282 (D.C. Cir. 1982) (noting that certain provisions of the Alaska Natural Gas Transportation Act are rules of procedure that do not grant private rights).

109. See, e.g., 17 CONG. REC. 1024 (1886) (statement of Sen. Ingalls); 13 *id.* at 2652 (1882) (statement of Sen. Blair) (stating that future Congresses cannot be bound by this law); *id.* at 2648 (statement of Sen. Garland) (stating that although he approves the substance of the bill, Congress cannot bind itself); 8 *id.* at 164 (1878) (statement of Sen. Garland) ("[A]n act passed by a previous Congress assuming to bind . . . a succeeding Congress need not be repealed because it is void; and for that reason I oppose this bill.").

enacting and amending legislation required presidential approval (or an extraordinary majority in Congress), and thus improperly involved the President in implementing the rules for determining presidential elections.¹¹⁰ In addition, one Congress could never bind another in this matter.¹¹¹ Congress could govern itself, they reasoned, by enacting concurrent rules for each vote count, or a continuing joint rule which the houses could amend at any time.¹¹²

Many other congressmen believed that electoral vote counting was a proper subject for binding legislation. Congress's rule-making authority governed its own proceedings, and the ECA was properly legislative because through it the two houses adopted rules to govern each other's actions.¹¹³ Moreover, the power to count electoral votes was a power vested in the national government,¹¹⁴ and the Sweeping Clause allows Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department . . . thereof."¹¹⁵ These congressmen pointed to how Congress might properly pass laws determining, for example, what credentials would be acceptable to establish that someone was a foreign ambassador and thus amenable to the Supreme Court's original jurisdiction under Article III,¹¹⁶ or how the

In 1880, when the Democrats controlled both houses of Congress, they attempted to pass a joint rule governing the count. *See, e.g., 10 id.* at 3652-63 (1880). This led to extended debate on the propriety of relying on the houses' rule-making power rather than on their legislative power. *See, e.g., id.*

Some congressmen argued against the propriety of legislation on the related ground that the Constitution vested the electoral vote counting power in the President of the Senate and that Congress lacked legislative power to move it elsewhere. *See 18 id.* at 74-75 (1886) (statement of Rep. Baker); *17 id.* at 1059 (statement of Sen. Wilson); *10 id.* at 4389 (1880) (statement of Rep. Updegraff); *id.* at 3685 (statement of Rep. Ingalls).

110. *See, e.g., 17 id.* at 867 (1886) (statement of Sen. Morgan); *10 id.* at 3685 (1880) (statement of Rep. Ingalls). President Lincoln stated this view when he reluctantly signed legislation (framed as a joint resolution) excluding the Confederate states from the electoral count in 1865. *See SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 229-30 (1877).*

111. *See supra* notes 106-07.

112. In 1880, when the Democrats controlled both houses of Congress, the Senate leadership refused to consider a bill. 10 CONG. REC. 3052 (1880). Instead, the Senate proposed (and passed) a joint rule on the subject that failed in the House due to strong Republican objections. *Id.* at 3704.

113. *Id.* at 3694 (statement of Sen. Edmunds).

114. Specifically, this power was vested in the two houses of Congress while meeting in joint session. U.S. CONST. amend. XII.

115. U.S. CONST. art. I, § 8, cl. 18. This is the "horizontal" component of the Sweeping Clause, which extends to any power vested in the federal government by the Constitution. *But see Kesavan, supra* note 13, at 1731-43 (arguing against the breadth of this component of the Sweeping Clause).

116. *See* U.S. CONST. art. III, § 2, cl. 2 (granting the Supreme Court jurisdiction over all cases

judicial branch was to govern itself.¹¹⁷ The ECA, properly understood, was similar because it established the evidence by which Congress would govern its actions when it met not in legislative conclave, but rather to count electoral votes.¹¹⁸

A final argument supporting the ECA's status as binding legislation was tied to the constitutional postulate of equality between the House of Representatives and the Senate. Recognizing the equality of the houses of Congress, the authors of the ECA presumed that, under the Constitution, Congress could not count an electoral vote unless both the House and the Senate agreed that it should be counted.¹¹⁹ Given the frequency of houses of Congress being controlled by different political parties,¹²⁰ frequent tie votes and the inability to decide questions raised during the count were ever-present threats when Congress met to count electoral votes. The inherent delays of bicameralism may be a benefit to the thoughtful enactment of legislation, but it is a searing problem for deciding questions regarding presidential elections: "The failure of the Constitution, the *casus*

that affect public ambassadors).

117. See 8 CONG. REC. 54 (1878) (statement of Sen. Edmunds).

118. See 18 *id.* at 46 (1886) (statement of Rep. Dibble) (arguing for a very limited scope of power); 17 *id.* at 1019 (statement of Sen. Hoar); 15 *id.* at 5547 (1884) (statement of Rep. Herbert); 8 *id.* at 54 (1878) (statement of Sen. Edmunds); *id.* at 70 (statement of Sen. Morgan) (claiming Congress had assumed this understanding in regulating the submission of electoral votes in 1792). Congress may well have adopted this interpretation when, in 1792, it required the state governors to issue certificates to the electors, and when, in 1800, the two houses passed, but could not reconcile, versions of the Grand Committee Bill. See CURRIE, *supra* note 59, at 136-39, 288-91 (discussing the 1792 law and Grand Committee Bill); *infra* text accompanying note 410 (discussing the 1792 statute).

Other congressmen may have held the more limited position that Congress's legislative power is confined to specifying the consequences that follow when the two houses disagree during the count. No power, they felt, could bind the houses when they were in agreement. See 17 CONG. REC. 867 (1886) (statement of Sen. Morgan).

119. Some congressmen believed this position was unconstitutional when a state submitted only one set of properly certified electoral returns. See, e.g., SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 452-55 (statement of Sen. Morton); *id.* at 416-18 (recounting a Senate Report written by Sen. Morton). They argued that when a state submitted only one electoral return, it was constitutionally entitled to a presumption of validity and it required a concurrent vote of both houses to reject the electors. *Id.* at 416-18, 452-55. But since the ECA adopted the rule they wanted, whether for constitutional or prudential reasons, this objection need not detain us. Other congressmen believed that when a state submitted a single set of electoral votes, the Constitution compelled Congress to accept it. See 18 CONG. REC. 45 (1886) (statement of Rep. Dibble); *infra* text accompanying note 453. The congressmen who adopted the ECA clearly spurned this position. See *infra* text accompanying note 295. So it, too, need not detain us here.

120. 17 CONG. REC. 2427 (1886) (statement of Sen. Hoar); *id.* at 1063 (statement of Sen. George); *id.* at 818 (statement of Sen. Sherman) (pointing out that more than half the time Congress's two houses have been controlled by different political parties); Edmunds, *supra* note 31, at 16.

omissus, is the failure to provide an arbiter when [the houses of Congress] disagree. The provision for such an arbiter . . . comes within the legislative power committed to Congress” by the Sweeping Clause.¹²¹ The ECA, in effect, arbitrated differences between the houses by “reduc[ing] to a minimum the cases where any difference [between the houses] can properly arise.”¹²²

Other congressmen did not go this far. They believed that Congress’s legislative power was wholly confined to resolving disagreement between the House and the Senate.¹²³ They approved the legislation governing electoral vote counting only “so far as it was necessary to meet the contingency of a divided vote of the two houses.”¹²⁴

Most interesting was the position of congressmen, including some who assumed leading positions in the ECA’s passage,¹²⁵ who voted for the law, and urged others to do so, even though they believed the Act was not binding on Congress. These congressmen assumed that Congress’s electoral count decisions were not subject to judicial review.¹²⁶ Because they believed that “[n]o power in this Government can or ever will set aside and annul the declaration of who is elected President . . . when that declaration is made in the presence of the two Houses of Congress,”¹²⁷ their view was that a “law will be as a cobweb . . . as against the power of [Congress to] . . . wilfully violate[] . . . destroy[] . . . and trample[] it under foot.”¹²⁸ As Senator John Morgan explained to his colleagues, as the ECA proceeded to its final passage:

121. 17 CONG. REC. 1019-20 (1886) (statement of Sen. Hoar).

122. *Id.*

123. *See, e.g.*, 18 *id.* at 51 (statement of Rep. Adams).

124. *Id.* Adams was speaking against the House committee’s attempt to give conclusive effect to any state that submitted one set of electoral returns. *See infra* text accompanying note 368. Adams begrudgingly accepted this provision in the Senate bill. 18 CONG. REC. 52 (1886). Those decisions, he said, “may be regarded as a judicial determination of the question by a court of last resort,” and that might justify congressional deference. *Id.*

125. *See, e.g.*, 18 CONG. REC. 31 (1886) (statement of Rep. Caldwell); 17 *id.* at 867 (statement of Sen. Morgan).

126. These congressmen understood electoral vote counting as a paradigmatic political question. *See, e.g.*, 17 *id.* at 1058 (statement of Sen. Evarts); *id.* at 1024 (statement of Sen. Ingalls) (describing electoral vote counting as a political function); *id.* at 817, 1020 (statement of Sen. Sherman); 10 *id.* at 3700 (1880) (statement of Sens. Edmunds and Morgan). *But see* 17 *id.* at 1064 (1886) (statement of Sen. Edmunds) (implying availability of quo warranto proceeding for the losing candidate).

127. 17 *id.* at 867 (1886) (statement of Sen. Morgan).

128. *Id.*; *see also* 18 *id.* at 51-52 (statement of Rep. Adams) (speaking in favor of the Senate bill); *id.* at 31 (statement of Rep. Caldwell); 15 *id.* at 5547 (1884) (statement of Rep. Herbert); 10 *id.* at 3700 (1880) (statement of Sens. Morgan and Edmunds).

There is a power in this country existing in most of the tribunals which no one has a right to question or disregard. A decision of the Supreme Court of the United States might be made as a result of bribery, yet there is no power in the country that can set it aside; that is the supreme tribunal. . . . So [Congress when met as] this joint tribunal may vote down the voice of the State's electors, or it may sustain one set of certified votes in preference to another, and after the act has been done the power to revoke it, even the power to question it, has passed beyond human control; the only answer is, in such a case, *ita lex scripta est*.¹²⁹

Yet, to these congressmen, an unenforceable law was better than no agreement at all.¹³⁰ In addition, they believed an unenforceable law was better than a joint rule because of the law's greater ability to bind Congress's conscience and create a moral obligation to abide by its terms: "[W]hatever law we may pass . . . we do no more than to impose upon the consciences of members a sentiment of obedience to law."¹³¹ Senator Morgan concluded:

I will vote for this bill . . . I vote for it for the sake of quietude and peace and reconciliation in this country, believing that perhaps when the bill has passed and been signed by the President, if it should be so signed, it will be a little harder to get rid of than even a concurrent resolution; that there will be men to be found in the two Houses when the count . . . shall take place . . . who will be more reluctant to part with a rule which in itself I conceive to be entirely wise than they would be if it had only received the sanction of the two Houses.¹³²

It is important to appreciate that the Congresses that debated the ECA struggled with the binding law/internal rule dichotomy and chose to set forth their handiwork in the form of law because of that form's greater (though perhaps ultimately limited) ability to bind. Congress understood that even if the ECA enacted rules of only moral obligation, it nonetheless would constrain behavior both outside¹³³ and inside¹³⁴ Congress.

129. 17 *id.* at 867 (1886) (statement of Sen. Morgan); *cf.* 15 *id.* at 5547 (1884) (statement of Rep. Herbert) (discussing the power of the final decision-maker).

130. Senator Morgan, for example, preferred adopting a joint rule. 17 *id.* at 867-68 (1886) (statement of Sen. Morgan).

131. *Id.* at 867; *cf.* 18 *id.* at 75 (statement of Rep. Herbert) (speaking of the "law-abiding" sentiment of the American people).

132. 13 *id.* at 2651 (1882) (statement of Sen. Morgan).

133. The ECA certainly impacted the litigation surrounding the 2000 presidential election. *See,*

In addition, knowing that some supporters of the ECA considered its provisions as only binding on Congress's conscience may affect our understanding of congressional debate, and therefore, of the ECA's various provisions. It is important to know that some congressmen conceived the ECA as a joint rule, and therefore, that a majority vote in Congress could implicitly set it aside because those sentiments sometimes get entwined with their discussion of what the ECA rules were supposed to mean.¹³⁵ At all times, we must be sensitive to separate whether a particular provision was meant to be binding, if only as an internal rule, from whether it was meant to be entirely discretionary.¹³⁶

It is, of course, impossible to know how many congressmen voted for the ECA believing they were enacting binding law as compared to the number of members who accepted the "rules of moral obligation" approach.¹³⁷ Whether the ECA is a statute or a joint rule enacted in statutory form is ambiguous. In truth, both theories underlay its enactment.

The difference between the two theories disappears, however, to the extent that the ECA involves political questions not subject to judicial review.¹³⁸ The difference between the two theories also disappears to the extent that Congress self-enforces its own internal rules.¹³⁹ The houses of

e.g., *Bush v. Gore*, 531 U.S. 98, 110 (2000) (refusing to remand case because "safe harbor" provision of the ECA was about to expire).

134. *See* 18 CONG. REC. 75 (1886) (statement of Rep. Herbert) (commenting on how the ECA's ability to bind Congress's conscience would be amplified by the American people's desire for application of preexisting law to close elections).

135. *See, e.g., id.* at 30-31 (statement of Rep. Caldwell).

136. An illustration is the statement by Representative Caldwell, Chairman of the House committee managing the ECA on final passage, on why removing the word "lawful" from a particular clause was of no moment and whether section 2 of the ECA was meant to control against a concurrent vote of the two houses. *Id.*

137. Neither house of Congress recorded most of its votes on the bill, including the final vote. It is difficult to estimate how many colleagues each senator spoke for or persuaded.

In addition, some congressmen made remarks, probably predicated on the view that Congress's electoral vote counting was not judicially reviewable, which indicates that they did not think the statute/rule issue was critical. *See, e.g., id.* at 30. ("Congress may provide by law or joint rule the manner of counting the [electoral] vote.").

138. Most congressmen during the years the ECA was debated assumed there would be no judicial review of Congress's electoral vote counting decisions. *See, e.g., 17 id.* at 1058 (statement of Sen. Evarts); *id.* at 867 (statement of Sen. Morgan); 15 *id.* at 5455 (1884) (statement of Rep. Hart); Eric Schickler et al., *Safe at Any Speed: Legislative Intent, The Electoral Count Act of 1887, and Bush v. Gore*, 16 J.L. & POL. 717, 750-54 (2000) (Congress rejected federal court involvement in the electoral count).

139. The difference between the two theories may be muted for another reason: In theory the courts will enforce Congress's in-house rules when the rights of a third party, perhaps a losing presidential candidate, are affected. *See* Bach, *supra* note 107, at 730-31 (noting that courts are reluctant to oversee enforcement of in-house rules); John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment*

Congress do take their in-house rules seriously, if only because it is in the long-term interest of the individual members and the leadership to do so.¹⁴⁰ Perhaps the uniqueness, the stress, and the enormous prize involved in the outcome of a contested presidential election presents an exceptional situation in which the traditional norms of congressional behavior will be suspended. Traditional norms of judicial behavior seem to have constrained neither the justices who sat on the 1877 Electoral Commission,¹⁴¹ nor the Court that decided *Bush v. Gore*.¹⁴² If so, with or without judicial review, the ECA may not bind.¹⁴³

The congressmen who debated and enacted the ECA, by living through the contested Hayes-Tilden election, knew the pressures of close presidential elections. Their opinion was that putting the ECA in statutory form would give it more binding force than adopting it as a joint rule.¹⁴⁴ But whether the ECA is a statute or a joint rule, it contains the regulations Congress adopted to govern its vote counting sessions and is Congress's last word on the subject. As with all of Congress's internal rules, let alone obligatory statutes, the ECA has the capacity to influence and guide, if not govern, the conduct of the two houses.¹⁴⁵ Even if it does not bind, Congress needs to understand the ECA's provisions.

Process, 52 CASE W. RES. L. REV. 489, 530-42 (2001) (stating that lower courts reserve the power to intervene but have never done so). *But see* Gregory Frederick Van Tatenhove, Comment, *A Question of Power: Judicial Review of Congressional Rules of Procedure*, 76 KY. L.J. 597, 605-15 (1987) (finding that courts are more willing to intervene).

140. Bach, *supra* note 107, at 732-42 (noting that the Senate is more flexible in this regard than the House).

141. They all voted along party lines. See 13 CONG. REC. 5144 (1882) (statement of Rep. Browne); HAWORTH, *supra* note 5, at 236, 243, 260, 335-36. For contemporary congressional reaction to the Electoral Commission, see *supra* text accompanying note 76.

142. See Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 FLA. ST. U. L. REV. 811, 866 (2001); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1724-47 (2001); Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in Bush v. Gore*, 29 FLA. ST. U. L. REV. 493, 496 (2001); Randall Kennedy, *Contempt of Court*, 12 AM. PROSPECT 15 (2001), reprinted in *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY* 336 (E.J. Dionne, Jr. and William Kristol eds., 2001); Cass Sunstein, *What We'll Remember in 2050*, CHRON. HIGHER EDUC. (2001), reprinted in *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra*, at 339; Jeffrey Rosen, *The Supreme Court Commits Suicide*, NEW REPUBLIC, Dec. 25, 2000 at 18, reprinted in *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra*, at 311.

143. It should be noted, however, that in 1877, the House, which was controlled by Democrats, did abide by the Electoral Commission statute even though it failed to work in the Democrats' favor. HAWORTH, *supra* note 5, at 278-83.

144. See *supra* text accompanying note 132.

145. The ECA matters until it is amended or rescinded. As previously discussed, whether the ECA is a statute or an internal rule matters for how it may be amended or rescinded. See *supra* text accompanying notes 25-26.

B. *Relevant Premises of Nineteenth-Century Election Law and Administrative Law*

Congress's debates and committee reports make it evident that enacting the ECA required congressmen to take positions on Congress's power to count electoral votes, the scope of that power, and whether that power was subject to legislative control. Frequently, these were the subjects under discussion. In contrast, it is less evident that enacting the ECA required congressmen to draw from their understanding of nineteenth-century election and administrative law. As compared to the ECA's other premises, nineteenth-century election and administrative law were the overt subjects of discussion far less often.¹⁴⁶ Rather, Congress's understanding of nineteenth-century election and administrative law influenced the ECA debates by providing the concepts and terms for analyzing important aspects of the subject with which Congress was dealing. Nineteenth-century election and administrative law's influence is reflected less in what Congress talked about than in what Congress assumed when it was debating.

Nineteenth-century election and administrative law did not determine the content of the ECA. Presidential elections have so many unique aspects that Congress, at least to some extent, decided to govern them with *sui generis* rules. Congress certainly decided that, even when it is counting electoral votes, it is not an administrative tribunal entirely subject to administrative norms.¹⁴⁷ In counting electoral votes, Congress considered itself the nation's ultimate political tribunal canvassing both the sovereign states' appointment of presidential electors and the electors' exercise of their unique office.¹⁴⁸ To be sure, some congressmen considered Congress's role in electoral vote counting as a ministerial administrative function.¹⁴⁹ Others deemed it wholly political, subject to no rule other than the "justice [of] the particular occasion."¹⁵⁰ Most congressmen fell

146. For examples of congressmen drawing from administrative law and election law, see 17 CONG. REC. 1064 (1886) (statement of Sen. Edmunds); 15 *id.* at app. 305-06 (1884) (statement of Rep. Broadhead).

147. Neither did Congress consider itself a judicial body governed by judicial norms.

148. *See, e.g.*, 18 CONG. REC. 30 (1886) (statement of Rep. Caldwell); 13 *id.* at 2651-52 (1882) (statement of Sen. Blair); *id.* at 2650 (statement of Sen. Morgan).

149. *See, e.g.*, 18 *id.* at 45-47 (1886) (statement of Rep. Dibble); 8 *id.* at 72-73 (1878) (statement of Sen. Jones); *see also* SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 691-702 (1877) (statement of Sens. Baldwin and Pinckney on the Grand Committee Bill of 1800).

150. 13 CONG. REC. 2650 (1882) (statement of Sen. Morgan); *see also* 15 *id.* at 5099-5101, 5105 (1884) (statement of Rep. Pryor).

somewhere in between and crafted an electoral vote counting regime influenced by diverse norms.¹⁵¹

Nevertheless, Congress's understanding of nineteenth-century election and administrative law shaped Congress's imagination of what it might do. It also shaped Congress's understanding of the regulations it enacted. Recovering the premises of nineteenth-century election and administrative law is necessary to interpret various ECA provisions.

It is, for example, frequently said that in the nineteenth century, as in the modern era, elections were administrative proceedings with no right to judicial review.¹⁵² That is true, but misleadingly so. In the nineteenth century, the executive branch's administration of elections almost invariably was subject to judicial review at the behest of interested parties, be they executive branch officials, defeated candidates, or even voters.¹⁵³ Knowing the broad outlines of nineteenth-century election law and administrative law is fundamental to recovering Congress's understanding of the ECA.

1. Nineteenth-Century Election Law

A simplified version of an uncontested nineteenth-century election is that the voters balloted at local polling stations where administrative officials determined if they were qualified and, if they were, accepted their ballots.¹⁵⁴ After the polls closed, the local election officials tallied the votes,¹⁵⁵ which sometimes involved discretionary judgments as to the legality of the ballot¹⁵⁶ and for whom it was cast.¹⁵⁷ The local officials then forwarded the results of their tally to the county canvassing officials, who

151. See, e.g., 18 *id.* at 51-52 (1886) (statement of Rep. Adams) (Congress may legislate only for the case where its houses disagree); *id.* at 49 (statement of Rep. Eden) (Congress may act only when a state presents multiple returns). It is impossible to determine the extent these congressmen did so from constitutional or prudential considerations.

152. See, e.g., THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 623 (photo reprint 1972) (1868) (statutes may make the canvass "conclusive" or establish a "special . . . board . . . with powers of final decision"); GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 286-87 (Chicago, 4th ed., Callaghan & Co. 1897) (observing that "exclusive jurisdiction" to review elections may be committed to administrative boards or municipal legislatures); Edmunds, *supra* note 31, at 17.

153. See *infra* text accompanying notes 167-68.

154. See, e.g., ILL. REV. STAT. ch. 46 (1880); ILL. REV. STAT. ch. 37 (1845); 1822 N.Y. LAWS 268; COOLEY, *supra* note 152, at 617-23; MCCRARY, *supra* note 152, at 196-226, 387-406. I use the term "ballot," but the same was true in the early part of the century when voting was by voice, and, in the latter part of the century when voting, in some jurisdictions, was by machine.

155. COOLEY, *supra* note 152, at 934.

156. MCCRARY, *supra* note 152, at 107.

157. See COOLEY, *supra* note 152, at 606-14, 616-17, 620-21; MCCRARY, *supra* note 152, at 387-406.

added the various local tallies together when a race covered multiple polling precincts.¹⁵⁸ The county returning board forwarded the results of their canvass to the state canvassing board.¹⁵⁹ That board checked the county returns for proper form and added the county returns together when a race was statewide or covered multiple counties.¹⁶⁰ When all the tallies were complete, the state canvassing board certified the outcome of each race.¹⁶¹ Based on that certification, the state's governor¹⁶² issued certificates of election to the candidates that the administrative canvass showed to have a plurality of the votes, or a majority when that was required.¹⁶³

Should the result of the election as certified by the administrative apparatus be challenged, the fundamental rule of nineteenth-century election law was that the voters' ballots entitled someone to elective office, not the governor's certificate.¹⁶⁴ In the nineteenth century, election outcomes as declared by election administrators, and as certified by the governor, almost always were subject to challenge in court.¹⁶⁵

158. COOLEY, *supra* note 152, at 934.

159. *Id.*

160. *Id.* at 934-35.

161. *Id.* at 934.

162. State law might provide that the certificate be issued by the state returning board or the secretary of state. MCCRARY, *supra* note 152, at 228-29. Frequently, the duty was placed on the governor, *see, e.g.*, ILL. REV. ST. ch. 46, § 78 (1880), and, for simplicity, I will refer only to his certificate.

163. COOLEY, *supra* note 152, at 619-20, 621-22; MCCRARY, *supra* note 152, at 228-30.

164. *People v. Cook*, 8 N.Y. 67, 83 (1853) ("[I]t is the election, and not the certificate of the canvassers that gives the right to an office."); *Att'y Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567, 826 (1855) ("[I]t is the election to an office, and not the canvass of the votes, which determines the right to the office."); *see also* COOLEY, *supra* note 152, at 623-24; MCCRARY, *supra* note 152, at 279-336. Thomas McIntyre Cooley, doyen of nineteenth-century constitutional scholars, put the matter this way:

As the election officers perform for the most part ministerial functions only, their returns, and the certificates of election which are issued upon them, are not conclusive in favor of the officers who would thereby appear to be chosen, but the final decision must rest with the courts. This is the general rule, and the exceptions are of those cases where the law under which the canvass is made declares the decision conclusive, or where a special statutory board is established with powers of final decision. Whatever may be the office, an election to it is made only by the candidate receiving the requisite plurality of the legal votes cast; and if any one, without having received such a plurality, intrudes into an office, whether with or without a certificate of election, the courts have jurisdiction to oust, as well as to punish him for such intrusion.

COOLEY, *supra* note 152, 623-24.

165. *See infra* text accompanying notes 166-77.

In England, the writ of quo warranto was used to subject elections to judicial review.¹⁶⁶ In the early nineteenth century, American courts adapted quo warranto into a proceeding where state attorneys general, unsuccessful candidates, or any voter could challenge the right of a candidate to exercise the office to which the governor's certificate of election said he was entitled.¹⁶⁷ In several celebrated cases, even the governor's claim to office was held subject to challenge through quo warranto proceedings.¹⁶⁸ Following English practice, the only exception was legislative office because, by common-law tradition, the legislature itself is the appropriate tribunal for determining the elections and qualifications of its own members.¹⁶⁹

The courts' jurisdiction to try an officeholder's right to the position through quo warranto had a common law, not a constitutional, basis. Legislatures could deny their courts quo warranto jurisdiction without enacting any substitute.¹⁷⁰ Typically this was not done.¹⁷¹ Rather, throughout the nineteenth century, legislatures sought to modernize election challenges by creating election contest laws to supplement quo

166. JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, EMBRACING MANDAMUS, QUO WARRANTO AND PROHIBITION 544, 557, 580, 634-35 (Chicago, 3d ed., Callaghan & Co. 1896); MCCRARY, *supra* note 152, at 294.

167. *See, e.g.*, *People ex rel. Budd v. Holden*, 28 Cal. 123, 129 (1865); *People ex rel. Smith v. Pease*, 27 N.Y. 45, 54 (1863); *People ex rel. Van Voast v. Van Slyck*, 4 Cow. 297, 323, 325 (N.Y. Sup. Ct. 1825); *Barstow*, 4 Wis. at 584; COOLEY, *supra* note 152, at 623-24; MCCRARY, *supra* note 152, at 279-36.

168. *State ex rel. Drew v. McLin*, 16 Fla. 17, 62, 65 (1876); *Barstow*, 4 Wis. at 602; 17 CONG. REC. 1064 (1886) (statement of Sen. Edmunds) (mentioning the availability of quo warranto proceedings to review gubernatorial elections). *But see State v. Baxter*, 28 Ark. 129, 139 (1873) (state constitution vests contest over governor's office exclusively in state legislature). Senators Edmunds and Sherman suggested that even the Presidency might be subject to quo warranto proceedings. *See* SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 481 (1877) (statement of Sen. Edmund) (stating that quo warranto available for presidential elections); 17 CONG. REC. 817 (1886) (statement of Sen. Sherman). But other senators strongly disagreed. *See, e.g., id.* (statement of Sen. Hoar). In 1882, the House committee's substitute for the Senate bill provided for quo warranto proceedings after Congress counted the electoral votes. 13 *id.* at 5143 (1882). The substitute bill never passed.

169. The Constitution expressly vests this authority in Congress. *See, e.g.*, U.S. CONST. art. I, § 5, cl. 1. Some state constitutions vested authority to determine challenges to gubernatorial elections in the legislature also. *See*, MCCRARY, *supra* note 152, at 281 (citing *Baxter*, 28 Ark. at 129).

170. COOLEY, *supra* note 152, at 623. *But see id.* at 624 n.1 (citing *People v. Cicott*, 16 Mich. 283 (1868)) (indicating that the person receiving the requisite number of votes has a constitutional right to have his claim tried by a jury).

171. *See* H.R. MISC. DOC. NO. 44-13, at 481 (statement of Sen. Edmunds) (stating that presidential elections are subject to judicial proceedings); 17 CONG. REC. 1064 (1886) (statement of Sen. Edmunds) (commenting that all states subject election administration to judicial oversight); *infra* text accompanying notes 172-75.

warranto actions.¹⁷² Legislatures could make the streamlined election contest proceedings the exclusive means to challenge election outcomes. Typically, they chose not to.¹⁷³ When courts addressed the issue of whether a legislature intended its election contest law to entirely supplant quo warranto proceedings, they created the general rule that “ousting” the courts’ quo warranto jurisdiction required a clear legislative statement.¹⁷⁴ Generally, then, unsuccessful candidates (other than candidates for legislative office) had two avenues for judicial review of the election administrators’ decisions and the propriety of the governor’s certificate of election: quo warranto and election contest proceedings.¹⁷⁵

For the purposes of this Article, it would not matter if legislatures had entirely supplanted quo warranto proceedings with election contest laws. Although they did not have to be, election contests, like quo warranto, were judicial proceedings.¹⁷⁶ The point is that nineteenth-century elections were not merely administrative affairs entirely governed by the executive branch.¹⁷⁷

That the governor’s certificate of election was not conclusive did not mean that it was of no value. The governor’s certificate gave its holder a prima facie right to office.¹⁷⁸ Until any challenge to that right was successfully completed, the candidate was entitled to hold office, exercise its powers, and receive its emoluments.¹⁷⁹ The candidate with the prima facie right was an officer de facto.¹⁸⁰ His acts in office could not be attacked on the grounds that he was not, in fact, entitled to the office.¹⁸¹ A public official’s right to office could be questioned only in a direct challenge to his title to office through quo warranto or election contest proceedings.¹⁸²

172. Legislatures also sought to modify quo warranto actions by enacting Actions in the Nature of Quo Warranto. See MCCRARY, *supra* note 152, at 236-37.

173. See *infra* text accompanying notes 175-77.

174. MCCRARY, *supra* note 152, at 281.

175. Defeated legislative candidates, and high executive officials, when they did not have recourse to the courts, could contest their (non)elections before the legislature. Nineteenth-century election contest laws may not have extended to presidential electors, and they may have only had recourse through quo warranto proceedings. See *infra* text accompanying notes 241-56, 214 (discussing quo warranto in 1870s elections and the absence of contest laws for presidential elections).

176. See COOLEY, *supra* note 152, at 624-26; MCCRARY, *supra* note 152, at 280, 311-16, 339.

177. This is generally true under modern law also. An exception may be presidential elector contest states—like Texas—which are brought only before the governor. TEX. ELEC. CODE ANN. § 221.002 (Vernon 2003).

178. See COOLEY, *supra* note 152, at 624-25; MCCRARY, *supra* note 152, at 227-42.

179. MCCRARY, *supra* note 152, at 189.

180. *Id.* at 191.

181. *Id.* at 149.

182. *Id.* at 199.

The important lessons to draw from this sketch of nineteenth-century election law is that the governor's certificate of election, issued as the official statement of an election's outcome after completion of the administrative process, did not give the successful candidate a conclusive right to office. A perfected title to office, so to speak, required judicial proceedings that reviewed all aspects of the underlying election and administrative process.¹⁸³ However, the governor's certificate did entitle the candidate who possessed that credential to hold office until a successful challenge to his title had been completed.

What these precepts meant for presidential elections when electoral votes were received and challenged before Congress was a subject of contentious debate in the Congresses that developed the ECA. The contending positions will be reviewed in Part III when the ECA is analyzed in detail.¹⁸⁴ On one point, however, the congressmen debating the ECA were in general agreement: that the only people entitled to exercise the electors' office and have their electoral votes counted by Congress were the people who were electors de facto on the date the electors balloted for President.¹⁸⁵ In other words, only the people who had the governor's certificate of election were entitled to cast electoral votes unless a successful challenge had been completed by elector balloting day.¹⁸⁶ An unsuccessful candidate for the elector's office who had not completed his challenge could not possibly cast an electoral ballot that would be counted. This was because, in Congress's view, in order to do an official act, one had to be (at least) an officer de facto on the date that act needed to be done.¹⁸⁷

For nineteenth-century presidential elections, Congress's view of the "officer de facto" doctrine gave unusual electoral significance to the outcome of the state's administrative process. Until the passage of the

183. See, e.g., Edmunds, *supra* note 31, at 9 (equating prima facie determinations with the political branches and equating finality with judicial determination).

184. See, e.g., *infra* text accompanying notes 353-62, 431-37; see also *infra* text accompanying notes 198-227 (discussing the views of Justice Bradley and Field while on the Election Commission).

185. See, e.g., SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 362 (1877) (detailing the Senate Committee Report on the effect of Louisiana quo warranto proceeding in 1872); 5 CONG. REC., pt. 4, 261 (1877) (statement of Justice Bradley, as an Electoral Commission member). Senator Morton indicated some disagreement with the 1872 Committee Report, but later changed his mind. See *id.* at 196 (discussing the Florida case in 1876); DOUGHERTY, *supra* note 10, at 86. But see 5 CONG. REC., pt. 4, 250 (statement of Justice Field, as an Electoral Commission member) (arguing that the quo warranto proceeding, which was filed before but decided after the electors balloted, related back to the date of filing and controlled who were the proper electors).

186. Congress could refuse to count the vote of the certified person. See *infra* text accompanying notes 212, 433 (discussing 1873 dispute over Louisiana's vote).

187. See H.R. MISC. DOC. NO. 44-13, at 362 (addendum by Sen. Morton).

ECA, there were only twenty-nine days between election day and elector balloting day.¹⁸⁸ In the turbulent elections of 1872 and 1876, twenty-nine days had proven insufficient time to complete even the trial phase of an election challenge.¹⁸⁹ Part of the problem, Congress was quick to note, was that although the states could have extended their expeditious election contest laws to presidential elections, they had not done so.¹⁹⁰ Prior to the ECA, presidential elections were subject to judicial scrutiny, but only through the procedurally less efficient writ of quo warranto. In 1872 and 1876, quo warranto proceedings had been brought to review the presidential election in various states, but none of them even had their trial phase completed before the electors balloted.¹⁹¹

Congress's understanding of the officer de facto doctrine did not mean that the candidate who had the appropriate credentials on elector balloting day was entitled to have his vote counted by Congress. Although Congress felt it could not retroactively seat another candidate and count his vote, the heart of the ECA debate concerned under what conditions Congress could reject the vote of a credentialed elector when Congress believed he had been seated improperly.¹⁹²

From an election law perspective, then, in debating the ECA, the issues before Congress included whether (and how) Congress should encourage the states to extend their election contest laws to presidential elections, and the extent to which Congress had (or should have) the power to reject electoral votes that had been cast by credentialed electors, who were officers de facto, on elector balloting day.

2. Nineteenth-Century Administrative Law

In many ways, when Congress debated its power to reject electoral votes cast by credentialed electors, it did so with a mindset framed by the norms of nineteenth-century administrative law. Most important was the fundamental principle that ministerial administrative acts were subject to judicial review, but discretionary administrative acts generally were not.¹⁹³

188. See *infra* text following note 236.

189. See *infra* text accompanying notes 240-60.

190. See *infra* text accompanying note 276.

191. See *infra* text accompanying notes 241-61. The quo warranto proceedings were completed before Congress met to count electoral votes, but Congress ignored the results of the quo warranto actions because they were not concluded before elector balloting day. H.R. MISC. DOC. NO. 44-13, at 362 (1877) (addendum by Sen. Morton); 5 CONG. REC., pt. 4, 261 (statement of Justice Bradley).

192. See, e.g., *infra* text accompanying note 365, 536 (discussing attempts to broaden the conclusive effect of state certification).

193. See 8 CONG. REC. 70-72 (1878) (statement of Sen. Morgan); Frank J. Goodnow, *The Writ of Certiorari*, 6 POL. SCI. Q. 493, 512-14 (1891); Louis L. Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 970-71 (1957) [hereinafter Jaffe, *Judicial Review*];

There was an exception to this principle: discretionary administrative decisions made by administrators who were acting on matters outside their jurisdiction, or whose decisions were tainted by fraud or corruption, could always be set aside in a court of law.¹⁹⁴ A fraudulent decision, or a decision made without jurisdiction, was no decision at all and could be ignored. Stated another way, when a tribunal or decision-maker made a discretionary decision within his jurisdiction, that decision was not subject to judicial revision for mere error, gross error, or any error that did not support a finding of corruption, fraud, or lack of jurisdiction.

If these norms of administrative law applied without translation to Congress's counting of electoral votes, it would mean that Congress could go behind the governor's certificate, the state returning board, and the local returning boards because, typically, they acted ministerially. It also meant that Congress could not challenge the conduct of the election at the precinct level because, absent fraud, the decisions made there were discretionary judgments about voter qualification and ballot reading.

But Congress was not a court reviewing the administrative process of an election. Congress was a political body reviewing, on behalf of the nation and all the states, the states' appointment of their electors under constitutional provisions that firmly and exclusively delegated the power of appointment to the states. Some nationalistic congressmen took this difference to mean that Congress was not bound by the norms of administrative law and could go behind both ministerial and discretionary decisions of state officials to police the purity of national elections.¹⁹⁵ Other trenchantly states' rights congressmen took this difference to mean that Congress could not even go behind the ministerial action of the states' administrative officials.¹⁹⁶ The states spoke to Congress through the credentials issued by their duly-constituted officials. For Congress to challenge the officials' decisions was to intrude improperly into the states' right to appoint electors.¹⁹⁷

Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 419 (1958); Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 305 (1948).

194. See H.R. MISC. DOC. NO. 44-13, at 691 (statement of Sen. Baldwin); MCCRARY, *supra* note 152, at 423-29 (discussing fraud by election officials); *infra* text accompanying notes 208-11, 357-59.

195. See, e.g., 18 CONG. REC. 50-51 (1886) (statement of Rep. Adams); *id.* at 31 (statement of Rep. Caldwell); 15 *id.* at 5461-62 (1884) (statement of Rep. Springer); *id.* at 5547 (statement of Rep. Herbert); 13 *id.* at 2651-52 (1882) (statement of Sen. Blair).

196. See, e.g., 18 *id.* at 45-47 (1886) (statement of Rep. Dibble); 8 *id.* at 72-73 (1878) (statement of Sen. Jones); see also H.R. MISC. DOC. NO. 44-13, at 691-702 (statements of Sens. Baldwin and Pickney).

197. According to the proponents of this view, the remedy for fraudulently issued credentials was punishment at the state level. See H.R. MISC. DOC. NO. 44-13, at 696 (statement of Sen. Pickney); 18 CONG. REC. 45 (1886) (statement of Rep. Dibble).

There were, of course, various positions in between. The play of these norms in the Hayes-Tilden election controversy of 1876 shows how many different ways they could be elaborated and applied in complex disputes. Consider, as one example, the analysis given by Justice Joseph Bradley in casting the votes that decided all the controversies before the Electoral Commission of 1877.¹⁹⁸

To resolve the disputed election of 1876, Congress created an Electoral Commission with the “same powers, if any, now possessed” by Congress to accept or reject electoral votes from the four states that submitted multiple packets of electoral votes from competing slates of electors.¹⁹⁹ To Justice Bradley, this meant that only the electors who had the governor’s certificate of election on elector balloting day plausibly had a right to have their ballots counted.²⁰⁰ In Florida, Louisiana, and South Carolina, the Republican electors had the governor’s certificate of election, meaning that they had a *prima facie* right to have their ballots counted, not that they should have their ballots counted.²⁰¹ In every case, Justice Bradley went behind the governor’s certificate because it was ministerial to determine whether the governor properly acted at the direction of the state returning board.²⁰² In the cases of Florida, Louisiana, and South Carolina, the

198. See 5 CONG. REC., pt. 4 (1877). I use Justice Bradley as my example even though he was not a member of Congress because: (1) while on the Electoral Commission he was charged with applying Congress’s powers; (2) he was regarded as the most nonpartisan member of the Commission; and (3) he analyzed all the disputed cases (while other members of the Commission did not). At this point, I am not analyzing how Congress necessarily used the norms of election and administrative law. Instead, I am showing how the norms could be used, and that they were used, by contemporaries to think about Congress’s electoral vote counting powers. These norms informed the arguments of all the members of the Electoral Commission and the advocates arguing before them, whether they were congressmen or justices. See *id.*

199. Act of Jan. 29, 1877, ch. 37, § 2, 19 Stat. 277, 229; see also 5 CONG. REC., pt. 4, 259 (1877) (statement of Justice Bradley) (“[T]he powers of the Commission are precisely those . . . Congress possess[es] in counting electoral votes.”). Bradley’s remarks left open whether Congress could amplify its powers through legislation. *Id.* at 264. No power enhancing legislation had been enacted, however.

For a review of the various disputes before the 1877 Electoral Commission, see DOUGHERTY, *supra* note 10, at 136-213; FAIRMAN, *supra* note 5, at 56-122; HAWORTH, *supra* note 5, at 57-167, 220-84.

200. 5 CONG. REC., pt. 4, 261 (1877) (statement of Justice Bradley) (discussing the Florida case). In Florida, a quo warranto proceeding was commenced before the electors balloted and was concluded, at the trial level, before Congress met to count the electoral votes. HAWORTH, *supra* note 5, at 78-80. Applying the officer de facto doctrine, Justice Bradley refused to consider the outcome of the quo warranto action. 5 CONG. REC., pt. 4, 261 (1877). Justice Field disagreed with him on this point. *Id.* at 247 (statement of Justice Field).

201. 5 CONG. REC., pt. 4, 263, 265, 266 (1877) (statement of Justice Bradley).

202. *Id.*

governor had issued certificates to the electors that the returning boards determined had won.²⁰³ So, that is where the matter ended.

For Justice Bradley, the matter ended with the determination of the state returning boards even though, in Florida and Louisiana, the decisions of the state boards were themselves subject to challenge.²⁰⁴ The state returning boards were charged with having produced a Republican majority by fraudulently rejecting local returns favorable to the Democratic electors.²⁰⁵ Justice Bradley, however, refused to go behind the actions of the state returning boards because he determined that those boards, under the unique laws of their states, exercised discretionary powers in determining whether to accept returns from the county canvassing authorities.²⁰⁶ In Florida and Louisiana, rejecting local returns was a discretionary decision which Justice Bradley, representing Congress, would not overturn in the absence of fraud.²⁰⁷

In responding to the fraud allegation, Justice Bradley did not say that fraud never vitiated a returning boards' discretionary decisions. Nor did he say that fraud always did. Rather, Justice Bradley took a middle course and acknowledged that Congress was in a unique position. Without having enacted legislation to aid itself, Congress had limited time and institutional capacity to conduct a quasi-judicial investigation into the facts of the alleged frauds.²⁰⁸ Therefore, under the Constitution, Congress's inherent power was limited to setting aside returns only for "manifest fraud."²⁰⁹ "Manifest fraud" was fraud that was so notorious that it "did not require an

203. *Id.*

204. The objection to the South Carolina returns focused on the entire conduct of the election and the presence of federal troops, not on any decision of the state canvassing board. *Id.* at 266. Bradley ruled that Congress, when meeting to count electoral votes, could take "notice" of disorder "of such a public character" as "secession and the late civil war" but not of lesser disorders. *Id.* Without a law providing for investigation, Congress had to assume the election was conducted properly. *Id.*; see also *infra* text accompanying note 209 (discussing "manifest fraud").

205. 5 CONG. REC., pt. 4, 261, 262-63 (1877).

206. *Id.* Justice Bradley was correct that the Louisiana statute was unique in giving its returning board discretionary power. See *State ex rel. Bonner v. Lynch*, 25 La. Ann. 267 (1873) (finding that the Supreme Court of Louisiana cannot go behind state returning board because the board exercises discretionary functions). However, Justice Bradley's view of the Florida returning board was not correct. In saying the Florida board also had discretionary power, Bradley pointedly did not follow the Supreme Court of Florida's determination that the Florida state canvassing board exercised only ministerial authority. 5 CONG. REC., pt. 4, 261 (1877) (statement of Justice Bradley); *State ex rel. Drew v. McLin*, 16 Fla. 17 (1876). Bradley said simply, "I do not concur" with the Florida court; the court's ruling that the canvassing board exceeded its jurisdiction "was not necessary to the judgment." 5 CONG. REC., pt. 4, 261 (1877). In doing this, he presaged the treatment of the Supreme Court of Florida by the United States Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000).

207. 5 CONG. REC., pt. 4, 261, 263 (1877) (statement of Justice Bradley).

208. *Id.* at 260, 263-64 (statement of Justice Bradley).

209. *Id.* at 263 (statement of Justice Bradley); see also *id.* at 260, 261.

investigation on the part of the [Congress] to ascertain by the taking of evidence the truth of the case."²¹⁰ In Bradley's view, if the Florida and Louisiana returning boards had erred at all, it was that their "proceedings . . . were . . . based on erroneous principles and findings."²¹¹ A discretionary administrative decision could not be set aside for mere error.

However, Justice Bradley determined that the governor of Oregon had not issued his certificate of election as directed by the state canvassing authority.²¹² Oregon's canvassing authority had determined that the Republican electors had the most votes and certified them.²¹³ One of the Republican electors, however, was constitutionally ineligible because he was a United States postmaster.²¹⁴ For that reason, Oregon's governor, who was a Democrat, refused to issue a certificate of election to the ineligible elector.²¹⁵ Instead, the governor gave his certificate to a Democratic elector on the grounds that that elector had received the next highest number of votes.²¹⁶

Responding to these facts, Justice Bradley ruled that under Oregon law the governor had no authority to make such a decision.²¹⁷ In credentialing the Democratic elector, Oregon's governor was acting beyond his jurisdiction.²¹⁸ The governor's only power was ministerial, to credential whomever the state canvassing authority anointed.²¹⁹ Therefore, Justice Bradley concluded, the Democratic elector was never properly seated; his vote was not to be counted.²²⁰ The Republican elector who filled the vacancy created when the ineligible elector resigned was properly in office on elector balloting day; that elector's vote was the one to receive.²²¹ With all disputed electoral votes awarded to Republican electors, Rutherford Hayes won the Presidency by one electoral vote.²²²

210. *Id.* at 263.

211. *Id.* at 261.

212. *Id.* at 265. The state canvassing authority was the secretary of state, not a board. *Id.*

213. *See id.* at 264-66.

214. DAVID A. MCKNIGHT, *THE ELECTORAL SYSTEM OF THE UNITED STATES* 419 (F.B. Rothman 1993) (1878).

215. HAWORTH, *supra* note 5, at 158, 162-63; MORRIS, *supra* note 5, 183-85.

216. HAWORTH, *supra* note 5, at 163; MORRIS, *supra* note 5, at 184.

217. *See* 5 CONG. REC., pt. 4, 265 (1877) (statement of Justice Bradley).

218. *Id.* at 265.

219. *Id.*

220. *Id.*

221. The ineligible elector who resigned, and the elector who the remaining Republican electors had appointed to fill the vacancy, were the same person. HAWORTH, *supra* note 5, at 165.

222. *See* Harp Week, *Finding Precedent: Hayes vs. Tilden*, at <http://elections.harpweek.com/9Controversy/bio-Controversy-Full.asp?UniqueID=2&Year=1876> (last visited Feb. 15, 2004).

Of course, the Democrats on the Election Commission had opposing analyses that deployed the norms of nineteenth-century election law and administrative law to argue their respective positions. Justice Stephen Field, for example, held that the Florida board had no discretion, as their “duty . . . was ministerial, involving only the exercise of such judgment as was required to determine whether the papers returned were genuine.”²²³ Justice Field also believed that Oregon law did clothe its governor with authority to refuse to issue a certificate of election to a candidate whose ineligibility was “a fact of public notoriety.”²²⁴ While the governor had no right to grant a certificate of election to the next runner-up,²²⁵ neither did the remaining Republican electors have the right to fill the vacancy created by their colleague’s ineligibility.²²⁶ Oregon, therefore, had validly appointed only two electors, rather than three.²²⁷

Obviously, there was no single perspective on what the norms of nineteenth-century election law and administrative law suggested about Congress’s power to count electoral votes. The importance of these norms is that they were part of the world view with which Congress, from 1873 to 1887, discussed the various bills that finally emerged as the Electoral Count Act of 1887. The norms of election law and administrative law neither determined Congress’s view of its electoral vote counting power, nor settled what the ECA should provide. The norms did, however, help frame the debate. Having them in mind will help to understand the debate’s outcome.

III. THE ELECTORAL COUNT ACT OF 1887

The seven sections of the Electoral Count Act of 1887 attempt to do five things. They are (with the relevant section indicated):

1) give the states enough time between election day and elector balloting day to settle controversies over the appointment of their presidential electors (Section 1);

223. 5 CONG. REC., pt. 4, 245 (1877) (statement of Justice Field).

224. *Id.* at 250.

225. Justice Field held that the weight of American precedent was that when the victorious candidate is ineligible, it is unfair to “elect to office a man whose pretensions the people had designed to reject.” *Id.* at 250; COOLEY, *supra* note 152, at 620 (stating the American rule); MCCRARY, *supra* note 152, at 248-50 (same). English precedent was to the contrary. 5 CONG. REC., pt. 4, 250 (statement of Justice Field); MCCRARY, *supra* note 152, at 247.

226. 5 CONG. REC., pt. 4, 251 (1877) (statement of Justice Field).

227. *Id.* The consequence of Justice Field’s logic, had it prevailed, is that Hayes and Tilden would have tied, and the House, controlled by Democrats, presumably would have elected Tilden.

Justice Field gave no opinion on the Louisiana and South Carolina controversies.

2) encourage the states to establish mechanisms for resolving contests over the appointment of presidential electors prior to the day of elector balloting (Section 2);

3) publicize and place on the record the states' determination of the outcome of their elector appointment process (Section 3);

4) minimize congressional involvement in resolving controversies over elector appointment not authoritatively resolved by the states (Section 4); and

5) settle procedural issues for conducting the joint session at which Congress counts the states' electoral votes (Sections 4-7).

*A. Section 1: Giving the States Enough Time to Settle Controversies over the Appointment of Their Presidential Electors*²²⁸

When Congress, in 1792, first exercised its authority to “determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes,”²²⁹ it selected the first Wednesday in December as the day for the electors to ballot,²³⁰ and allowed the states to appoint their electors at any time “within thirty-four days preceding” that date.²³¹ Not anticipating controversies over who had been selected as an elector, Congress was concerned with minimizing the time between elector appointment and elector balloting. Its concern, paralleling the Framers', was in minimizing the chance that the citizens selected for the responsibility of electing the President would be subject to corrupting influences after their identities were known.²³² Some congressmen wanted an even shorter time frame, but they recognized that Congress had to allow sufficient time for the electors to be notified of their appointment and assemble in an era and at a time of year when communications and travel were difficult.²³³

In 1845, Congress shifted to having the states appoint electors on a uniform day.²³⁴ It selected “the Tuesday next after the first Monday in the month of November” as election day²³⁵ but did not change the date for elector balloting.²³⁶ This left twenty-nine days between the date for elector

228. Electoral Count Act of 1887, ch. 90, § 1, 24 Stat. 373, 373 (current version at 3 U.S.C. § 7 (2000)).

229. U.S. CONST. art. I, § 1, cl. 3.

230. Act of Mar. 1, 1792, ch. 8, § 2, 1 Stat. 239, 239.

231. *Id.* § 1.

232. 2 ANNALS OF CONG. 278-79 (1792).

233. *Id.* (statement of Reps. White, Dayton, and Baldwin). Representative White felt that “[i]f it had been possible, he could have wished that the Electors should meet and give in their votes on the very day of their being chosen.” *Id.* at 278.

234. Act of Jan. 23, 1845, ch. 1, 5 Stat 721 (codified at 3 U.S.C. § 1 (2000)).

235. *Id.*

236. What is popularly known as election day is really “appointment” day, the time when

appointment, which almost universally was by popular election, and the date the electors would ballot. Congress's decision to leave only twenty-nine days between election day and the day the electors balloted reflected a failure to focus on the problems of resolving elector election disputes, probably because of a lack of experience with such disputes. Prior to 1845, the main controversies that had arisen during Congress's electoral vote counting sessions concerned exogenous factors, such as whether the appointed slate came from a territory that had been admitted to the Union as a state.²³⁷ These problems did not raise issues whose resolution involved time-consuming factual determinations that had to be settled to determine who the proper electors were.

From 1845 until 1872, there were bitter controversies, but none involved conflicting claims as to who had title to the electors' office. Rather, they continued to involve exogenous problems.²³⁸

In 1872, Congress's good fortune ended. There were a series of controversies, most of which did not raise questions of the identity of a state's elector.²³⁹ However, one dispute, involving Louisiana's electoral vote, did present a dispute between competing slates, each claiming to be the state's authentic electors.²⁴⁰

electors are appointed. The states determine how electors are appointed; a popular election is one of the ways they may select electors. *See* U.S. CONST. art. II, § 1, cl. 2. By 1845, popular elections had become the near-universal method for selecting electors, but even then, as well as later, states used other methods. *See* Friedman, *supra* note 142, at 817 n.18. In this Article, I will refer to "appointment" day as election day in deference to modern usage.

237. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 72-75 (1877) (discussing whether Michigan was entitled to electoral votes); *id.* at 49-56 (discussing whether Missouri was entitled to electoral votes); *id.* at 46-47 (discussing whether Indiana was entitled to electoral votes). In 1837, there was also a potential controversy, which Congress chose to overlook, over whether appointed electors were constitutionally unqualified because they held federal office. *See id.* at 71. In 1809, there had been a potential controversy, which Congress also ignored, over whether Massachusetts had followed the proper appointment process. *See id.* at 37-42.

238. *See id.* at 246-47 (stating that Georgia electors voted on the wrong day); *id.* at 231-36 (discussing the dispute over votes from Georgia, which arguably had not yet complied with Congress's terms for readmission after the Civil War); *id.* at 86-144 (stating that Wisconsin electors voted on the wrong day); *infra* text accompanying note 590 (discussing 1865 problem of votes submitted by Confederate states).

239. *See* H.R. MISC. DOC. NO. 44-13, at 363-407 (discussing the objection to three Georgia electoral votes cast for Horace Greeley, who had died after election day but before elector balloting day; discussing the objection to Mississippi, Texas, and Arkansas electoral votes for improper certification; and discussing the objection to Arkansas electoral votes because there had been no valid election).

240. There could have been a second dispute over multiple slates of electors: Two slates of electors claimed to have carried Arkansas, but in the end, only one set of Arkansas's electoral votes was presented when the other slate did not press its case. *Id.* at 389-91; *Electoral College*, ARK. GAZETTE, Dec. 5, 1872, at 4:3. Arkansas's electoral vote was still rejected by Congress on the

In the controversy over Louisiana's 1872 electoral vote, Congress immediately perceived that a new problem had arisen and part of the problem was that the states had insufficient time to resolve controversies over elector selection. In 1872, the results of Louisiana's November 5 election were tied up in litigation over which of several contending state canvassing boards was the legal one.²⁴¹ A federal judge asserted jurisdiction under Reconstruction-era legislation and enjoined counting the popular vote because of claims of racial discrimination.²⁴² The federal judge took until December 6 to determine the proper returning board.²⁴³ Unfortunately, elector balloting day in 1872 was Wednesday, December 4.²⁴⁴ On that day, no slate of electors had been certified as elected by a legal canvass of Louisiana's election.²⁴⁵ Consequently, although two different slates of Louisiana electors submitted electoral votes to Congress, one of which was certified by the governor and the other by the secretary of state, both houses of Congress agreed that neither of the competing slates held office as presidential electors as a result of a "lawful" canvass on December 4, the date elector ballots had to be cast.²⁴⁶

The problem of multiple elector slates, each claiming to be the lawful electors, was repeated in 1876. This time there were controversies in three states over the identity of the elector slate that had received the most votes,²⁴⁷ and unlike the 1872 election, the presidential election turned on the disputes' outcome.²⁴⁸ Once again, the short time between election day

grounds that no valid election had occurred and that there had been no proper certification. See H.R. MISC. DOC. NO. 44-13, at 406-07.

241. Althea D. Pitre, *The Collapse of the Warmoth Regime, 1870-72*, 6 LA. HIST. 161, 180-82 (1965).

242. *Kellogg v. Warmouth*, 14 Fed. Cas. 157 (C.C.D. La. 1872) (No. 7667) (Governor Warmoth's name is misspelled in the case); H.R. MISC. DOC. NO. 44-13, at 359 (Senate Report on the Electoral Vote of Louisiana).

243. *Kellogg*, 14 Fed. Cas. at 157; H.R. MISC. DOC. NO. 44-13, at 359 (Senate Report on the Electoral Vote of Louisiana).

244. H.R. MISC. DOC. NO. 44-13, at 391-94 (Certificates of Louisiana electors indicating the date they cast their ballots).

245. *Id.* at 394 (statements of Reps. Sheldon and Stevenson, and Sen. Carpenter); *id.* at 361 (statement in Senate Report).

246. See *Kellogg*, 14 Fed. Cas. at 157; H.R. MISC. DOC. NO. 44-13, at 358-63, 391-94, 396-99, 402-05; Pitre, *supra* note 241, at 178-82. The action filed in Louisiana on November 14, 1872 to determine the proper composition of the canvassing board was not resolved until January 1873. See *State v. Wharton*, 25 La. Ann. 2 (1873); H.R. MISC. DOC. NO. 44-13, at 362.

247. See *supra* notes 201-21 and accompanying text. Oregon also sent in multiple slates of electors. In Oregon, however, the problem did not involve who won the election. One of the Republican electors held a federal appointment and was, therefore, ineligible to be a presidential elector. The controversy turned on the governor's power to make a substitute appointment. See *supra* text accompanying note 218. Because the Oregon dispute did not involve an election contest, it will not be discussed at this point.

248. Hayes and Tilden were separated by one electoral vote. See *supra* note 222.

and elector balloting day was at the heart of the problem. Twenty-nine days had once again proved too short for the states to sort out whether the Republican or Democratic electors had garnered the most votes even though timely quo warranto actions were filed in Florida and South Carolina.²⁴⁹

In 1876, election day was Tuesday, November 7 and elector balloting day was Wednesday, December 6. Perhaps for strategic reasons, Florida's administrative canvass of the election results was not completed until early morning on Wednesday, December 6, the day the electors balloted.²⁵⁰ That canvass, by a Republican-controlled board, refused to count various returns favoring Democratic electors and ruled that the Republican electors had carried the state by 924 votes.²⁵¹ The defeated Democratic electors immediately commenced a quo warranto proceeding.²⁵² The quo warranto was not resolved at the trial level until January 25.²⁵³ Although the trial court, presided over by Judge Pleasant White, a Democratic partisan, ruled in favor of the Democratic electors and overturned the returning board's action,²⁵⁴ the Republican electors filed an appeal which the Florida Supreme Court set for argument at its regular session in June 1877.²⁵⁵ That was about four months after Congress had counted Florida's electoral votes for Hayes.²⁵⁶ Prominent among the reasons given by the Republican-dominated Electoral Commission for counting Florida's Republican

249. See 5 CONG. REC., pt. 4, 261 (1877) (statement of Justice Bradley) (concerning Florida); DOUGHERTY, *supra* note 10, at 202 (discussing South Carolina). An action was probably not filed in the third state, Louisiana, because the Supreme Court of Louisiana in 1873 had ruled that its canvassing board exercised discretionary authority and, therefore, was not subject to judicial revision; its determination was final. See *State ex rel. Bonner v. Lynch*, 25 La. Ann. 267 (1873); *supra* text accompanying note 206.

250. See 5 CONG. REC., pt. 4, 287 (1877) (reprinting Florida's certificates which are dated December 6); HAWORTH, *supra* note 5, at 76 (stating that the canvass was completed on the night of December 5). The story of the Florida count is detailed in Jerrell H. Shofner, *Florida in the Balance: The Electoral Count of 1876*, 47 FLA. HIST. Q. 122 (1968). Florida law allowed the returning board thirty-five days to complete its work, even though federal law required the electors to ballot on the twenty-ninth day. *Id.* at 130.

251. Shofner, *supra* note 250, at 146.

252. *Id.* at 147. It could not have been started any earlier, as quo warranto proceedings require that someone be in office in order to be challenged.

253. See HAWORTH, *supra* note 5, at 78-79.

254. See *id.* at 79.

255. *Id.*

256. Jerrell H. Shofner, *Florida Courts and the Disputed Election of 1876*, 48 FLA. HIST. Q. 26, 43 (1969). With the election settled, the Republican electors apparently never prosecuted their appeal. *Id.* at 42. The Supreme Court of Florida was composed of two Republicans and one Democrat, and that may explain why the Court did not expedite its consideration of the quo warranto appeal.

electors was that they were the certified electors on December 6, which was elector balloting day.²⁵⁷

South Carolina's administrative canvass, which like Florida's favored the Republican electors, was also subject to a quo warranto proceeding.²⁵⁸ The South Carolina canvassing board finished its work, and the governor certified the Republican electors on November 22.²⁵⁹ On December 2, the Democratic electors commenced a quo warranto proceeding directly in the Supreme Court of South Carolina.²⁶⁰ The court did not decide the case until January 26, at which time it dismissed the action for a pleading error which the court, not the Republican electors, raised.²⁶¹ Probably sensing futility, the Democratic electors never refiled.

Drawing from this experience and wanting to enable the states to settle controversies over their own elector elections through judicial processes, Senator George Edmunds wrote an article suggesting that Congress move election day to September 1 and elector balloting day to January 1, a separation of 122 days.²⁶² The following year he submitted a bill to reform Congress's electoral vote counting process.²⁶³ It was the first version of what eventually became the ECA.²⁶⁴ The bill's first and third sections moved election day to "the first Tuesday in October" and set elector balloting for "the second Monday in January,"²⁶⁵ a separation of ninety-seven to 104 days depending on how the calendar broke. As Edmunds explained: "The object of . . . sections 1 and 3 is to produce a longer period of time between the choice of electors . . . and the meeting of the electors,

257. See, e.g., 5 CONG. REC., pt. 4, 239 (1877) (statement of Sen. Hoar); *id.*, 196-97 (statement of Sen. Morton).

258. See HAWORTH, *supra* note 5, at 154.

259. 5 CONG. REC., pt. 4, 180 (1877).

260. State *ex rel.* Barker v. Bowen, 8 S.C. 382 (1876) (refusing removal to the federal courts, but mentioning the date the action was commenced).

261. Bowen, 8 S.C. at 403, 408. The error was that the Democratic electors had brought the case in the name of the state rather than in the name of the United States. *Id.* at 407. I am unaware of any other court with a similar pleading rule. It should be noted that the Bowen court was composed of Judges Moses, Willard, and Wright, all of whom were Republicans. See ERNEST MCPHERSON LANDER, JR., A HISTORY OF SOUTH CAROLINA, 1865-1910 26 (1960) (on Willard); William C. Hine, *Jonathan Jasper Wright*, in 24 AM. NAT'L BIOGRAPHY 34 (John A. Garraty & Mark C. Carnes eds., 1999) (on Wright); R. H. Woody, *Franklin J. Moses, Jr., Scalawag Governor of South Carolina, 1872-74*, 10 N.C. HIST. REV. 111, 112 (1933) (on Moses).

262. Edmunds, *supra* note 31, at 18.

263. 8 CONG. REC. 51 (1878) (statement of Sen. Edwawrds); 7 *id.* at 3738 (statement of Sen. Edwards).

264. Compare 8 *id.* at 51 (citing S. 1308, 45th Cong. (1878)), with Electoral Count Act of 1887, ch. 90, 24 Stat. 373 (current version at 3 U.S.C. §§ 5-6, 15-18 (2000)) (the ECA); 13 CONG. REC. 859 (1882) (Sen. Hoar saying the 1882 bill is "the one originally . . . reported by the Senator from Vermont [Edwards] . . . in 1878").

265. 8 CONG. REC. 51 (1878) (citing S. 1308, 45th Cong. (1878)).

in order to dispose of any dispute or question that may arise in respect of who have been chosen as the electors.”²⁶⁶

Edmunds’s 1878 bill passed the Senate but never came to a vote in the House.²⁶⁷ Without further commentary, all subsequent predecessors of the ECA left election day on “the Tuesday next after the first Monday in the month of November”²⁶⁸ but set elector balloting, as Edmunds had suggested, on “the second Monday in January.”²⁶⁹ That is what the ECA provided when it finally passed in 1887.²⁷⁰

Due to differences in how the calendar breaks, in four out of seven presidential elections, the ECA allowed sixty-nine days between election day and elector balloting; in the other three elections the spacing reduced to sixty-two days. Thus, the first step in the ECA’s reformation of the electoral vote counting process was to more than double the time the states had to determine the outcome of their elector elections.²⁷¹

*B. Section 2: Encouraging the States to Establish Mechanisms for Resolving Contests over the Appointment of Presidential Electors Prior to Elector Balloting Day*²⁷²

Having increased the time available for settling presidential election controversies, Congress sought in section 2 of the ECA to encourage the states to use the time to settle any controversy over their appointment of

266. *Id.* (statement of Sen. Edmunds).

267. *Id.* at 197 (describing S. 1308, 45th Cong. (1878) as passing the Senate, being introduced in the House, and being referred to a committee from which it never emerged).

268. *See supra* note 235 and accompanying text.

269. *See, e.g.*, 15 CONG. REC. 5076 (1884) (citing S. 25, 48th Cong. (1884)); 13 *id.* at 859 (1882) (citing S. 613, 47th Cong. (1882)).

270. 17 *id.* at 2387 (1886) (citing S. 9, 49th Cong. (1886)).

271. In 1934, in the only substantive change to the ECA since its adoption, Congress moved elector balloting day to “the First Monday after the second Wednesday in December,” only forty-one days after election day. The change was made to conform with the newly adopted Twentieth Amendment which moved the presidential inauguration day to January 20. U.S. CONST. amend. XX. At the time, Representative Sumners observed that the time between election day and elector balloting was too short “to allow a reasonable time for settling contests over the election of presidential electors” and that the general election should be moved to early October. 78 CONG. REC. 9900 (1934) (statement of Rep. Sumners). Sumners’ suggestion was never acted on and the current spacing remains three to four weeks less than the authors of the ECA thought appropriate.

On two occasions, the time allowed by the 1934 amendment has proven insufficient. After the 1960 election, Hawaii took until December 30 to decide (at the trial level) the outcome of its election. 107 CONG. REC. 290 (1961) (setting forth the Hawaii judgment). After the 2000 election, Florida was still attempting to resolve its election when the United States Supreme Court halted the process six days before the electors balloted. *See* infoplease, 2000 Election Chronology, at <http://infoplease.com/ipa/A0884144.html> (last visited on Feb. 16, 2004).

272. Electoral Count Act of 1887, ch. 90, § 2, 24 Stat. 373 (current version at 3 U.S.C. § 5 (2000)).

presidential electors before the day for elector balloting. In the late nineteenth century, clearly established law in almost all states permitted the state judiciary to review election results through quo warranto proceedings.²⁷³ Experience showed, however, that those proceedings were too time-consuming for the short deadline required by presidential elections. Even with the extended calendar adopted by the ECA, courts would have difficulty completing quo warranto proceedings in time.²⁷⁴ What Congress wanted was for the states to develop, or apply, their existing, more streamlined election contest laws to presidential elections.²⁷⁵ As Senator Oliver Morton observed at the outset of the fourteen-year campaign to enact the ECA, the fundamental problem was that although:

[e]very State provides by law for contesting the elections for governor and other State officers and members of the legislature, . . . no provision is made for contesting the election of electors; and whatever returns shall be made up, although produced in whole or in part by fraud or violence, must stand and the vote be counted upon them if returned in time.²⁷⁶

The ECA's sponsors hoped that "[i]f the disputes touching the constitution of the Electoral Colleges in the States could be disposed of in advance of their action, the counting of the electoral votes at the seat of government . . . would usually be little more than a formal ceremony."²⁷⁷

In urging the states to develop or apply their election contest procedures to presidential election disputes, Congress felt it was trenching all that it could on states' rights. On the one hand, Congress felt that, absent a constitutional amendment, it could not command the states to adopt such

273. See *supra* text accompanying note 167 (discussing quo warranto).

274. In 1876, for example, the Florida trial court reached its decision in late January. See 5 CONG. REC., pt. 4, 288 (1877) (stating that Florida Certificate No. 3 mentioned the date the quo warranto was completed); *supra* text following note 250.

275. Election contest laws are statutorily authorized in nearly all states and expedite post-election relief procedures beyond mere recounting of ballots. See *Developments in the Law—Elections*, 88 HARV. L. REV. 1114, 1298, 1302 (1975). Although quo warranto was the common law method for trying an office holder's title to office, election contest laws was an alternative proceeding date to the early nineteenth century. See, e.g., 1821 Ill. Laws 74.

276. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 346 (1877); see also *id.* at 408, 414; 13 CONG. REC. 2647 (1882) (statement of Sen. Pugh) (commenting on state election contest laws); 5 *id.* at 24 (1876) (President Grant, in the Annual Message he sent to Congress during the Hayes-Tilden contest stated that "[t]he attention of Congress cannot be too earnestly called to the necessity of throwing some greater safeguard over the method of choosing and declaring the election of a President. Under the present system there seems to be no provided remedy for contesting the election in any one State.").

277. Edmunds, *supra* note 31, at 18.

mechanisms.²⁷⁸ Some states' rights-oriented congressmen bristled even at the idea that Congress might legislate an incentive to encourage the states to enact presidential election contest laws.²⁷⁹ On the other hand, Congress felt it was either unconstitutional or simply unwise to try presidential elector contests before Congress or the federal courts.²⁸⁰ Consequently, to encourage the states to develop procedures for settling their own elector election disputes, Congress offered a momentous incentive, "a concession never before offered to the States in the matter of electing the Chief Executive of the United States":²⁸¹ that Congress would be "conclusive[ly]" bound by a state's "final determination" of any controversy concerning the identity of its presidential electors.²⁸²

Prior to 1887, Congress debated, but never abjured, its discretion to reject electoral votes due to underlying defects in the electors' appointment to office.²⁸³ In 1873, Congress had rejected Louisiana's and Arkansas's electoral votes due to qualms about their electors' election.²⁸⁴ Although

278. In 1877, just after the disastrous Hayes-Tilden election, Senator Eaton, a Democrat, proposed an amendment commanding that "[a] tribunal for the decision of all contested issues arising in the choice of the electors of President and Vice-President shall be appointed in each State" by the state's governor and senate "not less than twelve months prior to the time fixed by law for the choice of electors." 6 CONG. REC. 415 (1877) (describing S.R. Res. No. 7). Eaton's proposal never made it out of committee. AMES, *supra* note 4, at 121, 401.

279. See SAMUEL DIBBLE, VIEWS OF THE MINORITY TO ACCOMPANY BILL S. 9, H.R. REP. 49-1638, pt. 2, at 1-2 (1886); 18 CONG. REC. 45 (1886) (statement of Rep. Dibble); 17 *id.* at 1061 (statement of Sen. Teller); 15 *id.* at 5546 (1884) (statement of Rep. Hammond); *id.* at 5078 (statement of Rep. Eaton), discussed in Burgess, *supra* note 10, at 635-37.

280. See 17 CONG. REC. 1020 (1886) (statement of Sen. Hoar) (preferring to appoint the senior Justice of the Supreme Court as arbiter); Edmunds, *supra* note 31, at 18; Schickler et al., *supra* note 138, at 750-54. In 1873, when the problem of contending elector slates first arose, Senator Frelinghuysen, a Republican, proposed a constitutional amendment ordaining that "[d]isputes arising with regard to the persons chosen as electors of President and Vice-President shall . . . be decided by the Supreme Court of the United States." H.R. MISC. DOC. NO. 44-13, at 345. Frelinghuysen's amendment, like Eaton's proposal, see *supra* note 278, never made it out of committee. AMES, *supra* note 4, at 119, 394.

281. 13 CONG. REC. 2646 (1882) (statement of Sen. Pugh).

282. 3 U.S.C. § 5 (2000).

283. See, e.g., H.R. MISC. DOC. NO. 44-13, at 452-55 (statement of Sen. Morton) (discussing the 22d Joint Rule); 10 ANNALS OF CONG. 27-32, 126-46 (1800) (recounting the debate on the Grand Committee bill).

284. See *supra* text accompanying note 66. In regard to Arkansas, some Congressmen pointed to a formal defect in the electors' certification: it was impressed with the seal of the secretary of state, not the seal of the State. H.R. MISC. DOC. NO. 44-13, at 431 (statement of Sen. Morton). But also among the objections were protests to the validity of the electors' election and the canvass of the state vote. *Id.* at 394-95 (statement of Sen. Rice); see also *id.* at 389-91 (statement of the Vice President on presence of other Arkansas returns that were too informal to be presented); *id.* at 335 (statement of Sen. Sherman establishing a committee to inquire into the Arkansas election). In subsequent years, some congressmen unfairly characterized Congress's rejection of Arkansas's vote as entirely due to the absence of the seal. See, e.g., *id.* at 431 (statement of Sen. Morton).

both houses joined in rejecting Louisiana's and Arkansas's votes, the fact is that from 1865 to 1876, Congress's 22d Joint Rule allowed a majority vote of a single house to reject any state's electoral vote.²⁸⁵ Now, in what was to be "the groundwork . . . of the whole system of the [electoral] count,"²⁸⁶ Congress adopted a law "framed upon the proposition that the power to adjudge and to decide upon the validity of the appointment of electors resides in the States, and may be completely and finally exercised through tribunals created by State laws and regulated in their procedure by State laws."²⁸⁷

As finally enacted, section 2 reads:

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 determinations 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.²⁸⁸

The meaning of section 2 was explained by Senator Hoar, floor leader during much of the fight for the ECA and Chairman of the Senate committee managing its final passage:²⁸⁹ "The bill provides that where the State has created a tribunal for the determination of [elector appointment controversies,] the proceedings of that tribunal shall be conclusive . . ."²⁹⁰

In 1869, Congress had questioned Louisiana's electoral vote based on the electors' underlying election, but both houses voted to admit the votes. *Id.* at 238-46.

285. The single house veto was allowed by the 22d Joint Rule, the then-current regulation for Congress's electoral counts. *See supra* text accompanying notes 63, 91 (discussing the 22d Joint Rule).

286. Burgess, *supra* note 10, at 635.

287. 8 CONG. REC. 70 (1878) (statement of Sen. Morgan).

288. Electoral Count Act of 1887, ch. 90, § 2, 24 Stat. 373, 373 (current version at 3 U.S.C. § 5 (2000)).

289. *See* Biographical Directory of the United States Congress, *George Frisbie Hoar*, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000654> (last visited Feb. 15, 2004).

290. 17 CONG. REC. 1020 (1886) (statement of Sen. Hoar); *see also* 18 *id.* at 49 (statement of Rep. Eden) (describing the Senate bill and opposing it on behalf of the House substitute); 17 *id.* at 867 (statement of Sen. Morgan) ("In this bill there is but one sentiment, and that is to secure to each State its full electoral power, to be expressed and exercised, as far as may be, under the Constitution, through its own laws and through the final and conclusive judgment of its own

The thought that justifies section 2 was also straightforwardly set out by Senator James Pugh, floor leader during the unsuccessful effort to pass the ECA in 1882:²⁹¹ “[I]t is better and safer to trust the States with the settlement of their own contests and disputes, according to their own laws to ascertain what was really done by the State itself . . . and for the two Houses to accept the proof of the result . . . as conclusive,” than to leave “the whole field . . . open as it is now,” entirely subject to congressional discretion.²⁹²

The ECA debates are replete with comments like Hoar’s and Pugh’s in every session where the bill was discussed, from its initial proposal in 1878 to final passage in 1887. They make it quite clear that the theory of section 2 is that the states are the proper locus of authority to determine elector election controversies and, for that reason, the final determination by a state’s duly appointed tribunal should bind Congress.²⁹³ This was the centerpiece of the ECA’s solution to the quagmire that elector election disputes presented for Congress’s electoral vote counting.

There were, of course, many congressmen who objected to section 2’s solution to the problems of electoral vote counting. Congressmen who held strong nationalist tenets objected to section 2 and proposed amendments to allow a concurrent vote of both houses of Congress to set aside a state’s final elector determination.²⁹⁴ Their amendments did not pass. Other congressmen with strong states’ rights convictions objected to section 2 for the opposite reason: the bill’s recognition of conclusive authority in a state

tribunals.”).

291. 13 *id.* at 2645 (1882) (statement of Sen. Pugh, as Chair of the committee reporting on the bill, introducing the bill).

292. 13 *id.* at 2646 (statement of Sen. Pugh).

293. *See, e.g.*, 18 *id.* at 50 (1886) (statement of Rep. Eden); 17 *id.* at 867 (statement of Sen. Morgan); 15 *id.* at 5461 (1884) (statement of Rep. Springer) (opposing the ECA for this reason); *id.* at 5459 (statement of Rep. Parker); *id.* at 5078-79 (statement of Rep. Browne); 13 *id.* at 2651 (1882) (statement of Sen. Blair) (opposing the ECA for this reason); *id.* at 2651 (statement of Sen. Hoar); 8 *id.* at 158-59 (1878) (statement of Sen. Bayard); *id.* at 52-53 (statement of Sen. Edmunds).

The only indication in the legislative history that a section 2 determination is not meant to be conclusive is from congressmen who supported both the bill and Congress’s moral obligation to be bound by a section 2 determination, but thought that one Congress could not constitutionally bind another. *See, e.g.*, 18 *id.* at 31 (1886) (statement of Rep. Caldwell); 17 *id.* at 867-68 (statement of Sen. Morgan) (stating that for this reason he prefers a joint resolution, but will vote for the bill); 13 *id.* at 2650-51 (1882) (statement of Sen. Morgan) (same). The difference between these two positions matters only if there is judicial review of Congress’s determination that the requirements for meriting section 2 status have not been met.

294. *See, e.g.*, 15 *id.* at 5547, 5550 (1884) (statement of Rep. Herbert) (showing that the House adopted Rep. Herbert’s amendment to the Senate bill only to immediately vote the whole bill down in favor of a House substitute that enlarged the scope of conclusive state action); 13 *id.* at 2651-52 (1882) (statement of Sen. Blair). *But see* 15 *id.* at 5459 (1884) (statement of Rep. Parker) (stating, as an ardent nationalist, support for state power in this area).

was not broad enough. These congressmen felt the state should bind the national government whenever the state presented but one return, even if it had not been subject to a section 2 final determination process.²⁹⁵ The House, in 1886, adopted this view endorsing states' rights, but receded from it in conference with the Senate.²⁹⁶

In the end, the idea that Senator Edmunds had suggested as far back as 1877 prevailed. Giving state determinations of elector election contests conclusive effect was the key to his hope of disposing of elector appointment controversies before Congress met, rendering the joint session "little more than a formal ceremony."²⁹⁷ The debate engendered by the objectors to section 2 only served to create an extensive legislative record supporting section 2's textual commitment.

Thus, section 2's text and legislative history are clear. In section 2, Congress precommitted not to review an elector's election. Nevertheless, Congress's commitment to accept electoral votes submitted by electors who claim section 2 status is not unlimited. It is subjected to express and implied limitations that substantially hedge section 2's overt promise. An exploration of section 2's limitations gives us a more nuanced understanding of the ECA's solution to the problems of electoral vote counting.

In overview, the express and implied limitations of section 2 frame the grounds for Congress, consistent with the ECA, to refuse counting electoral votes that claim section 2 status. Claiming section 2 status is different from having it. Congress may, consistent with section 2's commitment, refuse to count an electoral vote that claims section 2 status when that claim is invalid.²⁹⁸ Section 2 also contains grounds for refusing to count votes even when the claim is meritorious. Some grounds for denying section 2 status, or refusing to count an electoral vote that merits it, follow from conditions that are expressed in the text of section 2. Others follow from assumptions underlying the ECA. I first review section 2's express limitations and then turn to those that are implicit in the ECA's assumptions.

Obviously, one condition is that the tribunal issuing the final determination of the elector election contest must have been granted such

295. See, e.g., SAMUEL DIBBLE, VIEWS OF THE MINORITY: TO ACCOMPANY BILL S.9, H.R. REP. 49-1638, pt. 2, at 1-2 (1886); 18 CONG. REC. 48 (1886) (statement of Rep. Cooper).

296. 18 CONG. REC. 668 (1887); *id.* at 74-77 (1886).

297. Edmunds, *supra* note 31, at 18.

298. See *infra* text accompanying notes 299-317.

authority under the state's law.²⁹⁹ Another is that the tribunal's ruling was "final."³⁰⁰

Section 2's text expressly states that Congress will be bound only if the state's law designating the "final determination" tribunal and establishing its presidential election contest process was enacted "prior" to the presidential election.³⁰¹ Congress specified this limitation for two reasons. First, the limitation was designed to prevent states from creating electoral commissions "for a particular election or a particular purpose to aid the friends of one candidate rather than another according to the political disposition of the Legislature."³⁰² Second, Congress believed that:

Unless you provide beforehand that State laws establishing these tribunals or conferring jurisdiction on tribunals already established shall be passed in advance of the election, no State will take the trouble to pass such laws. If the States know that they can, whenever a case arises, convene the legislature and pass a bill to dispose of each electoral question, you remove all probability of the passage of such laws.³⁰³

299. The subtleties of whether a tribunal is the state's designated section 2 authority are discussed in Wroth, *supra* note 13, at 338-40.

300. The ECA does not define, and Congress never discussed, what it meant by a "final determination." Would a judgement of a trial court be final if subject to appellate review? Would a judgment of a court of last resort be final if subject to a motion for rehearing?

301. Electoral Count Act of 1887, ch. 90, § 2, 24 Stat. 373, 373 (current version at 3 U.S.C. § 5 (2000)).

302. 8 CONG. REC. 52 (1878) (statement of Sen. Edmunds); *see also* 18 *id.* at 75 (1886) (statement of Rep. Herbert); *id.* at 47 (statement of Rep. Cooper). In 1872, the governor of Louisiana had signed a bill into law after the election for the express purpose of constituting the returning board as he wanted it. Pitre, *supra* note 241, at 181. The law had passed the legislature two years before the election, but the governor delayed signing it. *Id.* at 177, 181.

303. 18 CONG. REC. 75 (1886) (statement of Rep. Herbert). Note that the focus in the remarks quoted in the text is on procedure, such as establishing commissions and their jurisdiction. This indicates that the section 2 limitation we are discussing extends to the legislative designation of the section 2 authority and all post-election day legislation concerning an election's final determination. It does not encompass the designated authority's use of its power.

In other words, during the 2000 presidential election, had the Supreme Court of Florida finished its work within section 2's "safe harbor" provision, and ruled for the Democratic electors, the Republican charge that it had "changed the law," *see* Andrew Ferguson, *Who Are You Calling Angry?*, TIME, Dec. 18, 2000, at 50; Thomas Ulen, Book Review, 2001 U. ILL. J.L. TECH. & POL'Y, 317, 326 (2001) (quoting CASS SUNSTEIN, ECHO CHAMBERS: BUSH V. GORE, IMPEACHMENT, AND BEYOND 4 (2001)), would not have been a proper ground for claiming a violation of this part of section 2. The bonafides of the section 2 tribunal's use of its authority may be a violation of section 2's putative fraud exception. *See infra* text accompanying notes 357-81. But if every disputable application of substantive law came within the section 2 limitation under discussion here, it would allow Congress to deny the tribunal's decision regarding section 2 status based on "mere error." That is something the ECA did not intend.

Requiring states to designate their final electoral authority prior to the election is an obvious protective measure, although it is one that the minority of the House committee tried unsuccessfully to remove as an undue intrusion on the states' plenary power to appoint electors as their legislatures saw fit.³⁰⁴

Less obvious as a protective measure is section 2's stipulation that the final settlement of any elector appointment controversy be made "at least six days before" the day set for elector balloting.³⁰⁵ The origin of the six-day limit is mysterious. Senator Edmunds's original 1878 bill allowed a state's final determination process to bind Congress even if it took up to the "time fixed for the meeting of the electors."³⁰⁶ So did his 1880 and 1882 proposals.³⁰⁷ When Senator Hoar reintroduced the measure in the forty-eighth Congress in 1884, he described it as verbatim to what was passed in the last Congress.³⁰⁸ Yet Hoar's 1884 bill had the six-day provision in it.³⁰⁹ Even though the six-day provision cut down the time that the states could settle election contests and conclusively bind Congress by almost a full week, the reason for the change was never discussed.³¹⁰

In 1886, as the ECA approached final passage, the six-day provision was the subject of some discussion when the minority on the House committee guiding its passage moved to delete that particular proviso.³¹¹ Their cogent argument was that:

304. See SAMUEL DIBBLE, VIEWS OF THE MINORITY: TO ACCOMPANY BILL S. 9, H.R. REP. 49-1638, pt. 2, at 2 (1886). Specifically, Representative Dibble wrote:

[I]n case a contention shall arise in a State as to who are its lawfully-chosen electors, and it should happen that no State law exists which will meet the emergency thus arising, we contend that Congress has no Constitutional power to prescribe that such State may not provide for the determination of such contention at any time prior to the day for casting the electoral vote.

Id.; see also 18 CONG. REC. 46 (1886) (statement of Rep. Dibble). The vociferously pro-states' rights committee minority really meant it when they said that the states' elector appointment power was plenary, and that "up to . . . the day when the electors are to cast their votes, the State power as to appointment can not be interfered with in any manner, shape, or form by the Congress of the United States, or by any other power." *Id.*

305. Electoral Count Act of 1887 § 2.

306. 8 CONG. REC. 51 (1878) (citing S. 1308, 45th Cong. § 4 (1878)).

307. 13 *id.* at 859 (1882) (citing S. 613, 47th Cong. § 2 (1882)); 10 *id.* at 3656 (1880) (citing S. 1485, 46th Cong. § 2 (1880)). The 1882 bill was introduced as "the Edmunds bill." 13 *id.* at 2645 (1882) (statement of Sen. Pugh); see also *id.* at 186 (statement of Sen. Hoar).

308. 15 *id.* at 430 (1884) (statement of Sen. Hoar).

309. *Id.* at 5076 (citing S. 25, 48th Cong. § 2 (1884)).

310. The bill cut the time from sixty-nine or sixty-two days, depending on how the calendar breaks, to sixty-three or fifty-six days, respectively. See *supra* text accompanying note 271. Current law allows only forty-one days due to the changes introduced in 1934. See *supra* note 271.

311. 18 CONG. REC. 46 (1886) (statement of Rep. Dibble).

[I]f there is any fraud or any neglect of duty, if there is any hiatus, any unforeseen occurrence whereby the vote of a State is likely to be lost by reason of conflict, we contend that the State should have the full period up to the time of the casting of the electoral vote in order to repair that difficulty, to make that determination, to save her vote. As [we] have already shown, the State has complete control of the matter. It is a field into which Congress has no right to enter. That being the case, the State should have until that time to repair any disaster which may interfere with or interrupt the casting of her vote by the proper electors.³¹²

Unfortunately, the minority's complaint was never answered because it was mixed in with the minority's protest against forcing the states to enact their contest procedures before the presidential election had taken place.³¹³ The ECA's proponents preferred to refute the more outlandish part of the minority's protest and never addressed the minority's other, sounder critique.³¹⁴ Had they done so, they might have revealed their reasons for enacting the six-day proviso.

Most likely, the six-day provision was understood as a measure encouraging "fair and orderly" electoral procedures.³¹⁵ As will be discussed, the ECA's third section requires every state's governor to give the appointed electors a certificate of their election "on or before" the day on which they ballot.³¹⁶ The six-day provision allows time for communicating the result of any election contest to the victorious electors, for the governor to execute the necessary paperwork, and for the duly appointed electors to gather and receive their credentials before balloting.³¹⁷

312. *Id.*; see also SAMUEL DIBBLE, VIEWS OF THE MINORITY: TO ACCOMPANY BILL S. 9, H.R. REP. 49-1638, pt. 2, at 1-2 (1886) ("[U]p to the time of casting the votes in the electoral colleges, each State has the right, in cases of contest, of determining which are its lawfully chosen electors.").

313. See *supra* text accompanying note 304.

314. 18 CONG. REC. 50 (1886) (statement of Rep. Eden) (rejecting the minority's view that the bill "dictate[s] to the States the mode of appointing electors"); *id.* at 47 (statement of Rep. Cooper) (eventually misreading the provision as allowing the law to be passed six days before the electors meet).

315. *Id.* at 50 (statement of Rep. Eden) (after discussing the minority's view, describing his understanding of the general purpose of the bill).

316. Electoral Count Act of 1887, ch. 90, § 3, 24 Stat. 373, 373 (current version at 3 U.S.C. § 6 (2000)).

317. Whether with modern communications the six-day proviso is still as helpful as it was under nineteenth-century conditions, and whether it is worth the collateral problems it creates, are certainly open questions.

Whatever the origins³¹⁸ and purpose of the six-day provision, it was meant as a “safe harbor” and not as the end point for state-conducted election contests.³¹⁹ As Representative John Eden explained in refuting the minority of the House committee’s objections to the six-day provision:

If any State neglects to use the means within its power to identify who are its legally appointed electors, the two Houses of Congress . . . are to resort to other provisions of the bill to determine who are the legally appointed electors of the State. The bill contemplates no exclusion of electoral votes from the count because of the failure of a State to settle disputes as to the lawful vote of the State.³²⁰

The only consequence of settling election disputes less than six days before elector balloting day was that Congress would not be conclusively bound by the state tribunal’s decision of the identity of the electors. Should a state not subject its electors to a section 2 process, or should that process be concluded less than six days before the electors’ ballot, Congress had more discretion, under section 4 of the ECA, to reject the electors’ vote.³²¹

Section 2’s final express limitation is that it is conclusive only as to the “ascertainment of the electors.”³²² Controversies over how the electors

318. I have traced the notion of providing a decent interval between elector ascertainment and elector balloting to Senator Eaton’s proposed constitutional amendment in 1877 requiring the states to create “[a] tribunal for the decision of all contested issues arising in the choice of [presidential] electors.” 6 CONG. REC. 415 (1877). The proposed amendment required the tribunals to be constituted a year before the election and to render their decisions a month before the electors balloted. *Id.* Eaton’s proposal never emerged from committee. AMES, *supra* note 4, at 121, 401. The only other appearance of a suggestion for an interval between elector ascertainment and elector balloting was in Representative Updegraff’s 1882 House substitute for Senator Edmunds’s bill. That substitute bill directed the governor to provide his certificate “five days before the day fixed for their meeting, or as soon as a final judicial determination shall be made.” 13 CONG. REC. 5143 (1882) (discussing section 4 of the House substitute). However, under the House substitute, the tribunal rendering the decision was allowed conclusive effect even if its decision was reached on elector balloting day. *Id.* (discussing section 3 of the House substitute). Yet Updegraff’s 1882 idea that it would be good for the governor to have the certificates prepared five days before the day for casting electoral ballots so nicely anticipates having the tribunal’s decision rendered six days before the electors’ ballot, that it is hard not to imagine a connection between it and the six-day provision’s initial appearance in 1884.

319. Commentators temporarily lost sight of this during the 2000 election dispute. *See, e.g., Contesting the Vote: Comments from Gore on the Florida Election*, N.Y. TIMES, Nov. 29, 2000, at A1 (noting that Vice President Gore said December 12 is the “deadline for seating electors”); *Contesting the Vote: Update—Matter of Dates and Disputes*, N.Y. TIMES, Nov. 29, 2000, at A25 (“Mr. Gore . . . is facing a Dec. 12 federal deadline for selecting Florida’s 25 electors.”).

320. 18 CONG. REC. 50 (1886) (statement of Rep. Eden).

321. *See infra* text accompanying notes 477-80 (discussing section 4 of the ECA).

322. Electoral Count Act of 1887, ch. 90, § 2, 24 Stat. 373, 373 (current version at 3 U.S.C. § 5 (2000)). That is, it is conclusive only to the identity of the electors appointed to cast the states’

exercise their office, or whether the electors were qualified under the Constitution to hold the electors' office, remain subject to congressional review.³²³ The ECA envisions presidential elections as consisting of three stages: appointing electors; casting electoral ballots; and aggregating and counting electoral votes at the seat of government. In general, the Congresses that debated and passed the ECA regarded the appointment stage as wholly committed to the states; the aggregation and counting stage as wholly committed to the federal government; and the ballot casting stage as a period of mixed state and federal jurisdiction.³²⁴

As a consequence, although the states may well have had jurisdiction to police how their electors conduct themselves in office,³²⁵ in passing the ECA Congress retained its authority to scrutinize and reject electoral ballots cast corruptly³²⁶ or in violation of constitutional rules.³²⁷ Because a section 2 determination preceded the casting of electoral ballots, it could not preclude Congress from rejecting electoral votes that were not cast by ballot; not cast on the day required by federal law; cast for a President and Vice President who were both citizens of the same state as the elector; cast for a constitutionally ineligible candidate; or cast as a result of elector bribery or corruption.³²⁸

electoral votes. For simplicity, I have made a bit of an understatement here. I will argue that requiring Congress to accept a section 2 declaration as to who are the state's electors covers errors in their underlying election but, perhaps, does not cover either a total failure to have an election or an election so rife with impropriety that the state tribunal's decision upholding it is fraudulent. *See infra* text accompanying notes 357-81.

323. *See* Electoral Count Act of 1887 § 2.

324. *See, e.g.*, 18 CONG. REC. 45 (1886) (statement of Rep. Dibble); 8 *id.* at 162-63 (1878) (statement of Sen. Merrimon).

325. They are, after all, state officers, performing a federal function. *See Ray v. Blair*, 343 U.S. 214, 224 (1952) (explaining that the electors are not federal officers, even though they perform a federal function); 18 CONG. REC. 45 (1886) (statement of Rep. Dibble).

326. 8 CONG. REC. 163 (1878) (statement of Sen. Merrimon) (mentioning bribery, intimidation, and fraud); *id.* at 70; (statement of Sen. Morgan) (mentioning "corruption through bribery").

327. *See* U.S. CONST. art. II, § 1, cls. 3-5.

328. Congress has never had a case where an elector voted corruptly. Congress's exercise of its jurisdiction to scrutinize the constitutional qualifications of electors dates to 1837, and its jurisdiction to scrutinize other constitutional norms to 1817. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 44-48, 70-76 (1877); Kesavan, *supra* note 13, at 1680, 1683-85. None of these episodes resulted in the rejection of a vote. In 1872, three votes from Georgia were rejected for violation of the constitutional norm of voting for a qualified presidential candidate—the disqualification was that the candidate had died after election day. *See* text accompanying note 66 (discussing Greeley). Congress exercised its power to consider whether electors complied with constitutional norms most recently in 1969 in discussing whether to reject a vote cast by an elector who did not vote for his party's presidential candidate. *See* Kesavan, *supra* note 13, at 1692-94.

Neither did Congress mean to preclude itself from rejecting votes cast by individuals who were not constitutionally qualified to hold the elector's office.³²⁹ This was a more controverted decision because the facts involved in determining whether an individual appointed to the elector's office suffered a constitutional disqualification preceded the section 2 determination and could have already been adjudicated. It does, to some extent, countermand the state's final determination of who is entitled to the elector's office (though it does not directly countermand the determination of who won the election). Although this exception may be textually supported by saying that constitutional disqualifications are outside the scope of the word "ascertained" as used in the ECA, it may also be supported as the first implied limitation to section 2.

Whether expressed in the text or not, the ECA's legislative history and its underlying assumptions support the notion that Congress, under section 2, retained power to reject votes submitted by electors who were not constitutionally eligible to hold the elector's office. In contrast to the language ultimately adopted, earlier versions of section 2 extended the conclusive effect of the state's final determination to the electors' lawful title to office.³³⁰ Determining the electors' "lawful title to office" arguably encompassed a decision on whether the electors suffered from any constitutional disabilities.³³¹ But the ECA proponents always intended to recognize only the state's right to identify who it selected to cast its electoral votes.³³² The electors' qualifications for office were constitutional requirements, not matters committed to state discretion. As Senator Morgan argued in 1878, "The Constitution expressly declares certain grounds of ineligibility which operate *ex proprio vigore* so as to annul any appointment of such persons."³³³ Eventually, in 1886, the Senate committee changed section 2 to read that a "final determination" was

329. U.S. CONST. art. II, § 1, cl. 2 (prohibiting federal officials from being electors).

330. 15 CONG. REC. 5076 (1884) (citing S. 25, 48th Cong. § 2 (1884)); 13 *id.* at 859 (1882) (citing S. 613, 47th Cong. § 2 (1882)); 8 *id.* at 51 (1878) (citing S. 1308, 45th Cong. § 4 (1878)).

331. Disqualifications usually require factual determinations. *See, e.g.*, H.R. MISC. DOC. NO. 44-13, at 71 (statement of Sen. Grundy) (discussing difficulty of determining if certain electors were constitutionally disqualified). If Congress was willing to defer to state adjudication of other factual matters, the deference reasonably could be extended to the determination of whether electors held federal offices.

332. 8 CONG. REC. 163 (1878) (statement of Sen. Merrimon); *id.* at 158-59 (statement of Sen. Bayard); *id.* at 70 (statement of Sen. Morgan); *see also* 18 *id.* at 31 (1886) (statement of Rep. Caldwell) (discussing other constitutional objections to the elector's vote).

333. 8 *id.* at 70 (1878) (statement of Sen. Morgan); *see also id.* at 158 (statement of Sen. Bayard). Senator Morgan, who was speaking about the statute when it contained the "lawful title to office" language, would have extended section 2's conclusivity principle to include an elector's constitutional eligibility if it had been specifically addressed in a section 2 determination. *See id.* at 70-71.

“conclusive” only as to the “ascertainment” of the electors.³³⁴ Substituting “ascertainment” for “lawful title to office” stated more clearly the understanding that a section 2 determination established the electors’ identity under state law, not their eligibility under the federal Constitution.

Indeed, in the view of the Congresses that debated and passed the ECA, constitutional ineligibilities were more encompassing than the personal disqualifications listed in Article II, section 1 of the Constitution. It included, for example, the judgment that the votes came from a territory that was a state of the American union entitled to electoral votes.³³⁵ It included, in the view of Representative Andrew Caldwell, Chairman of the House committee managing the bill’s final passage, the judgment that the state had a republican form of government or that the state’s electoral vote total should not be reduced, under the Fourteenth Amendment, “in proportion as that State shall have denied the right to vote to its citizens of color.”³³⁶ Constitutional prerequisites were the foundation of the elector’s (or the state’s) right to vote. Congress’s grant of conclusive effect to section 2 determinations was not meant to bar Congress from rejecting votes that lacked the basic predicate for the votes’ constitutional status as electoral votes. Constitutional infirmities may be said to be the second implied limitation to Congress’s section 2 commitment.³³⁷

The third implied exception to Congress’s section 2 commitment involves the nature of the section 2 authority. Senator Edmunds’s original bill, and the bill as resubmitted in succeeding Congresses, required the states to designate judicial tribunals for the “trial and determination” of elector appointment controversies if they wanted the final determination to bind Congress.³³⁸ During the 1886 floor debate, however, Senator William Evarts objected to requiring judicial proceedings. Presidential elections, he said, were “from the beginning to the end, . . . a political transaction to be governed by” the political branches.³³⁹ The Framers, he

334. The change apparently was made in committee and no comment was made about it on the Senate floor.

335. See SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 46-47, 49-56, 70-75 (discussing Indiana, Missouri, and Michigan).

336. 18 CONG. REC. 31 (1886) (statement of Rep. Caldwell) (citing U.S. CONST. art. IV, § 4).

337. I treat constitutional infirmities as implied limitations separate from the electors’ constitutional qualifications because they deal with matters—statehood and compliance with the Fourteenth Amendment, for example—which normally would not be raised before the state’s tribunal because they might impugn the title of all the contending states of electors.

338. 15 *id.* at 5076 (1884) (citing S. 25, 48th Cong. § 2 (1884)) (“try and determine”); 13 *id.* at 859 (1882) (citing S. 613, 47th Cong. § 2 (1882)) (“try and determine”); 8 *id.* at 51 (1878) (citing S. 1308, 45th Cong. § 4 (1878)); see also Edmunds, *supra* note 31, at 18 (“[I]t would be safer . . . to have [elector election] disputes settled by honest judicial means in the States in which they may occur . . .”).

339. 17 CONG. REC. 1058 (1886) (statement of Sen. Evarts).

believed, preferred certainty and efficiency in presidential elections and wanted the process to be “as little impeded and as little interrupted as possible.”³⁴⁰ Because Evarts’s objection built on concerns that other senators had about any judicial involvement in electoral processes,³⁴¹ or about dictating anything to the states on elector appointment matters,³⁴² the ECA’s managers thought it best to recommit the bill.³⁴³ The bill emerged from committee with language to meet Senator Evarts’s concern. Now, the bill gave conclusive effect to a state’s final determination made “by judicial or other methods or procedures.”³⁴⁴

With that change, the bill allowed the states to designate any “State functionar[y]” as its section 2 “authority.”³⁴⁵ At the states’ option, contests over elector elections could be conclusively settled by judicial, executive, or legislative officers. The final authority might be the legislature, the governor, or the very returning board that canvassed the election in the first place. Yet, as an analysis of the ultimate wording of section 2 shows, it is likely that the ECA’s leadership was reconciled to the change because, even as amended, the ECA still required that, whatever state functionary was designated, its final determination had to involve at least a quasi-judicial process.³⁴⁶

The bill that emerged after recommitment in the Senate required that, in order to bind Congress, the state’s “final determination” authority had to address “any controversy or contest” concerning the electors’ election.³⁴⁷ Addressing “any controversy or contest” implies more than merely declaring that the original canvass is final. It implies more than merely recounting the accepted ballots. These ministerial tasks frequently precede an election controversy or conflict. What responding to any controversy or conflict requires is a re-evaluation of the facts of the election in light of the applicable law.³⁴⁸ Even if not carried out by the judiciary with the full panoply of courtroom due process, this re-evaluation is inherently a judicial or quasi-judicial proceeding. As Senator Hoar explained earlier in the 1886 ECA debates (though not in response to Evarts’s criticism):

[W]hoever is taken, it is a person who is taken for the purpose of exercising a judicial function. I do not mean by “a judicial

340. *Id.*

341. *See, e.g., id.* at 1062 (statement of Sen. Saulsbury).

342. *See, e.g., id.* at 1061 (statement of Sen. Teller).

343. *Id.* at 1063-64.

344. *Id.* at 2387 (citing S. 9, 49th Cong. § 2 (1886), after recommitment); *see also id.* at 2427 (statement of Sen. Hoar) (explaining the change).

345. *Id.* at 2427 (statement of Sen. Hoar).

346. *See infra* text accompanying notes 347-56.

347. *See supra* text accompanying note 288 (quoting section 2 of the ECA).

348. *See infra* text accompanying notes 349-52.

function” one of the functions usually assigned to courts, but I mean judicial in regard to the nature and character of the act to be performed; that is, you are to have a tribunal which is to determine the existing fact and the existing law, in contradistinction from determining the law or creating the fact according to his own desire.³⁴⁹

In agreeing to modify section 2 to allow states to bind Congress without having a judicial settlement of elector election controversies or contests, Hoar was not abandoning the ECA’s bedrock principle that whoever or whatever the state designated as its final authority, that authority had to respond with at least quasi-judicial review processes that could review and redetermine the factual and legal judgments made by election administrators.³⁵⁰

Perhaps the point can be made most clearly if we imagine a state designating as its final authority the very same returning board that canvassed the election in the first place. In the original canvass, that board typically acts ministerially: it receives the returns from the various local boards, checks their formal regularity, and adds them together. In contrast, in responding to any controversy or contest brought about by the election, the returning board must then critically review what it and the local election boards and officials have done. It may be called upon to make complex factual determinations and apply ambiguous law to them. It might find itself reviewing the propriety not only of all of its own original actions, but also all the actions and decisions of the local boards and election judges. Unless the state authorizes its final authority to engage in some irreducible minimum of discretionary fact finding and law application, the state has not, in any fair sense of the phrase, “provided . . . for [the] . . . determination of any controversy or contest concerning the appointment of all or any of the electors of such State.”³⁵¹ All it has done is repeat the original ministerial canvass.³⁵²

349. 17 CONG. REC. 1020 (1886) (statement of Sen. Hoar); *see also* SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 481 (1877) (statement of Sen. Edmunds) (stating that presidential elections are subject to judicial proceedings); 17 CONG. REC. 1064 (1886) (statement of Sen. Edmunds) (commenting that all states subject election administration to judicial oversight).

350. 17 CONG. REC. 1759 (1886) (remarks of Sen. Hoar) (saying the “substance” of the bill that reemerged from the Committee was “unchanged”); *id.* at 2386 (same).

351. Electoral Count Act of 1877, ch. 90, § 2, 24 Stat. 373, 373 (current version at 3 U.S.C. § 5 (2000)).

352. To illustrate what the ECA requires: Until 1989, Texas’s election contest law designated its State Board of Canvassers as the authority to hear presidential elector election contests. TEX. ELEC. CODE ANN. § 221.002 (Vernon 1985), *amended by* TEX. ELEC. CODE ANN. § 221.002 (Vernon 1989). It also authorized the Board, when hearing an elector contest, to adjudicate the issue of whether illegal votes were counted or legal votes refused. *Id.* § 221.002 (Vernon 2004).

As Senator Edmunds indicated just before submitting his original bill to Congress, in the presidential election process, ministerial decisions should be *prima facie* binding; only judicial determinations may bind “finally.”³⁵³ Congress, however, was ill-prepared to perform the quasi-judicial function, and section 2 of the ECA encourages the states to do it. Edmunds’s belief was that “[t]he experience of governments seems to have proved that, on the whole, judicial tribunals are best calculated to hear and decide disputed questions of law and fact, although they may involve inquiries extending into the domain of politics and the decision of the fact of an election.”³⁵⁴ His preference was for the states to “provide by law for the immediate decision, by [their] own highest court[s], of all contests touching the choice of Electors.”³⁵⁵ Ten years later, in securing passage of the ECA, Edmunds was willing to compromise on the form, but not the essence of his belief. He would accept any state-designated authority, so long as it was empowered to hear and decide “disputed questions of law and fact”³⁵⁶ concerning elector election contests.

Given that section 2 final determination tribunals had to employ at least quasi-judicial methods, Congress may be empowered to ensure that the tribunals did not act fraudulently—the fourth implied exception to Congress’s section 2 commitment.

What if there were no election in the state, but a corrupt tribunal, as part of the conspiracy, nonetheless gave a section 2 validation to certain individuals as electors? Would Congress be bound by such enormities? Senator Bayard answered in the negative because

[A] fraudulent judgment is no judgment. Prove fraud, and you have proved that which is a universal solvent and which absolutely destroys the form of fact which it has set up. Therefore there is nothing to prevent the two Houses of Congress from penetrating a judgment obtained by fraud, because that would be no judgment at all, and so far from

Incidentally, in 1989, Texas substituted the Governor as the final arbiter of presidential election contests. *See id.* Thus, in the 2000 election, we might have seen George Bush authorized to determine an elector election contest involving Al Gore and himself.

353. Edmunds, *supra* note 31, at 9; *see also* 17 CONG. REC. 1063-64 (1886) (statement of Sen. Edmunds) (stating that the initial determination of elections is an administrative function everywhere subject to judicial review).

354. Edmunds, *supra* note 31, at 19-20.

355. *Id.* at 18-19. Edmunds also preferred that there be “prompt review of the decisions of the State courts by the Supreme Court of the United States.” *Id.* at 19. He never incorporated this latter preference into any proposed legislation, probably in deference to the politics of the matter and his own doubts about whether federal jurisdiction was constitutional. The Supreme Court had only just begun to hint at federal interest in presidential elections. *See Ex parte Yarbrough*, 110 U.S. 651 (1884); *cf. Ex parte Siebold*, 100 U.S. 371 (1879) (federal interest in congressional elections).

356. Edmunds, *supra* note 31, at 19.

invading the right of the State it would be a direct decision in favor of the State.³⁵⁷

In this, Bayard echoed Senator Morgan, who had earlier argued that the benefit of section 2 was that “[e]very State can save its vote, if it will do so, against the power of [Congress] lawfully to exclude it for any cause except for the constitutional disability of the electors or for fraud in the action of the State tribunal that determines the validity of its appointment.”³⁵⁸ No one in the Senate ever countered Bayard’s and Morgan’s remarks.³⁵⁹ The power of fraud to undo otherwise-binding transactions was a fundamental assumption of Anglo-American law that permeated late nineteenth-century political/legal culture.³⁶⁰

The House of Representatives, however, had a different understanding of section 2. In 1884, when House opponents of the Senate bill attacked it for requiring Congress to accept section 2 determinations even when rendered by a “bribe[]”³⁶¹ or a “venal”³⁶² tribunal, none of the bill’s proponents responded that section 2 countenanced a fraud exception.³⁶³

In 1886, as the ECA proceeded to final passage, the House more clearly indicated its understanding that there was no fraud exception to section 2’s conclusivity principle. The 1886 House debate opened with Representative Caldwell, Chairman of the House committee in charge of the legislation, presenting the Senate bill with amendments proposed by the House committee.³⁶⁴ Among the committee’s amendments was one drafted to prevent Congress from rejecting any “electoral vote or votes from any State from which but one . . . return has been received”—even when there had

357. 8 CONG. REC. 159 (1878) (statement of Sen. Bayard).

358. *Id.* at 70-71 (statement of Sen. Morgan).

359. Senator Morgan was an active proponent of the ECA throughout its extended consideration, serving as a member of the Senate committee that drafted the ECA and as a floor debater. *See* 17 CONG. REC. 863-68, 1063 (1886) (statements of Sen. Morgan); 15 *id.* at 2650-51 (1882) (statement of Sen. Morgan); 10 *id.* at 3052, 3658, 3662, 3691, 3700 (statements of Sen. Morgan); 9 *id.* at 15 (1879) (committee assignments); 8 *id.* at 68-72 (1878) (statement of Sen. Morgan). He never indicated a different view, and his view complements his position that ultimately the ECA bound only Congress’s conscience. *See* 17 *id.* at 867 (1886) (statement of Sen. Morgan). In other words, even under the ECA, Congress retained sufficient flexibility to respond appropriately to any situation. *See id.*

360. *See supra* text accompanying notes 194, 207-11.

361. 15 CONG. REC. 5078 (1884) (statement of Rep. Eaton).

362. *Id.* at 5547 (statement of Rep. Herbert); *see also id.* at 5105 (statement of Rep. Pryor) (discussing fraudulent votes).

363. Rather, in 1884, the House heard only Representative Browne’s overstated response that the states ought to have “absolute power to determine every question concerning the appointment of its electors.” *Id.* at 5079. The response is overstated because it did not even allow Congress to reject votes based on constitutional infirmities. *See id.*

364. 18 CONG. REC. 29-31 (1886).

been no section 2 final determination.³⁶⁵ Speaking in support of the amendment, Representative William Cooper, a member of the House committee,³⁶⁶ praised it for going

[T]o the utmost verge of safety in providing against any possible invasion of the right of a State, for [it provides] that, where there is but one certificate from a State, no matter whether every single member of each House considering it may believe, or may know, that not one of the men named in that certificate has been duly elected, yet they shall have no right to throw it out, but it must be counted.³⁶⁷

Cooper's remarks provoked a telling response from Representative George Adams, who favored the Senate bill:

The conclusive presumption of validity established by the provision of the Senate bill . . . is established in a case where the question at issue has been submitted to and decided by the State tribunal provided for in section 2 of the bill. The decision of this State tribunal may be regarded as a judicial determination of the question by a court of last resort. To give conclusive effect to such a judicial determination is . . . a very different thing from the provision of the proposed amendment, since the latter gives the same conclusive presumption in favor of a mere alleged return which has never been judicially passed upon and may be known to be a forgery by every member of each House.

....

. . . [T]he provision of the Senate bill . . . is not . . . so dangerous as the provision of the House amendment that a single return, or a paper purporting to be a return, shall be conclusively presumed to be the legal and valid vote of a State, even though all the members of both Houses (to use the

365. *Id.* at 29 (citing S. 9, 49th Cong. § 4 (1886), as amended by the House committee). I have removed the word "lawful" from the quoted language. In the original it appears just before the word "return." I have done this because Representative Caldwell, in his remarks, stated that the committee had decided to remove that word. *Id.* at 31.

366. 17 *id.* at 538 (list of members of Select Committee on the Election of the President and Vice President).

367. 18 *id.* at 48 (statement of Rep. Cooper); *see also id.* at 50 (statement of Rep. Eden) (stating that the bill "absolutely requires" accepting the state return when only one slate of electors appears); *id.* at 49 (statement of Rep. Cooper). Representative Cooper is listed as a member of the House Select Committee on the Election of the President and Vice President. 17 *id.* at 538.

illustration of my friend [Rep. Cooper]) are firmly convinced that the return is a rank forgery.³⁶⁸

Adams's remarks clearly reveal an expectation that there was no fraud exception to both the House committee's proposal and section 2, as it then stood, and as it eventually passed into law.³⁶⁹

From this legislative history it is possible to conclude that the Congress that adopted the ECA did not intend a fraud exception to section 2's conclusivity principle. Senator Morgan's and Senator Bayard's remarks were made in 1878.³⁷⁰ Morgan and Bayard were both Democrats, and their remarks reflected the Democratic position on how to deal with the Republican returning boards that had, they thought, improperly certified Republican electors in the 1876 election.³⁷¹ It is possible that as the 1876 conflict receded, all parties began to appreciate the importance of making no exception to the principle of keeping elector election disputes out of Congress, especially when there had been a determination of the matter by quasi-judicial procedures. There always had been an undercurrent of opinion in Congress that the power of elector appointment was so completely vested in the states that Congress had to accept whatever returns came from the states' duly designated authorities.³⁷² That opinion had never dominated. But, as Representative Adams's remarks suggest, perhaps it reflected majority sentiment when combined with section 2's

368. 18 *id.* at 52 (statement of Rep. Adams). Rep. Adams, it should be noted, thought the Senate provision might be unconstitutional because Congress could not bind itself. *Id.* at 51-52. In his view, legislation could properly provide only for instances of disagreement between the two houses. *Id.*

369. Rep. Adams's remarks are a bit overwrought. It is difficult to imagine that either the House committee's proposal or the unamended Senate bill meant to compel Congress to accept forged documents. Even the most vociferous states' rights advocates admitted Congress's power to check the regularity of electors' credentials. *See, e.g., id.* at 47 (statement of Rep. Dibble).

Given the acknowledged power to check credentials, it should be pointed out that a true fraud exception lies somewhere between the literal remarks of Representatives Cooper and Adams. Representative Cooper claimed that Congress would have to accept credentials "knowing" that the electors were not elected. *Supra* text accompanying note 367. Not all erroneous elections are fraudulent. Thus, just as Adams's remarks overstate the absence of a fraud exception, Rep. Cooper's remarks do not literally deny its presence.

The Senate proposal successfully passed into law as it stood because although the House adopted the committee's proposal, the House receded from the proposal in the conference with the Senate. *See infra* text accompanying note 454.

370. *See supra* material cited in notes 357-58.

371. *See* 5 CONG. REC., pt. 4, 247 (1877) (statement of Justice Field); *id.* at 229 (statement of Rep. Hunton); *id.* 211-12, 215-16 (statement of Sen. Bayard).

372. *See* SAMUEL DIBBLE, VIEWS OF THE MINORITY: TO ACCOMPANY BILL S. 9, H.R. REP. 49-1638, pt. 2, at 1 (1886); SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 690-702 (1877) (statements of Sens. Baldwin and Pickney); 18 CONG. REC. 46-47 (1886) (statement of Rep. Dibble).

novel suggestion of interposing a state quasi-judicial tribunal to review the state's election.

It is also possible to conclude that the Senate and House simply disagreed on whether there was a fraud exception to Congress's section 2 commitment. Throughout the ECA's long gestational period, the House was more inclined towards states' rights than the Senate.³⁷³ It is plausible that the two chambers' differing views on the balance of national interest and states' rights in electoral vote counting created differing views on the implied fraud exception to section 2. If so, the ECA is ambiguous on whether there is an implied fraud exception to section 2's promise that state "final determinations" would be "conclusive."³⁷⁴

Finally, it is also possible to conclude that section 2 contemplates a fraud exception, but is ambiguous as to how extensive the fraud must be before Congress may appropriately decide to deny that a proper section 2 final determination was rendered. Section 2 was designed to prevent Congress from having to revisit and review troubled elections, but there may well be implied limits to that commitment. There was, after all, a strong sentiment in Congress that ultimately the ECA could not constitutionally bind a Senate and House that concurred in refusing to count particular electoral votes.³⁷⁵ Many proponents of the ECA voted for it intending to give the ECA's approach to electoral vote counting as much binding moral force as possible, but acknowledging that it could be set aside when appropriate.³⁷⁶

Recall also that the discussion of nineteenth-century administrative law showed that some nineteenth-century constitutionalists distinguished between degrees of fraud.³⁷⁷ Justice Bradley's rulings while on the Election Commission illustrate that there were some constitutionalists who held that Congress could not overturn state discretionary judgments for mere fraud, yet felt Congress could do so when confronted with "manifest fraud."³⁷⁸ Indeed, Justice Bradley felt that some fraud might be so extensive as to undermine the existence of the constitutional facts that were necessary to support the state tribunals' assertion of jurisdiction.³⁷⁹ That would be a

373. See *supra* text accompanying note 365 (discussing the House committee proposal); *supra* text accompanying note 304 (discussing House Committee minority); *infra* text accompanying note 536 (same).

374. See Electoral Count Act of 1887, ch. 90, § 2, 24 Stat. 373, 373 (current version at 3 U.S.C. § 5 (2000)).

375. See *supra* text accompanying notes 126-28.

376. See *supra* text accompanying note 128. This, in fact, was Representative Adams's actual position in the 1886 House debate just discussed. 18 CONG. REC. 51-52 (1886).

377. See *supra* text accompanying notes 193-211 (discussing administrative law).

378. See *supra* text accompanying note 209 (discussing Justice Bradley's position that Congress's inherent power was limited to setting aside returns only for "manifest fraud").

379. 5 CONG. REC., pt. 4, 263 (1877) (statement of Justice Bradley); see also *id.* at 260-61

species of constitutional infirmity, and Congress clearly intended an implied exception to section 2 for constitutional infirmity.³⁸⁰ Under this view, it would be appropriate to conclude that fraud did vitiate section 2 final determinations, though perhaps not in all instances of fraud.

In the end, in light of section 2's text and the legislative history, what is certain is that Congress meant section 2's conclusivity principle to encompass and protect final determinations that were merely erroneous.³⁸¹ In the Anglo-American tradition, errors in judgment did not vitiate discretionary decisions made by tribunals acting within their jurisdiction.³⁸² If there is an implied fraud exception to section 2's conclusivity principle, it was not intended to impugn this fundamental understanding.

In addition to section 2's implied exceptions, section 2's conclusivity principle is limited by an implicit understanding that underlies every application of section 2 when Congress meets to count electoral votes. When Congress receives an electoral vote, or set of electoral votes, claiming to have section 2 status, Congress decides whether the claim is meritorious.³⁸³ Since "Congress" means the Senate and the House of Representatives acting concurrently, deciding that an electoral vote merits section 2 status requires both houses of Congress to agree that it does. Each house might manifest its agreement through acquiescence. However, should an objection be made to counting an electoral vote that claims section 2 status,³⁸⁴ the electoral vote would not be received as conclusive

(statement of Justice Bradley) (arguing that, at least without further legislation, the want of jurisdiction must be based on facts that are manifest without further investigation); *cf.* *Bell v. Southwell*, 376 F.2d 659, 662, 664 (5th Cir. 1967) (explaining that the federal voiding of state elections is "drastic" and "guardedly exercised," but is appropriate for "gross, spectacular, [and] completely indefensible" unconstitutional state action).

The "constitutional facts" doctrine is discussed in Jaffe, *Judicial Review*, *supra* note 193, at 953; Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

380. *See supra* text accompanying note 337. The specific illustration Senator Bayard gave of evidence of fraud as an exception to section 2, was when there was no constitutional fact supporting the tribunal's judgment. *See* 8 CONG. REC. 158-59 (1878) (statement of Sen. Bayard).

381. For example, in the 2000 election, had the Supreme Court of Florida been allowed to reach a final determination by December 12, its ruling would have been unimpeachable in Congress, even if erroneous. *See supra* note 303. Or, given what happened, the final determination the Supreme Court of Florida did reach, though compelled to do so by an arguably erroneous United States Supreme Court decision, was equally conclusive because all courts were acting honestly.

382. *See supra* text accompanying notes 193-94.

383. If Congress's electoral vote counting under the ECA is subject to judicial review, then the courts ultimately will determine whether an electoral vote merits section 2 status. *See infra* note 396. Still, Congress must make the decision, at least in the first instance. *See* STANLEY BACH & JACK MESKELL, CONG. RESEARCH SERV., COUNTING ELECTORAL VOTES IN CONGRESS—MULTIPLE LISTS OF ELECTORS FROM ONE STATE 6 (2001) (suggesting the Joint Session may decide the lawfulness of a section 2 determination).

384. The ECA requires that objections be in writing and signed by at least one senator and one

if either the Senate or the House of Representatives sustains the objection. There is, in effect, a one-house veto over an electoral vote achieving section 2 status.³⁸⁵

The “Congress decides/one house veto” understanding follows from the constitutional postulate of equality between the House of Representatives and the Senate and its corollary that Congress acts only when its two chambers concur.³⁸⁶ For the Congresses that debated and passed the ECA, this postulate meant that counting an electoral vote required the assent of both houses of Congress.³⁸⁷ Congress could provide otherwise through statute or joint or concurrent rule.³⁸⁸ But unless Congress did,³⁸⁹ no electoral vote could be counted if one house objected to its reception.³⁹⁰

The ECA’s theory, then, is that under the Constitution, without supplemental legislation, no electoral vote may be counted unless both

representative. *See infra* text accompanying note 615.

385. To avoid confusion, let me state now that I am not discussing whether the vote will be counted. Section 4 of the ECA contains the rules which govern whether a return is counted. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373-74 (current version at 3 U.S.C. § 15 (2000)). A return that does not have section 2 status can still be counted under that provision. *See id.* Also, the vote of an elector that does have section 2 status may nonetheless not be counted because Congress, consistent with both section 2 and section 4, may find there is a supervening defect, like a constitutional infirmity, disqualification, or, perhaps, fraud. *See infra* text accompanying notes 458-68.

386. *See supra* text accompanying note 119 (discussing the equality postulate).

387. Some congressmen believed that the Constitution compelled Congress to accept electoral votes whenever: (1) a state submitted a single set of electoral votes; or (2) a state’s governor certified one of a state’s multiple submissions. *See, e.g.*, SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 504-05 (1877) (statement of Sen. Morton); sources cited *supra* note 372 (describing the view of Representative Dibble and of the House Committee minority). The congressmen who voted for the ECA clearly spurned this position.

Other congressmen believed that when a state submitted a single set of electoral votes, the Constitution required that Congress treat the votes as presumptively valid. *See, e.g.*, H.R. MISC. DOC. NO. 44-13, at 444, 527 (statement of Sen. Morton). This meant that the votes could be rejected, but only if both houses concurred in rejecting them. Since the ECA adopted this rule, whether for constitutional or prudential reasons, *see infra* text accompanying notes 506, 510, it requires no further discussion.

388. Some congressmen believed that the Constitution only allowed Congress to provide rules for situations where the houses disagreed about whether a vote should be counted. *See, e.g.*, 18 CONG. REC. 51-52 (1886) (statement of Rep. Adams).

389. As we have seen, congressmen debated whether statutes, joint rules, or concurrent rules were the proper vehicle for “providing otherwise.” *See supra* text accompanying notes 106-40. But most congressmen agreed it could be done by some means.

390. *See, e.g.*, 18 CONG. REC. 75 (1886) (statement of Rep. Herbert); *id.* at 52 (statement of Rep. Adams); *id.* at 51 (statement of Rep. Eden); *id.* at 47 (statement of Rep. Dibble); 17 *id.* at 1021, 2427 (statement of Sen. Hoar) (implying, by his comments of what the “remnant” is, that no vote could be counted unless both houses assented); *id.* at 865, 867 (statement of Sen. Morgan); 13 *id.* at 5148 (1882) (statement of Rep. Hewitt).

houses of Congress agree to count it.³⁹¹ In the ECA, Congress granted away much of that power, leaving, in Senator Hoar's view, "only [a] remnant."³⁹² As we shall see, the Senate and House of Representatives agreed in section 4 that when a state submitted one set of electoral votes, those votes would be counted unless both chambers concurred in rejecting it.³⁹³ In section 2, the Senate and House of Representatives agreed that if the states designated tribunals to determine electoral election contests, both chambers would be conclusively bound by those tribunals' decision.³⁹⁴ But in the ECA, Congress nowhere limited its power to determine whether a return truly deserved section 2 status.

In other words, under the terms of the ECA, when a return comes before Congress, even if it is the only return from that state, the most it can do is claim to have section 2 authentication. It does not have section 2 authentication until Congress agrees that it does. Only if both houses agree that a return merits section 2 status will the return be entitled to it.

Of course, if there is judicial review of Congress's electoral vote counting, a court might reverse Congress for blatantly incorrect rulings on whether a return was validly authenticated by the state's final determination authority.³⁹⁵ But absent judicial review, the ECA requires the concurrent vote of both houses for a return to obtain (or be recognized as having) section 2 status.³⁹⁶

In short, unlike other provisions of the ECA, section 2 does not alter Congress's normal voting rule. That Congress's normal voting rule applies to the determination of whether an electoral vote merits section 2 status is critically important to understanding the ECA's structure and coherence. This principle solves the problem that section 2's grant of "conclusive" effect to a state's "final determination"³⁹⁷ is unconstitutional as an instance

391. See *infra* text accompanying note 439 (discussing the 22d Joint Rule).

392. 17 CONG. REC. 1021 (1886) (statement of Sen. Hoar).

393. See *infra* text accompanying notes 447-56.

394. See *supra* text accompanying notes 338-44.

395. Also, if the President of the Senate, as presiding officer at Congress's vote counting session, rules an objection out of order because he thinks the return is conclusive under section 2, section 2 will have some binding effect. I shall argue, however, that the Senate President has no such power. See *infra* text accompanying note 665.

396. Even if there is judicial review, Congress will have initial say in whether a return merits section 2 status, and reviewing courts are likely to accord Congress's decision great deference. See Bach, *supra* note 107, at 730-31 (noting that courts are reluctant to oversee enforcement of Congress's in-house rules); Roberts, *supra* note 139, at 530-42 (observing that despite power to do so, courts have not intervened to enforce congressional rules); *cf.* Bush v. Gore, 508 U.S. 98, 113 (2000) (review of state court decisions on state law that have unconstitutional implications is "independent, if still deferential") (Rehnquist, C.J., concurring); Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 843 (deference accorded the reasonable construction of a statutory provision made by the administrator of an agency).

397. Electoral Count Act of 1887, ch. 90, § 2, 24 Stat. 373, 373 (current version at 3 U.S.C.

of “one Congress binding another.”³⁹⁸ The present Congress, by agreeing to give an electoral vote section 2 status, manifests its view that the state’s determination is conclusive.³⁹⁹ This principle also, as will be discussed, reconciles an otherwise irreconcilable conflict with the voting rules set out in section 4 of the ECA that apply to a state that submits one set of electoral returns.⁴⁰⁰ It helps us understand the voting rules set out in section 4 that apply to a state that submits multiple sets of returns.⁴⁰¹ Finally, it is the bedrock for understanding the ECA’s procedural provisions, particularly the role of the President of the Senate as presiding officer of the electoral vote counting session.⁴⁰²

To sum up this long discussion of section 2: section 2 essentially encourages the states to craft post-election contest procedures for their presidential elections by pledging Congress to accept the states’ identification of their duly appointed electors. Congress’s commitment is subject to express and implied limitations. Those limitations frame the grounds that Congress, consistent with section 2’s pledge, may refuse to grant section 2 status to electoral votes that claim it, and may refuse to count electoral votes that have it.

When electors claim section 2 status, Congress is not to ask, at least initially, “Are these the electors who won the election?” Rather, Congress should ask: (1) Have these electors been confirmed by the state’s final determination process?; (2) Was the state law creating that process enacted prior to election day?; (3) Did the process use quasi-judicial methods?; (4) Was the determination final at least six days before the day set for elector balloting?; and, perhaps, (5) Was the determination nonfraudulent?

Electors who claim section 2 status have it only when all these questions are answered affirmatively. In answering these questions affirmatively, Congress acts bicamerally. The questions can be answered affirmatively only if both the House and Senate concur. Absent judicial review, electors claiming section 2 status receive it only when both chambers of Congress agree that they merit it.

If either chamber answers negatively to any of the questions, the electors’ votes may still be the appropriate votes to count and they may be

§ 5 (2000)).

398. See *supra* note 106 and accompanying text.

399. If judicial review allowed a court to accept a vote after both houses voted to reject the return because the court found the return to clearly deserve section 2 status, then the ECA would be binding on a future Congress.

400. See *infra* text accompanying notes 701-02.

401. Conversely, section 4’s voting rules for grappling with situations in which a state submits multiple slates of electors and multiple slates claiming section 2 status will make it clearer that both houses must agree a particular set of electoral votes merits section 2 status in order for that set to have it.

402. See *infra* text accompanying notes 587-669 (discussing procedural provisions).

counted, but not because of section 2's conclusivity principle. Section 2 is a "safe harbor," not the only ground for accepting and counting electoral ballots.⁴⁰³

If both Houses answer affirmatively to all of these questions, Congress may still refuse to count the votes of any electors who (1) represent a territory not entitled to participate in the Electoral College; (2) suffer a personal constitutional disqualification from holding the elector's office; (3) voted in violation of constitutional requirements; or (4) voted corruptly. Thus, section 2's pledge is inherently limited. It was not meant to cover anything beyond the state's determination of the identity of the electors it appointed to cast its electoral votes.

In deciding to accept or reject the votes of electors who merit section 2 status, Congress is governed by section 4 of the ECA.⁴⁰⁴ Section 4's provisions, and their relation to section 2, are discussed later.⁴⁰⁵ The analysis thus far has dealt only with the decision to accord electoral votes section 2 status and the conditions and limitations of that decision. Section 2 is, as Professor Burgess said, "the groundwork . . . of the whole system of the [electoral] count."⁴⁰⁶ Still, it is preliminary to a consideration of the rules set out in section 4 by which electoral votes are actually counted.

C. Section 3: Authenticating and Publicizing the States' Appointment⁴⁰⁷

Focused as it was on resolving problems concerning the identity of the states' electors, Congress in section 3 of the ECA extended federal requirements for authenticating and publicizing the states' choice of electors. The Constitution originally required the electors to authenticate their own acts: After balloting and making a list of the persons voted for and the number of votes each person received, the Constitution directed the electors to "sign and certify" the list and "transmit" it "sealed to the Seat of the Government, directed to the President of the Senate."⁴⁰⁸ In 1792, in the only legislation enacted before 1887 affecting the electoral ballot counting process, Congress set further requirements for authenticating the

403. See *infra* text accompanying notes 438-559 (discussing section 4 of the ECA).

404. See *infra* text accompanying notes 509.

405. See *infra* text accompanying note 458-68 (discussing the relationship between section 4 and section 2).

406. Burgess, *supra* note 10, at 635.

407. Electoral Count Act of 1887, ch. 90, § 3, 24 Stat. 373, 373 (current version at 3 U.S.C. § 6 (2000)).

408. U.S. CONST. art. II, § 3. The Twelfth Amendment directed the electors to make distinct lists for President and Vice President, but made no change in the certification and delivery process. *Id.* amend. XII.

electors' status as electors and their vote tallies.⁴⁰⁹ Congress's 1792 statute required the electors to make out their certified lists in triplicate and certify on the outside of each of the sealed packets that the packet contained their state's list of electoral votes.⁴¹⁰ The statute also required the electors to appoint a messenger to hand-deliver one packet to the Senate President, send one packet by mail to the Senate President, and deliver the third packet to the local federal district judge.⁴¹¹

In addition, the Act of 1792 directed the governor of each state to "cause three lists of the names of the electors of such state to be made and certified and . . . delivered to the electors on or before" the day set for elector balloting.⁴¹² The electors were to "annex" one of the governor's lists "to each of the lists of their votes."⁴¹³ With this provision, Congress shifted the authentication of who were the state's electors from the electors themselves to the governor of the state.

Some congressmen were troubled by the provision requiring the governor to execute certificates naming his state's electors. It was "degrading" to require him to participate, and there was nothing that could be done should the governor refuse to comply.⁴¹⁴ However, most congressmen thought the provision was an appropriate method for regulating how the states "exercis[ed] this privilege" of casting electoral ballots.⁴¹⁵

In all probability, Congress viewed the requirement as an exercise of its authority under Article IV of the Constitution to prescribe the manner in which state "Acts, Records and Proceedings shall be proved."⁴¹⁶ That is how later Congresses saw it.⁴¹⁷ The governor is the officer who speaks for the state to the rest of the Union. He seems to be the appropriate person to inform Congress as to the identity of his states' presidential electors.

The ECA, as originally proposed by Edmunds and as reintroduced in subsequent Congresses, carried forward the 1792 certification requirements, making clear that the governor was to make out the

409. See Act of Mar. 1, 1792, ch. 8, § 2, 1 Stat. 239, 239-40 (providing the duties of electors in presidential elections).

410. *Id.*

411. *Id.*

412. *Id.* § 3 (providing the duties of the executive of each state).

413. *Id.*

414. See, e.g., 3 ANNALS OF CONG. 279-80 (1791) (statement of Reps. Niles and Hillhouse).

415. See, e.g., *id.* at 279 (statement of Rep. Clark).

416. U.S. CONST. art. IV, § 1. A draft of the Constitution contained a clause authorizing Congress to determine "the manner of certifying and transmitting" electoral votes, but it was deleted by the Committee on Style. CURRIE, *supra* note 59, at 137 & n.54.

417. 18 CONG. REC. 45 (1886) (statement of Rep. Dibble) (an ultra-states' rights congressman saying federal legislation may be predicted on Article IV, Section 1 to regulate the certification of the states' electoral process).

certificate after the electors' final determination.⁴¹⁸ During the 1886 debates, Senator Evarts proposed additional safeguards: "After the final act of the State in the process of elections," the governor should execute a certificate "under the seal of State" setting forth "who had been appointed and what votes had been given or cast for every person voted for for that place."⁴¹⁹ This certificate, "as soon as practicable after the final act of the State in the electoral appointment," should be sent to the United States Secretary of State to "publish[] to the whole world what was declared by each State as the result, and not merely a certificate of a conclusion, but a statement of the final act of election itself—that is, the canvass and declaration of the polls."⁴²⁰ Senator Evarts also suggested that three copies of this enlarged gubernatorial certificate should be given to the electors to be annexed to their list of votes.⁴²¹

What Evarts wanted, "neither more nor less than [what] is required for the security of elections in our own States," was "an open and public declaration under the authority of high official duty of the result."⁴²² He thought that this more complete official statement of the electors' election might justify section 2's conclusive effect. The certificate required by the 1792 law was only "a certificate of a conclusion."⁴²³ Evarts saw his certificate as "a statement of the final act of election itself" that gave a certainty of knowledge on the subject.⁴²⁴ With this certainty of knowledge published to the world and communicated openly to Congress well before

418. *See, e.g.*, 15 *id.* at 5076 (1884) (citing S. 25, 45th Cong. § 3 (1884)); 13 *id.* at 859 (1882) (citing S. 613, 47th Cong. § 3 (1882)).

419. 17 *id.* at 1057 (1886) (statement of Sen. Evarts).

420. *Id.* The text of section 3 of the ECA as finally adopted is ambiguous as to whether, when the state's initial administrative ascertainment of electors is subject to a contest that results in a section 2 final determination, the governor should send in a section 3 certificate after both the administrative ascertainment and the final determination, or only after the final determination. *See* Electoral Count Act of 1887, ch. 90, § 3, 24 Stat. 373, 373 (current version at 3 U.S.C. § 6 (2000)). Senator Evarts's comments, and in the legislative history, make it clear that the governor should wait until the end of his or her state's election determination process. 17 CONG. REC. 2427 (1886) (statement of Sen. Hoar). Thus, Governor Jeb Bush acted prematurely when he sent in his certificate of ascertainment to the federal government on November 26, 2000, and followed that one up with a second certificate of final determination on December 13. *See* EXEC. DEP'T, STATE OF FLA., CERTIFICATE OF ASCERTAINMENT OF PRESIDENTIAL ELECTORS (Nov. 26, 2000), available at http://www.archives.gov/federal_register/electoral_college/2000_certificates/ascertainment_florida.html (last visited Feb. 14, 2004); EXEC. DEP'T, STATE OF FLA., CERTIFICATE OF FINAL DETERMINATION OF CONTESTS CONCERNING THE APPOINTMENT OF PRESIDENTIAL ELECTORS (Dec. 13, 2000) [hereinafter CERTIFICATE OF FINAL DETERMINATION, available at http://www.archives.gov/federal_register/electoral_college/2000_certificates/ascertainment_florida.html (last visited Feb. 14, 2004)].

421. 17 CONG. REC. 1057 (1886) (statement of Sen. Evarts).

422. *Id.* (statement of Sen. Evarts).

423. *Id.*

424. *Id.*

it counted the electoral vote, Evarts thought giving conclusive effect to a section 2 final determination might be justified.

Perhaps, then, it would be considered entirely right that no vote that was communicated under these sanctions and with this ascertainment could properly be challenged by either House or brought into question unless both Houses should concur in some grave, some *post hoc* occurrence that should disparage the absolute control given to this ascertainment.⁴²⁵

In truth, Evarts's proposal accomplished nothing, given that by 1887 the result of every state's election was publically known as it was reached.⁴²⁶ Accordingly, Senator Hoar at first resisted it.⁴²⁷ His mind began to change, though, when Senator Edmunds spoke on its behalf. In Senator Edmunds's view:

[T]he two Houses of Congress would be informed as to who it appeared from this certificate of the governor had been elected electors . . . and who it appeared if a tribunal in that State—which is the great security, after all—had decided, if there was any doubt or dispute, was the true electoral college of that State. That would enable the two Houses of Congress to be advised in advance of the state of the official circumstances that had taken place in that State.⁴²⁸

With Senator Edmunds's support, Senator Evarts's proposed expansion of the governor's certificate was drafted into section 3 by the Senate committee during the bill's recommittal.⁴²⁹

In adding a more elaborate gubernatorial certification to the states' electoral vote packets, Congress did not mean to make any substantive change in the law of the electoral count.⁴³⁰ Over the course of the

425. *Id.* at 1058.

426. *See* 19 *id.* at 1062 (1886) (statement of Sen. Hoar) (commenting that election results are public knowledge); FAIRMAN, *supra* note 5, at 40-41; HAWORTH, *supra* note 5, at 45-56 (discussing that on the morning after the 1876 election it was known that Hayes and Tilden were separated by only a few contestable electoral votes); Letter from Thomas Jefferson to James Madison (Dec. 19, 1800), *reprinted in* 2 MATTHEW DAVIS, MEMOIRS OF AARON BURR 69-70 (photo reprint 1971) (stating Jefferson's expectation that he and Burr would tie for the presidency).

427. 17 CONG. REC. 1062 (1886) (statement of Sen. Hoar).

428. *Id.* (statement of Sen. Edmunds); *see also id.* at 2386 (statement of Sen. Hoar) (commenting on Senator Edmunds's role).

429. *See id.* at 2427 (statement of Sen. Hoar); *id.* at 2387 (S. 9, 49th Cong. § 3 (1886), after recommittal).

430. *See, e.g., id.* 2427 (statement of Sen. Hoar) (indicating that the provision for a more elaborate gubernatorial certification is not a significant change).

nineteenth century, a few congressmen had argued that the governor's certification should be definitive as to the identity of the state's electors.⁴³¹ However, that never was the sentiment of the vast majority of Congress. In 1801, 1809, and 1873, Congress accepted electoral votes transmitted by electors without any gubernatorial certification.⁴³² Conversely, in 1873 and 1877, Congress rejected votes backed by the governor's formal certificate.⁴³³ For most congressmen, the presence or absence of the governor's certificate was a factor to be considered, but because the governor's certification of an elector's appointment to office was a ministerial act, it was not conclusive.⁴³⁴

In making his proposal for an expanded gubernatorial certificate, Senator Evarts clearly focused on the fact that, under the ECA, the governor's certificate might be authenticating the state's section 2 final determination.⁴³⁵ He wanted to give that fact more publicity, and he wanted Congress to have earlier notice of it.⁴³⁶ But he was not altering the legal effect of the governor's certificate per se. We will see that ECA section 4 does, under certain circumstances, give the governor's certificate legal import.⁴³⁷ The point here is that historically the governor's certification had little or no effect on an electoral vote's validity and section 3 did not alter that tradition.

431. See, e.g., SAMUEL DIBBLE, VIEWS OF THE MINORITY: TO ACCOMPANY BILL S. 9, H.R. REP. 49-1638, pt. 2, at 1 (1886); SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 690-702 (1877) (statements of Sens. Baldwin and Pickney); 18 CONG. REC. 46-47 (1886) (statement of Rep. Dibble).

432. See H.R. MISC. DOC. NO. 44-13, at 381-89 (discussing Texas's 1872 electoral certificate and vote); *id.* at 41 (statement of Rep. Hillhouse) (discussing returns of one of the states, which he does not name); 13 CONG. REC. app. 539 (1882) (statement of Rep. Updegraff) (describing Georgia's vote in 1800); GOV. PACKSON, EXECUTIVE DEP'T, STATE OF GA., CERTIFICATE OF 1800 GEORGIA ELECTION (1800). Certificate of Georgia vote 1800 (photocopy on file with the author).

433. H.R. MISC. DOC. NO. 44-13, at 357-63, 390-98, 403-05 (discussing and rejecting Louisiana's electoral votes, even those certified by Governor Warmoth); 5 CONG. REC., pt. 4, 178-79, 264-66 (1877) (transcript of Electoral Commission meeting) (discussing and rejecting a vote from an elector certified by Oregon Governor Grover); *supra* text accompanying notes 212-21 (discussing Justice Bradley's rejection of Oregon's 1877 vote).

434. See, e.g., 17 CONG. REC. 1023 (1886) (statement of Sen. Sherman); *infra* text accompanying notes 480-87 (discussing governor's certification); *supra* text accompanying notes 212-21 (relating Justice Bradley's discussion of the Oregon electoral vote in 1877).

435. 17 CONG. REC. 1057 (1886) (statement of Sen. Evarts).

436. *Id.*

437. See *infra* text accompanying notes 532-57 (discussing the governor's certification under section 4 when there are multiple slates of electors).

D. Section 4: The Substantive Electoral Count Provisions⁴³⁸

In adopting the 22d Joint Rule in 1865, Congress made its position on the Constitution's default rules for electoral vote counting crystal clear: When the Senate and House concurred in counting an electoral vote, it would be counted; when they concurred in not counting an electoral vote, it would not be counted; when they disagreed in counting an electoral vote, it would not be counted.⁴³⁹ There was, in effect, a one-house veto over counting an electoral vote. Also, in 1865, in adopting the joint resolution barring Congress from counting electoral votes submitted from states that had joined the Confederacy, Congress made clear its view that it had the power to alter the default vote counting rules by concurrent rule, joint rule, or statute.⁴⁴⁰

In section 2 of the ECA, Congress used its power to commit itself to accepting the state's determination of the identity of its electors whenever the Senate and House agreed that the electors' appointment had been adjudicated by a proper section 2 final determination process.⁴⁴¹ Given the conditions that hedged whether electors merited section 2 status, Congress knew section 2 did not guarantee that every state would always submit electoral votes that merited section 2 treatment.⁴⁴² In addition, given section 2's limitations, Senate and House agreement that certain electors deserved section 2 status did not mandate counting their votes.⁴⁴³

Congress saw section 2 as a great aid, but not as a complete solution, to the problems of the electoral count. In section 4, Congress addressed the rules which, while meshing with section 2, would actually determine whether or not to count an electoral vote.⁴⁴⁴

438. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373-74 (current version at 3 U.S.C. § 15 (2000)).

439. See *supra* text accompanying note 63. I believe Congress's 1865 view reflects dominant congressional opinion since the founding, although there is scholarly commentary that claims otherwise. See *supra* notes 61-63 (noting that some historians claim Congress adopted this position for the first time in the 1860s).

440. See *supra* text accompanying notes 63, 69 (discussing the 22d Joint Rule and the 1865 Joint Resolution). A joint resolution has the same constitutional status as a statute because it requires bicameral passage and presidential presentment. See U.S. CONST. art. I, § 7, cl. 3. That Congress had power to alter the Constitution's default voting rules by statute was subject to greater diversity of opinion in Congress. See *supra* text accompanying notes 128-32.

441. See *supra* text accompanying note 287 (discussing section 2 of the ECA).

442. In fact, almost none of the electoral votes that have been submitted since the ECA's adoption have been adjudicated by a section 2 process. Florida's electoral vote in 2000 is the only instance of which I am aware. See Wroth, *supra* note 13, at 337 (A 1961 "survey" of electoral counts under the ECA shows no submission of section 2 validated returns.); MASKELLE ET AL., *supra* note 13, at 23-29 (describing electoral counts from 1889 to 1997 and not mentioning any § 2 determinations).

443. See *supra* text accompanying notes 403-06.

444. See *infra* text accompanying note 509.

Section 4 is a rather long and turgid provision that covers some of the procedures of Congress's vote counting session and the substantive counting rules.⁴⁴⁵ The substantive rules themselves require 394 words and are communicated, in part, with a sentence that is 275 words in length. This nightmare for interpretation breaks the situations confronting Congress into four generic situations and provides vote counting rules for each one. The generic situations are:

- (1) when Congress receives only one set of electoral votes from a state;
- (2) when Congress receives two or more sets of electoral votes from a state and one of them claims to have been authenticated by a section 2 proceeding;
- (3) when Congress receives two or more sets of electoral votes from a state and two or more of them claim to have been authenticated by a section 2 proceeding; and
- (4) when Congress receives two or more sets of electoral votes from a state and none of them have been authenticated by a section 2 proceeding.

The remainder of this Part explores section 4's treatment of the four generic situations. After discussing section 4's approach to single submissions from a state, this Part groups the problem of multiple submissions and analyzes them together.

1. When Congress Receives Only One Set of Electoral Votes from a State

From 1865 to 1876, Congress's sentiment for states' rights was at an historic low ebb. In those years, Congress governed electoral vote counts through the 22d Joint Rule which allowed Congress to reject any electoral vote, even if a state had submitted only one return, when a single house of Congress voted to reject it.⁴⁴⁶ By the mid-1870s, there was general dissatisfaction with this approach, which some congressional leaders began to describe as unconstitutional.⁴⁴⁷ In 1875, the Senate began passing bills that cabined Congress's power to reject electoral votes when a state submitted only one return. Under the Senate bills, Congress retained unfettered discretion to reject electoral votes from a state that submitted

445. For a discussion of the procedural rules, *see infra* text Part III.E.

446. *See supra* text accompanying note 63.

447. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 453-54 (1877) (statement of Sen. Morton); *id.* at 416-18. The Senate voided the joint rule in 1876. H.R. MISC. DOC. NO. 44-13, at 444-58, 782-94 (1877); Wroth, *supra* note 13, at 330.

one set of returns but only “by the affirmative vote of the two houses.”⁴⁴⁸ And beginning in 1878, the Senate bills further qualified Congress’s discretion by requiring Congress to accept electors authenticated by a section 2 proceeding as the states’ true electors.⁴⁴⁹

From 1875 until 1886, all of the Senate bills died in the House.⁴⁵⁰ In 1886, however, the House responded to the Senate bill with a counterproposal that was more deferential to states’ rights. The House agreed with the Senate that section 2 determinations conclusively bound Congress as to the electors’ identity.⁴⁵¹ But the House also wanted Congress, in the absence of a section 2 determination, to be conclusively bound as to the electors’ identity when a state presented only one set of returns and the electors’ appointment to office was attested to by the governor’s certificate called for by section 3.⁴⁵² The House provision read: “[N]o electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been certified to according to section 3 of this act, from which but one return has been received, shall be rejected.”⁴⁵³ At conference, the Senate and House of Representatives compromised. The conference accepted the House’s amendment, but conditioned it on the requirement that electors have been “lawfully certified” by the governor.⁴⁵⁴

As compared to the provision that passed the House, the provision that emerged from conference, and passed into law, was lengthier and more repetitious than might be expected for such a slight change. Representative Caldwell, the Chairman of the House committee, attributed the extra length to the desire “to express in words what is of clear implication . . . thus leaving nothing to doubtful construction” about the extent of Congress’s commitment to accept electoral returns when a state presented only one set of electors.⁴⁵⁵ As enacted, the relevant part of section 4 provided:

[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 three of this act from which but one return has been received shall be rejected, but

448. H.R. MISC. DOC. NO. 44-13, at 687 (citing S. 1, 44th Cong. § 1 (1876)); *id.* at 459 (citing S. 1251, 43rd Cong. § 1 (1875)); In the Electoral Commission Law of 1877, Congress also provided that it required the concurrent vote of both houses to reject electoral votes from a state that presented only one return. *See* Act of Jan. 29, 1877, ch. 37, § 1, 19 Stat. 227, 227-28.

449. *See supra* text accompanying note 428.

450. Wroth, *supra* note 13, at 330-31, 334.

451. ANDREW CALDWELL, REPORT: TO ACCOMPANY BILL S. 9, H.R. REP. NO. 49-1638 (1886); 18 CONG. REC. 29-30 (1886).

452. 18 CONG. REC. 77 (1886).

453. *Id.* (citing adopted amendment).

454. *Id.* at 668, 713.

455. *Id.* at 668.

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.⁴⁵⁶

In the end, then, Congress reserved for itself the power to reject, by concurrent vote, the electoral vote of a state that presented one set of electors. However, Congress limited its power to do so to when: (1) the electors' votes were not "regularly given;" or (2) the governor had not "lawfully certified" the electors' appointment.

a. When the Single Set of Electoral Votes Claims Authentication by a Section 2 Process

Since this part of section 4 literally applies to all instances where a state submits one set of electoral votes, it seems to apply regardless of whether the state's return has been authenticated by a section 2 final determination proceeding. In covering the submission of section 2 authenticated returns, this part of section 4 seems to contradict section 2's pledge to give "conclusive" effect to a state's "ascertainment" of its electors.⁴⁵⁷ By allowing a concurrent vote of the houses of Congress to reject a state's single set of electoral votes, section 4 seems to conflict with section 2's pledge.

The conflict, however, is more apparent than real. Section 2's pledge does not extend to the electors' post-ascertainment conduct, nor to any constitutional infirmities in their status as electors or in the votes they cast.⁴⁵⁸ It applies only to the identity of the electors the state appointed. As to all those matters not within the scope of section 2's conclusivity principle, section 4 complements, rather than contradicts, section 2 by providing the rule that governs whether some defect properly bars counting the votes of the duly ascertained electors.

Still, section 2 does have some scope. In section 2, Congress committed itself to not reject electoral votes merely because it thought that the electors authenticated by a proper section 2 process had not actually won the state's presidential election.⁴⁵⁹ With this in mind, it is possible to see how section 4 both meshes with, and controls, section 2.⁴⁶⁰

456. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373-74 (current version at 3 U.S.C. § 15 (2000)).

457. *See id.* § 2.

458. *See supra* text accompanying notes 322-37.

459. If there is no fraud exception, Congress's commitment is even larger.

460. This is an initial assessment. The final understanding must await an analysis of the procedural provisions which affect how section 2 and section 4 work together procedurally.

On the one hand, given that electors claiming section 2 status do not, in fact, have section 2 status unless both the Senate and the House of Representatives concur, both houses of Congress voting against counting an electoral vote expresses the view that the elector casting that vote either:

(1) merits section 2 status but for some valid reason beyond section 2's scope does not merit having his vote counted;⁴⁶¹ or

(2) does not merit section 2 status, and for some valid reason, to be discussed in our analysis of section 4, does not merit having his vote counted.

In either situation, section 2's pledge and section 4's rule for counting electoral votes from states that submit only one set of returns work together and do not conflict.

On the other hand, it is always possible that the elector whose vote was rejected under section 4 by Congress's concurrent vote did in fact qualify for section 2 status and there was no valid reason for rejecting that vote. It is possible that both the Senate and the House of Representatives adopted option (1) or (2) pretextually, or merely erroneously.⁴⁶² In that case, as Senator Edmunds told the Senate when submitting his original bill in 1878, Congress's action would not be "rightful."⁴⁶³ Edmunds thought that if Congress shirked its section 2 commitment, the courts might intervene.⁴⁶⁴ Most congressmen disagreed, thinking that in electoral vote counting, Congress was the nation's ultimate tribunal.⁴⁶⁵ In their view, when the

461. Of course, if only one house of Congress manifests its view that the electors do not merit section 2 status by voting against counting their votes, the votes would still be counted under section 4 if those votes were the only set of electors the state submitted.

462. Given the complexity of the ECA, mistakes in application are easy to make, even unintentionally. During the 2001 vote count, some House members objected to counting Florida's electoral votes on the ground that they were not "regularly given." 147 CONG. REC. H52 (daily ed. Jan. 6, 2001) (statements of Reps. Jackson-Lee, Meek, Johnson, and Cummings). Since there was no post-appointment misbehavior by Florida's electors, this was an inappropriate ground for objecting. It would have been more plausible to object to Florida's electoral votes by arguing they were not lawfully certified. But this position would require a showing that Florida's election was fraudulent and that Florida's electoral votes were not entitled to section 2 status. See *infra* text accompanying notes 400-502.

463. 8 CONG. REC. 52 (1878) (statement of Sen. Edmunds). The situation is actually more complex than Senator Edmunds thought. If the ECA is really a joint rule adopted in statutory form, then the Senate's and House's concurrence expresses their intent to change the rule. Even if the ECA is a statute, it cannot constitutionally bind Congress, and Congress rightfully may ignore it. Only if the ECA is a statute that binds Congress would Congress's action not be rightful. Even then, there may be no power to correct it.

464. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 481 (statement of Sen. Edmunds) (stating that presidential elections are subject to quo warranto proceedings); 8 CONG. REC. 52 (1878) (statement of Sen. Edmunds); Edmunds, *supra* note 31, at 20 (stating that Congress should pass a law subjecting disputed presidential elections to the judiciary).

465. See, e.g., 17 CONG. REC. 867 (1886) (statement of Sen. Morgan); discussion *supra* Part

presidency was closely contested, judges, even Supreme Court justices, might succumb to party spirit.⁴⁶⁶ Electoral vote counting was a political, not judicial, affair. Yet, thinking of the judiciary was useful because, as Senator Morgan reminded his colleagues when the ECA debate drew to a close:

Senator [Edmunds] from Vermont remarked recently in debate that there is a point beyond which you can not bind the human conscience. . . . A decision of the Supreme Court of the United States might be made as a result of bribery, yet there is no power in the country that can set it aside; that is the supreme tribunal. . . . So [Congress] may vote down the voice of the State's electors, . . . and after the act has been done the power to revoke it, even the power to question it, has passed beyond human control.⁴⁶⁷

The Congresses that debated and passed the ECA believed that: in all governmental arrangements, there was no escaping the problem of human fallibility; in electoral vote counting, the Constitution made Congress the nation's tribunal of last resort; and, absent judicial review, section 4's voting rule controlled section 2's conclusivity principle.⁴⁶⁸

b. When the Single Set of Electoral Votes Does Not Claim Authentication by a Section 2 Process

In debating section 4's voting rule for situations where a state submitted one set of electoral votes, Congress generally assumed that it would faithfully self-enforce section 2's pledge.⁴⁶⁹ Consequently, most of the discussion of this part of section 4 focused on counting returns from a state

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466. See, e.g., 17 CONG. REC. 866 (1886) (statement of Sen. Morgan) (recognizing the possibility of political bias in Supreme Court justices); 13 *id.* at 5144-45 (1882) (statement of Reps. Bowman and Browne) (recognizing the possibility of bias in all judges); *supra* text accompanying note 35.

467. 17 CONG. REC. 867 (1886) (statement of Sen. Morgan); see also 8 *id.* at 70 (1878) (statement of Sen. Morgan) (stating that Congress's "power could be abused so that the people would refuse submission to the persons so declared elected; but such refusal would be revolution, however much it might be justified in morals or by the right to demand redress for governmental abuse").

468. Once again, I postpone discussing the possible influence of the President of the Senate in his role as presiding officer of Congress's vote counting session. For that discussion, see *infra* Part III.E.

469. Congress seemed to think that the answer to the question whether a state return merited section 2 status would be readily apparent. Congress ignored Representative Updegraff's warning that law can never define two classes of cases with total clarity. See 13 CONG. REC. app. 539 (1882) (statement of Rep. Updegraff).

that submitted one set of electoral votes that did not claim authentication by a section 2 procedure.⁴⁷⁰ In that situation, without any potential conflict with section 2's conclusivity principle, the Senate and House of Representatives agreed to count a state's single set of electoral votes unless both houses concurred in rejecting them.⁴⁷¹ In addition, the Houses of Congress agreed to limit the rightful grounds for rejecting a state's single set of electoral votes to when the votes were not "*regularly given* by electors whose appointment has been *lawfully certified* to according to section three."⁴⁷²

In preserving its right to reject non-section 2 authenticated electoral returns that were not regularly given or lawfully certified, Congress meant to encompass all the express and implied exceptions to counting electoral votes that were discussed as part of section 2.⁴⁷³ A vote not "regularly given" included all improprieties in the electors' conduct in office.⁴⁷⁴ A vote not "lawfully certified" included Congress's power to reject electoral votes due to preexisting constitutional infirmities.⁴⁷⁵ All of the prior analyses of constitutional infirmities that justify rejecting section 2 authenticated returns apply here with even greater force since we are discussing returns that have not been subject to quasi-judicial scrutiny.⁴⁷⁶ In addition, in 1886, when Representative Caldwell explained section 4 to the House of Representatives, his illustrations of a return that was not lawful were instances of constitutional infirmity.⁴⁷⁷ It was, he said,

470. See, e.g., 18 *id.* at 49 (1886) (statement of Rep. Eden) (discussing Congress as responding to electoral returns that either have or do not have section 2 authentication); 17 *id.* at 2427 (statement of Sen. Hoar) (same).

471. 18 *id.* at 668, 713 (1887) (Conference Report). In other words, if the chambers of Congress disagreed, the votes would be counted. There was no one-house veto.

472. Electoral Count Act of 1887, ch. 90, § 3, 24 Stat. 373, 373 (current version at 3 U.S.C. § 6 (2000)) (emphasis added).

473. See *supra* text accompanying notes 403-06 (summarizing analysis of section 2 of the ECA).

474. 18 CONG. REC. 52 (1886) (statement of Rep. Adams) (discussing phrase "regularly given" as it appears in another section). As discussed, these defects include failing to comply with constitutional requisites for elector voting, such as not voting on the correct day, voting for a constitutionally disqualified candidate, or corruption in office.

475. Constitutional infirmities include defects resulting from the constitutional ineligibility of the elector and from the state's inability to participate in the Electoral College. See *supra* text accompanying notes 322-37.

476. See 18 CONG. REC. 52 (1886) (statement of Rep. Adams) (discussing returns authenticated by the section 2 procedure as entitled to more protection than returns that have not been through that process).

477. *Id.* at 31 (statement of Rep. Caldwell) (referring to violations of the Republican Guarantee Clause and of the Fourteenth Amendment's mandate to decrease state electoral votes as a penalty for denying the vote to African-American citizens).

“certainly absurd to try to deny to Congress the power to remedy an unlawful return, although it might be the only return.”⁴⁷⁸

In other words, in limiting its discretion to reject electoral returns under section 4, Congress sensibly intended non-section 2 authenticated returns to be at least as vulnerable to congressional rejection as a return that had section 2’s additional stamp of authenticity. In fact, Congress intended non-section 2 authenticated returns to be more vulnerable to congressional rejection.⁴⁷⁹ Finding a vote to be “lawfully certified” encompasses additional grounds for rightful rejection: that the governor issued his section 3 certificate to electors who were not entitled to it under state law; or that state election officials had acted fraudulently.⁴⁸⁰

Congress’s power, when both Houses concurred, to reject votes from electors whose gubernatorial certification was not authorized by state law is well supported by section 4’s legislative history and the ECA’s assumptions. Recall that in 1873 and 1877, Congress had rejected votes given by electors whose appointment was certified by their state governor.⁴⁸¹ Congress in one case, and the Electoral Commission on behalf of Congress in the other, had done so because they had determined that the governors had issued their certificates to electors who were not entitled to them under state law.⁴⁸² In 1886, Senator Sherman reminded Congress why these decisions were proper. A governor’s certificate, he said, “is only prima facie evidence of the facts contained in it; it is not at all conclusive.”⁴⁸³

The propriety of Congress’s action in 1873 and 1877, and the support for Sherman’s remark, lie in the nineteenth-century legal culture’s assumptions about administrative law and election law. In particular, Congress’s action and Sherman’s remarks rely on the view that a state governor acts ministerially, not discretionarily, when he certifies the outcome of an election.⁴⁸⁴ A governor’s “ministerial” certificate gives its recipient a “prima facie” right to office and makes him an officer de

478. *Id.*

479. 17 *id.* 2427 (statement of Sen. Hoar).

480. Fraud was discussed as a possible ground for rejecting section 2 authenticated returns. *See supra* notes 357-82 and accompanying text. The difference is that for section 4, there is no doubt that fraud is a permissible ground. *See infra* text accompanying notes 500-02.

481. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 357-63, 390-98, 403-05 (1877) (discussing and rejecting Louisiana’s electoral votes, even those certified by Governor Warmoth); 5 CONG. REC., pt. 4, 264-66 (1877) (statement of Justice Bradley) (discussing and rejecting a vote from an elector certified by Oregon Governor Grover).

482. *See supra* material cited note 481.

483. 17 CONG. REC. 1023 (1886) (statement of Sherman) (speaking of a governor’s certification of Senate and House elections).

484. *See* discussion *supra* Part II.B.1 (discussing election law).

facto.⁴⁸⁵ The governor's certificate was *evidence* of office that, by the norms of administrative law and election law, could be reviewed, shown to be erroneous, and overturned.⁴⁸⁶ In short, the governor's certificate issued under section 3 of the ECA was like any other ministerially issued credential: Congress could set aside the governor's action for mere error.⁴⁸⁷

In reserving power under section 4 to reject a state's single set of electors when those electors' only authentication is the governor's section 3 certificate, Congress clearly retained power to review the bonafides of the governor's ministerial decision to favor one set of electors over another. Unfortunately, section 4's legislative history is ambiguous on how far behind the governor's certificate Congress could go. Could Congress "go to the bottom of everything"⁴⁸⁸ and reverse the entire election based on mere error in any part of its administration?

To appreciate the issue, recall the simplified sketch of election administration set out earlier in the Article.⁴⁸⁹ In that sketch, precinct-level administrative officials first made discretionary decisions about voter qualification, the legality of ballots, and for whom they were cast, and then made ministerial decisions in tallying the votes. Drawing from the precinct officials' tally sheets, the county and state returning boards made ministerial decisions in aggregating the precinct and county returns and forwarding them to the governor with an indication of the victorious candidate.

In debating the ECA, Congress focused on the governor's actions but not on the other boards in the election administration hierarchy.⁴⁹⁰ Consequently, although the ECA debates define Congress's oversight of the governor's role in presidential elections, they provide scant insight regarding Congress's oversight of the state, county, and precinct election boards and officials.

If we attempt historically informed speculation, two positions seem the most plausible.⁴⁹¹ On the one hand, there is the position that Justice

485. See, e.g., 5 CONG. REC., pt. 4, 261 (1877) (statement of Justice Bradley).

486. See, e.g., *id.* at 265 (discussing the Oregon Governor's certification of the 1877 election).

487. See *supra* text accompanying note 193 (discussing administrative review). Errors could include issuing the certificate to electors that the state's Election Board had not declared to be the winners.

488. 8 CONG. REC. 55 (1878) (statement of Sen. Edmunds).

489. See *supra* text accompanying notes 154-62.

490. See, e.g., 18 CONG. REC. 45 (1886) (statement of Rep. Dibble) (discussing import of governor's certificate but not any other administrator); 17 *id.* at 2427-28 (colloquy between Sens. Hoar and George on failure of Governor to abide by the Act, but not other officials); *id.* at 1022 (statement of Sen. Hoar) (same).

491. I do not consider a third position that the Constitution denied Congress the ability to go behind the governor's certificate. That minority position clearly was rejected by the decision to allow Congress to question the governor's ministerial decisions.

Bradley elaborated in deciding the Electoral Commission cases in 1877.⁴⁹² This position is grounded in the constitutional principle that the Constitution vests the power of elector appointment entirely in the states.⁴⁹³ According to Justice Bradley, because the state boards were “part of the machinery for ascertaining the result of the election,”⁴⁹⁴ they were part of the state’s plenary appointment power and immune from congressional intrusion.⁴⁹⁵ Although Justice Bradley countenanced Congress’s “go[ing] behind the governor’s certificate,” he thought Congress “can only do so for the purpose of ascertaining whether he has truly certified the results to which the board arrived. [Congress] cannot sit as a court of appeals on the action of that board.”⁴⁹⁶

On the other hand, there is the position grounded in the principles of nineteenth-century administrative law and election law that pervaded late nineteenth-century legal-political culture.⁴⁹⁷ Under those principles, which allowed erroneous ministerial decisions, but not erroneous discretionary decisions, to be overturned, Congress, in deciding on the lawfulness of the governor’s certificate, could review administrative acts back to the last decision that required discretionary judgment.⁴⁹⁸ If so, Congress could review the ministerial decisions of all the state returning boards and overturn them for erroneous applications of state law. But Congress could not similarly review and overturn the discretionary decisions of the local precinct administrators, nor could it reject presidential electors based on other erroneous discretionary election decisions, like ballot design or voter roll purging.⁴⁹⁹

Of course, to stay true to nineteenth-century norms, we have to add a fraud exception to both Justice Bradley’s and the administrative-election law approaches.⁵⁰⁰ At some point, the conduct of a state’s election may be sufficiently heinous to be disqualified on the grounds of fraud. This raises, as it did in our discussion of section 2, the ambiguous scope of the fraud

492. 5 CONG. REC., pt. 4, 260-66 (1877) (statement of Justice Bradley).

493. *See id.*

494. *Id.* at 265.

495. *Id.* at 260.

496. *Id.* at 261. Justice Bradley’s differing treatment of the state governor and state returning board is hard to fathom. It rested on Justice Bradley’s view that the board is part of the machinery for determining who the state appointed while the governor is a conduit for reporting the board-determined result. *See id.* at 265.

497. *See discussion supra* Part II.B.

498. *See supra* text accompanying note 193 (discussing administrative review).

499. However, these defects could be grounds for rejecting an elector if they amounted to a constitutional infirmity.

500. *See* 5 CONG. REC., pt. 4, 261, 263 (1877) (statement of Justice Bradley) (acknowledging and defining a manifest fraud exception to his general principle not to review the decisions of state returning boards); *supra* text accompanying note 193 (discussing the administrative-election law fraud exception).

exception. Did it encompass all acts of fraud, or only “manifest fraud?”⁵⁰¹ The ECA’s legislative history provides no clear answer.

Nevertheless, in one important regard section 4’s fraud exception is more settled than section 2’s. Here, because we are not dealing with a congressional pledge that a state’s determination is conclusive, there is no legislative history questioning whether the fraud exception should exist. Indeed, Representative Adams’s protest against the House committee’s proposal to extend section 2’s conclusivity principle to all situations in which a state submitted a single set of electoral votes implies that, should the House recede from that proposal (as it eventually did), all non-section 2 authenticated electoral votes were subject to a fraud exception.⁵⁰² The ambiguous issue for section 4’s treatment of non-section 2 authenticated returns is not the existence of the fraud exception, but solely its scope.

Still, even with a fraud exception added in the mix, Congress’s power to determine whether the governor lawfully certified the state’s single set of electors does not go very far into probing the validity of most elector elections.⁵⁰³ Either Justice Bradley’s approach, which limits Congress to scrutinizing only the governor’s action, or the administrative-election law approach, which allows congressional review to penetrate further into the chain of ministerial decisions, may be adopted and stay true to the purposes of section 4’s treatment of electoral votes submitted by a state that returned one slate of electors authenticated only by a governor’s section 3 certificate and not by a section 2 final determination. Congress itself struggled over whether the word “lawful” should appear in this part of section 4, fearing that including it “may afford a pretext for usurpation by Congress of the power to disfranchise a State.”⁵⁰⁴ Although Congress eventually decided to include the word, by doing so it did not intend to give Congress “arbitrary power” to accept or reject electoral votes “where but one return was received from a State.”⁵⁰⁵

In sum, when a state submits one set of electoral votes, section 4 specifies that Congress may reject any or all of them only by a concurrent vote of its two chambers. In addition, while section 2 provides the proper grounds for rejecting electoral votes that Congress thinks validly claim section 2 authentication, section 4 provides the proper grounds for

501. See *supra* text accompanying note 209 (discussing manifest fraud).

502. See *supra* text accompanying note 368 (discussing Representative Adams’s complaint).

503. Even under the broader rule, none of the problems of the 2000 Florida presidential election would be proper grounds for objecting to the lawfulness of the governor’s certificate. The problems with the Florida election did not rise to the level of fraud.

504. 18 CONG. REC. 31 (1886) (statement of Rep. Caldwell) (quoting the minority report); see also *id.* at 668 (citing the Conference Report); *id.* at 30-31 (statement of Rep. Caldwell).

505. *Id.* at 31 (statement of Rep. Caldwell).

rejecting electoral votes that do not claim, or incorrectly claim, section 2 status.⁵⁰⁶

When a state submits a single set of electoral votes that are not entitled to section 2 status, the proper grounds for rejecting any or all of them include all the proper grounds for rejecting electoral votes that merit section 2 status.⁵⁰⁷ In addition, Congress can go behind the electors' section 3 certification and, by concurrent vote, reject any or all of their votes based on improprieties or mistakes in the governor's administrative decision to issue his certificate. Arguably, Congress may also reject the electors' votes because of errors by other election officials in making the ministerial decisions on which the governor relied. Regardless of whether Congress may review the ministerial decisions of election officials below the gubernatorial level, Congress may review all election decisions, whether ministerial or discretionary, for fraud. Whether the fraud exception applies to all acts that amount to fraud, or only those that are so notorious to qualify as manifest fraud is not clear. In the end, judging whether the governor lawfully certified his state's electors should not "afford a pretext for usurpation by Congress of the very power which the [ECA] intends to repudiate,"⁵⁰⁸ that is, the power to reopen all aspects of the elector's election.

In short, when a state submits one set of electoral returns, this part of section 4, in conjunction with section 2, provides the rules for counting electoral votes and frames and guides Congress's discussion of whether the votes ought to be counted.⁵⁰⁹

506. In other words, when a state submits one set of elector votes that do not claim, or do not merit, section 2 status, section 4 frames and guides the discussion of whether to count any or all of them by providing the Senate and House's agreement on the proper grounds for rejecting such electoral votes.

507. See *supra* text accompanying notes 403-06 (summarizing section 2).

508. SAMUEL DIBBLE, VIEWS OF THE MINORITY: TO ACCOMPANY BILL S. 9, H.R. REP. 49-1638, pt. 2, at 1 (1886) (referring to "lawful" in another section); see also 18 CONG. REC. 50 (1886) (statement of Rep. Edens); *id.* at 31 (statement of Rep. Caldwell).

509. The ECA never directly speaks to the case of a state's single set of non-section 2 authenticated electors that also do not have a section 3 certification. Congress assumed that state governors would always carry out their federally imposed obligation to certify their state's return. See 17 CONG. REC. 2427-28 (1886) (statements of Sens. George and Hoar).

Should Congress receive one set of electoral votes from a state that lacked the governor's section 3 certificate, the implication of the ECA is that Congress may accept those votes, though it is not bound to. More importantly, my reading of the ECA is that a vote by either house to reject any or all of the electoral votes would suffice. In principle, this outcome seems appropriate because lacking a section 2 or a section 3 certification means electors lack the credential that would give them their *prima facie* claim to office. This is true even though they are the only electors presenting themselves. A counterargument to this position is that the Constitution does not require electors to have any certification other than their own. See U.S. CONST. art. II, § 1. However, if we limit ourselves to interpreting the ECA, the ECA presumes as a baseline that both houses must concur

2. When Congress Receives Multiple Sets of Electoral Votes from a State

The ECA provisions providing congressional rules for counting electoral votes from states which submit a single packet of returns reflect Congress's decision to accord those single packets a presumption of regularity.⁵¹⁰ That is why, when Congress deals with a state that has submitted a single return, the ECA requires the House and Senate to concur before any vote from a single-return state is rejected.⁵¹¹

The ECA provisions providing congressional rules for counting electoral votes from states which submit multiple packets of returns reflect a different presumption. Underlying the ECA is the view that when multiple returns are submitted from a state, no return can enjoy a presumption of regularity.⁵¹² In the abstract, when there are multiple returns from a state, any of them may be the state's "true return,"⁵¹³ reflecting the state's "true voice."⁵¹⁴

to accept an electoral vote and changes that default rule in specified situations. The default rule is premised on the view that the two houses are the judges of what votes count and nothing can be counted without both houses saying it should be.

510. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, MISC. H.R. DOC. NO. 44-13, at 417 (1877); *id.* at 349 (statement of Sen. Morton); 17 CONG. REC. 816 (1886) (statement of Sen. Hoar).

511. *See* Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373-74 (current version at 3 U.S.C. § 15 (2000)).

512. *See, e.g.*, 17 CONG. REC. 866-67 (1886) (Sen. Morgan); *id.* at 816 (Sen. Hoar). In the ECA, Congress obviously decided to accord a presumption of regularity to the electors backed up by a section 2 determination. But, as has been argued, it requires a concurrent vote of both houses to determine which return, if any, has that backing. *See supra* text accompanying notes 383-96. Some congressmen always argued that the packet backed up by the governor's certificate ought to be deemed the regular packet, *see, e.g.*, H.R. MISC. DOC. NO. 44-13, at 693-94, 696 (statement of Sen. Pinckney), but Congress refused to adopt that position and the ECA does not reflect this presumption. *See* Electoral Count Act of 1887 § 4. 18 CONG. REC. 45-46 (1886) (statement of Rep. Dibble). The ECA does, however, turn to the governor's certificate as a last resort. *See infra* text accompanying note 542.

513. 17 CONG. REC. 867 (1886) (statement of Sen. Morgan).

514. *Id.*; *see also id.* at 869 (statement of Sen. Sherman); 8 *id.* at 164 (1878) (statement of Sen. Merrimon). As Representative Broadhead said:

When there is but one return, it being the act of a public officer, it is *prima facie* correct, and requires, therefore, the concurrent action of both bodies to overturn it. When there are two returns, the two *prima facie* cases offset and destroy each other, and it requires the affirmative action of both bodies to determine which is the true return.

15 *id.* at app. 306 (1884) (statement of Rep. Broadhead).

Accordingly, when the Senate first began addressing electoral count reform in the mid-1870s, it passed bills, submitted by Senator Morton, that refused to count any electoral vote from a state submitting multiple returns unless the House and Senate concurred as to which packet of electoral votes was the “true and valid return.”⁵¹⁵

When Senator Edmunds assumed leadership of the electoral count reform movement, he modified Senator Morton’s approach to reflect his interest in encouraging the states to resolve presidential election disputes through their own contest procedures.⁵¹⁶ Senator Edmunds’s 1878 bill, and all subsequent drafts through 1884, addressed the problem of multiple returns from a state through a three-step process that turned on whether any of the returns had been authenticated through the state’s section 2 “final determination” process.⁵¹⁷ First, the bills provided that if there were multiple returns, Congress should count the votes cast “by the electors who are shown by the determination mentioned in section 2 of this act to have been appointed, if the determination in said section provided for shall have been made.”⁵¹⁸ Second, the bills anticipated that multiple tribunals might claim to be the state’s final determination authority and have authenticated different sets of electors. In that instance, the bills directed Congress to count the votes cast by the electors credentialed by the tribunal that the two houses concurred was “the tribunal of such State so authorized by its laws.”⁵¹⁹ Third, if no set of electors claimed to have been credentialed by

515. H.R. MISC. DOC. NO. 44-13, at 459 (citing S. 1251, 43d Cong. § 2 (1875)); *see also id.* at 687 (citing S. 1, 44th Cong. § 2 (1876)). Senator Morton’s bills also provided that when there was but one return from a state, it required a concurrent vote of both houses to reject. *See id.* (citing S. 1, 44th Cong. § 1 (1876)).

516. Wroth, *supra* note 13, at 334-35.

517. *See infra* text accompanying notes 518-24.

518. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373-74 (current version at 3 U.S.C. § 15 (2000)). For simplicity, I use the ECA’s final language. To compare the language of the bills, *see*, for example, 13 CONG. REC. 859 (1882) (citing S. 613, 47th Cong. § 4 (1882)); and 8 *id.* at 51 (1878) (citing S. 1308, 45th Cong. § 6 (1878)). The ECA also provided for counting votes of the electors appointed to fill any vacancies in the electoral college that arose after an elector’s initial appointment. *See* Electoral Count Act of 1887 § 4. That provision was not in Senator Edmunds’s original bill, but was added in 1886. 17 CONG. REC. 966 (1886) (statement of Sen. Hoar) (submitting amendments).

519. 15 CONG. REC. 5076 (1884) (citing S. 25, 48th Cong. § 4 (1884)); *see also, e.g.*, 13 *id.* at 859 (1882) (citing S. 613, 47th Cong. § 4 (1882)). I use the bills’ language because it is clearer than the language of section 4 of the ECA. The language in this part of the ECA was subject to a non-substantive change when the bill’s sponsors accepted Senator Evarts’s view that section 2 authorities need not be judicial tribunals. 17 *id.* at 2387 (1886) (citing S. 9, 49th Cong. § 4 (1886), after recommittal). After the change, the bill directed Congress to accept the votes of the electors supported by “the decision of such State so authorized by its laws,” *id.*, which is how the law read on final passage. *See* Electoral Count Act of 1887 § 4. Except for indicating that the “final determination” authority need not be a judicial tribunal, Senator Hoar described his deletion of the word “tribunals” as non-substantive. 17 CONG. REC. 2387 (1886) (statement of Sen. Hoar).

the state's final determination process, or if the houses did not concur as to the identity of the final determination tribunal, the bills instructed Congress to count the votes cast by the electors "which the two Houses, acting separately, shall concurrently decide to be the lawful votes of the legally appointed electors of such State."⁵²⁰

In each instance, the bills conditioned Congress's obligation to count the electors' votes on their having been regularly given, which allowed Congress to reject electoral votes when the electors' conduct in office violated constitutional or statutory requirements.⁵²¹ Though it was never discussed, it can be inferred that Congress also retained the power to reject the vote of any properly elected elector that both houses agreed was not eligible to hold the elector's office, or, perhaps, if the section 2 authentication was fraudulent.⁵²²

Thus Senator Edmunds's approach to addressing the problems of multiple returns from a single state directed Congress away from an open-ended search for the proper return, and towards the simpler issues of identifying the state's final determination authority and whether that institution had reached its decision according to the terms and conditions of section 2.⁵²³ Only when the state had no identifiable authority, or when that authority did not comply with section 2's limitations, was Congress to face the messy problem of determining for itself which set, if any, of dueling electors had been duly elected.⁵²⁴

After years of debate, Congress eventually adopted Senator Edmunds's approach to the problem of multiple returns, with one exception. In this part of section 4, as elsewhere in the ECA, Congress adopted Senator Edmunds's preference for deferring to the state's section 2 authority when it was identifiable and when it had complied with section 2 requirements.⁵²⁵ But when (1) none of the multiple sets of electors claimed authentication by a section 2 process, (2) the Senate and House disagreed as to the identity of the state's section 2 authority, or (3) the Senate and House disagreed on whether the authority's decision complied with section

520. 15 CONG. REC. 5076 (1884) (citing S. 25, 48th Cong. § 4 (1884)); *see also, e.g.*, 13 *id.* at 859 (1882) (citing S. 613, 47th Cong. § 4 (1882)). I use the bills' language because this part of Senator Edmunds's proposal was subject to a substantive change as the ECA approached final passage. *See infra* text accompanying notes 532-42 (discussing the role of the governor's certificate).

521. *See supra* text accompanying note 473 (discussing "regularly given").

522. *See supra* text accompanying notes 473-80 (discussing these defects for electors who lack section 2 status).

523. *See supra* text accompanying notes 299-406 (discussing section 2's conditions and limitations).

524. *See, e.g.*, 18 CONG. REC. 49 (1886) (statement of Rep. Eden).

525. *See* Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373-74 (current version at 3 U.S.C. § 15 (2000)).

2's conditions, Congress ultimately decided to allow the state's governor to determine the identity of the state's proper set of electors.⁵²⁶

In the view of many congressmen, Senator Edmunds's third step for handling the electoral votes from states that submitted multiple returns was problematic. Multiple returns, they noted, could easily be "manufactur[ed],"⁵²⁷ allowing one house of Congress, for partisan advantage, to pretextually disagree with the other house on the identity of a state's true electors.⁵²⁸ This disagreement would be fatal to counting any return. These congressmen were concerned that, in the presence of multiple returns, a single chamber of Congress might block the counting of a state's entire vote, altering the result of an election.⁵²⁹

With this ploy in mind, some congressmen voiced fears that the House, in particular, had an incentive to reject votes because it might, by rejecting enough votes to reduce all candidates below the constitutionally required majority, throw the election to itself for final resolution.⁵³⁰ In addition, states' rights oriented congressmen objected to Senator Edmunds's system allowing a sovereign state to be entirely disfranchised by the vote of a single house of Congress. In their view, Senator Edmunds's third step to the problem of multiple returns from a single state allowed Congress too much discretionary involvement in the state's choice of electors.⁵³¹

Accordingly, as the bill approached final passage, Senator Hoar suggested a change in the ECA's ultimate provision for handling multiple returns. From the floor, Senator Hoar proposed that when there was no proper section 2 determination, or when the House and Senate could not agree, the electors to whom the governor had given his section 3 certificate should be accepted as "the truly chosen board" unless "rejected . . . by the

526. See *infra* text accompanying notes 542-43 (discussing import of governor's certificate when the houses disagree).

527. 17 CONG. REC. 815 (1886) (statement of Sen. Sherman) (stating that the single/double return distinction "is a distinction without a difference, because in any case of a dispute that may arise the manufacturing or creating of double returns is the easiest possible process"). John Burgess agreed with the ease of creating conflicting returns, Burgess, *supra* note 10, at 649, and it was, in fact, done in 1889. See 20 CONG. REC. 1860 (1889) (discussing Oregon's vote). In 1877, there was an attempt to manufacture a dual return from Vermont, which the Senate President refused to put before the joint session. See HAWORTH, *supra* note 5, at 274-79.

528. See, e.g., 17 CONG. REC. 1058 (1886) (statement of Sen. Evarts); *id.* at 816, 819 (statement of Sen. Sherman); see also 18 *id.* at 46 (statement of Rep. Dibble).

529. See, e.g., 18 *id.* at 46 (statement of Rep. Dibble); 17 *id.* at 1060 (statement of Sen. Teller); *id.* at 1059 (statement of Sen. Wilson); *id.* at 816, 819 (statement of Sen. Sherman).

530. 17 *id.* at 867 (statement of Sen. Morgan).

531. See, e.g., *id.* at 1023 (statement of Sen. Hoar); *id.* at 816 (statement of Sen. Sherman) (describing the bill as giving one house of Congress the ability to "exclude the vote of any State" when it "was one chief object of the framers . . . to separate as wide as the poles the election of electors from the power of the legislative branch").

concurrent vote of the two Houses."⁵³² Senator Hoar's proposal provoked substantial opposition in the Senate. Senator Sherman, for example, objected passionately that Senator Hoar was

[S]eek[ing] to avoid the difficulty . . . which is manifest to every one, the danger of allowing either of the two great political bodies [i.e., either House of Congress] to reject the vote of a State; and he now proposes to leave that question to be finally settled by the governor of the State.

....

. . . It seems to me he is jumping out of the frying-pan into the fire. Are we willing to leave to one man, who, being the governor of a State, and therefore necessarily a party in the contest that has occurred in the State, to decide this question in which he probably from political feeling or otherwise is more interested than any other mortal man?

....

. . . [T]o leave the question in dispute to be decided by the governor of a State, it seems to me only involves this matter in greater difficulty. In cases which may arise where honesty of opinion and sincerity of conviction may exist in both parties, where there is a real dispute as to who have been elected electors for a particular State, it seems to me to select the governor of the State to decide the question is . . . not a remedy at all, but only aggravates the disease.⁵³³

532. *Id.* at 1020 (statement of Sen. Hoar). The amendment that Senator Hoar submitted read as if it denied Congress power to reject the electors certified by the governor under any circumstances, *see id.* at 966, 1019, and that is how Senator John Sherman understood it. *Id.* at 1021 (statement of Sen. Sherman). When introducing his proposed amendment, Senator Hoar described it as I have described it in the text. *Id.* at 1020. His later discussions are ambiguous, but are consistent with the interpretation I have given. *Id.* at 1022-24.

533. *Id.* at 1021 (statement of Sen. Sherman); *see also id.* at 1062 (statement of Sen. Saulsbury). John Burgess also thought giving power to the state governors was unwise. Burgess, *supra* note 10, at 649. Senator Sherman was reading Senator Hoar's amendment as if a governor's certificate would conclude the matter, even over the opposition of both houses of Congress. *See* 17 CONG. REC. 1021 (1886) (statement of Sen. Sherman).

Senators Hoar and Teller attempted to answer Senator Sherman's concerns. Senator Hoar argued that the states implicitly left the decision to their governor whenever they did not establish a different tribunal. *Id.* at 1022, 1024 (statement of Sen. Hoar). Senator Teller argued:

Where can you leave that, in the absence of a judicial inquiry, better than with the governor of a State? I know in times of high partisan excitement there may be danger that the governor of a State will outrage the people of his State by not

The Senate, apparently agreeing with Senator Sherman, never put Senator Hoar's proposal to a vote, preferring to pass the bill as it originally stood.⁵³⁴

Nonetheless, when the Senate bill came to the floor of the House, the committee responsible for the bill suggested amending it to include Senator Hoar's proposal.⁵³⁵ To maintain that position, the House of Representatives had to beat back a proposal from a substantial minority of the Committee to make the governor's certificate control absolutely, even over the concurrent objection of both houses.⁵³⁶ After debate, the House of Representatives adopted the Committee majority's proposal.⁵³⁷ At conference, Senator Hoar accepted it on behalf of the Senate.⁵³⁸ Although the conferees adopted the House's amendment, they "remodel[ed] . . . the language . . . so as to clear up any ambiguity . . . and define accurately the meaning of Congress . . . when there has been no determination of the question in the States by making certain the counting of votes cast by lawful electors appointed by the laws of the State."⁵³⁹ The Conference Committee's rewritten provision, which passed into law, read:

[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. 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

expressing the voice that they have expressed at the polls; but it is much safer to leave it with him, who is answerable to the people for any outrage he may commit, than to intrust it to hands foreign to the State and having no connection with the State.

Id. at 1060 (statement of Sen. Teller).

534. Specifically, on Senator Sherman's suggestion, the bill was recommitted for further study, and when it reemerged from the Committee, Senator Hoar's proposal had been forgotten. 17 CONG. REC. 1023-26 (1886) (statement of Senator Sherman).

535. 18 *id.* at 30.

536. SAMUEL DIBBLE, VIEWS OF THE MINORITY: TO ACCOMPANY BILL S. 9., H.R. REP. 49-1638, pt. 2, at 2 (1886); 18 CONG. REC. 76 (1886) (voting down minority amendment); *id.* at 45, 47 (statement of Rep. Dibble).

537. 18 CONG. REC. 77 (1886).

538. *Id.* at 668 (1887). It is not surprising Senator Hoar accepted the proposal considering that it was his own idea.

539. *Id.*

have been certified by the Executive of the State, under the seal thereof, shall be counted.⁵⁴⁰

As summarized by the Conference Committee, this provision meant that when there are multiple returns and “there has been no determination of the question in the State[] . . . in the case of the two Houses disagreeing, then the electors whose appointment has been certified by the executive of the State shall be counted.”⁵⁴¹

According to this part of section 4, then, when there are multiple returns, one of them will be accepted as the state’s true return unless both the Senate and the House of Representatives agree that none of them are valid, or the houses disagree and none of the electors have been certified by the governor,⁵⁴² or multiple governors have certified different returns.⁵⁴³ In addition, once a return is accepted as the state’s true return, it takes a concurrent vote of both houses to reject a vote based on the electors’ post-appointment behavior.⁵⁴⁴

Under this system, the ECA gives the state governor extraordinary power when there are multiple returns. That position was controversial in

540. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 374 (current version at 3 U.S.C. § 15 (2000)).

541. 18 CONG. REC. 668 (1887).

542. 17 *id.* at 2427-28 (1886) (statements of Sens. George and Hoar) (discussing the problem of a governor refusing to issue a certificate).

543. *See* Wroth, *supra* note 13, at 344. Or, stated another way, there are multiple returns certified by different claimants to the governor’s office and Congress cannot agree as to the identity of the true governor. *See* 18 CONG. REC. 47 (1886) (statement of Rep. Dibble). Multiple returns certified by different claimants to the governor’s office were submitted to Congress by Florida in 1877. *See* 5 *id.*, pt. 4, at 287-88 (1877). In 1961, Hawaii submitted multiple returns certified by different governors, and interestingly, each certifying governor was the legitimate governor at the time he certified the return. *See* 107 *id.* at 288-91 (1961).

The question may be asked whether, when there are multiple returns and one of them claims certification by the state’s section 2 authority, that return should be assumed to be *prima facie* valid and require a concurrent vote of both houses to reject it. I think not. Section 4 of the ECA states that in the presence of multiple returns, the return authenticated by the state’s section 2 authority is to be counted. But until the houses agree that a return has been so authenticated, it is only a return that purports to have that status. Electoral Count Act of 1887 § 4. Stated another way, the basic theory of the ECA is that no votes are to be counted unless both houses agree to count them or the ECA expressly provides otherwise. As stated previously, the rule about counting the section 2 authenticated return can only come into effect when the houses agree that they have a section 2 return before them. *See supra* text accompanying notes 383-402.

544. This is the meaning I draw from the Conference Committee’s language that “*lawful votes* of the legally appointed electors,” Electoral Count Act of 1887 § 4 (emphasis added), could be rejected by a concurrent vote. The Conference Committee Report confirms this by stating: “It takes the concurrent votes of both Houses, deciding that the votes are not lawful votes, in order to reject them.” 18 CONG. REC. 668 (1887).

its time. Senator Sherman condemned it,⁵⁴⁵ as did Professor Burgess.⁵⁴⁶ Nevertheless, it had defenders who felt that the decision was more appropriately and safely made in the states and by state officials.⁵⁴⁷ Maybe, modern Americans are less concerned about disfranchising a state. Yet in 1886, Congress's debates focused on it and passing the ECA turned on it.⁵⁴⁸

In the 2000 election, we witnessed the problem of giving this tie-breaking power to the state's usually partisan governor when Jeb Bush signed and forwarded his section 3 certification to the President of the Senate even as his state's election contest was still proceeding.⁵⁴⁹ One wonders what Jeb Bush would have done had his state supreme court been permitted to finish its work outside the safe harbor time period but still before the electors balloted.⁵⁵⁰

In giving this power to the states' governors, the congressmen who adopted the ECA cannot be said to have been insensitive to such concerns. They had before them the warnings of Senator Sherman and others. They also had the historical experience of the fraudulent certification granted by Governor Warmoth of Louisiana in 1872, which both houses agreed to reject.⁵⁵¹ Moreover, they had the experience of their most recent presidential election, the election of 1884. That election turned on the outcome of the New York vote, which was very close and subject to contest.⁵⁵² Ultimately, the New York election was settled by 1149 votes,⁵⁵³ and Governor Grover Cleveland certified the Democratic electors, awarding the presidential election to himself.⁵⁵⁴ As everyone in Congress

545. See 17 CONG. REC. 1021 (1886) (statement of Sen. Sherman).

546. Burgess, *supra* note 10, at 649. On Professor John Burgess's status, see *supra* text accompanying note 10.

547. See 17 CONG. REC. 1060 (1886) (quoting statement of Sen. Teller); *id.* at 1022, 1024 (statement of Sen. Hoar).

548. Burgess described the provision on the governor's certificate as a "*conditio sine qua non*" of acceptance by the House. Burgess, *supra* note 10, at 649.

549. CERTIFICATE OF FINAL DETERMINATION, *supra* note 420; David Barstow & Somini Sengupta, *Contesting the Vote: The Florida Legislature*, N.Y. TIMES, Nov. 28, 2000, at A25 (stating that Jeb Bush signed Florida's Certificate of Ascertainment the night of November 26, "barely an hour after the state canvassing commission declared George W. Bush the winner" of the state's election, a move which was unusually hasty compared to other states).

550. One also wonders what Governor Bush would have done had the Supreme Court of Florida finished after the electors had balloted. Modern norms may countenance post-electoral balloting certifications. See 107 CONG. REC. 288-91 (1961) (accepting the votes of Democratic electors from Hawaii despite post-electoral balloting certification).

551. See SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNT ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 359, 362, 393-94, 407 (1877); Pitre, *supra* note 241, at 181.

552. See 1 EDWARD STANWOOD, A HISTORY OF THE PRESIDENCY 447-49 (2d ed. 1975).

553. *Id.* at 449.

554. See 16 CONG. REC. 1532 (1885) (describing the reading of Governor Cleveland's

that passed the ECA knew, sometimes the governor of a state might not only be partisan, but he might also be the candidate.⁵⁵⁵

In sum, the governor's certificate as a fail-safe to prevent state disfranchisement was a very conscious, if controversial, choice. Without it, the ECA would not have been passed.⁵⁵⁶ Perhaps nineteenth-century views about whether presidential elections were national or state concerns are different from late twentieth-century views; perhaps concerns about congressional or House aggrandizement were different; perhaps Congress wanted to remove itself as much as possible from ultimate responsibility. Whatever the reason, granting the state governor his tie-breaking authority clearly was the choice Congress made.⁵⁵⁷

The end result of this analysis of the substantive provisions of the ECA is that the ECA specifies the Senate and House's agreement on the proper grounds for refusing to count electoral votes. In addition, the ECA provides that whenever Congress's two houses concur in counting a vote, it will be counted, and whenever they concur in not counting a vote, it will not be counted. When the two chambers disagree on whether or not to count a vote, the ECA provides a set of bright-line rules that determine whether or not the vote should be counted. These bright-line rules are the Senate and House of Representatives's agreement as to how to handle instances where the branches of Congress disagree. They vary the Constitution's default rule of bicameral concurrence for electoral vote counting. At least until one house withdraws from the ECA, they govern the electoral count.⁵⁵⁸

certificate attesting to the results of the New York election to applause on the House floor and in the galleries).

555. Let alone the brother of the candidate, as he was in the 2000 election in Florida. Unlike Jeb Bush, who sent in his initial certification before the election contest was determined, Grover Cleveland waited until after the contest in his state was settled. *See supra* notes 549-53.

One complication that Congress in the 1880s did not anticipate, perhaps, is that the presidential candidate would not only be the certifying governor, but also the section 2 authority determining the outcome of any presidential election contest. Nonetheless, that is what Texas law, absent a recusal, provides. *See* TEX. ELEC. CODE ANN. § 221.002 (Vernon 2004).

556. Burgess, *supra* note 10, at 649. Consider the substantial minority of the House committee who wanted to amend the ECA so that the governor's certificate was conclusive and could not be rejected even by a concurrent vote of the House and Senate. *See supra* text accompanying note 536.

557. If there is judicial review of Congress's vote counting, one can speculate whether a court might set aside the counting of those votes based on a governor's fraudulently issued tie-breaking certification. A fraudulent certification is, after all, no certification at all. Indeed, since the governor in issuing his section 3 certificate acts ministerially, one wonders whether it might be set aside for mere error. The counterargument is that the ultimate provision in section 4 does not provide that the governor's certificate be "lawful" as it does elsewhere in the ECA. The implication is that all the ECA requires is the "fact" of gubernatorial certification, not its bona fides.

558. If the ECA is a binding statute, its provisions govern until a statute is passed authorizing a change.

Given the strength of states' rights sentiment in the Congresses that debated and passed the ECA, a necessary feature of the ECA's electoral vote counting system is that when the chambers of Congress disagree about whether to count a state's electoral vote, the only time a state is excluded from the Electoral College is when the state's governor does not certify any slate of electors.⁵⁵⁹

E. Sections 4-7: The Procedural Provisions⁵⁶⁰

Having dispensed substantive guidance to itself in sections 1-4, Congress, in the remainder of section 4 and in sections 5-7, settled the procedures for the electoral count sessions. These provisions were not the subject of any discussion during the fourteen years the ECA was debated. This is unfortunate given the potential for procedural issues to affect not only the substantive outcome of Congress's electoral vote counting, but the public perception of the count's regularity. As the Congresses that debated and adopted the ECA knew, it was procedural concerns, centered on the Senate President's⁵⁶¹ conduct of Congress's vote counting sessions, that in 1857 and 1869 led to "unseemly scene[s],"⁵⁶² "great uproar,"⁵⁶³ and days of acrimonious debate.⁵⁶⁴ And in those years, the presidential election outcomes were entirely lopsided and not at all in doubt.⁵⁶⁵

The ECA's procedural provisions have two purposes. The first is to facilitate an expeditious meeting so that difficulties in electoral vote counts can be resolved, and a new President elected, before the current President's term ends.⁵⁶⁶ The second is to drain away as much power as possible from

559. L. Kinvin Wroth and Jack Maskell suggest an additional instance in which a state would be entirely disenfranchised. See MASKELL, *supra* note 17, at 6-11; Wroth, *supra* note 13, at 343. I discuss their suggestion in Appendix II.

560. Electoral Count Act of 1887, ch. 90, §§ 4-7, 24 Stat. 373, 373-74 (current version at 3 U.S.C. §§ 15-18 (2000)).

561. The Senate President usually is the Vice President, though he may be the senator who has been elected President *pro tempore*. In writing about Congress's past electoral vote counting sessions, I generally will not distinguish whether the Senate President was the Vice President or a President *pro tempore* who presided at the meeting.

562. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 263 (1877) (statement of Rep. Butler); see also *id.* at 273 (statement of Speaker Colfax) (recalling the "scene" in 1857 but not describing it); *id.* at 264 (statement of Rep. Callis) (describing the session as "undignified").

563. *Id.* at 264-65.

564. See *id.* at 78-143 (recounting the debate during and after the 1857 and 1869 electoral counts).

565. In 1857, James Buchanan defeated John Fremont and Millard Fillmore by 174 votes to 114 and 8, respectively, even if we count Wisconsin's five disputed votes for Fremont. See *id.* at 88. In 1869, Ulysses Grant beat Horatio Seymour by the margin of 214 electoral votes to 80, even if we include Georgia's nine disputed votes for Seymour. *Id.* at 265.

566. Burgess, *supra* note 10, at 651-52.

the Senate President, whom the ECA appoints to preside at the joint session when Congress counts the votes.⁵⁶⁷

When the ECA was passed, the President's term ended on March 4.⁵⁶⁸ To ensure a timely electoral count, section 4 of the ECA sets Congress's vote counting session for "the second Wednesday in February,"⁵⁶⁹ approximately two to three weeks before the new President's term begins.⁵⁷⁰ Section 4 also called for the electoral returns from the states to be presented in alphabetical order.⁵⁷¹ No debate is allowed in, and no question may be put to, the joint session.⁵⁷² If there are any objections to a state's vote, section 4 requires that it "be made in writing" and "be signed by at least one Senator and one Member of the House of Representatives."⁵⁷³ After all the objections to the vote of a particular state are received, the Senate returns to its own chamber and the two houses independently debate and rule on the objections.⁵⁷⁴ Section 6 of the ECA limits debate at the separate meetings. Each congressman may speak only once, for up to five minutes, and the entire debate must end after two hours.⁵⁷⁵ Section 7 of the ECA limits recesses. No recess is allowed unless the houses are meeting separately to decide an objection.⁵⁷⁶ At that time, each house may decide to recess, but must be back in session the following day by 10:00 A.M. (Sundays excepted).⁵⁷⁷ If the vote counting session lasts five days, no further recesses are permitted.⁵⁷⁸

Most of the ECA provisions governing the timeliness of the meeting were taken from earlier concurrent or joint rules or from the 1877 Electoral Commission law.⁵⁷⁹ Commentators have pronounced them satisfactory for allowing Congress to conclude its work in time to inaugurate a President or elect one in the House of Representatives if it becomes necessary.⁵⁸⁰

567. See *infra* text accompanying note 586.

568. R.S. tit. 3, ch. 2, § 152 (1873); Wroth, *supra* note 13, at 341 (inauguration day moved from March 4 to January 20 in 1934). Now it ends on January 20. See U.S. CONST. amend. XX, § 1.

569. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373 (current version 3 U.S.C. § 15 (2000)).

570. Now it is set for January 6, fourteen days before Inauguration Day. 3 U.S.C. § 15 (2000).

571. Electoral Count Act of 1887 § 4.

572. *Id.* § 5.

573. *Id.* § 4.

574. *Id.*

575. *Id.* § 6.

576. *Id.* § 7.

577. *Id.*

578. *Id.*

579. See, e.g., SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 224 (1877) (stating that the 22d Joint Rule allowed no debate when the Senate and House separated to consider an objection to receiving an electoral vote).

580. John Burgess, who is very critical of the ECA's substantive provisions, pronounced the procedural provisions "exhaustive" and as good "as human wit can divine." Burgess, *supra* note

The provisions governing the President of the Senate's conduct of the meeting are another matter. Some of greatest acrimony in Congress's nineteenth-century vote counting sessions concerned the Senate President's conduct of the meeting.⁵⁸¹ Jack Maskell's observation that "[t]here are questions . . . as to the role and authority of the presiding officer in making any initial determinations, rulings or 'instructions' in the joint session, and . . . how any final determination or ruling is implemented" is a masterpiece of studied understatement.⁵⁸²

Given the history of some support for the proposition that the Constitution granted the Senate President total power to count electoral votes, one goal of the ECA was to "settle" that "the power to count the vote" is held by Congress, organized as two separate houses, and "is not in the President of the Senate."⁵⁸³ Congress could have accomplished this goal by confining the Senate President's participation in the joint session to the constitutional minimum. The Constitution designates the President of the Senate as the person to whom the electors should send the sealed packets containing their electoral votes, and it specifies that he is to "open" them "in the presence of the Senate and House of Representatives."⁵⁸⁴ What happens after the Senate President opens the votes is, under the theory of the ECA, a subject of legislative discretion. With the opening of the votes, the Senate President has reached the end of his constitutional role in the presidential election process.⁵⁸⁵

Yet, following tradition, the ECA designated the Senate President as the "presiding officer" of the joint session at which the Senate and House count the electoral vote.⁵⁸⁶ The question left open in the ECA is how much

10, at 652.

581. See *supra* notes 561-64 and accompanying text (discussing 1857 and 1869 meetings); *infra* note 633 and accompanying text (discussing 1869 meeting).

582. MASKELL, *supra* note 17, at 3-4. The ECA's procedural provisions have not previously been the subject of sustained study.

583. 18 CONG. REC. 30-31 (1886) (statement of Rep. Caldwell).

584. U.S. CONST. amend. XII.

585. 17 CONG. REC. 865 (1886) (statement of Sen. Morgan) (stating that the Senate President presides "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."). The first time an objection was made to counting a state's vote during Congress's vote counting session was in 1817. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 46 (1877) (statement of Rep. Taylor). The objector was a House member. *Id.* He addressed his remarks to the Speaker of the House. *Id.* A Senator who spoke in support of the House member's objection spoke to the President of the Senate. *Id.* (statement of Sen. Vernon).

586. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373 (current version at 3 U.S.C. § 15 (2000)).

substantive power over electoral vote counting the Senate President acquired because of that statutorily conferred role.⁵⁸⁷

Sketching an answer requires separating the Senate President's role as custodian of the returns from his role as presiding officer of the joint session. As custodian of the returns, the Senate President plays a crucial gatekeeping function. He is instructed by the Constitution to "open all the certificates,"⁵⁸⁸ which section 4 of the ECA describes as "all the certificates and papers purporting to be certificates of the electoral votes."⁵⁸⁹ Prior to the ECA, on three occasions the Senate President received papers relating to the electoral count that he did not present to the joint session. In 1865, the Senate President did not present electoral returns from Louisiana and Tennessee on the grounds that Congress had adopted a joint resolution, which President Lincoln had signed but not yet promulgated, excluding the Confederate states from participating in the Electoral College.⁵⁹⁰ In 1873, the Senate President did not present one packet of returns from Arkansas on the ground that they "did not in any respect comply with the requirements of the law on the subject."⁵⁹¹ He explained:

The informal returns were signed by three out of the six electors, and they stated that they could not obtain the certificate of the governor They were not sealed or indorsed on the back. The Chair opened them on the distinct understanding that they were informal, because they were directed to him as any other letter might be.⁵⁹²

In 1877, the Senate President refused to receive a supposed second packet of electoral returns from Vermont on the grounds that it had been presented to him after the date specified by law for all packets to be received.⁵⁹³

587. I do not consider the power that the Senate President may exercise as presiding officer of the Senate when the Senate meets separately to consider objections raised at the joint session.

588. U.S. CONST. amend. XII.

589. Electoral Count Act of 1887 § 4.

590. See H.R. MISC. DOC. NO. 44-13, at 227-28. The Senate President also said he would present them if instructed to by either house. *Id.* at 228.

591. *Id.* at 390.

592. *Id.* at 390-91.

593. HAWORTH, *supra* note 5, at 275. The Senate President's ruling involved some interpretive discretion. No law expressly specified a date for all packets to be in. The Senate President held that the law required him to submit all packets he had on the date that Congress began its vote counting session. *Id.* Needless to say, the Senate President was a Republican and the supposed late-arriving packet of Vermont electoral votes was being proffered by Representative Hewitt of New York, a Democratic leader. *Id.* at 274-75. In 1961, Vice President Nixon presented returns that arrived on the morning of Congress's electoral count session. *Bush v. Gore*, 531 U.S. 98, 127 (2000) (Stevens, J., dissenting); 107 CONG. REC. 288-91 (1961); A. A. Smyser, *How Kennedy Won 1960 Recount in Hawaii*, HONOLULU STAR-BULL., June 8, 1963, at 5.

On other occasions, the Senate President has presented questionable returns. In 1801, the Senate President presented the only packet of returns from Georgia even though they clearly did not comply with formal federal requirements.⁵⁹⁴ In 1877, he presented a clearly “burlesque”⁵⁹⁵ certificate from Louisiana because its envelope specified that it was the “Vote of electoral college of the State of Louisiana.”⁵⁹⁶ And in 1889, at the first electoral count after the ECA’s enactment, the Senate President presented a second set of returns from Oregon⁵⁹⁷ that, apparently as a practical joke, had been sent in by Samuel MacDowell, claiming to be Oregon’s “Governor de jure.”⁵⁹⁸

In two of these situations, the presentation of the certificates mattered. In 1801, the return from Georgia, which was presented by Vice President Jefferson, gave Jefferson four electoral votes. Without those votes, Jefferson would not have had sufficient votes to be elected President; the election would have been thrown into the Federalist-dominated House; and Adams would have been re-elected President.⁵⁹⁹ In 1877, if the Senate

594. The returns from Georgia lacked the governor’s certificate and simply listed the names of the four electors who declared they were voting for Thomas Jefferson and Aaron Burr. *See* 13 CONG. REC. app. 539 (1882) (statement of Rep. Updegraff) (describing Georgia’s vote in 1800); GOV. PACKSON, EXECUTIVE DEP’T, STATE OF GA., *supra* note 432.

595. 5 CONG. REC. 1504 (1877) (statement of Rep. Mills) (referring to the certificate); *see also* MCKNIGHT, *supra* note 214, at 419 (referring to a “burlesque certificate”).

596. 5 CONG. REC. 1503 (1877) (statement of Rep. Stone) (reading the envelope address). The Senate President, in presenting this paper, said it was his “duty . . . to submit all papers coming into his hands and purporting to be certificates.” *Id.* Given the envelope’s designation, he “had no discretion in respect of laying the paper before the two Houses.” *Id.* After receiving objections to all of Louisiana’s returns, the Senate President asked for and received unanimous consent that the burlesque certificate should not be considered further. *Id.* at 1505.

597. 20 *id.* at 1860 (1889).

598. *See* SAM W. MACDOWELL, STATE OF OR., GOVERNOR CERTIFICATE OF THE LEGAL ELECTION AND APPOINTMENT OF THE LEGAL ELECTORS OF THE LAWFUL PRESIDENT AND VICE-PRESIDENT OF THE UNITED STATES OF N. AMERICA (1888). The Senate President then asked for unanimous consent to count the Oregon return that had a certificate from the person recognized as Oregon’s governor. *Id.* As Congress knew, Oregon’s governor in 1889 was Sylvester Pennoyer, who is still famous among American law students as the defendant in *Pennoyer v. Neff*, 95 U.S. 714 (1878). Samuel MacDowell is not mentioned in any history of Oregon that I have been able to locate.

599. Jefferson needed seventy electoral votes to be elected President. With Georgia’s four votes, he had seventy-three. *See* SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 30-31 (1877).

In 1797, Vice President Adams presented Vermont’s electoral votes even though they were not entirely free from doubt. Vermont’s four electoral votes were necessary for Adams to have been elected President. 1 STANWOOD, *supra* note 552, at 51-52. Their defect, if any, was that the Vermont legislature had appointed the electors without previously enacting a law authorizing themselves to do it. *Id.* Since the Vermont return was formally correct, the issue was not whether the votes should have been presented, but whether they should have been counted. For that reason, I do not consider them here.

President had presented the second set of returns from Vermont, Vermont's multiple returns would have been sent to the Electoral Commission for initial consideration, a move which could have postponed concluding Congress's vote counting session—and electing the President—to past the inauguration date. Under the law at the time, the House Speaker would have become acting President and a special election would have been held in the Fall.⁶⁰⁰

Thus, the Senate President's role as gatekeeper does matter. His decision to present a return affects whether there are one or multiple returns before Congress, which affects certain decisional rules under the ECA.⁶⁰¹ Whether the Senate President, as presiding officer, can be required by a concurrent vote of both houses to present, or not present, some paper is an open question. I think he can be so required. The Constitution makes the Senate President the custodian of papers.⁶⁰² Pre-ECA electoral count precedent supports the proposition that Congress governs what papers are submitted to it for consideration.⁶⁰³ On the other hand, I think it is also clear that the Senate President's decision to present, or not present, material cannot be reversed if the houses disagree.⁶⁰⁴ When the houses disagree, Congress has not spoken.

Aware of the inherent power lodged in gatekeepers, Congress, in section 4 of the ECA, instructed the Senate President to present not only "all the certificates," but also "all . . . papers purporting to be certificates of the electoral votes."⁶⁰⁵ Clearly, the authors of the ECA were attempting to make the Senate President's constitutional role of custodian and presenter of electoral certificates a ministerial function. However, even ministerial officials have an irreducible amount of discretionary or interpretive authority. The ECA's goal was to reduce the Senate President's discretionary power as gatekeeper to the absolute minimum, by specifying his obligation to present "all . . . papers purporting to be certificates of the electoral votes."⁶⁰⁶ Phrasing the Senate President's

600. R.S. tit. 3, ch. 2, §§ 146-48 (1873).

601. *See supra* text accompanying notes 510-15 (discussing section 4).

602. *See* U.S. CONST. amend. XII.

603. H.R. MISC. DOC. NO. 44-13, at 227-28. The Senate President, in saying that a motion to require him to present papers in his possession was in order, relied on language in the 22d Joint Rule. *See id.* Similar language is in section 6 of the ECA.

604. *See supra* text accompanying notes 119, 383 (discussing bicameralism). *But see* H.R. MISC. DOC. NO. 44-13, at 228 (statement of Senate President in 1865, explaining that "in the opinion of the Chair, if either branch of Congress shall be disposed to order the [withheld] returns to be read, it is within their power to do so").

605. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373 (current version at 3 U.S.C. § 15 (2000)).

606. *Id.*; *see also* 18 CONG. REC. 46 (1886) (statement of Rep. Dibble) (discussing residual interpretive authority of ministerial officials).

obligation this way removes most of his discretion to affect whether Congress receives one or multiple returns from a state.⁶⁰⁷

The ECA had the same goal in mind with regard to the Senate President's role as presiding officer. Presiding officers of parliamentary bodies traditionally have a fair amount of discretionary power. They recognize speakers, rule on points of order, rule motions in or out of order, interpret rules (with the help of a parliamentarian), and keep order.⁶⁰⁸ Procedural rules inevitably have gaps and ambiguities requiring interpretation.⁶⁰⁹ It is impossible to divine all the scenarios that might occur in close presidential elections and how the Senate President may utilize his power as presiding officer to affect the outcome of Congress's vote counting session. But the ECA's procedural rules seem designed to drain as much power as possible away from the Chair and give it to the two houses.

Under the ECA, the House of Representatives and Senate each appoint two tellers. The Senate President is instructed to proceed through the states in "alphabetical order," and to "hand[] . . . all the . . . papers" to the tellers "as they are opened."⁶¹⁰ Most crucially, it is the tellers who "make a list of the votes as they shall appear from the said certificates."⁶¹¹

The ECA also requires the House and Senate to consider one state at a time.⁶¹² Although the ECA is not free from ambiguity on this point, electoral count precedent, both before and after the ECA's passage, is that the Senate President submits all the papers pertaining to the state under consideration to Congress before he "call[s] for objections" to any of that state's returns.⁶¹³ All objections to counting a state's electoral vote must be

607. Coincidentally, it increases the discretionary power of the two houses and, if they disagree, makes it more frequent that the tie-breaking certificate of the state governor will decide the issue, because it promotes placing multiple electoral returns before Congress. See discussion *supra* Part III.D.2 (discussing multiple returns).

608. ROBERT'S RULES OF ORDER REVISED § 58, at 236-37 (75th Anniversary ed. 1951); see also *id.* at § 21, at 78-83 (questions of order and appeal); *id.* at § 40, at 174-75 (dilatatory, absurd, or frivolous motions).

609. See H.R. MISC. DOC. NO. 44-13, at 246-47, 263-65 (providing different interpretations of the 1869 rules); *id.* at 87-93 (providing differing interpretations of the 1869 rules); *supra* text accompanying note 596 (discussing interpretation of rule that barred second Vermont certificate in 1877); *infra* text accompanying note 661 (discussing interpretation of ECA in the 2001 joint session).

610. Electoral Count Act of 1887 § 4.

611. *Id.*

612. *Id.*

613. *Id.* The text is ambiguous, but precedent is clear that all papers from a state are presented before objections are in order. This has happened every time the Senate President has received and presented multiple returns. See H.R. MISC. DOC. NO. 44-13, at 391-95 (presenting multiple returns from Louisiana); 107 CONG. REC. 288-91 (1961) (presenting multiple returns from Hawaii); 20 *id.* at 1860 (1889) (presenting multiple returns from Oregon); 17 *id.* at 817 (1886) (statement of Sen.

made when that state is under consideration, not after the joint session has moved on to counting another state.⁶¹⁴ Objections must be “made in writing” and “signed by at least one Senator and one [House] Member.”⁶¹⁵ When all objections to the papers pertaining to one state have been submitted, the ECA instructs the Senate President to entertain a motion to withdraw so that the houses may separately consider and respond to the objections.⁶¹⁶ The ECA specifies that no debate is allowed in Congress’s joint session.⁶¹⁷ The Senate President may only “put” questions to the two houses “on a motion to withdraw.”⁶¹⁸ After the House and Senate reach their separate decisions, the joint session reconvenes and the ECA authorizes the Senate President “to announce the decision of the questions submitted.”⁶¹⁹

As proposed by Senator Edmunds in 1878, at the conclusion of the vote counting session, the tellers were to “deliver[]” their tally to the Senate President who was empowered to “thereupon announce the state of the vote, and the names of the persons, if any, elected, which announcement shall be deemed a sufficient declaration of the persons elected President and Vice President.”⁶²⁰ As the bill approached final passage in 1886, the House deleted the words that allowed the Senate President to declare “the

Sherman) (stating that the Senate President simply hands the certificates to the tellers); 5 *id.* at 1195-98, 1503-06, 1728-31, 1945-46 (1877) (presenting multiple returns from Florida, Louisiana, Oregon, and South Carolina respectively); 3 DRESCHLER’S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ch. 10, § 1.2, at 7 (1977) (when there are multiple returns, the Vice President hands them to the tellers in the order in which they were received). Thus the Senate President cannot influence the process by controlling the order in which returns are considered. I thank Professor Jack Balkin for drawing my attention to this problem.

614. Electoral Count Act of 1887 § 4 (providing that objections may be made “upon such reading of any such certificate or paper”). This provision is backed up by electoral vote counting precedent. *See* H.R. MISC. DOC. NO. 44-13, at 227, 246 (statement of Senate President) (ruling objections out of order as not timely).

615. Electoral Count Act of 1887 § 4. Section 4 also requires that the objection “shall state clearly and concisely, and without argument, the ground thereof.” *Id.* For simplicity, I will not refer to this requirement, but will simply speak of the ECA’s formal requirements for objections as involving a writing signed by a senator and a member of the House.

616. *Id.*

617. *Id.* § 5.

618. *Id.*

619. *Id.* § 4.

620. 8 CONG. REC. 51 (1878) (citing S. 1308, 45th Cong. § 6 (1878)).

names of the person, if any, elected.”⁶²¹ At conference, the Senate accepted the change, and the Conference Report explained that:

[T]he effect of [the amendment] is to prevent the President of the Senate from doing more than announcing the state of the vote as ascertained and delivered to him by the tellers; and such announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President.⁶²²

Two things about the House of Representatives’s change should be noted. First, Congress was unwilling to allow the Senate President any minimal ability to interpret the outcome of the vote count. Second, the Conference Committee Report asserts that it is the tellers—mere minions of the two houses—who ascertain the vote. The Conference Report confirms that the Senate President is meant to be something of an automaton.

If the Senate President’s role as presiding officer gives him power to influence the outcome of Congress’s electoral count, it flows from two sources: (1) his ability to announce, when the joint session reconvenes, the decision reached by the House of Representatives and the Senate in their separate sessions; and (2) his ability to declare substantive objections and procedural motions out of order.⁶²³

Does the Senate President’s power to “announce the decision of the questions submitted”⁶²⁴ to the Senate and House of Representatives when they separate to consider objections made to a state’s electoral vote give him power to influence the outcome of the proceedings? In the House and the Senate, the presiding officer has the power to announce not only the vote totals, but also whether the question carries.⁶²⁵ Before the ECA,

621. 18 *id.* at 76 (1886) (statement of Rep. Oates). Between 1878 and 1886, only two changes were made to the procedural provisions in Senator Edmunds’s original bill, and this was one of them. The other change dealt with the date set for starting Congress’s electoral count session. Senator Edmunds’s original bill selected the second Monday in February rather than the second Wednesday. Compare 8 *id.* at 51 (1878) (citing S. 1308, 45th Cong. § 6 (1878)), with Electoral Count Act of 1887 § 4. That change has no effect on the Senate President’s power.

622. 18 CONG. REC. 668 (1886).

623. By “substantive objections,” I mean objections to counting a state’s electoral vote. By “procedural motions,” I mean all motions questioning the Senate President’s conduct of the meeting, including appeals from any of his rulings on substantive objections and other procedural motions.

624. Electoral Count Act of 1887 § 4.

625. The Senate’s precedents script the presiding officer’s comments. See FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE, S. DOC. NO. 101-28, at 1441 (1992). In the House, the presiding officer announces the vote totals and whether the bill passes. See *Proceedings of the House of Representatives* (C-SPAN1 television broadcast, Nov. 20, 2003) (statement of Speaker pro tempore Bass). The Congressional Record does not reflect this practice; the editor

Senate Presidents announced both the way the Senate and House had ruled on objections and the import of those decisions for whether a vote was to be counted under the existing rules.⁶²⁶ On one occasion, the Senate President's power to declare the import of the Senate and House's decision gave him power to determine how certain electoral votes would be counted.⁶²⁷ That was in 1869, and, exacerbated by other rulings, it led to that year's "uproar[ious]" electoral count session.⁶²⁸

Does the Senate President retain this power under the ECA? In the only precedent since the ECA's passage, the 1969 debate on North Carolina's "faithless elector," Senator Richard Russell, presiding as Senate President pro tempore,⁶²⁹ continued the pre-ECA tradition. After the Senate and House of Representatives considered the objection to counting the "faithless elector's" vote, the joint session reconvened, and the Secretary of the Senate and Clerk of the House reported that each house had rejected the objection,⁶³⁰ Senator Russell then said:

Under the statute in this case made and provided, the two Houses having rejected the objection that was duly filed, the original certificate submitted by the State of North Carolina will be counted as provided therein.

Tellers will now record and announce the vote of the State of North Carolina . . . in accordance with the action of the two Houses referred to and pursuant to the law.⁶³¹

Russell's actions set the precedent that the Senate President's pre-ECA tradition of announcing the legal effect of the separate House of Representatives and Senate decisions continues. It is not left for the tellers, who, being from different houses and perhaps differing parties, might disagree on the legal import of the two houses's disposition of the objection. This tradition gives the Senate President power to interpret the import of the House and Senate's disposition of objections when the houses disagree.⁶³²

indicates the import of a vote. *See, e.g.*, 142 CONG. REC. 25482, 25576 (1996). In this regard, the Congressional Record is not a verbatim transcript of House proceedings. *Compare Proceedings of the House of Representatives, supra*, with 149 CONG. REC. H11665-67 (daily ed. Nov. 20, 2003) (statement of Speaker pro tempore Bass) (Congressional Record reporting the same votes).

626. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 389 (1877) (statement of the Vice President).

627. *Id.* at 263 (statement of Senate President).

628. *Id.* at 264-65.

629. 115 CONG. REC. 196-97 (1969) (Sen. Russell elected President pro tempore); *id.* at 145, 171 (President pro tempore presiding at electoral count session).

630. *Id.* at 171 (statement of Senate President pro tempore).

631. *Id.*

632. If the houses are in agreement, they can always overrule the Senate President or instruct

Russell's precedent is fully consistent with the ECA's purposes. If the substantive provisions of the ECA are interpreted as this Article suggests, the Senate President's power to declare the import of the Senate and House of Representatives's separate decisions should not, as it was in 1869, be the cause of dissension. In 1869, the problem was that Congress's electoral vote counting session was governed by both the 22d Joint Rule and another concurrent rule adopted that year for handling expected problems with Georgia's electoral vote.⁶³³ When Representative Benjamin Butler objected to counting Georgia's vote on grounds different from those that had been expected,⁶³⁴ the interpretive problem was whether the 22d Joint Rule or the specially adopted concurrent rule applied to this complex situation.⁶³⁵ The Senate President first allowed Butler's objection, implying that the 22d Joint Rule applied.⁶³⁶ But when the House of Representatives sustained Butler's objection, and the Senate overruled it, the Senate President decided to count Georgia's vote according to the terms of the specially adopted concurrent rule.⁶³⁷ Since under the 22d Joint Rule, a state's electoral vote should not have been counted if one house sustained an objection to it, Butler and many other congressmen were outraged.⁶³⁸ Of course, the ensuing debate showed that other congressmen would have been outraged by the opposite decision.⁶³⁹

Under the ECA, however, an 1869-type problem should not arise because the Senate President, in deciding on the import of the Senate and House's separate decisions, has only the modicum of interpretive authority, which even the most ministerial officials always have. When the Senate and House separate to consider objections to counting a state's electoral vote, they have many difficult and ambiguous questions to resolve, both of law and of the law's application to the situation at hand.⁶⁴⁰ In contrast to

their tellers what to record. *See infra* text accompanying notes 653-67 (discussing appeals). This assumes that appeals of the Senate President's rulings are in order. *Id.*

633. H.R. MISC. DOC. NO. 44-13, at 230-35, 246-47.

634. *Id.* at 246-47.

635. *See id.*

636. *Id.* at 247.

637. *Id.* at 263.

638. *Id.* at 263-64.

639. *Id.* at 273 (statement of Speaker Colfax) (explaining that "there is nothing clearer" than the applicability of the special concurrent rule on Georgia).

640. Is there, for example, a fraud exception to a section 2 tribunal's final determination? If so, does it cover only manifest fraud? What operative facts meet whatever standard is imposed? *See supra* text accompanying notes 372-81. To take instances that have arisen: when an elector votes for a candidate different from the one he is pledged to vote for, is that an example of a vote that is not regularly given?, 115 CONG. REC. 171 (1969) (answering "no"); should Congress consider electors whose right to that office was determined by an election contest that concluded after the day set for elector balloting? 107 *id.* at 290 (1961) (answering "yes," by unanimous consent at the suggestion of the Vice President, but without meaning to set a precedent).

the discretionary decisions made by Congress's two chambers, the legal import of the Senate and House's separate votes are entirely bright-line and almost self-applicable. Once the Senate President has performed his gatekeeping function, it is clear whether a state has submitted one or multiple returns. If there is one return, the House and Senate must concur to reject it.⁶⁴¹ If there are multiple returns, the houses must concur to accept one of them.⁶⁴² If the houses disagree in their disposition of a state's multiple return, it should be clear if one of the returns reasonably purports to be certified by the state governor under the state's great seal, and whether the Senate and the House of Representatives concurred in rejecting it. Thus, interpreting the legal import of the Senate and House of Representatives's decisions is rather straightforward.⁶⁴³

If the Senate President's power to declare the import of the Senate and House of Representatives's separate votes does not give him the ability to influence the outcome of Congress's electoral count, does his power to rule substantive objections and procedural motions out of order give him that capacity?⁶⁴⁴ Before the ECA, Senate Presidents, on several occasions, prevented substantive objections and procedural motions by ruling them out of order.⁶⁴⁵ Two of these occasions involved substantive objections made to a state's vote after that state had already been counted and the joint session had moved on to other states. The Senate President, on both occasions, ruled that the objections were not timely.⁶⁴⁶ Those rulings

641. See Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373-74 (current version at 3 U.S.C. § 15 (2000)).

642. In addition, if there are multiple returns, but the houses agree that one of them was authenticated by the state's section 2 authority, the counting rule is that both houses must concur to reject the votes because of elector ineligibility or post-appointment behavior. See *supra* note 544. But determining if the situation arises is a bright-line determination requiring only a ministerial decision.

643. This is one of the reasons why it was important to assert that when a slate of electors claim section 2 status, they do not have it unless the Senate and the House agree that they do. This argument helps clarify that the Senate President has no role in deciding if section 2's conditions and limitations have been met. If section 2's conclusivity principle imposed a separate voting rule in competition with section 4, then the Senate President would be in the position he was in with regard to the two rules governing the 1869 electoral count. He would be in a position, after Congress voted to reject the slate claiming section 2 status, to rule that the case came within the terms of section 2 and not section 4.

644. See *infra* text accompanying notes 649, 652 (distinguishing the ECA's textual basis for allowing substantive objections and procedural motions).

645. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 246 (1877) (statement of 1869 Senate President and Sen. Drake); *id.* at 227 (statement of 1865 Senate President and Rep. Pruyn); *id.* at 89 (statement of 1857 presiding officer and Rep. Letcher); *id.* at 82 (statement of 1849 Senate President and Sen. Stevens). These were substantive objections to counting votes.

646. *Id.* at 246 (statement of 1869 Senate President and Sen. Drake); *id.* at 227 (statement of Senate President and Rep. Pruyn).

involved an exercise of interpretive discretion. On both occasions, the objectors supported their motions with minimally rational arguments as to why they were not time-barred.⁶⁴⁷ Another occasion involved the Senate President's refusal to allow an appeal from his ruling interpreting the legal import of Congress's disposition to an objection to a state's electoral vote.⁶⁴⁸ Does the Senate President continue to have the power, under the ECA, to rule objections and other motions out of order?

To some extent he does, but substantive objections and procedural motions need to be considered separately because of their differing textual bases. With regard to substantive objections, section 4 of the ECA expressly imposes two bright-line requirements on congressmen who wish to object to counting a state's electoral vote. The first is that the substantive objection must be in writing and signed by at least one senator and one member of the House of Representatives.⁶⁴⁹ The second is that all objections to counting a state's electoral vote must be presented when the state is under consideration, not before or after.⁶⁵⁰

Beyond the bright-line requirements of form and timing, the ECA imposes one requirement on substantive objections that is not expressed in the ECA text. As in all parliamentary assemblies, efficiency requires that the Senate President have authority to disallow all motions that are merely dilatory. Discretion to rule dilatory motions out of order must be implied from necessity. Otherwise, a persistent minority, even as small as one senator and one representative, could hamstring Congress's entire

647. *Id.* at 246; *id.* at 227. Senator Drake's argument, for example, was that the "vote of Nevada has been reported, but has not yet been decided on." *Id.* at 246. Apparently, Senator Drake believed that the decisive moment for counting votes is when the tellers make their report, not when each state is individually dealt with. *See id.* Representative Pruyn's argument was substantially the same. *See id.* at 227.

648. *Id.* at 263 (statement of Senate President and Sen. Butler). This was part of the 1869 fracas. *See supra* notes 562-64 and accompanying text. House Speaker Colfax supported the Senate President's refusal to allow appeals from his ruling. H.R. MISC. DOC. NO. 44-13, at 273 (discussing the conduct of the 1869 vote counting session); *see also id.* at 89 (statement of 1857 presiding officer) (ignoring appeal made by Senator Toombs); *id.* at 82 (statement of 1849 Senate President) ("[N]o motion was in order.").

649. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373-74 (current version at 3 U.S.C. § 15 (2000)). Vice President Gore, in his role as Senate President, enforced this requirement during the 2001 electoral count, ruling out of order a series of objections to Florida's certificate because they were signed by a House member but no Senator. *See* 147 CONG. REC. H34-36 (daily ed. Jan. 6, 2001).

This provision also requires that the objection be without argument. Electoral Count Act of 1887 § 4.

650. *See supra* text accompanying note 648 (discussing statements of Representative Pruyn and Senator Drake). Although the ECA text is not wholly unambiguous, pre-ECA electoral vote counting precedent and considerations of efficient administration counsel that the Senate President have the power to supervise the timeliness of objections.

proceeding.⁶⁵¹ But if an objection is timely, presented in proper form, and not dilatory, the Senate President must allow it, and the Senate and House must separate to consider it.

This conclusion applies not only to substantive objections to a state's electoral vote, but also to procedural questions concerning the Senate President's conduct of the meeting. Admittedly, it is not entirely clear that the ECA's framers intended to allow procedural motions, including appeals from the Senate President's rulings. The ECA's only textual support for procedural motions and appeals is section 6's passing remark:

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 once⁶⁵²

Procedural motions and appeals from the presiding officer's rulings are a normal part of parliamentary procedure.⁶⁵³ However, pre-ECA vote counting precedent is mixed regarding whether procedural motions and appeals from the Senate President's rulings are permitted at Congress's electoral vote counting sessions.⁶⁵⁴ Two of these precedents were set in 1849 and 1857 when the concurrent rule typically adopted for each vote counting session made no provision for substantive objections or procedural motions of any kind.⁶⁵⁵ The third pre-ECA precedent was set in 1865 under the newly adopted 22d Joint Rule. That rule contained

651. See ROBERT'S RULES OF ORDER (NEWLY REVISED) § 39, at 331 (10th ed. 2000) (“[E]very deliberative assembly has the right to protect itself from the use of [parliamentary] forms for the opposite purpose.”). This is especially true because the Senate President must entertain procedural motions, like appeals from his rulings. See *infra* text accompanying notes 662-64. Dilatory motions that present substantive objections to counting a state's electoral vote present little danger of undue delay because of the ECA's provisions that make for expeditious consideration of substantive objections. See *supra* text accompanying notes 482-88, 513, 572-74. But procedural motions, like quorum calls and appeals of the Senate President's rulings, can unduly delay substantive consideration of any state.

652. Electoral Count Act of 1887 § 6 (emphasis added).

653. See, e.g., ROBERT'S RULES OF ORDER (NEWLY REVISED), *supra* note 651, at 240-52.

654. See, e.g., SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 273 (1877) (statement of Speaker Colfax) (discussing the conduct of the 1869 vote counting session); *id.* at 226-28 (statement of Senate President) (discussing procedural motions); *id.* at 89 (statement of 1857 Senate President) (ignoring appeal made by Senator Toombs); *id.* at 82 (statement of 1849 Senate President) (“[N]o motion was in order.”).

655. *Id.* at 86, 89-90 (1857 rule and Senate President ruling); *id.* at 81-82 (1849 rule and Senate President ruling).

language that allowed procedural motions,⁶⁵⁶ and the Senate President relied on it to rule that procedural motions were in order.⁶⁵⁷ Nonetheless, during the “uproar[ious]” 1869 vote counting session,⁶⁵⁸ which was also governed by the 22d Joint Rule, the Senate President refused—without explanation—to allow appeals from his ruling interpreting the legal import of the Senate and House’s split over whether to count Georgia’s electoral vote.⁶⁵⁹ In the contentious debate that followed, House Speaker Schuyler Colfax supported the Senate President’s refusal to allow appeals from his rulings. His reason, which seems plainly incorrect, was that allowing appeals would require a vote to be taken in the joint session on a per capita basis, and this was impermissible.⁶⁶⁰

In the only post-ECA precedent, Vice President Al Gore, presiding as Senate President at the 2001 electoral vote counting session, ruled out of order a slew of procedural motions, including an appeal of his rulings, on the grounds that, although they were in writing and signed by members of the House of Representatives, they were not also signed by a senator as the ECA requires.⁶⁶¹ In making these rulings, Vice President Gore, relying on the advice of the Senate and House Parliamentarians, extended the ECA’s formal requirements for substantive objections to procedural motions and appeals. “[R]eading” the ECA substantive and procedural provisions “as a coherent whole,” he said, requires “the Chair [to] hold[] that no procedural question . . . is to be recognized by the presiding officer in the joint session unless presented in writing and signed by both a

656. The 22d Joint Rule, after setting out the procedure of Senate and House separation to decide objections to counting a state’s electoral vote, stated: “And any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner.” *Id.* at 224 (citing S.J. Res. 22, 38th Cong. (1865)); *see also id.* at 462 (statement of Sen. Morton) (commenting on 22d Joint Rule).

657. *Id.* at 227-28 (statement of Senate President) (discussing motion to submit the Confederate certificates); *id.* at 226 (statement of 1865 Senate President) (indicating he could receive procedural motions, even for something as insignificant as dispensing with reading the electoral certificates in their entirety, if the houses are willing to “separate in order to pass upon the question”).

658. *Id.* at 264-65.

659. *Id.* at 263-64.

660. *Id.* at 273. Speaker Colfax also said the 22d Joint Rule did not provide for it, and no appeal had ever been taken. *Id.* But he seems to have forgotten the 1865 incident, the Senate President’s explanation of how the 22d Joint Rule provided for it, and how it could be handled by the same procedure for deciding substantive objections to counting a state’s electoral vote. *See supra* text accompanying note 657.

It should be noted, however, that Speaker Colfax was correct in saying no appeal had ever been taken. In 1865, after the Senate President ruled that the appeal was in order, the House member who made the appeal withdrew it rather than force a separation of the two houses. H.R. MISC. DOC. 44-13, at 227-28 (statements of the Vice-President and Sen. Yeaman).

661. 147 CONG. REC. H35-36 (daily ed. Jan. 6, 2001).

Representative and a Senator.”⁶⁶² Gore’s reasoning implies that if the procedural motions and appeals⁶⁶³ met the ECA’s formal requirements, they would be allowed, and the Senate and House of Representatives would have to separate to consider them.⁶⁶⁴

To require the Senate President to allow procedural motions and appeals to his rulings when they are (1) timely, (2) meet the ECA’s formal requirements, and (3) not dilatory, helps to effectuate the ECA’s basic tenet that Congress, not the Senate President, counts the state’s electoral votes.⁶⁶⁵ Allowing appeals of the Senate President’s rulings is an especially important means to limit the Senate President’s influence over the outcome of Congress’s vote counting. But, allowing appeals does not eliminate the Senate President’s influence. Sustaining an appeal requires a concurrent vote by the Senate and House. If the houses do not agree, the Senate President’s ruling stands.⁶⁶⁶ Nevertheless, allowing appeals constrains the

662. *Id.* at H35. Vice President Gore said this a number of times in response to different motions. *Id.* at H35-36. Gore’s reference was to 3 U.S.C. §§ 15-18 (2000), where sections 4-7 of the ECA are codified.

663. Vice President Gore specifically responded to an appeal with this analysis. 147 CONG. REC. H36 (daily ed. Jan. 6, 2001) (statement of Vice President and Rep. Hastings).

664. This assumes the procedural motions were also timely, not argumentative, and not dilatory. These facets of proper substantive objections and procedural motions were not in issue at this point.

Vice President Gore also subjected a request for unanimous consent to the requirement that the appeal be in writing with the appropriate two signatures. *Id.* (statement of Vice President and Rep. Waters) (noting also that an objection was heard). This seems to go too far and counters over a century of precedent. Since 1865, Senate Presidents have expedited the proceedings by accepting, or suggesting, unanimous consent motions. The tradition, which began under the 22d Joint Rule, was immediately adopted under the ECA and has continued ever since. H.R. MISC.DOC. NO. 44-13, at 226 (statement of 1865 Vice President); 107 CONG. REC. 290 (1961) (accepting and counting one of Hawaii’s multiple returns as the appropriate return); 43 *id.* at 2149 (1913) (correcting a clerical error); 20 *id.* at 1859-60 (1889) (disposing of facetious electoral return from Oregon).

665. *See supra* text accompanying note 583 (discussing role of the Senate President). Allowing procedural motions and appeals does lengthen Congress’s vote counting session. To some extent this is undesirable, as dispatch is a virtue in electoral vote counting. Still, the ECA provides rules that limit delay by requiring that all objections to counting a state’s vote be submitted while the state is under consideration, that all objections be considered together, and that time limits for the Senate and House’s separate consideration of the objections and recesses be enforced. *See supra* note 647 and accompanying text.

I also note that most of the procedural motions and appeals during the 2001 vote counting session were because the Senate President had ruled out of order substantive objections that did not have a senatorial signature. *See supra* note 649. Had there been a senatorial signature, the substantive objection would have been in order, and no procedural motions, which threatened delay, would have needed to be made.

666. That it would take a concurrent vote of both houses to overrule a substantive or procedural ruling of the Senate President should be added to the reasons why the ECA should be read to give the Senate President as few opportunities as possible to exert influence through ruling substantive objections and procedural motions out of order. This supports the view that the Senate

Senate President's power, while, at the same time, vindicates the principle that when the Senate and House of Representatives are in agreement, they govern the vote count.

The spirit of the ECA, if not its letter, mandates that the Senate President's substantive and procedural rulings be subject to review and reversal by a united Congress. This is especially important with regard to the Senate President's interpretation of the legal import of the Senate and House of Representatives's separate decisions on substantive objections to counting a state's electoral vote. As ministerial as the Senate President's ruling may be, the ECA's basic principles require that the Senate President's substantive and procedural rulings be subject to appeal. Otherwise, the Senate President's views may determine the outcome of an electoral count even when both the Senate and House oppose his decision.

That the Senate President's rulings, if subject to an appeal, are sustained whenever the Senate and House of Representatives disagree, highlights the importance of this Article's conclusion that the Senate President has no power to rule a congressman's objection to counting a state's electoral vote out of order on substantive grounds.⁶⁶⁷ It is for the Senate and House of Representatives to determine which objections are good or bad, and it is section 4's vote counting rules that determine whether a state's electoral vote will be received; the Senate President is not supposed to exert any influence.

In sum, it is likely that the Congresses that debated and adopted the ECA intended to require the Senate President to accept all substantive objections to counting a state's electoral vote, procedural motions, and appeals to his rulings that were timely, in writing, signed by a senator and a member of the House of Representatives, and not dilatory. This approach may, on occasion, delay the proceedings because only a few substantive objections and procedural motions should fail the ECA's general bright-

President should review objections, motions, and appeals only for whether they are in proper form, timely, and not dilatory.

667. See, for example, *supra* text accompanying notes 383-402, where it is argued that when electors claim section 2 status, it is for Congress to decide whether they merit it. Even if the Senate President is certain that the electors deserve section 2 status, the Senate President cannot tilt towards that outcome by ruling out of order objections to counting their votes. The Senate President can only act when the objections are formally insufficient, not timely, or dilatory.

For similar reasons, should members of Congress object to receiving a state's vote on the ground that the vote was not regularly given because of concerns about the way the votes in the presidential election were recounted by county canvassing boards, the Senate President may not rule the objection out of order even though the objection that the vote was not regularly given applies only to the electors' post-appointment behavior. See *supra* text accompanying note 474. Although the Senate President might refuse to accept the objection on the grounds that it was argumentative, once the argument was removed, the Senate President would have to receive it. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373-74 (current version at 3 U.S.C. § 15 (2000)).

line requirements. But the problem of lengthier proceedings is more than offset by the Senate President's diminished ability to influence the outcome of Congress's electoral vote counting session. The ECA's fundamental principles require this trade-off.⁶⁶⁸

Thus the Senate President's power to interpret the import of the Senate and House of Representatives's separate decisions on objections to counting a state's electoral votes, and his power to rule substantive objections, procedural motions, and appeals out of order, give him only minimal, and reviewable, power to influence the outcome of Congress's electoral vote counting. As Representative Caldwell, Chairman of the House committee managing the ECA, said when he introduced the bill to the House of Representatives in 1886:

[The bill] will decide, first, that the power to count the vote is not in the President of the Senate.

Second, that it is in the two Houses of Congress, not ministerially merely, not as witnesses, . . . but with power to count, and the consequent power to decide upon the legality of the votes to be counted.

Third, 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.⁶⁶⁹

The ECA was written to allow Congress, not the Senate President, to count the state's electoral votes.

IV. CONCLUSION

The ECA provides a framework for Congress's consideration of the states' electoral votes, specifies the proper grounds for members of Congress who wish to object to counting any or all votes from a state, and provides decisional rules for cases where the Senate and House of Representatives disagree about whether to count a vote. Under the ECA, whenever the Senate and House agree on counting or rejecting a vote, their

668. In addition, the ECA has built-in safeguards that limit delay. *See supra* text accompanying notes 570-80. When Rep. Caldwell, in the second paragraph of his remarks, referred to the votes' "legality," he meant a judgment of whether the votes suffered constitutional infirmities, not whether there were mistakes in state law. 18 CONG. REC. 31 (1886) (statement of Rep. Caldwell). This is shown by the examples he gave. *See supra* text accompanying note 336 (discussing constitutional infirmities).

669. 18 CONG. REC. 31 (1886).

concurrence governs. When the Senate and House disagree, the ECA specifies the votes, if any, that will be counted. The ECA minimizes the ability of the Senate President to influence the outcome of Congress's vote counting session because of his constitutional role as custodian of the states' electoral packets, or because of his statutory role as presiding officer at the vote counting session.

The ECA requires that if a state submits one set of electoral votes, it will be counted unless both the Senate and the House of Representatives agree to reject them, or some part of them. If a state submits multiple sets of electoral votes, the set that the Senate and House agree to count will be counted.⁶⁷⁰ If the houses of Congress cannot agree to accept a particular set, the votes that were certified by the state's governor will be counted, unless the houses agree to reject them.⁶⁷¹

The ECA's delimitation of the grounds for rejecting electoral votes revolves around whether any of the returns submitted by the state were contested before the state's final determination authority in a process that meets the requirements of section 2. In all cases Congress may reject the votes of electors who were constitutionally ineligible to hold the elector's office, who balloted corruptly, or who balloted in a way that violated post-appointment constitutional or statutory requirements. The votes of electors whose appointment is authenticated only by their governor's section 3 certificate may be rejected on two additional grounds: that the electors' gubernatorial certification resulted from ministerial error;⁶⁷² or that the electors' election was itself so irregular as to be fraudulent or violate constitutional norms.

The votes of electors whose appointment is authenticated by a section 2 process are more secure. In section 2, Congress pledged itself to be "conclusively" bound to regard electors authenticated by the state's final determination process as duly appointed under state law. Their underlying election may not be inquired into, and Congress may not disregard the section 2 tribunal's decision because of mere error. Whether section 2's conclusivity principle is subject to a fraud exception is unclear, as is the scope of that exception, if it exists.⁶⁷³ However, it is clear that not every

670. If Congress accepts one slate of electors as properly elected under state law, then the Senate and House must concur in rejecting the votes of some of them because of other defects. *See supra* text accompanying note 544.

671. If there are multiple claimants to the governor's office, and they certify multiple returns with copies of the state's seal, the state's electoral votes cannot be counted unless the two houses agree on the identity of the legitimate governor. *See supra* text accompanying notes 542-43.

672. It is unclear whether ministerial error is limited to the governor's actions or may be traced back to the ministerial errors of the canvassing boards on which the governor relied.

673. If the fraud exception does exist, Congress may inquire into fraud in the section 2 process. Fraud in the underlying election may be evidence of the section 2 tribunal's fraud, but it does not necessarily establish it.

electoral slate that claims section 2 status actually merits it. Section 2 establishes conditions that must be met if Congress is to accept electors authenticated by that process as conclusively determined. It is for Congress to decide whether the state's section 2 "final determination" process meets the ECA's requirements. And Congress can acknowledge section 2 status only through bicameral concurrence.

As interpreted by this Article, the ECA is a coherent enactment. The ECA's coherence does not mean that it is a complete response to the problems of Congress's electoral vote counting.⁶⁷⁴ The ECA's sponsors said it was.⁶⁷⁵ Nevertheless, should Congress reject an electoral vote, the ECA does not address whether, or under what circumstances, the number of electoral votes required for the President's election is reduced. To be elected President, the Constitution requires a candidate to receive "a majority of the whole number of Electors appointed."⁶⁷⁶ The provision was adopted to prevent states from hamstringing the federal government by simply not participating in the presidential election.⁶⁷⁷ When Congress rejects an electoral vote, the effect that decision has on the denominator that determines whether a candidate has more than fifty percent of the electoral vote is an entirely open issue, and congressional precedent is split. Should the number always remain the same? Should it always be reduced pro tanto? Should the effect on the number vary with the reason for Congress's exclusion?⁶⁷⁸

Senate leaders raised this issue while the ECA was under consideration, and they gave differing answers to the question.⁶⁷⁹ Good arguments were raised on all sides of the question. Perhaps because the diversity of strongly held views might imperil the delicate web of compromises supporting the

674. By not "complete," this Article means that the ECA does not provide a uniquely correct solution for every dispute that might arise when Congress counts electoral votes. This notion of "completeness" is drawn from Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 7 (1983).

675. See, e.g., 18 CONG. REC. 668 (1887) (excepting instances of dual governments in a state); 17 *id.* at 1019, 1020 (1886) (statement of Sen. Hoar) (same).

676. U.S. CONST. amend. XII.

677. Wroth, *supra* note 13, at 324-25.

678. If the problem were in an elector's appointment, that may differ from the problem with the way an appointed elector behaved in office.

The ECA also leaves open many minute procedural issues. See MASKELL, *supra* note 17, at 3-4 (mentioning, for example, "form . . . of question[s] . . . presented"). Although these problems are perhaps too minute to be dealt with in the ECA (or in this Article), partisan squabbling over them could diminish the public's perception of regularity.

679. See, e.g., 17 CONG. REC. 2428 (1886) (statement of Sen. George); *id.* at 1061 (statement of Sen. Call); *id.* at 820-21 (statement of Sen. Hoar); *id.* at 820, 1057 (statement of Sen. Evarts); 17 *id.* at 819 (statement of Sen. Edmunds); see also 18 *id.* at 49 (statement of Rep. Cooper); MASKELL ET AL., *supra* note 13, at 2-3; Burgess, *supra* note 10, at 650; Wroth, *supra* note 13, at 345.

ECA, Congress avoided addressing the issue in the ECA. If a future Congress were to exclude votes under the ECA, it is possible that one chamber of Congress would conclude that the leading candidate did not receive a majority of the relevant pool of electoral votes, while the other chamber will conclude that he or she did.⁶⁸⁰ The Senate President's role is limited by the ECA to receiving the tellers' lists and "announc[ing] the state of the vote."⁶⁸¹ According to the ECA, the Senate President's announcement "shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President of the United States."⁶⁸² Well, not always.

If the ECA's coherent treatment of Congress's electoral vote counting is not entirely comprehensive, neither is it entirely wise.⁶⁸³ Whether the governor's certificate should play its crucial tie-breaking role was, and still is, questionable policy. The decision not to run election contests in the federal courts is also debatable. The time frame for election contests may always have been too short. It certainly is too short now that the period between election day and elector balloting day has been reduced to only forty-one days.⁶⁸⁴

In addition, the rule that section 2's safe harbor provision disappears six days before the electors ballot may no longer serve any purpose, if it ever did. The existence and scope of the fraud exceptions to section 2 final determinations, and to the electors' election when it is authenticated only by the governor's section 3 certification, may be questionable from the perspective of jurists who value certainty and minimal congressional

680. In 1873, when Congress rejected Arkansas's and Louisiana's electoral vote, and when it rejected three votes from Georgia, the Senate's and House's journals recorded the required majority for election differently. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 354 (1873) (stating that 177 electoral votes are required); JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 348 (1873) (stating that 184 electoral votes are required); MASKELL ET AL., *supra* note 13, at 4-5. The Senate's and House's disparity in treatment raises the problem noted in the text. It is a troubling precedent, particularly because it is the only occasion on which Congress rejected a state's electoral vote, rather than giving alternate counts or choosing between competing slates.

In addition, Congress's precedents are not consistent on diminishing the majority required for election when electoral votes are not cast because an elector died or was not appointed. *See id.* at 3-5; Wroth, *supra* note 13, at 345 n.95. On these occasions, however, the Senate and House have recorded the required majority the same way. The point is, however, that Congress's action shows no consistent pattern.

681. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 374 (current version at 3 U.S.C. § 15 (2000)).

682. *Id.*

683. For cogent critiques of the ECA's policy choices, see Burgess, *supra* note 10, at 637-38, 645-50; Wroth, *supra* note 13, at 334-52. *See also* Glennon, *supra* note 13 (suggesting a thorough overhaul of the electoral vote counting system).

684. The period is actually thirty-five days if we limit the time to the "safe harbor" period.

interference with presidential elections, and from the opposite perspective of jurists who value electoral integrity and national oversight.

Among the ECA's other problems is the question of whether it is a statute or a joint rule enacted in statutory form. Fundamental questions beyond the scope of statutory interpretation turn on this issue, potentially embracing the ECA's constitutionality, whether Congress's application of it is subject to judicial review, or simply, how it can be amended or rescinded.

In addition, the ECA's coherence does not tell us whether it should be applied as its framers intended. Statutory meaning is as much a matter of jurisprudence as historical analysis.⁶⁸⁵ Communications in the modern world are far faster and better than they were in the nineteenth century. Principles of federalism and the balance of federal and state interests in national elections have evolved since the Gilded Age. The world, not just the nation, is vitally interested in the outcome of America's presidential elections. Modern Congresses, armed with new technologies, motivated by different vital principles, and responding to new historical circumstances, may sensibly and rightfully act as nineteenth-century Congresses could not, or would not.

Perhaps fidelity to the rule of law requires that the ECA's bright-line rules be applied as they were intended. These rules include the use of the governor's certificate as the ultimate tie-breaker when the houses of Congress cannot agree to reject the votes they certify. However, fidelity to the rule of law does not mean that modern Congresses are bound to apply the ECA as its framers intended in every specific instance. Modern Congresses might not be bound by nineteenth-century views about whether an electoral vote is regularly given when it is cast for a candidate to whom the elector is not pledged.⁶⁸⁶ Maybe modern Congresses should not be bound by nineteenth-century views of whether electors are lawfully certified when their title to office is first established by an election contest that ended after elector balloting day.⁶⁸⁷ Neither are modern Congresses

685. See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

686. In 1969, Congress addressed whether it should count a vote cast for a candidate other than the candidate to whom the elector was pledged. 115 CONG. REC. 145-72, 209-47 (1969). The law of the state involved, however, did not bind electors to vote as they had pledged. See *id.* Consider also the argument, made in 1969, that Congress should not only disregard the "faithless electors" vote, but record it for the candidate for whom it should have been cast. *Id.* at 198-201 (statements of Sens. Muskie and Mundt). Nineteenth-century Congresses would not have considered doing that.

687. See 107 *id.* at 288-91 (1961) (counting the votes of Hawaii's Democratic electors based on a trial court's determination of an election contest two days before Congress met, although the ruling was still subject to appeal). Nineteenth-century Congresses would have not allowed this, based on their understanding of the officer de facto doctrine. See *supra* text accompanying note

necessarily bound by nineteenth-century views about how far Congress may go behind the governor's ministerial certificate and about the scope of the fraud exception to an elector's election when the electors' appointment is authenticated only by the governor's lawful certification. For similar reasons, the existence and scope of a fraud exception to section 2's conclusivity principle may not be settled by historical analysis alone.

Still, even if historical analysis of the views of the ECA's framers does not bind, it does matter. Historical analysis sheds light on the problems the Senate and the House of Representatives confront when they meet to count electoral votes, and it provides a fuller understanding of the agreement they reached over a century ago to frame and implement their response. Historical analysis provides a starting point, but not an end point. According to some scholars, the value of historical analysis is not to bind contemporary decision-makers to the framers' specific intent, but to ensure that in departing from that intent, they evolve the law knowingly, thoughtfully, and with due regard to the limits of their rightful creativity (as that scholar defines it).⁶⁸⁸

Whatever the value of historical analysis, this Article has studied the views of the framers of the ECA so that modern members of Congress and informed citizens can understand the law (or joint rule) as the Senate and House of Representatives understood it over 100 years ago. That is a step towards clarifying, changing, or simply not being afraid to utilize the ECA next time a presidential election is close and partisanship runs rampant—as the ECA authors knew it would—when the presidency of the United States turns on a few votes cast somewhere in America's far-flung domain.

Unfortunately, clarifying, changing, and implementing the ECA can never remedy the electoral count's most fundamental problem: When Congress counts the states' electoral votes, the results of the electors' voting are already known. No matter what substantive criteria and processes Congress adopts for judging the propriety of each state's electoral vote, in a close presidential election, when each state's vote is known beforehand, partisans on every side will usually be able to game the system to figure out grounds to reach the result they want. Because the basic facts and decisional standards of the electoral count are known before the count begins, any electoral count system that works within the present constitutional structure can be manipulated by partisans earnestly asserting colorable claims.

185.

688. See generally CALABRESI, *supra* note 685; ESKRIDGE, *supra* note 685; Jack Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 953 (1988); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 401-43 (1995).

Think back to the 2000 election. Suppose the Florida Supreme Court finished its work within the safe harbor period and ruled in favor of the Democratic electors. As a slate of electors claiming safe harbor status, the Democratic electors would have been entitled to have their votes counted unless there were sufficient grounds (e.g. fraud) for denying them section 2 status. Surely the history of the electoral count shows that partisan commitments may decisively influence whether a member of Congress or the interested public argues for or against the existence of the fraud exception and whether the Supreme Court of Florida's decision was so flawed as to be within it.⁶⁸⁹ Surely, partisan considerations would influence, and perhaps even dictate, the earnestly asserted positions that members of Congress and the interested public would take on these questions.

The problem that the results of the electors' balloting are known before the electoral count occurs is one of the inherent weaknesses of the Constitution's presidential election system. It is possible to believe that the framers did not anticipate the difficulty because they expected the electors to exercise an independent vote by secret ballot. In such circumstances, when the electors forwarded the results of their balloting in sealed packets to Congress, the packets' contents would not be known beforehand. In this scenario, the rise of political parties derailed the framers' presidential election system because political parties selected electors based on their known support for particular candidates.

It is also plausible that the framers anticipated the problem and that the rise of political parties only exacerbated it. Even if the electors exercised an independent choice by secret ballot, the constitutional system still contemplated each state's electors counting their own electoral votes and sending only the certified totals to Congress. Inevitably, even in the earliest elections, word of how each state's electors voted reached the nation's capital before the packets were opened.⁶⁹⁰ A neutral counting of unknown results at the seat of government was doomed from the start.

The ECA's framers knew all this. In 1876, they experienced firsthand the strife and posturing that follows a close presidential election. Their response was to create an electoral count system that sought to minimize the conflicts that would reach Congress, to confine and define Congress's discretion to reject what the states had done, and to resolve disagreements between the Senate and the House of Representatives through bright-line vote counting rules. Unable to agree on any constitutional amendment,

689. Or consider a variant of this hypothetical: If one supposes there was time for a rehearing petition to be filed under normal Florida Supreme Court rules, perhaps the earnestly asserted issue would be whether the Florida Supreme Court's decision was "final."

690. See Letter from Thomas Jefferson to James Madison, *supra* note 426 (stating Jefferson's expectation that he and Burr would tie for the presidency).

Congress attempted, through the ECA, “to remove, as far as it is possible to be done by legislation . . . , a difficulty which grows out of an imperfection in the Constitution itself.”⁶⁹¹

691. 17 CONG. REC. 1019 (1886) (statement of Sen. Hoar).

APPENDIX I
THE ELECTORAL COUNT ACT OF 1887
24 Stat. 373

Chap. 90.—An act to fix the day for the meeting of the electors of President and Vice-President, and to provide for and regulate the counting of the votes for President and Vice-President, and the decision of questions arising thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the electors of each State shall meet and give their votes on the second Monday in January next following their appointment, at such place in each State as the legislature of such State shall direct.

SEC. 2. That 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 the 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.

SEC. 3. That it shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State, by the final ascertainment under and in pursuance of the laws of such State providing for such ascertainment, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by the preceding section to meet, the same certificate, in triplicate, under the seal of the State; and such certificate shall be inclosed [sic] and transmitted by the electors at the same time and in the same manner as is provided by law for transmitting by such electors to the seat of Government the lists of all persons voted for as President and of all persons voted for as Vice-President; and section one hundred and thirty-six of the Revised Statutes is hereby repealed; and if there shall have been any final determination in a State of a controversy or contest as provided for in section two of this act, it shall be the duty of the executive of such State, as soon as practicable

after such determination, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such determination, in form and manner as the same shall have been made; and the Secretary of State of the United States, as soon as practicable after the receipt at the State Department of each of the certificates hereinbefore directed to be transmitted to the Secretary of State, shall publish, in such public newspaper as he shall designate, such certificates in full; and at the first meeting of Congress thereafter he shall transmit to the two Houses of Congress copies in full of each and every such certificate so received theretofore at the State Department.

SEC. 4. That Congress shall be in session on the second Wednesday in February 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 one o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. 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; and the votes having been ascertained and counted in the manner and according to the rules in this act 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. 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. 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; and 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 three of this act 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. 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 two of this act 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; but 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 two of this act, 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 laws; and 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. 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. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. 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.

SEC. 5. That while the two Houses shall be in meeting as provided in this act 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.

SEC. 6. 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.

SEC. 7. That at such joint meeting of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators, in the body of the

Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform. 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 act, 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 ten 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.

Approved, February 3, 1887.

APPENDIX II

WHETHER SECTION 4'S TREATMENT OF THE "MULTIPLE RETURN" PROBLEMS IS DISJUNCTIVE OR CONJUNCTIVE

Jack Maskell and L. Kinvin Wroth read the ECA's three step process for grappling with multiple return problems as disjunctive.⁶⁹² Their analysis suggests a situation where a state would be entirely disfranchised beyond those that I have delimited.⁶⁹³ According to Maskell and Wroth, when there are multiple sets of returns authenticated by different tribunals claiming to be the state's section 2 authority, should the House and Senate disagree as to which tribunal is the proper section 2 authority, no vote from the state is to be counted, and "[t]his result follows regardless of the governor's action."⁶⁹⁴ As Wroth explains: "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."⁶⁹⁵

There is evidence in the ECA's legislative history supporting Wroth's and Maskell's position. As they indicate, Senator Hoar, Representative Eden, and the Conference Committee Report specifically mention the governor's certificate only when discussing the situation "when there has been no determination of the question in the States."⁶⁹⁶ I submit, however, that when more than one tribunal in a state asserts that it is the state's section 2 authority, if the houses of Congress disagree as to which tribunal is the proper one, then that is an instance when no determination of the question in the State has been made.⁶⁹⁷

692. MASKELL, *supra* note 17, at 8-11; Wroth, *supra* note 13, at 343.

693. My view is that when there are multiple submissions, a state will be disfranchised only when both the Senate and the House concur in rejecting all the state's submissions, or there is no submission certified by the governor, or there are two or more governors and Congress disagrees as to who the true governor is.

694. Wroth, *supra* note 13, at 343. Maskell points out that Burgess implicitly agrees with their position. MASKELL, *supra* note 17, at 8 n.26 (citing Burgess, *supra* note 10, at 642-44).

695. Wroth, *supra* note 13, at 343. I treat Wroth and Maskell's analysis in Appendix II because: (1) it applies only to the rare instance when a state makes multiple submissions and two or more of them claim section 2 authentication; and (2) my response is so detailed that it would burden the text. The length of my response reflects the complexity of the subject and the wealth of material. It also reflects my great respect for Wroth's and Maskell's views on the ECA. I owe a great debt to Wroth's seminal and perceptive article. *See* Wroth, *supra* note 13. Jack Maskell, who works for the Congressional Research Service, has enormous experience in divining the meaning of statutes for Congress. Differing from Wroth and Maskell is something that requires extensive support.

696. 18 CONG. REC. 668 (1886); *see also id.* at 49-50 (statement of Rep. Eden); 17 *id.* at 1020, 1022 (statement of Sen. Hoar).

697. *Cf. supra* text accompanying note 383 (discussing electors claims to have section 2 status).

As passed, section 4's provision dealing with multiple returns is:

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 two of this act to have been appointed, if the determination in said section provided for shall have been made . . . ; but 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 two of this act, 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 laws; and 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. *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.*⁶⁹⁸

Textually, it is more plausible to read the final sentence, particularly the words "such votes," as relating to the entire prior sentence, not just to the clause after the final semicolon.⁶⁹⁹

In addition, the main purpose of the amendments that led to Congress turning to the governor's certificate as the ultimate tiebreaker—Hoar's floor amendment⁷⁰⁰ and the House of Representatives' committee's substitute proposal⁷⁰¹—was to respond to congressmen concerned about the power of one house of Congress to disfranchise a state when there were multiple returns. In reviving their proposals, and in crafting section 4's final language, the Conference Committee's view was that:

698. Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 374 (current version at 3 U.S.C. § 15 (2000)) (emphasis added).

699. Maskell implicitly admits this. MASKELL, *supra* note 17, at 9-10.

700. See *supra* text accompanying note 532 (discussing Senator Hoar's amendment).

701. See *supra* text accompanying note 535 (discussing the House committee's proposal).

The general effect of all [the reconciling amendments], and of the bill as reported . . . , is to provide for the decision of all questions that may arise as to its electoral vote to the State itself; and where, *for any reason, that fails, then the Houses circumscribe their power to the minimum under any circumstances to disfranchise a State*, and such result can only happen when the State shall fail to provide the means for the final and conclusive decision of all controversies as to her vote.⁷⁰²

Under Wroth's and Maskell's reading, one house of Congress may disfranchise a state under more circumstances than under my reading. Under Wroth's and Maskell's reading, a state is disfranchised whenever there are multiple sets of returns authenticated by different tribunals claiming to be the state's section 2 authority and the House and Senate disagree on which board is the proper section 2 authority.⁷⁰³ In addition, a state is disfranchised even if only one of the multiple returns claims to have been authenticated through a section 2 process but the House and Senate disagree about whether the determination met all the conditions section 2 imposes for being a proper final determination.⁷⁰⁴ Under my reading, a state is disfranchised only when the houses concur in rejecting the return certified by its governor.⁷⁰⁵

In the legislative history of the provision, there is much evidence that supports reading the final sentence (the sentence about the governor's certificate) as applying to more than just the final clause of the preceding sentence. The provision that passed the House of Representatives was more likely to be read disjunctively because in that draft the provision on the governor's certificate appeared as part of the final clause dealing with the situation when there was no tribunal determination.⁷⁰⁶ Moving the

702. 18 CONG. REC. 668 (1886) (emphasis added).

703. See *supra* note 694 and accompanying text.

704. See *supra* text accompanying notes 299-381 (reviewing the conditions). If Wroth and Maskell are right, their reading should apply to the first and second step in the ECA's three-step process. In other words, I am arguing that, if (as Wroth and Maskell argue) the sentence on the governor's certificate does not relate to the second clause of the provision on multiple returns, it would seem to follow that it does not apply to the first clause either. The first clause is the one that deals with the case of multiple returns with only one of them purporting to be authenticated by a section 2 process.

705. I exclude from consideration whether disfranchisement might also occur if the governor refused to certify any return, or there are multiple governors certifying different returns. The point is that Wroth's and Maskell's reading would disfranchise a state under all the circumstances that mine does plus the additional occasions under discussion here.

706. As passed by the House, the provision read, in relevant part:

“governor’s certificate” language to its own sentence seems to clarify that the provision on the governor’s certificate applies to more than just the clause after the last semicolon. It may well have been part of what the Conference Committee meant when it said it “remodel[ed] . . . the language of the House amendment so as to clear up any ambiguity in the section . . . when there has been no determination of the question in the States.”⁷⁰⁷

Moreover, in introducing his amendment, Senator Hoar said: “[I]f the amendment which I have proposed shall be adopted no case can arise under this bill of rejecting the vote of any State except in the single case of dual State governments.”⁷⁰⁸ “Dual state governments” implies not just multiple tribunals claiming to be the state’s section 2 authority, but multiple claimants to the governor’s office. Similarly, the House of Representatives committee report did not limit its description of the role of the “governor’s certificate” amendment to situations where the House of Representatives and the Senate disagreed about which tribunal was the state’s proper section 2 authority. The House committee report merely paraphrased the Senate bill’s provision on multiple returns and stated:

Under the amendment, where there is but one State government and two sets of returns, purporting to be the vote of the State, then that return shall be counted which is supported by the certificate of the executive of the State, . . . unless both houses, acting separately, shall concur

[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 2 of this act, 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 laws; and 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 *were cast by electors whose appointment shall have been duly certified under the seal of the State by the executive thereof, in accordance with the law 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.*

18 CONG. REC. 30 (1886) (emphasis added) (citing the bill with the House committee’s proposed amendments, which were passed as proposed).

707. *Id.* at 668.

708. 17 *id.* at 1020 (statement of Sen. Hoar); *see also id.* at 1021 (statement of Sen. Hoar) (“Now, I can not . . . think of any case which this bill does not cover, determine, or remand to the State to determine, any case in which any friction or difficulty can grow out of the mechanism here provided, except in the case of dual State governments.”).

in deciding that the vote so certified and returned is not the lawful vote of the State.⁷⁰⁹

The remarks of Representative Samuel Dibble, chief spokesman for the House committee minority, support reading the “governor’s certificate” language as coming into play whenever the houses disagreed about which votes, if any, to count when a state submitted multiple sets of electoral votes. Dibble’s states’ rights position was that Congress’s power in counting electoral votes was “a ministerial act”⁷¹⁰ of “count[ing], in the sense of enumeration.”⁷¹¹ Congress’s power, he said, was “to recognize credentials”⁷¹² and he “deni[ed] the existence of any authority in one House, or in both Houses of Congress combined, to set aside that prima facie case when it is certified and presented in regular form and manner.”⁷¹³ To Dibble, the only legitimate time to disfranchise a state that submitted authenticated returns was when there was a “dual government” with “two persons claiming to hold the office of governor, two persons claiming to hold the State seal, two impressions of the seal which are facsimilies” on different returns, and each House recognizes a different government.⁷¹⁴ For these reasons, Dibble said he agreed with the Senate bill “in its general tenor and spirit,” and with the House committee majority’s proposed amendment to count, when all else failed, the return certified by the state’s governor under the seal of the state.⁷¹⁵ Indeed, he led the House committee minority in insisting that the governor’s certificate conclude the matter and not be subject to rejection by a concurrent vote of both houses.⁷¹⁶

Dibble was, in short, extraordinary in his desire that Congress not have power to disfranchise a state, yet he never protested that under the House committee majority’s bill that Congress had the power to disfranchise a state whenever the two houses received multiple returns that purported to

709. ANDREW CALDWELL, REPORT: TO ACCOMPANY BILL S. 9, H.R. REP. NO. 49-1638, at 2 (1886).

710. 18 CONG. REC. 46 (1886) (statement of Rep. Dibble).

711. *Id.* at 45.

712. *Id.* at 47.

713. *Id.* at 46. Representative Dibble held that it was for the judiciary to “prevent grievous wrongs from being done” and that courts were the “places where hide-bound forms of credentials can be broken through.” *Id.* at 46-47.

He was such a states’ rights enthusiast that he, along with the committee minority, argued that it was an unconstitutional infringement of the states’ plenary power to appoint electors for Congress to require the states’ section 2 authorities (1) to conclude their work six days before the electors balloted in order to have conclusive effect, and (2) to be established before election day. See SAMUEL DIBBLE, VIEWS OF THE MINORITY: TO ACCOMPANY BILL S. 9, H.R. REP. 49-1638, pt. 2, at 1-2 (1886); 18 CONG. REC. 45-47 (1886) (statement of Rep. Dibble).

714. 18 CONG. REC. 47 (1886).

715. *Id.*

716. *Id.*; see also H.R. REP. 49-1638, pt. 2, at 1-2.

come from differing section 2 authorities simply by disagreeing as to which tribunal was the proper one. Silences are difficult to interpret, but I think it suggests that he did not read the committee's bill as disjunctive. Rather, I think that he thought the requirement to turn to the governor's certificate applied whenever the houses disagreed as to the identity of the state's proper section 2 authority because that was an instance of what the bill meant when it spoke of the state making no determination of the question.⁷¹⁷

As a final argument, consider that before the amendment regarding the governor's certificate was added, section 4 was drafted in the same disjunctive style as it was after Hoar and the House committee added their amendment. The unamended section 4 read:

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 evidence mentioned in section 2 of this act to have been appointed, if the determination in said section provided for shall have been made . . . ; but in case there shall arise the question which of two or more of such State tribunals determining what electors have been appointed, as mentioned in section 2 of this act, 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 the tribunal of such State so authorized by its laws; and 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, acting separately, shall concurrently decide to be the lawful votes of the legally appointed electors of such State.⁷¹⁸

If Wroth's and Maskell's argument about the implication of the disjunctive clauses is correct, then the meaning of the unamended provision is that if, under the first clause, the houses disagree on whether there has been a timely section 2 determination, or, under the second clause, the houses disagree on whether any of the multiple returns claiming section 2 authentication really have it, then the houses have no authority, as the third

717. Dibble's own substitute bill was drafted in the same supposedly disjunctive form.

718. 17 CONG. REC. 2387 (1886) (citing S. 9, 49th Cong. § 4 (1886), after recommital); see also 15 *id.* at 5076 (1884) (citing S. 25, 48th Cong. § 4 (1884)).

clause allows when there is “no such determination,” to attempt to agree that any return is the state’s valid return regardless of whether it has a section 2 authentication. In other words, Wroth’s and Maskell’s reading means that once any return is received that purports to have a section 2 authentication, if the houses disagree about the bonafides of that authentication, they are precluded from counting another return, even when both houses agree that it is the valid return. Under Wroth’s and Maskell’s reading, a return that claims section 2 status may not trump all, but it does forestall all. This does not seem to be what Congress could possibly have intended.⁷¹⁹

The implication I draw from this is that after the provision on the governor’s certificate was added, even before the Conference Committee redrafted the provision to make it clearer, it applied generally to all instances of multiple returns. The Congress that wrote the ECA intended that when the Senate and House of Representatives disagreed about whether a return had section 2 status, that itself was an instance of “no such determination” made under the ECA. It is another example of the requirement that the Senate and House of Representatives must agree before a return can be accorded section 2 status.⁷²⁰ In this situation, the houses have to agree not only that there was a section 2 determination, but also on the tribunal that made it.

719. This argument applies to the provisions that were ultimately passed, but it is clearer if one considers the bill’s earlier versions.

720. *See supra* text accompanying notes 383-85 (discussing requirement for House and Senate concurrence).

APPENDIX III

SUMMARY OF GROUNDS UNDER THE ECA FOR DENYING ELECTORS
SECTION 2 STATUS AND FOR NOT COUNTING ELECTORAL VOTES

- I. Grounds for Denying Electors Section 2 Status
 - A. The electors' status was not authenticated by the authority designated by state law to make the "final determination" of the identity of the state's electors
 - B. The state's final determination process was not established by a state law enacted prior to election day
 - C. The determination was not "final" six days or more before the day set for elector balloting
 - D. The state's "final determination" process did not use quasi-judicial methods
 - E. And perhaps: The "final determination" authority's decision was (1) fraudulent, or (2) "manifestly" fraudulent

- II. Grounds for Rejecting Electoral Votes Submitted by an Elector Who Has Section 2 Status
 - A. Pre-appointment grounds
 1. The elector is personally disqualified from holding the elector's office because he or she also holds federal office
 2. Other constitutional infirmities, such as
 - a. The elector was appointed by a territory that is not entitled to participate in the presidential election
 - b. The state submitted more electoral votes than it is entitled to under the Constitution
 - B. Post-appointment grounds
 1. The elector cast his or her vote in violation of constitutional and federal statutory requirements; for example, the elector did not vote
 - a. by ballot
 - b. for a President and Vice-President, one of whom is not an inhabitant of the elector's state
 - c. on the day set by federal law
 - d. for candidates who are constitutionally qualified to hold the President's and Vice-President's office
 2. The elector cast his or her vote because of bribery or corruption

- III. Grounds for Rejecting Electoral Votes Submitted by an Elector Who Does Not Have Section 2 Status
 - A. All the grounds mentioned in II above
 - B. The elector's Certificate of Election resulted from

1. the governor's ministerial error, and perhaps, any ministerial error by election administrators on which the governor relied
2. a fraudulent appointment process, although it is arguable that the fraud must be so notorious that it is "manifest"

Another way of stating the grounds for objecting to counting electoral ballots is that section 4 of the ECA requires an elector's vote to be "regularly given" and "lawfully certified." "Regularly given" covers all post-appointment grounds. "Lawfully certified" covers all pre-appointment grounds. All the grounds in III above are pre-appointment. The grounds in II are pre- and post-appointment, as indicated.

The specific grounds mentioned here are drawn from the grounds discussed by the Congresses that framed the ECA. It is not meant to be exhaustive of the specific objections that members of Congress may raise. For example, members of Congress might object if electors voted for candidates other than the candidates state law bound them to vote for. If so, the objection, based on post-appointment conduct, would be that the electors' votes were not "regularly given." This would be the appropriate ground of objection regardless of whether the electors claimed section 2 status.

