Nobody for President

John Harrison*

Disputes concerning presidential electors and their votes are more common than one may think. When the electoral votes from the 1856 presidential election were counted in 1857, for example, there were doubts about Wisconsin's votes, because its electors had met and voted a day late due to a blizzard.¹ Most of the time, as in 1857, it does not matter because there are enough undisputed electors to constitute a majority.

At least twice it has mattered. After the 1876 presidential election, disputes arose about the entire electoral slates of Florida, Louisiana, and South Carolina, and about one elector from Oregon.² With all

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¹ Wisconsin's problem in 1856 came before the joint session of the two houses that met in February 1857 to count the electoral votes. See CONG. GLOBE, 34th Cong., 3d Sess. 651-653 (Feb. 11, 1857).

² The Constitution gives Congress power to set the day on which the electors are to vote, "which Day shall be the same throughout the United States." U.S. CONST., art. II, § 1, para. 4. The same provision authorizes Congress to set "the Time of chusing the electors," id., which by implication need not be a single day.

Section 1 of title 3 of the United States Code, which designates the first Tuesday after the first Monday in November as the time for choosing electors, derives from an 1845 statute that provided the same date. Act of January 23, 1845, ch. i, 5 Stat. 721. The 1845 statute also contained the ancestor of 3 U.S.C. 2, which authorizes state legislatures to provide for the choosing of electors when a state holds an election on the date set out in Section 1 but fails to make a choice on that day. The predecessor to Section 2 was included in the 1845 legislation at the instance of Representative Hale of New Hampshire, which State at that time required an absolute majority for the election of electors. See CONG. GLOBE, 28th Cong., 2d Sess. 14 (Dec. 9, 1844). Absent a permission like that contained in Section 2, such a State could hold an election, fail to select electors because no slate received an absolute majority, and be unable to hold a run-off because the time for choosing the electors had passed. Id. (As the foregoing indicates, proponents of action under Section 2 by the Florida legislature in the recent confusion had to take the position that the Bush electors had not been chosen on election day 2000.)

² Reconstruction was at its tag-end in 1876. Elections in the South were marked by violence, fraud, and bitter disputes about the returns. In all three of the disputed southern
of those electors in his column, Republican Rutherford B. Hayes would be elected by a single vote; if Hayes lost any one of them, Democrat Samuel Tilden would prevail. With the House of Representatives controlled by the Democrats and the Senate controlled by the Republicans, the joint session at which electoral votes were to be opened promised to be a zoo. In response, Congress created a fifteen-member Electoral Commission, to which disputed votes would be referred. The Commission was to investigate and report to Congress; its recommendations would be accepted unless both houses voted to reject them. By a series of party-line votes, with the Justices’ votes reflecting their partisan affiliations, the commission ruled for Hayes in each dispute. Democrats in the House of Representatives dropped their filibuster just a few days before the end of Grant’s term, and Hayes was inaugurated.

The second episode, the Florida dispute, is too recent to be called history. It is also too fresh in everyone’s mind to require recapitulation. For my purposes, two points are important. First,

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3 The Electoral Commission consisted of five Senators (three Republicans and two Democrats), five Representatives (three Democrats and two Republicans), and five Justices of the Supreme Court. The original plan was that two of the Justices on the Commission would be Republicans (Miller and Swayne) and two would be Democrats (Field and Clifford), while one would be David Davis. Although Justice Davis had been a close confidant of President Lincoln, his party affiliation was thought to be sufficiently unclear that he might, just conceivably, be impartial. The plan was disrupted when the Illinois legislature elected Davis to the United States Senate. Instead of Davis, Justice Bradley, a Republican from New Jersey, filled the last seat on the commission. See id. at 36-40. The statute creating the Electoral Commission is Act of January 29, 1877, ch. 37, 19 Stat. 227.

Under now-current separation of powers doctrine the commission was almost certainly unconstitutional. Its members exercised significant government power but were not appointed consistently with the Appointments Clause, as Buckley v. Valeo, 424 U.S. 1 (1976), says they should have been.

4 In The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873), Justice Miller referred to the proposal and ratification of the Fourteenth Amendment as events “almost too recent to be called history.”
there were plausible scenarios under which two slates of electors would present themselves from Florida, and this time the choice between them would decide the presidency. Second, many participants and commentators believed that it was ultimately up to Congress to decide which slate was valid.

My concern here is with the claim that Congress is the final judge of electoral votes. I maintain that Congress has no such authority, nor does anyone else. This essay will give the reasons for that conclusion, and then briefly discuss whether such an arrangement could possibly be a good idea.

I. FINAL DECIDERS

A. In the Constitution or Constitutional Practice

1. Congress

The Twelfth Amendment governs the manner in which presidential electors are to vote, and instructs them to transmit those votes, sealed, to the President of the Senate at the seat of government. It goes on: “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,” then provides that the person with the highest number of votes for each office shall be elected, if that number is a majority of the whole number of electors appointed. If not, the House of Representatives is to choose the President, and the Senate the Vice President, pursuant to rules set out in the Amendment.

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5 It was possible, for example, that the Florida courts would declare the Gore electors to have been chosen while the Florida legislature purported to choose the Bush electors pursuant to 3 U.S.C. 2.

6 A participant who seems to have believed that is Justice Breyer, who said in Bush v. Gore that “the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. A federal statute . . . specifies that, after States have tried to resolve disputes (through ‘judicial’ or other means), Congress is the body primarily authorized to resolve remaining disputes.” 112 S. Ct. 525, 555 (2000) (Breyer, J., dissenting). A commentator with similar views was Stuart P. Taylor, who suggested that Bush v. Gore presented a non-justiciable political question because of “the 12th Amendment’s exclusive assignment to Congress of the authority to ‘count’ electoral votes.” Stuart P. Taylor, Bush vs. Gore: A First Draft For the Justices to Consider, 32 Nat’l J. 5713, 5717 (2000).

7 U.S. CONST., amend. XII.

8 Id.
Absent the mention of Congress in the Twelfth Amendment, the suggestion that Congress has the last word on presidential elections would be insupportable. Dispute resolution is not an exercise of legislative power. Again leaving aside the Twelfth Amendment, it is not an exercise of any of the non-legislative powers conferred on Congress or its houses, such as the power to impeach and try civil officers of the United States.

It is not surprising, then, that the Amendment is the main prop for the asserted congressional power. That claim of power, however, encounters a series of difficulties. Most basic is the observation that the Constitution elsewhere gives the House and Senate a similar power, but does so quite explicitly. Each house is the "judge of the elections, qualifications, and returns" of its members. To be a judge is to have a non-legislative, dispute resolving power, and the Article I provision is an exception to the general principle that the two houses' sole power is participation in the legislative process set out in Article I, Section 7. In the lawyer's hackneyed phrase, when the Constitution's drafters wanted to give some institution authority to judge elections, they knew how to say so. In the Twelfth Amendment, they did not say so.

Pulling on this thread reveals further difficulties, most of which have been gone over during the periodic debates on this issue. One difficulty involves the role of the President of the Senate, the Vice President of the United States. The Twelfth Amendment provides that in the presence of the two houses he shall open all the certificates from the electors. But as history shows, there can be more than one purported certificate from a State. Indeed, multiple purported certificates may be the most common cause of dispute. The certificates that the President of the Senate is to open, however, are those of the electors, not those of non-electors. Hence in order

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9 U.S. CONST., art. I, § 5.

10 Multiple purported certificates are not the only possible problem, however. There may be objections to the validity of a State's sole purported electoral certificate. In 2000, for example, only one certificate from Texas appears to have been transmitted to the seat of government, but there were doubts as to the validity of the electoral votes certified. If Governor Bush and Secretary Cheney were both inhabitants of Texas, it is possible that the votes for them were invalid. See U.S. CONST., amend. XII (electors shall vote for one person for President and another for Vice President, one at least of whom shall not be an inhabitant of the electors' State). If the votes were invalid, then very likely the House of Representatives should have elected the President. Texas appointed electors, so without the Texas votes no one would have had a majority of the electors appointed.
to know which certificates to open, the President of the Senate must know which of competing slates of electors were validly appointed.

If the Twelfth Amendment is assumed to be a dispute resolution mechanism, a natural reading of it thus indicates that in one especially important context the dispute is to be resolved by a single individual.11 Neither House nor Senate is given any authority over the President of the Senate when it comes to opening the certificates, and Congress by statute may no more control the exercise of this constitutionally granted authority than it may tell the President whom to pardon. It would be hard to imagine that one person had been given this power, even if we did not know that the President of the Senate often would be a candidate for President of the United States. We know that well, as did the authors of the Twelfth Amendment.12

It would be much easier to believe that this important decision was vested in a collective body, were there not serious problems with the operation of the collective body, the joint session of Congress (if it is to be called that).13 How is the joint session to make decisions? The Constitution provides no explicit rule, and certainly does not indicate that the House and Senate are to be put together into one body that will act by majority vote. Rather, the two chambers appear to retain their separate identities: the certificates are to be opened in the presence, not of the Senators and Representatives, but of the Senate and the House.

11 Early in the Hayes-Tilden dispute, the leading Republican position was that the President of the Senate should determine which certificates to open and count. At the time the President of the Senate was President Pro Tempore Thomas Ferry of Michigan, the Vice President having died in office. Ferry was a Republican. See HOOGENBOOM, supra note 2, at 32.

12 Pursuant to the provision in Article II that the Twelfth Amendment amended, Vice President Jefferson had opened the electoral votes from the 1800 election in which he had been a candidate for President.


13 The Twelfth Amendment does not call the meeting that it contemplates a joint session. It says that the President of the Senate shall open the certificates in the presence of the Senate and the House of Representatives.
If the two houses do retain their separateness, the implication is that they act as they must when, for example, they set a time to adjourn: through concurrent decision.\textsuperscript{14} For anything to happen, both houses must agree to it. That arrangement produces a determinate answer, however, only when there is a default, a privileged status quo. For any legislative act, the default is the legal situation without the legislation. But in the case of an electoral dispute there is no default, no equivalent to inaction.\textsuperscript{15} Either someone has a majority of the electors appointed, or no one does and the House of Representatives must elect a President. Inaction, which leaves the country in ignorance as to what has happened, does not correspond to any of those possible outcomes and is not an answer.

Those who find wholly textual arguments unsatisfying may be more nourished by a substantive consideration that has always figured in this debate. The Federal Convention went to considerable lengths to create a presidency that would be independent of Congress. The creaky electoral college scheme was adopted in large part because the convention was unwilling to have Congress elect the President but was unable to come up with anything better than the electoral college. (In particular, a majority was not prepared to endorse direct popular election.)\textsuperscript{16} In keeping with this distrust of

\textsuperscript{14} See U.S. Const., art. 1, § 7.

\textsuperscript{15} The drafters of 3 U.S.C. 15, which governs the congressional electoral count, understood this problem, most likely because they remembered the potential deadlock of 1876-1877, when different parties controlled House and Senate. Section 15 thus purports to set defaults, providing for example that when there are competing electoral slates, none of which has been identified as lawful by the State under Section 5 of title 3, the slate certified by the Governor shall be treated as lawful unless both houses concurrently decide otherwise.

\textsuperscript{16} Forrest McDonald explains the problem, and the Electoral College as a solution:

Nobody [at the Federal Convention] had been able to devise a satisfactory mode of electing the president that would make him independent of Congress, and nobody was willing to vest real power in an office that was subordinate. . . . Then, building upon a suggestion made by Pierce Butler of South Carolina, the convention worked out the electoral college system in a matter of three days. Suddenly the constitutional order clicked into place.

Forrest McDonald, The American Presidency: An Intellectual History 163 (1994). As McDonald notes, the projected absence of potential presidents with nationwide reputations among the people, once Washington passed from the scene, made popular election a non-starter for many delegates. Id. at 166-167.
Congress, the drafters put the selection of electors in the hands of the other great power center, the States, and gave Congress only very limited legislative power on the subject.\textsuperscript{17} As the experiences of 1876-1877 and 2000 indicate, giving Congress power to resolve an electoral dispute is very close to giving it power to choose the President; indeed, electoral disputes could be trumped up for that very purpose. It is unlikely that the Constitution allows through the back door what it bars the front door against.

If Congress is not a dispute resolver, one is left to wonder why the Constitution employs both houses and the Senate's President in the count. Is it mere ceremony, un republican pomp? I think it is a ceremony, but not a pointless one. Some device is needed to record the electoral votes, and a public occasion for the count will inspire public confidence in the probity of the process. This is not the only situation in which the Constitution seeks to create a record of who has what job; the President himself is given the task of commissioning officers of the United States, and a commission is first and foremost evidence of appointment.\textsuperscript{18} Congress is there to make a record, not to be the judge. The electoral count ceremony is not designed for situations in which votes are in dispute.

So far I have focused on the Constitution’s text. But the well-known document is the law only insofar as there is an actual practice of following it; the written Constitution is in principle not necessarily, and in fact not completely, the real constitution. It is thus possible that there is a finality rule as a practical matter, whatever the document says or implies.

\textsuperscript{17} As noted above, Congress may determine the time for choosing electors and the day on which they are to give their vote. Its power over its own elections is considerably broader, extending to the time, place, and manner of election. U.S. CONST., art. I, § 4, para. 1. Congress has no authority over the franchise in those elections. U.S. CONST., art. I, § 2, para. 1 (voters in House elections are those eligible to vote for the most numerous house of the state legislature); U.S. CONST., amend. XVII (same for Senate).

\textsuperscript{18} U.S. CONST., art. II, § 3 (President shall commission all officers of the United States).
One reason to believe that such a rule exists is that it recently became a commonplace assertion that Congress counts the electoral votes. Maybe, then, Americans do in fact act as if Congress has the dispute-resolving power that I say the Constitution denies it. Of course, we cannot say that Americans follow such a rule. No one alive today has seen Congress resolve such a dispute, and the precedent of Hayes and Tilden does not really support the claim of congressional finality. On that occasion Congress found it necessary to create an Electoral Commission. Whether the nation’s acquiescence in Hayes’ presidency came from a belief in congressional finality or a willingness to accept that ad hoc solution, which the two houses used to guide their action as the electoral votes were opened, is impossible to say.

Thus, the proper question is not whether Americans follow a rule of congressional finality, but whether they would do so. It may seem obvious that they would. In addition to the widespread assumption that Congress has that role there is a very powerful practical consideration that would support congressional action. Once again, events of 1876-1877 point the way: if the country is in such a terrible mess, who but Congress could possibly be in a position to fix it? In particular, only Congress can provide the necessary coordination, simply by virtue of its status as the national legislature. If a solution is desperately needed and only the legislature can provide one, it may seem that whatever the legislature does will be accepted. That will be true, not because of any norm derived from the Constitution, from any established practice, or from any consideration other than simple practical necessity.

Any answer here is necessarily speculative. I think it doubtful whether Americans in general would act as if Congress has the power finally to resolve disputed presidential elections. For one thing, although as far as I know the precise analysis I present here is novel, doubts about congressional finality in counting electoral votes are not. They were raised as early as 1800.19 Were the issue to become a

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19 David Currie provides an excellent account of the 1800 proceedings. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 288-291 (1997). Even before the bizarre Jefferson-Burr tie, members of Congress foresaw possible disputes about the coming election, and a Federalist Senator proposed the creation of a joint committee to report a plan for congressional resolution of disputes. Id. at 288. Senator Pinckney of South Carolina, in good South Carolina fashion quick to scotch the snake of federal power, objected at some length to the suggestion that Congress had any such authority. Id. at 288-289. The
matter of practical debate, those doubts once again would come to
the fore, and people would realize that there is neither a textually
clear answer nor a long-standing tradition in support of Congress.

Such doubts would not eliminate the practical necessity of a
solution, or Congress' unique position to provide one, but they
would fundamentally change the institution's role in the political
system. In normal circumstances Congress has two main sources of
popular support and legitimacy. One is the general belief in
democratic decision making coupled with the general belief that
Congress is a reasonably democratic legislature, one close enough to
reflecting the people's will that the people should accept it as doing
so. Another is the fact that Congress is provided for by the
Constitution, and the Constitution is itself generally accepted.20
That latter consideration may be, for example, the reason the Senate is
treated as a legitimate part of the system despite its extreme
malapportionment.

If there would be serious doubts about the constitutional
foundations of congressional finality, then in resolving a disputed
presidential election Congress to a large extent would be acting, not
as the legislature established by the Constitution, but as an
extraordinary political body seeking to hammer out an extra-
constitutional solution to a problem the Constitution cannot solve.
It would have a status similar to that of the Federal Convention and
would ask the people to accept its solution on its merits, not because
of their prior commitment to a decision making mechanism. This, I
think, is more or less what happened in 1876-1877.

To continue the speculation, it seems to me that a convention-like
Congress would function under different political rules than does an
ordinary legislature that operates pursuant to a written constitution
or long-standing practice. It would face an informal and quite
imprecise super-majority requirement. In proposing a solution, a
congressional majority – which even in ordinary times need not
represent a majority of the country – would have to reckon with any

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20 General acceptance of the Constitution itself probably rests on its coordinating
function, on substantive endorsement of the system of government it creates, and on belief in
tradition for its own sake.
group sufficiently large and well organized to threaten non-cooperation. In particular, it is hard to imagine that a solution could work without the acquiescence of the country's two great political parties, whatever the nominal control of Congress was.

A useful thought experiment here employs a slight variation on recent events. Pursuant to statute, Congress meets for the electoral count on January 6, which means that the newly-elected Congress meets; congressional terms turn over on January 3 of odd-numbered years.21 In the 2000 elections the Republicans retained control of the House by a narrow margin, whereas the Democrats gained enough seats in the Senate to create a 50-50 split beginning on January 3, 2001. The Vice President, as President of the Senate, has a casting vote, and vice presidential terms turn over on January 20, not January 3.22 For the first 17 days of the 107th Congress, the Senate was controlled by the Democrats through Vice President Gore's tie-breaking vote.23 The Democrats thus won control of the Senate for the day on which the electoral votes were to be counted.

Behind the Republicans' acceptance of that conclusion lay the resolution of a minor crisis, one somewhat neglected in the furor over the presidency. In Missouri's 2000 Senate election, the highest vote-getter was a dead man, Mel Carnahan. Missouri's Democratic Governor took the position that the result under Missouri law was

21 3 U.S.C. 15 (Congress to be in session to count electoral votes on January 6 in years following a selection of electors). Congressional terms turn over on January 3rd of odd-numbered years pursuant to the Twentieth Amendment. U.S. CONST., amend. XX.

22 Presidential and Vice Presidential terms are likewise set by the Twentieth Amendment. U.S. CONST., amend. XX.

23 The arrangement under which the Vice President whose term is expiring presides over the electoral count led to the memorable scene during the count in which Vice President Gore repeatedly gavelled down Democratic members of the House who objected to Florida's electoral votes but were unable to obtain the requisite objection from a Senator. See 147 Cong. Rec. H34-H36 (daily ed. Jan. 6, 2001). Perhaps the most striking exchange was the following:

Ms. WATERS: Mr. Vice President, I rise to object to the fraudulent 25 Florida electoral votes.

The VICE PRESIDENT: Is the objection in writing and signed by a Member of the House and a Senator?

Ms. WATERS: The objection is in writing and I do not care that it is not signed by a Member of the Senate.

The VICE PRESIDENT: The Chair will advise that the rules do care, and the signature of a Senator is required.

Id. at H35.
that no one was elected, so that upon the expiration of Senator Ashcroft’s term there was a vacancy, one that Mrs. Carnahan could be appointed to fill. The Republicans acquiesced in this arrangement, despite some doubts about its validity; it is possible that the proper result, when the highest vote-getter is ineligible for the office, is that the second-highest wins. Then-Senator Ashcroft thus had a claim that he had been re-elected.

Had the stakes of control of the Senate during the 17-day window been higher, the Republicans might have acted differently. When the Senate convened on January 3 they were still in control, because the new Senators had not yet been seated. If the Republicans had been prepared to play hard-ball, they could have declined to seat Mrs. Carnahan and instead referred her credentials to a committee to investigate the legality of her appointment. That investigation could have taken some time. While it was pending, Republicans would have had a 50-49 advantage in the Senate and would have controlled both houses of Congress during the electoral count. If the Republicans had been prepared to play really hard ball, they could have seated John Ashcroft and taken control 51-49.

That maneuver would have been possible because of the Senate’s power finally to resolve disputes about the elections, returns, and qualifications of its members. For purposes of ordinary legislation the Senate’s decisions on such questions, even when blatantly political, are routinely accepted. Imagine, though, that the Republicans had refused to seat Mrs. Carnahan precisely so that they could control both houses on electoral count day and resolve a still-live dispute about the presidency. Under those circumstances it is easy to imagine that the Democrats would have taken the position that Congress has no such power, that they were prepared to participate in a compromise solution but that they were not prepared to be simply bullied, and would not recognize the Republicans’ planned extra-constitutional action. Such a threat, I think, would have been quite credible.

To say that a solution must come from Congress thus is not to say that any solution that comes from Congress will be effective.

2. The States

Maybe the Constitution gives some institution or officer other than Congress the last word as to questions concerning electoral
votes. Other than Congress, the leading candidate for that role historically is the States themselves. Since the 1790s, federal statutes have called on state executives to certify their States’ electoral votes, and current law contemplates an important role for the Governor’s certification.\(^{24}\) Maybe that role is a product, not just of legislation, but also of the Constitution itself. Certainly putting dispute resolution in the hands of the States rather than Congress would match putting the substantive decision in the hands of the States rather than Congress.

Despite the attraction of this possibility in principle, a closer examination makes it implausible. The most serious difficulty arises because States, like the United States, have separation of powers, with one government in three branches. As recent events in Florida suggest, different branches of a state government may answer these questions differently. Indeed, there is nothing to keep three branches from coming up with three different answers, nor are the possibilities limited to three. All the States but one have bicameral legislatures, and many of them, like Florida, have plural executives. We can imagine different answers from a State’s Governor, its Secretary of State, its lower house, its upper house, its supreme law court, and its chancellor.

In this regard the identification of electoral votes is in much worse condition constitutionally than the much more mundane process of certifying judgments. Under the Full Faith and Credit Clause, finality attaches to certain state acts, like judicial decrees.\(^{25}\) Because it may not be clear to determine whether such an act has taken place and what it was, Congress has power to specify the mode of proof.\(^{26}\) It has no such power with respect to state dispute resolution regarding electoral votes.\(^{27}\)

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\(^{24}\) In the first statute governing presidential elections the Second Congress provided that the executive authority of each State was to certify the identity of that State’s electors. Act of March 1, 1792, ch. vii, § 3, 1 Stat. 240. Under the current statute, when there is a dispute about the electors’ identity the Governor’s certificate is to control unless both houses of Congress decide to the contrary. 3 U.S.C. 15.

\(^{25}\) U.S. CONST., art IV, § 1 (full faith and credit to be given to public acts, records, and judicial proceedings).

\(^{26}\) Id.

\(^{27}\) The Necessary and Proper Clause will not help here because the States’ powers with respect to presidential elections, whatever they are, are not vested in any department or officer of the United States.
To be sure, it is likely that the Constitution's authors believed that this was a problem for the States, and that they would find a way to take care of it. In non-pathological cases they do so. Once again, though, there is no trace in the Constitution of any attempt to deal with the pathological case. That one is simply unprovided-for.

3. The Supreme Court

Maybe the right place to look for a final decision maker is not the Capitol, but across the street. This time the Supreme Court of the United States put an end to the Florida recount, and the country seems prepared to go along with the Court's decision, however grudgingly in some quarters. Bush v. Gore is receiving the same treatment as Youngstown Sheet & Tube and United States v. Nixon. Whatever the Constitution's original design, and whatever the implication of its text, the Court has taken on the role of final interpreter of the Constitution, and often final resolver of concrete legal disputes that have immense practical implications. Despite the fact that the constitutional text does not establish such a role for the Court, one may think that practice does so. Certainly the practice of judicial review, unlike that of congressional resolution of electoral disputes, is well settled.

Or maybe not. The Supreme Court, in reviewing the decision of the Supreme Court of Florida, was participating in Florida's dispute resolution mechanism, a mechanism designed to qualify under Section 5 of U.S.C. title 3. The majority opinion in the Supreme Court relied on what it took to be a principle of Florida law: that Florida had a strong policy of qualifying for the so-called Section 5 safe harbor. The whole proceeding, that is to say, was premised on the importance of the congressional electoral count; that is when Section 5 matters. In 2000 the premise of the Court's action seems to have been that Congress has the last word.

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28 Section 5 applies during the congressional electoral count and provides limited finality for the result of any pre-existing state dispute resolution mechanism, including a judicial mechanism.

29 "The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the 'legislative wish' to take advantage of the safe harbor provided by 3 U.S.C. § 5." Bush v. Gore, 121 S. Ct. 525, 538 (2000) (citation omitted). The Court went on, "Surely when the Florida Legislature empowered the courts of the State to grant 'appropriate' relief, it must have meant relief that would have become final by the cut-off date of 3 U.S.C. § 5." Id.
Indeed, *Bush v. Gore* may make it less likely that the unwritten constitution provides for the Supreme Court to have the last word in contested presidential elections. Enough people have denounced the decision as partisan or at least ideological to draw into question the Court's legitimacy in this highly political arena. If it is true that the Court's power rests on public acceptance, and public acceptance rests on the belief that the judges follow the rule of law and not politics, then this episode very likely has made it less certain that other political actors and the public would allow the Court to have the last word in the future.

**B. By Statute**

To say that Congress is not the adjudicator of presidential elections is not to say that it has no role in resolving electoral disputes. Perhaps it may confer final authority on some other decision maker. That possibility is not very promising, however.\(^{30}\)

Section 5 of title 3, as the country now knows, purports to attach important consequences to state dispute resolution mechanisms.\(^{31}\) As the statute now reads, those consequences attach to a rule that Congress is to follow when the electoral votes are being counted. A statute could instead provide that everyone was to treat state decisions as final.\(^{32}\) Such a statute, however, would constitute a conferral of power by Congress on the state decision maker and thus would encounter serious objections. Formalists would argue that state officers and institutions are incapable of receiving federal power. They are neither Congress nor Article III courts, nor do they

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\(^{30}\) Congress also could adopt rules purporting to answer particular questions that may arise in electoral disputes. In light of Congress' carefully limited authority with respect to presidential elections, it is doubtful whether it has any such power. In any event, such rules would themselves be subject to dispute as to their application.

\(^{31}\) Under Section 5, the outcome of a State's mechanism for resolving electoral disputes is to be treated as final during the congressional electoral count, provided that the result was reached more than six days before the electors voted and was pursuant to laws in place before the dispute arose. 3 U.S.C. 5.

\(^{32}\) I put aside at this point the problem that sometimes there will not be agreement as to whether a state decision process qualifies under the federal rule. Any attempt to replace a final decision maker with a rule that everyone has to apply encounters this difficulty. The most familiar finality rule in American law, the rule that empowers the Supreme Court of the United States, is subject to it. The difficulty would arise, for example, if there were doubts as to whether four supposed Justices had been validly appointed; five members are not a quorum and hence may not act for the Court, 28 U.S.C. 1 (six Justices constitute quorum of Supreme Court).
have any connection to the President. Moreover, state officers are not appointed consistently with the Appointments Clause of Article II.\textsuperscript{33}

Those who take a less rule-obsessed approach to government structure also likely would find such a statute doubtful. While conferring finality on state institutions would not aggrandize the power of Congress, it would have a major impact on the over-all allocation of authority under the Constitution. Determination of the identity of presidential electors is as important an issue as arises in American politics.

If state institutions are not likely recipients of final decisional authority, maybe some part of the federal government could be given such a role. After recent events, the federal courts might seem a likely candidate. Congress could create a federal election contest procedure for presidential electors. It might provide, for example, that anyone authorized by state law to participate in the selection of electors could bring an action against the state official responsible for certifying the identity of the electors. Under current standing doctrine, the participant’s interest almost certainly would be enough to satisfy Article III as the Court understands it. Identifying a federal question in cases that are actually dominated by state law could prove somewhat problematic, but it is hard to imagine a contested election that would not raise at least a colorable federal claim.

This solution may seem obvious, but it is hardly clear that it would work. The relief in such a lawsuit would be an order to the certifying official. As recent events demonstrate, questions concerning the validity of certifications are common in disputed elections. A certification made under court order is no less subject to question than any other, and the binding effect of the court’s judgment itself is limited to the parties to the lawsuit. Non-parties, which is to say most of the country, would be as free to reject a court-sponsored certification as any other.

II. AD HOC SOLUTIONS

If the foregoing is correct, neither the written Constitution nor unwritten practice provides a rule under which to decide disputed

\textsuperscript{33} Chief Justice Marshall rejected the suggestion that Congress could delegate its legislative authority to the States in \textit{Wayman v. Southard}, 23 U.S. 1 (1825).
presidential elections. This raises the question whether such a gap in such an important place is desirable.

There certainly is much to be said in favor of having a final decider for this question. A constitution that has such a rule has done all that it can to keep the country away from the abyss of a complete breakdown of the political system. That abyss was approached in 1876-1877, although of course it is a matter of speculation (and was then) just how close the approach was. Whatever its other merits, a rule that enables the country to avoid total political gridlock or even violence has value. This is perhaps the premier instance in which it may be more important to have a rule than to have the right one.

Against this strength must be measured a weakness. Finality rules, because of their formal nature, invite manipulation. In particular, they invite both attempts improperly to influence the final decision maker and actions by that decision maker that are not based on the merits. One nice illustration of the first point comes from the Hayes-Tilden episode. As soon as it became clear that the electoral votes of three southern States were still up for grabs, at least some of them apparently were up for sale. In particular, there is reason to believe that Louisiana’s returning board (the body charged with collecting and certifying election returns) took bids from representatives of the two parties.34 As to the second point, both 1876-1877 and 2000 provide as many examples as one would like of decisions that were either made, or widely believed to be made, with an eye to the result. Indeed, if you add the people who today believe that the Florida Supreme Court acted as it did so that Gore would win, to those who believe that the Supreme Court of the United States acted as it did so that Bush would win, the result is very likely most of the country (even allowing for a substantial overlap group of cynics).

Having no final decider prevents such activity. Instead, it puts the country in an interesting situation, one in which an answer must be found while the clock ticks: presidential terms end at noon on January 20.35 With no decision rule in place, politicians must

34 See HOOGENBOOM, supra note 2, at 29-30. When the difficulties in the southern elections became apparent, many prominent political figures, including both elected officials and others, traveled to the South. They were known as “visiting statesmen,” id. at 28, a term that unfortunately was not revived in 2000.

35 In 1800-1801 Jefferson and Burr tied in the electoral vote and the House of Representatives, rather than choosing a President immediately, deadlocked in a series of
somehow come up with an ad hoc way of resolving the problem, one that will be accepted by enough of the country to keep things going. Their task is much like that faced by the Federal Convention, especially if one agrees with those Federalists who maintained that without a new national government the country was going to the dogs in short order. Something had to be put together that the country was willing to go along with.

The great attraction of the non-norm is that it creates enormous pressure to devise a mechanism that will garner widespread acceptance. At moments of great national turmoil, it encourages compromise, consensus, and the pursuit of legitimacy. Probably the great strength of the Hayes-Tilden Electoral Commission was its ad hoc character. It reflected, not generic thinking about dispute resolution, but the there-and-then political situation. Because it was designed for the moment, public acceptance of its result was grounded, not simply on the generic need for an answer, but on particular features of that answer. It was the work, not of long-dead drafters, but of the very politicians who would have to live with it. That gave it a kind of legitimacy that we do not normally associate with the Constitution, but that had the virtue of immediacy.

That legitimacy, however, was necessarily limited, as would be the legitimacy generated by any similar ad hoc procedure designed in the future. It could do nothing more than assure people that a dispute had been resolved in a manner that was acceptable to the largest and best organized interest groups in the country, especially the two main political parties. It could not assure them that the true winner had been found and inaugurated as President.

So far the country has been down this road only once, except for the few halting steps taken in the most recent election. Maybe our luck will hold out.

ballots. While the House struggled, the country moved toward a void in the presidency. Article II, Section 12, para. 7 of the Constitution provides for the Vice President, or some statutorily-designated officer if the Vice President is unavailable, to exercise the powers and duties of the President in cases of removal, death, resignation, or inability to discharge the office. It does not mention failure to elect by the House. See CURRIE, supra note 19, at 292-293 (discussing deadlock and pointing out that the Constitution makes no provision for an acting President in such a situation). The Twentieth Amendment fills that gap, providing that if no President has been chosen at the beginning of a presidential term the Vice President shall act as President until a President qualifies. U.S. CONST., amend. XX. It does not, however, provide for the situation in which a President has been chosen but there is a dispute as to who it is. That was the situation in 1877 and it could have happened in 2001.