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THE RULE OF LAW V. "PARTY NATURE": PRESIDENTIAL ELECTIONS, THE CONSTITUTION, THE ELECTORAL COUNT ACT OF 1887, THE HORROR OF JANUARY 6, AND THE ELECTORAL COUNT REFORM ACT OF 2022

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ABSTRACT

With respect to the election of the President of the United States, the Constitution is vague and full of silences and gaps. Responding to the constitutional crisis of 1876, the Electoral Count Act of 1887 ("ECA") attempted to offer more specific rules. The ECA was a major advance, but in important ways, it was exceedingly complicated and ambiguous, leaving important puzzles and gaps. The Electoral Count Reform Act of 2022 ("ECRA"), amending the ECA in response to the horrors of January 6, 2022, is a phenomenal achievement; on essentially all questions, it offers a great deal of clarity. The signal virtue of the ECRA is that it vindicates the rule of law by sharply cabining the discretion of both Congress and the states. For the first time in U.S. history, the ECRA requires the rule of law in presidential elections, by limiting the risk of on-the-spot, ex post maneuvering in either Congress or the states.

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I. THREE ELECTION DAYS, NOT ONE

Like millions of Americans, I was watching national television on January 6, 2021[1]—as it happens, in my home in Concord, Massachusetts, the birthplace of the United States of America. (That location introduced, I confess, considerable emotion.) I was expecting some drama in view of the defiant attitude of President Donald Trump and his supporters—more drama, certainly, than the usual in connection with what is almost always an excruciatingly dull Joint Session of Congress for the counting of the vote in the Electoral College. But even with that defiance, it was exceedingly difficult to anticipate what would happen on that day.

When the President's supporters breached the Capitol, I initially thought that it was a bit of a comedy. At least at first, and on television, the insurrectionists seemed hapless. It was difficult to believe, in real time, that they were actually disrupting the time-honored proceedings and threatening to capture, injure, and kill people, including the Vice President of the United States.

If you live in an apparently stable democracy, genuine instability, and a cracking of the nation's foundations, are hard to credit. They are too inconsistent with what you think you know.

Before the presidential election of 2020, and, in particular, before that horrifying day, it was generally believed that every four years, Americans elect their President on the first Tuesday in November, when they go to the polls to vote. But there are three election days, not one. The standard belief was a shorthand for the more complicated truth, which is that on the first Tuesday in November, Americans go to the polls and effectively determine the composition of the Electoral College. By statute, the electors meet and vote about six weeks later,[2] and about three weeks after that, Congress meets in a Joint Session to determine the winner.[3] In U.S. history, the meeting of the electors and the Joint Session have usually been mere formalities, and it is unnecessary for people to pay much attention to what happens there. As a practical matter, everything ordinarily turns on what happens on election day, and on the count that night (and perhaps, in the immediately following days), not on the formalities.

But on rare occasions, things have become much more complicated. Before the horror of 2020, a chief example was the 2000 presidential election between George W. Bush and Al Gore, when a contested recount in Florida, on which the outcome would turn, was halted by the Supreme Court on constitutional grounds, a mere six days before the meeting of the Electoral College.[4] The Court's decision essentially ensured that Bush would become President. For

[1] *See generally* CBS News, *Live Coverage: Protesters Swarm Capitol, Abruptly Halting Electoral Vote Count*, YOUTUBE (Jan. 6, 2021), https://www.youtube.com/watch?v=3Fsf4aWudJk.

[2] *See* 3 U.S.C. § 7 (1948), *amended by* Electoral Count Reform Act of 2022, Pub. L. No. 117-328, § 106, 136 Stat. 4459.

[3] *See id.* § 15, *amended by* Electoral Count Reform Act of 2022 § 109.

[4] Bush v. Gore, 531 U.S. 98, 110 (2000) (ending Florida recounts on December 12, 2000).

present purposes, what matters is that the presidency is not necessarily decided on, or even near, election day.

In connection with the presidential election of 2020, the legal questions associated with electoral counting were put in especially sharp relief. The vagueness of the Constitution, and the complexity and ambiguity of the Electoral Count Act of 1887 ("ECA"),[5] were no longer a matter for theorists, speculators, and specialists; they had immense practical importance. In these circumstances, the Electoral Count Reform Act of 2022 ("ECRA")[6] is an extraordinary achievement. It makes fundamental changes, designed both to clarify previous law and to reduce the risk of chaos.

The changes are far more significant than they might at first appear; they turn a notoriously complicated and opaque statute into something that is reasonably simple and clear. Unlike the relevant constitutional provisions and the ECA, the ECRA is straightforward to apply.[7] The main thesis of this Article is simple: *for the first time in U.S. history, the ECRA requires the rule of law in presidential elections by limiting the risk of on-the-spot, ex post maneuvering in either the states or Congress*. There are no guarantees in this world, but the foregoing sentence deserves to be in italics.

II. THE CONSTITUTION AND "PARTY NATURE"

In Article II and the Twelfth Amendment, the Constitution has important words to say about presidential elections,[8] but it says very little about how to handle postelection contestation.[9] The relevant text of the Constitution provides, "[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."[10] Under the Constitution, the President is the candidate with the majority of Electoral College votes; if no candidate receives a majority of Electoral College votes, the House of Representatives votes to select the President.[11]

That seems straightforward, and in the views of its authors, it was undoubtedly meant to be. But the world is full of surprises, and unanticipated or

[5] 3 U.S.C. §§ 1-21; *see* Cass R. Sunstein, *Post-election Chaos: A Primer* 10 (Harvard Pub. L. Working Paper No. 20-25, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685392 [https://perma.cc/JE4L-6SXQ]. Some people have been highly critical of the ECA, urging that it is fatally ambiguous. *See, e.g.*, Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 518-19 (2010). In any case, the Electoral Count Reform Act of 2022 ("ECRA") is now the relevant text.

[6] Electoral Count Reform Act of 2022 §§ 101-110.

[7] It remains true, of course, that life can turn up unexpected challenges, and no one should be surprised if it turns out that the ECRA has relevant ambiguities; some possibilities are flagged below.

[8] U.S. CONST. art. II, § 1; *id.* amend. XII.

[9] *See* Colvin & Foley, *supra* note 5, at 494.

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

[11] *Id.*

complex situations can make seemingly straightforward words anything but that. In the words of one commentator, the constitutional framework for counting votes turns out to be "shockingly ambiguous."[12] Justice Joseph Story identified some of the problems early:

> In the original plan, as well as in the amendment, no provision is made for the discussion or decision of any questions . . . as to the regularity and authenticity of the returns of the electoral votes, or the right of the persons, who gave the votes, or the manner, or circumstances, in which they ought to be counted. It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary, than to open the certificates, which were produced, in the presence of both houses, and to count the names and numbers, as returned.[13]

Even in the founding era, the issue ought not to have been taken for granted. Then as now, it was readily imaginable that vote counting would turn out to be something other than a mere matter of mechanics, and, indeed, it has been something other than that on important occasions.[14] But many of Story's questions are now answered by the ECRA.[15] As originally enacted, the ECA was specifically designed to sort out the relevant uncertainty,[16] and while it did not succeed on that count, its promise now seems to be largely realized.

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[12] Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309, 324 (2019).

[13] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1464, at 327 (Boston, Hilliard, Gray & Co. 1833).

[14] There is a wide range of scholarship on presidential electoral vote counting in the case of a disputed election, particularly regarding the 1876 election. *See generally* PAUL LELAND HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 (1906); ROY MORRIS, JR., FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876 (2004); WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2005); Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 FORDHAM L. REV. 1043 (2010). For a helpful compilation on this subject, see generally 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 (2d Sess. 1877).

[15] *Compare* Electoral Count Reform Act of 2022, Pub. L. No. 117-328, § 109, 136 Stat. 4459 (amending 3 U.S.C. § 15 to provide clear instructions on what objections can be made, and procedure for making them), *with* 3 U.S.C. § 15 (1948) (using lower threshold for raising objections and not limiting what objections can be made).

[16] The ECA followed a fascinating and lengthy history of congressional efforts to specify and clarify the process of electoral counting. For an excellent account of these efforts, see Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1663-74 (2002). For a superb exegesis on this topic, from which I have learned a great deal, see generally Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004). For another valuable source discussing the ECA, see generally Foley, *supra* note 12. For an especially spirited discussion of some of the legal questions surrounding the ECA, see generally LAWRENCE DOUGLAS, WILL HE GO?: TRUMP AND THE LOOMING ELECTION MELTDOWN IN 2020 (2020).

The original ECA was a direct response to the constitutional crisis in 1876, when Congress could not agree whether the presidency had been won by Samuel J. Tilden or Rutherford B. Hayes.[17] The election has been described as "the most violent, fraud-ridden, and tumultuous in history."[18] After the popular vote, it was exceedingly unclear who had won the Electoral College, not least because three states had each sent two opposing electoral certificates to Congress, with electors pledged to either Tilden or Hayes.[19] Unable to settle the matter on its own, Congress created a bipartisan Electoral Commission.[20] Hayes ultimately became President as a result of the "Bargain of 1877,"[21] even though he had lost the popular vote and probably the electoral vote as well.[22]

The commission was widely regarded as a disaster,[23] and the ECA was meant as a long-term solution, one that would prevail above partisanship.[24] Congress sought to provide "a quiet, orderly, accepted, lawful method of deciding [the] vexed and troublesome question" of how to count votes.[25] With the Tilden-Hayes conflict very much in mind, many members of Congress recognized that with a contested election, matters of principle would rapidly transform into matters of politics. As one member put it:

> [T]he political conscience is a flexible and elastic rule of action that readily yields to the slightest pressure of party exigencies. . . . When the great office of President is at stake, with the immense patronage at its disposal, it would be expecting too much of human nature, under the tyranny of party, to omit any opportunity to accomplish its ends, more especially under that loose code of morals which teaches that all is fair in politics, as in war or in love.[26]

As another member put it, with specific reference to the Tilden-Hayes contest, rather than considering their country first and their political party second, "[a]ble men, learned men, distinguished men, great men in the eyes of the nation, seemed intent only on accomplishing a party triumph, without regard to the

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[17] Siegel, *supra* note 16, at 547-48.

[18] Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 127 (1994). Violence surrounded this election, both before and after the popular election. *See id.* at 127-28 (describing postelection violence and highlighting calls for "Tilden or War").

[19] *See* Kesavan, *supra* note 16, at 1688-89.

[20] *Id.* at 1689.

[21] *See* C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 8 (Oxford Univ. Press 1966) (1951). *But see* Michael Les Benedict, *Southern Democrats in the Crisis of 1876-1877: A Reconsideration of* Reunion and Reaction, 46 J.S. HIST. 489, 518-20 (1980) (examining primary source materials and Congressional voting records to question whether "Compromise of 1877" was actual cause of Hayes being seated).

[22] Kesavan, *supra* note 16, at 1690.

[23] *See* Siegel, *supra* note 16, at 555.

[24] *Id.* at 548-50.

[25] 8 CONG. REC. 161 (1878) (statement of Sen. Bayard).

[26] 15 CONG. REC. app. at 311 (1884) (statement of Rep. Findlay).

consequences to the country. That is human nature. That is, unfortunately, party nature."[27] These have turned out to be prescient words, not least in the context of the 2020 presidential election.

III. THE RULE OF LAW, THE ECA, AND THE ECRA

We can understand the concern about "party nature" to be a recognition of motivated reasoning[28] and, in particular, of "desirability bias," by which people are prone to adopt beliefs that fit with their wishes.[29] In the context of a dispute about who has won an election, how to count votes, and how to read the Twelfth Amendment, desirability bias will inevitably loom large. (The events of January 6 were many things, but one of the things they were was an unambiguous case in point.) How might the law enable institutions to rise above desirability bias and "party nature"? The original hope was that the ECA would answer that question and, thus, handle any confusion or chaos that might arise.[30] But as enacted, the ECA was a bit of a mess, and it left countless questions open.

The storming of the Capitol in 2021[31] and President Trump's repeated suggestions that Vice President Pence could overturn the results of the election[32] were products of President Trump's personal intransigence. Nothing in the ECA could be held responsible for the horrors of that day. Nor was President Trump's intransigence justifiable by reference to any genuine ambiguities in the ECA. (On the role of the Vice President, the law was clear; it is clearer now, but it was still clear then.)[33] But still, ambiguities there were, and without the ECRA, they could have become a serious problem for the future.

A. *Goals and Reforms*

The ECRA was designed to respond specifically to that risk. It made six principal reforms. First, the ECRA clarifies the role of the Vice President, stating unambiguously that it is "ministerial."[34] (This provision was an obvious

[27] 8 CONG. REC. 168 (1878) (statement of Sen. Hill).

[28] *See generally* Nicholas Epley & Thomas Gilovich, *The Mechanics of Motivated Reasoning*, 30 J. ECON. PERSPS. 133 (2016).

[29] *See* Ben M. Tappin, Leslie van der Leer & Ryan T. McKay, *The Heart Trumps the Head: Desirability Bias in Political Belief Revision*, 146 J. EXPERIMENTAL PSYCH. 1143, 1143, 1147 (2017).

[30] My focus throughout is on federal law; state law is also crucial, for reasons that will emerge, but I do not explore imaginable issues here.

[31] *See generally* CBS News, *supra* note 1.

[32] MIKE PENCE, SO HELP ME GOD 433-72 (2022) (detailing how President Trump repeatedly asked Vice President Pence to overturn the 2020 election); Jane C. Timm, *Fact Check: No, Pence Can't Overturn the Election Results*, NBC NEWS (Jan. 5, 2021, 3:09 PM), https://www.nbcnews.com/politics/donald-trump/fact-check-no-pence-can-t-overturn-election-results-n1252869 [https://perma.cc/5EKB-98Z7].

[33] *See* Sunstein, *supra* note 5, at 13.

[34] Electoral Count Reform Act of 2022, Pub. L. No. 117-328, § 109, 136 Stat. 4459(amending 3 U.S.C. § 15).

response to President Trump's repeated efforts to encourage—or direct?—Vice President Pence to refuse to count certain votes for now-President Joe Biden.) Second, the ECRA raises the threshold to lodge an objection to electors from just a single member of both chambers to at least one-fifth of the members of each house.[35] Third, the ECRA identifies each state's *governor*, unless another state executive is otherwise specified in the laws or constitution of a state in effect on election day, as the person who is responsible for submitting the certificate of ascertainment identifying that state's electors.[36] Fourth, if there is a legal dispute over the electors, the ECRA requires Congress to defer to the state or federal court's judgment identifying electors rather than the state executive's list of electors.[37] Fifth, the ECRA takes steps to further bind states to their own law, and thus reduces the risks of ex post political maneuvering within states.[38] Sixth, the ECRA provides for expedited review of certain claims in federal court related to a state's certificate identifying its electors.[39] This accelerated process is designed to ensure a rapid and conclusive resolution of legal disputes that Congress cannot question. In the process of making these changes, the ECRA simplifies and eliminates a cumbersome and complex set of processes in the ECA.

Nonetheless, there is continuity between the two enactments. At its inception, the ECA was based on the widespread assumption that Congress had the constitutional power to enact it[40] and thus to exercise a measure of supervision over the process of counting votes for the presidency. Its specific purpose was to minimize the role of Congress (and of course, the incumbent President and Vice President, both of whose self-interest are obviously at stake) and to give principal authority to the states.[41] It is difficult to overstate the importance of this point. *At almost every turn, the ECA sought to limit congressional discretion and to confine the roles of the House and Senate*. With its efforts at

[35] *Id.*

[36] *Id.* § 104 (amending 3 U.S.C. § 5).

[37] *Id.*

[38] *Id.* § 102 (amending 3 U.S.C. §§ 1-2) ("The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State prior to election day."); *id.* § 104 ("[T]he executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day."). These provisions aim to prevent state legislatures from changing the vote after election day in accordance with different rules; they are a national check on ex post state efforts to manipulate the outcome of the election by changing the rules of the game.

[39] *Id.* § 104.

[40] *E.g.*, 18 CONG. REC. 30 (1886) (report and statement of Sen. Caldwell) ("[The ECA] if passed *will be an authoritative expression of the Constitution* erected into law in advance of any complication which may again arise, as it has in the past, as to the counting the electoral votes of the States and the declaration the of the result." (emphasis added)). For a detailed legislative history of the ECA, see Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 722-30 (1996).

[41] *See* Siegel, *supra* note 16, at 578-79.

simplification and plain direction, the ECRA explicitly carries forward this goal and attempts to ensure that "party nature" will not thwart it. It does so by reducing the level of discretion held by both Congress and (importantly) the states. In this way, it should be seen as an effort to impose the rule of law on presidential elections.

B. *The Primacy of State Law and the Limited Role of Congress*

To reduce the risk of conflict and uncertainty, the ECA and ECRA make state law decisive. We should emphasize here the independent importance of two operative words: "state" and "law." *State* is opposed to *federal*; *law* is opposed to *discretion*. A key sentence, and perhaps the key sentence, of the ECRA reads: "The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day."[42] By contrast, the ECA allowed a failed election to be remedied ex post as the state legislature saw fit.[43] The ECRA sharply limits the discretion of state and federal officials by requiring them to adhere to state law, as announced in advance.

Here is the all-important section of the ECRA, amending 3 U.S.C. § 5(a)(1), in full:

> Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.[44]

The certificate must come from the executive of each state, and the issuance of the certificate must be consistent with state laws "enacted prior to election day."[45] In this way, federal law binds the relevant state executives to *preexisting* state law, rather than allowing the state legislature to chart a new course. To that extent, the rule of law is imposed, as a matter of federal law, on state officials. That substantive directive is accompanied by the establishment of relevant processes within the states. Among other things, executives have a duty to send

[42] Electoral Count Reform Act of 2022 § 102.

[43] *See* 3 U.S.C. § 2 (1948) ("Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."). President Trump tried to use this to his advantage in Wisconsin where he lost the popular vote and the Electoral College in 2020. Complaint for Expedited Declaratory and Injunctive Relief Pursuant to Article II of the United States Constitution at 70-72, Trump v. Wis. Elections Comm'n, 506 F. Supp. 3d 620 (E.D. Wis. 2020) (No. 20-CV-01785). President Trump asked a federal judge to find the election was so corrupt as to require intervention. He proposed the proper remedy was to "[r]emand[] this case to the Wisconsin Legislature" and allow that body to exercise its authority under the ECA to choose the legal process for appointing the electors *after* the election. *Id.* at 72.

[44] Electoral Count Reform Act of 2022 § 104.

[45] *Id.*

their state's certificate of ascertainment of appointment of electors to the Archivist of the United States.[46] In addition, litigation brought by aggrieved candidates for President and Vice President in federal courts with respect to the issuance of the certification or "the transmission of such certification" must be heard by a three-judge panel, with direct review by the Supreme Court.[47] Congress is not allowed to second-guess federal court decisions: "The determination of Federal courts on questions arising under the Constitution or laws of the United States with respect to a certificate of ascertainment of appointment of electors shall be conclusive in Congress."[48]

This is not the only time the critical phrase "conclusive in Congress" appears in the ECRA. The ECRA also provides that in general, "a certificate of ascertainment of appointment of electors . . . shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State."[49] That is an extraordinarily firm declaration, plainly designed to reduce the possibility that any certificate can be questioned in Congress. There are only two legitimate grounds for congressional objection: ''(I) The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors" or "(II) [t]he vote of one or more electors has not been regularly given."[50]

Both of these grounds are quite narrow. The first ground is a state not meeting the timing and administrative requirements of the "not later than" provision of the new 3 U.S.C. § 5(a)(1).[51] The only question, with respect to lawful certification, is *one of state law on the day of election*. A congressional objection is permissible if a state executive has issued a certificate of ascertainment of appointment of electors not in accordance with laws enacted prior to election day.[52] If, for example, the governor of Mississippi has issued a certificate that is not consistent with Mississippi law as it existed before election day, then a congressional objection is perfectly appropriate. But if members of Congress think that Mississippi's processes are not reliable, or that there is something fundamentally wrong with what happened in Mississippi, there is no basis for an objection *unless what is thought to be fundamentally wrong can be described in a way that makes out a specific objection under the new 3 U.S.C. § 5(a)(1)*.

The second ground allows Congress to reject such votes on the ground that they have not been "regularly given" by electors whose appointment has been "lawfully certified" by that state's governor.[53] To understand that phrase, it is

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* § 109.

[51] *Id.* § 104.

[52] *Id.*

[53] For an argument that giving Congress the authority to reject votes as irregularly given is inconsistent with the constitutional plan, see Kesavan, *supra* note 16, at 1764 ("The joint

necessary to define the critical term "regularly given."[54] The background and legislative history behind the original ECA (from which the term was adopted) points to a narrow category of Electoral College votes that should be regarded as "irregularly given." These include:

- votes for people who could not constitutionally become President (such as someone who is not of age or not a natural-born citizen);
- votes on the wrong day;
- votes in the wrong place;
- votes cast in the wrong manner; and
- votes that resulted from duress, corruption, or bribery.[55]

In terms of the actual process of making an objection, the ECRA enacts a serious check on partisanship: to reject a vote from an elector, the objection has to be supported by one-fifth of the members of *both* houses of Congress.[56] There is no one-house veto, as existed under the ECA (where, if the houses disagreed, the returns from the state executive would be counted).[57] It follows that if the two houses are controlled by different parties, electoral votes are highly unlikely to be rejected, at least if we assume that partisanship will play a major role. If the two houses are controlled by the same party, of course it becomes more likely that electoral votes will be rejected, but the much higher threshold significantly decreases risks of self-dealing.

C. *The No Longer Vexing Question of "Fraud"*

Suppose that the governors of Michigan, Pennsylvania, and Wisconsin have made a final determination that the Democratic candidate won the popular vote in their states. As a result, the states' electors plan to vote for the Democratic candidate. But suppose that in Congress, supporters of the Republican candidate argue that it is all a fraud—and that the Republican candidate actually won the three states. What then?

The text of the original ECA was frustratingly silent on that question. The Senate debates seemed to suggest that Congress could ignore a final determination by the states if fraud was indeed involved. One Senator said: "[e]very State can save its vote, if it will do so, against the power of [Congress] lawfully to exclude it for any cause except for the constitutional disability of its

convention violates the anti-Congress principle to the extent that it rejects electoral votes contained in authentic electoral certificates as not 'regularly given.'").

[54] *See* Kesavan, *supra* note 16, at 1659, 1678, 1693, 1810 (explaining meaning of "regularly given" is not well defined, but precedent suggests some interpretations). *See generally* Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529 (2021).

[55] *See* Muller, *supra* note 54, at 1537-40.

[56] Electoral Count Reform Act of 2022 § 109.

[57] *See id.*

electors or *for fraud in the action of the State tribunal that determines the validity of the appointment*."[58] Another Senator put it this way:

> [A] fraudulent judgment is no judgment. Prove fraud, and you have proved that which is a universal solvent and which absolutely destroys the form of fact which it has set up. Therefore there is nothing to prevent the two Houses of Congress from penetrating a judgment obtained by fraud, because that would be no judgment at all, and so far from invading the right of the State it would be a direct decision in favor of the State.[59]

Alleged fraud comes in many shapes and sizes, but we should be able to understand the argument. Suppose that Jones clearly defeated Smith in the popular vote, but the state executive authorizes or embraces manifest fraud and determines that Smith defeated Jones. Perhaps the state executive concludes that ballots that were illegally altered are entitled to be counted. Surely, one might think, the final determination of the state executive cannot qualify as such. If all we had were the text of the ECA and these remarks in the Senate, we might be inclined to conclude that there is indeed a general fraud exception.

At the same time, the discussion in the House seemed to reach a different conclusion. One member said this:

> [T]o the utmost verge of safety in providing against any possible invasion of the right of a State, for [it provides] that, where there is but one certificate from a State, no matter whether every single member of each House considering it may believe, or may know, that not one of the men named in that certificate has been duly elected, yet they shall have no right to throw it out, but it must be counted.[60]

The suggestion here seems to be that no matter what members of both houses believe or know, they may not go beyond or penetrate a final determination, so long as there is "but one certificate." Another member of the House similarly referred to the "conclusive presumption of validity."[61] In the House, these conclusions were uncontested. However jarring, the theory here seems to be institutional: Even if fraud can happen, the proper remedy is at the *state* level, not through Congress which might be unacceptably biased and so subject to "party nature."

At this point, we might think that there was simply a split between the Senate and the House, and we might find it exceptionally difficult to decide whether there is some kind of "fraud exception." Before the ECRA, this was indeed a hard question. But the ECRA dissolves the difficulty. Recall once more that there are now only two grounds for objection: "(I) The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of

[58] 8 CONG. REC. 70-71 (1878) (statement of Sen. Morgan).

[59] 8 CONG. REC. 159 (1878) (statement of Sen. Bayard).

[60] 18 CONG. REC. 48 (1886) (statement of Rep. Cooper).

[61] 18 CONG. REC. 52 (1886) (statement of Rep. Adams).

electors" and "(II) [t]he vote of one or more electors has not been regularly given."[62]

Under the new 3 U.S.C. § 5(a)(1), there is no *freestanding* fraud objection; any question of fraud should be resolved by reference to state law and what it says on that question. Section (1) refers the analysis to state law in accordance with new 3 U.S.C. § 5(a)(1).[63] The term "regularly given" does not contain a general fraud exception, though it contains specific grounds for an objection based on bribery, corruption, or the like.[64] The issue of fraud is therefore subsumed into two much narrower questions, to wit: (1) Is there any problem under the new 3 U.S.C. § 5(a)(1)? (2) Was any elector bribed or corrupted?

D. *Vice President of the United States, President of the Senate*

What is the role of the Vice President? As noted, and as (almost) everyone knows, this issue became central to the 2020 presidential election when President Donald Trump sought to convince Vice President Mike Pence to declare that various certified votes were a product of fraud and should not be counted.

Under the Constitution, the Vice President is the President of the Senate. For a presidential election, what exactly does that mean? Before it was amended, the ECA attempted to minimize the Vice President's role.[65] It intended to ensure that the power to count the votes is held by Congress, not the President of the Senate.[66] Still, the ECA makes him the "presiding officer."[67] But what authority does that role confer? What exactly does it entail? At some points in American history, the Vice President has made material decisions about vote certificates, acting as a gatekeeper.[68] Did the ECA allow that as well? Does the Constitution help answer that question?

Even before enactment of the ECRA, the answer was not hard. The ECA itself sought to ensure that the Vice President's role is purely ministerial. It required him to present "all the certificates and papers purporting to be certificates of the electoral votes."[69] Importantly, it also required both the House of Representatives and the Senate to appoint two tellers.[70] The President of the Senate was specifically directed to go through the states in "alphabetical order," and to hand the papers to the tellers "as they are opened."[71] The tellers, and not the President of the Senate, "make a list of the votes as they shall appear from

[62] Electoral Count Reform Act of 2022 § 109.
[63] *Id.* § 102
[64] Muller, *supra* note 54, at 1540.
[65] Siegel, *supra* note 16, at 636.
[66] *Id.*
[67] 3 U.S.C. § 15 (1948).
[68] Siegel, *supra* note 16, at 638-39.
[69] 3 U.S.C. § 15 (1948).
[70] *Id.*
[71] *Id.*

the said certificates."[72] To that extent, the ECA seemed to deprive the Vice President of discretion, and to give him no authority to displace the decisions of state authorities and Congress. Indeed, the text and history of the statute strongly suggest "that the Senate President is meant to be something of an automaton."[73]

The ECRA resolves all doubt; it plainly states that the role of the Vice President is "ministerial."[74] Under the ECRA, the President of the Senate is clearly not allowed to "solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors."[75]

To understand the role of the Vice President, we should also look at the Twelfth Amendment to the Constitution, which states: "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."[76]

The President of the Senate "opens all the certificates," but what does that mean, exactly? Does the President of the Senate have any authority to make decisions? To decide whose votes count? Under the Twelfth Amendment, the President of the Senate can be seen as the presiding officer, at least in the sense that it is he who opens the certificates, but that could easily be taken to be a ceremonial or ministerial role. As noted, the ECA explicitly made the President of the Senate the presiding officer of that convention, and that judgment seems to reflect historical practice, before and after 1887.[77] At the same time, and despite that practice, there is a plausible argument that it would be unconstitutional to give the Vice President a nonceremonial role, in light of the evident risk of self-dealing.[78]

Recall that the Twelfth Amendment directs the Vice President, as President of the Senate, to open the certificates. Note by contrast that with respect to vote counting, the key words—"the votes shall then be counted"[79]—*are in the passive voice*. Who counts the votes? The Vice President himself, with the authority to make substantive judgments?[80] Does the contrast with the active voice in the same sentence mean nothing, or does the difference speak volumes? We might emphasize that the text could easily have said that the President of the Senate "open all the certificates and counts them." Because it did not say that, perhaps

[72] *Id.*

[73] Siegel, *supra* note 16, at 642.

[74] Electoral Count Reform Act of 2022, Pub. L. No. 117-328, § 109, 136 Stat. 4459 (amending 3 U.S.C. § 15).

[75] *Id.*

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

[77] *See* Kesavan, *supra* note 16, at 1697-98.

[78] *Id.* at 1698-1700. In particular, the conclusion that "the better reading of the Electoral College Clauses, when read in light of the Senate Impeachment Clause and of conflict-of-interest principles generally, is that the Vice President, the President of the Senate, shall not be the presiding officer of the electoral count." *Id.* at 1670.

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

[80] *See* Foley, *supra* note 12, at 326.

the Vice President is not the person who does the counting. And because of the Vice President's potential rooting interest, it would seem singularly odd to suggest that the Vice President is that person. But the constitutional text and background raise some puzzles.[81]

In the 1960 election between Richard Nixon and John F. Kennedy, then Vice President Nixon, the President of the Senate, resolved a difficult controversy over Hawaii's electoral votes.[82] Yet, the election did not turn on his resolution (which was actually pro-Kennedy), and Nixon insisted that his action should not be taken to establish a precedent.[83] The better view would seem to be that the opening and the counting are ceremonial acts, not allowing the Vice President to make discretionary judgments of any kind.[84] And indeed, the conventional wisdom is that with respect to counting and the Twelve Amendment, the Vice President cannot make such discretionary judgments and that the counting is done by the joint convention of the Senate and the House.[85]

With respect to the Vice President, there are other questions: Does he rule on motions? Does he decide that certain objections are out of bounds? Before the enactment of the ECA, the Vice President did exercise such powers.[86] It is not clear whether the ECA was meant to build on those practices or to reject them. But it is clear that if the ECA did allow any such role, it should not have been taken to authorize the Vice President to exercise discretion in a way that might be affected by his obvious rooting interest; the ECA limited his discretionary judgments to technical issues reviewable by Congress.[87] If there were any doubts, the ECRA resolves them. Recall these words: "The President of the Senate shall have no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors."[88]

E. *Back to the Constitutional Question*

The ECRA seems to answer most of the questions that one could imagine.[89] But is it constitutional?[90] Some people raised doubts about the ECA, and for

[81] *See id.*

[82] *See* Kesavan, *supra* note 16, at 1691-92.

[83] *Id.*

[84] *Id.* at 1704, 1709 ("The best interpretation as a matter of text and the better interpretation as a matter of history is that the counting function is vested in the Senate and House of Representatives.").

[85] *See id.* at 1709.

[86] *See* Siegel, *supra* note 16, at 645-46.

[87] *Id.* at 650.

[88] Electoral Count Reform Act of 2022, Pub. L. No. 117-328, § 109, 136 Stat. 4459 (amending 3 U.S.C. § 15).

[89] As noted, however, life is full of surprises.

[90] As the ECRA operates on the same general principles of the ECA, arguments for and against the ECA's constitutionality can be imported to the ECRA debate. *See In re* Green, 134 U.S. 377, 379-80 (1890) (noting in dicta that ECA is "[i]n accord with the provisions of

multiple reasons.[91] Most fundamentally, some people have questioned whether Congress has the authority to enact a statute of this kind, even under the Necessary and Proper Clause.[92] Another problem should be familiar: Congress has no authority to bind its successors.[93] In fact, that is probably the strongest constitutional objection to the ECA and the ECRA, if taken to purport to be binding law.

If this objection is correct, a current Congress could decide that it would not follow the ECRA. Indeed, some of the members of Congress who voted for ECA in 1887 endorsed the belief the ECA was nonbinding.[94] As they understood it, the ECA was in the nature of a joint rule, not ordinary legislation.[95] They said that it should not be seen as binding but as imposing a moral obligation, meant to reduce the risk of chaos and of rampant partisanship.[96] In view of those risks, there is good reason to hope that current members of Congress would see the ECRA at least in those terms and follow it for that reason. If the statute is seen not as binding but as a statement of best practices, to be adopted voluntarily by members of Congress, the constitutional questions generally dissolve.[97]

F. Bush v. Gore *Redux*

There is another constitutional question not addressed by the ECRA but signaled by *Bush v. Gore*[98]: the constitutionality of recounts. The Court's analysis emphasized that while "[t]he individual citizen has no federal

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the Constitution"); Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 858-89 (2002).

[91] Kesavan, *supra* note 16, at 1743, 1746.

[92] *See id.* at 1730-43 (analyzing three prongs of Necessary and Proper Clause and concluding ECA "treads on terribly thin textual ground").

[93] *Id.* at 1779-81; Siegel, *supra* note 16, at 560-61.

[94] Siegel, *supra* note 16, at 563-64.

[95] *Id.*

[96] *See* 17 CONG. REC. 867 (1886) (statement of Sen. Morgan) ("[W]hatever law we may pass . . . we do no more than to impose upon the consciences of members a sentiment of obedience to law.").

[97] *But see* Kesavan, *supra* note 16, at 1758.

> First and foremost, the textual argument makes clear that there is no source of power, express or implied, for Congress to pass the Electoral Count Act. A careful analysis of the Necessary and Proper Clause and the Electoral College Clauses reveals that neither clause supports Congress's power to enact the Electoral Count Act. In the absence of an implied grant of power to Congress to enact such a statute, the Electoral Count Act is unconstitutional.

Id. If this is so, the question is whether following particular provisions of the ECA, as a matter of voluntary practice, is itself unconstitutional. In other words, voluntary adoption of those practices might be taken to violate the Constitution, if, for example, they give the joint convention authority that is granted only to the states under the Constitution, as argued by Kesavan. I do not believe that this objection is convincing, but it is not self-evidently wrong.

[98] 531 U.S. 98 (2000).

constitutional right to vote for electors for the President of the United States,"[99] a state that has provided for the vote "may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[100] Any mechanisms for counting votes, including any recount mechanisms, must "satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right."[101] This means, in essence, that similarly situated voters must be treated similarly. To that end, states are required to produce "uniform rules to determine" the intent of the voters.[102] As the Court put it: "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another. . . . This is not a process with sufficient guarantees of equal treatment."[103]

There is a serious cautionary note here about any procedure for counting or recounting votes. Any such procedure must be undertaken pursuant to sufficiently clear standards, including "uniform rules" that prevent arbitrariness in the form of unjustified variance.[104] Importantly, lower court cases since *Bush v. Gore* have been cautious about extending the case to other situations that appear to raise questions about potentially arbitrary counting.[105] But there is no question that if recounts occur, *Bush v. Gore* will be highly relevant and put a great deal of pressure on courts to ensure against any kind of arbitrariness.

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Notwithstanding its apparent modesty, the ECRA is both a watershed and an extraordinary exercise in bipartisan problem-solving. The ECRA provides a great deal of guidance for counting votes and in particular for what must happen on the second and the third of the nation's three election days. Above all, it imposes the rule of law on both state and federal actors in a domain in which partisan loyalties could otherwise wreak havoc on the electoral process.

To be sure, open questions are probably inevitable, and we should never forget the immense power of "party nature." But there are fewer open questions, and smaller open questions, than there were in 2020.

[99] *Id.* at 104.

[100] *Id.* at 104-05.

[101] *Id.* at 105.

[102] *Id.* at 106.

[103] *Id.* at 106-07.

[104] On the broader problem, see generally DANIEL KAHNEMAN, OLIVIER SIBONY & CASS R. SUNSTEIN, NOISE: A FLAW IN HUMAN JUDGMENT (2021).

[105] *See* Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 8-9 (2007).