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The Twelfth Amendment: A Constitutional Ticking Time Bomb*

NATHAN L. COLVIN & EDWARD B. FOLEY†

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

—Justice Joseph Story¹

* Professors Bruce Ackerman and David Fontana used the term “ticking time bomb” to describe the same problems with the original language of the Constitution’s Article II that the framers of the Twelfth Amendment incorporated into the text of the Twelfth Amendment. Because we agree with their conclusion that this problem is the equivalent to a “ticking time bomb,” we have decided to adopt their term. See Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 VA. L. REV. 551, 585, 629 (2004).

† This historical essay is a collaboration between its two authors. Nathan L. Colvin, a student at The Ohio State University Moritz College of Law, undertook research on this topic under the supervision of Professor Edward B. Foley and deserves the credit for writing the initial draft as well as undertaking revisions in response to Professor Foley’s edits and inputs. The problems posed by the ambiguity of the Twelfth Amendment were addressed by Professor Foley in his contribution to the symposium for which this essay is a contribution, and he is grateful for the opportunity that symposium provided to discuss the problem (and potential solutions) with other symposium participants. To the extent that this historical essay goes beyond a description of the relevant facts, and begins to evaluate those facts with an eye to identifying a particular remedy to the deficiencies of the Twelfth Amendment, the evaluative emphasis and tone is a genuinely joint voice that combines the perspectives of the two coauthors. Had either author been writing this essay on his own, the emphasis and tone likely would have been distinct from the collaborative product published here. But both authors wished to downplay their own distinctive perspectives on the topic in the interest of producing a joint work—one reason being the fact that any potential reform of the Twelfth Amendment necessarily is a pluralistic enterprise. It surely will not be possible to amend the Constitution to remedy the defects, now over 200 years old, unless citizens of different political viewpoints can come together to, first, recognize the need to adopt a solution and, then, to develop one. This essay is our offering in that spirit.

1. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1464 (Boston, Hilliard, Gray, & Co. 1833). Professor Foley originally encountered Justice Story’s quote while researching one of our country’s earliest disputed elections, the 1792 New York gubernatorial election. See Edward B. Foley, University Distinguished Lecture at the Ohio State University: The Original *Bush v. Gore*: An Historical Perspective on Disputed Elections (Oct. 14, 2008) (transcript available at http://moritzlaw.osu.edu/electionlaw/docs/post_lecture_draft05march09.pdf).

I. INTRODUCTION

Despite Justice Story's prescient warning, at first glance, some readers might wonder how an amendment to the Constitution that is rarely, if ever, a part of public discourse has the potential to create a national crisis in modern times. Justice Story was describing the Twelfth Amendment, which provides the constitutional framework for the selection of President and Vice President.² The potential for crisis comes from ambiguous constitutional text that has left modern interpreters with significant unanswered questions. There has been little legislative effort to address the problems with the text of the Twelfth Amendment, perhaps because our nation has not had a serious dispute over electoral votes reach the counting stage in Congress for over one hundred years.³ The 2000 election never caused a serious dispute before Congress, because candidate Al Gore conceded defeat after the U.S. Supreme Court halted the recount of ballots in Florida. Thus, there was no further dispute over the winner of Florida's electoral votes by the time Gore, as President of the Senate, announced on January 6, 2001 before both

2. The text of the Twelfth Amendment is lengthy, but the relevant portion is included below:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.

U.S. CONST. amend. XII. The remaining relevant text is in Article II Section 1 of the Constitution. Clause 2 delegates the choosing of electors to the states and provides for the qualifications of electors. Clause 4 gives Congress the power to determine the day that all states select their respective electors and the day those electors must cast their votes. Both days must be uniform for all states. Clause 5 details the qualifications to be President. U.S. CONST. art. II, § 1.

3. As a result, nineteenth-century legal scholars did recognize the problems with the Twelfth Amendment; some twentieth-century scholars have recognized the problems, but little scholarship has been produced to trace the problems and argue for the necessity of constitutional reform. *See, e.g.*, Laurence H. Tribe, *Erog .y Hsub and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170, 279 (2001) (noting the ambiguities and suggesting the questions remain unanswered today); Edward B. Foley, *Voting next time—and in 2020*, Election Law @ Moritz (Nov. 10, 2008), <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=3897> (identifying the disaster imbedded in the ambiguities of the Twelfth Amendment and arguing for the need resolve the questions).

houses of Congress that George W. Bush had been elected President with a majority of electoral votes.

Consequently, the last—and indeed only—major dispute in the nation's history over the counting of electoral votes to reach Congress was the Hayes-Tilden election in 1876. Although Congress adopted a new statute, the Electoral Count Act of 1887, in the aftermath of that crisis, the Twelfth Amendment itself has never been revised to fix the defects in it.

The problems with the text of the Twelfth Amendment are twofold. First, the text of the amendment contains several ambiguities about how the process should work, particularly about how disputes regarding the validity of electoral votes should be resolved and who should resolve them. The second problem is the lack of guidance from other sources. There is little substantive case law on the subject, due in part to these ambiguities, the gravity of the topic (election of the President), and the scarcity of close presidential elections. Making matters worse, the statutory effort (the Electoral Count Act) to address the problem is inadequate, unwieldy, and arguably unconstitutional.

Although the Supreme Court's decision in *Bush v. Gore*⁴ averted congressional confrontation over electoral votes pursuant to the deficient framework of the Twelfth Amendment, the episode signals the possibility that a similar dispute might arise again—but this time without the saving intervention of the Supreme Court.⁵ Although the events of 2000 produced passing interest in the mechanism established by the Twelfth Amendment, since then there has been no sustained plan to prepare the nation if a dispute over electoral votes goes all the way to Congress. Nevertheless, the history of the Twelfth Amendment and the commentary on it during the nineteenth century show that the nation needs a contingency plan of this sort.

Some nineteenth-century scholarship analyzed the historical instances in which the Twelfth Amendment issues have come up, and some scholarship has dealt with the complexity and problems of the Electoral Count Act. This Article attempts to create a continuous narrative of America's electoral vote disputes and analyze the problems in the modern context. The flaws of the Twelfth Amendment are so fundamental that constitutional change is necessary. We recognize the exceedingly difficult nature of attaining a constitutional amendment, especially on a topic where either of the two major political parties will want to block any measure it perceives as disadvantageous to its interests, either short

4. 531 U.S. 98 (2000).

5. See, e.g., RICHARD A. POSNER, *BREAKING THE DEADLOCK* ix (2001) (defending the Court's judgment as a pragmatic approach to averting political and constitutional crisis).

or long term. Moreover, like putting off preparations to defend against a once-a-century category five hurricane, it is easy to postpone consideration of a constitutional amendment designed to protect against another debacle of the kind that occurred in 1876 (and did not even materialize in 2000). Still, the need for a constitutional amendment to repair the defects of the Twelfth Amendment is so great—since the magnitude of the electoral storm is so severe should another 1876 arise—that it is worth raising the point. At the same time, however, given the unlikelihood of an amendment, despite its necessity, it is also worth proposing a second-best legislative solution that would modify the Electoral Count Act.

This Article starts by analyzing the history of the Twelfth Amendment and then traces its usage and application through early American presidential elections.⁶ Next, this Article examines the election of 1876 and Congress's attempt to solve some of the problems by enacting the Electoral Count Act of 1887 (ECA), followed by a brief discussion of the ECA's inadequacy (and possible constitutional defects)⁷ in practice through the twentieth century.

This Article concludes by reemphasizing the importance of having clear procedures for dealing with disputes over electors—for fairness, reducing partisanship, and creating a result that maximizes public acceptance and confidence. While the losing side in an electoral dispute will always be disappointed with the outcome, this should not mean that the loser must feel the path to that outcome was unfair. Additionally, the current system encourages judicial intervention that is unhealthy for the Supreme Court and undesirable for the nation. To forestall this undesirable outcome and any future problems, it is necessary for Congress to address this uncertainty by adopting constitutional changes before

6. Between the election of 1800 and the election of 1876 there were eleven disputes over electoral votes, and members of Congress raised twenty-one objections to the validity of the votes of different states. Throughout this time, Congress fervently debated the extent to which it had the ability to exercise power but passed no legislation. J. HAMPDEN DOUGHERTY, *THE ELECTORAL SYSTEM OF THE UNITED STATES* 105 (1906).

7. The discussion is brief because Vasán Kesavan has already provided a thorough analysis of the possible constitutional defects of the Electoral Count Act. See Vasán Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653 (2002). Kesavan provides some summary of the history of the electoral counts with the purpose of showing the defects with the Electoral Count Act, and with this in mind, it is Kesavan's argument that the Electoral Count Act is the systemic illness in the electoral system. To that end, he proposes some revisions to the Act he argues would fit better with his understanding of the Constitution. *Id.* at 1811–12. We argue, instead, that the Electoral Count Act is a symptom of an illness. The true illness is the ambiguity of the Twelfth Amendment, which has manifested itself in the Electoral Count Act and the historical instances of electoral disputes, including the most recent dispute over Florida in 2000. Thus, the Twelfth Amendment requires attention and remedy, and our historical analysis bears this in mind.

another electoral dispute tests the system again. If the reader is to accept these conclusions, it invites the question, should we scrap the Electoral College altogether? Rather than address that weighty (and oft-discussed) question, this Article only addresses problems posed by the text of the Constitution and assumes preservation of the present Electoral College.⁸

II. A HISTORY OF THE UNITED STATES PRESIDENTIAL ELECTORAL SYSTEM: PRACTICE, REFORM ATTEMPTS, AND FLAWS

Prior to ratification of the Twelfth Amendment, Congress relied on the Electoral College vote-counting procedures located in Article II of the Constitution.⁹ The Twelfth Amendment made significant changes to the procedures for casting electoral votes, but the critical ambiguous text of the original Constitution, “[t]he President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted,” was preserved.¹⁰ While the amendment solved other problems, this sentence has been at the root of many subsequent controversies. The sentence almost suggests “a formula that forces us to suppose that according to the view of the framers of the Constitution, the question [of counting votes] was one simply of addition,”¹¹ and the use of the passive voice here suggests the Framers did not anticipate controversy in the electoral count.¹² This assump-

8. During the ratification debates, Alexander Hamilton said that the mode of electing the President was perhaps the only part of the Constitution to escape criticism. *THE FEDERALIST* No. 68 (Alexander Hamilton). Despite this, choosing a method of selecting a president was one of the hardest problems for the Constitutional Convention. BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 27 (2005). The Convention considered various plans, including election by popular vote and parliamentary style appointment, but settled on the current system, which they adopted from the Maryland Constitution. *See generally* TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT* 7–25 (1994); C.C. Tansill, *Congressional Control of the Electoral System*, 34 *YALE L.J.* 511, 511–14 (1925). The Electoral College was primarily a compromise between the interests of the large states and those of the small states. The constitutional debates about our electoral system were quite animated and perhaps among the most thorough in the Convention. *See* KURODA, *supra*, at 7–8. The Framers explicitly rejected election by popular vote or selection by the national legislature—this Article will leave aside the debate about whether to change the substance of the Electoral College system. In other words, we assume for purposes of this Article that the formula for allocating the number of electoral votes should remain the same and that state legislatures should remain entitled to choosing the method by which their electors are selected. The only topic we address, thus, is the procedural one concerning how to resolve disputes that might arise over a state’s electoral votes under this system. For a broader discussion on scrapping or reforming the Electoral College, see generally Ann Althouse, *Electoral College Reform: Déjà Vu*, 95 *Nw. U. L. REV.* 993 (2001) (reviewing three of the top books concerning the Electoral College).

9. U.S. CONST. art. II, § 1, cl. 3.

10. *Id.*; accord U.S. CONST. amend. XII.

11. DOUGHERTY, *supra* note 6, at 2 (quoting an earlier commentator on this point).

12. Perhaps this should not be surprising. The Framers did not anticipate, and indeed hoped to

tion, that the counting of electoral votes would be a ministerial duty, was shortsightedness on the part of the Framers that led to ample debate and dispute throughout the 1800s.

When a dispute arises over the validity of a state's electors, several ambiguities from this text arise. The starting issue for an analysis of electoral vote determination under the Constitution is ascertaining where the Constitution vests the power to count and/or determine the validity of votes, and this is where the first ambiguity comes from. There are four possible actors: (1) the Vice President of the United States acting as the President of the Senate, (2) the two houses of Congress acting together, (3) the two houses of Congress acting separately, and (4) the states.¹³ The text of the Twelfth Amendment is unclear on this subject, and, throughout our history, various theories have prevailed. Early scholars generally divided the patterns into three general periods. During the first period, from 1789 to 1821, the power was generally thought vested in the states or in the President of the Senate.¹⁴ In the second period, from 1821 to 1861, Congress generally found that there was a

prevent, the formation of political parties. For them, George Washington was the model president. They hoped that the mechanism of the Electoral College could secure, if not exact replicas of this most virtuous model, at least sufficient facsimiles so that the president would be above partisanship. ACKERMAN, *supra* note 8, at 27-31.

Additionally, early in our history, the state legislatures directly appointed their electors to cast ballots. It is easy to understand how the Constitutional Convention might have assumed that these votes would be legal and without controversy. The Constitution provided only a few requirements for electoral votes: that the electors themselves are not in the service of the United States and that the electors cast their votes for an eligible candidate. Perhaps the Framers assumed that no state would appoint ineligible electors and no elector would vote for an ineligible presidential candidate such that the counting would truly be mere addition. DOUGHERTY, *supra* note 6, at 3-4.

13. It is undeniable that each state will play a major role in determining its own electoral votes, although it is debatable just how extensive or exclusive the state's authority is in this regard relative to potential congressional actors. What is more difficult to conceive is how the states, rather than a single national actor, could exercise final authority over the accumulation of all electoral votes from the various states and thus the declaration of the presidential winner. Moreover, insofar as the national task of accumulating the electoral votes from the several states may occasionally involve a question of what alleged submission from a particular state constitutes the actual electoral votes from that state, it becomes more difficult to assert that *this* question must finally and conclusively be resolved by the state itself rather than any national actor. But acknowledging this point invokes the possibility of making inroads on the exclusivity of each state's ability to determine its own electoral votes. Thus, figuring out what belongs exclusively to each state, and what belongs properly to a national institution, in the counting of electoral votes is no easy matter—and indeed has perplexed many of the discussants of this topic over the decades.

14. Tansill, *supra* note 8, at 511; see also DAVID A. MCKNIGHT, *THE ELECTORAL SYSTEM OF THE UNITED STATES* 17 (1878) ("From the time of the first Congress in 1789 to the year 1821, history shows that the unquestioned custom was for the President of the Senate to declare the votes officially, whilst Counting was, what the language of the law would seem to convey clearly enough, simply enumeration." (internal quotation marks omitted)). This period is perhaps notable because many of the Framers of the Constitution were members of Congress. The theory held until those individuals left government. See MCKNIGHT, *supra*, at 18.

casus omissus in the Constitution as to who should count the votes and what power that actor had to reject votes.¹⁵ In the third period, from 1861 to the present,¹⁶ Congress acted affirmatively to determine the validity of electoral votes and for the first time rejected some votes.¹⁷

At first, it might seem odd that three different interpretations of the same text have taken hold through history, but the Framers failed to explain the power of the President of the Senate or Congress in the process.¹⁸ Early on, the President of the Senate would be called upon to make some judgments as presiding officer, and this might suggest that the Framers and their contemporaries thought the proper exercise of power belonged in the hands of this single individual. However, as time passed, this power increasingly tilted to Congress as a collective body.

This is not surprising given the different interpretations available. On one hand, the text “in the Presence of the Senate and House of Representatives”¹⁹ suggests the Framers might have intended for these bodies to serve as mere witnesses to the President of the Senate’s act of counting. Other interpretive approaches suggest that either the Framers did not anticipate these possibilities or would surely not have placed such power in the hands of one individual, instead intending a greater role for Congress. Additionally, the Framers must not have anticipated that they were placing an individual likely to have a conflict of interest—the Vice President of the United States—at the center of the storm. Sure enough, the sitting Vice President has been a candidate for President or Vice President, while simultaneously serving in his capacity as President of the Senate. If the Vice President’s role is merely ministerial, there is not much of a conflict of interest as a practical matter; but if the Vice President’s duty encompasses resolving potentially decisive controversies over which candidate gets a state’s electoral votes, then the conflict is monumental.²⁰

15. MCKNIGHT, *supra* note 14, at 17 (“From 1821 to 1861 it was generally held that a *casus omissus* existed in the Constitution, and that no one was empowered to count; whilst Counting was used in the broader and unwarranted sense of canvassing.” (internal quotation marks omitted)); *see also* Tansill, *supra* note 8, at 520–21 (noting that for the first time in 1821 Congress maintained some power to control and canvass the votes and this view was accepted in practice for the next forty years).

16. Whether this period extends to the present is a difficult question. As will be seen, Congress has not faced a serious dispute over electoral returns since 1887.

17. MCKNIGHT, *supra* note 14, at 19 (noting the third period has been marked by the belief that Congress has the right, as an affirmative act, to count votes and thus to determine the legality of votes); *see also* Tansill, *supra* note 8, at 522–25.

18. *See* WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876, at 99 (2004). Chief Justice Rehnquist described the Constitution as “silent as to *who* would do the counting.” *Id.*

19. U.S. CONST. art. II, § 1, cl. 3.

20. *See* Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the*

Finally, perhaps the more important question about the Twelfth Amendment, if there was some sort of controversy in electoral votes (whether an elector has a defect or whether there are competing electors), could the Vice President or Congress—whichever is the final federal counting authority under the Constitution—go behind the certificate submitted by the state? How might the federal counting authority deal with multiple returns from a state? Congress has repeatedly considered this question, and opinions have varied. Running contrary to the notion that Congress has strong power to question the electoral returns of a state is another clause in the Constitution, which might suggest that Congress should afford strong deference to the state's submitted electors.²¹ In all, one can summarize the questions about the counting power²² as follows:

- What is the power of the President of the Senate during the proceedings?
- What is the power of Congress? Is it as a joint body or may Congress act as separate houses?
- Is vote counting a ministerial task such that the role of the vote counter is that of simply adding the vote totals?
- Under the Article II, Section 1, Clause 2 of the Constitution, what deference should be given to a state's determination of an election?

Presidency, 90 VA. L. REV. 551, 556 (2004) (“[T]he Vice-President . . . is a natural candidate in the next presidential contest. It is an obvious mistake to designate him as the presiding officer over the electoral vote count.”).

21. See U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress . . .”). The early methods were quite diverse. In the election of 1796, six states used popular election to choose electors, while ten states gave the job to the state legislature. Some allowed the electors' votes to be split in proportion to the popular vote. ACKERMAN, *supra* note 8, at 31. The Court has interpreted this section, in the context of a state changing the method of appointing electors from election by popular vote to direct legislative appointment and suggested that it represents a strong delegation of power to the States. *McPherson v. Blacker*, 146 U.S. 1, 24–37 (1892) (discussing the different historical modes of appointing electors and suggesting there is no doubt that the legislature may resume appointing the electors). Some have argued that a state legislature might even appoint electors after an election has been held.

22. This list is not an exhaustive list of problems with the Twelfth Amendment as a whole. We intend to focus on the ambiguous text and counting power, but other scholars have noted other problems. For instance, some have noted that it is unclear whether rejected votes (or votes not given) should change the way the majority of votes required to be elected is calculated. For a discussion of this issue and a history of congressional practice, see JACK MASKELL ET AL., CONG. RESEARCH SERV., ELECTORAL VOTE COUNTS IN CONGRESS: SURVEY OF CERTAIN PROFESSIONAL PRACTICES (2000), available at <http://wikileaks.org/wiki/CRS-RL30769>. Professors Levinson and Young have devoted an article to the so-called Habitation Clause of the Twelfth Amendment, which forbids electors from casting two votes for inhabitants of the same state, and have noted that it could raise a whole host of issues. Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. L. REV. 925 (2001).

- How should multiple slates of votes from a single state be dealt with?
- How far behind the certificate may the vote counter go (i.e., may the vote counter seek evidence of fraud, incorrect results, etc.)?
- Can constitutionally invalid (ineligible electors, voting on the wrong day, votes from a territory, etc.) votes be rejected?
- Can electoral votes subject to other defects (such as fraud, problematic voting procedures, contested elections, etc.) be rejected?
- Is there room for judicial review?

A. *Early Elections Under the Original Constitutional Framework*

1. THE FIRST AND SECOND ELECTIONS

On April 6, 1789, Congress gathered in New York City to count the first electoral votes. The election was without controversy because the country was united around the candidacy of the George Washington, but the record of the proceedings does provide some understanding of how the Framers and their contemporaries might have understood the Constitution to operate on this matter.²³ Because the country was without a Vice President, the first order of business was to elect a member of the Senate as the President of the Senate “for the sole purpose of opening the certificates and counting the votes of the electors of the several States in the choice of a President and Vice-President of the United States.”²⁴ Both houses of Congress appointed members to “sit at the Clerk’s table to make a list of the votes as they shall be declared.”²⁵ The record then shows that the President of the Senate “in [the House and Senate’s] presence, had opened and counted the votes of the electors for President and Vice-President of the United States.”²⁶ This record might support a strong role for the President of the Senate in opening *and*

23. Of course, there is some uncertainty in relying on the record of the counts in the first place. For instance, the record for the first two counts is only a few pages long and certainly does not include every detail about the proceedings; however, it is the best evidence available.

24. H. SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES: PROCEEDINGS AND DEBATES OF CONGRESS RELATING TO COUNTING THE ELECTORAL VOTES FOR PRESIDENT AND VICE-PRESIDENT OF THE UNITED STATES, H.R. MISC. DOC. NO. 44-13, at 7 (2d Sess. 1877) [hereinafter *COUNTING ELECTORAL VOTES*]. *Counting Electoral Votes* is a compilation of federal records relevant to the counting of electoral votes, starting with the debates at the constitutional convention, congressional debates about proposed and accepted statutory and constitutional changes, and records of the proceedings of each electoral count. A House select committee tasked with determining a method to resolve the Hayes-Tilden dispute commissioned the document in the winter of 1876–1877. 7 CHARLES FAIRMAN, *FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877*, at 10 (THE OLIVER WENDELL HOLMES DEVISE: THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, Paul A. Freund & Stanley N. Katz eds., Supp. 1988).

25. *COUNTING ELECTORAL VOTES*, *supra* note 24, at 7.

26. *Id.*

counting the votes, while the members at the clerk's table play the role of mere witnesses to his actions—keeping record of the votes.

The record for the second election suggests a slight change to this procedure with more delegation of duty from the President of the Senate.²⁷ Prior to the count, Congress formed a committee to, among other items, “ascertain and report a mode of examining the votes for President and Vice-President.”²⁸ The committee declared that each house should appoint a “teller” to make a list of the votes as declared and deliver the results to the President of the Senate.²⁹ The record shows “[t]he two Houses having accordingly assembled, the certificates of the electors . . . were, by the Vice-President, opened, read, and delivered to the tellers appointed for the purpose, who, having examined and ascertained the votes, presented a list of them to the Vice-President.”³⁰ The nation reelected George Washington without controversy, but the record suggests some diminished role for the President of the Senate, as the tellers seemed to play a role in the counting.³¹

2. PRESIDENTIAL ELECTIONS OF 1796 AND 1800

The record shows similar procedures during the next two elections, with the President of the Senate opening certificates and declaring results while the tellers made a list of the votes and delivered that list to the Vice President.³² A recent piece of scholarship argues that in these

27. Of course, it is impossible to know with any certainty if this was not a mere change in word choice rather than a change in the proceedings.

28. COUNTING ELECTORAL VOTES, *supra* note 24, at 10.

29. *Id.*

30. *Id.*

31. See DOUGHERTY, *supra* note 6, at 33. Some scholars have suggested that even this might have been a departure from the Constitution. See 2 CYCLOPAEDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND OF THE POLITICAL HISTORY OF THE UNITED STATES 62, 63 (John J. Lalor ed., 1899) (quoting Professor Alexander Johnston's assertion that “the intention of the system of American constitutional government was that the President of the Senate should canvass the votes: in accordance with a general authenticating law, if Congress would or could pass such a law; otherwise according to his best judgment”); see also Tansill, *supra* note 8, at 516 (agreeing that many scholars held that Congress could pass a general law providing for the authentication of the certificates, but the sole function of counting the votes belonged to the President of the Senate). Some scholars hold that the innocent and proper appointment of the tellers was the first inroad by Congress upon the President of the Senate's counting powers. *Id.* (quoting Professor Johnston on this point).

32. See COUNTING ELECTORAL VOTES, *supra* note 24, at 12–13, 30. The record for the 1792 and 1800 elections describes the action in the Senate chamber as follows: “the certificates of the electors of sixteen States were, by the Vice-President, opened and delivered to the tellers appointed for that purpose, who, having examined, and ascertained the number of votes, presented a list thereof to the Vice-President.” *Id.* at 30; *accord id.* at 10. It is difficult to say what the record meant by “having examined,” but this account suggests an even more active role than the one envisioned by the committee and, if accurate, cuts against Professors Ackerman and Fontana's argument that Jefferson as Vice President ruled on a questionable certificate in his own favor. See

two presidential elections, John Adams and Thomas Jefferson, as Vice Presidents presiding over the electoral vote count, “used their power to make rulings that favored their own election as President of the United States.”³³ However, the two men parted ways when it came to involving Congress in the process: according to Professors Ackerman and Fontana, while Adams gave Congress a chance to object to his ruling, Jefferson did not.³⁴

In the election of 1796, reports and rumors suggested that the Vermont electors might have been constitutionally invalid.³⁵ The implications were high, as without the votes, Adams would have lost the presidency to Jefferson. The *Annals of Congress* notes that after announcing the final count, “[t]he President of the Senate then sat down for a moment, and rising again, thus addressed the two Houses.”³⁶ Scholars, including Professors Ackerman and Fontana, have argued that Adams was pausing to give an opportunity for objections.³⁷ Since no objection was heard, we cannot know for certain, nor can we guess, how Adams might have handled such objections.

By contrast, as Vice President, Thomas Jefferson counted votes from Georgia that some argue were facially defective in terms of the formal requirements for their submission contained in the original Article II of the Constitution.³⁸ There was no allegation at the time (or subsequently) that nefarious conduct underlay the formal defect, giving Georgia’s electoral votes to Jefferson and Burr rather than Adams and Pinckney. In other words, Georgia’s submission was substantively accurate in naming Jefferson and Burr as the winners of its electoral votes, despite its formal defects. Still, the legal question remains whether Geor-

infra note 33 and accompanying text. If nothing else, this might just show the danger in relying on the record since other sources suggest the Vice President opened and announced the results.

33. Ackerman & Fontana, *supra* note 20, at 552.

34. *Id.* at 601.

35. *Id.* at 571. The charges were (1) that Vermont did not have a valid law authorizing the selection of electors; (2) that the electors were made through a “resolve” instead of a legislative enactment; and (3) that the appointment of the electors was not within the timeline provided by federal statute. *Id.* at 572–73. The charges were serious enough that the candidates (including Jefferson at home in Virginia) were aware of the reports. Professors Ackerman and Fontana thoroughly discussed the reports and found the charges did not have legal merit. *Id.* at 571–79.

36. 6 ANNALS OF CONG. 2097–98 (1797).

37. Ackerman & Fontana, *supra* note 20, at 580–81; *see also* EDWARD STANWOOD, A HISTORY OF THE PRESIDENCY FROM 1788 TO 1897, at 51–52 (Charles Knowles Bolton ed., rev. ed. 1928).

38. Article II requires that each state’s electors “*sign and certify*” their votes for President. U.S. CONST. art. II, § 1, cl. 3 (emphasis added). Georgia’s submission simply listed the names of the state’s electors, without their signatures and certifications. Ackerman & Fontana, *supra* note 20, at 588–98, 612–13; *see also* Norman J. Ornstein, *Three Disputed Elections: 1800, 1824, 1876, in AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE* 29, 30 (John C. Fortier ed., 3d ed. 2004).

gia's votes can be counted, since the formal requirement protects against the possibility of fraud on other occasions. Even more, the *institutional* question exists: *Who* decides the legal question of whether Georgia's electoral votes can be counted despite their formal defect? Does Jefferson get to decide this all by himself, as President of the Senate? Even if he does, given his obvious self-interest in the particular election, should he give members of Congress the opportunity to consider the issue?

The available evidence suggests that the tellers (those opening the envelopes) notified Jefferson of the problem, and Vice President Jefferson "decisively" resolved the issue by counting the vote in the final tally.³⁹ Regardless of whether this should serve as precedent, it is clear that the text of the Constitution is extremely vague on the subject of counting Electoral College votes, and the possibility for controversy was always present. While the Constitution did not specify the exact role of the Vice President in opening and counting electoral votes from the states, the election of 1800 made evident the awkwardness of giving the Vice President the authority to resolve questions about the validity of electoral votes.⁴⁰

3. THE GRAND COMMITTEE PROPOSAL OF 1800

In early 1800, to prepare for the presidential election that would take place later that year, Federalist Senator James Ross proposed a bill to create a "Grand Committee" to "inquire, examine, decide, and report

39. Ackerman & Fontana, *supra* note 20, at 603. The *Memoirs of Aaron Burr* suggests that Jefferson was even more aggressive in his actions, though the source is at least questionable given the memoirs were written by a staunch Burr loyalist. *Id.* at 604–06. Interestingly, a senator described the event in a similar fashion, though seemingly as oral tradition until 1876. *Id.* at 609. Notably, much like post-*Bush v. Gore* arguments, Ackerman and Fontana argue that Jefferson's actions were prudent because they averted certain constitutional crisis:

Jefferson did not merely place Georgia's votes into the Republican column; he did not publicly acknowledge the existence of any sort of problem. In contrast to John Adams . . . he did not give his opponents a clear opportunity to raise the issue.

. . . .

Jefferson's silence seems particularly sensible in the context of the confused legal situation . . . with the painfully ambiguous words of the Constitution as a guide. . . . Jefferson's silence allowed everybody to resolve the matter without a heated legalistic battle.

Id. at 614–16; see also ACKERMAN, *supra* note 8, at 71–74 ("All things considered, Jefferson's obfuscations provided the best way out of the dark situation left by the Founders. . . . If Jefferson had raised the issue squarely . . . everybody would have confronted an infinite regress: Could the president of the Senate claim the right to decide whether the president of the Senate possessed the contested power? To which the Federalist majorities in the House and Senate would counter that their constitutionally required 'presence' at the vote count authorized them to override the president's rulings from the chair. And so forth.").

40. Ackerman and Fontana argue that the Founders overlooked the problem of placing the Vice President in such a prominent role because they optimistically thought the republic would remain without faction. See *id.* at 557–67.

upon” electoral vote irregularities.⁴¹ The bill was likely a partisan attempt by the Federalists to ensure victory in the upcoming presidential election.⁴² Under the proposed committee each house of Congress would have selected six members, and the Chief Justice would have served as the thirteenth member and chairman of the committee.⁴³ The concept largely came from the Federalist senators, but the Republicans attempted to amend the bill. Interestingly, the proposed amendment by Senator Nicholas recognized many of the problems that could arise with the returns and thus indicates that Congress was well aware of these problems as early as 1800, before adoption of the Twelfth Amendment.⁴⁴ Nicholas and the Republicans largely argued against the Federalist version’s delegation of the vote counting from the joint session of Congress to a committee.⁴⁵

Republican Senator Charles Pinckney, a Framers of the Constitution, gave a strong speech in opposition that foreshadowed most of the themes for the debate that remain relevant today. The speech focused on the idea that the Constitution intended to prevent congressional interference with the presidential election, which might in turn compromise the

41. Ackerman & Fontana, *supra* note 20, at 583 (internal quotation marks omitted); *see also* KURODA, *supra* note 8, at 78; Tansill, *supra* note 8, at 517.

42. *See, e.g.*, JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 263–64 (1996) (noting the partisan Federalist motives behind the bill and Federalist John Marshall’s opposition to it on constitutional grounds); Kesavan, *supra* note 7, at 1669 (noting that the Federalist’s motives behind the Grand Committee bill were to ensure Jefferson’s defeat); L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321, 327 (1961) (discussing the partisan motivations of the Grand Committee Bill’s backers).

43. COUNTING ELECTORAL VOTES, *supra* note 24, at 17. The initial bill gave each House the power to appoint two members as tellers. The President of the Senate would open the electoral certificates so the tellers could record all of the relevant information. Then the Grand Committee, meeting in secret, could take all of the documents and determine the validity of all of the votes by majority vote. The committee had investigatory authority to subpoena witnesses and take testimony. After meeting, the committee would turn over its results as the “final and conclusive determination of the admissibility, or inadmissibility, of the votes.” KURODA, *supra* note 8, at 78–79 (internal quotation marks omitted).

44. *See* KURODA, *supra* note 8, at 79–80. Nicholas conceded that six legitimate issues might arise:

(1) whether an Elector has been appointed in a mode authorized by the Legislature of his state or not; (2) whether the time at which he was chosen, and the day on which he gave his vote were those determined by Congress; (3) whether he was not at the time, a Senator or Representative of the United States, or held an office of trust or profit under the United States; (4) whether at least one of the persons for whom he has voted is an inhabitant of a state other than his own; (5) whether the Electors voted by ballot, and signed, certified and transmitted to the President of the Senate, a list of all the persons voted for, and the number of votes for each; (6) whether the persons voted for are natural born citizens, or were citizens of the United States, at the time of the adoption of the Constitution, were thirty-five years old, and has been fourteen years resident within the United States.

Id.

45. KURODA, *supra* note 8, at 80.

President's independence.⁴⁶ In the House, Federalist John Marshall raised constitutional objections and amended the bill to strip the committee of conclusive power. Instead, under Marshall's amendment, both houses of Congress, meeting separately, would have to agree that votes were invalid and should be rejected.⁴⁷ The House sent this amended bill back to the Senate, which removed many of Marshall's changes. The two houses could not agree upon amendments, and consequently the bill died.⁴⁸ Despite Pinckney and Marshall's statements and the Grand Committee Bill's defeat, clearly there was early confusion and disagreement about the power of Congress to regulate electoral vote counting.

B. *Passage of the Twelfth Amendment and Subsequent Elections*

Jefferson's ruling to count Georgia's electoral votes despite their formal deficiency was not the end of that electoral count in 1800. Inclusion of Georgia's votes caused Jefferson and Aaron Burr to be tied, with even votes, so that they were the only two candidates in a runoff to be settled by the House of Representatives. (Had Georgia's votes been

46. The speech is worth quoting because it provides an early and complete example of one point of view that various members of Congress have consistently held throughout these debates.

Knowing that it was the intention of the Constitution to make the President completely independent of the Federal Legislature, I well remember it was the object, as it is at present . . . to give to Congress no interference in or control over the election of a President. . . . It never was intended, nor could it have been safe, in the Constitution, to have given to Congress thus assembled in convention the right to object to any vote, or even to question whether they were constitutionally or properly given. This right of determining on the manner in which the electors shall vote; the inquiry into the qualifications, and the guards that are necessary to prevent disqualified or improper men voting, and to insure the votes being legally given, rests and is exclusively vested in the State Legislatures. . . . To give to Congress, even when assembled in convention, a right to reject or admit the votes of States, would have been so gross and dangerous an absurdity that the framers of the Constitution never could have been guilty of. How could they expect . . . that party spirit would not prevail and govern every decision? Did they not know how easy it was to raise objections . . . ? Or must they not have supposed that, in putting the ultimate and final decision of the electors in Congress . . . they would render the President their creature . . . ?

COUNTING ELECTORAL VOTES, *supra* note 24, at 19–20.

Pinckney went on to discuss the problems of constitutional defects or double returns. For the constitutional requirements of electors, Pinckney argued that the framers left it to the State Legislatures to "perform their duties" on this point. *Id.* at 20. On the issue of double returns, Pinckney argued that the Grand Committee approach would actually serve as "temptation [for the minority in the state] to dispute every election, and to always bring forward double returns." *Id.* at 20–21.

47. Ackerman & Fontana, *supra* note 20, at 584.

48. Tansill, *supra* note 8, at 518. The primary issue was whether the consent of one or both houses was required to reject a state's votes. See KURODA, *supra* note 8, at 81; Wroth, *supra* note 42, at 327 ("The House, less aggressively partisan than the Senate, refused to accept a measure which would permit rejection by vote of the Senate alone. The bill failed when neither House would yield.").

excluded, the runoff would have been among the top five vote-getters, a scenario that likely would have favored the Federalists in their opposition to Jefferson.)⁴⁹ It was clear on the national level that Republicans intended Jefferson as their choice for President, while Burr was the party's choice for Vice President.⁵⁰ While the original constitutional language gave each elector two votes, it did not allow the electors to designate one of their votes for President and the other for Vice President. Gaming the electoral votes became crucial, and party leaders considered having electors in some states cast votes for Jefferson and Burr while other electors cast votes for Jefferson and another Republican candidate to give Jefferson a clear victory.⁵¹ However, Jefferson was concerned that he might be stuck with a Federalist Vice President if Burr lost too many second votes; a similar situation had happened to the Federalists in 1796 when Adams and Jefferson were President and Vice President.⁵² Consequently, party leaders changed paths, urging a vote for the entire ticket.⁵³ Jefferson and Burr both received seventy-three electoral votes, throwing the election to the House of Representatives. There the Federalists maintained a majority; however under the Constitution, voting to elect the President is done by state delegation, with each state having a single vote. Under this rule, neither party had a majority because some states had split delegations.⁵⁴ Given this deadlock, Republicans faced two new undesirable outcomes—the Federalists might give the presidency to Aaron Burr, or worse, they could refuse to break deadlock leaving a Federalist as Acting President.⁵⁵ Balloting appeared to stall and rumors spread of military preparations in some Republican strongholds.⁵⁶ Ultimately, some Federalists were unwilling to risk conflict or a Burr presidency, and the House selected Jefferson as President

49. For more literature on the fascinating election of 1800 (in addition to Ackerman and Fontana's work), see SUSAN DUNN, *JEFFERSON'S SECOND REVOLUTION* (2004); JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* (2004); EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE* (2007).

50. This sentiment held even when the election was thrown to the House of Representatives as the Republican delegation from Burr's home state of New York continued to support Jefferson over Burr. KURODA, *supra* note 8, at 103.

51. *Id.* at 99.

52. *See id.* at 108 (noting that the Federalists threw so many votes away from their choice for Vice President that Thomas Jefferson finished second).

53. *Id.* at 99.

54. *Id.* at 100.

55. *Id.* at 100–01. The Constitution was silent as to what should happen if the House could not select a candidate. *Id.* at 103. The possibility that the Federalists might stall in order to appoint one of their own as President was real, and actors on both sides were fully aware of this possibility. *See generally* ACKERMAN, *supra* note 8, at 36–54. John Marshall, then Secretary of State, was floated a possible replacement, and Professor Ackerman suggests that he might have actually been one of the primary protagonists behind this movement. *Id.* at 41–54, 80–85.

56. *Id.* at 105.

by the thirty-sixth ballot.⁵⁷

The elections of 1796 and 1800 put both major political parties on notice about this particular problem with the Constitution. The 1796 election prompted Federalist initiatives to require electors to designate the office for which they casted ballots.⁵⁸ At the same time, the chief reform goal for Republicans was to ensure that the states selected electors by general or district elections rather than by legislative appointment.⁵⁹ The Republican experiences of the 1800 election led to a strong push for constitutional amendment⁶⁰ that had picked up steam by 1803, when the Republicans maintained strong majorities in the House and Senate.⁶¹ The House took up the amendment first, focusing primarily on the issue of designation and the number of candidates the House might consider if no candidate received a majority of votes.⁶² The Senate largely debated the same issues but also considered the virtue of retaining the office of Vice President and what contingency to make in the event that the House was unable to select a candidate.⁶³

In late 1803, both houses approved a final amendment that required designation of electoral votes, allowed the House to consider the three highest vote-getters if no candidate received a majority, and created a contingency if the House was unable to select a President.⁶⁴ Thirteen of the seventeen states ratified the amendment by June of 1804.⁶⁵ Notably, despite recognition during the Grand Committee debates that significant problems remained about how to deal with disputed electoral returns, Congress retained the ambiguous language that “[t]he President of the Senate shall, in the presence of the Senate and House of Representatives,

57. *Id.* (noting that rather than vote for Jefferson, many of the Federalists ultimately abstained to allow Jefferson to gain the votes of their delegations—Jefferson received no Federalist votes).

58. *Id.* at 109 (noting that the constitutional amendment process was active on this issue both in Congress and at the state level).

59. *Id.* at 110–11 (noting Republican activity in Congress and at the state level to ensure these goals).

60. DOUGHERTY, *supra* note 6, at 37. Early initiatives began at both the state level and federal level in the two years directly following the election. See KURODA, *supra* note 8, at 117–26.

61. KURODA, *supra* note 8, at 127, 133 (noting a 96 to 38 Republican advantage in the House and a 24 to 9 advantage in the Senate).

62. For a thorough discussion and analysis of the House debate, see *id.* at 127–31. Federalists naturally argued that the constitutional amendment for elections was inappropriate when it was impossible to separate partisan motives from the ultimate product. *Id.* at 130.

63. For a thorough discussion and analysis of the Senate debate see *id.* at 133–43. The Federalist minority made similar arguments to maintain the status quo and were particularly concerned that the reforms would disadvantage the smaller states. *Id.*

64. See *id.* at 151.

65. DOUGHERTY, *supra* note 6, at 26; see also Tansill, *supra* note 8, at 518 (noting the passage of the amendment was “really a constitutional recognition of the existence of political parties”). For discussion about ratification, see KURODA, *supra* note 8, at 155–61.

open all the certificates and the votes shall then be counted,"⁶⁶ in the Twelfth Amendment.

Several possibilities exist for why Congress declined to fix this problem. It is clear that the country actually faced the repercussions of a lack of designation in the 1796 and 1800 elections, so the impetus for reform was much stronger on this point. Furthermore, despite strong majorities in Congress, the Republicans still had difficulty approving the amendment because of the requirement of a two-thirds majority in both houses—additional reform might have cost the Republicans votes. This might explain why the Republicans also did not pursue their prior goal to take appointment away from the state legislatures.⁶⁷ Indeed, the amendment itself was also a partisan maneuver to consolidate Republican power, and, with strong majorities, the Republicans likely were not concerned about disputed electoral returns.

1. ELECTIONS UNDER THE NEW AMENDMENT

The election of 1804 was unremarkable except to note that the record contains two different and contrary descriptions of the proceedings.⁶⁸ The election of 1808 was a slightly different story—a Representative introduced a resolution stemming from complaints by Massachusetts residents suggesting that the appointment of the Massachusetts electors was "irregular and unconstitutional."⁶⁹ The resolution called for an investigation and passed the House, however a scholar who researched further was unable to find any subsequent action.⁷⁰ Otherwise, there were no difficulties until the election of 1816. Indiana had adopted a constitution in June of 1816, but Congress did not admit the state to the Union until December 1816; despite this, the state still submitted electors.⁷¹ The method adopted for conducting the count was not unlike the previous few electoral counts,⁷² but, upon reaching Indiana's

66. U.S. CONST. amend. XII.

67. On this point, the Republicans also did not have a partisan motive to pursue this goal as they had strong majorities in many of the states at the time. Kuroda argues that Jefferson was concerned primarily with maintaining Republican control of the federal government and was willing to abandon democratic reforms to this end. *See* KURODA, *supra* note 8, at 171–72.

68. The description of the duties for the tellers was essentially the same as in the previous two counts, but the Senate record suggests the President of the Senate only opened the certificates and allowed the tellers to read the results and count the votes. However, the House record reports that the Vice President "open[ed] all the certificates and count[ed] all the votes." *COUNTING ELECTORAL VOTES*, *supra* note 24, at 36–37.

69. Kesavan, *supra* note 7, at 1679 (internal quotation marks omitted); *see also* *COUNTING ELECTORAL VOTES*, *supra* note 24, at 37–39.

70. Kesavan, *supra* note 7, at 1679–80.

71. DOUGHERTY, *supra* note 6, at 40.

72. *See* *COUNTING ELECTORAL VOTES*, *supra* note 24, at 44, 46; *see also* Tansill, *supra* note 8, at 519.

votes, a member of the House rose to make the first recorded objection to accepting the submission of the electoral votes.⁷³ A senator motioned to allow the House of Representatives to deliberate the question.⁷⁴ Another senator seconded the motion, and the President of the Senate put the question to the members of the Senate, who agreed.⁷⁵ The votes of Indiana were inconsequential in the ultimate outcome of the election, and the House could not come to any conclusions; so the two houses joined once again to finish the counting, including Indiana's votes.⁷⁶

A similar situation arose in the election of 1820 over the status of the State of Missouri. Missouri's standing as a free or slave state was one of the first real flash points leading up to the Civil War. Missouri had adopted a constitution in July 1820 but was not acknowledged as a state until August 1821 (after the electoral count) when the Missouri Compromise was finally accepted.⁷⁷ As Indiana did, Missouri still chose presidential electors and submitted their electoral votes to Congress; again, the votes did not affect the ultimate outcome of the election.⁷⁸ Moreover, as in the past, both houses formed a joint committee "to ascertain and report a mode of examining the votes."⁷⁹ The only difference this time was that Missouri was not yet in the Union at the time of the count. Members of the joint committee anticipated and sought to avoid the problems. Prior to the count, the joint committee submitted a resolution that essentially amounted to a waiver of the question by stating two hypothetical vote totals.⁸⁰

73. The member addressed his objection to the Speaker of the House who retorted, "the two Houses had met for the purpose—the single specified purpose—of performing the constitutional duty which they were then discharging, and that while so acting, in joint meeting, they could consider no proposition, nor perform any business not prescribed by the Constitution." COUNTING ELECTORAL VOTES, *supra* note 24, at 46.

74. *Id.*

75. *Id.*

76. *Id.* at 47. The House debate included a few points worth mentioning. First, the member who raised the objection noted that he did so because although the votes were of no consequence, "the time might arrive when it would be of the greatest importance in the election of President of the United States, and that it would be better to settle it now, when its decision would not affect the election." *Id.* There was some concern about whether any resolution to the question should be done jointly with the Senate, or if the House could act independently. (One member was particularly concerned that a joint resolution would suggest that the House could not act independently in the future). *Id.*

77. DOUGHERTY, *supra* note 6, at 42. The issue was wording in the Missouri Constitution that directed the state legislature to prevent freed slaves from coming into the state. A majority in Congress would not allow admission to the Union until this provision was changed. Tansill, *supra* note 8, at 520.

78. DOUGHERTY, *supra* note 6, at 42–43.

79. COUNTING ELECTORAL VOTES, *supra* note 24, at 51.

80. This part of the resolution read:

That if any objection be made to the votes of Missouri, and the counting or omitting to count which shall not essentially change the result of the election, in that case

The resolution was the subject of heated debate in the House. Representative Henry Clay defended the tactic by first noting that, “the Constitution was silent” on the issue.⁸¹ Clay characterized this move as “avoiding” the issue and the uncertain paths:

Suppose this resolution not adopted, the President of the Senate will proceed to open and count the votes; and would the House allow that officer, singly and alone, thus virtually to decide the question of the legality of the votes? If not, how then were they to proceed? Was it to be settled by the decision of the two Houses conjointly or of the Houses separately? . . . In fact there was no mode pointed out in the Constitution of settling litigated questions arising in the discharge of this duty; it was a *casus omissus*.⁸²

Clay understood that the question was open to many interpretations but likely could not see the two bodies reaching a resolution in this context of dispute between slave and nonslave states. He likely thought it better to fix the problem later by legislation or an amendment to the Constitution.⁸³ Clay’s hope that Congress might avoid the constitutional ambiguities proved elusive.⁸⁴ Representative John Randolph argued that even this avoidance of the issue was unconstitutional because it suggested that Congress had “the power to decide on the votes of any State.”⁸⁵ Both houses agreed on the resolution but the debate sparked again during the actual electoral count, and the houses divided to discuss the issue again.⁸⁶ Despite the feelings of certain members of the House, the issue

they shall be reported by the President of the Senate in the following manner: Were the votes of Missouri to be counted, the result would be, for A B for President of the United States, ——— votes. If not counted for A B for President of the United States, ——— votes. But in either event A B is elected President of the United States.

Id.

81. *Id.* at 52. Senator Barbour presented the resolution and noted that he considered the problem to be “a *casus omissus* in the Constitution,” subject to remedy only by an act of Congress or an amendment to the Constitution. *Id.* at 49.

82. *Id.* at 52.

83. *Id.*

84. By contrast, it appears that the Senate did not debate the subject as vociferously, perhaps because it focused on the propriety of dealing with the question separate from the House. *See id.* at 49.

85. *Id.* at 51. Those in opposition essentially echoed Senator Pinckney’s pleas during debate over the Grand Committee bill. Representative Trimble was of the opinion that the resolution did not give “due to State rights” and was concerned that it might be cited as precedent. *Id.* at 52. Representative Floyd “protested against this assumption of authority on the part of Congress.” *Id.* The vote tally in the House was close, ninety yeas and sixty-seven nays, with members on both sides unsure about whether Congress could actually reject the votes. *See id.*; *see also* Tansill, *supra* note 8, at 520.

86. This time, Representative Randolph renewed his arguments with dramatic flair, suggesting that there was no such power in the Constitution to supply the defect to the *casus omissus*, that this would effectively boot Missouri from membership in the Union, and that it might set such a precedent that a President, “not only not worthy of being at the head of the

was tabled and the two bodies joined to complete the count. The President of the Senate announced the vote in hypothetical terms as provided in the joint resolution.⁸⁷

Although the issue of slavery overshadowed the debate, both sides acknowledged that there was a clear problem to which no clear answer existed. This dispute marks the first full debate of the issues, as well as full recognition that a *casus omissus* existed on the issue in the Constitution. The alternative count also marked the first time that Congress maintained some, albeit restrained, power to control and canvass electoral votes.⁸⁸ Although Congress waived the issue, the view that there was a *casus omissus* with some room to influence decisions would control for the next forty years.⁸⁹

2. CONSTITUTIONAL COMMENTATORS RECOGNIZE THE POTENTIAL FOR PROBLEMS

Despite the lack of publicized controversies arising over the ambiguous language of the Constitution, the two most influential early commentators on the Constitution noted the problems created by the Twelfth Amendment. Perhaps none was as succinct as Justice Joseph Story, who suggested that the drafters of both texts seemed to take for granted that no problems would ever arise as to the regularity and authenticity of electoral returns.⁹⁰ Chancellor Kent also summarized some of the questions:

The Constitution does not expressly declare *by whom* the votes are to be counted and the result declared. In the case of questionable votes, and a closely contested election, this power may be all-important; and I presume in the absence of all legislative provision on the subject, that the President of the Senate counts the votes, and determines the result, and that the two houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors.⁹¹

nation, but not worthy of being at the head of a petty corporation" might manipulate the vote for his own gain. COUNTING ELECTORAL VOTES, *supra* note 24, at 54–55.

87. *Id.* at 56. This was not without controversy. Again members protested, demanding to know the actual vote tally. Representative Randolph offered a resolution that the election was illegal, but it was ignored. *Id.*

88. Tansill, *supra* note 8, at 520.

89. *Id.* at 521.

90. STORY, *supra* note 1.

91. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 277 (O.W. Holmes, Jr. ed., Fred B. Rothman & Co. 1989) (1826). Of course, Kent's view of the Vice President's power is not unanimous, and, as we will see, the power has certainly shifted with the passage of time. One scholar suggested that early precedent actually suggests quite the opposite conclusion. See 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 185 n.1 (New York, D. Appleton & Co. 1882) ("The vice-president was *never*

3. REMAINING ELECTION DISPUTES DURING THE SECOND PERIOD

In the election of 1836, the Indiana and Missouri question arose again. This time, Michigan submitted electors before formal admission to the Union.⁹² Because Michigan's votes did not affect the ultimate outcome, Congress adopted a resolution nearly identical to the one it used in the case of Missouri, this time apparently without much debate.⁹³ There was an additional problem when allegations arose that several of the electors were ineligible because they held federal office. Henry Clay amended the normal resolution to allow the joint committee to "inquire into the expediency of ascertaining whether any votes were given at the recent election contrary to the prohibition contained in the second section of the second article of the Constitution," although the findings of the committee were not binding.⁹⁴

The joint committee concluded that the electors were clearly constitutionally ineligible from casting their votes.⁹⁵ In this case, Congress declared the voting of the ineligible electors "vitiated *ab initio*," and the President of the Senate and tellers did not include their votes.⁹⁶ Again, it appears that these proceedings were less controversial than the previous two disputes.⁹⁷

The election of 1856 produced a most unusual scenario. All of the votes cast were regular, but a massive snowstorm prevented Wisconsin's electors from casting their votes on the required day.⁹⁸ Congress did not seem to anticipate this issue, and the ensuing debate is worth analyzing not only to see how the role of the President of the Senate devolved, but

charged with the power to count the votes. The person who counted the first votes for president and vice-president was no vice-president, but a senator elected by the senate as its officer . . .").

92. DOUGHERTY, *supra* note 6, at 48.

93. See COUNTING ELECTORAL VOTES, *supra* note 24, at 72–74.

94. *Id.* at 70. It was alleged that some of the electors were postmasters and one a pension agent. *Id.* at 71.

95. *Id.* Reporting to the Senate on the joint committee's work, Senator Grundy noted that the problems that might arise in a less obvious case:

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

Id.

96. *Id.* at 73–74.

97. The record really does not show much dissension, but one senator did presciently ask what might happen if the outcome of the election hinged on these votes. Senator Grundy of the joint committee stated that he could not answer such a hypothetical. *Id.*

98. See U.S. CONST. art. II, § 1, cl. 4.

also the importance of the joint committee's resolution and the discussion about the counting powers.

THE PRESIDING OFFICER. Pursuant to law, and in obedience to the concurrent order of the two houses, the President of the Senate will now proceed to open and count the votes which have been given

....
....

The Presiding Officer thereupon proceeded to open and hand to the tellers the votes of the several States Pending the count,

Senator CASS said: I suggest that it is better to read the results of the vote, and not the certificates in full, unless the reading of the certificates be called for.

THE PRESIDING OFFICER. The Presiding Officer considers that the duty of counting the vote has devolved on the tellers under the concurrent order of the two houses; and he considers, further, that the tellers should determine for themselves in what way the votes are verified to them, and read as much as they may think proper to the two houses assembled.

. . . It appeared from the certificate of the electors of the State of Wisconsin that the electoral vote of that State had not been cast on the day prescribed by law.

MR. LETCHER. [Raising an objection] . . . I do not know what would be proper in a case of this sort; but I desire now to call attention to it, in order that the point may be brought to the attention of the country. A time may come when it would be a matter of importance to have these votes in regular shape. . . .

THE PRESIDING OFFICER. The Presiding Officer considers that debate is not in order while the tellers are counting the votes.

MR. JONES, of Tennessee. I suppose, Mr. President, the proper way would be for the tellers to report the facts to the convention of the two houses, and let them decide.

THE PRESIDING OFFICER. The Presiding Officer so considers. [The counting continued and the tellers reported that all certificates were regular, but Wisconsin voted on the incorrect day].⁹⁹

From here, the debate took an interesting turn. The President of the Senate appears to have considered himself bound by two documents, the Constitution and the concurrent order of the two houses.¹⁰⁰ However, the concurrent resolution, as it was in the past, was written in general terms and merely described the procedures of the count. The President of the Senate appeared to act with the power of a Presiding Officer by counting

99. COUNTING ELECTORAL VOTES, *supra* note 24, 87-88.

100. *See id.* at 89.

the votes and dismissing objections.¹⁰¹ The Presiding Officer resisted objections and arguments until the two houses divided—there, the debate was fervent with topics covering a range of issues: the power of the President of the Senate, whether votes could be excluded, whether he could count or exclude the votes, whether the houses could do so separately or concurrently (or the House alone), and whether the penalty of complete disenfranchisement was too harsh when the people properly cast their votes.¹⁰² The debate ran for two days, but the House could not reach an agreement; the debate closed with the President of the Senate's counting of Wisconsin's vote standing.¹⁰³ It was fortunate, once more, that Wisconsin's debatable electoral votes did not matter to determining the winner of the presidency.

C. *Congress Assumes a Larger Role: Adoption and Use of the
Twenty-second Joint Rule*

Congress continued this practice of waiving the issue and ignoring electoral disputes until 1865.¹⁰⁴ That year, Congress adopted a joint rule that gave it “unfettered discretion to reject electoral votes when only one house of Congress objected to receiving the votes.”¹⁰⁵ The Twenty-second Joint Rule is the broadest reach Congress has ever asserted over the electoral count.¹⁰⁶ Under the rule, an objection to an electoral vote

101. *See id.* at 89–91 (recording objections, including an accusation that the Presiding Officer had acted beyond his authority, as well as the Presiding Officer's responses). The presiding officer maintained that the only role in joint session was to count the votes and that any other function must be performed as separate houses. *Id.*

102. *Id.* at 93–144.

103. *Id.*

104. *See* Stephen A Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 557 (2004).

105. *Id.* In larger part, as with the earlier Grand Committee bill, the partisan intent of this rule was to ensure that one party (then the Federalists, now the Republicans) could control the vote counting process and to penalize southern states as needed. The full rule stated that if any question were raised,

the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall in like manner submit said question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurring votes of the two Houses.

DOUGHERTY, *supra* note 6, at 78 (internal quotation marks and emphasis omitted).

106. *See* Tansill, *supra* note 8, at 522 (calling the rule the “climax of Congressional control”). Adoption of the rule was, of course, not without controversy. Senators questioned the competence of Congress “to legislate at all in reference to the counting of the votes,” and “whether Congress is clothed with any power over the subject of counting of [the] electoral votes.” COUNTING ELECTORAL VOTES, *supra* note 24, at 150 (statements of Senators Harris and Doolittle). Senator Doolittle described the question as “one of the most grave” that could possibly arise under the Constitution but recommended that Congress avoid the question, as it had in the past, because the result of the election did not hinge on the answer. *Id.* at 151–52.

would have the ultimate effect of a near presumption to reject that set of votes.¹⁰⁷ On February 4, 1865, Congress passed a joint resolution excluding the electoral votes of the southern states, including Louisiana and Tennessee, which at the time were back under Union control.¹⁰⁸ During the proceedings, members of Congress demanded the production of the returns of Louisiana and Tennessee, but the President of the Senate refused and stated that he would comply agreeably with "the law of the land."¹⁰⁹ The year 1865 marked the first time that Congress rejected the votes of a state, as well as a new period of understanding of the electoral count.¹¹⁰

The divisive exigencies of the Reconstruction Era also led to congressional rejection of votes from southern states in 1869 and 1873.¹¹¹ The election of 1872 provided particularly interesting facts. Louisiana had submitted two slates of electors: one, the result of a partial canvass by a board appointed by the Governor and another one, submitted by a rival and unofficial canvassing body.¹¹² Both houses separated and rejected both of Louisiana's returns.¹¹³ The votes of Arkansas were attested to by the Secretary of State but lacked a state seal. The House voted to accept these votes, while the Senate voted to reject them; so they did not count under the terms of the then-controlling Joint Rule.¹¹⁴ Commentators described the rejection of Arkansas's votes as particularly unjust. The reason for the rejection was the lack of a state seal, but it turned out Arkansas did not have a state seal, and "in twenty minutes [the Senate] disfranchised about six hundred thousand people."¹¹⁵ There were also objections to the votes of Mississippi and Texas, but both houses accepted the votes.¹¹⁶ Georgia's votes were challenged because they were cast for Horace Greeley, who ran for President but died in

107. If there was an objection to a vote, the vote could only be counted if both houses separately agreed to count the vote. *See supra* note 105 and accompanying text.

108. Tansill, *supra* note 8, at 523.

109. McKnight, *supra* note 14, at 310.

110. Dougherty, *supra* note 6, at 80; Tansill, *supra* note 8, at 523.

111. Several southern states were not permitted to participate in the election because their governments were not "adequately organized." There was a question about Georgia's eligibility, and a resolution provided for an "alternative count" of its votes as had been done before the Civil War. However, during the vote, objections were heard; and under the Twenty-second Joint Rule, the houses separated to resolve the issue. The House voted to reject Georgia's votes; but as a joint body, the President of the Senate ruled, much to the consternation of many members of the House, that the alternative count resolution should be followed. Dougherty, *supra* note 6, at 81-84.

112. *Id.* at 86.

113. COUNTING ELECTORAL VOTES, *supra* note 24, at 407.

114. Dougherty, *supra* note 6, at 86-87.

115. *Id.* at 88 (internal quotation marks omitted).

116. The objections were that Mississippi failed to state that the electors voted by ballot and that the authenticity of the seal from Texas was uncertain. *Id.* at 87.

between the popular election and the meeting of the electoral voters.¹¹⁷ Objectors argued that he was not a person within the meaning of the Constitution. The Senate voted to accept the votes, but the House rejected them; so the Joint Rule required the rejection of the votes.¹¹⁸

D. *A Step Back: Repeal of the Twenty-second Joint Rule and the Ongoing Debate*

By 1875, Congress apparently realized that the Twenty-second Joint Rule went a step too far and allowed for the rejection of votes with too much ease. This interpretation of congressional motive might be a bit generous, as the Republicans anticipated that the Democrats would control the House of Representatives for the first time in two decades.¹¹⁹ Therefore, Senate Republicans were no longer willing to allow the House to unilaterally discard electoral votes that could turn the outcome of the election or throw the election to the House.

In 1875 and early 1876, Congress debated the necessity of making changes to the Twenty-second Joint Rule.¹²⁰ Charles Fairman's meticulous book on the Electoral Commission in the 1876 presidential election dispute contains a valuable summary of all of the important arguments and proposals.¹²¹ The debates are important, as Fairman notes,¹²² because they were conducted well before the 1876 election in an ostensible effort to remove as much partisanship as possible.¹²³ Additionally, the debates provide a useful illustration of the various arguments and theories foreshadowing the all-important crisis of 1876, to be discussed in the next section. As such, this section will briefly summarize the debates and proposals.

Largely, the debates were simply a continuation of the same arguments that long consumed this issue. However, the debates took place in a different context, given the recent rejection of electoral votes by Congress under the Twenty-second Joint Rule. The early debate was exclusive to the Senate, starting simply with a suggestion to amend the Twenty-second Joint Rule to prohibit a single house from rejecting a

117. Kesavan, *supra* note 7, at 1687.

118. DOUGHERTY, *supra* note 6, at 87–88.

119. *See id.* at 92 (“It was known that the succeeding House of Representatives would be under Democratic control.”).

120. FAIRMAN, *supra* note 24, at 9 (noting “the effort of Senators in February 1875, renewed in March 1876, to frame a proper measure to regulate the counting of electoral votes, including cases where conflicting returns were sent up from a State”).

121. *See id.* at 9–39.

122. *See id.* at 9 (“It was an exercise in innocence and truth, in patriotism and faith.”).

123. One might argue, however, that Republicans were trying to act quickly before they would lose power over the issue.

state's electoral votes.¹²⁴ Interestingly, the primary disagreement was not about the virtue of making a change, but whether Congress could make such a change without a constitutional amendment. The dividing lines were drawn between those who did not believe the Constitution gave Congress a "right to say whether votes shall be counted or not be counted"¹²⁵ and those who did.¹²⁶

One of the strongest opponents of congressional power on this matter made two notable proposals. First, Senator Bayard suggested that the Constitution should be amended to create a tribunal that would have all power to determine any electoral disputes.¹²⁷ Second, the Senator suggested waiting until the next session of Congress, when it seemed likely that the Democrats would control the House, which might ensure that any decision would be "non-partisan."¹²⁸ Senator Edmunds made a similar suggestion for a constitutional or statutory change that would defer the power to decide contests to some sort of bipartisan congressional committee or to a federal appeals court, with the possibility of appeal to the Supreme Court.¹²⁹ As the senators debated the virtues of the rule change that had allowed the houses to separate to deliberate disputes, one senator noted that even this suggestion was on unsettled ground. If Congress had the power to resolve disputes, might the language of the Twelfth Amendment require them to act as one joint body?¹³⁰

124. FAIRMAN, *supra* note 24, at 10. It was recognized that simply repealing the rule was not enough, because this would not address a situation of multiple, competing returns where each house recognized a different return as valid. On this, both Republicans and Democrats agreed that further explanation was necessary. *Id.* at 12.

125. *Id.* at 10–11 (summarizing the arguments of Senator Bayard, a leading Democrat, who thought all power in this regard belonged to the states and the role of Congress was simply to add up the votes). However, when faced with a question about competing returns, the Senator was largely evasive and unsure. *Id.* at 11. Notably, Senator Morton, who proposed the initial amendment changing the Twenty-second Joint Rule, also had severe doubts about Congress's power to adopt any regulating rule in the first place, but felt that changing the old rule was more important. *Id.* at 13 (summarizing Senator Morton's arguments).

126. For instance, see the arguments of Senators Edmunds (a Republican) and Thurman (a Democrat). *Id.* at 13–14; *see also id.* at 26 (quoting Senator Frelinghuysen, "it seems to me that, where the Constitution commits a subject to Congress and yet leaves it so undefined, so general, we have a power according to our discretion by law to carry out the authority committed to us. . . ." (alteration in original) (internal quotation marks omitted)).

127. *Id.* at 16.

128. *Id.* Senator Hamilton, a Democrat, also believed that Congress could not regulate on this point, but believed the problem should be fixed by a constitutional amendment. *Id.* at 19.

129. *Id.* at 17–18. In response to the idea that a presidential election could be the subject of litigation, some senators suggested that it would violate the separation of powers. *Id.* at 18. Senator Edmunds's amendment, which would have created a committee whose conclusions would be accepted unless rejected by both houses, also failed. *Id.* at 19.

130. *Id.* at 19 (quoting Democratic Senator Merrimon, who argued that every aspect of the electoral count required Congress to act as a joint body). *But see id.* at 31 (noting that Senator Merrimon later changed his mind on the subject of Congress acting as a joint body). Senator Merrimon also questioned the power of Congress to go behind the state's certificates and

Despite these colorful debates—or perhaps because of them—the Senate was unable to reach a resolution, but it took up the issue again in the following Congress.¹³¹ Senator Morton introduced the same bill, and shortly thereafter the Senate repealed the Twenty-second Joint Rule.¹³² The debate continued, and, for some, the possibility that a state could face disenfranchisement if the two houses could not agree in the case of competing certificates was too grim.¹³³ Several senators still maintained that any changes required constitutional amendment.¹³⁴

Eventually, the president pro tempore put the question of whether the bill should pass before the Senate; the vote showed thirty-two votes to pass (including all but three Republicans) and twenty-six votes against (including all but three Democrats).¹³⁵ Disappointed by the lack of unanimity, some of the bill's supporters pushed for reconsideration, which delayed further action on the bill for several months.¹³⁶ Several senators asked to work on amendments that they hoped might achieve a greater consensus, but with the delay, the bill no longer had the same urgency and was laid to rest.¹³⁷ Despite weeks of intense debate, Congress did not pass the bill, but the Senate repealed the Twenty-second Joint Rule in 1876.¹³⁸ One senator described the debates as “strong proof of the want of direct provision in the Constitution in relation to this question of the count of the votes,”¹³⁹ while a later commentator noted

maintained that the states must provide for their own manner of determining the outcome of disputes. According to Senator Merrimon, Congress's only power was to reject a forged certificate or to perhaps reject a state's votes if it had not in fact held an election. *Id.* at 20.

131. *Id.* at 22.

132. *Id.*

133. *See id.* at 23. One proposal suggested that in this event, the state delegations, including senators, should vote on the issue with each state having a single vote; if the delegation could not come to an agreement, that state would not have a vote. *Id.* This suggestion was proposed as an amendment. *Id.* at 25–27. Senators supported it because of the apparent similarity to the Twelfth Amendment's procedure for an election thrown to the House and because it seemed to create a solution that did not appear to favor either political party. *Id.* at 25. However, the amendment was rejected by a fairly wide margin. *Id.* at 30–31. Another amendment gave the decision to the presiding officer of the Senate, the Speaker of the House, and the Chief Justice of the Supreme Court. *Id.* at 26–27. Another senator suggested the “spirit of the Constitution” would allow the President of the Senate to decide. *Id.* at 23. This was, of course, opposed because of the likelihood that he might be a candidate himself. *Id.* at 31–32.

134. *See, e.g., id.* at 28–29. For instance, one senator suggested that this was akin to Congress providing for a federal investigation of a state's gubernatorial election. *Id.* at 28. Some also maintained that the power was entirely vested in the President of the Senate. *Id.* Some of the senators who believed an amendment was necessary were willing to vote for this bill in the meantime. *Id.* at 28–30.

135. *Id.* at 35.

136. *Id.* at 35–36.

137. *Id.* at 36–37.

138. Siegel, *supra* note 104, at 558 n.92.

139. DOUGHERTY, *supra* note 6, at 100 (quoting Senator Bayard) (internal quotation marks omitted).

that "[i]t is seldom that views so diverse have been expressed in relation to a matter that seems so simple in itself."¹⁴⁰

Despite decades of debate and the strong role that Congress assumed in the period before these debates, questions about congressional power over the electoral count persisted and in large regard remained unanswered. In this light, the Twenty-second Joint Rule and congressional action during this period should not be understood as authoritative precedent for several reasons. First, Republicans approved the rule during Reconstruction as a partisan tool to punish the southern states. Second, once it was clear that the Democrats would have some ability to use the rule in the House, the Senate rescinded the rule.¹⁴¹ Finally, the rule had no defenders in the debates of 1875 and 1876 leading up to the election of 1876.¹⁴²

E. *Presidential Election of 1876 and Enactment of the Electoral Count Act*

1. THE ELECTION OF 1876 AND THE ELECTORAL COMMISSION

The most significant historical event to expose the flaws of the Twelfth Amendment was the presidential election of 1876. The contest between Republican Rutherford B. Hayes and Democrat Samuel Tilden would bring about the most serious congressional attempt to remedy the problems with the Amendment. The election came at a tumultuous time in American history: the Democrats had been in the minority for over twenty years, and commentators noted the harsh partisanship of the race.¹⁴³ Unlike prior disputes, and despite a solid popular-vote majority for Tilden, it became clear that the outcome of the election depended on tenuous results from three states—Florida, Louisiana, and South Carolina—and the resolution of an additional issue concerning a single elector in Oregon.¹⁴⁴ If Hayes could hold on to all the disputed electoral votes, then he would have an electoral majority (and thus the presi-

140. *Id.* at 100–01.

141. *Id.* at 102 ("It was said that the inspiration of the bill was partisan and its object to forestall a free and impartial consideration of this grave matter by the next Congress, in which the House of Representatives would be under Democratic control.").

142. *Id.* at 95 ("The twenty-second joint rule had few, if any, defenders.").

143. The administration of the sitting President, Ulysses S. Grant, was perhaps one of the most scandalous in our history. See REHNQUIST, *supra* note 18, at 15–32. The economy was in poor shape, and bitterness over Reconstruction created "a solid bloc of votes for the Democrats." *Id.* at 32. There were riots in Louisiana and rumors that thousands of persons were going to descend upon Washington D.C. for the counting of the votes. DOUGHERTY, *supra* note 6, at 107. For the authoritative book on the resolution of the dispute, see generally FAIRMAN, *supra* note 24. For an account more favorable to Tilden, see generally ROY MORRIS, JR., *FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN AND THE STOLEN ELECTION OF 1876* (2003).

144. FAIRMAN, *supra* note 24, at 40–46; REHNQUIST, *supra* note 18, at 99.

dency); whereas if Tilden secured just one of the disputed electoral votes, the majority (and the presidency) would be his.

The disputes in Florida, Louisiana, and South Carolina arose as follows: In Florida, each county had a duty to conduct a canvass of votes and submit the results to the governor and the secretary of state; then a Board of State Canvassers was formed to canvass those returns.¹⁴⁵ Three different certificates of electors would eventually come to Congress from Florida. The first certificate favored Hayes and was the result of the board's canvass; it was signed by the governor in a timely manner.¹⁴⁶ But in Florida, as in several other southern states, there were allegations of many improprieties surrounding the casting and counting of ballots (specifically violence, voter intimidation, and fraud).¹⁴⁷ Pro-Tilden Democrats objected to this first certificate on the ground that state and county canvassers had improperly discarded Democratic ballots, thereby swinging the election in Florida to Hayes.¹⁴⁸ In an effort to counteract this initial pro-Hayes certificate, the slate of presidential electors pledged to Tilden decided to go ahead and meet as if they were the authorized Electoral College delegates from Florida.¹⁴⁹ Upon the governor's refusal to certify these pro-Tilden votes,¹⁵⁰ the Florida attorney general submitted his own certification of them,¹⁵¹ thereby creating a second certificate (albeit one of obviously questionable validity). Matters did not end there, however. The legislature passed a bill calling for a new canvass, which was later certified in favor of Tilden.¹⁵² Additionally, a Florida circuit court ruled that the Tilden electors were the legitimate electors for Florida.¹⁵³ Relying on the new canvass and the court

145. FAIRMAN, *supra* note 24, at 58–59.

146. *Id.* at 59; DOUGHERTY, *supra* note 6, at 143.

147. FAIRMAN, *supra* note 24, at 60.

148. *See id.* One account of these events, written in the early twentieth century, assessed the state canvassing board's manipulations:

On the whole, it is not improbable that an unpartisan board . . . would in the end have found a small majority for Tilden. The least partisan man who witnessed the count, namely General Barlow, took that view of the case. He had gone to Florida at the request of Grant, he was a Republican, but he came to the conclusion that on the evidence the board should give Tilden a majority of from 30 to 55. He even urged one of the Republican members of the board to adopt such a course, but without effect.

PAUL LELAND HAWORTH, *THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876*, at 75 (AMS Press 1979) (1906).

149. They did so on December 6, the date specified by Congress for the meeting of the Electoral College, and thus the same day that the pro-Hayes electors certified by the state canvassing board also met. HAWORTH, *supra* note 148, at 76–77.

150. FAIRMAN, *supra* note 24, at 64.

151. HAWORTH, *supra* note 148, at 76–77.

152. *Id.* at 79.

153. *Id.* Similar allegations followed Florida's gubernatorial race, and the Florida Supreme

opinion, the newly elected Democratic governor created a third certificate that essentially reaffirmed the presidential votes earlier cast by the Tilden electors on their own initiative.¹⁵⁴ As between the two pro-Tilden certificates, this third one had the virtue of being signed by the state's chief executive pursuant to the procedures mandated by the state's legislature and judiciary, but the second one had the virtue of its earlier timing in accordance with the Electoral College calendar established by Congress.

Under similarly complicated circumstances, including allegations of fraud and violence, Louisiana also submitted three sets of certificates to Washington.¹⁵⁵ The first slate of electors was for Hayes; it came from the canvassing board and was certified by the ostensible governor.¹⁵⁶ The second was for Tilden, with these electors disregarding the work of the canvassing board on the ground that the board was corrupt.¹⁵⁷ This slate was certified by a different individual who purported to be the lawful governor.¹⁵⁸ The third slate was in effect a duplicate of the first.¹⁵⁹

South Carolina submitted two slates, one for Hayes from the Board of Canvassers, certified by the governor, and another for Tilden, alleging that the Tilden electors were the rightful voters.¹⁶⁰

In Oregon, the voters had elected a postmaster general as one of Hayes's electors, a possible violation of the constitutional prohibition against federal office holders acting as electors.¹⁶¹ Because of this, the elector resigned from his office as postmaster, and Oregon law allowed the remaining electors to choose a replacement; they chose the resigned elector.¹⁶² The Democratic Oregon governor refused to certify this slate

Court issued a mandamus directing the canvassing board to restore certain votes. This order changed the outcome of the election and replaced the Republican governor with a Democratic governor. *Id.* at 77.

154. FAIRMAN, *supra* note 24, at 64.

155. DOUGHERTY, *supra* note 6, at 162.

156. *Id.* at 163–65 (noting that the objection to this slate was the canvassing board's abuse of its power by unwarranted rejection of votes).

157. "It is needless to say that the result announced by the returning board had been attained by a series of grossly partisan and illegal acts." HAWORTH, *supra* note 148, at 116. Haworth goes on to consider, however, whether this malfeasance nonetheless achieved rough justice: "Did the returning board . . . merely take back stolen property? . . . [Was this] one of those rare situations in which two wrongs go to make a right?" *Id.* at 117.

158. DOUGHERTY, *supra* note 6, at 165.

159. *Id.* The third certificate was primarily produced out of concern that the first certificate contained a technical defect in regard to the endorsement on the envelope. HAWORTH, *supra* note 148, at 114–15.

160. *Id.* at 202–03. Democrats objected that South Carolina did not properly form procedures to select electors, was not a republican form of government, and that the Federal army and marshals interfered with voting. *Id.*

161. FAIRMAN, *supra* note 24, at 43.

162. *Id.* at 117.

of electors and instead certified a slate with two Hayes electors and a Tilden elector as a replacement for the former postmaster.¹⁶³ The secretary of state, on the other hand, submitted a certificate that contained the three original Hayes electors and noted that there was no question that the Hayes electors received the most votes on election day.¹⁶⁴

As in 1796 and 1800, it appeared that the Constitution might thrust the Vice President into the center of the storm. However, President Grant's Vice President had died during his term in office, and the role of President of the Senate had shifted to the president pro tempore, a Republican.¹⁶⁵ Republicans controlled the Senate, while Democrats controlled the House.¹⁶⁶ Understandably, as it became clear that the election would be decided by these disputed votes, partisans began drawing lines. The Republicans argued for an interpretation of the Constitution that awarded the Senate president controlling power over the vote tally, while the Democrats contended the joint bodies of Congress should have such power.¹⁶⁷

But before this debate could be resolved, and prior to the presidential electors casting their votes in state capitals, the Senate and House appointed two committees to investigate the vote counts in the contested states.¹⁶⁸ Committee members went to the states to conduct the investigations, and their findings fell along partisan lines.¹⁶⁹ Knowing the history of disagreement about how to resolve these disputes, both houses appointed committees to report on how Congress might reach some sort of resolution.¹⁷⁰

The committees came together after the holidays and settled on the idea of a tribunal (the Electoral Commission) to investigate the disputes.¹⁷¹ Various proposals for the composition of the tribunal were heard but the joint committee ultimately settled on a Commission that would contain five members from each house, and four Supreme Court Justices who would choose a fifth Justice to join them.¹⁷² Any decisions

163. *Id.* The Chairman of the Democratic National Committee telegraphed this request to the governor, and the telegram illustrates the Chairman's hopes that the move would force Congress to "go behind" all certificates. *See id.* at 43.

164. *Id.* at 117.

165. REHNQUIST, *supra* note 18, at 100.

166. *Id.*

167. *See id.*; DOUGHERTY, *supra* note 6, at 107–08.

168. FAIRMAN, *supra* note 24, at 47–48.

169. REHNQUIST, *supra* note 18, at 113–14.

170. FAIRMAN, *supra* note 24, at 47–48.

171. *Id.* at 48.

172. *Id.* at 48–49; REHNQUIST, *supra* note 18, at 115–19. The work of the committee was fairly bipartisan, with only one member dissenting from the final report that was submitted to both houses. DOUGHERTY, *supra* note 6, at 110. The dissenting member, Senator Morton, was one of the key actors in the debates about replacing the Twenty-second Joint Rule. Morton continued to

by a majority of the Commission would be read before the joint session and would govern unless the two houses separately concurred otherwise.¹⁷³

Without the joint committee's proposed tribunal, it was clear that the two houses were at loggerheads. The Republicans seemingly had the upper hand, if the potentially crucial President of the Senate could exercise his judgment in Hayes's favor. But Tilden was confident that he could resist any move to compromise by asserting that he was the duly elected President—at least on the strength of Florida's votes, without regard to the other disputed states. He was prepared, if necessary, to throw the election to the Democratic-controlled House of Representatives on the ground that no candidate received a majority of the votes cast.¹⁷⁴ The outcome of both paths was uncertain enough that congressmen suggested various other compromises.¹⁷⁵ For instance, one senator introduced a constitutional amendment to give the Supreme Court juris-

doubt the power of Congress to submit any questions to another tribunal. FAIRMAN, *supra* note 24, at 49. The most critical question with which the committee dealt was the ability of the Electoral Commission to “descend below the decision of a State authority.” DOUGHERTY, *supra* note 6, at 113. Ultimately, the compromise did not clearly express whether or how far behind the results the commission would be permitted to go. The additional question raised by the committee was whether the commission was constitutional, and the dissenting member maintained the bill was unconstitutional. *Id.* at 114–15. Of the four Justices appointed to the commission, two were known to be Republicans and two were known to be Democrats. *See* REHNQUIST, *supra* note 18, at 118–19. The fifth Justice was figured to be David Davis, thought to be the most independent member of the Court at the time. FAIRMAN, *supra* note 24, at 54. However, to his surprise, he was elected by the state legislature to the U.S. Senate seat for Illinois, and the Justices were left to choose a Justice known to be a stronger Republican. DOUGHERTY, *supra* note 6, at 135; FAIRMAN, *supra* note 24, at 54.

173. FAIRMAN, *supra* note 24, at 49.

174. REHNQUIST, *supra* note 18, at 116.

175. Despite the uncertainty of either position, each of the two candidates was confident that his constitutional position was the correct one. *See id.* at 115–16. Still, it was not difficult to understand why both sides saw the necessity to compromise. As Senator Edmunds described the situation in a law review article, it was easy at this point in American history to see a situation whereby both Hayes and Tilden took the oath of office; both might try to command the military and executive branch offices; the legislative branch would be paralyzed; and the nation might descend once again into civil war. George F. Edmunds, *Presidential Elections*, 12 AM. L. REV. 1, 3–4 (1877) (“Without some settlement . . . it was morally certain that the Senate would declare Mr. Hayes to be the lawful President, and the House of Representatives would declare that the lawful President was Mr. Tilden. In that case, each of those gentlemen would have taken the oaths of office, and attempted to exercise its duties; each would have called upon the army and the people to sustain him against the usurpations of the other . . .”). Senator Merrimon, who believed Congress had no power to delegate to another tribunal, felt there was no other possibility but to accept this tribunal. FAIRMAN, *supra* note 24, at 50 (quoting Senator Merrimon, “I feel constrained to yield doubts in favor of this bill. It may have the effect of preserving the life of the Republic.”). Finally, if any deadlock extended past inauguration day, it was unclear what the next steps might have been. This issue was not addressed until the Twentieth Amendment. *See* U.S. CONST. amend. XX, § 3.

diction over the contest, but this amendment did not pass.¹⁷⁶ Both houses entertained extensive debates about the proposed Electoral Commission, which largely followed themes stretching back to the Grand Committee debates.¹⁷⁷ Ultimately, the bill passed the Senate with 47 votes (26 Democrats and 21 Republicans) compared to 17 nays (16 Republicans and 1 Democrat).¹⁷⁸ In the House, the vote was 191 in favor (159 Democrats and 32 Republicans) and 86 against (68 Republicans and 18 Democrats).¹⁷⁹

The process for counting votes under the new Electoral Commission Act was relatively straightforward. The President of the Senate opened the certificates from each state and allowed for objections from senators or representatives.¹⁸⁰ If a state submitted only a single return, only the two houses voting concurrently could reject that return.¹⁸¹ If a state submitted multiple returns, and if a member of Congress raised an objection, the question went to the Commission, whose decision was final unless overridden by a majority in each house.¹⁸² Given the nature of the partisan split between the two houses, this effectively gave final say to the Commission.¹⁸³

The presiding officer proceeded to open and count certificates until he reached the certificates from Florida.¹⁸⁴ He announced the three Florida certificates and all were objected to, at which time the certificates, accompanying papers, and objections were handed over to the Commis-

176. REHNQUIST, *supra* note 18, at 114.

177. See DOUGHERTY, *supra* note 6, at 111–35. Most of the differences during the debate were the same as those that had been raised in the past. Some congressmen were certain the outcome would simply hinge on the opinions of the “non-partisan fifth justice.” One senator took it upon himself to argue for *eight* hours that the counting power *did not* reside in the President of the Senate. *Id.* at 117–18. The senator relied on the text, historical practice, various unsuccessful bills, and common sense, and apparently the argument was well received. *Id.* at 117–23. One senator, who supported giving the Supreme Court power to determine the matter, urged his colleagues to submit a constitutional amendment to the states to remove any future embarrassment. *Id.* at 125. In the House, future President James Garfield, relying especially on the use of passive voice in the relevant constitutional text, made a plea for Congress to resume what he thought was its proper role—that of a mere witness to the opening and counting of the votes. *Id.* at 129. To do otherwise, he argued, would obliterate the constitutional safeguards and forever make Congress “a grand returning board.” *Id.* at 129–30 (internal quotation marks omitted); see also FAIRMAN, *supra* note 24, at 49–55 (summarizing some of the arguments of proponents and opponents of the Commission).

178. FAIRMAN, *supra* note 24, at 50.

179. *Id.* at 53.

180. REHNQUIST, *supra* note 18, at 163.

181. DOUGHERTY, *supra* note 6, at 110.

182. *Id.* at 111. For instance, three certificates were opened from Florida, and all three had objections so they were referred to the Commission. REHNQUIST, *supra* note 18, at 164–65.

183. REHNQUIST, *supra* note 18, at 163–64; see also DOUGHERTY, *supra* note 6, at 110–11.

184. FAIRMAN, *supra* note 24, at 57–58.

sion.¹⁸⁵ Those making the objections had an opportunity to present their case followed by counsel for both sides.¹⁸⁶

The dispute over Florida's electoral vote clearly was the decisive one, because it was here that Tilden was on strongest ground. Like Hayes, he had a certificate signed by the governor, but Tilden could claim that his certificate was superior because it was the most recent, thereby superseding the legal authority of the previous one for Hayes. The Republicans continued to argue that neither Congress nor the Commission could go beneath the face of the certificate to determine the true counting of the ballots for presidential electors. But Tilden readily could concede this point with respect to Florida: the face of his signed certificate declared him the winner. The Republicans, therefore, were left to contend that the earlier certificate was lawfully authoritative because federal law had specified a time by which the state must act, and the earlier certificate on its face complied with this deadline whereas the later one did not.¹⁸⁷

The congressional members of the Commission drew their conclusions along predictable partisan lines.¹⁸⁸ Each of the five Justices issued their own opinions, though all were certain that Justice Bradley's opinion would carry the outcome of the Commission's decision.¹⁸⁹ These opinions again fell along the predictable lines, and so we will only discuss Justice Bradley's opinion.

Justice Bradley first concluded that the President of the Senate has merely ministerial powers, with no authority to conduct any investigation behind the certificates; any proper investigation "must be performed and exercised by the two Houses."¹⁹⁰ But, Bradley noted that the "extreme reticence" of the Constitution left serious doubt about whether Congress had any power to go behind the returns.¹⁹¹ Bradley turned next to Article II of the Constitution, which appeared to ensure that the "mode of appointment belong exclusively to the State. Congress has nothing to do with it, and no control over it, except . . . to determine the

185. *Id.* at 58.

186. *Id.* For a summary of the arguments by the objectors and counsel, see *id.* at 58-78.

187. For an account of the Republican argument that emphasizes the temporal distinction between the two gubernatorially signed certificates, see HAWORTH, *supra* note 148, at 228-29.

188. For a summary of the arguments of these commission members, see FAIRMAN, *supra* note 24, at 78-87.

189. *Id.* at 95 (noting James Garfield's diary, which mentioned that all knew Bradley held the casting vote). For summaries of the opinions of the Justices, see *id.* at 87-112.

190. PROCEEDINGS OF THE ELECTORAL COMMISSION AND OF THE TWO HOUSES OF CONGRESS IN JOINT MEETING RELATIVE TO THE COUNT OF ELECTORAL VOTES CAST DECEMBER 6, 1876 FOR THE PRESIDENTIAL TERM COMMENCING MARCH 4, 1877, at 1020 (1877) [hereinafter PROCEEDINGS] (statement of Justice Bradley).

191. *Id.* (quoting Justice Bradley).

time of choosing the electors, and the day on which they shall give their votes.”¹⁹² Thus, Bradley concluded, the state controls all of the mechanics of the elections.¹⁹³ However,

this exclusive power and control of the State is ended and determined when the day fixed by Congress for voting has arrived, and the electors have deposited their votes and made out the lists and certificates required by the Constitution. Up to that time the whole proceeding (except the time of election) is conducted under State law and State authority. All machinery, whether of police, examining boards, or judicial tribunals, deemed requisite and necessary for securing and preserving the true voice of the State in the appointment of electors, is prescribed and provided for by the State itself¹⁹⁴

With this timing in mind, Bradley argued that “the findings and recorded determinations of the State board or constituted authorities [should be] binding and conclusive since the State can only act through its constituted authorities[.]”¹⁹⁵ Addressing whether this meant that Congress must accept potentially fraudulent results in the appointment of electors, Justice Bradley concluded that Congress has no jurisdiction to do otherwise because it is entirely within the state’s jurisdiction to prevent frauds.¹⁹⁶ Florida statute imposed a duty upon the Florida governor to certify the returns, and Justice Bradley held that the certificate must at least be *prima facie* evidence of a valid return. Justice Bradley summarized his conclusion as follows:

The governor’s certificate is *prima-facie* evidence that the State canvassers performed their duty. Indeed, it is conceded by the objectors that they made a canvass and certified or declared the same. It is not the failure of the board to act, or to certify and declare the result of their action, but an illegal canvass, of which they complain. To review that canvass, in my judgment, the Houses of Congress have no jurisdiction or power.¹⁹⁷

192. *Id.* at 1020 (quoting Justice Bradley). Going further, Justice Bradley noted that the prohibition against federal office holders acting as electors makes clear that the Constitution intended to remove any congressional or federal influence from the process. *Id.* at 1021.

193. *Id.* at 1021.

194. *Id.* (quoting Justice Bradley).

195. *Id.* (quoting Justice Bradley).

196. *Id.* (“To revise the canvass of that election [of electors], as made by the State authorities, on the suggestion of fraud, or for any other cause, would be tantamount to a recanvass.” (quoting Justice Bradley)). On this point, Justice Bradley drew an interesting analogy to another provision of the Constitution—Article I, Section 5, Clause 1, which states that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members” Justice Bradley noted that the contrast between this provision and the constitutional provisions on presidential elections weighed against giving Congress the same power over the presidential elections as it holds over its own elections. *See id.* at 1021–22.

197. *Id.* at 1023 (emphasis omitted) (quoting Justice Bradley).

Thus, rejecting the initial certificate was problematic to Justice Bradley because it would require the Commission to review the performance of the Florida canvassing board. The Commission voted 8–7 against receiving any evidence in the case of the Florida electors, and therefore the governor's certificate was accepted.¹⁹⁸ The Commission's results were presented to the joint session and objections were heard.¹⁹⁹ The houses divided to vote on whether to accept the Commission's results, with the Senate quickly accepting the decision 44–24.²⁰⁰ The House debated the subject much more thoroughly and rejected the decision by a vote of 168–103—but because the houses disagreed, the joint session accepted the Commission's decision that the Hayes's slate of electors was proper.²⁰¹

The Commission's Florida decision set the grounds for the Commission's analysis of the objections to the returns of the other states. The Commission, in an 8–7 decision, rejected the objections to the Louisiana certificate certified by the Republican board.²⁰² The same was the case for the electors of South Carolina.²⁰³ Throughout the proceedings, the majority of the Commission had held that it should not "go behind the returns" but should instead accept the prima-facie-valid slate of elec-

198. FAIRMAN, *supra* note 24, at 110. The remaining issue was a possible constitutionally ineligible elector, and Justice Bradley went against the Republicans and voted to hear some testimony on this question. Justice Bradley, again the deciding vote, concluded that the elector resigned his office before the election. *Id.* at 113. He also concluded that the constitutional provision "does not have the effect of annulling the vote given by one who, though disqualified, is regularly elected, and acts as an elector." PROCEEDINGS, *supra* note 190, at 1025. In his own notes, Justice Bradley explored this issue further. He noted that the constitutional ineligibility of an elector could create four views:

1. That his election, or appointment, is void[.]
2. That his election is only voidable, but if he act[s] as elector without a removal of the disqualification his vote will be void.
3. That his election is voidable, but if he act[s] his vote will be good—as the official act of an elector *de facto*.
4. That his election is neither void, nor voidable until some provision has been made by law for ascertaining and providing the ineligibility.

FAIRMAN, *supra* note 24, at 121 (quoting Justice Bradley).

Justice Bradley decided that he was ultimately of the fourth view and that "until a law is passed providing a mode of ascertaining the fact of ineligibility, the issue cannot be raised when the two Houses are met They have no machinery for entering upon such a trial. Before their meeting they have no jurisdiction on the subject." *Id.* at 122 (quoting Justice Bradley). Thus, according to Justice Bradley, the houses possessed the constitutional authority to reject ineligible electors but required a statute to provide the method for making the determination.

199. FAIRMAN, *supra* note 24, at 114.

200. *Id.* at 115.

201. *Id.* at 116.

202. *Id.* at 116–17. The Commission's decision was accepted by the Senate and rejected by the House. *Id.* at 117.

203. *Id.* at 119.

tors.²⁰⁴ The application of this principle does not seem as simple in the case of Florida, where two different governors certified two different returns by two different canvasses.

The Commission's concept of a prima-facie-valid certificate may be easier to understand by looking more closely at the case of Oregon. By a vote of 8–7, the Commission held that the Hayes slate of electors, certified by the Oregon secretary of state, was proper and that the governor's refusal to sign did not void it.²⁰⁵ (This decision was accepted by the Senate and rejected by the House.)²⁰⁶ Oregon law required the secretary of state to canvass the votes for the electors in the presence of the governor, to make the list of electors, and to affix the seal of the state on the certificate.²⁰⁷ Oregon law also required both the secretary of state and the governor to sign the seal, but in this case the governor refused due to an allegedly ineligible elector.²⁰⁸ The ineligible elector had resigned his federal office *after* his election (a potential violation of the constitutional requirement for electors), and Oregon law gave the other electors the right to replace him.²⁰⁹ The other electors chose to fill the vacancy with that same elector, who was now eligible.²¹⁰ These electors then recorded their votes for Hayes on the certificate and submitted it to the President of the Senate with certification from the secretary of state.²¹¹ The governor issued his own certificate, naming the two original Hayes electors and substituting a Tilden elector for the ineligible elector.²¹² Thus, the Commission was faced with two competing returns. Arguably, under Oregon law, neither certificate was prima facie valid because neither certificate was signed by both the Secretary of State and the Governor.

Thus, the counsel for Tilden adopted Hayes's earlier argument, asserted in the prior cases, that the Commission should not go behind the certificate of the governor.²¹³ Unsurprisingly, counsel for Hayes characterized the argument and prior holdings differently, claiming that in each state "by its laws there is some final ministerial canvass, which, com-

204. See, e.g., *id.* at 114, 116.

205. *Id.* at 117.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. DOUGHERTY, *supra* note 6, at 187.

212. *Id.* Because the two original Hayes electors refused to recognize the governor's replacement elector, the replacement elector appointed two additional replacements. The governor's replacement elector cast his vote for Tilden, while the additional replacements cast their votes for Hayes and this return ultimately went to Congress. *Id.* at 187–88.

213. See *id.* at 185.

pleted, shows what the election was; and we need only to look into the laws of this State . . . to see whether the apparent canvassing board was one that had such authority under the laws of the State.”²¹⁴ This argument held the day. Justice Bradley maintained that the secretary of state was the highest canvassing authority under Oregon law and that his certificate was not unlike those in Florida or Louisiana, which were approved by their canvassing boards.²¹⁵ So, the important question for the Commission was not whether the certificate was certified by the governor, but whether the certificate reflected the results reached and approved by the state’s canvassing body as authorized by the laws in place in that state at the time. Declining to “go behind the returns” did not mean the Commission could not look at the state’s laws and the evidence presented by the certificates themselves. Thus, if the state’s highest canvassing authority approved the return, the certificate was the prima-facie-valid return from the state, and the Commission would not investigate further.

But the distinction between Oregon and Florida, it must be emphasized, cannot be made on the basis of state law alone. To be sure, Oregon law demonstrated that the governor acted unlawfully in refusing to withhold his certification. But in Florida the state legislature ordered a re-canvassing of the vote for presidential electors, the canvassing board complied, and the new governor—*pursuant to that state law*—signed that state’s last-in-time (and thus ordinarily most lawfully authoritative) certificate. There was no allegation that the state legislature acted contrary to state *constitutional law*, and, even if there were, there would be the kind of federal constitutional issues that arose in *Bush v. Gore* (addressed by the concurrence there) about whether the state *constitution* could deprive the state *legislature* of authority that the *Federal Constitution* in Article Two gave to the state *legislature* concerning the appointment of presidential electors.²¹⁶ Finally, there was at least some argument that the third Florida certificate (resulting from the re-canvass requested by the legislature) reflected the actual results of the election.

Thus, if the act of the Florida legislature in calling for a re-canvass was to be null and void, it must be so by virtue of federal law, not because of state law. What federal law? Bradley was not completely clear on the answer to this key question, but it appears that he argued that Article II of the U.S. Constitution constrains the authority of a state legislature to alter state law concerning the appointment of presidential

214. *Id.* at 186 (quoting Mr. Evarts arguing on behalf of Hayes) (internal quotation marks omitted).

215. *Id.* at 197.

216. *See Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (Rehnquist, C. J., concurring).

electors after the duly specified date on which they must meet. Justice Bradley addressed the question in his opinion: “The question then arises, whether the subsequent action of the courts or legislature of Florida can change the result arrived at and declared by the board of State canvassers”²¹⁷ Justice Bradley acknowledged that he originally thought a judicial modification of the canvassing board’s decision in a *quo warranto* proceeding could supersede the board’s initial determination.²¹⁸ But he changed his mind because the Florida proceeding came too late:

If the [*quo warranto*] court had . . . rendered its decision before the votes of the electors were cast, its judgment, instead of that of the returning-board, would have been the final declaration of the result of the election. But its decision being rendered after the votes were given, it cannot have the operation to change or affect the vote, whatever effect it might have in a future judicial proceeding in relation to the presidential election. The judicial acts of officers *de facto*, until they are ousted by judicial process or otherwise, are valid and binding.²¹⁹

It is unclear what the basis of Bradley’s reasoning is or whether it makes sense (and holds together as a matter of logical analysis). Bradley, at this point in his analysis, claimed to be looking to state law to figure out the authoritative status of the canvassing board’s initial determination and its relationship to the subsequent judicial reversal of it.²²⁰ It may be true that usually under state law, the acts of *de facto* officers are valid, and thus the votes of presidential electors ordinarily would stand once given, even if the individual electors had no valid title to their position at the time (because the ballot count on which their supposed title rests was erroneous). But what if the state legislature wishes to deviate from this general doctrine? If Florida wants to declare null and void the official acts of individuals purporting to act as presidential electors when those individuals should not have been acting as presidential electors—and instead wishes to recognize the action of individuals who were entitled to act as presidential electors (based on a corrected proper count of the ballots)—why cannot Florida law make that determination for itself and then have that determination be binding on Congress? For Bradley’s analysis to hold up at all, it must be because the Federal Constitution constrains the ability of states to revise their counting of ballots for presidential electors after the individuals who initially were determined to be appointed as presidential electors have exercised the sole function of their office.

217. PROCEEDINGS, *supra* note 190, at 1023 (quoting Justice Bradley).

218. *Id.* at 1024.

219. *Id.* (quoting Justice Bradley).

220. *See id.* (reviewing the powers of the board as defined by state statute).

Bradley makes clear that his reasoning rests on federal, rather than state, law in the next portion of his analysis:

The State may, undoubtedly, provide by law for reviewing the action of the board of canvassers at any time before the electors have executed their functions. . . . The legislature may pass a law requiring the attendance of the supreme court or any other tribunal to supervise the action of the board, and to reverse it, if wrong. . . . *No tampering with the result can be admitted after the day fixed by Congress for the casting of the electoral votes [for President], and after it has become manifest where the pinch of the contest for the Presidency lies, and how it may be manipulated.*²²¹

Of course, nowadays the “pinch” is manifest by the morning after the citizens have cast their ballots for presidential electors, but the Framers of the Constitution (and even the Twelfth Amendment to a lesser extent) assumed that the presidential electors might on occasion exercise independent judgment about their vote for President.²²² Therefore, it is reasonable for Bradley to want to avoid the possibility of a state institution—legislature, court, or executive—undoing the work of the state’s presidential electors after the electors have voted.²²³ Bradley was emphatic on this point:

I am entirely clear that the judicial proceedings in this case were destitute of validity to affect the votes given by the electors. Declared by the board of canvassers to have been elected, they were entitled, by virtue of that declaration, to act as such against all the world until ousted of their office. They proceeded to perform the entire functions of that office. They deposited their votes [for President] in a regular manner, and on the proper and only day designated for that purpose, and their act could not be annulled by the subsequent proceedings on the *quo warranto*, however valid these might be for other purposes.²²⁴

Thus, Bradley concluded:

I think no importance is to be attached to the acts performed by the

221. *Id.* (emphasis added).

222. *See, e.g.*, THE FEDERALIST NO. 68 (Alexander Hamilton) (“It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.”); *see generally* Vasan Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123 (2001). Indeed, the first “faithless elector” was a Federalist elector who voted for Democrat-Republican Thomas Jefferson in 1796. *See id.* at 124 n.5.

223. But if Bradley was right on this point, then Nixon acted unconstitutionally in permitting Hawaii’s third slate of electoral votes to be counted in the election of 1960. *See infra* Part II.F.

224. PROCEEDINGS, *supra* note 190, at 1024 (quoting Justice Bradley).

board of canvassers after the 6th day of December, nor to the acts of the Florida legislature in reference to the canvass. In my judgment, they are all unconstitutional and void. To allow a State legislature in any way to change the appointment of electors after they have been elected and given their votes, would be extremely dangerous. It would, in effect, make the legislature for the time being the electors, and would subvert the design of the Constitution in requiring all the electoral votes to be given on the same day.²²⁵

Thus, according to Justice Bradley, state legislatures are incapable of error correction after that deadline, even if they are convinced that an error has been made in counting the popular votes for the state's presidential electors. In any event, whether or not Bradley's own reasoning was sound in explanation of his decisions regarding both Florida and Oregon, his rulings determined the outcome.

More importantly, even if one thinks Bradley was sound in his constitutional argument forbidding Florida to undo the ruling of its canvassing board after the presidential electors had cast their votes, the correctness of this analysis does not eliminate the structural problem of the Twelfth Amendment itself—the lack of clear guidance as to which votes to accept and the ultimate arbiter of that decision. Bradley was only a commissioner, not a member of Congress. If the House of Representatives had refused to acquiesce in Bradley's 8–7 tie-breaking vote—or if in a future comparable crisis either House refuses to accept the kind of reasoning Bradley engaged in—the defect of the Twelfth Amendment comes to the fore. Someone in Bradley's position ultimately cannot control, but can only recommend. Whichever side stands to lose from the adoption of Bradley's position, whether the Senate (and its President) or the House (and its Speaker), must agree to acquiesce in the Bradley position despite disagreeing with it. If that side chooses not to acquiesce, then there is a crisis that the Constitution as presently written has no means of averting.

An argument exists that the delegation of congressional power to the Electoral Commission, particularly with such strong majorities in both houses, sets a constitutional precedent concerning the power of Congress to control the counting of electoral votes. But this argument is debatable, in that an act of Congress—particularly one to avert a crisis—cannot supersede the text of the Constitution itself. The Hayes and Tilden camps were truly at loggerheads, and the prospect of civil unrest

225. *Id.* at 1025 (quoting Justice Bradley).

or war²²⁶ cannot be separated from the desire for peaceful resolution.²²⁷ Compromise was the only possible way to avert a total calamity.²²⁸ Indeed, if the Republicans controlled Congress by wide margins, as they had in the prior decades, it is easy to imagine a much different approach and historical precedent. Even with the Commission in place, and given that the House and Senate were controlled by different parties, it was at least theoretically conceived that either the House or the Senate could have attempted to assert constitutional authority under the Twelfth Amendment to act unilaterally on behalf of its preferred candidate (the House by claiming that neither candidate received enough undisputed votes to be elected President outright, or the Senate under its presiding officer's authority). That the dispute did not linger after the Commission's 8–7 split decision is at least some blessing.

2. THE ELECTORAL COUNT ACT—CONGRESS ATTEMPTS TO ADDRESS THE PROBLEM

The infamous 1876 Hayes-Tilden presidential contest sparked years of congressional debate on reforming the procedures for counting presidential electors. The Electoral Count Act (ECA) of 1887, still on the books today, was the product of this debate.²²⁹ The ECA attempts to

226. The threat of civil unrest was real. President Grant deployed federal troops to various areas to maintain peace during the counting of the votes. Ornstein, *supra* note 38, at 35.

227. Additionally, both political parties might have thought the Electoral Commission would actually award their candidate a victory. DOUGHERTY, *supra* note 6, at 134.

228. As one commentator noted, the law actually captured Congress's continued uncertainty about its power. In a doubly uncertain move, Congress gave the Electoral Commission "the same powers, if any, now possessed for that purpose by the two Houses acting separately or together." *Id.* at 133 (internal quotation marks omitted). Here, Congress avoided conclusions about the amount (if any!) of power that Congress possessed and whether that power, if it existed, was in the two houses acting together or separately. As the commentator noted, the "outcome of practically one hundred years of discussion of a brief clause of the Constitution was a law confessedly temporary in its operation, in which the doubts of a century are crystallized into statutory form." *Id.* This demonstrates that at its heart, the bill was a compromise and again a waiver of an opportunity to assert the nature of congressional power over the electoral count. It might be argued that whereas before, Congress had waived the question when the outcome was not in doubt, here it waived the question and allowed an extraconstitutional body to determine the outcome of the election, going so far, as Dougherty notes, as to bind itself to the decision of that body. *Id.* at 134; see also E.W. Stoughton, *The "Electoral Conspiracy" Bubble Exploded*, 125 N. AM. REV. 198 (1877) (noting that the Electoral Commission was a result of the unity of the leaders of the Democrats and the willingness of the Republicans to surrender political advantage in the interest of peace to stave off a situation where the President of the Senate declared Hayes President while the House of Representatives elected Tilden).

229. The statute is codified at 3 U.S.C. §§ 5–6, 15–18 (2006). The final law was the product of nearly ten years of congressional effort: Senator Edmunds introduced the first bill in 1878, and the Senate passed a similar bill three times without the House acting. DOUGHERTY, *supra* note 6, at 215. The legislative history of the bill was recently and thoroughly documented elsewhere. See generally Erick Schickler et al., *Safe at Any Speed: Legislative Intent, the Electoral Count Act of 1887, and Bush v. Gore*, 16 J.L. & POL. 717 (2000); Siegel, *supra* note 104.

accomplish five tasks:

- 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) [codified as amended at 3 U.S.C. § 7]; 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) [codified as amended at 3 U.S.C. § 5 and known as the “safe harbor” provision]; 3) publicize and place on the record the states’ determination of the outcome of their elector appointment process (Section 3) [codified as amended at 3 U.S.C. § 6]; 4) minimize congressional involvement in resolving controversies over elector appointment not authoritatively resolved by the states (Section 4) [codified as amended at 3 U.S.C. § 15]; and 5) settle procedural issues for conducting the joint session at which Congress counts the states’ electoral votes (Sections 4–7) [codified as amended at 3 U.S.C. §§ 15–18].²³⁰

Under the ECA, the two houses separately have control over the counting of the votes. In some respects the law does seek to tie Congress’s hands and give deference to the state’s election returns.²³¹ The ECA provides an elaborate procedure for how objections are to be made and considered, how and which types of votes might be rejected, when those votes might be rejected, and how much, if any, deference to give to the state.²³² Some legislators objected to conferring this power upon Con-

230. Siegel, *supra* note 104, at 578–79. The Act originally gave states until “the second Monday in January” to hold the meeting of presidential electors, *id.* at 583, whereas today, the statute specifies “the first Monday after the second Wednesday in December,” 3 U.S.C. § 7, as the date for this Electoral College meeting.

231. The strongest example of this is the so-called “safe-harbor” aspect of the statute. If a state has a law, enacted prior to the day fixed for appointing electors, that governs the “determination of any controversy or contest,” and that determination is made six days before the day fixed for the meeting of the electors—Congress must accept that slate of electors. AFTER THE PEOPLE VOTE, *supra* note 38, at 5 (internal quotation marks omitted).

232. Section four of the Act, codified at 3 U.S.C. § 15, outlines the procedure:

[T]he 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 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.

3 U.S.C. § 15 (2006).

gress, particularly if Congress could simply reject votes if both houses were in agreement.²³³

In 120 years, the provisions of the ECA have not been battle tested, and “[d]uring 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.”²³⁴ As a result, questions remain about whether the ECA is constitutional, or whether Congress is actually bound by its provisions.²³⁵ The ECA debate continued many of the same constitutional arguments about congressional power that were first used during the Grand Committee Bill debate in 1800. Congressmen raised an additional constitutional concern during the ECA debate: that this was “an unconstitutional attempt to bind Congress’s discretion.”²³⁶ There were two prongs to this argument: first, that the legislation required presidential approval and improperly involved the President in creating rules for determining presidential elections;²³⁷ second, that one Congress

233. See, e.g., 17 CONG. REC. 816 (1886) (statement of Sen. Sherman) (“That is a dangerous power. [It] allows the two Houses of Congress, which are not armed with any constitutional power whatever over the electoral system, to reject the vote of every elector of every State, with or without cause, provided they are in harmony in that matter.”); see also DOUGHERTY, *supra* note 6, at 235.

234. Siegel, *supra* note 104, at 544.

235. For a modern argument of possible constitutional defects concerning the ECA, see generally Kesavan, *supra* note 7. But see *id.* at 1660 (“The prevailing wisdom, in the Supreme Court and elsewhere, is that the Electoral Count Act is constitutional.”). Ackerman and others, however, have rejected some of Kesavan’s arguments. See, e.g., Ackerman & Fontana, *supra* note 20, at 636 n.239 (rejecting Kesavan’s arguments); Wroth, *supra* note 42, at 344–53 (noting that Congress has jurisdiction for the resolution of these questions but suggesting that Congress grant the federal courts the power to reach binding decisions in all controversies). For a discussion of congressional debate on this subject leading up to the passage of the ECA, see Siegel, *supra* note 104, at 560–68.

The weight of scholarly opinion seems to be that Congress presumptively will be inclined to follow the Electoral Count Act if a future dispute arises: to the extent that the Act provides adequate guidance and, most critically, to the extent that it is in the strategic political interest of each political party to do so. Regardless of the merits of the constitutional question, if there is sufficient political pressure on one party to abandon the procedures of the Electoral Count Act, in favor of a position based directly of their preferred interpretation of the Twelfth Amendment, the party and its members in Congress may choose that route. See Siegel, *supra* note 104, at 544 n.13 (“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. 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.” (citation omitted)).

236. Siegel, *supra* note 104, at 560.

237. *Id.* at 560–61. When Congress passed a joint resolution in 1865 stripping southern states of their right to cast electors in the presidential election, President Lincoln signed the resolution but included a message disclaiming “all right of the executive to interfere in any way in the matter

could never bind a future Congress.²³⁸ Even some of the supporters of the ECA admitted they were uncertain whether the law was constitutional or binding but voted for the law because they argued it created a strong moral obligation from which a future Congress would not deviate.²³⁹

If the uncertain and tenuous relationship between the Twelfth Amendment and the Electoral Count Act is the main cause for current and future concern, a problem of almost equal magnitude is the complexity and ambiguity of the ECA itself—particularly with respect to the situation in which multiple certificates purport to be the state’s authoritative electoral votes. The ECA has language addressing this situation, but that language is maddeningly difficult to parse, is subject to competing scholarly interpretations, and is arguably incomplete in terms of the circumstances that might arise. For example, what is supposed to happen under the ECA if, as with Florida in 1877, there are two certificates signed by the state’s chief “executive” and the two houses of Congress disagree as to which of these two is authoritative?²⁴⁰

F. *The Elections of 1960, 1968 and 2000: Return to Waiver of the Issue?*

Unfortunately, the only instances of electoral controversy after the ECA’s passage do not lend much help for determining how it works. In the 1960 election, Hawaii could have provided an interesting scenario when the state submitted three certificates to Congress.²⁴¹ Despite a Kennedy lead in early returns, the first official count gave Nixon the lead by 141 votes.²⁴² However, Democratic electors petitioned the courts

of canvassing or counting electoral votes.” *AFTER THE PEOPLE VOTE*, *supra* note 38, at 15 (internal quotation marks omitted).

238. Siegel, *supra* note 104, at 561; *see, e.g.*, 8 CONG. REC. 165 (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.”); 13 CONG. REC. 2652 (1882) (statement of Sen. Blair) (arguing that a future Congress would not be bound by the law); *see also* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 2–3 n.1 (3d ed. 2000); Tribe, *supra* note 3, at 277 (stating that the ECA is “shadowed by constitutional doubt over the power of one Congress to bind its successors in such matters”).

239. Siegel, *supra* note 104, at 563–66; *see, e.g.*, 13 CONG. REC. 2651 (1882) (statement of Sen. Morgan) (stating that the Senator will vote for the bill because he thinks once it is passed the men found in Congress will be more reluctant to part with a rule that previously received the sanction of the two houses and President).

240. Ackerman and Fontana raise this possibility, saying that another Electoral Commission of the kind that was created in 1877 would be necessary. Ackerman & Fontana, *supra* note 20, at 640–42.

241. *See* 107 CONG. REC. 289 (1961).

242. Wroth, *supra* note 42, at 341.

for a recount, and the request was granted on December 13.²⁴³ While the state-court litigation was still pending, pursuant to the first official count, a slate of Nixon-Lodge electors voted on December 19 (the proper day), and this slate was certified by the acting governor of Hawaii and submitted to Congress.²⁴⁴ The second certificate was a slate of Kennedy-Johnson electors who purported to cast their votes on the same day, pursuant to their own claim of authority given the pending dispute—their appointment as the state's electors was not certified by a state executive.²⁴⁵ On December 30, the Hawaii court decreed that Kennedy was the proper winner of the state's electoral votes, by a margin of 115 votes.²⁴⁶ Subsequently, in a third certificate, the newly elected governor of Hawaii, relying on the court's recount, certified that the Kennedy-Johnson electors who submitted their votes in the second certificate were the true electors of the State of Hawaii.²⁴⁷

These three certificates from Hawaii in 1960 bear a remarkable similarity to the three certificates from Florida in the Hayes-Tilden disputed election of 1876: one for the Republicans, and two for the Democrats. The sole Republican certificate met the congressional deadline and was signed by the governor. One of the Democratic certificates met the deadline, but was without the necessary certificate. The other had the necessary certificate, but did not meet the deadline because it purported to reflect an accurate and corrected counting of the state's ballots for its presidential electors. One might think that, based on the "precedent" from the Electoral Commission's treatment of Florida in the Hayes-Tilden dispute, the first (Republican) certificate from Hawaii would be ruled the authoritative one. But that is not what occurred. Instead, presidential candidate Nixon in his capacity as President of the Senate ruled in favor of the third certificate, the one reflecting the result of the judicial redetermination of the ballot count:

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

If there is no objection in this joint convention, the Chair will

243. Lum v. Bush, Civ. No. 7029 (Haw. Cir. Ct. Dec. 30, 1960), *noted in* 107 CONG. REC. 290 (1961).

244. *See* 107 CONG. REC. 289 (1961).

245. *See id.*

246. Lum v. Bush, Civ. No. 7029 (Haw. Cir. Ct. Dec. 30, 1960), *noted in* 107 CONG. REC. 290 (1961); Wroth, *supra* note 42, at 341 (noting the state's Attorney General opposed the recount on the grounds that there was not enough time to resolve the dispute before federal law required the electors to vote).

247. 107 CONG. REC. 289-90 (1961).

instruct the tellers—and he now does—to count the votes of those electors named in the certificate of the Governor of Hawaii dated January 4, 1961²⁴⁸

Ultimately, Hawaii's three electoral votes had no bearing on the ultimate outcome of the election of 1960.²⁴⁹

There were no objections, and Nixon counted the votes.²⁵⁰ This is the only instance of multiple slates of electors after passage of the ECA, but without the presidency at stake the ECA was not tested. Indeed, it is arguable that Nixon's conduct with respect to Hawaii simply bypassed the ECA altogether; it seems that under the ECA, the third certificate (the one accepted by Nixon) could *not* have been accepted without a concurrent vote from both houses of Congress.²⁵¹ In any event, had Hawaii's electoral votes been outcome determinative to the 1960 presidential election, it is entirely unclear how a controversy over them would have played out.

In 1969, a Republican elector from North Carolina was "faithless"²⁵² and gave his vote to George Wallace instead of Richard Nixon. The governor certified the state's electoral certificate with the knowledge of the faithless elector.²⁵³ Before the electoral count, senators introduced a memorandum recommending that the faithless elector's vote be rejected and cast according to North Carolina's popular vote.²⁵⁴ A representative objected during the electoral count and presented an objection signed by several representatives and senators, marking the first and only time the ECA procedures went into effect.²⁵⁵ The houses split and debated the objection but only to consider whether to reject the vote.

248. *Id.* at 290 (emphasis added).

249. In this respect, Hawaii's votes differed from the combined effect of the electoral votes from Illinois and Texas, where Republicans were concerned that improper conduct by Democrats had given those states to Kennedy. In the first few days after Election Day, Nixon considered challenging the results in those two states but ultimately decided against it. (It would have been necessary for Nixon to overturn the results in both states in order to prevail, and the judgment of some advisers was that challenging the result in Texas was out of reach.) Thus, no dispute over the electoral votes from Illinois and Texas reached Congress or Nixon as President of the Senate. While Professor Ackerman argues the result in Hawaii should stand as precedent for accepting late returns, see Bruce Ackerman, *Anatomy of a Constitutional Coup*, LONDON REV. OF BOOKS, Feb. 8, 2001, at 3, 6, Judge Posner maintains that Nixon's actions should not stand as precedent because Hawaii's votes did not change the outcome, and Nixon specifically said his action should not stand as precedent. POSNER, *supra* note 5, at 135–36;

250. See POSNER, *supra* note 5, at 135–36.

251. See 3 U.S.C. § 15 (2006).

252. A "faithless" elector votes for someone other than his party's presidential and vice-presidential candidates. AFTER THE PEOPLE VOTE, *supra* note 38, at 7.

253. Ten electors have violated their pledge and voted for a different candidate throughout history, but there has never been a concerted group of electors trying to swing the election. *Id.*

254. See *id.* at 14.

255. See *id.*

Several representatives argued that the vote should be excluded on various grounds—that Congress had a constitutional duty to protect the electoral system, that the faithless vote was not “regularly given” under the ECA, or on the now-recognized constitutional principle of “one [person], one vote.”²⁵⁶ Those who argued against the objection did so because the vote was still “regularly given” under the ECA or because under the Constitution, the counting of the votes is only a ministerial duty.²⁵⁷ Both houses rejected the objections in close votes. The debate demonstrated that many questions the ECA attempted to resolve remained unanswered—or worse yet, the enactment might have created new questions altogether.

Vice President Al Gore presided over the electoral count following the 2000 election. There was potential for objections to be raised about the electors submitted from Florida, and Democratic House members submitted twenty objections but were unable to gain the support of a single senator in order start the ECA procedures.²⁵⁸ Vice President Al Gore was in the unenviable position of overruling objections that were made on his own behalf, and no precedents were set. But if he had not conceded the election after the Supreme Court’s decision in *Bush v. Gore*, and competing slates of electors had been sent to Congress from Florida, deep problems with the ECA procedures would have been exposed. Even assuming Gore did not unilaterally assert constitutional authority as President of the Senate to determine which of the competing slate of electors should be counted, he might have cast the tie-breaking vote in his own favor on any resolution concerning presidential electors taken up by the Senate in the vote-counting process. Similarly, if the Senate and House deadlocked, the ECA (at least on one interpretation) called for the “executive” of the state to be decisive, which either would have been candidate George W. Bush’s brother, Jeb, or arguably unclear if another “executive” officer (say, the state’s Democratic Attorney General) asserted Gore to be the rightful winner of Florida’s votes. On one interpretation of the ECA (although not the only interpretation), Florida’s electoral votes would need to be discarded, with the state’s entire citizenry disenfranchised, and the presidential election would be thrown to the House of Representatives on the ground that no candidate had received a majority of electoral votes. Suppose, alternatively, that the Florida Supreme Court had ordered Governor Jeb Bush to sign a certifi-

256. Kesavan, *supra* note 7, at 1693 (internal quotation marks omitted).

257. For instance, one representative argued that congressmen “are not election supervisors nor given discretion to recompute the vote received from a sovereign state. The Constitution clearly proscribes our duty as ‘to count the electoral votes,’ the ministerial function of a central collecting agency and a tabulating point.” *Id.* at 1694 (citing 115 CONG. REC. 168 (1969)).

258. AFTER THE PEOPLE VOTE, *supra* note 38, at 14–15.

cate in Gore's favor, and he felt obligated to comply—with the consequence that Congress received two competing certificates signed by the same governor. Could Gore have decided to break the deadlock in his favor in this circumstance? The inadequacy of the ECA procedures is seen by some as a justification for the Supreme Court's agreeing to decide *Bush v. Gore*.²⁵⁹

III. SUMMARY OF THE HISTORICAL FLAWS AND PROBLEMS

A. *Summary of the Historical Problems*

The ambiguous text of the Twelfth Amendment has left us with several unclear answers to several questions. Historically speaking, the electoral disputes fall into several categories:

- Eligibility of the electors
- Eligibility of the state to submit electors
- Whether the electors or state properly performed their duties
- Whether the electoral certificate represents the genuine election results of a state

There is still potential for such disputes. As recently as the 2000 election, multiple slates of electors or Congress contemplating rejection of a single slate of electors were both real possibilities, and members of Congress objected to counting Ohio's electoral votes in 2004.²⁶⁰ While there is perhaps little concern about an ineligible state submitting electors, the concern about mixed election results in a state remains.

Once one or more of these disputes comes before the joint meeting of Congress, several constitutional questions have arisen about the procedures of the meeting:

- What is the role of the President of the Senate?
- Is vote counting simply a ministerial task, or can votes be rejected?
- What level of deference should be given to a state's determination of an election?
- How far behind the certificate may the vote counter go?
- Can constitutionally invalid votes be rejected?
- Can electoral votes subject to nonconstitutional defects be rejected?

259. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 322, 328–40 (2003); Michael J. Glennon, *Nine Ways to Avoid a Train Wreck: How Title 3 Should Be Changed*, 23 CARDOZO L. REV. 1159, 1160 (2002).

260. Ohio Representative Stephanie Tubbs Jones and California Senator Barbara Boxer objected to the counting of Ohio's electoral votes using the ECA procedures. 151 CONG. REC. H86 (daily ed. Jan. 6, 2005). The two houses split and the House voted to reject the objection 267–31. *Id.* at H127. The Senate rejected the objection 74–1. *Id.* at H128.

- How should multiple slates of votes from a single state be dealt with?

Are there satisfactory answers to any of these questions? Is historical precedent useful? If so, which historical precedent should hold the most weight? The role (as arbiter of the validity of electoral votes) that Congress first asserted in 1861 and continued through the enactment and use of the ECA encounters several problems. First, this role runs contrary to the first period from 1789 to 1821, when many of the Framers of the Constitution were in Congress.²⁶¹ Indeed when Congress attempted to assert such a role in 1800, Framer Charles Pinckney and future-Chief Justice John Marshall, among others, vehemently rejected the role as unconstitutional, and Congress rejected the bill.²⁶² Indeed, it also runs contrary to the second period from 1821 to 1861, when Congress was unable to come to a conclusion about the ability of the body to reject electoral votes. Secondly, the historical trend that led Congress to assert such power can be attributed in part to neglect on the part of the President of the Senate, as well as a natural tendency for Congress to gradually assert itself. For instance, one scholar points to the early use of congressionally appointed tellers to assist the President of the Senate as the first step in this trend.²⁶³ The electoral counts, of course, occurred every four years, and as new generations of politicians took their place on Capitol Hill, precedents were easier to forget. The view that the President of the Senate retained such a level of control and power runs contrary to other conceptions of how the legislature should work and is, in a sense, quite autocratic—not to mention the now-obvious potential for conflicts of interest that can result from this type of unilateral assertion.²⁶⁴ Coinciding with the abdication of the power of the President of the Senate, it is not unexpected for members of Congress to assert a stronger role for themselves in the count and to argue for such a constitutional interpretation.²⁶⁵ Indeed, it would take an inordinate amount of

261. See McKNIGHT, *supra* note 14, at 17 (arguing that weight should be afforded to this period because Framers such as Langdon, King, Sherman, Madison, and Pinckney were seated in Congress).

262. See *supra* Part II.A.3.

263. McKNIGHT, *supra* note 14, at 20 (noting the step-by-step gradual abdication of duties and arguing that this was not a surprising trend given the electoral count was a mere formality during these years).

264. See *id.* at 21.

265. See *id.* (“[Congressmen] entered the halls of legislation often with no definite idea of the constitutional powers of Congress . . . Impressed with a sense of their own importance, when the season of Counting had returned they were ready to adopt any system consonant with a due regard to their own unquestionable dignity.”); *id.* at 22 (“[T]he prime cause of the final assumption of the canvassing power by Congress . . . [was] the constant tendency of republican governments towards centralization.”); see also THE FEDERALIST NO. 71 (Alexander Hamilton) (“The tendency of the legislative authority to absorb every other, has been fully displayed and illustrated . . . In

political willpower for a President of the Senate to reassert himself as an individual against the entire body of Congress.

Finally, some of the historical precedents are affected by the particular circumstances in which they arose. First, Congress's strong role in the electoral count came about during the Civil War and Reconstruction Eras, culminating with the enactment of the Twenty-second Joint Rule. Radical Republicans, with strong majorities in both houses, sought to penalize the southern states for rebellion and secession while retaining as much power as possible.²⁶⁶ Later, the use of the Electoral Commission is often described as a necessary compromise—attributed to the threat of turmoil, split political control in Congress, and lack of clear understanding of how the procedure should work.

B. *The ECA's Lack of Clarity and Other Problems*

Even as Congress has gradually increased its power over the process (assuming the role Congress has taken in adopting the ECA is constitutional),²⁶⁷ this ascension to power leaves open the following questions:

- Does the legislation contemplate judicial review?
- What constitutes a “regularly given vote”?²⁶⁸
- Is there room for interpretation in the safe-harbor statute?²⁶⁹
- The statute provides no guidance in several scenarios—how should Congress make a judgment as to which votes to count?

The ECA did not limit congressional debate about the “faithless” elector in 1969. Under one interpretation of the Act, it was inappropriate for Congress to consider this issue (because there was but a single certificate from the state, it comported with the “safe harbor” deadline, and under the relevant interpretation the electoral votes were “regularly given”); under the alternative interpretation of the ECA, it was appropriate for the two houses of Congress to at least debate whether to discard

governments purely republican, this tendency is almost irresistible.”); STORY, *supra* note 1, § 1432 (quoting the *Federalist* papers on this point with approval).

266. Many of the assertions of power by Congress came at a time of political strife. The first real extension occurred during the controversy over Missouri's admittance to the Union in 1821. Like the Twenty-second Joint Rule, the Grand Committee Bill of 1800 was an attempt by the Federalists to solidify their grasp on political power.

267. See *supra* note 235 and accompanying text (discussing objections to the constitutionality of the ECA).

268. See, e.g., John C. Fortier, *The 2000 Election*, in AFTER THE PEOPLE VOTE, *supra* note 38, at 37, 44 (noting that Congress must still decide whether votes were “regularly given”).

269. For instance, if the Supreme Court had not ended the 2000 Florida recount, could Congress have declined to afford the Florida electors safe-harbor status if, like Vice President Nixon, Congress considered a late-arriving slate of electors to be more authoritative under state law? See, e.g., *id.* (noting that Congress has latitude in judging whether state law for resolving controversies was followed).

the vote of a "faithless" elector. Though it was certainly intended to create a thorough and clear process for review and resolution of disputes, the ECA has left much uncertainty. It is not hard to imagine that had the dispute truly mattered in the outcome of the election, litigation would have ensued.

Whether the Supreme Court can review Congress's actions under the ECA, in counting the electoral votes or in choosing among various slates of electors, is a significant question. One of the more thorough reviews of the legislative history of the ECA reveals that Congress considered giving the Court some role in the process but rejected the idea every time, and it was clear that Congress did not think the Court had a constitutional role nor did it believe the Court should have any jurisdiction at all.²⁷⁰ Senator Sherman noted at the time, "[T]here is a feeling in this country that we ought not to mingle our great judicial tribunal with political questions, and therefore this proposition has not met with much favor."²⁷¹

C. *A New Problem: Judicial Intervention in the 2000 Presidential Election and the Political Question Doctrine*

In 2000, the Supreme Court intervened in a presidential election for the first time. The decision was not without controversy and effectively ended recounts that the Florida Supreme Court deemed necessary under Florida law.²⁷² To this day, the decision is subject to thorough disagreement and debate from conservative and liberal legal scholars.²⁷³ The advancement of Equal Protection Clause precedent dealing with the right to vote and election administration,²⁷⁴ coupled with the uncertainty of the Twelfth Amendment suggest intervention of the Court in future cases on such grounds is possible, although uncertain.²⁷⁵

270. See Siegel, *supra* note 104, at 563–65 (noting that several congressmen saw electoral vote counting as a political question).

271. 17 CONG. REC. 817 (1886) (statement of Sen. Sherman).

272. For an overview of the entire body of Florida 2000 litigation, see generally POSNER, *supra* note 5.

273. *Id.*; see generally THE VOTE: BUSH, GORE & THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds., 2001).

274. The *Bush v. Gore* per curiam opinion found an Equal Protection Clause violation, relying on precedents such as *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Gray v. Sanders*, 372 U.S. 368 (1963), and *Moore v. Ogilvie*, 394 U.S. 814 (1969). See *Bush v. Gore*, 531 U.S. 98, 105–11 (2000) (per curiam). The one person, one vote jurisprudence is a relatively new wrinkle added to all of the questions presented by the ambiguities of the Twelfth Amendment.

275. See Edward B. Foley, *The Future of Bush v. Gore*, 68 OHIO ST. L.J. 925, 952–57 (2007) (arguing that the Court would be hard-pressed to overturn *Bush v. Gore* in the future). But see Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 3 (2007) (arguing that courts have been reluctant to understand *Bush v. Gore* as an important precedent).

Many scholars have argued that the political question doctrine suggests that the Supreme Court should not intervene in an election dispute akin to the Florida dispute in 2000.²⁷⁶ Regardless of the merit of the political question doctrine arguments, it is clear that this is yet another ambiguity of the Twelfth Amendment.²⁷⁷ Absent a constitutional amendment clarifying the precise jurisdictional boundary between (a) the federal judiciary, in addressing the kind of Fourteenth Amendment questions presented in *Bush v. Gore*, and (b) Congress and its officers in exercising their constitutional duties under the Twelfth Amendment, there are bound to be future disputes over just how far the jurisdiction of the Court may intrude into the domain of Congress (and, conversely, just how far the political question doctrine prevents the Court from doing so). Given this inevitable turf-warfare, it is all the more reason why a constitutional amendment is necessary to remedy the defects of the Twelfth Amendment.

Scholars who have defended both the Court's decision to intervene and its rationale for ending the recount have argued that the decision was

276. Professor Erwin Chemerinsky was one of the most ardent supporters of the idea that *Bush v. Gore* was subject to the political question doctrine. See Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1094 (2001) (arguing that *Bush v. Gore* was not justiciable on three grounds: (1) Bush lacked standing to raise equal protection claims, (2) the case was not ripe for review, and (3) the case was a political question). Professor Laurence Tribe initially counted himself in Professor Chemerinsky's camp. See Tribe, *supra* note 3, at 277–86 (arguing that there is a “powerful case” based on the text of the Twelfth Amendment for the Court to play no role but to protect Congress's decision-making function). Later, Professor Tribe backtracked slightly:

I confess . . . the error of my overly mechanical formulation of the “political question” question in my first scholarly analysis of the dispute . . . And I [now] offer a considerably more nuanced formulation that rejects . . . my own *Harvard Law Review* position that the question was categorically non-justiciable, advancing instead a “political process” doctrine according to which political nonjusticiability, in an important class of instances, is akin to nonjusticiability for want of ripeness

Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT. 571, 573–74 (2002).

For a critique of Tribe's revised view, see Nelson Lund, *Carnival of Mirrors: Laurence Tribe's “Unbearable Wrongness,”* 19 CONST. COMMENT. 609, 616–18 (2002). For different voices expressing Tribe's earlier (but since recanted) categorical view that the entire *Bush v. Gore* case was nonjusticiable, see Steven G. Calabresi, *A Political Question*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 129 (Bruce Ackerman ed., 2002); Erwin Chemerinsky, *How Should We Think About Bush v. Gore?*, 34 LOY. U. CHI. L.J. 1, 16 (2002) (suggesting, rather than definitively making, this argument; an earlier piece by Chemerinsky was more definitive on the issue, so arguably he did some backtracking comparable to Tribe's).

277. Undoubtedly, the Twelfth Amendment's language on this subject is not nearly as clear as the Impeachment Clause's language is about keeping all power in Congress. See U.S. CONST. art. I, § 3, cl. 6 (“Senate shall have the *sole Power* to try all Impeachments.” (emphasis added)); see also *Nixon v. United States*, 506 U.S. 224, 237–38 (1993) (holding that the Impeachment Clause awards the Senate final authority to determine what it means to “try” an impeachment).

“a pragmatic solution to a looming national crisis.”²⁷⁸ But *Bush v. Gore*, by its very entry into the territory, has created new uncertainties. What is the meaning and scope of the new Fourteenth Amendment jurisprudence generated by *Bush v. Gore*, and might it have application in disputes over future presidential elections? Next time, will the Court back away, leaving matters to Congress—or, if the Twelfth Amendment remains unfixed, will another potential crisis cause the Court to repeat the kind of intervention it undertook in *Bush v. Gore*? *Bush v. Gore* was an exercise of the Court’s discretionary jurisdiction, and not a product of a statutorily specified procedure; therefore its ad hoc quality (whether or not necessary for its own occasion) calls for new rulemaking to regularize the procedure in the future.

IV. NEED FOR CONSTITUTIONAL CHANGE TO AVERT DISASTER

This history and summary of the problems in the Twelfth Amendment and in our system for addressing disputed electoral outcomes is not meant to show with certainty that crisis will one day rock the system. Indeed, if disputes like the Hayes-Tilden election of 1876 demonstrate anything, it might be the great discretion with which both sides have been able to handle tenuous situations in the past.²⁷⁹ However, the preceding sections do demonstrate that the failure of the Framers to foresee electoral disputes—and the resulting ambiguity in the Constitution—has created a system wrought with unanswered questions and conflicting precedents. If history is any indication, the procedure and subsequent outcome of any future dispute that makes it to Congress will likely be determined not by any statute or constitutional text, but by the partisan makeup of both houses. Additionally, because of the underlying ambiguities, the gravity of the stakes, and the precedent of *Bush v. Gore*, the Supreme Court is likely to remain an unpredictable “wild-card” factor in any future electoral dispute. Both of these situations are undesirable, and politicians and scholars have recognized the problems of the ambiguity

278. POSNER, *supra* note 259, at 322, 328–40. Though he disagrees with the justification, Professor Tribe accepts the explanation of the Court’s behavior as “stretching the constitutional fabric . . . to protect the nation itself from being torn apart.” Tribe, *supra* note 3, at 284–87; see also *Bush v. Gore*, 531 U.S. 1046, 1047 (2002) (Scalia, J., concurring) (arguing that grant of certiorari was necessary to prevent “casting a cloud” upon the legitimacy of the election); cf. Terri Bimes, *Averting Crisis: The Role of the Supreme Court Justices in the 1876 Election*, 3 ELECTION L.J. 702, 703–05 (2004) (reviewing WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004) and arguing that Rehnquist sought to justify the Court’s intervention in the 2000 election by implying that the Supreme Court was the natural body to turn to in order to resolve the dispute).

279. Even so, one must ask if this discretion was the product of partisan splits in Congress and the prospect of violence if Congress could not reach a compromise. Indeed, if instead only one party controlled Congress in 1877, would the two parties have even sought compromise?

of the Constitution on these points for two centuries. The situation is like a ticking time bomb, waiting to explode under the right set of facts, and indeed—it is easy to see from the historical examples how the bomb might have exploded already were it not for the particular context of the dispute. The problem remains and Congress should fix the text in advance of a future crisis.²⁸⁰

A. *A Florida 2000 Hypothetical Exercise*

To reinforce the idea that the situation is both untenable and undesirable, it is useful to conduct a relatively simple hypothetical exercise. With the 2000 election still somewhat fresh in our collective memory, it is not hard to hypothesize how this system could have exploded in the past or might still in the future. If the Supreme Court refused to grant certiorari in *Bush v. Gore*, or if, as four Justices would have done,²⁸¹ the Court remanded the case to allow the recount to continue, a very different scenario was possible in the event that Al Gore won the recount. The Florida legislature, dominated by Republicans, was prepared to name George W. Bush as the proper winner and appoint a Bush slate of electors; and in all likelihood, Governor Jeb Bush also was prepared to certify that slate of electors and send it to Congress.²⁸² There are several

280. During debate after rescinding the Twenty-second Joint Rule, one senator provided the case for resolving the issue outside the context of an election:

[W]hen [Congress] see[s] that such a contingency as this may be fraught with the consequences of revolution, [it should] provide beforehand against it. There never was a time when you could do it, when you would be less liable to the charge of any sinister influence, because it cannot change the result, it cannot determine anything except to settle the principle; and then when an occasion occurs that evil consequences may follow from settling it one way or the other, here will be a precedent showing that Congress, at a time when there was no inducement to anything but an honest and a straightforward decision of the case, maturely settled it, and settled it in such a manner that the influence of the decision will be morally binding upon our successors, and will be preserved.

COUNTING ELECTORAL VOTES, *supra* note 24, at 153 (statement of Senator Hale).

281. *Bush v. Gore*, 531 U.S. 98, 127 (2002) (Stevens, J., dissenting, joined by Ginsburg, Breyer, JJ.) (“[T]he appropriate course of action would be to remand to allow more specific procedures for implementing the legislature’s uniform general standard to be established.”); *id.* at 134–35 (Souter, J., dissenting).

282. Fortier, *supra* note 268, at 41 (stating that the Florida legislature started the process, and the Republicans argued that the Florida Supreme Court “had effectively changed the election recount law,” so it was the legislature’s duty to appoint a Bush slate of electors); Tribe, *supra* note 3, at 276 (noting that the Florida legislature gave every indication that they would take this step); *see also, id.* (arguing that the *Bush v. Gore* per curiam opinion strongly suggested the state legislature could appoint electors at any time (citing *Bush*, 531 U.S. at 104–)). In the wake of the 2000 election, at least one state changed its law to allow the legislature or governor to directly appoint electors in certain circumstances. *See* N.C. GEN. STAT. § 163-213 (2007). Federal law also allows the legislature to appoint electors if the state “failed to make a choice on the day prescribed by law.” 3 U.S.C. § 2 (2006). But what exactly constitutes a failure to make a choice? There is at least arguably a distinction between, on the one hand, the state’s citizenry not voting on Election

ways a competing Gore slate of electors could also have been appointed: if the Florida Supreme Court or the Florida attorney general (Gore's campaign chair) determined that the legislature's act defied Florida law, they might have certified and sent a slate of electors; or perhaps a state court might have compelled the governor to appoint a second slate.²⁸³

Congress, faced with these hypothetical competing slates of electors, was divided. While the Republicans controlled the House of Representatives, the Senate was split fifty-fifty; assuming purely partisan voting, Vice President Gore would have been the tie-breaking vote.²⁸⁴ If Congress chose to abide by the ECA, which is a significant question on its own, several problems still arise. If two different slates were certified by the governor (which happened in the 1960 presidential election), the ECA provides no guidance for how Congress should proceed.²⁸⁵ If two different authorities had certified two different slates, for example one by the governor and one by the attorney general, the ECA would require a divided Congress to accept the slate certified by the governor—unless the Senate took the position (justifiably or not) that a slate certified by the attorney general was equally authoritative under the ECA.²⁸⁶ Once the two houses are in disagreement, it is not difficult to imagine the controversy extending past inauguration day, which would trigger the Twentieth Amendment and a whole host of new uncertainties.²⁸⁷ Chang-

Day (to which this statute obviously would apply) and, on the other, the state's dispute-resolution machinery taking extra time to determine what exactly the citizenry's voting was. See Akhil Reed Amar, Dunwoody Distinguished Lecture in Law: Bush, Gore, Florida, and the Constitution (Mar. 24, 2009) (recording available at <http://streaming.video.ufl.edu/~law/20090324-dunwoody.asx>), in 61 FLA. L. REV. (forthcoming Dec. 2009).

283. AFTER THE PEOPLE VOTE, *supra* note 38, at 16.

284. This also brings up another question: does the President of the Senate, in addition to the role of presiding officer under the Twelfth Amendment, get to cast tie-breaking votes in the Senate? Regardless, this is another example of the ill-advised choice of placing one of the likely candidates for election in such a precarious and conflicted position during the electoral count proceedings. If Vice President Gore made decisions or cast tie-breaking votes in his own favor, one can imagine the public outcry and the resulting illegitimacy of his presidency.

285. AFTER THE PEOPLE VOTE, *supra* note 38, at 16; see Fortier, *supra* note 264, at 45 (noting it was entirely possible that the Florida courts might have compelled the governor to submit a second slate for Gore if Gore had prevailed in the recount).

286. See AFTER THE PEOPLE VOTE, *supra* note 38, at 16. If one political party controlled both houses of Congress, then it could ignore the certification by the governor.

287. See U.S. CONST. amend. XX, § 3 ("If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified."). Congress has passed a statute, codified at 3 U.S.C. § 19 (2006), that creates a line of succession, starting with the Speaker of the House, in the event that by a "failure to qualify" there is no President or Vice President.

The Twentieth Amendment does not eliminate, and indeed potentially exacerbates, the

ing the partisan makeup of Congress, by giving strong majorities to the Democrats, makes for an equally interesting and unpredictable situation if Congress was faced with only Bush electors or competing slates of electors.²⁸⁸

B. *Reform Is Necessary*

Our hope is that this Article provides a thorough discussion of the constitutional ambiguities, the available interpretations and differing precedents, culminating with the Supreme Court's intervention in 2000—leading the reader to conclude that constitutional reform is necessary. The problems of the ambiguous text have arisen time and again through the course of our history, and through this discussion it should be clear that the questions remain as uncertain as ever. It is especially clear, that these issues remain relevant today, after our nation's collective experience in the 2000 election. The ambiguities of the Twelfth Amendment, together with the new precedent of Supreme Court intervention, have created a most undesirable situation—one in which the rules in advance of a 2000- or 1876-style dispute are tenuous at best.²⁸⁹

problems associated with the institutional ambiguity of the Twelfth Amendment. The Twentieth Amendment seems to specify what to do if Inauguration Day arrives and a President has not been recognized as elected under the Twelfth Amendment—although the language of the Twentieth Amendment, with its apparent distinction between a President not having been “chosen” and one not having “qualified” confusing the matter, is far less than ideal to the task. But what is worse, suppose there is a dispute about whether a President has, or has not, been “chosen” or “qualified” by January 20? It is not hard to imagine the possibility. The President of the Senate might insist, either on behalf of himself under the Twelfth Amendment, or on behalf of the Senate as a body, that one candidate has indeed been elected before January 20, while at the same time the Speaker of the House might refuse to recognize the authority of the Senate president to declare the election over. The Speaker, too, could be acting on his own behalf, under the statutory line of presidential succession that arguably applies in this context under the Twentieth Amendment, or the Speaker could be asserting the institutional authority of the House of Representatives to choose a President when no candidate receives a majority in the Electoral College, which would be the case if a dispute caused the votes of a “swing state” to be discarded. From one perspective, it might be argued that the Twentieth Amendment necessarily applies in this situation, since there is a dispute over who is elected President. But from another perspective, that dispute is over, since the Senate president (the outgoing Vice President) has authoritatively ruled (at least according to him and his partisan supporters). In short, the defect of the Twelfth Amendment causes uncertainty about whether the procedures of the Twentieth Amendment have been triggered.

288. Congress could simply ignore the ECA altogether, or, assuming partisan voting within the framework of the ECA, the Democrats could refuse to afford the slate of electors protection because the Florida procedures for final determination of any controversy or contest did not play out as required under 3 U.S.C. § 5, or because the votes were not “regularly given” under 3 U.S.C. § 15. Alternatively, if a Democratic Congress was presented with Bush electors certified by the governor and Gore electors certified by another authority, could it refuse the deference that the ECA gives to the slate certified by governor under § 15? Again, arguably the votes were not “regularly given.”

289. Professor Amar discussed this idea in his Dunwoody Lecture, noting that the opinions of scholars over the *Bush v. Gore* decision center on disagreements as to what the law was on

Thus, it is our hope that this Article might form the impetus for some debate about how to change the constitutional procedures for electing the President.

We recognize that such a reform is not easy, from a political standpoint or from a theoretical standpoint. Constitutional reform is difficult, and, indeed, Congress has declined the opportunity to enact a fix to the Twelfth Amendment at several moments in history.²⁹⁰ The failure and inadequacy of the unwieldy ECA and Congress's previous attempt to fix the system demonstrate the difficulty of any new reforms. Nevertheless, as others have recognized in the past, it seems that the fix must be by constitutional amendment, and it should be done in advance of any future electoral disputes. Constitutional amendment is desirable over statutory reform for several reasons: First, underlying any statutory reform will be the possibility that Congress could simply ignore the statute on antibinding grounds. Second, the difficulty of passing an amend-

Election Day and whether the Florida Supreme Court or the U.S. Supreme Court was departing from that law. Amar argues there is a consensus against actions that appear to be changing the rules or departing from the law after an election. *See* Amar, *supra* note 282; *see also* Richard L. Hasen, *Bush v. Gore and the Lawless Principle: A Comment on Professor Amar*, 61 FLA. L. REV. (forthcoming 2009). These same concerns about departing from the "rules" are endemic in the Twelfth Amendment and ECA, particularly for disputes that reach Congress because of the competing interpretations available to members of Congress and scholars.

290. The issue was raised preceding the passage of the Twentieth Amendment. The legislative history of the Twentieth Amendment is worthy of a separate article and will not be detailed here. Nonetheless, it is worth briefly mentioning that early in the congressional proceedings leading to the adoption of the Twentieth Amendment, it was recognized that the Electoral Count Act of 1877 was inadequate in fixing the defects inherent in the Twelfth Amendment. Specifically, at a congressional hearing on New Year's Eve in 1924, the clerk of the House of Representatives, as part of his testimony, included an address he had given during that year's presidential election on the defects inherent in the then-existing process under the Twelfth Amendment and the Electoral Count Act. *See Choice of President in Event President and Vice President Shall Not Have Been Elected and Qualified—Elimination of Electoral Messengers and Incidental Expenditure Required: Hearings on H.R. 10268 and H.R. 11256 Before the H. Comm. on Election of President, Vice President, and Reps. in Cong., 68th Cong. 5–18 (1924)* (statement of Hon. William Tyler Page). In that address, the clerk observed that the resolution of the 1876 election was an ad hoc endeavor, by a process that was "extra constitutional." *Id.* at 14. He also observed that the Electoral Count Act "[a]t best . . . is open not only to serious constitutional objections but to the criticism that it leaves unsettled a number of points that in the future may easily lead to serious disputes." *Id.* at 13. The problem inheres in the fact that the Twelfth Amendment identifies no body, other than arguably the President of the Senate, to resolve conclusively any question concerning the counting of electoral votes, but history has prevented the Senate president as a single individual from asserting this unilateral authority. "Nothing short of a constitutional amendment can supply the omissions which time has revealed," the clerk concluded. *Id.* Alas, however, by the time Congress proposed the Twentieth Amendment to the states, over seven years later, the need to rectify these omissions had been overlooked once more. Instead, the Twentieth Amendment focused on what were perceived as more pressing matters, including the possible deaths of both a President-elect and Vice President-elect, and the failure of the House and Senate to choose, even when the duty unquestionably falls upon them (as in the presidential election of 1824). Thus, the same need for a rectifying constitutional amendment that persisted in 1924 still exists today, despite the subsequent adoption of the Twentieth Amendment.

ment and achieving ratification will force both sides in Congress to compromise and reduce the possibility that the reform will mirror the previous partisan changes of the nineteenth century.

The most difficult question will likely be who should be the ultimate decision-maker in the event of a future electoral dispute. Several possibilities exist. Congress could identify a single federal officer, more likely the Chief Justice rather than the President of the Senate, with the unilateral authority to resolve any disputes—but it would seem doubtful that Congress would want to assign such awesome power to a single individual. Congress could try to keep an equal role for each of its two houses, but the problem then is what to do if the houses deadlock. Congress could try to leave power over these disputes with the states, but what if there is a dispute about whether a state has handled the matter according to congressionally specified procedures? Ultimately, it seems that some new institution or mechanism needs to be developed.

For instance, one of us has suggested the creation of a nonpartisan, specialized election court to be the final arbitrator of election disputes.²⁹¹ Or, if Congress would prefer a nonjudicial final arbiter, it could create standing rules for the kind of Electoral Commission that existed for the Hayes-Tilden dispute, with these rules better crafted to avoid the problem that emerged in that one episode: the single, nonpartisan neutral on a fifteen-member body was unable to serve. (It would likely be better, for example, to have a much smaller commission, where the number of nonpartisan neutrals more closely balances the number of partisan members; consider, as a possibility, a seven-member commission, with one member appointed by each of the majority and minority parties in both houses of Congress, with three nonpartisan neutrals unanimously selected by the first four.) Once Congress agrees on an ultimate decision-maker, Congress should make that decision-maker's jurisdiction decisively clear to eliminate any possibility that some other institution could attempt to interfere with its authority. Likewise, Congress should endeavor to ensure—as far as is humanly possible—that the procedural rules under which the ultimate decision-maker operate are absolutely clear. Ideally, the clarity of these procedures will constrain future political actors: they may not like the rules (just as many now do not like the fact that the President is not directly elected by a popular vote of all U.S.

291. See Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 376–81. For an example of how the election court could work in the context of a presidential election dispute, see Election Law @ Moritz, Election Court, <http://moritzlaw.osu.edu/electionlaw/electioncourt> (last visited Mar. 10, 2009) (including briefs, arguments, and opinions resulting from the decision of a three-judge panel in a hypothetical McCain v. Obama 2008 dispute).

citizens), but they will know the rules as specified in the Constitution and must abide by them.

V. CONCLUSION

When Justice Story commented on the ambiguities of the Constitution in electoral disputes, he must have presumed that questions of such grave importance would eventually be resolved. Instead, our country has embarked on a meandering journey of ad hoc approaches to resolving electoral disputes. The decision of the Supreme Court in 2000 marked only the most recent stop on this journey but was met with as much dissatisfaction as previous historic stops such as the Electoral Commission and the Twenty-second Joint Rule. Instead of waiting for the next electoral dispute and hoping that the Court or a bipartisan split in Congress might save our country, Congress should address this historic problem with an amendment to the Constitution that clearly addresses the electoral count procedures.