Boston University School of Law
Scholarly Commons at Boston University School of Law

Faculty Scholarship

4-6-2023

Congressional Meddling In Presidential Elections: Still Unconstitutional After All These Years; A Comment On Sunstein

Gary S. Lawson
Boston University School of Law

Jack M. Beermann
Boston University School of Law

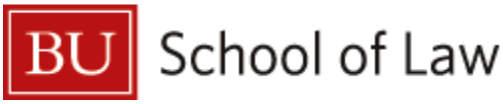
Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship

 Part of the Constitutional Law Commons, and the Law and Politics Commons

Recommended Citation

Gary S. Lawson & Jack M. Beermann, *Congressional Meddling In Presidential Elections: Still Unconstitutional After All These Years; A Comment On Sunstein* (2023).
Available at: https://scholarship.law.bu.edu/faculty_scholarship/3489

This Working Paper is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



CONGRESSIONAL MEDDLING IN PRESIDENTIAL ELECTIONS: STILL UNCONSTITUTIONAL AFTER ALL THESE YEARS; A COMMENT ON PROFESSOR SUNSTEIN

Boston University School of Law
Research Paper Series No. 23-25

April 6, 2023

Gary S. Lawson
Boston University School of Law

Jack M. Beermann
Boston University School of Law

Congressional Meddling in Presidential Elections: Still Unconstitutional After All These Years; A Comment on Professor Sunstein

Gary S. Lawson[*] and Jack M. Beermann[**]

Forthcoming, 103 B.U. L. REV. – (2023)

Abstract

In a prior article, see *Jack Beermann & Gary Lawson,* The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) about Counting Electoral Votes, *16 FIU L. REV. 297 (2022), we argued that much of the 1877 Electoral Count Act unconstitutionally gave Congress a role in counting and certifying electoral votes. In 2022, Congress amended the statute to make it marginally more constitutional in some respects and significantly less constitutional in others. In response to a forthcoming article by Cass Sunstein defending the new Electoral Count Reform Act on policy grounds, we explore how the ECRA reduces the opportunities for members of Congress unconstitutionally to object to electoral votes but in other respects compounds the constitutional problems of its century-and-a-half old predecessor by (a) trying to allocate authority over presidential elections to people, such as congressionally appointed tellers, who cannot receive such authority, (b) trying to restrict the discretion of actors, such as the Vice President, in whom the Constitution vests a small measure of discretion, and (c) trying to issue orders to people, such as state legislators, over whom Congress has no authority.*

Cass Sunstein, with characteristic clarity and thoughtfulness, has explained why he thinks the Electoral Count Reform Act of 2022[1] ("ECRA") is a major step forward in imposing "the rule of law on presidential elections."[2] Whether he is right depends, at least in part, on what one

[*] William Fairfield Warren Distinguished Professor, Boston University School of Law.

[**] Philip S. Beck Professor of Law, Boston University School of Law.

[1] *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Division P, 136 Stat. 4459, 5233.

[2] Cass R. Sunstein, *The Rule of Law v. "Party Nation": Presidential Elections, the U.S. Constitution, the Electoral Count Act of 1887, the Horror of January 6, and the Electoral Count Reform Act of 2022,* -- B.U.L. REV. --, -- (2023) [108].

considers to be the "law" that is supposed to rule.[3] One possible source of such ruling "law" is the United States Constitution. That source, intriguingly, shows up only in passing in Professor Sunstein's article;[4] though it gets a prominent mention in the article's title. Because Professor Sunstein's article does not actually provide any significant analysis regarding whether the ECRA is in fact constitutional, we suspect that what he means by the "rule of law" is an orderly process governed by the ECRA rather than the chaotic political hot mess that occurred on January 6-7, 2021. He apparently hopes that the relevant actors addressed by the law – the House, the Senate, the Vice President, state executives and legislators, and presidential electors – will *choose* to follow the new statutory scheme even if it has no legally binding force[5] -- much as Congress hopes that people will choose to follow the Flag Code even though it is only recommendatory.[6]

We are not experts on institutional design, so we do not purport to say what we consider the ideal mechanisms for implementing the electoral college (or even whether implementing the electoral college is a good idea). Maybe the ECRA of 2022 hits it exactly right. We don't know. Nor do we have any good way to predict whether people will voluntarily choose to follow the ECRA if push ever comes to shove. If we could accurately predict the actions of politicians, we

---

[3] It also depends on how one gives content to the notoriously slippery term "the rule of law." To some, the rule of law indicates simply that political actors and private citizens obey the commands issued by judges hearing cases within their jurisdiction. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183-205 (10th ed. 1959), To others, the rule of law signifies something about the nature of the legal system, that "the rule of law" requires as much as possible that that law consists of a set of determinate commands that binds everyone, including judges, political actors and private parties. See Antonin A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989). Although the two of us may differ on the legal status of the text or original meaning of the Constitution, for the purposes of this comment we take as a starting point that disobedience to the best understanding of the Constitution is not consistent with the rule of law as it is conventionally understood in the United States.

[4] *See* Sunstein, supra note 2, at – [115]

[5] *See id.* at – [115-16]

[6] *See* 4 U.S.C. §§ 5-10 (2018).

would not be writing law review commentaries; we would be auctioning off that remarkable talent to the highest bidder. We do, however, have some views on the issue that Professor Sunstein has largely avoided: Much of the ECRA is pretty obviously unconstitutional, just as much of the Electoral Count Act of 1877[7] was pretty obviously unconstitutional. We have the made the latter point at length elsewhere;[8] this brief comment extends our analysis to the new statute.

In some respects, as we explain in our concluding section to this comment, the ECRA is a constitutional improvement over what came before it, in the sense that it reduces the opportunities for members of Congress to behave unconstitutionally. In other respects, however, the ECRA compounds the problems of its century-and-a-half old predecessor by (a) trying to allocate authority over presidential elections to people who cannot receive such authority, (b) trying to restrict the discretion of actors in whom the Constitution vests discretion, and (c) trying to issue orders to people over whom Congress has no authority. Perhaps there are some respects in which this maelstrom of constitutional defects conforms to the rule of law, but if fidelity to the Constitution is an element of the rule of law, then surely there are respects in which it does not.

It is difficult to overstate the respect and admiration we have for Professor Sunstein. One of us owes his academic career to the inspiration Professor Sunstein provided as a teacher and scholar of administrative law, and his influence on the development of administrative law and regulatory policy more generally in the twentieth and twenty-first centuries has been enormous.

---

[7] Act of February 3, 1877, ch. 90, 24 Stat. 373. Congress codified, this act, with minor modifications, when enacting Title 3 of the United States Code into positive law. *See* Act of June 25,1948, ch. 644, 62 Stat. 672. Enactment of codifications into positive law makes those codifications authoritative even over different wording in the Statutes at Large. *See* 1 U.S.C. § 204(a) (2018).

[8] *See* Jack Beermann & Gary Lawson, *The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) about Counting Electoral Votes,* 16 FIU L. REV. 297 (2022).

Just as Judge Jerome Frank expressed "serious misgivings" when he found himself in disagreement with the great Judge Learned Hand,[9] we have serious misgivings about disagreeing with anything Professor Sunstein says in his article. Thankfully, our differences with him are more matters of focus than substance, although we must concede that we are in disagreement with him, and much of the rest of the country it seems, over the respective roles of Congress and the President of the Senate in determining the authenticity and validity of electoral votes. Where Professor Sunstein sees the Electoral Count Act of 1887 and the Electoral Count Reform Act of 2022 as efforts by Congress to minimize its own involvement in the process of electing the President, we see Congress as illegitimately arrogating power to itself to overturn the election by voting to reject the determinations of the Vice President on the authenticity and validity of electoral vote certificates.

I

Start with the basics. The Constitution specifically gives Congress power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives,"[10] but Congress's only granted power over presidential elections is the power to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes."[11] That is because the Constitution entrusts the bulk of designing and creating the process of presidential and vice-presidential selection to state legislatures rather than to Congress: "Each State shall appoint, in

[9] National Labor Relations Board v. Universal Camera Corp, 190 F.2d 429, 431 (2d Cir. 1951) (Frank, J. concurring).

[10] U.S. CONST. art. I, § 4, cl. 1.

[11] *Id.* art. II, § 1, cl. 3.

such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[12] Nor does the Necessary and Proper Clause help Congress here. That clause allows Congress to make laws "for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[13] State legislatures are none of the above, so Congress has no power to make laws to "carry[] into Execution" the constitutional functions of state legislatures.[14]

There is an immediate textual ambiguity in these provisions: When the Constitution gives Congress power to fix the "Time of chusing the Electors," what does that mean? It seems at first glance as though it cannot mean the power to pick a specific date on which electors must be chosen, because the sentence goes on to say that Congress can fix the "Day" on which the electors will vote. If fixing the "Time" meant fixing the "Day," it would have been very easy to say that. But then what does it mean? Is the "Time" of chusing electors narrower than, broader than, or ultimately the same as the "Day" on which they vote?

Fortunately, we do not have to answer that question, because on any resolution the ECRA blows through Congress's limited constitutional power in other ways. Perhaps the most glaring defect in the ECRA, a bit ironically given the law's title, is its provisions for counting electoral votes.

---

[12] *Id*. art. II, § 1, cl. 2

[13] *Id.* art. I, § 8, cl. 18.

[14] For the same reasons, Congress cannot prescribe the form of oath for state officials, even though an oath of some sort is mandated by the Constitution. *See* id. art. VI, § 3. As a result, the first statute enacted by the First Congress was flagrantly unconstitutional. *See* Gary Lawson, *The Constitution's Congress,* 89 B.U. L. REV. 399, 403-06 (2009).

The Twelfth Amendment is unclear about precisely who is supposed to count electoral votes once they have been cast and delivered. It says that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates,"[15] but once the certificates are opened, the Constitution says only that "the votes shall then be counted,"[16] without specifying who must do the counting. As we explain at length in our prior article,[17] one can make a case either for the President of the Senate (normally the Vice President) as implied vote counter or for the House as the counter for President and the Senate as counter for the Vice President. Conceivably, though less plausibly, one could try to make a case for the House and Senate jointly as the counting agent. Those are the only entities mentioned in the Twelfth Amendment. Congress, as a legislative body, is not mentioned at all. (It is not at all clear that the assemblage of the House and Senate mentioned in the Twelfth Amendment is a joint session of Congress.)

The ECRA chooses "none of the above" as the vote counter. Here is what the statute says about vote counting:

> (c) APPOINTMENT OF TELLERS.—At the joint session of the Senate and House of Representatives described in subsection (a), there shall be present two tellers previously appointed on the part of the Senate and two tellers previously appointed by the House of Representatives by the presiding officers of the respective chambers.

---

[15] U.S. CONST. amend. XII.

[16] *Id*.

[17] *See* Beermann & Lawson, *supra* note 8, at 302-04.

(d) PROCEDURE AT JOINT SESSION GENERALLY.— (1) The President of the Senate shall

(A) open the certificates and papers purporting to be certificates of the votes of electors appointed pursuant to a certificate of ascertainment of appointment of electors issued pursuant to section 5, in the alphabetical order of the States, beginning with the letter A; and

(B) upon opening any certificate, hand the certificate and any accompanying papers to the tellers, who shall read the same in the presence and hearing of the two Houses.

. . .

(e)

. . .

(3) LIST OF VOTES BY TELLERS; DECLARATION OF WINNER.—The tellers shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.[18]

[18] Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117328, § 109, 136 Stat. 5238-40.

While it is not as pellucidly clear as it could be, it seems as though the ECRA makes the congressionally appointed tellers the official vote-counters.

There are two very large problems with this set-up. First, one cannot make a case for tellers as the constitutionally proper counting authority. The Twelfth Amendment makes no reference to tellers. While there is nothing constitutionally wrong with having tellers appointed to assist the appropriate constitutional actors to carry out their duties, it is more than a bit of a stretch of the Twelfth Amendment to allow Congress to vest actual counting authority in those tellers. While it is not entirely clear whether the Constitution implicitly vests counting authority in the Vice President, the House, and/or the Senate, the authority pretty obviously falls somewhere in that group, and whatever answer proves to be correct is fixed by the Constitution, not by Congress.

Second, if Congress somehow has power to make the tellers the official vote-counters, the tellers would surely be "Officers of the United States,"[19] which would require them to be appointed in accordance with the Appointments Clause. Indeed, if the tellers have *final* counting authority, they would be *superior* officers who can be appointed only by the President with the advice and consent of the Senate.[20] The respective Houses of Congress could no more appoint tellers with that kind of power than they could appoint members of the Federal Election Commission.[21]

We are not saying here, any more than in our prior article, precisely how electoral votes must be counted. We are saying only that it cannot be the process prescribed by the ECRA.

---

[19] U.S. CONST. art. II, § 2, cl. 2.

[20] *See* United States v. Arthrex, 141 S.Ct. 1970 (2021).

[21] *See* Buckley v. Valeo, 424 U.S. 1 (1976).

II

One of the principal aims of the ECRA is to remove as much discretion as possible from the actors responsible for presidential and vice presidential selection. Unfortunately for Congress, the Constitution at times commits discretion to some of those actors, whether Congress likes it or not.

Most notably, the new statute provides, in what Professor Sunstein calls "perhaps the key sentence . . . of the ECRA,"[22] that "[t]he electors of President and Vice President shall be appointed, in each State, on election day, *in accordance with the laws of the State enacted prior to election day.*"[23] The obvious purpose of this provision is to prevent state legislatures from playing political games with the selection process by making last-minute changes to state law. Assuming, however, that Congress can fix the date for appointment of electors, where does Congress get the power to tell state legislatures what laws to apply when making those appointments and when to enact those laws? Nothing in the Constitution even remotely gives Congress power to dictate to States how the selection process for electors takes place,[24] except perhaps ancillary provisions like the Fourteenth and Fifteenth Amendments that, inter alia, grant Congress the power, "by appropriate legislation" to enforce guarantees of due process and racial equality in voting.[25]

---

[22] Sunstein, *supra* note 2, at – [109]

[23] ECRA § 1, 136 Stat. 5233 (emphasis added).

[24] As Congress recognized for many years. *See* In re Green, 134 U.S. 377, 380 (1890) ("Congress has never undertaken to interfere with the manner of appointing electors").

[25] U.S. Constitution Amend. XIV, § 5, Amend. XV, § 2.

If a State specifies a process for appointing electors by law, and the state legislature then wants to change that law on the date for appointment of electors, or even thirty seconds before the appointments take place, there is nothing in the federal Constitution that prohibits such a change or authorizes Congress to prohibit it. Suppose, for example, a State sets up a popular vote for electors, and that vote takes place the day before the date set by Congress for appointment of electors. The state legislature does not like the result of the popular election, and so on the specified appointment day it passes a new law giving itself power to appoint electors notwithstanding any prior procedures. The Constitution obviously permits this. The ECRA purports to forbid it. But Congress purports to do many things that it has no constitutional power to do, such as appoint members of the Federal Election Commission or create law without using the constitutional procedures for lawmaking. Perhaps it would be more consistent with the rule of law for state legislatures to stick to pre-election-day appointment procedures, which might reduce the influence of "party nature" on the proceedings,[26] but how does Congress get off imposing its vision of the rule of law on state officials?[27] The Constitution does not contain a "rule of law clause" empowering Congress to require state officials, in all respects, to follow a particular conception of the rule of law.

There is a second respect in which the ECRA tries to limit discretion contrary to the Constitution's allocation of authority. The Constitution makes the Vice President the President of the Senate,[28] and the Twelfth Amendment specifies that the President of the Senate "shall, in

---

[26] Whether it would actually reduce the impact of "party nature" depends on what the pre-election and post-election processes look like. It is not hard to imagine scenarios in which post-election law manifests less "party nature" than pre-election law.

[27] *See* Sunstein, *supra* note 2, at – [109] ("the rule of law is imposed, as a matter of federal law, on state officials").

[28] U.S. CONST. art. I, § 3, cl. 4.

the presence of the Senate and House of Representatives, open all the certificates [listing electoral votes] and the votes shall then be counted."[29] We just saw that this may well include the authority to count the electoral votes. Does it include (or also include) the authority to decide whether a document purporting to be a state certificate is genuine? Donald Trump thought so in 2020, which is why he urged Vice President Pence to declare some of the certificates in the 2020 election void on grounds of fraud.

The ECRA definitely denies the Vice President any such power, as it contains two key provisions about the role of the President of the Senate in the presidential selection process:

> (1) MINISTERIAL IN NATURE. -- Except as otherwise provided in this chapter, the role of the President of the Senate while presiding over the joint session shall be limited to performing solely ministerial duties.
>
> (2) POWERS EXPLICITLY DENIED.—The President of the Senate shall have no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors.[30]

In our view, however, the Constitutionvests a measure of discretion in the President of the Senate that Congress cannot take away. In particular, implicit in the Constitution's instruction to the President of the Senate to "open all of the certificates" so that the votes may be counted[31] is power, indeed a duty, to determine which envelopes contain the certificates and which pieces of

---

[29] *Id*. amend. XII.

[30] ECRA § 15, 136 Stat. 5238.

[31] U.S. Const., Amend. XII.

paper inside the envelopes are the certificates. In the absence of the naming of another official to perform that function, we find this implication particularly strong.

To be sure, in this instance, unlike with state legislatures, we are talking about a federal official, so Congress does have power to pass laws "for carrying into Execution" that official's constitutionally vested powers But those laws must conform to the rest of the Constitution, and there's the rub. If the Constitution itself grants the President of the Senate power to "solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors," Congress cannot remove that discretion by statute.

In our prior article, we argued for a limited role for the President of the Senate precisely along these lines, because the President of the Senate must decide whether any particular document in his or her hand really is a "certificate" reflecting electoral votes.[32] Legal academics who react to Donald Trump as vampires react to garlic will no doubt be appalled at the suggestion that he and his minions, including a phalanx of lawyers and legal who are now viewed by many as pariahs, [33] were correct about this small aspect of the process for electing the

---

[32] *See* Lawson & Beermann, *supra* note 8, at 304-08.

[33] Lawson, speaking only for himself and not for the hypothetical author "Lawson & Beermann," is troubled by this widely held viewpoint. For example, John Eastman, in his capacity as a lawyer, advised President Trump that the Vice President had power to postpone counting of electoral vote certificates if members of state legislators wanted more time to explore claimed irregularities in their states' voting. As a result, he is now facing disbarment proceedings in California, based at least in part on his arguments regarding the Twelfth Amendment. *See In the Matter of John Charles Eastman, Notice of Disciplinary Charges,* Case No. SBC-23-O-30029, at 15, para. 31; available at https://discipline.calbar.ca.gov/portal/DocumentViewer/Index/xv_FicSci6H9VoCsxKkcVVqIlxBVZgX1T4U7NWRSzvWtgW8H1kv4DPfgbBfHMGMod0MPwiqkG7yhlp42frDgZtjouvz-_10p41IMUugMBRY1?caseNum=SBC-23-O-30029&docType=Initial%20Pleading%2FResponse&docName=Notice%20of%20Disciplinary%20Charges&eventName=Notice%20of%20Disciplinary%20Charges&docTypeId=268&isVersionId=False;*Respondent John Charles Eastman's Answer to Notice of Disciplinary Charges,* Case No. SBC-23-O-30029, at 12 et seq., available at https://discipline.calbar.ca.gov/portal/DocumentViewer/Index/VKp2rlkQmKkpmUd-6hcJ7oHy79up_S7eHMGmo6mltqLMlF-eKVFELkH1kJy3WEzD5ZzM3f5A4kwtCPNY8goLPRJn6T5zkMxP1NhDOPXHBUQ1?caseNum=SBC-23-O-30029&docType=Initial%20Pleading%2FResponse&docName=Response&eventName=Response&docTypeId=268&isVersionId=False. For reasons that Lawson & Beermann explain in their prior article and in the next few sentences of this one, Eastman's position is partially mistaken: The Vice President can determine whether a

President. They should, however, find solace in the fact that this limited power could not have helped President Trump in 2020, because the issue in 2020 was not whether the documents delivered to the President of the Senate were or were not "certificates" provided by the electors but rather whether there was some defect in the process that produced those certificates – and that is a matter for States to resolve, not the President, the Congress or anybody else.[34] But it does mean that the President of the Senate has a residuum of power that is more than "ministerial," and Congress has no power to take it away. The President of the Senate, not Congress, determines what counts as a "certificate" for purposes of the Twelfth Amendment – subject, we believe, to the possibility of judicial review.[35]

Professor Sunstein's only comment on this matter is to invoke Vasan Kesavan's comprehensive article[36] to suggest that the House and Senate, and not the Vice-President, have the vote-counting function.[37] But even if that proves to be correct, this is not a matter of vote counting. This is a matter of determining what counts as a "certificate" for purposes of the Twelfth Amendment, which is an act that must occur *before* any votes are counted. Someone

---

document is truly a certificate reflecting the electoral votes of a State but cannot look beneath the certificates to the underlying state electoral process. *See* Lawson & Beermann, *supra* note 8, at 311-12. But, given the textual gaps in the Twelfth Amendment, the notion that Eastman's argument is so absurd that a lawyer should be disbarred for making it is itself so absurd that there is a better case for disbarring the lawyers bringing that charge than for disbarring Eastman. Lawyers make adventurous, and even dubious, arguments all the time – just as Congress enacts dubious statutes all the time, with the ECRA being just the latest example. Eastman's Twelfth Amendment arguments are at least as plausible as the arguments for the constitutionality of the ECRA provisions that Lawson & Beermann criticize in this comment..

[34] *See id*. at 308-13.

[35] *See id*. at 312-14.

[36] *See* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?,* 80 N.C. L. REV. 1653 (2002).

[37] *See* Sunstein, *supra* note 2, at – [114-15].

has to make discretionary judgments about what counts as a "certificate," and the Twelfth Amendment simply does not, through silence or otherwise, devolve that power onto Congress.

III

The ECRA purports to impose duties on a variety of actors. One such actor is the Archivist.[38] We have no trouble with Congress defining that duties of that federal officer. The ECRA, however, also purports to order "the executive of each State . . . [to] issue a certificate of ascertainment of appointment of electors"[39] "[n]ot later than the date that is 6 days before the time fixed for the meeting of the electors."[40] The state executives are then ordered to transmit copies of those certificates to the Archivist and the electors.[41] This may very well be a wise and salutary practice, which responsible state executives will happily perform. But it is hard to see where Congress gets the power to tell state executives how to act in this regard. That power does not come from Article II or the Twelfth Amendment. It does not come from the Necessary and Proper Clause, because state executives are not federal officials, even when performing functions under the Constitution.[42] This provision of the ECRA doesn't really bother us since nothing state executives do is relevant to the election of the President; the Constitution specifies that "The electors . . . shall make distinct lists of all persons voted for as President, and of all persons

---

[38] ECRA §§ 6 &11, 136 Stat. 5236-37.

[39] *Id.* § 5, 136 Stat. 5235.

[40] *Id.*

[41] *See id*.

[42] If they were federal officials, they would need to be appointed in accordance with the Appointments Clause or some other provision of the federal Constitution.

voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate." No state executive is involved in the voting, certifying or transmitting votes to [the] President of the Senate, and Congress has no power to authorize state governors, secretaries of state or other state executive officials to meddle in the electoral process. Only the state legislature has that power.[43]

Similarly, the ECRA imposes filing requirements on the electors, but here we believe Congress is acting within its proper scope.[44] The electors are likely to be considered "Officers of the United States whose Appointments are not herein otherwise provided for"[45], the "herein" referring to the U.S. Constitution. If we are correct about this, then Congress could, under the Necessary and Proper Clause, specify the procedures they should follow to carry out their federal functions. And we think there is a good case to be made that have it right: electors perform the federal constitutional functions (or at least a joint federal-state function) of voting for President and Vice-President and transmitting the certificates of those votes to the President of the Senate, and the Constitution, outside of the Appointments Clause, specifies how they are appointed ("Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors")[46] The fact that they are appointed in the manner specified by the state legislature does

---

[43] We recognize that if the state legislature directs that the governor or some other official such as the state secretary must determine which slate of electors is legitimate, their actions might influence the President of the Senate's determination concerning the validity of electors' certificates. In a case in which more than one certificate is provided by purported electors of a state, Interactions between the President of the Senate and state officials might be quite extensive, and the President of the Senate might treat their views as determinative, subject to judicial review. We do not believe we need to resolve all of the implications of this problem since it does not, in our view, provide Congress with a basis to place requirements of any kind on state officials designated by the state's legislature as having a role in the election.

[44] *See* ECRA § 11, 136 Stat. 5236-37.

[45] U.S. Const. Art II, § 2, cl. 2.

[46] U.S. Const. Art II § I, cl. 2.

not make them state officials any more than Senators were state officials when they are appointed by the state legislature itself. Even if they are not Officers of the United States, we believe that they are at least a sort of sui generis federal creation over which Congress has the power to make laws "necessary and proper for carrying into Execution" their federal functions.[47] Alas, while it appears that the ECRA's provisions aimed at the electors have support in the Constitution, this is not an improvement over prior law since the Electoral Count Act of 1887 similarly specified the process electors were supposed to follow to transmit their votes to the Senate President.[48] And this does not help resolve the key controversy over the scope of the discretion inherent in the role of the President of the Senate in the opening and counting process.

IV

As Professor Sunstein so eloquently describes in the current paper and a pre-ECRA analysis of the events of January 6, 2021,[49] both the ECA and the ECRA are efforts by Congress to create a mechanical process for finalizing presidential elections within which the Members of

---

[47] U.S. Const. Art. I § 8, cl. 18. We acknowledge that there are problems, textual, structural and otherwise, with considering electors Officers of the United States. First, the Constitution expressly prohibits any "person holding an office of trust or profit under the United States" from serving as an elector. U.S. Const. Art. I § 1, cl. 2. This implies that electors cannot be Officers of the United States because Officers of the United States cannot be electors. Second, the legal standard for status as an Officer of the United States has been held to include a requirement that the person occupy a "continuing office" under the United States, which might be viewed to exclude officers who perform only the occasional service of being electors. This is potentially a very sticky wicket, but we do not find it necessary to navigate it since we conclude that Congress has power to enable electors to carry out their roles whether they are officers or not. For a comprehensive review of officer status under the Constitution that concludes that electors are not Officers of the United States. *See* Seth Barrett Tillman & Josh Blackman, Offices *and Officers of the Constitution, Part II: The Four Approaches* 61 S. TEX. L. REV. 321 (2021).

[48] See 3 U.S.C. §§ 8-11 (2018).

[49] Sunstein, *supra* note 2, at – [107]; Cass R. Sunstein, Post-Election Chaos: A Primer (September 2, 2020). Harvard Public Law Working Paper No. 20-25, Available at SSRN: https://ssrn.com/abstract=3685392 or http://dx.doi.org/10.2139/ssrn.3685392.

Congress would "rise above desirability bias, and above 'party nature.'" With this in mind, we agree with Professor Sunstein that the ECRA is, in one respect, a constitutional improvement over the old ECA. Under the old statute, if one member of each of the House and Senate raised written objections to certificates, each House would then debate the matter and vote on the objections.[50] Under the ECRA, it now requires one-fifth of each House to start that consideration process. Because in our view, *any* consideration process on the part of Congress is unconstitutional, the ECRA is a step in the right direction not because Congress has the power to enact it, but simply because it makes it harder for Congress to unconstitutionally interfere with the process of opening the certificates and counting the votes. It's analogous to a homeowner or business installing a burglar alarm; burglary remains illegal but the alarm makes it less likely that an attempt will succeed. That is progress of sorts, even if it is not an exemplar of the rule of law.

This brings us almost all the way back to where we started: given our lack of expertise in institutional design, we cannot pretend to provide firm advice on what, if anything, Congress should do to fix the process for finalizing presidential elections. All other things being equal, we do believe that Congress should not transgress clear constitutional limits on its authority.[51] But assuming there is room in the Constitution for Congress to arrogate to itself the power to determine which certificates should count toward electing the President, we are willing to speculate on whether that would improve the prospects for successfully suppressing, as Professor Sunstein calls it "party nature" and provide an orderly, non-biased process for finalizing the election. Here, based largely on historical events, as we argued in our earlier article,[52] we

---

[50] 3 U.S.C. § 15 (2018).

[51] One of us views nearly all constitutional issues as raising primarily questions of social utility rather than positive law, but even that deviant finds value in the stability inherent in obedience to clear constitutional commands.

[52] Beermann and Lawson, supra note 8.

believe that the better course is to trust the Vice-President to authenticate and count the certificates, subject to the possibility of judicial review. How confident are we that this is a better process for electing the President? Not a whole heck of a lot, but remember, the alternative to the Vice President is the Congress of the United States.