

**SENATE ELECTION OF THE VICE PRESIDENT AND
HOUSE OF REPRESENTATIVES ELECTION OF THE PRESIDENT**

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I. INTRODUCTION

This Article is the third in a study of the United States post-general election presidential and vice presidential electoral process.¹

¹ Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL'Y 665 (1996) [hereinafter Ross & Josephson, *Popular Vote*]; William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145 (1996) [hereinafter Josephson & Ross, *Repairing*].

The debate over the Electoral College continues. See also Christopher Anglim, *A Selective, Annotated Bibliography on the Electoral College: Its Creation, History, and Prospects for Reform*, 85 LAW LIBR. J. 297 (1993). Compare GEORGE C. EDWARDS III, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* (Yale Univ. Press 2004) with TARA ROSS, *ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE* (World Ahead Publishing 2004).

It examines the final stages of electing a President or Vice President if the Electoral College does not elect one or both. A possible last article in this series may discuss issues considered in the previous two and in this Article in light of the *Bush v. Gore* litigation,² some of the literature it has spawned, and developments subsequent to the first two articles, now a decade old. It may also address issues raised by some of the many proposed Electoral College reforms.

A. *The Twelfth Amendment Procedures*

The following briefly summarizes the Twelfth Amendment's procedures for counting votes for the presidency and vice presidency.

The Constitution³ and the Twelfth Amendment provide, with only orthographic variations, that "[t]he President of the Senate

Robert W. Bennett believes the Electoral College can be "tamed." ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* (Stanford Univ. Press 2006). I am most grateful to Professor Bennett for reading and commenting on a draft of this Article.

The New York Times has editorially defended, attacked, and advocated ameliorating the College. Compare Editorial, *The Case for the Electoral College*, N.Y. TIMES, Dec. 19, 2000, at A34, with Editorial, *A Really Modest Proposal*, N.Y. TIMES, Nov. 6, 2004, at A18, and Editorial, *Drop Out of the College*, N.Y. TIMES, Mar. 14, 2006, at A26. Most recently, the newspaper has supported the so-called National Popular Vote effort. Editorial, *Maryland Takes the Lead*, N.Y. TIMES, Apr. 14, 2007, at A14. See *infra* note 249. Recently, it called for a constitutional amendment abolishing the College without stating what would take its place. Editorial, *Flunking the Electoral College*, N.Y. TIMES, Nov. 20, 2008, at A42. It referred to the National Popular Vote effort without actually endorsing it. *Id.* The *Times* subsequently printed five letters, only one of which supported abolition, and none even referred to National Popular Vote. Letter to the Editor, N.Y. TIMES, Nov. 24, 2008, at A24.

Some recent authors' substantive positions on the College seem difficult to ascertain. See, e.g., Michael Herz, *How the Electoral College Imitates the World Series*, 23 CARDOZO L. REV. 1191 (2002); Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526 (2001).

Therefore, it seems useful to repeat our comment from *Repairing*: "[W]e choose to be analysts and improvers . . . not defenders or attackers." Josephson & Ross, *Repairing*, *supra*, at 151.

The legal status of electors, discussed in Josephson & Ross, *Repairing*, *supra*, at 152, and in Ross & Josephson, *Popular Vote*, *supra*, at notes 250 and 251, and accompanying text, has since been the subject of two articles. Vasanth Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123 (2001); John A. Zadrozny, *The Myth of Discretion: Why Presidential Electors Do Not Receive First Amendment Protection*, 11 COMMLAW CONSPICUOUS 165 (2003).

² E.g., *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

³ U.S. CONST. art. II, § 1, cl. 3; see also 3 U.S.C. § 15 (2006).

Disagreement initially existed as to whether the Vice President counts the electoral votes or only presides over the joint session of Congress and announces the result. See Josephson & Ross, *Repairing*, *supra* note 1, at 179; Ross & Josephson, *Popular Vote*, *supra* note 1, at 705. On September 17, 1787, the Constitutional Convention adopted an imple-

shall, in the Presence of the Senate and House of Representatives, open all the Certificates [of the elector votes], and the Votes shall then be counted,”⁴ and “[t]he Vice President of the United States shall be President of the Senate [except when] he shall exercise the Office of President of the United States.”⁵ Many Vice Presidents have performed this function, without mishap or objection, even when they were candidates for President or Vice President.⁶ Robert W. Bennett appears concerned about the “awkwardness” of this, and Michael J. Glennon argues that to avoid “massive conflict of interest when the Vice President is also a candidate for President,” the President *pro tempore* of the Senate should preside.⁷ The same point could

menting resolution that provided in relevant part, “[T]he Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening *and counting* the Votes for President” Constitutional Convention Res. adopted September 17, 1787, *reprinted in* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 103-6, 103d Cong., 1st Sess. 21-22 (Johnny H. Killian & George A. Costello eds. 1996), *available at* <http://www.gpoaccess.gov/constitution/pdf/con044a.pdf> (emphasis added) [hereinafter KILLIAN & COSTELLO].

⁴ U.S. CONST. art. II, § 1, cl. 3.

⁵ U.S. CONST. art. I, § 3, cls. 4, 5.

⁶ John Adams in 1793 and 1797, Thomas Jefferson in 1801, George Clinton in 1809, John C. Calhoun in 1829, Martin Van Buren in 1837, John C. Breckinridge in 1861, Thomas C. Marshall in 1917, Charles Curtis in 1933, John N. Garner in 1937, Richard M. Nixon in 1957 and 1961, Spiro T. Agnew in 1973, Walter F. Mondale in 1981, George H.W. Bush in 1985 and 1989, Daniel Quayle in 1993, Albert Gore, Jr. in 1997 and 2001, and Richard B. Cheney in 2005. WORLD ALMANAC AND BOOK OF FACTS (2005) [hereinafter WORLD ALMANAC 2005].

Vice President Hubert H. Humphrey did not preside in 1969, and Richard B. Russell presided as President *pro tempore* of the Senate. 115 CONG. REC. 145, 171-72 & 246 (1969); SENATE MANUAL, S. DOC. NO. 106-1, 106th Cong., 1st Sess. 994 (2000) [hereinafter SENATE MANUAL]. Robert W. Bennett speculates that this was because of “conflict.” BENNETT, *supra* note 1, at 202 n.65. Actually, Vice President Humphrey was in Norway in early January 1969, attending the funeral of former United Nations Secretary General Trygve Lie as the official representative of the President of the United States. E-mail from Norman Sherman to Toni Nesbit, Assistant to the Honorable Max M. Kampelman (Aug. 4, 2006, 11:13 EST) (on file with author).

⁷ BENNETT, *supra* note 1, at 24-25, 29; Michael J. Glennon, *Nine Ways to Avoid a Train Wreck: How Title 3 Should Be Changed*, 23 CARDOZO L. REV. 1159, 1187-89 (2002).

Kesavan describes the conduct of Vice Presidents John Adams and Thomas Jefferson during the counting of elector votes in 1797 and 1801, respectively. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1656-57 n.3 (2002). He later argues, notwithstanding the language of the Twelfth Amendment, that 3 U.S.C. § 15 may be unconstitutional, because it makes the President of the Senate the presiding officer over the elector vote count. *Id.* at 1700. It is not clear on what constitutional prohibition he is relying. If he is relying on the absence of specific constitutional authorization for a statute specifying who will preside over the counting, then he must contend, as he tries to do, with the Twelfth Amendment’s specific statement, “[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.” *Id.* at 1696-1701 (alteration in original).

be made about the Vice President if he were a candidate to succeed himself or about the President *pro tempore* if he were a presidential or vice presidential candidate. It could also be said about the Vice President presiding over a Senate election of the Vice President or about the Speaker of the House presiding over the House electing a President if he were a candidate or if it seemed unlikely that either a new President or Vice President would be chosen. But so far, history does not support Professor Bennett's, Professor Glennon's, or Mr. Kesavan's misgivings.

When the vice presidency is vacant, whether because the Vice President is acting as President,⁸ has resigned, or has died, the President *pro tempore* of the Senate⁹ presides.¹⁰

Someone needs to preside. If not the Vice President, acting as President of the Senate, then who? See *infra* notes 34 and 225–35 and accompanying text for arguments that should sustain the constitutionality of 3 U.S.C. § 15 in this respect.

Professor Ackerman and Mr. Fontana describe Adams's and Jefferson's actions in far greater length and with impressive historical research. Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551 (2004). They conclude that 3 U.S.C. § 15 is constitutional. *Id.* at 636 n.239, 640. They also conclude that both Adams and Jefferson acted properly. They dismiss Kesavan's arguments as "a case study on the dangers of a misguided textualism . . . [H]is interpretations seem far less plausible than those that Congress has consistently adopted over the course of two centuries." *Id.* at 631 n.220.

⁸ U.S. CONST. art. I, § 3, cl. 4.

Prior to the adoption of the Twenty-fifth Amendment, the United States had no Vice President when elector votes were to be counted from 1841 to 1845, from 1850 to 1853, from 1865 to 1869, from 1881 to 1885, from 1899 to 1901, from 1923 to 1925, from 1945 to 1949, and from 1963 to 1965 because the Vice Presidents were acting as President. WORLD ALMANAC 2005, *supra* note 6.

Prior to the adoption of the Twenty-fifth Amendment, the United States had had no Vice President due to death at least four times when the elector votes were to be counted: in 1875 (Henry Wilson), 1885 (Thomas A. Hendricks), 1899 (Garret A. Hobart), and 1912 (James S. Sherman). SENATE MANUAL, *supra* note 6, at 1078, 1082, 1085, 1088. Another source says that this was also true of George Clinton (Apr. 20, 1812), Elbridge Gerry (Nov. 23, 1814), and William R. King (Apr. 18, 1853). WORLD ALMANAC 2005, *supra* note 6, at 563–64. The Senate Manual does not confirm this, but the World Almanac is confirmed by "Occasions When Vice Presidents Have Voted to Break Tie Votes in the Senate" compiled by the Senate Historical Office from a variety of sources and dated May 2003, which is on file with the author.

The United States had no Vice President when elector votes were to be counted only once due to resignation, that of John C. Calhoun in 1832. WORLD ALMANAC 2005, *supra* note 6, at 579 & n.1.

Twice for brief periods since the adoption of the Twenty-fifth Amendment on February 23, 1967, the United States has not had a Vice President: between the resignation of Vice President Spiro T. Agnew on October 10, 1973, and Gerald R. Ford's swearing in as Vice President on December 6, 1973, and between Vice President Ford's swearing in as President on August 9, 1974, and New York Governor Nelson A. Rockefeller's swearing in as Vice President on December 29, 1974. SENATE MANUAL, *supra* note 6, at 1104 n.1. But

If, after elector votes are counted, the President of the Senate declares that no presidential candidate has received a majority of those votes, the Twelfth Amendment declares that the presidential election is decided by the House of Representatives from “the persons having the highest numbers not exceeding three on the list of those voted for as President” The House must “choose *immediately, by ballot, the President.*”¹¹ It votes by state delegations¹² rather than by individ-

on neither occasion was the vice presidency vacant when elector votes were to be counted.

⁹ U.S. CONST. art. I, § 3, cl. 5.

¹⁰ S. Doc. No. 101-25 (1992), *reprinted in* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES 1019–24 (Alan S. Frumin ed., rev. ed. 1992), *available at* <http://www.gpoaccess.gov/riddick/browse.html>. Mr. Riddick, the Senate Parliamentarian emeritus, states, “The Vice President or President *pro tempore*, in such a joint session is the presiding officer” *Id.* at 812.

¹¹ U.S. CONST. amend. XII (emphasis added). When the Twelfth Amendment says “ballot,” it means the identity of each voter is not revealed, i.e., is secret. Josephson & Ross, *Repairing*, *supra* note 1, at 172 nn.199–203 and accompanying text; Ross & Josephson, *Popular Vote*, *supra* note 1, at 677 n.61 and accompanying text; *cf.* House Rule XXXVIII, *in* CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 103-342, 103d Cong., 2d Sess. 766 § 934 (1995) (first adopted in 1789) [hereinafter JEFFERSON’S MANUAL]. The ad hoc rules adopted for the House presidential elections of 1801 and 1825 provided for ballot boxes for the ballots of each state’s House delegation and for the states’ ballots. Rules of the U.S. House of Representatives, 6th Cong., 2d Sess. § 6 (1801), *reprinted in* MICHAEL J. GLENNON, WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION app. D, at 145–47 (Congressional Quarterly Inc. 1992) [hereinafter 1801 Rules]; Rules of the U.S. House of Representatives, 18th Cong., 2d Sess. § 5 (1825) [hereinafter 1825 Rules], *reprinted in* GLENNON, *supra*, app. D, at 147–49. Professor Glennon agrees with our opinion that “ballot” means “secret,” *id.* at 50–51, as does Kesavan in *The Very Faithless Elector?*, *supra* note 1, at 138. *See also* LUCIUS WILMERDING, JR., THE ELECTORAL COLLEGE 172, 182–83, 206–07 (1958); *Presidential Succession Between the Popular Election and the Inauguration: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 103d Cong., 2d Sess. 15 n.26 (1994) (statement of Ass’t Att’y Gen. of the U.S. Walter Dellinger, Office of Legal Counsel, Justice Dep’t) [hereinafter *Presidential Succession Hearings*]; Kesavan, *supra* note 7, at 1803 & nn.587, 588; James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 506 (1962).

In a July 1, 1980 memorandum to the Honorable Richard Bolling of Missouri, Chair of the House Committee on Rules, Representative Martin Frost reviewed the House’s precedents and concluded, “It is clear by practice that the House has consistently interpreted ‘by ballot’ in the 12th Amendment to mean secret written ballot.” Memorandum from Congressman Martin Frost, *printed in* 138 Cong. Rec. 15,690, 15,691, cols. 2 & 3 (1992) [hereinafter *Frost Memo*]. Representative Frost inserted this memo on June 22, 1992 because in that year there were “three contending candidates for President” *Id.* at 15,690, col. 1. Representative Frost acknowledged that even were “the House to adopt a rule to the contrary in 1981 [i.e., not by ballot] . . . this undoubtedly would raise a major furor.” *Id.* at 15,691, col. 3.

The secondary authorities are not unanimous on the issue of secret ballot. *See, e.g.,* ROBERT M. HARDWAY, THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM 58 (1994). The *Frost Memo* argued “for the maximum amount of

ual Representatives. Each state has one vote.¹³ The Twelfth Amendment provides that an absolute majority, twenty-six of the now fifty states, is required to elect the new President.

The Senate enters this picture in two different situations. The Twelfth Amendment provides:

And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.¹⁴

The Twelfth Amendment also immediately thereafter provides:

The person having the greatest number of [elector] votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.¹⁵

The Representatives in the House are roughly¹⁶ apportioned with respect to the states' populations. But because the House, when

public scrutiny of the process consistent with the Constitution." *Frost Memo, supra*, at 15690, col. 1. Professor Bennett thoughtfully discusses the issues in BENNETT, *supra* note 1, at 104–05.

- 12 Although under the Twenty-third Amendment, the District of Columbia's three electors vote for President and Vice President, the District was not made a state for purposes of the Twelfth Amendment. Therefore, the District of Columbia's non-voting delegate to the House does not vote for President. The legislative history of the Twenty-third Amendment is clear that this treatment of the District was not an oversight but deliberate:

MINIMUM IMPACT; PRESERVATION OF ORIGINAL CONCEPT OF CONSTITUTION

The proposed amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in *national elections*. *It would not make the District of Columbia a State. It would not give the District of Columbia any other attributes of a State* or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its forms of government. *It would not authorize the District to have representation in the Senate or the House of Representatives. It would not alter the total number of presidential electors from the States, the total number of Representatives in the House of Representatives, or the apportionment of electors or Representatives among the States.* It would, however, perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress.

H.R. REP. NO. 86-1698, at 3 (1960) (emphases added). Nevertheless, the District's three electors are electors, and thus their number adds to the majority of the whole number requirement for elector election of the President and Vice President.

13 U.S. CONST. art. II, § 1, cl. 3, *amended* by U.S. CONST. amend XII.

14 U.S. CONST. amend. XII, *superseded* by U.S. CONST. amend. XX, § 3.

15 U.S. CONST. amend. XII.

16 Under the Constitution, "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to

the whole Number of free Persons, . . . excluding Indians not taxed, three fifths of all other Persons.” U.S. Dep’t of Commerce v. Montana, 503 U.S. 442, 444 n.1 (1992) (first two alterations in original) (quoting U.S. CONST. art. I, § 2, cl. 3). Section 2 of the Fourteenth Amendment provides that “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.” *Id.* at 444 n.1 (quoting U.S. CONST. art. XIV, § 2; *see also* 2 U.S.C. §§ 2a(a)–2(c) (2006) (establishing the criteria for allocating the number of Representatives for each state).

The U.S. Code forbids the Bureau of the Census’s use of “the statistical method known as ‘sampling’” “for the determination of population for purposes of apportionment of Representatives in Congress among the several States.” 13 U.S.C. § 195 (2006); *see also* Dep’t of Commerce v. U.S. House of Representatives, 525 U.S. 316, 317 (1999) (holding that the Census Act prohibits the use of statistical sampling to determine the population for congressional apportionment purposes). In *Utah v. Evans*, 536 U.S. 452 (2002), the Court sustained the use of “hot-deck imputation” for apportionment purposes and rejected Utah’s claim for an additional Representative, which would have required reducing North Carolina’s House representation because the total number of Representatives is statutorily fixed at 435. *See* Act of Aug. 8, 1911, ch. 5, §§ 1–2, 37 Stat. 13–14.

On April 19, 2007, the House passed H.R. 1905, which would permanently increase the number of Representatives to 437 by giving the District of Columbia a Representative and giving Utah an elected-at-large Representative. H.R. 1905, 110th Cong. (1st Sess. 2007). On April 20, the bill was referred to the Senate Committee on Finance. On September 18, 2007, the Senate failed by a vote of fifty-seven to forty-two to close debate on this bill. Ian Urbina, *District of Columbia Voting Bill Falls Short in Senate*, N.Y. TIMES, Sept. 19, 2007, at A20. S. 150 and H.R. 157, 111th Cong. (1st Sess. 2009), the former of which has already passed the Senate, are in part to the same effect. Because the District of Columbia is not a state, *see supra* note 12, the principal purpose of these bills raises substantial constitutional issues. *See* Evan P. Schultz, *Text Here to Vote: The Push for D.C. Voting Rights Calls Up the Flaws in Constitutional Interpretation*, LEGAL TIMES, Mar. 16, 2009, at 16.

Should the House be called upon to choose a President, the number of Representatives in each state’s House delegation can obviously affect the vote for President. The Framers thought that a contingent election of the President in the House, instead of in the Senate, would “lessen[] the aristocratic influence of the Senate.” JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 592 (Ohio Univ. Press 1966) (quoting Colonel George Mason); *see also* THE FEDERALIST NOS. 55, 56, 57, at 338–53 (James Madison) (Clinton Rossiter ed., 2003) (discussing the difficulty of determining and rationalizing the number of Representatives for each state); *cf.* THE FEDERALIST NO. 66, at 399–405 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (objecting to the Senate sitting as the court of impeachment since this would consolidate too much power in the Senate). The Framers also thought that the House would elect “the man who in their opinion may be best qualified for the office.” THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

Apportionment of House seats and gerrymandering can obviously affect how democratic (with a small “d”) the choice of a President would be for each House state delegation. In 1789, a constitutional amendment for reapportionment was proposed by Congress as part of what later became the Bill of Rights. This amendment was not originally ratified, but it eventually became the Twenty-seventh Amendment. The unratified amendment provided:

After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than

one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall be not less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?*, app. B at 301 (1993); *see also* KILLIAN & COSTELLO, *supra* note 3, at 47 (explaining the method for electors to vote).

For discussions of the second Congress's struggle to apportion the House after the 1790 census, see David P. Currie, *The Constitution in Congress: The Second Congress, 1791–1793*, 90 NW. U. L. REV. 606, 607–15 (1996), and DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 128–36 (Univ. of Chi. Press 1997) [hereinafter CURRIE, FEDERALIST PERIOD].

The history of Congress's abandoned attempts to statutorily require compact and contiguous congressional districts of equal population is recounted in *Wesberry v. Sanders*, 376 U.S. 1, 42–45 (1964) (Harlan, J., dissenting). The Supreme Court held that these statutes were not reenacted in *Wood v. Broom*, 287 U.S. 1 (1932).

Gerrymandering affects the House's choosing a President to the extent that it results, state-by-state, in more Representatives from one party than compact, contiguous, and equal population congressional districts might produce. For example, in 2003, Texas redistricted its congressional districts for the 2004 general election, which resulted in Republican candidates winning twenty-one House seats to the Democrats' eleven; prior to 2001, the Democrats had a 17-15 majority in Texas's House delegation. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 412–13 (2006); *accord* STEVE BICKERSTAFF, *LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY* (2007). Texas has voted for the Republican Party candidate for President since 1980. U.S. Census Bureau, *Statistical Abstract of the United States: 2000*, 274–75 tbls.455 & 456 (120th ed. 2001) (providing information for the years 1980–96); *WORLD ALMANAC 2005*, *supra* note 6, at 594 (providing information for the year 2000); U.S. Nat'l Archives & Records Admin., *2004 Presidential Election, Popular Vote Totals* (2004), http://www.archives.gov/federal-register/electoral-college/2004/popular_vote.html (providing information for the year 2004). However, in 2004 President Bush's 4,527,000 Texas votes were approximately 61% of the votes cast for major political party presidential candidates. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2008*, tbl.388 (127th ed.). Republicans won 58% of the vote in statewide races against Democrats, *League of United Latin Am. Citizens*, 548 U.S. at 413, while winning 62.5% of the redistricted House seats, nearly 5% more than their showing in 2004 statewide races. *Id.*

Unfortunately, none of the Supreme Court gerrymandering opinions appear to be aware of this particularly sinister aspect of gerrymandering. David S. Wagner identifies this type of gerrymandering as an issue with respect to congressional district elector appointments using the district systems in Maine and Nebraska as examples. David S. Wagner, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect that Change*, 25 REV. LITIG. 575, 585 (2006). For information with respect to Maine and Nebraska's district systems, *see infra* note 178. House districts seem likely to become more and more gerrymandered until the Supreme Court finally intervenes. *See* Rachel Morris, *The Race to Gerrymander*, WASH. MONTHLY, Nov. 2006, at 15 (discussing the problems gerrymandering creates in various states).

The voluminous academic literature on gerrymandering also seems to not be aware of its consequences for a House election of a President. *E.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) (discussing gerrymandering as a harm); Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002) (identifying incumbent control of redistricting as a means to immunize districts from par-

electing a President under the Twelfth Amendment, votes by states, the states with smaller populations acquire disproportionate voting power.¹⁷

tisan competition); Samuel Issacharoff, Surreply, *Why Elections?*, 116 HARV. L. REV. 684 (2002) (highlighting the reasons why processes exist as they are despite a lack of textual justification).

An interesting note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, argues “that the Court should therefore abandon its conception of partisan gerrymandering as a species of vote dilution and focus instead on the federalism injury that state legislatures inflict when they interfere with the ability of the ‘People of the several states’ to elect their national representatives.” 117 HARV. L. REV. 1196, 1198 (2004). This argument would have been strengthened had the author also considered the consequences of gerrymandering for House elections of a President.

California Governor Arnold Schwarzenegger’s ballot initiative proposal to shift the power to redraw legislative districts from the State Legislature to a panel of retired judges was defeated. John Broder, *Not on Ballot, Schwarzenegger Is Still Rebuked*, N.Y. TIMES, Nov. 10, 2005, at A1.

Bills have also been introduced in the New York State legislature to authorize or create apportionment commissions. S. 2047, A. 5413, Reg. Sess. (N.Y. 2007).

New York State Governor Eliot Spitzer proposed a State constitutional amendment “to emancipate redistricting from partisan gerrymanders.” Letter from Jerry H. Goldfeder, Chair, Comm. on Election Law, Ass’n of the Bar of the City of N.Y., to Eliot Spitzer, Governor of the State of N.Y. (Jan. 7, 2008), available at <http://www.nycbar.org/pdf/report/dpny-22644164-v1-Signed.pdf> (supporting and criticizing the proposal).

The American Bar Association’s House of Delegates, on February 12, 2008, approved a resolution, recommended by two ABA Sections and its Standing Committee on Election Law, urging each state to assign the redistricting process for congressional and legislative districts to independent commissions. Michael Asimow, *Section of Administrative Law and Regulatory Practice, Report to ABA House of Delegates* (2008), available at http://www.abanet.org/leadership/2008/midyear/sum_of_rec_docs/hundredtwo_102A_FINAL.doc.

¹⁷ CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 109–10 (1997).

According to the 2000 census, the mean population of the states was 5,612,436. WORLD ALMANAC 2005, *supra* note 6, at 371. Only sixteen states, slightly less than a third, had a higher population than the mean. *Id.* These states had 322 electoral votes, *id.* at 592, far more than the 268 required for a majority (the constitutionally required absolute majority of the fifty states), but only 16 votes in a House election of a President. The twelve states with the largest elector votes have an electoral college majority of 271. *Id.* But these states would have only 12 votes in any House election of a President.

At the inception of the United States, the five states—slightly more than a third—with the greatest number of elector votes (Virginia with 12, Massachusetts with 10, Pennsylvania with 10, and Maryland and New York with 8 each) had 48 votes, an electoral college majority. But they had only 5 votes in any House election of a President. *Id.* at 623.

Because in 1787 there was no census, Article I, Section 2, clause 3 of the Constitution apportioned the initial Representatives as indicated by the second column of the following table:

Consequently, a President could have been elected by the 106th Congress House in 2001 with the support of House delegations from twenty-six of the twenty-eight states whose delegations had fewer than seven Representatives.¹⁸ In that admittedly unlikely event, if all the

State	Representatives	1790 Census Totals	Post-1790 Census Representatives
New Hampshire	3	141,885	4
Massachusetts	8	378,787	14
Rhode Island	1	68,825	2
Connecticut	5	237,946	7
New York	6	340,120	10
New Jersey	4	184,139	5
Pennsylvania	8	434,373	13
Delaware	1	59,094	1
Maryland	6	319,728	8
Virginia	10	747,610	19
North Carolina	5	393,751	10
South Carolina	5	249,000	6
Georgia	3	82,548	2
Totals	65		

The source for South Carolina's 1790 Census population is WORLD ALMANAC 2005, *supra* note 6, at 622 (rounded). Otherwise, the source for the third column is RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 3 (1793) (Act of March 1, 1791). The source for the fourth column is SENATE MANUAL, *supra* note 6, at 1132–33.

The elector votes of the thirteen original states as provided in the Constitution totaled 91. Only 69 votes were counted in the 1788 election: 8 from New York, 7 from North Carolina, 3 from Rhode Island, and 2 from each of Maryland and Virginia not having voted. *Id.* at 1063. The mean and the median numbers of electors were seven, with a majority at forty-six. Please note in column four the extraordinary increase in Representatives of Massachusetts, New York, North Carolina, Pennsylvania, and Virginia (which included what is now West Virginia, which was not admitted to the Union until 1863) as compared to the 1787 estimate. See Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 301 (2002) (discussing the admission of West Virginia into the Union). In the 1790 census, Kentucky (73,677), Maine (96,540), Tennessee (36,000 rounded), and Vermont (85,539) were also counted. The source for Kentucky, Maine, and Vermont is RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES, *supra*, at 3. The source for Tennessee is WORLD ALMANAC 2005, *supra* note 6, at 622.

Kentucky had two Representatives, and Tennessee and Vermont one each. SENATE MANUAL, *supra* note 6, at 1133.

- 18 One vote from each of the: (1) seven one-Representative states (Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming); (2) six two-Representative states (Hawaii, Idaho, Maine, Nevada, New Hampshire, and Rhode Island); (3) four three-Representative states (Nebraska, New Mexico, Utah, and West Virginia); (4) two four-Representative states (Arkansas and Kansas); (5) three five-Representative states (Iowa, Mississippi, and Oregon); and (6) six six-Representative states (Arizona, Colorado, Connecticut, Kentucky, Oklahoma, and South Carolina). SENATE MANUAL, *supra* note 6, at 1132–33, col. 22 (providing the 1990 apportionment).

Representatives from those states were present and voting, a President could be elected by as few as 78 of the 435 Representatives. This could be even fewer if some members of state delegations were not present and voting, and if House rules did not regulate state delegation quorums and majorities.

These possibilities exist because (1) as we have seen, the House elects a President by an absolute majority vote of state delegations; (2) under the Twelfth Amendment, a quorum of the House for this purpose consists of “*a member* or members from two-thirds [i.e., now thirty-four] of the states”¹⁹; (3) there is no requirement that each state vote on each ballot; and (4) apparently there is not now, as we shall see, a constitutional or other quorum or majority requirement for the vote *within* each state’s House delegation. If only one Representative is present from a state with more than one Representative, he may be able to constitutionally cast that state’s vote, as he certainly can in the seven states with only one Representative, unless House rules should regulate state delegation quorums and majorities.

Because under the Twelfth Amendment, electors cast separate ballots for President and Vice President, the electors may elect either the President²⁰ or the Vice President²¹ without electing the other, or

However, this possibility is very theoretical. Assuming that: (1) each House state delegation would have cast its ballots along party lines; (2) Connecticut and Nevada would not have voted, having equal numbers of Republicans and Democrats; and (3) the independent Representative from Vermont would have voted for the Democratic Party candidate, since he typically voted with the Democrats to organize the House, *see* 147 CONG. REC. H3 (daily ed. Jan. 3, 2001), then eight of the foregoing twenty-eight small states (Arkansas, Connecticut, Hawaii, Maine, North Dakota, Oregon, Rhode Island, Vermont, and West Virginia) would have cast their ballots for the Democratic Party candidate. *See generally* CONGRESSIONAL YELLOW BOOK (Spring 1999). Thus, in the 106th Congress, the Republicans had a majority in the House delegations of only seventeen of the smaller states. *Id.* at 928, 929, 934, 936, 940, 944–46, 955, 956, 958, 960, 966, 970, 971, 976, 982.

It would have been extremely difficult for any political party to acquire a twenty-six-state majority from only the smallest states. For example, only two of the seven-, eight-, and nine-person House state delegations had Republican majorities in the 106th Congress: Louisiana and Tennessee. *Id.* at 951, 963.

Many of the larger states—California, Massachusetts, Michigan, New York, and Texas—had more Democrat than Republican Representatives, though the balance in some was close (Illinois, New Jersey, and Pennsylvania), and Florida and Ohio had Republican majorities. *Id.* at 927–82.

¹⁹ U.S. CONST. amend. XII (emphasis added).

²⁰ In the election of 1836–37, Martin Van Buren, President Andrew Jackson’s second-term Vice President, was elected President with both a popular and an electoral vote majority. SENATE MANUAL, *supra* note 6, at 1070. But Richard M. Johnson, Van Buren’s running mate, received one vote less than a majority of electors. *Id.* On February 8, 1837, the Senate elected Johnson on its first roll call vote by thirty-three to sixteen. 13 REG. DEB.

they may fail to elect both.²² But since the Twelfth Amendment eliminated Senate voting for Vice President by ballot, each Senator may openly vote for a Vice President if the electors do not choose one. Thus, there is more potential political accountability than when each state's vote for President is determined by its House delegation voting by ballot and each state itself votes by ballot.

In any case, because both the House voting for President by states and senatorial voting for Vice President are constitutional and because the Fourteenth Amendment's one-person-one-vote requirement²³ applies to the states and not to the United States, these anti-majoritarian provisions must be accepted unless and until constitutionally amended.

B. Presidential and Vice Presidential Terms

Necessary background also requires a brief discussion of presidential and vice presidential terms. The Constitution provided two-year terms for Representatives²⁴ and six-year terms for Senators,²⁵ and for the Congress to meet once each year on the first Monday in December unless otherwise provided by law.²⁶ The Constitution provides for the President and Vice President to hold "Office during the Term of four Years."²⁷

Because the Framers could not have known if or when the Constitution would be ratified, the Constitution does not provide for a starting date. On September 13, 1788, the Continental Congress, by authority purportedly conferred by the Constitutional Convention, established that the first terms would commence on the first

738–39 (1837). Then-President *pro tempore* of the Senate, William R. King of Alabama, presided over that vote. *Id.* at 739

21 In the election of 1824, John C. Calhoun won a majority of the elector votes for Vice President, even though no presidential candidate had an elector majority. SENATE MANUAL, *supra* note 6, at 1068. Vice President Calhoun was also President Andrew Jackson's first-term Vice President. *Id.* at 1069. He resigned December 28, 1832, to become a Senator. WORLD ALMANAC 2005, *supra* note 6, at 579. Thus, he did not preside as Vice President over the counting of the elector votes in 1833, and William R. King did as then-President *pro tempore* of the Senate. SENATE MANUAL, *supra* note 6, at 992; 9 REG. DEB. 1722–23 (1833).

22 In the disputed election of 1876, William A. Wheeler was elected Vice President by exactly the same number of elector votes as Rutherford B. Hayes had allegedly garnered for President. SENATE MANUAL, *supra* note 6, at 1080.

23 Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

24 U.S. CONST. art. I, § 2, cl. 1.

25 U.S. CONST. art. I, § 3, cl. 1.

26 U.S. CONST. art. I, § 4, cl. 2.

27 U.S. CONST. art. II, § 1, cl. 1.

Wednesday in March of 1789, and after the First Congress assembled, a joint committee determined that the terms of the first class of Senators and of all the Representatives commenced on that same day and must necessarily terminate on March 3, 1791.²⁸ The four-year term of the first President was also determined by the joint committee to have begun on March 4, 1789, even though President Washington did not take the oath of office until April 30, 1789.²⁹ The Act of March 1, 1789 confirmed this March 4 date.³⁰ The Twelfth Amendment gave this date constitutional status when it provided, “[a]nd if the House . . . shall not choose a President . . . before the fourth day of March next following, then the Vice President shall act as President”³¹ Consequently, from 1789 through 1933 presidential, vice presidential, and congressional terms began on March 4.

Section 1 of the Twentieth Amendment³²—which was ratified on January 23, 1933, Sections 1 and 2 thereof to take effect on the

²⁸ JEFFERSON’S MANUAL, *supra* note 11, § 6; KILLIAN & COSTELLO, *supra* note 3, at 425–26.

²⁹ JEFFERSON’S MANUAL, *supra* note 11, § 150.

³⁰ Josephson & Ross, *Repairing*, *supra* note 1, at 175 & nn.222–23; *see also* Act of March 1, 1792, ch. 8, § 12, 1 Stat. 241 (making March 4 the commencement day for the four-year terms of the President and Vice President). This Act also contains this remarkable section:

Sec. 10. *And be it further enacted*, That whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every state . . . specifying that electors of the President of the United States shall be appointed or chosen in the several states within thirty-four days preceding the first Wednesday in December then next ensuing: *Provided*, There shall be the space of two months between the date of such notification and the said first Wednesday in December

Id. at 1 Stat. 240–41. The section further provides that if the notices were sent less than two months before such Wednesday and if the presidential terms were not to expire on the third day in March thereafter, then such electors would be chosen in the next year. *Id.* The history of this special elections provision is discussed in CURRIE, FEDERALIST PERIOD, *supra* note 16, at 144–46. The Second Congress and President George Washington apparently had no doubt of their constitutional authority to provide for a special presidential election, perhaps resting on the last phrase of Article II, Section 1, clause 6, “or a President shall be elected,” and Article I, Section 8, clause 18, the Necessary and Proper Clause. *Hearings on H.R. 10268 & H.R. 11256 Before Committee on Election of the President, Vice President, and Representatives in Congress*, 68th Cong., 2d Sess. 18-19 (1925) [hereinafter *1925 House Hearings*]. For discussion of the Necessary and Proper Clause as authority for federal legislation with respect to presidential elections, see *infra* notes 221 & 225–34 and accompanying text.

³¹ U.S. CONST. amend. XII, *superseded by* U.S. CONST. amend. XX, as to the reference to the fourth day of March.

³² Section 3 of the Twentieth Amendment also provided:

If, at the time fixed for the beginning of the term of the President, the President *elect* shall have died, the Vice President *elect* shall *become* President. If a President shall not have been *chosen* before the time fixed for the beginning of his term, . . . then the Vice President *elect* shall *act* as President until a President shall

following October 15—changed the beginning of presidential and vice presidential terms from March 4 to January 20 and the beginning of congressional terms from March 4 to January 3. Section 2 also, in effect, repealed the constitutional December congressional meeting date. This reduced the opportunities for lame duck congresses by providing for a new session of Congress to begin on January 3 of every year unless Congress appoints a different day by law.

Thus, generally the first session of each new Congress now commences at noon on January 3 of the year following a general election for President and Vice President,³³ and under present law the House and Senate meet at one o'clock in the afternoon of January 6³⁴ to count the electoral votes cast for President and Vice President.

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 . . .

U.S. CONST. amend. XX, § 3 (emphases added). For a discussion of the inapplicability of this provision to the failure of the House to choose a President and/or the Senate to choose a Vice President, see *infra* note 40. Section 4 of the Twentieth Amendment provides that:

The Congress may by law provide for the case of the *death* of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the *death* of any of the persons from whom the Senate may chose a Vice President whenever the right of choice shall have devolved upon them.

U.S. CONST. amend. XX, § 4 (emphases added). Although hearings were held in 1994, no laws implementing either of these provisions have been enacted. *Presidential Succession Hearings*, *supra* note 11 *passim*.

For the possible but doubtful relevance of the Presidential Succession Act, 3 U.S.C. § 19 (2006), see *infra* note 62 and accompanying text.

The combination of sections three and four supersedes the Twelfth Amendment's "if the House of Representatives shall not choose a President . . . before the fourth day of March next following, then the Vice President shall act as President. . . ." U.S. CONST. amend. XX. Thus, the suggestion of Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, that "No . . . subsequent constitutional provisions have amended the Twelfth Amendment" is not correct. 29 FLA. ST. U. L. REV. 925, 943 n.73 (2001).

³³ U.S. CONST. amend. XX, §§ 1–2.

³⁴ 3 U.S.C. § 15 (2006). For some reason, a concurrent resolution is adopted implementing the statute. *E.g.*, S. Con. Res. 1, 97th Cong., 1st Sess. (1981). Sometimes the date is changed if January 6 is a Sunday. See *infra* note 183.

The Constitution in Article II, Section 1, clause 4, authorizes Congress to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes." U.S. CONST. art. II, § 1, cl.4; see 3 U.S.C. §§ 1, 7 (2006) (setting a November date for appointing electors and a December date to give their votes). *McPherson v. Blaker*, 146 U.S. 1, 41 (1892), held unconstitutional Michigan's legislation that purported to change this date. *Accord* *Maddox v. Bd. of State Canvassers*, 149 P.2d 112 (Mont. 1944).

The Twelfth Amendment, like clause 3 of Section 1 of Article II of the Constitution, directs that the elector votes be counted in the presence of the Senate and House but does not specify the day on which the counting shall take place. If the Congress can determine the time of choosing electors, the day electors vote, and, at the least, witness the

C. Outline of Article

Because little attention has been paid to the issues that may arise if the Senate elects a Vice President, this Article will first discuss that subject. It will discuss, among other issues, by what time, if any, the Senate may or must elect a Vice President, and what the Senate should do if a new President is not elected by the House by noon on January 20.

This Article will then discuss House election of the President. It will briefly review what happened in the House presidential elections of 1801 and 1825. (It will not discuss the election of 1877, because the procedure then followed is unlikely ever to be repeated.)³⁵ It will consider House adoption of rules of procedure or the enactment of legislation to provide such rules. If the House does not elect a President by January 20, it will discuss whether or not the House may or must continue voting for a President or, to put the same issue another way, whether or not the House may or must stop the presidential election process either before, on, or after January 20.

counting of the electors' votes, someone must have the power to determine when the votes will be counted. If not Congress, who? If an explicit constitutional grant of authority is required, Congress's power to set a date for the counting could be based on the second substantive arm of the Necessary and Proper Clause, "other Powers vested by this Constitution in the Government of the United States." U.S. CONST. art. I, § 8, cl. 18. For a discussion of the issues thus raised, see Josephson & Ross, *Repairing*, *supra* note 1, at 176 and Ross & Josephson, *Popular Vote*, *supra* note 1, at 713 *et seq.* But see Kesavan, *supra* note 7, at 1660–62 (arguing that 3 U.S.C. § 15 is unconstitutional). Nevertheless, as Chief Justice Marshall famously said in *McCulloch v. Maryland*, even before he reached the Necessary and Proper Clause issues: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) 316, 420 (1819).

We will return to these issues when we discuss Congress's power to protect the presidential election process. See *infra* notes 225–35 and accompanying text.

³⁵ For two quite different versions of the events of 1876–77, compare ROY MORRIS, JR., *FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876* (2003), with WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* (2004), and John Copeland Nagle, *How Not to Count Votes*, 104 COLUM. L. REV. 1732 (2004) (reviewing both books).

President Grant's second-term Vice President, Henry Wilson, died on November 22, 1875. WORLD ALMANAC 2005, *supra* note 6, at 579 n.6. Therefore, no Vice President presided over the 1877 counting of the elector votes, but Thomas W. Ferry, the President *pro tempore* of the Senate, did preside. SENATE MANUAL, *supra* note 6, at 993; accord 5 Cong. Rec. 1195 (Feb. 1, 1877), 1703 (Feb. 20, 1877), 1888 (col. 1) (Feb. 24, 1877); see *supra* note 10.

II. SENATE VICE PRESIDENTIAL ELECTION

The Twelfth Amendment provides with respect to Senate election of the Vice President:

[I]f no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; *a quorum for the purpose shall consist of two-thirds of the whole number of Senators*, and a majority of the whole number shall be necessary to a choice.³⁶

The Constitution originally provided that the Senate would, like the House, choose “by Ballot.” The Twelfth Amendment eliminated the ballot requirement. Hence, in 1837, the only time the Senate has elected a Vice President, it acted by roll call vote.³⁷

A. *Two Highest Numbers on the List*

What if one or more vice presidential candidates are tied for either or both of the “two highest numbers on the list”?³⁸ This Twelfth Amendment formulation does not, on its face, necessarily take account of that possibility, however unlikely. This is somewhat perplexing, because the Constitution did: “But if there should remain two *or more* who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.”³⁹ The textual issues thus raised are similar to those raised by the Twelfth Amendment’s “not exceeding three” formulation for the House choosing a President, except for not impliedly conferring any discretion on the Senate to consider only one

³⁶ U.S. CONST. amend. XII (emphasis added). Rule VI of the Senate Rules provides in subsection 1 that a “quorum shall consist of a majority of the Senators duly chosen and sworn.” SENATE MANUAL, *supra* note 6, at 5. But the Twelfth Amendment’s two-thirds of the whole number quorum requirement obviously overrides that, at least for purposes of the Senate vote for Vice President.

Subsection 2 of Senate Rule VI says, “No Senator shall absent himself from the service of the Senate without leave.” SENATE MANUAL, *supra* note 6, at 5. Subsection 4 authorizes the Sergeant at Arms to request, “when necessary, to compel the attendance of the absent Senators.” *Id.*; see also S. Doc. No. 101-25 (1992), reprinted in RIDDICK & FRUMIN, RIDDICK’S SENATE PROCEDURE, *supra* note 10, at 275–81 (discussing Senate precedents).

³⁷ See *supra* note 20. This precedent also supports Michael J. Glennon’s argument that, unlike the House presidential election proceedings in 1801 and 1825, which were held in executive session, see *infra* notes 92 and 93 and accompanying text, the Senate vice presidential election proceedings should be open. MICHAEL J. GLENNON, WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION 57 (1992). Senate Rule XXI does provide for sessions with closed doors. SENATE MANUAL, *supra* note 6, at 20; see RIDDICK & FRUMIN, RIDDICK’S SENATE PROCEDURE, *supra* note 10, at 275–81.

³⁸ U.S. CONST. amend. XII.

³⁹ U.S. CONST. art. II, § 1, cl. 3 (emphasis added).

candidate. Those issues will be discussed later in this Article.⁴⁰ The Senate Rules and other contents of the Senate Manual say nothing about this issue. Arguably, because the clause refers to “numbers” not persons, if more than one candidate ties for the second-highest position, the Senate’s choice is not limited to two persons.

B. By When Must the Senate Vote?

Unlike the corresponding provisions for the House election of the President, neither the Constitution nor the Twelfth Amendment provide that the Senate must vote immediately after the President of the Senate declares that the electors have failed to elect a Vice President. Why not? The legislative history of the Twelfth Amendment does not shed any light on the answer to this question, and neither of the two most recent historians of the Amendment mention the issue.⁴¹

The 1803 Senate, whose version of the Amendment was ultimately adopted,⁴² may have foreseen prolonged delays in House presidential elections in light of the 1801 experience, which required thirty-six ballots. If so, the Senate’s apparent wish to await that outcome is understandable if the Senate majority is to have the opportunity of choosing (or not choosing) a Vice President compatible with the President chosen or, if no President is chosen by the House, of choosing (or not choosing) the Vice President on the ticket that received the most popular votes, or the one the Senate majority decides is most qualified to act as or to be President.⁴³

40 See *infra* Parts III.B.2.c & V.E.2. What if one of the two vice presidential candidates lacks the constitutional qualifications or has withdrawn, died, or become incompetent? The House Report on what became the Twentieth Amendment expressed the opinion that the Senate, *like the House*, could not vote for a dead *person* but did not express an opinion as to any of the other issues. H.R. REP. No. 72-345, at 6, 7 (1932). See also generally Ross & Josephson, *Popular Vote*, *supra* note 1, *passim* (discussing whether or not Congress could refuse to count *elector* votes for a dead candidate). Arguably, the same considerations apply to Senators’ votes for a deceased vice presidential candidate. See *infra* notes 142 and 143 and accompanying text.

41 DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1829*, at 39–54 (2001); TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804* (1994).

42 KURODA, *supra* note 41, at chs. 13 & 14.

43 CURRIE, *supra* note 41, at 49–51. In an October 29, 1924 radio address, the then-Clerk of the House of Representatives, William Tyler Page, said:

One of the purposes of the twelfth amendment in conferring upon the Senate the power to elect a Vice President was to avoid, if possible, an interregnum in Government, which would certainly occur, however brief it might be, if the Senate postponed the election of a Vice President *until* the House *failed* to elect a President.

As we have seen, under Section 1 of the Twentieth Amendment the incumbent President's and Vice President's terms end at noon on January 20. If the House does not elect a new President by then, will the Senate elect a Vice President before noon on January 20? It should, so that the clause in § 3 of the Twentieth Amendment, "[i]f a President shall not have been chosen before the time fixed for the beginning of his term . . . then the Vice President elect shall act as President until a President shall have qualified,"⁴⁴ will be meaningful.

If the Senate has not elected a Vice President, does § 3 of the Twentieth Amendment apply? Probably not. Section 3 provides, in relevant part:

[A]nd 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*.⁴⁵

"Qualified" describes the presidential requirements of Article II, Section 1, clause 5: Natural-born citizen, thirty-five years old or older, fourteen years a resident, plus presumably not disabled and having taken the oath prescribed in Article II, Section 1, clause 8.⁴⁶ "[E]lect"

1925 *House Hearings*, *supra* note 30, at 11–12 (emphasis added); *cf.* Laurence H. Tribe & Thomas M. Rollins, *Deadlock: What Happens if Nobody Wins*, ATLANTIC MONTHLY, Oct. 1980, at 49–50, 60–61 (digital ed. Part I at 1 & Part II at 6), available at <http://www.theatlantic.com/issues/80oct/deadlock.htm> (speculating that the Senate would elect Walter Mondale as Acting President if the 1980 presidential election had been thrown into the House).

⁴⁴ U.S. CONST. amend. XX, § 3.

⁴⁵ *Id.* (emphasis added).

⁴⁶ JEFFERSON'S MANUAL, *supra* note 11, § 154; KILLIAN & COSTELLO, *supra* note 3, at 433–34; KURODA, *supra* note 42, at 79–80; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 757–59 (1987) (1833); Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 619 (1999); *cf.* Kesavan, *supra* note 1, at 126–27. The qualifications for Vice President are the same as those for President by virtue of the last sentence of the Twelfth Amendment.

The state cases supporting this construction of "qualified" are exemplified by *Toy v. Voelker*, 262 N.W. 881, 885–86 (Mich. 1935).

To these qualifications should be added the Twenty-second Amendment, prohibiting a President or Vice President from serving more than two terms, U.S. CONST. amend. XXII, § 1, and § 3 of the Fourteenth Amendment, barring anyone who has "engaged in insurrection or rebellion . . . or given aid or comfort to the enemies . . ." *Id.* at amend. XIV, § 3. But see, in the case of the Twenty-second Amendment, Peabody & Gant, *supra*, *passim* (arguing that the Twenty-second Amendment only applies to election, not service).

The Twelfth Amendment requirement that no elector can vote for a President and Vice President who are inhabitants of the same state does not itself appear to have been construed. U.S. CONST. amend. XII. But the use of "inhabitant" does not only relate to presidential and vice presidential qualifications. The Constitution also provides that a

means that the electors have chosen a President or Vice President.⁴⁷ Section 3 does not cover the situation when there is no President elect or Vice President elect.

The legislative history supports the inapplicability of this aspect of § 3 of the Twentieth Amendment. The Senate resolution provided

Senator and/or Representative must, “when elected, be an Inhabitant of that State for which he shall be chosen.” *Id.* at art. I, § 3, cl. 3; *id.* at art. I, § 2, cl. 2 (the Representative formulation is “in which,” not “for which”). The Constitutional Convention history is discussed in *Schaefer v. Townsend*, 215 F.3d 1031, 1036–37 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

This discussion was relied on in *Jones v. Bush*, which rejected a claim that the Texas electors should be enjoined from voting because both presidential candidate Governor George W. Bush and Vice Presidential candidate Richard B. Cheney were inhabitants of Texas. 122 F. Supp. 2d 713 (N.D. Tex. 2000), *aff’d without opinion*, 244 F.3d 134 (5th Cir. 2000), *cert. denied*, 531 U.S. 1062 (2001). Sanford Levinson—one of the counsel for plaintiffs in *Jones v. Bush*—and Ernest A. Young asked, “Does the Habitation Clause serve any worthwhile values?” Levinson & Young, *supra* note 32, at 950–54; *see also* James C. Ho, *Much Ado About Nothing: Dick Cheney and the Twelfth Amendment*, 5 TEX. REV. L. & POL. 227 (2000).

For a contrarian argument that the states may be able to add to the constitutional qualifications of Senators and Representatives—notwithstanding *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (holding that states could not impose term limits for members of Congress)—see John C. Eastman, *Open to Merit of Every Description? An Historical Assessment of the Constitution’s Qualifications Clauses*, 73 DENV. U. L. REV. 89 (1995). However, he does not seem to understand that his opinions, if accepted, would also imply that the states could add to the constitutional qualifications for President and Vice President, which seems highly unlikely.

A United States District Court ruled that Senator John McCain, born in the then-Panama Canal Zone, is a “natural born Citizen.” *Robinson v. Bowen*, 567 F. Supp. 2d 1144 (N.D. Cal. 2008). The history supporting this interpretation is in KILLIAN & COSTELLO, *supra* note 2. A similar suit was dismissed for lack of standing. *Hollander v. McCain*, 566 F. Supp. 2d 63 (D.N.H. 2008); *see also* Ted J. Chiappari & Angelo A. Paparelli, *Natural-Born Citizenship: McCain OK for Presidency?*, N.Y. L.J., Aug. 22, 2008, at 3.

In *Berg v. Obama*, a United States District Court denied plaintiff’s motion for a temporary restraining order in an action alleging that then-Senator Barack Obama had lost his United States citizenship, and on October 24, 2008, the Court dismissed the complaint, largely for lack of standing. 574 F. Supp. 2d 509 (E.D. Pa. 2008); *see also* Ted J. Chiappari & Angelo A. Paparelli, *President-Elect Obama, Dual Citizenship and the Constitution*, N.Y. L.J., Dec. 30, 2008, at 3.

Minor party candidates who were under thirty-five years of age have been held in unreported cases to be ineligible to be on presidential ballots. *See, e.g., McCain Wins Ballot Access Lawsuit*, BALLOT ACCESS NEWS (Richard Winger, S.F., Cal), Oct. 1, 2008, <http://www.ballot-access.org/2008/100108.html#5> (describing two such unreported cases, *Jeness v. Brown*, (D. Ohio 1972) and *Cleaver v. Jordan*, (Cal. 1968), *cert. denied*, 393 U.S. 810 (1968)).

⁴⁷ H.R. REP. NO. 72-345, at 6 (1932) (Committee on Election of President, Vice President, or Representatives in Congress on S.J. Res. 14 which, as amended, became the Twentieth Amendment); *Presidential Succession Hearings*, *supra* note 11, at 7, 9 (testimony of Ass’t Att’y Gen. Walter Dellinger); *id.* at 11 (statement of Ass’t Att’y Gen. Walter Dellinger); *id.* at 41 (testimony of Akhil Reed Amar); Josephson & Ross, *Repairing*, *supra* note 1, at 189 n.329.

that whenever the right to choose a President has devolved upon the House, and the House has not chosen a President before the time fixed for the beginning of his term, then the Vice President shall act as President, “as in the case of the death or other constitutional disability of the President.” But under the corresponding provision of the House amendment (the first clause of the second sentence of § 3), a Vice President only acts as President, not only when the House has failed to choose a President before the time fixed for the beginning of his term, but also in any case where, at that time, the President has failed to qualify for any reason. The conference agreement retained the substance of the House provision with changes in phraseology.⁴⁸

The second sentence of § 3 of the Senate resolution gave Congress the power by law to declare what officer shall act as President in a case where the election of the President has devolved upon the House and that of the Vice President has devolved upon the Senate, and neither the President nor the Vice President has been chosen before the time fixed for the beginning of their terms. The officer who acts as President will act only until the House has chosen a President or the Senate has chosen a Vice President. But the corresponding provision of the House amendment (the last clause of the second sentence of § 3) provided only for the case in which neither the President *elect* nor the Vice President *elect* have, for any reason, failed to qualify at the time fixed for beginning their terms. It then gives Congress the power by law to declare who shall act as President, or to provide the manner in which a qualified person shall be selected. The person who acts as President is to act only until a President or a Vice President has qualified. If, in such case, the Vice President *elect* should have qualified before a President has qualified, then, although he would act in place of the person acting under the law of Congress, he would do so only until the House has chosen a President and he has qualified, or until the President *elect* chosen by the electoral college has qualified. The conference agreement retained the substance of the House provision with changes in phraseology. The Conference Report also seems to assume that the Senate will not elect a Vice President until a time proximate to the expiration of the incumbent President’s and Vice President’s terms, which as we have seen should, but may not necessarily, be the case.⁴⁹

48 H.R. REP. NO. 72-633, 3-4 (1932) (Conf. Rep.), reprinted in 75 CONG. REC. 5026-27 (daily ed. Mar. 1, 1932).

49 *Id.* at 5027, para. 4 (statement of the House Managers).

C. *Absent Senators*

Under Rule VI of the Senate Rules, no Senator may be absent without leave, and the Sergeant at Arms may be directed to compel the attendance of absent Senators.⁵⁰ Under Rule XII, Senators may not decline to vote unless excused by the Senate.⁵¹

D. *Cloture*

The only current procedure for closing debate in the Senate is the cumbersome one set forth in Rule XXII.2,⁵² under which, for example, three-fifths of Senators must vote to close debate. Rule XXII.2 applies to “any measure, motion, [or] other matter pending before the Senate.”⁵³ Although the public reaction to any attempt to delay the Senate’s choice of Vice President would undoubtedly be extraordinarily negative, the possibility of filibuster exits. Even though the Senate does not constitutionally have to choose a Vice President immediately, it should amend its rules to ensure that should it ever have to do so, it can do so expeditiously, especially because under Senate Rule VIII all motions to change its standing rules are debatable,⁵⁴ and motions to change the rules are also regulated by Rule V.⁵⁵

E. *The Vice President as President of the Senate*

We have earlier discussed the issues that may be raised if the Vice President as the constitutional President of the Senate presides over the counting of elector votes.⁵⁶ Similar issues could be raised with respect to the Vice President as President of the Senate presiding over its election of a Vice President, especially if he were a candidate to succeed himself. Nothing in the Senate Rules would require the Vice President to recuse himself from presiding, though were he a candi-

50 SENATE MANUAL, *supra* note 6, at 5; see RIDDICK & FRUMIN, RIDDICK’S SENATE PROCEDURE, *supra* note 10, at 214–24 (detailing the Senate’s right to compel attendance).

51 SENATE MANUAL, *supra* note 6, at 10; see RIDDICK & FRUMIN, RIDDICK’S SENATE PROCEDURE, *supra* note 10, at 968 (describing Senate “pairing” as an opportunity for absent Senators to express their positions).

52 SENATE MANUAL, *supra* note 6, at 20–22; see RIDDICK & FRUMIN, RIDDICK’S SENATE PROCEDURE, *supra* note 10, at 282–334 (detailing Senate cloture procedure).

53 SENATE MANUAL, *supra* note 6, at 20–22.

54 SENATE MANUAL, *supra* note 6, at 8.

55 *Id.* at 5. In 1992, Senator David Pryor expressed concern at the possibility of a filibuster with respect to any Senate vice presidential elections. 138 CONG. REC. 11872 (daily ed. May 20, 1992).

56 See *supra* notes 6 and 7 and accompanying text.

date he might well be well advised to do so. The Senate's rules on excusing from voting⁵⁷ and conflict of interest⁵⁸ do not apply to the Vice President, except in the latter case to the extent that she or he is the supervisor of assistants who are on the Senate payroll.

Of course, in those situations when the vice presidency was vacant, that officer would not be available to break any tied Senate vote for Vice President.⁵⁹ Nor would the Vice President be available "when he shall exercise the Office of President."⁶⁰

F. Tie Senate Vote

If the Senate is equally divided, can the incumbent Vice President cast the deciding vote in a Senate election of a Vice President? The answer should be affirmative, because Article I, Section 3, clause 4 of the Constitution appears to admit of no exceptions. However, Lawrence D. Longley and Neal R. Pierce argue that the plain meaning of the Twelfth Amendment's language, "a majority of the whole number [of Senators] shall be necessary to a choice," precludes the possibility of the Vice President breaking a tie.⁶¹

But this leaves open the possibility that in such a case there would be no way to elect a new Vice President. There is doubt as to whether the Presidential Succession Act, the only possible alternative in that case, is applicable to such a failure to elect, as contrasted with the absence of an elected one.⁶²

57 SENATE MANUAL, *supra* note 6, at 10 § 12.2 (Rule XII.2).

58 *Id.* at 67–71 (Rule XXXVII).

59 "The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided." U.S. CONST. art. I, § 3, cl. 4.

60 U.S. CONST. art. I, § 3, cl. 5.

61 LAWRENCE D. LONGLEY & NEAL R. PEIRCE, THE ELECTORAL COLLEGE PRIMER 2000, at 13 (Yale Univ. Press 1999) (1996). Professor Robert W. Bennett agrees. BENNETT, *supra* note 1, at 20 nn.39–40 & 94; E-mail from Robert Bennett, Professor, to William Josephson (Apr. 10, 2008, 12:59 EST) (on file with author).

Kesavan also argues against the Vice President having such a vote because she or he is not a Senator. She or he could be conflicted, and the vice presidential election is not legislation. Kesavan, *supra* note 7, at 1710 n.246. However, Kesavan appears to be unaware of the Senate's precedents for vice presidential voting. See *infra* note 64 and accompanying text.

62 On its face, 3 U.S.C. § 19 was meant to provide for the removal, death, resignation, or inability of either or both a duly elected and qualified President and Vice President. This is consistent with Article II, Section 1, clause 6 of the Constitution, as well as the Act of March 1792, ch. 8, § 9, 1 Stat. 240 (1792), and the Succession Act of 1866. 3 U.S.C. § 19 (2006). The Clerk of the House of Representatives also addressed this concern in 1925. 1925 House Hearings, *supra* note 30, at 16–18 (Radio Address of William Tyler Page).

The Act provides for the succession to the Presidency of, in order, the Speaker of the House, the President *pro tempore* of the Senate, the Secretary of State, and then other

Because public policy abhors a vacancy in office,⁶³ this issue should be resolved in favor of the Vice President voting, which the majority of analogous Senate precedents support.⁶⁴ The Vice President is, after all, the constitutional President of the Senate.

cabinet members in order of the creation of each department. 3 U.S.C. § 19(a)(1), (b), (d)(1) (2006). Very substantial doubt has been raised as to the constitutionality of this statute, insofar as it provides for the succession of the House Speaker or of the President *pro tempore* of the Senate. Akhil Reed Amar & Vickram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995); Scott E. Gant & Bruce G. Peabody, *Musings on a Constitutional Mystery: Missing Presidents and "Headless Monsters"?*, 14 CONST. COMMENT. 83, 87 (1997); Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345 (2001–02). *But see* John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141 (1995); *cf.* Thomas H. Neale, *Election of the President and Vice President by Congress: Contingent Election*, CRS [Cong. Res. Service] *Report for Congress* 5-6 (Order Code RS20300 Jan. 17, 2001). Nevertheless, the doubts the Amar brothers have raised were also raised in the congressional debates on the 1792 Act, CURRIE, FEDERALIST PERIOD, *supra* note 16, at 139–44, and thereafter. 1925 *House Hearings*, *supra* note 30, at 19–20.

To some extent, 3 U.S.C. § 19 has been displaced by the Twenty-fifth Amendment, which provides in Section 1 that “[i]n case of the removal of the President from office or of his death or resignation, the Vice President shall become President.” U.S. CONST. amend. XXV, § 2. Article II, Section 1, clause 6 of the Constitution had said only that “the Powers and Duties of the said Office [of President] . . . shall Devolve on the Vice President.” However, in 1841 Vice President Tyler took the position that he was President, and this precedent was thereafter followed and has now been confirmed by the Twenty-fifth Amendment. KILLIAN & COSTELLO, *supra* note 3, at 435. Those editors’ suggestion that the Tyler precedent was supported by the last phrase of the clause, “or a President shall be elected,” seems incorrect, because the phrase relates only to the absence of “both” the President and Vice President. A better, but not completely compelling, argument could be based on Article I, Section 3, clause 5, which makes it clear that a Vice President, exercising the Office of President, cannot also continue to be President of the Senate, presumably because of separation of powers policies.

Section 2 of the Twenty-fifth Amendment provides that when there is a vacancy in the vice presidency, the President shall nominate a Vice President. U.S. CONST. amend. XXV, § 1.

Sections 1 and 2 together make it unlikely, but not impossible, that both offices could be simultaneously vacant. *Id.* §§ 1, 2.

In any case, the Succession Act does not clearly apply to a failure by the House to elect a President or the Senate a Vice President by the time the new terms of those officers begin. *See supra* note 23; CURRIE, FEDERALIST PERIOD, *supra* note 7, at 294 & n.474. *But cf.* BENNETT, *supra* note 1, at 81. Neither does the Twenty-fifth Amendment. *See infra* notes 169–73 and accompanying text.

⁶³ 63C AM. JUR. 2D *Public Officers and Employees* §§ 121, 149–50 (1997). George Ticknor Curtis agrees:

The principal office of the executive department was thus provided for; but the ultimate choice of the Vice President remained to be regulated. . . . In the first place, it was apparent that the executive would be a branch of the government that ought never to be vacant.

2 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 395 (1863).

⁶⁴ JEFFERSON’S MANUAL, *supra* note 11, § 36 (cmt.) states:

G. Which Vice President?

We should again remember that until the Twentieth Amendment was adopted in early 1933, the terms of the new President, Vice Presi-

The right of the Vice President to vote has been construed to extend to questions relating to the organization of the Senate (V, 5975), as the election of officers of the Senate (V, 5972–5974), or a decision on the title of a claimant to a seat (V, 5976, 5977).

The citations are to ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* (1907) [hereinafter *HINDS' PRECEDENTS*]; *JEFFERSON'S MANUAL*, *supra* note 11, at 17.

In recognition of the fact that after noon on January 20, 2001, Vice President Richard B. Cheney could have broken 50–50 tie votes for the organization of the Senate, 147 CONG. REC. 532–42, 548 (daily ed. Jan. 22, 2001), the Democratic and Republican Leaders of the Senate negotiated and agreed upon, and the Senate adopted, Senate Resolution 8, 107th Cong., 1st Sess. (2001). Accordingly, the senior Democratic Senator and the Democratic Leader acted as President *pro tempore* and Majority Leader, respectively, from January 3, 2001, until noon on January 20, 2001, and thereafter the senior Republican Senator and the Republican Leader acted as President *pro tempore* and Majority Leader. Shortly thereafter, however, Senator Jim Jeffords decided to become an independent and to vote with Democratic Party Senators to reorganize the Senate. See Wasserman, *supra* note 62, at 404 n.251.

According to the former Senate Historian, Richard A. Baker, on December 14, 1829, Vice President John C. Calhoun broke a tie vote for Senate Chaplain. Memorandum from Richard A. Baker to William Josephson (July 25, 2002) (on file with author). On January 13 and 25, 1832, Vice President Calhoun voted against the nomination of Martin Van Buren as Minister to Great Britain. GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 234–35 (1960). On November 28, 1877, Vice President William H. Wheeler broke a tie on a motion to consider a Senate committee report with respect to a contested election. *Id.* at 236–37.

Vice President Millard Fillmore also broke a tie for Senate Chaplain on January 9, 1850. *Id.* at 236; see United States Senate, Senate Chaplain, http://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm (last visited Feb. 28, 2008).

On July 18, 1789, Vice President John Adams cast his first Senate vote to break a tie in favor of the President's power to remove without consulting the Senate an officer to whose appointment the Senate had given its advice and consent. Henry Barrett Learned, *Casting Votes of the Vice-Presidents, 1789–1915*, 20 AM. HIST. REV. 571, 574 (1915).

The Senate debate on the Twelfth Amendment apparently assumed that if there was a Vice President, he would break any tie. 13 ANNALS OF CONG. 106 (1803); CURRIE, *supra* note 41, at 52.

James C. Ho, Sanford Levinson, Ernest A. Young, and William P. Marshall each support this opinion. Ho, *supra* note 46, at 239 n.47; Levinson & Young, *supra* note 32, at 934 n.37 (option (1) of three options); William P. Marshall, *The Supreme Court*, Bush v. Gore, and *Rough Justice*, 29 FLA. ST. U. L. REV. 787, 798 & n.61 (2001). Michael J. Glennon also seems to support this opinion in *Nine Ways to Avoid a Train Wreck: How Title 3 Should Be Changed*, *supra* note 7, at 1188–89. As Hamilton observed in the first of the two justifications he offered for the vice presidency:

One is that to secure *at all times* the possibility of a definitive resolution of the body [the Senate], it is necessary that the President should have only a casting vote.

THE FEDERALIST NO. 68, at 413 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). See generally RIDDICK & FRUMIN, *RIDDICK'S SENATE PROCEDURE*, *supra* note 10, at 1124–26.

dent, and Congress began on March 4, and if the electors did not elect a President or Vice President, the Lame Duck House and Senate, respectively, would do so.⁶⁵ Thus, any Senate tie vote would have been broken by the then-incumbent Vice President.

She or he might or might not have been of the same political party as the candidates for President and Vice President who received the most popular votes, just as a majority of the Senate (and of the state delegations in the House) might or might not have been. The Twentieth Amendment ensures that, absent a legislative change,⁶⁶ the incoming Congress will elect the President or Vice President or both. But because of the constitutional delay between its convening on January 3 and the incoming President's and Vice President's terms commencing at noon on January 20, the incumbent Vice President (who could be the continuing Vice President or the incoming President) might be called upon to break any Senate tie votes for Vice President. Moreover, if only because roughly two-thirds of the Senators will not have been reelected at the same time as the presidential election, those two-thirds of Senators may not reflect the votes of the most current presidential electorate. These possibilities make it more likely that the Senate will choose a new Vice President who was not the popular vote winner, as the House so chose a President in 1825,⁶⁷ or who was not of the same political party as the President elected by the electors or by the House.⁶⁸

⁶⁵ Josephson & Ross, *Repairing*, *supra* note 1, at 175.

⁶⁶ *Id.* at 176–77.

⁶⁷ SENATE MANUAL, *supra* note 6, at 1068.

⁶⁸ The latter possibility was foreseen by Robert M. Hardaway in THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM, *supra* note 11, at 62, and by Robert W. Bennett in BENNETT, *supra* note 1, at 72. All of these possibilities were foreseen by Michael J. Glennon, GLENNON, *supra* note 37, at 56–57. They were also foreseen during the Twelfth Amendment debates, during which at least one Representative argued that it was better to make the wrong person President than to not have one. CURRIE, *supra* note 41, at 51 n.98.

III. HOUSE PRESIDENTIAL ELECTION⁶⁹A. *Previous House Presidential Elections*

A President has been elected by the House twice since the adoption of the Constitution, once in 1801 and again in 1825.⁷⁰

1. *1801 House Election*

The 1801 election was governed by Article II, Section 1 of the Constitution, before the adoptions of the Twelfth, Twentieth, Twenty-third, and Twenty-fifth Amendments discussed above. Therefore, it is not a controlling precedent for the future. Nevertheless, some of what happened is instructive.

Prior to the adoption of the Twelfth Amendment in 1804, each presidential elector cast two votes, neither of which was designated for President or Vice President. The candidate receiving the highest number of votes, if that number constituted a majority of the total number of electors, was elected President; the candidate receiving the second highest number of votes was elected Vice President. If no candidate received a majority, the House elected a President from among the five candidates with the highest number of votes, with

⁶⁹ American historians do not seem to have paid much attention to the variety and difficulty of the issues raised by House election of the President. For example, a standard history of the House barely mentions the subject, and does not discuss either the procedures or the issues raised by presidential voting by House state delegations. See GEORGE B. GALLOWAY, *THE HISTORY OF THE HOUSE OF REPRESENTATIVES* 7, 285 (Stanley Wise ed., 2d rev. ed. 1976) (1961); see generally ROBERT V. REMINI, *THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES* (2006); CHARLES G. ROSE, *HISTORY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 1789–94*, H.R. DOC. NO. 103-324, 103d Cong., 2d Sess. (1994).

Under the original constitutional arrangement in which electors did not vote separately for President and Vice President, “It was rather expected that in the great majority of cases—‘nineteen times in twenty,’ one of the delegates said—there would be several candidates and that the selection from those candidates would fall to the . . . House of Representatives . . .” MAX FARRAND, *THE FATHERS OF THE CONSTITUTION: A CHRONICLE OF THE ESTABLISHMENT OF THE UNION* 137 (1921).

House presidential election has probably attracted more criticism than any other aspect of the Electoral College system. But as Professor Wechsler observed: “[S]ince the House vote by states on failure of an electoral majority is probably unchangeable alone, that feature of the system will probably remain as well, despite the weight and historicity of the objections to it.” Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 557 (1954).

⁷⁰ In 1877, technically, the electors elected the President and the Vice President. As I have said, 1877 should not be regarded as precedential. See *supra* notes 22 and 35 and accompanying text; Josephson & Ross, *Repairing, supra* note 1, at 156–57.

each state represented in the House casting one vote by ballot. The votes of a majority of the total number of states were necessary for election of a President.

In 1800, Thomas Jefferson and Aaron Burr tied for the highest number of elector votes.⁷¹ This triggered Article II, Section 1, clause 3 of the Constitution, “if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President.”⁷² For these purposes, a majority is defined as “of the whole Number of Electors appointed.”⁷³

Article I, Section 4, clause 2 of the Constitution then provided that the Congress should assemble at least once in every year on the first Monday in December unless Congress appointed a different day by law. By law, the electors’ votes were then to be counted on the second Wednesday in February.⁷⁴

In the House, Representatives belonging to the Federalist Party, which opposed Jefferson’s election, sought to embarrass him by voting for Burr, even though he had been the Republican “vice presidential” candidate.⁷⁵ Sixteen states were represented in the House, so a majority of nine states’ votes was required for election.

Consistent with the constitutional command that the “House shall immediately choose,” through six days and thirty-five consecutive secret ballots the House vote was eight states for Jefferson and six states for Burr; two states, Delaware and South Carolina, cast blank ballots; and two states, Maryland and Vermont, were “divided” because each delegation was deadlocked.⁷⁶ On the thirty-sixth ballot several Maryland Representatives and one Vermont Representative abstained, as

71 The electoral votes were 73 out of 138 for each Jefferson and Burr, 65 for Adams, 64 for Charles C. Pinkney, and one for John Jay. SENATE MANUAL, *supra* note 6, at 1064; ELECTION OF THE PRESIDENT OF THE UNITED STATES BY THE HOUSE OF REPRESENTATIVES, S. Doc. No. 227, 68th Cong., 2d Sess. 31, 33, 35 (1925) [hereinafter *1925 Senate Document*]; 10 ANNALS OF CONG. 744 (1801).

72 U.S. CONST. art. II, § 1, cl. 3.

73 *Id.*

74 Act of Mar. 1, 1792, ch. 8, § 5, 1 Stat. 240.

75 CURRIE, FEDERALIST PERIOD, *supra* note 16, at 292–93. That Lame Duck House of Representatives contained 106 members, of whom 58 were Federalists and 48 were Republicans. All were present but two, one who had died and one who was ill. *1925 Senate Document*, *supra* note 71, at 31; see also Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 618–20 (2004).

76 CURRIE, FEDERALIST PERIOD, *supra* note 16, at 293; 5 HINDS’ PRECEDENTS, *supra* note 64, § 6008 n.4. (1907).

did the Representative from Delaware.⁷⁷ Consequently, Jefferson became President, and Burr Vice President.⁷⁸

2. 1825 House Election

The Twelfth Amendment was proposed by Congress on December 9, 1803 and proclaimed by the Secretary of State on September 25, 1804, having been ratified by the legislatures of three-quarters of the states by July 27, 1804.⁷⁹ The Twelfth Amendment made two major changes affecting House election of the President. It required the electors to ballot separately for President and Vice President, and it reduced the number of candidates from whom the House would choose a President from the top five to “not exceeding three.”⁸⁰ The

⁷⁷ CURRIE, *FEDERALIST PERIOD*, *supra* note 16, at 293. *1925 Senate Document*, *supra* note 71, at 36–37, attributes the breaking of the deadlock only to Maryland. The current House historian states that the South Carolina House delegation also chose not to vote. REMINI, *supra* note 69, at 72.

Jill Lepore, in *Party Time: Smear Tactics, Skulduggery, and the Début of American Democracy*, *NEW YORKER*, Sept. 17, 2007, at 94, reviews EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN* (2008), a history of the 1800 presidential election. According to Professor Lepore, Phil Lampi estimates that “around a hundred and fifty-one thousand Americans cast votes for Republicans [in that election], compared with a hundred and thirty-nine thousand for Federalists. To the extent that this serves as a proxy for a popular vote, we now know that Jefferson won.” Lepore, *supra*, at 97. The American Antiquarian Society in Worcester, Massachusetts has been digitizing Mr. Lampi’s work, and “A New Nation Votes: American Election Returns, 1787–1825” will be made available online. *Id.*

⁷⁸ Article II, Section 1, clause 3 of the Constitution provided, “In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.” Under the first sentence, Burr, not chosen President, would be Vice President. If (1) Jefferson and Burr had tied for greatest number of votes, but neither had had an absolute majority; (2) five candidates had been before the House; and (3) the House had chosen Adams, Pinkney, or Jay as President, then neither Jefferson nor Burr would automatically have become Vice President. Under the second sentence quoted above, the Vice President would have been chosen from between them by the Senate by ballot.

⁷⁹ KILLIAN & COSTELLO, *supra* note 3, at 28 n.4. The Twelfth Amendment’s provision that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States” also filled a small but important constitutional gap. Article II, Section 1, clause 5 provided only for the eligibility of the President, but because prior to the Twelfth Amendment the electors were only voting for President, this was not an oversight.

⁸⁰ Thus introducing an unnecessary ambiguity, futilely noted along with other ambiguities in House debate at the time. See KURODA, *supra* note 41, at 147–48. The House did not attempt to fix the Senate version, at least in part because that would have meant further Senate action, risking inaction. See 13 *ANNALS OF CONG.* 679 (1803); KURODA, *supra* note 41, at 145.

Twelfth Amendment thus governed the 1825 House presidential and 1837 Senate vice presidential elections.

In 1824, four major presidential candidates came from the party that had dominated national politics since Jefferson's election in 1801. No candidate received an absolute majority of the 261 elector votes, and there were no tied elector votes.⁸¹ On the House's first secret ballot in 1825, enough Representatives who were supporters of Henry Clay (who was not a candidate because he had the fourth (and last) highest number of elector votes (thirty-seven))⁸² voted for the candidate with the second-highest number of the elector votes, John Quincy Adams, who had eighty-four elector votes, and Adams was chosen President.⁸³

B. House Presidential Election Precedents and Issues

Four possible sources of law or rule govern House presidential elections: (1) the Constitution; (2) statutes;⁸⁴ (3) the rules of the House; and (4) precedents of the House. These precedents interpret and apply in much the same way that judicial decisions interpret and apply the Constitution, statutes, and regulations.⁸⁵

Article I, Section 5, clause 2 of the Constitution provides, "Each House may determine the Rules of its Proceedings"⁸⁶ One of the

81 The candidate with the highest number of elector votes for President was Andrew Jackson with ninety-nine. SENATE MANUAL, *supra* note 6, at 1068.

82 *Id.*

83 *Id.* John C. Calhoun became Vice President, because he had more than an absolute majority, 182, of elector votes for that office. *Id.* Adams appointed Clay his Secretary of State. Josephson & Ross, *Repairing*, *supra* note 1, at 158.

84 However, no statutes appear to apply.

85 1 HINDS' PRECEDENTS, *supra* note 64, §§ 187, 210; 5 HINDS' PRECEDENTS, *supra* note 64, §§ 6002, 6743-65; DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, §§ 10.1, 10.2, 10.3 (1976) [hereinafter DESCHLER'S PRECEDENTS]. Before the House so acts, it is operating under the Constitution, statutes and the "common law" of parliamentary procedure. JEFFERSON'S MANUAL, *supra* note 11, § 60; 5 HINDS' PRECEDENTS, *supra* note 64, §§ 6758-60; 8 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 3384 (1936) [hereinafter CANNON'S PRECEDENTS].

In matters requiring concurrent actions, the House and Senate had jointly adopted rules until 1876. JEFFERSON'S MANUAL, *supra* note 11, § 61.

No House rule or precedent can bind a subsequent House. See JEFFERSON'S MANUAL, *supra* note 11, § 59. Each newly elected House of Representatives adopts its own rules. *Id.* § 388.

As a continuing body, because two-thirds of Senators serve through each Congress, the Senate's rules remain in effect unless and until changed. Rule V.2, Standing Rules of the Senate, in SENATE MANUAL, *supra* note 6, at 5; McGrain v. Daugherty, 273 U.S. 135, 181-82 (1927).

86 U.S. CONST. art. I, § 5, cl. 2.

first acts of each new House is to adopt a resolution establishing rules for that House, and that resolution generally incorporates by reference all applicable provisions which constituted the Rules of the prior House.⁸⁷

1. *1801 and 1825 House Presidential Election Rules*

The Rules of the House do not contain any provisions for electing a President. In both 1801 and 1825, the Lame Duck Houses adopted rules for each of those presidential elections. It is clear from the House debates concerning the 1825 Rules that they were not expected to bind future Houses faced with the task of choosing a President.⁸⁸ They are, nevertheless, relevant, because tradition and precedent are very important to the House in establishing its procedures.⁸⁹

The 1801 Rules and 1825 Rules were drafted and reported to the House by committees appointed by the respective Speakers.⁹⁰ At that time the Committee on Rules was a select committee authorized at the beginning of each House to report a system of rules for that House.⁹¹

The ad hoc rules adopted by the House to govern its presidential election procedures in 1801 and 1825 were substantially similar. In 1801, doors of the House were closed during balloting except against the officers of the House,⁹² but in 1825 Senators were allowed.⁹³ The

⁸⁷ *E.g.*, H.R. Res. 5, 95th Cong., 1st Sess. (1977).

⁸⁸ 1 REG. DEB. 445–46 (1825). Thus, it is not clear to what weight the 1801 and 1825 Rules would be entitled, even if they were part of general parliamentary law, which they probably are not. Longley and Peirce assert that the “rules . . . adopted by the House of Representatives on February 7, 1825, for the election of a president . . . following the presidential election of 1824 . . . would be *the governing* precedent if the House should again be called upon to elect a president, *though the House might alter the rules at any time.*” LONGLEY & PEIRCE, *supra* note 61, at 206 (emphasis added). Their apparent implication that the 1825 Rules would govern unless the House acted otherwise seems inconsistent with the legislative history cited immediately above and the “common law” with respect to House rules. *See supra* note 85; *but see Frost Memo, supra* note 11, at 15690, col. 3.

⁸⁹ 7 CANNON’S PRECEDENTS, *supra* note 85, § 1029 (“The procedure of the House is governed in some instances by the practice of the House rather than by express rules.”).

⁹⁰ 10 ANNALS OF CONG. 987 (1801); *1925 Senate Document, supra* note 74, at 65. Each committee was composed of one Representative from each state, the rules were debated in Committee of the Whole, and then adopted by per capita votes. *Frost Memo, supra* note 11, at 15690, col. 3; 3 HINDS’ PRECEDENTS, *supra* note 64, §§ 1982, 1984.

⁹¹ 4 HINDS’ PRECEDENTS, *supra* note 64, § 4321.

⁹² 1801 Rules, *supra* note 11, § 5.

⁹³ 1825 Rules, *supra* note 11, § 3. The 1801 Rules provided for a seat for the President or President of the Senate, 1801 Rules, *supra* note 11, § 2, but not apparently during balloting. 1801 Rules, *supra* note 11, § 5. The 1825 Rules did not provide for such a seat.

Representatives were seated by states.⁹⁴ In 1801, the House was not to adjourn.⁹⁵ In the 1825 Rules, a motion for adjournment could be made by a state and would be decided by a majority of the states.⁹⁶ Ballot boxes were provided for the ballots of each state's delegation⁹⁷ and for the ballots of the states.⁹⁸ Each state's delegation could appoint tellers to count its ballots,⁹⁹ and tellers were appointed to count the states' ballots.¹⁰⁰ In 1801, the House was to "continue to ballot for a President, without interruption by other business, until it shall appear that a President is duly chosen."¹⁰¹ The 1825 rule is substantially the same.¹⁰² The Speaker declares the result, and it is communicated to the Senate, the President,¹⁰³ and under the 1825 Rules, also to the President-elect.¹⁰⁴

The 1825 Rules (1) repeat the Twelfth Amendment's ambiguity in case of tie elector votes, "from the persons having the highest numbers, not exceeding three"¹⁰⁵; (2) inappropriately repeat the 1801 Rules' appropriate reference to "either . . . have a majority,"¹⁰⁶ Jefferson and Burr being the only 1801 candidates and there being three candidates in 1825; and (3) repeat the error by stating the balloting should continue, "in case *neither* . . . shall receive . . . a majority . . ."¹⁰⁷

Both the 1801 and 1825 rules substantially provide:

All questions arising after the balloting commences, requiring the decision of the House, which shall be decided by the House, voting per capita, to be incidental to the power of choosing a President, shall be decided by States without debate; and in case of an equal division of the votes of States, the question shall be lost.¹⁰⁸

94 1801 Rules, *supra* note 11, § 6; 1825 Rules, *supra* note 11, § 5, cl. 1.

95 1801 Rules, *supra* note 11, § 4.

96 1825 Rules, *supra* note 11, § 4.

97 1801 Rules, *supra* note 11, § 6; 1825 Rules, *supra* note 11, § 5, cl. 2. The *Frost Memo* incorrectly says that in 1801 no ballot boxes were provided for the ballots of the Representatives of each state. *Frost Memo*, *supra* note 11, at 15690, col. 3.

98 1801 Rules, *supra* note 11, § 6; 1825 Rules, *supra* note 11, § 5, cls. 5 & 6.

99 1801 Rules, *supra* note 11, § 6; 1825 Rules, *supra* note 11, § 5, cl. 3.

100 1801 Rules, *supra* note 11, § 6; 1825 Rules, *supra* note 11, § 5, cls. 7, 8 & 9.

101 1801 Rules, *supra* note 11, § 3.

102 1825 Rules, *supra* note 11, § 2.

103 1801 Rules, *supra* note 11, § 7.

104 1825 Rules, *supra* note 11, § 8.

105 *Id.*, § 2.

106 1801 Rules, *supra* note 11, § 7; 1825 Rules, *supra* note 11, § 7 (emphasis added).

107 1825 Rules, *supra* note 11, § 2 (emphasis added).

108 1825 Rules, *supra* note 11, § 6 (1801 Rules, *supra* note 11, § 8 contains slightly different phrasing).

The decision of whether or not a question is incidental to the Presidential choice power is decided by a *per capita* vote.¹⁰⁹

The one important substantive difference between the 1801 and 1825 Rules is that the 1825 Rules provide for the vote of each state to be determined by “a majority of the votes given,” by which it almost certainly meant, as provided almost immediately thereafter, “a majority of the whole number of votes given by such State.”¹¹⁰ The former formulation could have meant a majority of those present and voting or a majority of a quorum except that the 1825 Rules, like the 1801 Rules, did not contain an explicit state delegation quorum requirement. The latter formulation also is not entirely clear. Does it mean the whole number of votes given *to* such state, in which case an absolute majority of the total number of Representatives in the state delegation would be required? If so, it would be in line with the Twelfth Amendment’s requirement that “a majority of all the states shall be necessary to a choice.”¹¹¹ If that is what the latter formulation meant, it would also explain the absence of a quorum requirement. If not, the latter formulation is as, or almost as, ambiguous as the former.

Neither the 1801 Rules nor the 1825 Rules provided for a quorum of each state’s Representatives. The constitutional provision that “a Majority of each [house] shall constitute a Quorum to do Business” is on its face inapplicable to the determination of a quorum within House state delegations.¹¹² Arguably, 1825 Rules did not have to contain a quorum provision, if only an absolute majority of Representatives could cast each state’s vote.

¹⁰⁹ 1801 Rules, *supra* note 11, § 8.

¹¹⁰ 1825 Rules, *supra* note 11, § 5, cl. 4. A memorandum (on file with the author) dated June 10, 1980, from the Congressional Research Service to a recipient whose identity is crossed out, states that in 1801, “in actual fact a majority decision determined each state’s result” citing 2 JOHN BACH MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES FROM THE REVOLUTION TO THE CIVIL WAR 1790–1803, at 523 (1924). The memorandum does not explicitly address the issue of a majority of the whole number, a majority of those present, or a majority of a quorum, although the implication is for the latter. Neither does Thomas H. Neale in *Election of the President and Vice President by Congress: Contingent Election*, *supra* note 62, address this issue.

¹¹¹ U.S. CONST. amend. XII, § 1, cl. 3.

¹¹² U.S. CONST. art. I, § 5, cl. 1.

In a June 7, 1986, interview with the then-House Parliamentarian, the late Mr. William Haynes Brown, and Mr. Peter Robinson, a member of his staff, Beverly J. Ross, Esq. and the author, Messrs. Brown and Robinson indicated that the House would likely follow its usual majority of a quorum principle with respect to House state delegations voting. Memorandum from Beverly J. Ross, Esq., to Elia Fischer, Esq. and author (June 19, 1992) (on file with author) [hereinafter Brown Memorandum].

The Twelfth Amendment's quorum provision does contain an ambiguity: "A quorum *for this purpose* shall consist of a member or members from two-thirds of the states."¹¹³ Obviously, the presence of one Representative from the one-Representative states constitutes a quorum. Does the presence of any member from the more-than-one Representative states constitute a quorum? It does not necessarily follow from the fact that the presence of a single Representative from a one-Representative state means that other states constitutionally can be counted as present if only a single Representative is present.¹¹⁴ The pros and cons of these quorum issues were the subject of the most elaborate discussion in the *Frost Memo*,¹¹⁵ and we shall return to them later.¹¹⁶

The 1825 Rules, like the 1801 Rules, say:

[A]nd in case the votes so given shall be divided so that neither [sic] of said persons shall have a majority of the whole number of votes given by such State . . . then the word "divided" shall be written on each duplicate.¹¹⁷

Reference has previously been made several times to the ambiguity introduced by the Twelfth Amendment's provision, "and if no person have such majority ["of the whole number of Electors appointed"], then from the persons having the highest numbers *not exceeding three* . . . the House of Representatives shall choose immediately, by ballot, the President."¹¹⁸ The Constitution referred to "the five highest."¹¹⁹ The Twelfth Amendment's formulation implies that the House could reduce its choices to two or even one,¹²⁰ even though the intent of the Senate, which originated the limit of the House's choice to three, was clearly only to reduce the choices from five.¹²¹

There are other difficulties with the "not exceeding three" formulation. What if there were one or more of the three highest?¹²² Ar-

113 U.S. CONST. amend. XII, § 1, cl. 3 (emphasis added).

114 See *infra* Parts III.B.2.e. & V.D.

115 *Frost Memo*, *supra* note 11, at 15692, cols. 2 & 3.

116 See *infra* Parts III.B.2.e, III.B.2.f & V.D.

117 1825 Rules, *supra* note 11, § 5, cl. 4; 1801 Rules, *supra* note 11, § 6. The *Frost Memo* incorrectly states, "[t]he 1825 rules were more explicit on these points." *Frost Memo*, *supra* note 11, at 15690, col. 3.

118 U.S. CONST. amend. XII (emphasis added).

119 U.S. CONST. art. II, § 1, cl. 3.

120 The history of this phrase is well recounted in CURRIE, *supra* note 41, at 49 n.77.

121 *Id.* at 49. Excerpts from the debates on this issue are set forth at length in *1925 Senate Document*, *supra* note 71, *passim*.

122 The issue would arise with respect to the vice presidency only if there was a tie for second, because under the Twelfth Amendment the choice is made only "from the two highest numbers on the list . . ." U.S. CONST. amend. XII.

guably, because the clause refers to “numbers,” not “Person” as in Article II, Section 1, clause 3 of the Constitution, if more than three have the highest numbers, the House’s choice is not limited to three persons.¹²³ Why these issues were created is particularly difficult to understand, because the Constitution itself foresaw the possibility of ties by providing for two of them.¹²⁴

Finally, what if the House does not choose a President by noon on January 20? As we have seen,¹²⁵ a Vice President, elected by the electors or, if not, hopefully by the Senate by then, will “act as President” as the Twelfth and Twentieth Amendments provide. The implication is that the House goes on trying to choose a President. This would be consistent with what both the original Constitution and the Twelfth Amendment imply by the use of the phrase “shall choose immediately” and with the 1801¹²⁶ and 1825¹²⁷ Rules, which both provide that the House does no other business until it elects a President. But if the House is hopelessly deadlocked, a mechanism must be provided for its ending its presidential election.

And what if the Senate should fail to choose a Vice President? As we have seen, neither the Twentieth Amendment nor the Presidential Succession Act provides a clear answer.¹²⁸

Can any of these issues be resolved short of constitutional amendment?

123 13 ANNALS OF CONG. 671, 677–78, 680, 725, 736, 771 (1803).

John O. McGinnis suggests that had the House had to choose the President in 2000, it could have considered Ralph Nader and Patrick J. Buchanan as tied third-highest with zero elector votes. John O. McGinnis, *Popular Sovereignty and the Electoral College*, 29 FLA. ST. U. L. REV. 995, 999 n.18 (2001). He seems unaware that twelve other individuals also received a total of 613,051 votes for President, *2000 Presidential Election: Popular Vote Totals*, http://www.archives.gov/federal-register/electoral-college/2000/popular_vote.html (last visited Nov. 10, 2008), and no elector votes, not counting write-in votes (20,938) and “None of These Candidates (Nevada)” (3,315). WORLD ALMANAC 2005, *supra* note 6, at 595. The far better view is that candidates must receive at least one elector vote in order to be considered by the House.

124 U.S. CONST. art. II, § 1, cl. 3 (“[A]nd if there be more than one who have such Majority, and have an equal Number of Votes But if there should remain two or more who have equal Votes, the Senate shall chuse from them”).

125 See *supra* Part II.B. H.R. Res. 10268, 68th Cong., 2d Sess. (1924), in *1925 House Hearings*, *supra* note 30, at 1, could have filled the gap, as would have section three of the Senate Resolution with respect to what became the Twentieth Amendment, if either had been adopted.

126 1801 Rules, *supra* note 11, § 3.

127 1825 Rules, *supra* note 11, § 2.

128 See *supra* notes 32 and 62 and accompanying text.

2. Analogous House Rules and Precedents

The immediately foregoing discussion raised the following issues: House presidential election executive sessions and state delegation balloting, House adjournments while choosing a President, “not exceeding three,” quorum within House state delegations, divided House state delegations, majority voting within House state delegations, and House continuing to try to choose a President after noon on January 20. Could House rules authoritatively resolve any or all of the issues?

a. Executive Sessions and Balloting

The “by Ballot” requirement of the Twelfth Amendment (and of the Constitution itself) applies on its face only to the voting of the House state delegations to choose a President. By providing for ballot boxes and ballots for the votes of each state House delegation, the authors of the 1801 and 1825 Rules decided also to shield from public knowledge each Representative’s vote.¹²⁹

But it does not necessarily follow that each state’s House delegation has to vote by ballot, nor that both delegation and state balloting has to take place in a House secret session pursuant to House Rule XXIX.¹³⁰ The plain meaning of Rule XXIX applies it to “confidential communications,” but the Rule itself must stand for the proposition that the House determines whether or not it or its Committee of the Whole House on the State of the Union may sit in executive session.¹³¹ House Rule XI(g)(1) regulates when a House committee may go into executive session.¹³² House Rules I and IV give the Speaker control of the galleries and the Hall, and Rule V gives him power over the televising and broadcasting of House proceedings.¹³³ Rule IV deals with who may have access to the Hall and the galleries.¹³⁴

Thus, it is clear that the House, like the Senate in its Rules XXIX, XXX, and XXXI,¹³⁵ can by rule decide whether or not its proceedings to choose a President should be open or closed. The 1801 and 1825 Rules, though precedents for executive sessions, are not binding on

¹²⁹ See *supra* notes 97 and 98; *Frost Memo, supra* note 11, at 15691, cols. 1, 2 & 3.

¹³⁰ JEFFERSON’S MANUAL, *supra* note 11, § 914.

¹³¹ *Id.* (cmt.).

¹³² *Id.* § 708.

¹³³ *Id.* §§ 623, 682 & 684.

¹³⁴ *Id.* §§ 677, 682.

¹³⁵ SENATE MANUAL, *supra* note 6, at 52–55.

the House.¹³⁶ One can be confident that public opinion and the press will want open House sessions.¹³⁷ Obviously, this is an appropriate subject for any House presidential election rules.

It does not necessarily follow from either the constitutional “by Ballot” requirement or the 1801 and 1825 Rules precedents that House rules should require each Representative to vote in her or his state delegation. However, one can expect substantial political and public pressures on Representatives to vote for President within their state delegations in accordance with their party affiliation, or the popular vote in their respective districts or states or in the nation regardless of their party affiliation or even personal conviction. This may cause them to want to adhere to the *intra* state delegation balloting precedent. Obviously, this also is an appropriate subject for any House presidential election rules.¹³⁸

b. Adjournments

The House under its rules may regulate adjournments.¹³⁹ The provisions of the 1801 and 1825 Rules providing for the House to do no business other than presidential election and regulating motions for adjournment are sensible precedents that should be followed in any House rules.¹⁴⁰

c. “Not Exceeding Three”

Could the House, in the case of tied elector votes, consider more than three candidates? As we have argued in the case of the Senate in Part II.A, it could and should, and arguably, it could and should make clear its intention to do so by rule. As we have seen in Part II.A,

136 See *supra* note 85; 3 HINDS’ PRECEDENTS, *supra* note 64, § 1984 (“In the election of President by the House in 1825 there was a strong but not prevailing sentiment that the galleries should not be closed.”).

137 *Frost Memo*, *supra* note 11, at 15691, col. 1. The memorandum also argues that the ballots of each state should be made public, although it is less clear about the ballots of each Representative. *Id.* at cols. 1, 2 & 3.

138 In 1992, Representative James Sensenbrenner, until recently Chair of the House Judiciary Committee, introduced a resolution to amend the House Rules to require that the votes of individual Representatives be recorded in open session when the House is choosing a President. H.R. Res. 472, 102d Cong., 2d Sess. (1992). It was referred to the Rules Committee, and no further action was taken.

139 JEFFERSON’S MANUAL, *supra* note 11, § 773, cl. 4.

140 1801 Rules, *supra* note 11, § 4; 1825 Rules, *supra* note 11, § 4. The *Frost Memo* repeatedly emphasizes the urgency of a prompt House presidential election. *Frost Memo*, *supra* note 11, *passim*.

both the Constitution and the Twelfth Amendment provide for ties in other contexts, and why the Twelfth Amendment did not follow those precedents in this respect is unclear.

On the other hand, could the House limit its presidential candidates to two or even one? The answer, in general, should be no in light of the legislative history.¹⁴¹ However, suppose it became apparent that a presidential candidate was not qualified—for example, by age, citizenship, or inhabitance¹⁴²—or was incompetent, or had withdrawn or died. In the case of death, no House rule would seem necessarily required because the Representatives presumably would not vote for a dead candidate. But a candidate's lack of qualifications, disability, or withdrawal raise issues that might usefully be regulated by a House rule or by legislation.¹⁴³

141 The Senate did not consider the possibility. KURODA, *supra* note 41, at 136–38. The House ignored the issue, even though it was raised by Representative Simeon Baldwin. *Id.* at 147–48.

142 U.S. CONST. art. II, § 1, cl. 5; *see supra* note 46..

In *Popular Vote*, we discussed in various places and at length whether or not Congress could refuse to count “unconstitutional” elector votes or elector votes for dead candidates. Ross & Josephson, *Popular Vote*, *supra* note 1, *passim*. Arguably, the same considerations apply to Representatives' votes for President.

143 Congress did not count three 1872 Georgia elector votes for the late Horace Greeley. The subject is discussed in Ross & Josephson, *Popular Vote*, *supra* note 1, at 706–14, and in Kesavan, *supra* note 1, at 123.

James S. Sherman was elected Vice President for the thirty-first term, 1909–13, with President William Howard Taft. He died on October 30, 1912, just before the general election contested by President Taft and former President Theodore Roosevelt and won by Woodrow Wilson and his vice presidential running mate, Thomas R. Marshall. No elector votes were cast for Sherman, but the Senate Manual notes, “After the election, [Nicholas M. Butler of New York] *was selected* to receive the electoral votes of the States of Utah and Vermont owing to the death of James S. Sherman.” SENATE MANUAL, *supra* note 6, at 1089 (emphasis added). Those states were the only states whose electors voted for President Taft. *Id.* Thus, the issue of elector voting for a dead vice presidential candidate did not arise.

The House Report on what became the Twentieth Amendment expressed the opinion that if a presidential candidate dies after the electors vote but before their votes are counted, the votes must be counted by Congress. H.R. REP. NO. 72-345, at 5 (1932). It also expressed the opinion that if the election were thrown into the House and if the deceased's number was one of the three highest on the list, a state delegation vote cast for a dead man could not legally be counted. *Id.* at 6. It did not deal with the question of whether or not a fourth person who had received the next highest elector votes could then be considered. Its analysis was similar on the effect of the death of one of the two highest on the list for a Senate election of a Vice President. *Id.* at 7.

Legislation, at least in the case of death, was supported by then-Assistant Attorney General, later Solicitor General, Walter Dellinger, who agreed with the 1873 precedent that elector votes for a dead person should not be counted by Congress. *Presidential Succession Hearings*, *supra* note 11 at 17. However, Akhil Reed Amar and Walter Berns argued that elector votes for a dead person should be counted so that the deceased's vice presi-

If the House interpreted “not exceeding three” as equivalent to the three “highest numbers on the list,” as the Twelfth Amendment provides for Vice President and as the Constitution provided for President when the number was “five,”¹⁴⁴ then constitutionally it would not have discretion for deciding that less than three should be candidates for President.

While “not exceeding” arguably provides the House discretion to constitutionally consider fewer than three candidates, it provides no criteria, except perhaps in the cases of lack of qualifications, death, disability, or withdrawal. Except in such cases, it is hard to imagine a House of Representatives assuming responsibility for the exercise of such discretion, if any, as “not exceeding three” may confer discretion to reduce the number of presidential candidates or eliminate any tied candidates. Politically, it is easier to envisage the House exercising any such discretion to include all tied candidates, even though that might be contrary to the intent of the Twelfth Amendment’s reduction of presidential candidates from five to three and might increase the likelihood of no absolute state majority for President. Moreover, if the House attempted by rule to reduce the number of presidential candidates, a furor would almost certainly result, and as we shall see when we discuss the possibility of a legislative solution,¹⁴⁵ countervailing constitutional issues would be raised, and litigation would almost certainly ensue.

d. Divided

It seems unlikely that the House would, by rule, provide that a state’s vote for President would be deemed cast when there was no majority, however defined, of that state’s Representatives. Section 1 of House Rule VIII provides that “[e]very member shall be present within the Hall of the House during its sittings . . . and shall vote on each question put.”¹⁴⁶ The precedents of the House are that no member can be forced to vote (or deprived of the right to vote, and mem-

dential running mate could become President. *Presidential Succession Hearings*, *supra* note 11, at 23–25, 29. This opinion is also expressed in Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution’s Succession Gap*, 48 ARK. L. REV. 215, 224–25 (1994). Neither Professor Amar nor Professor Berns expressed that opinion in the context of the House of Representatives choosing a President, which did not arise in the course of the aforementioned hearings.

144 U.S. CONST. art. II, § 1, cl. 3.

145 *See infra* Part V.E.3.

146 JEFFERSON’S MANUAL, *supra* note 11, § 656.

bers may not vote by proxy).¹⁴⁷ Section 2 of House Rule VIII even regulates pairing. Because no Representative ordinarily can be forced to vote or be deprived of her or his vote, it seems problematic that the House would, by rule, compel members of a state delegation to vote for President or cast its vote for it. In the latter case, what would be the criteria for deciding for which candidate to cast a vote? This issue will be discussed further when the possibility of legislation is discussed.¹⁴⁸

e. Majority

As we have seen, the 1825 Rules defined “majority” for the purposes of determining each state’s vote for President as “a majority of the votes given . . . and . . . a majority of the whole number of votes given”¹⁴⁹ The House Rules contain many provisions defining a majority. Section 11 of House Rule XXXVIII provides:

In all cases of ballot a majority of the votes given shall be necessary to an election, and where there shall not be such a majority on the first ballot the ballots shall be repeated until a majority be obtained; and in all balloting blanks shall be rejected and not taken into the count in enumeration of votes or reported by the tellers.¹⁵⁰

The Speaker is elected by a majority,¹⁵¹ and the House acts by a majority.¹⁵²

As we have seen, the Twelfth Amendment says that “a majority of *all* the states shall be necessary to a choice.”¹⁵³ Perhaps in 1825, when presumably attendance at Congress in mid-winter was uncertain, “a majority of the votes given”¹⁵⁴ was a pragmatic choice. But in the twenty-first century a strong argument can be made, consistent with the Twelfth Amendment’s majority requirement of the total states’ vote, that a majority of the whole number of each state’s Representatives, possibly less vacancies, should be necessary to cast that state’s vote for President.

However, the *Frost Memo* concludes:

This is the single most important question that must be resolved in the Rules. Adopting a plurality requirement could hasten a decision by the

¹⁴⁷ *Id.* § 658 (cmt.).

¹⁴⁸ *See infra* Part V.E.3.

¹⁴⁹ 1825 Rules, *supra* note 11, § 5, cl. 4; *see supra* note 110 and accompanying text.

¹⁵⁰ JEFFERSON’S MANUAL, *supra* note 11, § 934.

¹⁵¹ *Id.* § 312 (cmt.).

¹⁵² *Id.* § 508.

¹⁵³ U.S. CONST. amend. XII (emphasis added).

¹⁵⁴ 1825 Rules, *supra* note 11, § 5, cl. 4.

House and would be consistent with the current method of selecting electors; however, it will reverse procedures followed in 1801 and 1825 and will undoubtedly lead to a major fight on the floor, particularly if the third candidate has any significant support in the House. Nonetheless, a fight in favor of plurality voting within state delegations could be worth the battle because to require a *majority* within states would heighten the chance that no one will be elected President and that the country will be governed for four years by a Vice-President selected by the Senate.¹⁵⁵

It seems clear from the context of the *Frost Memo* and Proposed Rule 5(c) of the proposed rules that Representative Frost drafted¹⁵⁶ that he is *not* talking about an *absolute* majority of each House state delegation, although he is aware that the Twelfth Amendment requires such a majority of all the elector votes and of all the House state delegations when they vote for the President.

The public policy choices are clear. Requiring a majority of a quorum, a majority of those present, a majority of those present and voting, an absolute majority, or an absolute majority less vacancies within the House state delegations may ensure more authoritative votes for President. On the other hand, a majority of state delegation Representatives present, or a plurality, should make a House election of a President more likely. These issues are clearly appropriate for consideration by House rules.

f. Quorum

The Constitution provides that “a majority of each [House] shall constitute a quorum to do business,”¹⁵⁷ but on its face, this would not apply to each of the House state delegations voting for President.

As we have seen, neither the 1801 nor the 1825 Rules established quorums for each House state delegation.¹⁵⁸ The constitutional authority of the House to “determine the Rules of its Proceedings” appears unlimited.¹⁵⁹ The precedent established by the majoritarian requirement for each state’s vote in the 1825 Rules¹⁶⁰ would also seem to support the House’s authority by rule to provide a quorum requirement for each state’s delegation. By analogy the House Rules

155 *Frost Memo*, *supra* note 11, at 15692, col. 3 (emphasis added).

156 *See id.* at 15695, col. 1 (“The candidate receiving a *plurality* of the vote in each state caucus shall be awarded that state’s vote.” (emphasis added)).

157 U.S. CONST. art. I, § 5, cl. 1.

158 *See supra* notes 112 and 114 and accompanying text. A quorum is also not required by the rules proposed by the *Frost Memo*, *supra* note 11.

159 U.S. CONST. art. I, § 5, cl. 2.

160 1825 Rules § 5, cl. 4.

contain numerous provisions establishing quorums for its committees.¹⁶¹ Generally, a quorum is a majority, although in the case of the Committee of the Whole House on the State of the Union, 100 Representatives is sufficient.¹⁶²

Consistent with the Constitution¹⁶³ and the Twelfth Amendment which requires “a quorum . . . of a member or members from *two-thirds* of the States,”¹⁶⁴ presumably so that a House vote for President would more likely be accepted as authoritative, the House should establish a high quorum requirement for each state’s delegation voting for President. There should be an exception for the one- and two-Representative state delegations, for which the attendance of all Representatives should be required. What that quorum requirement should be is debatable.

As state delegations increase in size, the number of Representatives that would constitute a majority of a quorum does not increase proportionally. For example, only four Representatives would be the usual quorum, and only three the usual majority of a seven-Representative state delegation. But in the case of California, the largest state delegation in 2008 with fifty-five Representatives, a quorum would have twenty-eight Representatives, and a majority of that quorum would be only fifteen Representatives.

The higher the quorum requirement, the more likely that a state delegation’s vote for President would be accepted as authoritative. Perhaps a quorum should start at two-thirds for the smaller state delegations and increase to three-quarters for the larger. Of course, if the House adopted a Rule that a majority for the purpose of casting each state’s vote for president was a majority of all its Representatives, possibly less vacancies, there would be little or no need for a quorum rule.

g. Duration of House Voting

Let us assume that the House fails to choose a President by noon on January 20. How long must it continue to try, given that under the provisions of the 1801 and 1825 Rules it cannot take up any other business?¹⁶⁵ Because there is no apparent limit on how long the Vice

161 JEFFERSON’S MANUAL, *supra* note 11, §§ 52, 53, 329, 343, 409, 709, 713c.

162 House Rule XVIII.6, *in* JEFFERSON’S MANUAL, *supra* note 11, § 982.

163 U.S. CONST. art. II, § 1, cl. 3.

164 *Id.* amend. XII (emphasis added).

165 *See supra* notes 101 & 102.

President, assuming there is one, may act as President,¹⁶⁶ the Executive Branch can continue to function. Constitutional officers can be appointed with the advice and consent of the Senate, authorized inferior officers can be appointed, and so forth.¹⁶⁷ But bills for raising revenue, which must originate in the House,¹⁶⁸ could not be considered and passed, nor could bills passed by the Senate be considered by the House.

Accordingly, the *Frost Memo* says that any House rules for a presidential election should “do everything possible to ensure that the House will actually reach a decision and not be deadlocked.”¹⁶⁹ Reason also requires that the House be able to determine that it is deadlocked and cannot comply with the Twelfth Amendment command that it “choose *immediately* . . . [a] President.”¹⁷⁰

Would the House, in making a deadlock decision, vote by states? Presumably yes, if the adjournment voting precedents established by the 1801 and 1825 Rules¹⁷¹ were followed. If the 1801 and 1825 Rules precedents were followed, the House would determine by a per capita vote that a deadlock vote was incidental to the power of choosing a President. Thus the vote sufficient for such a determination would be the same majority of whole number of states that is required to choose a President under the Twelfth Amendment. This would be consistent with the Twelfth Amendment’s public policy in this respect.¹⁷²

Again, it would be appropriate for the House to adopt a rule for this contingency. House Rule XIX is a precedent: a motion for the previous question “shall have the effect of cutting off all debate,”¹⁷³

166 U.S. CONST. amend. XII; U.S. CONST. amend. XX, § 3.

167 U.S. CONST. art II, § 2, cl. 2.

168 U.S. CONST. art. I, § 7, cl. 1.

169 *Frost Memo*, *supra* note 11, at 15690, col. 1.

170 U.S. CONST. amend. XII (emphasis added).

171 *See supra* notes 95 & 96 and accompanying text. The *Frost Memo*’s Proposed Rules for Election of the President in the House of Representatives (1981) are in accord. *Frost Memo*, *supra* note 11, at 15694, col. 3 (containing rule 4 of Proposed Rules).

172 Rule 6 of the *Frost Memo*’s Proposed Rules for Election of the President in the House of Representatives (1981) provides that such questions should be decided by the states without debate. It does not say by a majority of all the states. *Frost Memo*, *supra* note 11, at 15695, col. 1.

173 JEFFERSON’S MANUAL, *supra* note 11, § 804.

In 1992 Senator David Pryor suggested if (1) the 1992 presidential election were to be thrown into the House, (2) the House deadlocked, (3) the Senate failed to elect a Vice President by January 20, and (4) by implication the Speaker of the House elected on January 3 from among its Representatives did not wish to become President, assuming he constitutionally could, *see supra* note 62, that Speaker could resign, the House could by

although the “question” to which the Rule refers probably is not the question of the House choosing a President.

If the House determined that it could not choose a President, can a Vice President, only acting as President under Section 3 of the Twentieth Amendment, nominate a Vice President under Section 2 of the Twenty-fifth Amendment? Probably not. Section 1 of the Amendment applies only to the removal, death, or resignation of the President, and Section 2 applies only to the existence of a vice presidential vacancy.

IV. 2000 PRESIDENTIAL ELECTION

There are practical consequences for these recommendations with respect to House rules. Let us take the 2000 presidential election as an example and assume that neither Governor Bush nor Vice President Gore had a majority of all the electors’ votes.¹⁷⁴

The political party composition of state delegations in the first session of the 107th Congress was¹⁷⁵:

majority vote elect from the presidential candidates a non-member Speaker who could resign as Speaker on accession to the presidency (and, it could be added that if no Vice President had been elected, appoint one subject to congressional approval under the Twenty-fifth Amendment). 138 CONG. REC. S8330 (daily ed. June 17, 1992).

174 The 2000 elector votes were 271 for Governor Bush, 266 for Vice President Gore. One elector from the District of Columbia cast blank ballots for President and Vice President, 147 CONG. REC. 164 (daily ed. Jan. 20, 2001) (corrected proceedings of Saturday, Jan. 6, 2001). This would be an apparent violation of her pledge. D.C. CODE § 1-1001.08(g)(2) (2005). Presumably, they would have been cast for the Democratic Party candidates who carried the District of Columbia, but the result would not have changed.

175 CONGRESSIONAL YELLOW BOOK *passim* (Spring 2001). Lawrence D. Longley and Neal R. Peirce similarly analyzed the 1948 presidential election. LONGLEY & PEIRCE, *supra* note 61, at 42–45. The then-Clerk of the House similarly analyzed the 1920 presidential election. 1925 *House Hearings*, *supra* note 30, at 15–16.

One national election, even a midterm election, can dramatically change the results. While the 2004 presidential election left the House state delegations’s political compositions as they were in 2000, the 2006 midterm election resulted in ten additional House delegations with Democratic Party majorities: Colorado, Connecticut, Indiana, Iowa, Minnesota (was tied), New Hampshire, North Carolina, Pennsylvania, Vermont (had an independent who voted with the Democrats to organize the House), and Wisconsin (was tied). Two state House delegations, Arizona and Kansas, moved from Republican Party majorities to tied. CONGRESSIONAL DIRECTORY FOR THE 110TH CONGRESS 9–13, 102–05 (2007), available at <http://www.gpoaccess.gov/cdirectory/browse-cd-07.html> [hereinafter CONGRESSIONAL DIRECTORY].

State	Republicans	Democrats	Independent	Vacancy
Alabama	5	2		
Alaska	1	0		
Arizona	5	1		
Arkansas	1	3		
California	20	31		1
Colorado	4	2		
Connecticut	3	3		
Delaware	1			
Florida	15	8		
Georgia	8	3		
Hawaii		2		
Idaho	2			
Illinois	10	10		
Indiana	6	4		
Iowa	4	1		
Kansas	3	1		
Kentucky	5	1		
Louisiana	5	2		
Maine		2		
Maryland	4	4		
Massachusetts		10		
Michigan	7	9		
Minnesota	3	5		
Mississippi	2	3		
Missouri	5	4		
Montana	1			
Nebraska	3			
Nevada	1	1		
New Hampshire	2			
New Jersey	6	7		
New Mexico	2	1		
New York	12	19		
North Carolina	7	5		
North Dakota		1		
Ohio	11	8		
Oklahoma	5	1		
Oregon	1	4		
Pennsylvania	11	10		
Rhode Island		2		

State	Republicans	Democrats	Independent	Vacancy
South Carolina	4	2		
South Dakota	1			
Tennessee	5	4		
Texas	13	17		
Utah	2	1		
Vermont			1	
Virginia	7	3	1	
Washington	3	6		
West Virginia	1	2		
Wisconsin	4	5		
Wyoming	1			

Let us also assume that: (1) each Representative would have voted by party affiliation; (2) all would have been present and voting; (3) the Vermont Independent would have voted for Vice President Gore, because he votes with the Democrats to organize the House¹⁷⁶; and (4) the evenly divided states would not have cast substantive votes.

Governor Bush would have had the votes of twenty-eight House state delegations, an absolute majority, but a majority of only three, and Vice President Gore would have had the votes of eighteen states. Connecticut, Illinois, Maryland, and Nevada would not have voted because their delegations were evenly divided, but this would not have affected the outcome.

With respect to the four divided states, only the people of Nevada voted for Governor Bush. If a majority of the Representatives from each of the divided states—Connecticut, Illinois, Maryland, and Nevada—had voted in accordance with their states' popular votes, three states would have been added to the Gore vote and one, Nevada, to the Bush vote.¹⁷⁷

The political party majority of eight House state delegations was different from how the people of those states voted for President. The people of five states whose House delegations had Democratic

¹⁷⁶ See *supra* note 18. The Republicans then had a majority of seven Representatives in the eleven-Representative Virginia delegation, so it probably would not have mattered how its Independent, Virgil Goode, Jr., would have voted. He voted that year for the Republican candidate for Speaker. 147 CONG. REC. 21 (daily ed. Jan. 3, 2001). He was elected to the 110th and 111th Congresses as a Republican. CONGRESSIONAL DIRECTORY, *supra* note 175, at 271.

¹⁷⁷ WORLD ALMANAC 2005, *supra* note 6, at 595.

Party majorities—Arkansas, Mississippi, North Dakota, Texas, and West Virginia—voted for Governor Bush; the people of three states whose House delegations had Republican Party majorities—Iowa, New Mexico, and Pennsylvania—voted for Vice President Gore. One can imagine the political pressure on each of the Representatives from those states to vote in accordance with their district's¹⁷⁸ or state's popular votes.

¹⁷⁸ It would be beyond the scope of this study to determine how each Representative's district voted. Each state's popular vote would seem more relevant than the popular vote of any congressional district within a state. Under the Constitution and the Twelfth Amendment, the states' electors and the House state delegations vote to choose the President. This was the general idea of H.R.J. Res. 28, 108th Cong., 1st Sess. § 4 (2003). It was referred to the House Judiciary Committee's Subcommittee on the Constitution, and no further action was taken. Thomas H. Neale, CONGRESSIONAL RESEARCH SERVICE, *THE ELECTORAL COLLEGE: REFORM PROPOSALS IN THE 108TH CONGRESS* 6 (2005). There may be an exception to this preference in any state which might apportion elector votes by congressional districts, such as Maine and Nebraska currently do. ME. REV. STAT. ANN. tit. 21-A, §§ 802 & 805.2 (1993); 3 NEB. REV. STAT. § 32-714 (2004). Then-Senator Obama carried the second congressional district of Nebraska, whose elector will presumably vote for him. Susan Saulny, *Glory for Democrats, Riding on a Single Vote*, N.Y. TIMES, Nov. 12, 2008, at A16.

However, on August 1, 1980, Representative Robert E. Bauman, with seven co-sponsors, introduced a resolution to express the "sense of the House" that each Representative should vote in any House presidential election for the candidate "who receives a majority or plurality of the popular votes cast in the individual Member's district." H.R. Res. 760, 96th Cong., 2d Sess. (1980). It was referred to the Committee on House Administration, which took no action. *But see* Gary Lee, *Foley Opposes Formula for Presidential Voting: If House Must Decide, Members Should 'Look at Circumstances' at the Time, Speaker Says*, WASH. POST, June 15, 1992, at A7 ("Some Democratic Party Leaders believe that if the presidential election is volleyed to the House, members should be required to vote for the presidential candidate representing the party popularly supported by voters in their districts.").

Laurence A. Tribe and Thomas M. Rollins discuss these and other possibilities in Tribe & Rollins, *supra* note 43, at 58–60 (digital ed. at 3–7).

Then-House Speaker Thomas S. Foley said in a June 14, 1992 interview that anticipated the three-way presidential race in 1992:

It shouldn't be said in advance by members of Congress that their vote [for President in the House] is going to be pledged on some kind of formula, which may, at the time the vote is cast, seem wrong to them—wrong from the standpoint of the country, wrong from the standpoint of giving the president-elect legitimacy of office

Suppose [the lawmaker's] district cast its vote for the candidate that ran third in both the electoral vote and the popular vote of the country. Suppose one of the candidates has a majority of the popular vote and a majority of the electoral vote as well. I think it would be difficult to explain any other vote but support for that candidate.

Lee, *supra*, at A7; *accord*, Paul Gewirtz, *House Party*, NEW REPUBLIC, July 27, 1992, at 38 ("[W]hen the House last picked the president in the 1824 election, its rules required a state delegation to decide by majority vote, with no vote to be cast if no majority was obtained." (citations omitted)).

Both Hendrik Hertzberg and Jennifer Steinhauer reported that California, by popular initiative rather than state legislative action, and North Carolina were considering apportioning their electors' votes by congressional districts, although the North Carolina legislature tabled the measure. Hendrik Hertzberg, Comment, *Votescam*, THE NEW YORKER, Aug. 6, 2007, at 21–22; Jennifer Steinhauer, *Frustrated, States Try to Change the Way Presidents Are Elected*, N.Y. TIMES, Aug. 11, 2007, at A1. Such an initiative would be of doubtful constitutionality. In the first 2000 Supreme Court presidential election decision, *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), the unanimous Court said per curiam that the Florida Supreme Court had relied on the Florida Constitution in construing the Florida Election Code. *Id.* at 77–78. It vacated and remanded in part because “we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority under Art. II, § 1, cl. 2.” *Id.* at 78.

Actually, the Florida Supreme Court cited three times Article I, Section one of the Florida Constitution’s Declaration of Rights, *Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1220, 1230, 1236 & 1239 (Fla. 2000) (“All political power is inherent in the people.”), and Article VI, section one, *id.* at 1230 (“Registration and elections shall . . . be regulated by law.”). If the Court was concerned that these provisions of the Florida Constitution were adopted by some means other than legislative enactment and, although it is awfully hard substantively to see how, that they in some way fettered the Florida Legislature’s plenary United States constitutional authority to determine the manner by which electors may be appointed, see *McPherson v. Blacker*, 146 U.S. 1 (1892), its concern seems to have been unwarranted. The Florida Constitution’s Declaration of Rights, an expression of public policy at that, as well as the entire Constitution, like a statute, had in fact been adopted in its entirety by the Florida Legislature. 25 FLA. STAT. 665 (1970).

Nevertheless, from the Court’s concern it would seem to follow that no provision of an initiative could, by itself, affect the California Legislature’s decision that the State’s presidential electors shall be appointed winner-take-all. CAL. ELEC. CODE § 6906 (West 1994). Terrance Sandalow, dean emeritus of the University of Michigan Law School, agrees. Terrance Sandalow, Letter to the Editor, *Graduating from the Electoral College*, N.Y. TIMES, Aug. 27, 2007, at A16 (“The proposed initiative to amend the California Constitution . . . is . . . plainly unconstitutional as a matter of federal constitutional law.”). According to Bob Herbert, so does Harvard Law School Professor Laurence A. Tribe. Bob Herbert, *In 2008, Bush v. Gore Redux?*, N.Y. TIMES, Sept. 22, 2007, at A15 (“In Mr. Tribe’s view, the ‘one and only way’ for California to change the manner in which its electoral votes are apportioned is through an act of the State Legislature.”). David Gringer discusses the issues, but seems unaware of the aforesaid holding in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. at 77, in David Gringer, *Why the National Popular Vote Plan Is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182, 225–26 (2008).

The development of elector unit rule voting is discussed in Matthew J. Festa, Note, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099 (2001).

Without considering any of the legal issues discussed above, *The New York Times* has editorially opposed the California Initiative while at the same time reiterating its support for the National Popular Vote effort as an alternative to the California initiative. See *supra* note 1 and *infra* note 249. Such an initiative, which would raise legal issues about its effectiveness, is similar, if not identical, to those described above. Editorial, *Stacking the Electoral Deck*, N.Y. TIMES, Aug. 22, 2007, at A18. *But cf.* Jennifer Steinhauer, *Leader Quits Ballot Effort by G.O.P. in California*, N.Y. TIMES, Sept. 29, 2007, at A8; *Electoral Revision Misses June Ballot*, N.Y. TIMES, Dec. 7, 2007, at A28. Such an alternative which could raise legal issues about its effectiveness is similar, if not identical, to those described in the paragraph above.

So, if those House state delegations had voted the way the people of their states had voted, Governor Bush would have added the votes of five states and lost the votes of three, and Vice President Gore would have lost the votes of three.

Finally, as the table shows, in seven state delegations—Mississippi, Missouri, New Jersey, Pennsylvania, Tennessee, Utah, and West Virginia—only one vote separated the Republican and Democratic Representatives. The people of Missouri, Tennessee, and Utah, states whose House delegations had a Republican majority of one, voted for Governor Bush, and the people of New Jersey, whose House delegation had a Democratic majority of one, voted for Vice President Gore. The West Virginia delegation consisted of two Democrats and one Republican, but its people voted for Governor Bush. The Pennsylvania delegation consisted of 11 Republicans and ten Democrats, but its people voted for Vice President Gore.¹⁷⁹

We can, therefore, conclude that although House election of President Bush in 2000 was likely, House rules establishing both majority and quorum requirements and legislation dealing with the voting of the divided states might have made House choice of a President more authoritative.

Had there been a third presidential candidate who won elector votes, the situation would have been more problematic.¹⁸⁰

The issues raised by an unsuccessful Colorado initiative that would have divided its elector votes in proportion to its popular votes are thoughtfully discussed in David S. Wagner, Note, *The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot Initiatives to Effect that Change*, 25 REV. LITIG. 575 (2006). However, Wagner appears not to have focused on the significance of the Supreme Court's first 2000 presidential election opinion discussed above. Neither has Stanley Chang. Stanley Chang, Note, *Recent Development: Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 214–15 (2007). Supporters of such initiatives have argued, unpersuasively, that a vote of the people is an act of the legislature, as the Colorado initiative purported to provide. BENNETT, *supra* note 1, at 52, 214 n.32. For a comprehensive study of the history and law of initiatives, see John Gildersleeve, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437 (2007).

¹⁷⁹ WORLD ALMANAC 2005, *supra* note 6, at 595.

¹⁸⁰ In the twentieth century, more than two presidential candidates have won elector votes in 1912, 1924, 1948, 1960, 1968, 1972, 1976, and 1988. WORLD ALMANAC 2005, *supra* note 6, at 594. However, only in 1912, 1924, 1948, 1960, and 1968 did a third presidential candidate receive more than one elector vote. *Id.* Nevertheless, if any of those elections had been thrown into the House because no candidate had an absolute majority of elector votes, such a third presidential candidate would have been one of the three whom the House could have chosen as President. Moreover, if there had been more than one such presidential candidate and if they had tied elector votes, the issues raised by “not exceeding three” might also have arisen.

V. ADOPTION OF HOUSE RULES

Even though the electors' votes are not generally counted by Congress until January 6, the popular vote results for President and the likely elector votes are usually known immediately after Election Day in November. The actual results of the elector votes are usually known immediately or soon after the first Monday after the second Wednesday in December.¹⁸¹

Although under the Twentieth Amendment the term of the outgoing Congress does not expire until noon on January 3 of the next year, Congress usually adjourns *sine die*, i.e., terminates its session, prior to the November general election. However, the adjournment resolution usually includes a provision permitting the Congress to be recalled prior to January 3, if necessary.¹⁸²

Thus, if the presidential election is so close (as it was in 2000) that there is a possibility that the House would choose the President, the *Lame Duck House*, if still in session or if called into session, could adopt rules to govern the House presidential election. Or the new House could adopt rules or amend any previously adopted rules in the few days between the commencement of a new Congress at noon on January 3 and the counting of elector votes, which usually takes place on January 6.¹⁸³

Assuming that in the 2000 presidential election the voters for third party candidate, Patrick J. Buchanan, would have voted for Governor George W. Bush and those who voted for Ralph Nader would have voted for Vice President Al Gore, Florida's and New Hampshire's electors would have voted for Vice President Gore, instead of Governor Bush. WORLD ALMANAC 2005, *supra* note 6, at 595. Voters in Iowa, New Mexico, Oregon, and Wisconsin narrowly voted for Vice President Gore. *Id.* Even if the Buchanan votes had been added to Governor Bush's totals, the addition of the Nader votes to Vice President Gore's would have confirmed his winning of these states' elector votes. *Id.*

In 2002, two groups created separate vote-swapping websites under which Buchanan or Nader voters in "swing" states could agree with Bush or Gore voters, respectively, in "safe" states to vote for Bush or Gore, as the case may have been, in return for safe state voters voting for Buchanan or Nader. *See Porter v. Bowen*, 496 F.3d 1009, 1012-13 (9th Cir. 2007). The California Secretary of State's successful effort to close these sites was held to violate the First Amendment. *Id.* at 1027.

181 3 U.S.C. § 7 (2006).

182 *E.g.*, H.R. Con. Res. 531, 108th Cong., 2d Sess. (2004). Also, the President "may, on extraordinary Occasions, convene both Houses, or either of them . . ." U.S. CONST. art. II, § 3, cl. 1.

183 *See* 3 U.S.C. § 15 (2006). In 1996, Congress extended the date to January 9, 1997. Act of Oct. 11, 1996, § 2, Pub. L. No. 104-296, 110 Stat. 3558. In 1988, it advanced the date to January 4, 1989. Act of Nov. 9, 1988, Pub. L. No. 100-646, 102 Stat. 3341. And in 1984 the date was extended to January 7, 1985. Act of Oct. 9, 1984, Pub. L. No. 98-456, 98 Stat. 1748.

Even if the House had adjourned, the appropriate standing committee or committees could hold hearings on and draft proposed rules.¹⁸⁴

But it would be far better for the House to consider the issues that would be raised by such rules in a detached context. House Resolution 785¹⁸⁵ would have established a Select Committee on Procedures for Election of a President in the House of Representatives. It was introduced by Representative John L. Burton on September 9, 1980, and referred to the Committee on Rules. The Select Committee would have (1) investigated existing statutes, rules, procedures, and precedents relating to election of the President by the House, the extent to which existing law and precedents are appropriate for the present conduct of such elections, and changes which should be made in existing law; and (2) reported to the House concerning its investigation. The resolution would have authorized the Speaker to appoint ten members; the only criterion was that six should be members of the majority party. The committee would have been authorized to hold hearings and otherwise act during any session, recess, or adjournment of the then-present House, its authority to expire on the earlier of (a) thirty days after filing its report with the House or (b) “just prior to noon on January 3, 1981.”¹⁸⁶ This resolution apparently sought to avoid the question of whether it would have had the effect of ousting the jurisdiction of any standing committee by providing that its “report shall be referred to the committee or committees which have jurisdiction over the subject matter thereof.”¹⁸⁷ In 1980, the possibly significant third presidential candidacy of Representative John B. Anderson almost certainly was the impetus for the introduction of this resolution, but nonetheless no further action was taken.¹⁸⁸

Similarly, on June 10, 1992, Representative Pat Roberts submitted a resolution,¹⁸⁹ which was referred to the Committee on House Administration, to establish a panel of constitutional experts to recom-

184 House Rule XI, cl. 2(m)(1)(A), in JEFFERSON’S MANUAL, *supra* note 11, § 718. This is a relatively new change in the House Rules. *Id.* § 589 (cmt.). Such hearings could not be held during joint sessions. House Rule XI, cl. 2(i), in JEFFERSON’S MANUAL, *supra* note 11, § 710. JEFFERSON’S MANUAL section LI asserts that, constitutionally, congressional committee jurisdiction ends when the constitutional term ends. JEFFERSON’S MANUAL, *supra* note 11, § 589; 4 HINDS’ PRECEDENTS, *supra* note 64, § 4545.

185 H.R. Res. 785, 96th Cong., 2d Sess. (1980).

186 *Id.* § 5(c).

187 *Id.* § 6(c).

188 WORLD ALMANAC 2005, *supra* note 6, at 593.

189 H.R. Res. 478, 102d Cong., 2d Sess. (1992)

mend to the House an appropriate process for the selection of a President under the Twelfth and Twentieth Amendments. Presumably, Representative Roberts was motivated by the third-party candidacy of Mr. H. Ross Perot, but again no further action was taken.

A. *Jurisdiction of Relevant Standing Committees of the House*

Which House committees would have jurisdiction over the drafting of such rules?

1. *Rules Committee*

The Committee on Rules is a Standing Committee of the House with jurisdiction over the “rules and joint rules (other than [those] relating to the Code of Official Conduct) and order of business of the House,” and it is authorized, specifically, “to sit and act whether or not the House is in session.”¹⁹⁰ Its jurisdiction includes orders relating to use of the galleries during the electoral count¹⁹¹ and special orders providing times and methods for consideration of particular bills and resolutions.¹⁹²

Rules were adopted by the Committee on Rules to regulate its own operations and establish two standing subcommittees, the Subcommittee on Legislative and Budget Process and the Subcommittee on Rules and Organization of the House. The latter is responsible, among other things, for “matters . . . [concerning] relations between the two Houses of Congress, relations between the Congress and the Judiciary, and internal operations of the House.”¹⁹³ The latter subcommittee would seem to have jurisdiction of rules for the House presidential election process, but Rule 5(b)(2) authorizes the Chair of the Committee to retain whole Committee jurisdiction.¹⁹⁴ If, as seems likely, the full Committee considered rules for the House presidential election, it would almost certainly hold hearings on them as

¹⁹⁰ House Rule X, cl. 1(m), in JEFFERSON’S MANUAL, *supra* note 11, § 682a.

¹⁹¹ 4 HINDS’ PRECEDENTS, *supra* note 64, § 4327; JEFFERSON’S MANUAL, *supra* note 11, § 220.

¹⁹² 4 HINDS’ PRECEDENTS, *supra* note 64, § 4326. *See generally* STANLEY BACH & STEVEN S. SMITH, MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES: ADAPTATION AND INNOVATION IN SPECIAL RULES (1988); Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321 (1994).

¹⁹³ RULES OF THE COMMITTEE ON RULES, Rule 5(a)(1)(B), 109th Cong. 154 (1st Sess. 2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_house_committee_prints&docid=f:22112.pdf [hereinafter HOUSE COMMITTEES RULES].

¹⁹⁴ *Id.* at Rule 5(b)(2).

the House rules provide,¹⁹⁵ and as the Rules of the Rules Committee also provide.¹⁹⁶

2. *Committee on House Administration*

The House Standing Committee which has legislative jurisdiction over rules for House election of the President is the Committee on House Administration. House Rule X gives this Committee jurisdiction over measures relating to the “election of the President, Vice President . . . and Federal elections generally.”¹⁹⁷ The rules adopted by the Committee on House Administration contain no provisions for subcommittees, but Rule 16 authorizes the Chair to appoint appropriate subunits.¹⁹⁸

3. *Joint Referral*

If issues arose as to whether or not both the Committee on Rules and the Committee on House Administration had jurisdiction over any measures or rules regarding the election of the President by the House, the House Rules appear to require the Speaker to refer a matter to all committees with jurisdiction.¹⁹⁹

¹⁹⁵ See generally House Rule XI, cl. 2(g)(2), in JEFFERSON’S MANUAL, *supra* note 11, § 708.

¹⁹⁶ See generally HOUSE COMMITTEES RULES, *supra* note 193, Rule 3 at 152–54.

¹⁹⁷ House Rule X, cl. 1(h)(12), in JEFFERSON’S MANUAL, *supra* note 11, § 677a. This jurisdiction was exercised prior to the 1947 reorganization of the Congress by the Committee on Election of President, Vice President, and Representatives in Congress. *Id.* at §§ 677a & 677e (cmts.); see 4 HINDS’ PRECEDENTS, *supra* note 64, §§ 4299–304; 7 CANNON’S PRECEDENTS, *supra* note 85, §§ 2023–28. Then-House Parliamentarian Brown indicated that a meeting to elect a President is a constitutional function of the House over which the Committee on House Administration would assert jurisdiction. Brown Memorandum, *supra* note 112, at 2.

¹⁹⁸ Rule 16 of the Rules of the Committee on House Administration, in HOUSE COMMITTEES RULES, *supra* note 193, at 115.

¹⁹⁹ House Rule X provides in Clause 1: “[A]ll bills, resolutions, and other matters relating to subjects within the jurisdiction of any standing committees as listed in this clause shall . . . be referred to those committees . . .” JEFFERSON’S MANUAL, *supra* note 11, § 699 (emphases added). Clause 5 states in relevant part:

(a) Each bill, resolution, or other matter which relates to a subject listed under any standing committee named in clause 1 shall be referred by the Speaker in accordance with the provisions of this clause.

(b) Every referral of any matter under paragraph (a) shall be made in such manner as to assure to the maximum extent feasible that each committee which has jurisdiction under clause 1 over the subject matter of any provision thereof will have responsibility for considering such provision and reporting to the House with respect thereto.

Id. § 700. House Rule X clause 5(c) provides:

In carrying out paragraphs (a) and (b) with respect to any matter, the Speaker shall designate a committee of primary jurisdiction; but also may refer the matter

B. Authorization and Appointment of Select Committee

House Rule X, clause 6(e) authorizes the Speaker to appoint select committees ordered by the House from time to time.²⁰⁰ With the approval of the House, under House Rule X, clause 2(c), he may also appoint special ad hoc committees from the members of committees having jurisdiction over a matter.²⁰¹ The Rules Committee's jurisdiction includes resolutions providing for the appointment of special committees.²⁰²

C. Legislative Commission

As an alternative to standing committees or special committees of the House, one could imagine establishing a commission by legislative act for the purpose of investigating and reporting to the House the rules and procedures for electing the President.

Such a body's functions could extend beyond a single Congressional term.²⁰³ Arguably, the report of a presumably highly qualified, independent, bi-partisan commission should have some authority.

to one or more additional committees, for consideration in sequence (subject to appropriate time limitations), either on its initial referral or after the matter has been reported by the committee of primary jurisdiction; or may refer portions of the matter to one or more additional committees (reflecting different subjects and jurisdictions) for the consideration only of designated portions

Id.

200 *Id.* at § 701e. Then-House Parliamentarian Brown thought there was a good possibility that the Speaker would choose to appoint a balanced bipartisan committee rather than refer the special rules matter to one or more of the politically imbalanced standing committees. He referred to "the tradition of greater consultation with the minority party in times of crisis." Brown Memorandum, *supra* note 112, at 3.

Whether or not such a tradition survives is another question. See generally Charles Babington, *Scorched-Earth Politics: How Can Shutting Congressional Democrats Out of Legislation Be Good Government?*, WASH. POST NAT'L WKLY. ED., Jan. 5–11, 2004, at 22; Editorial, *Time Out—How House Republicans Stopped the Clock to Avert Embarrassment*, SYRACUSE POST-STANDARD, Apr. 3, 2004, at A6; Ronald Goldfarb, *The End of Civility?*, WASH. LAWYER, Feb. 2004, at 30.

201 JEFFERSON'S MANUAL, *supra* note 11, § 700.

202 7 CANNON'S PRECEDENTS, *supra* note 85, § 2049.

203 JEFFERSON'S MANUAL, *supra* note 11, § 589 (cmt.). The Commission on Administrative Review in the House of Representatives was established by H.R. Res. 1368, 94th Cong., 2d Sess. (1976). The Legislative Branch Appropriation Act, Pub. L. No. 94-440, § 101, 90 Stat. 1439, 1448 (1976), enacted "permanent law" with respect to the Commission. The Commission submitted its final report to, and terminated during, the 95th Congress on December 31, 1977.

D. Adoption of House Presidential Election Rules

If a resolution containing proposed House presidential election rules were reported from a committee, it may be debated in the House or in the Committee of the Whole.²⁰⁴ Debates in the House would be under the one-hour rule, which generally permits every one of the 435 members who chooses to speak to do so for not more than one hour but not more than once.²⁰⁵ More expeditious adoption of House presidential election rules would be facilitated by a special order or rule reported from the Committee on Rules, providing for debate on the proposed rules in the Committee of the Whole House, because in general, debate on amendments to resolutions in that Committee is permitted under the “five-minute rule.”²⁰⁶

To approve new rules or amend old ones, both the House and the Committee of the Whole require a majority of votes,²⁰⁷ with a quorum being present.²⁰⁸ The Committee of the Whole House does not vote on the question of passage of a resolution; it reports the resolution to the House.²⁰⁹

204 “Committee of the Whole,” as used in the text, refers to “the Committee of the Whole House on the state of the Union” and not to “the Committee of the Whole House which considers private [bills]” only. House Rule XXIII, *in* JEFFERSON’S MANUAL, *supra* note 11, § 869; *cf. id.* § 752.

205 House Rule XIV, cls. 2 & 6, *in* JEFFERSON’S MANUAL, *supra* note 11, §§ 758, 762.

206 House Rule XXIII, cl. 5(a), *in* JEFFERSON’S MANUAL, *supra* note 11, § 870; DESCHLER’S PRECEDENTS, *supra* note 85, § 5.6; 4 HINDS’ PRECEDENTS, *supra* note 64, § 4916. This rule permits five minutes of debate by an amendment’s proponent, five minutes from one opponent, and five minutes on each of a limited number of pro forma amendments. House Rule XXIII, cl. 5(a), *in* JEFFERSON’S MANUAL, *supra* note 11, § 870, which are devices for extending debate. *Id.* § 873a.

A resolution establishing presidential election rules could be reported to the Committee of the Whole under an open rule, i.e., a special order reported by the Rules Committee and adopted by the House permitting amendments to the resolution, a closed rule precluding any amendments, or a partially closed rule, i.e., one which restricts the number of amendments and substantive alterations which may be offered. *See, e.g.*, DESCHLER’S PRECEDENTS, *supra* note 85, § 5.6.

207 JEFFERSON’S MANUAL *supra* note 11, § 508; *cf.* House Rule XXIII, *in* JEFFERSON’S MANUAL, *supra* note 11, § 877.

208 A quorum of the House is a majority of its members. U.S. CONST. art. I, § 5, cl. 1; United States v. Ballin, 144 U.S. 1, 6 (1892). A quorum in the Committee of the Whole House on the State of the Union is one hundred members. House Rule XXIII 2(a), *in* JEFFERSON’S MANUAL, *supra* note 11, § 863.

209 *Cf.* House Rule XXIII 7, *in* JEFFERSON’S MANUAL, *supra* note 11, § 875. After the Committee of the Whole rises and its chair reports to the Speaker, the House must approve each amendment reported by the Committee of the Whole, and the resolution or bill itself may then be open to amendment by members of the House, 8 CANNON’S PRECEDENTS, *supra* note 85, § 2419, unless limited by special order.

E. Enactment of Legislation Establishing Rules for House Presidential Elections

The House, let alone one whose term is about to end when third-party candidacies or popular vote polls or both make it possible that a President may be chosen by the new House, may wish to establish rules for election of the President which represent a political consensus by engaging the Senate and the President in that effort or some of that effort.²¹⁰ Such a House may also consider the fact that the new House, which convenes on January 3, must be present at the counting of the elector votes on January 6 or thereabouts, and then might have to “immediately” proceed to the election of the President. The new House may not be able, and almost certainly will not have time, to thoughtfully consider rules for that election.

We have also seen that at least two of the issues raised by the Twelfth Amendment and the 1801 and 1825 Rules—“not exceeding three” and “divided”—may not be able to be resolved by House rules as such.²¹¹ Could they be resolved by law?

²¹⁰ The 38th Congress in 1865 adopted the Twenty-second Joint Rule, which provided that questions about counting certified elector votes would be decided by separate concurring votes of each House. However, they relied on a separate joint resolution not to count elector votes from Louisiana and Tennessee, submitted to President Lincoln who approved it, though he subsequently disclaimed “all right of the Executive to interfere in any way in the matter of canvassing or counting electoral votes” COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 13, at 229-30 (1876); See L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321, 328-29 n.34 (1961).

A joint resolution “is a bill so far as the processes of the Congress in relation to it are concerned. With the exception of joint resolutions proposing amendments to the Constitution, all these resolutions are sent to the President for approval and have the full force of law.” JEFFERSON’S MANUAL, *supra* note 11, § 397 (citations omitted). Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005), discusses the constitutional amendment exception. Despite this exception, President Lincoln “[a]pproved” the Joint Resolution that proposed what became the Thirteenth Amendment. George P. Fletcher, Introduction, *Lincoln and the Thirteenth Amendment*, ORG. OF AM. HISTORIANS MAG. OF HIST., Jan. 2007, at 52, 54-55. The 1877 Electoral Commission was created by the Act of Jan. 29, 1877, 19 Stat. 227. See Samuel T. Spear, *Counting the Electoral Votes*, 15 ALB. L. J. 156, 159 (1877).

Indeed, President Ulysses S. Grant also called for a legislative solution. 5 CONG. REC. 24 (1877); see Stephen A. Siegel, *The Conscientious Congressman’s Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 585 n.276 (2004).

Of course, the Electoral Count Act of 1887 was enacted. Act of Feb. 3, 1887, ch. 90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5-7, 15-18 (2006)).

²¹¹ See *supra* Parts III.C.2.c-d.

1. *Interplay Between Statutory House Rules and House Adopted Rules*

Enactment of a statute purporting to establish House presidential election rules or some of them could raise an issue under Article I, Section 5, clause 2 and Article VI, clause 2 of the Constitution. The former provides, “[e]ach House may determine the Rules of its Proceedings,”²¹² and the latter provides, “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”²¹³ *Jefferson’s Manual* takes the position that laws affecting rules of House proceedings enacted by a prior Congress are not binding on a subsequent House, but such laws enacted by a present Congress are.²¹⁴ The policy basis for this distinction apparently rests on the theory that while a past House may not bind a future House,²¹⁵ a present House may bind itself. But there are examples—some provisions of the Electoral Count Act of 1887²¹⁶ are possibly some of them, as are the legislative reor-

212 U.S. CONST. art. I, § 5, cl. 2.

213 *Id.* at art. VI.

214 JEFFERSON’S MANUAL, *supra* note 11, §§ 59–60. It is not clear that Stephen A. Siegel has made this distinction in Siegel, *supra* note 210, at 546.

215 *See supra* note 85.

216 Act of Feb. 3, 1887, 24 Stat. 373 (codified at 3 U.S.C. §§ 2, 5–7, 15–18 (2006)). For examples, the provision in 3 U.S.C. § 15 that two tellers shall be appointed by the House to make a list of the electors’ votes, or the provision in 3 U.S.C. § 16 that if the counting of elector votes shall not have been completed before the fifth calendar day after the first joint session for that purpose, no recess may be taken by the House. “It may be noted that, in the 91st Congress, a law specifying that the counting of electoral votes for President and Vice President should be conducted in a joint session was made a joint rule of the two Houses by its incorporation by reference in a concurrent resolution.” DESCHLER’S PRECEDENTS, *supra* note 85, § 5.3.

For a lengthy analysis of the Electoral Count Act, *see* Ross & Josephson, *Popular Vote*, *supra* note 1, at 704–40. In light of the presidential election of 2000, the year 2000 Supreme Court cases—*Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) and *Bush v. Gore*, 531 U.S. 98 (2000)—and the subsequent literature, another look needs to be taken at all aspects of the Act. *See* Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 FLA. ST. U. L. REV. 811, 860–67 (2001); Glennon, *supra* note 7; Kesavan, *supra* note 7; Eric Schickler et al., *Safe at Any Speed: Legislative Intent, the Electoral Count Act of 1887, and Bush v. Gore*, 16 J.L. & POL. 717 (2000); Siegel, *supra* note 210.

Such a look is beyond the scope of this article, but those Supreme Court justices who referred to the right of the Florida State Legislature to appoint electors, *see Bush v. Gore*, 531 U.S. at 104, appear not to have considered the substantive implications of the beginning phrase of 3 U.S.C. § 5: “If any State shall have provided, by laws enacted *prior* to the day fixed for the appointment of the electors . . . such determination . . . shall govern.” 3 U.S.C. § 5 (2006) (emphasis added). But Justice Rehnquist’s concurrence in *Bush* does touch upon the implications. *Bush*, 531 U.S. at 113. Nor did they apparently consider the implication of “on a subsequent day” in 3 U.S.C. § 2. These statutes were first enacted as part of the 1887 Electoral Count Act as one of a comprehensive series of elector vote

counting rules, presumably pursuant to Congress's power and duty to count the elector votes. U.S. CONST. art. II, § 2, cl. 3; U.S. CONST. amend. XII.

Moreover, the main holding in *McPherson v. Blacker*, 146 U.S. 1 (1892), which the Supreme Court cited in *Bush*, 531 U.S. at 104, stands only for the proposition that neither the Constitution nor the Fourteenth Amendment prohibit a state legislature from changing the way electors are appointed *prior* to the day of their appointment. *McPherson*, 146 U.S. at 38–39. It is not in the authority of a state legislature to change the method of appointment thereafter. Indeed, Professor Friedman has argued that had the Florida legislature purported to do so, its effort would have violated Section 1, clause 4 of Article II of the Constitution, “[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States,” and the Fourteenth Amendment’s Due Process Clause. Friedman, *supra*, at 817–23, 817 n.19, 838–40, 839 n.104 (citing *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995) for the latter proposition, but not citing its complicated subsequent history, e.g., *Roe v. Alabama by and Through Evans*, 52 F.3d 300 (11th Cir. 1995); *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995), *cert. denied sub nom. Davis v. Alabama*, 516 U.S. 908 (1995)). Professor Friedman also argues that 3 U.S.C. § 2 “cannot reasonably be understood to have meant that if the state holds an election on Election Day . . . then the Legislature may step in and choose a slate of electors without regard to what happened on Election Day.” *Id.* at 816. Kirby, *supra* note 11, at 497 n.24, makes the same point. Cf. BENNETT *supra* note 1, at 51 n.31. Chang, *supra* note 178, at 228, seems unaware that the Florida Legislature was apparently prepared to cast its elector votes regardless of the outcome of any recount.

“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 manner as the legislature of such State may direct” (emphasis added). 3 U.S.C. § 2 (2006). But if Congress may determine the time of choosing electors, which unlike the day they vote need not be uniform throughout the United States, may it not determine the times, unless the use of “time” in the singular is substantive? On the other hand, in 3 U.S.C. § 2 Congress was not determining another time, but seemingly delegating its authority to do so to the state legislatures. This does raise issues about its constitutionality.

Some states constitutionally prohibit retroactive state laws. See 2 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 41:3, at 383–84 & n.9 (6th ed. 2001). Florida is not one of them, except as we shall see, *infra*, with respect to certain criminal statutes, but retroactivity is justiciable otherwise. E.g., *Old Port Cove Holdings v. Old Port Cove Condominium Ass’n One*, 986 So. 2d 1279 (Fla. 2008) (holding that a statute relating to the rule against perpetuities is not retroactive); *Florida Hospital Waterman v. Buster*, 984 So. 2d 478 (Fla. 2008) (allowing a retroactive ballot initiative amending Florida Constitution); *Smiley v. Florida*, 966 So. 2d 330 (Fla. 2007) (allowing retroactive application of statute abrogating common law duty to retreat violates the Florida Constitution Article X, Section 9, which provides, “Repeal or amendment of a *criminal statute* shall not affect prosecution or punishment for any crime previously committed”). There is also the U.S. Constitution’s ex post facto law prohibition in Article 10, Section 10. U.S. CONST. art. 1, § 10. That was very early construed in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798), perhaps wrongly, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-2 (2d ed. 1988), to apply only to criminalization of what previously was not criminal.

Also, query whether a state legislature’s act with respect to appointing electors would be a law for either of these purposes. For examples, Article III, Section 8(a) of the Florida Constitution requires gubernatorial approval of a bill passed by the legislature before it “shall become a law.” FLA. STAT. ANN. § 677 (1970). So does Article 4, Section 7 of the New York Constitution.

ganization acts,²¹⁷ reorganization acts,²¹⁸ “fast track” trade agreement authorizations,²¹⁹ and other statutes²²⁰—that purport to determine rules for at least some Senate or House proceedings. I have not made an exhaustive survey of such statutes.

However, the major statutes amending the standing rules of the House (and Senate) explicitly acknowledge the constitutional right of each House to determine the rules for its own proceedings and to change any such rules contained in legislation.²²¹ Thus, even if a pre-

Perhaps a better argument against post-presidential popular election state legislative appointment of electors would be based on the Privileges and Immunities Clause of the Fourteenth Amendment. See U.S. CONST. amend XIV, § 1. Despite its emasculation in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–79 (1873), there are “Incentives for Bringing the Privileges or Immunities Clause to Life.” TRIBE, *supra*, at 1312; see Tony Mauro, *Shotgun Wedding: Liberals. Teamup with NRA in Gun Case*, LEGAL TIMES, Feb. 23, 2009, at 1. The right to vote for national officers was one of the privileges and immunities listed in *Twining v. New Jersey*, 211 U.S. 78, 97 (1908).

In *Oregon v. Mitchell*, 400 U.S. 112, 138–41 (1970), Justice William O. Douglas, concurring and dissenting in part, advanced a citation-packed equal protection argument, stating that the right to vote “is a civil right of the highest order.” *Id.* at 139. He presumably would have disagreed with the first sentence of this quotation from the per curiam opinion in *Bush v. Gore*.

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. . . . History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental

531 U.S. at 104.

The Court was laying the basis for its own equal protection argument and, in the next breath, quoted an 1874 Senate Report whose substantive relevance is questionable that asserted that state legislatures can resume the power. *Id.* Nevertheless, the Court’s ultimate recognition of this fundamental right may have implications for its future protection. See generally TRIBE, *supra*, at §§ 7-5 & 7-6 and authorities cited throughout.

217 *E.g.*, Legislative Reorganization Act of 1970, Pub. L. 91-510, 84 Stat. 1140; Legislative Reorganization Act of 1946, Pub. L. 601, 60 Stat. 812. The Legislative Reorganization Act of 1946 purports to amend House Rules X and XII to establish procedures for standing committees, and to provide for hearings and reports of the House Appropriations Committee. *Id.* §§ 133, 139.

218 *E.g.*, Reorganization Act of 1977, Pub. L. 95-17, 91 Stat. 29. Section 908 of the Reorganization Act of 1977 (codified at 5 U.S.C. § 908 (2006)), is substantively the same as Section 101 of the Legislative Reorganization Act of 1946. See *infra* note 221.

219 Section 1103(d) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1131–32 (codified at 19 U.S.C. § 2903 (2006)), is substantially the same as section 101 of the Legislative Reorganization Act of 1946.

220 *E.g.*, Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, 121 Stat. 735. Section 306, 121 Stat. 754, and Section 555, 121 Stat. 774, are substantially the same as Section 101 of the Legislative Reorganization Act of 1946. The former Act’s extensive changes to the Senate and House Rules are described in Nicholas G. Karambelas, *The Honest Leadership and Open Government Act of 2007*, WASH. LAWYER, Dec. 2007, at 31.

221 Section 101 of the Legislative Reorganization Act of 1946 provides:

The following sections of [the Title 1—Changes in Rules of Senate and House] are enacted by the Congress:

(a) As an exercise of the rule-making power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply; and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(b) With full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner and to the same extent as in the case of any other rule of such House.

§ 101, 60 Stat. at 814. Similar provisions with respect to the House were enacted in §§ 101(2), 241(2), and 251(2) of the Legislative Reorganization Act of 1970, 84 Stat. 1143, 1172–73. Twenty-six years ago, the House Rules Committee said:

To the extent that the House chooses to enact any rule into law, it places itself in the constitutionally unacceptable position of requiring the consent of the other body and of the President to directly modify or repeal that rule.

Since the enactment of the Congressional Budget and Impoundment Act of 1974 (Public Law 93-344) statutory adoption of rules has become increasingly common, but traditionally such rules carry a disclaimer relating to the rulemaking power of each House similar to the one contained in that Act (§ 904). The committee has previously reported to the House (H. Rept. 97-809, Part 2) that it views the authority of each House to “determine the rules of its proceedings” to be constitutionally grounded and considers the power of each House to modify rules it has chosen to enact in statutory form to be unaffected by whether that statute carries such a disclaimer. Nevertheless, the language is customary and the committee believes that unnecessary doubts are invited by proposing rules in statutory form, particularly in the absence of such a disclaimer.

H.R. REP. NO. 98-257, 98th Cong., 1st Sess. pt. 3, at 5 (1983).

In Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT’L L. 69, 98 n.140 (1988), the author provides a description of the above report, supplemented by an abbreviated quotation, and raises a concern that the inclusion of House rules in a statute might waive the House’s unilateral right to change them. The concern is not warranted by the above complete text of the pertinent paragraphs of the report, which acknowledges that disclaimers are effective to obviate any such concerns.

The Federal Contested Election Act, 2 U.S.C. §§ 381–96 (2006), applies only to an election “to choose a Representative in, or Delegate or Resident Commissioner to, the Congress.” *Id.* § 381. Many, if not most, of its provisions could have been adopted as House rules. The Senate has no such rules, whereas the House has had statutory contest procedures as early as the Fifth Congress in 1798. S. REP. NO. 91-546, 91st Cong., 1st Sess. at 1 (1969). Indeed, presumably in deference to the House, the Senate Report substantially excerpted H.R. REP. NO. 91-569, 91st Cong. 1st Sess., at 2–3 (1969). The Act does not contain any acknowledgement of the House’s right by unilateral action to change those provisions that could have been adopted by a House Rule. Professor Lawson writes:

Thus, a literal reading of the Sweeping Clause [the Necessary and Proper Clause] does not include the power to implement the various functions conferred on the individual houses of Congress.

There is some reason, however, to avoid this literal reading. The Sweeping Clause speaks of powers “vested by this Constitution in the Government of the United States.” There are, strictly speaking, no such powers. The Constitution does not ever grant powers to the “Government of the United States” as a unitary entity; all powers are granted to specific federal institutions, such as Congress, the House, the Senate, the President, the Vice President, the Chief Justice, and the federal courts. The best reading of the Sweeping Clause is thus to treat the phrase “the Government of the United States” as meaning “principal institutions of the Government of the United States,” which would certainly include the constitutionally created House

sent vote for a statute could be said to have bound itself, logically a subsequent motion in the same House to adopt a rule inconsistent with the law would seem to be as in order, as would a subsequent motion in that House to modify or repeal a rule it had adopted during that session.

Such a statute would also be subject to repeal or amendment by the new Congress in the few days between its convening and its required counting of the electors' votes, but such repeal or amendment would be subject to signature, veto, or pocket veto by the outgoing President, who will undoubtedly be interested in the House presidential election outcome whether or not he or she is a candidate to succeed him- or herself.

Finally, as we have seen, *Jefferson's Manual* flatly asserts that no statute can preclude a subsequent House or Senate from determining the rules of its own proceedings.²²² If this is so, then these statutory acknowledgments simply state the Constitution-based rule.

Nevertheless, the existence of these House (and Senate) rule enactments implies that they serve at least a presumptive purpose. On that assumption, we consider whether legislation could resolve the "not exceeding three" and divided House state delegation issues.

2. "Not Exceeding Three"

As we have seen, the legislative history of the Twelfth Amendment decision to change the constitutional formulation "from the five highest on the list" to "the persons having the highest numbers not exceeding three" suggests that it was not intended to confer discretion on the House to choose from fewer than three.²²³ Nor did the Twelfth Amendment enactors resolve the issue of elector tie votes among the candidates for President and Vice President, even though the Constitution had provided for the issue.²²⁴

and Senate. On this understanding, Congress could, by statute, implement the various powers granted to the individual houses.

Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373, 1386 (2005); cf. Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993). For discussion of the Necessary and Proper Clause as authority for federal legislation with respect to presidential elections, see *infra* notes 225–35 and accompanying text.

²²² See *supra* note 214.

²²³ See *supra* note 80.

²²⁴ "[I]f there be *more than one* who have such Majority, and have an *equal* Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; . . . But if there should remain two *or more* who have equal Votes, the Senate

Let us assume that a law was enacted making clear that the House does not have the power to consider fewer than three presidential candidates, assuming at least three receive elector votes, and it and the Senate have the power to consider more than three or two candidates for President or Vice President, respectively, if there are ties among the highest on the list. Nothing in the Constitution, including its amendments, specifically authorizes such an enactment. Nor does anything prohibit it. Would it be constitutional? Analogous authority suggests that it would be.

In *Ex parte Yarbrough*,²²⁵ the Court rejected the proposition “that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it.”²²⁶ It sustained a prosecution for conspiracy to intimidate a citizen in the exercise of his right to vote for a member of Congress:

Because there is no *express* power to provide for preventing violence exercised on the voter[,] . . . no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the Constitution. Article I., sec. 8, clause 18.²²⁷

The victim whom the defendants did “beat, bruise, wound, and maltreat”²²⁸ was black, and the Court explicitly invoked the Fifteenth Amendment and Congress’s power to enforce it by appropriate legislation.²²⁹ But the Court also held:

This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of

shall chuse from them by Ballot the Vice President.” U.S. CONST. art. II, § 1, cl. 3 (emphases added).

225 110 U.S. 651, 658 (1884); accord *Ex parte Siebold*, 100 U.S. 371 (1879). See *Kucinich v. Texas Democratic Party*, No. 08-5038, 2009 U.S. App. LEXIS 6084, at 11 (5th Cir. Mar. 24, 2009) (upholding presidential primary candidate oath to support party’s presidential candidate); *Ray v. Blair*, 343 U.S. 214, 230 (1952) (5-2 decision) (holding that an elector pledge to vote for party’s presidential candidate not unconstitutional).

226 *Yarbrough*, 110 U.S. at 658.

227 *Id.*

228 *Id.* at 656.

229 *Id.* at 664.

other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination.

The exercise of the right in both instances is guaranteed by the Constitution, and should be kept free and pure by congressional enactments whenever that is necessary.²³⁰

These principles for the protection of votes for Congress were extended to the protection of votes for President and Vice President. In *Burroughs & Cannon v. United States*,²³¹ the Court rejected the following argument of petitioners:

The Constitution confers upon the State the exclusive power of appointing presidential electors . . . except the time of choosing them. Having fixed the time, Congress has exhausted all of its power respecting their appointment, save the power to prevent the discriminations forbidden by the Fourteenth, Fifteenth, and Nineteenth Amendments.²³²

In upholding conspiracy indictments under the Corrupt Practices Act,²³³

The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or corruption.²³⁴

The Court concluded:

The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, . . . the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.²³⁵

²³⁰ *Id.* at 665.

²³¹ 290 U.S. 534 (1934).

²³² *Id.* at 536.

²³³ Act of Feb. 28, 1925, ch. 368, tit. III, 43 Stat. 1070 (codified at 2 U.S.C. §§ 241–48 (2006)), repealed by Campaign Communications Reform Act, Pub. L. 92-225, § 405, 86 Stat. 20 (1972).

²³⁴ *Burroughs*, 290 U.S. at 545. The Court discussed and quoted with approval *Ex parte Yarbrough*, 110 U.S. 651, 651 (1884). *Burroughs*, 290 U.S. at 545–47; cf. *Oregon v. Mitchell*, 400 U.S. 112, 139 & n.5 (1970) (Douglas, J., concurring and dissenting) (quoting *Ex parte Yarbrough*).

²³⁵ *Burroughs*, 290 U.S. at 547–48 (citing *Stephenson v. Binford*, 287 U.S. 251, 272 (1932)); *TRIBE*, *supra* note 216, §13-10 (“Although the Constitution does not explicitly concede

Moreover, should the House decide to consider fewer than three presidential candidates who received the highest elector votes, other than for lack of the constitutional qualifications, or should it or the Senate, respectively, not consider more than three or two qualified presidential or vice presidential candidates because of tie votes, highly undesirable litigation would almost certainly ensue. Alexander Hamilton said flatly, “The qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature.”²³⁶

Were the House to reject a constitutionally qualified candidate, it would in effect be impermissibly adding to the presidential or, in the case of the Senate, vice presidential constitutional qualifications.²³⁷ Were either to do so, the candidates rejected would have recourse to the federal judiciary.²³⁸

Congress dominion over the qualifications of voters in presidential and vice presidential elections, the Court has nonetheless ruled that Congress possesses the same powers over such elections that it enjoys with respect to congressional elections.” (footnote omitted); see also Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons Learned from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 887–908 (2002) (describing the implied congressional power to regulate presidential elections); cf. Kirby, *supra* note 11, at 499–500 (“[N]o congressional exercise of [the fourteenth, fifteenth, and nineteenth amendments] has yet directly conflicted with state regulation of appointment of presidential electors.”). For a most thoughtful discussion of the Necessary and Proper Clause, see Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997).

²³⁶ THE FEDERALIST NO. 60, at 369 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Although not completely clear, the context suggests that Hamilton was talking about the qualifications of Representatives. U.S. CONST. art. I, § 2, cl. 2. His view was upheld in *Powell v. McCormack*, 395 U.S. 486, 550 (1969), which held that when “judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution.”

The same reasoning should apply to the qualifications for President and Vice President. U.S. CONST. art II, § 1, cl. 5; U.S. CONST. amend. XII. The only *Federalist* discussion of the President’s constitutional qualifications appears to be in THE FEDERALIST NO. 64 (John Jay), *supra*, at 391, but in the context of the treaty power.

²³⁷ In distinguishing between (1) the House’s purported general power by majority vote to exclude a newly elected Representative—which the Court rejected—and (2) the House’s constitutional power to expel a Representative by a two-thirds vote, U.S. CONST. art. I, § 5, cl. 2, *Powell* indicated that in the former case the House was impermissibly trying to add to the Constitution’s qualifications for Representative. 395 U.S. at 537–40; see also U.S. CONST. art. I, § 2, cl. 2; *Powell*, 395 U.S. at 551 (Douglas J., concurring) (“Up to now the understanding has been quite clear to the effect that [Congress’s] authority [to deviate from or alter the qualifications for membership as a Representative] does not exist.”).

²³⁸ In *United States v. Smith*, 286 U.S. 6 (1932), Justice Brandeis held:

As to the construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one. Smith asserts that he was duly appointed to office, in the manner prescribed by the Constitution. The Senate disputes the claim. In deciding the issue, the Court must give great weight to the Senate’s present construction of its own rules; but so

There are no examples of the House or Senate excluding or considering excluding a presidential or vice presidential candidate who had received the requisite number of elector votes. Nor are there cases raising that issue. But such a person almost certainly has a constitutional right to be considered by the House or Senate. *Williams v. Rhodes*²³⁹ held that new political parties have a First Amendment right, made applicable to the states by the Fourteenth Amendment, to have the same opportunity to have their presidential electors on the ballot as the established political parties. A presidential or vice presidential candidate who received the requisite number of elector votes would

far, at least, as that construction was arrived at subsequent to the events in controversy, we are not concluded by it.

Id. at 33 (citation omitted); *accord Powell*, 395 U.S. at 512–16 (concluding that the Court has jurisdiction to entertain suits regarding the seating of Congressmen); DESCHLER'S PRECEDENTS, *supra* note 85, § 5.4 (acknowledging the Court's decisions as its jurisdiction and the justiciability of the House's unsuccessful effort to exclude Representative Powell).

239 393 U.S. 23 (1968); *id.* at 38–39 (Douglas, J., concurring); *id.* at 41 (Harlan, J., concurring).

Despite the uncertainty expressed in BENNETT, *supra* note 1, at 128–29, the rule of *Williams v. Rhodes* appears to retain its vitality. *Anderson v. Celebrezze*, 460 U.S. 780, 805–06 (1983) (holding that Ohio's filing deadline for independent candidates for the office of President of the United States could not be justified by the state's asserted interest in protecting political stability); *Lee v. Keith*, 463 F.3d 763, 765 (7th Cir. 2006) (holding that Illinois state election regulations operated unconstitutionally to burden the freedom of political association guaranteed by the First and Fourteenth Amendments); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582 (6th Cir. 2006) (using the analytical framework set forth in *Anderson v. Celebrezze*, 460 U.S. 780, to invalidate particular Ohio election regulations); *Duke v. Smith*, 13 F.3d 388, 392 (11th Cir. 1994) (finding that the Presidential Candidate Selection Committee violated the plaintiff's First and Fourteenth Amendment rights by excluding the candidate from the Presidential Primary Ballot); *Duke v. Cleland*, 5 F.3d 1399, 1405 (11th Cir. 1993) (quoting approvingly the analytical framework posited in *Anderson*, 460 U.S. 780); *Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575, 580 (S.D.W.Va. 2000) (ordering Secretary of State to certify plaintiffs as third-party nominees for the offices of President and Vice President); *Nader 2000 Primary Comm., Inc. v. Hazeltine*, 110 F. Supp. 2d 1201, 1209 (D.S.D. 2000) (declaring a South Dakota election statute unconstitutional as applied to the supporters of and independent candidates for President of the United States); *Campbell v. Hull*, 73 F. Supp. 2d 1081, 1094 (D. Ariz. 1999) (enjoining defendant from enforcing section of election law that required signors of nomination petition not be members of qualified political parties); *Duke v. Connell*, 790 F. Supp. 50, 51 (D.R.I. 1992) (granting plaintiff's order compelling Secretary of State to place his name on the ballot as a candidate); *Buchanan v. Secretary of State*, 616 N.W.2d 162 (Mich. 2000) (denying otherwise legitimate third-party presidential and vice presidential candidates claim for relief due to mootness); Robert Yablon, Comment, *Validation Procedures and the Burden of Ballot Access Regulations*, 115 YALE L.J. 1833 (2006) (detailing the efforts of third-party candidates in challenging state ballot access laws during the 2004 presidential campaign).

seem to have an even stronger case for inclusion as a candidate in the House's election of a President or the Senate's of a Vice President.²⁴⁰

Thus, the Congress may, and should, consider legislating under the Twelfth Amendment that neither the House nor the Senate has the power to exclude from consideration candidates who receive sufficient elector votes so that they qualify as among the three or two highest, respectively, because of elector vote ties.

3. *Divided*

Let us assume that (1) a House state delegation quorum, if required, was present, or (2) such a House state delegation could not vote, because it could not muster a quorum, if so required, or (3) it could not vote, because it could not muster whatever majority might be required.²⁴¹ If so, what would be the rule of decision for the casting of such a vote? Could a statute deem the votes for President cast, or authorize and direct the House Speaker to cast those votes, for a House state delegation that did not vote?

²⁴⁰ Nevertheless, one of the options for the Proposed Rules for the Election of the President By the House of Representatives (1981) would have eliminated any third candidate if no candidate had received a majority of the states on the first ballot. *Frost Memo, supra* note 11, at 15695, col. 1 (*Option A: Rule 5(f)*). No consideration was apparently given to an elector tie vote or to the possibility that there could be more than three candidates because of elector vote ties.

²⁴¹ The issues discussed in this section are unlikely to arise in any Senate vote for Vice President. As we have seen, under the Twelfth Amendment, "a majority of the whole number [of Senators] shall be necessary to a choice." U.S. CONST. amend. XII. Thus, the Senators vote individually and not by state delegations.

Moreover, the Senate Rules appear to be stricter than the House's about Senators voting. Unlike, as we shall see, in the House Rules, they contain no provision for voting "present." Moreover, under Senate Rule 12.1:

When the yeas and nays are ordered, the names of Senators shall be called alphabetically; and each Senator shall, without debate, declare his assent or dissent to the question, unless excused by the Senate

SENATE MANUAL, *supra* note 6, at 12. Senate Rule 12.2 provides:

When a Senator declines to vote on the call of his name, he shall be required to assign his reasons therefor, and having assigned them, the Presiding Officer shall submit the question to the Senate: "Shall the Senator for the reasons assigned by him, be excused from voting?" which shall be decided without debate

Id. Senate Rule 12.3 provides that a Senator "may decline to vote . . . on any matter when he believes that his voting on such a matter would be a conflict of interest." *Id.* It is difficult to imagine what might be such a conflict in a vote to choose a Vice President unless the Senator or a close family member were a candidate. Unlike Section 2 of House Rule VIII, which regulates pairing, JEFFERSON'S MANUAL, *supra* note 11, § 660a, pairing in the Senate is informal. RIDDICK & FRUMIN, RIDDICK'S SENATE PROCEDURE, *supra* note 10, at 968-70.

Again, not a word in the Constitution authorizes (or prohibits) such a law. But the situation appears to be substantively different from that discussed in the immediately preceding section of this article, “Not Exceeding Three.” There, the issue was protecting candidates’ rights to be considered by the House for President if they win sufficient elector votes.

House Rule VIII does assert authority to compel members to attend and to vote:

1. Every Member shall be present within the Hall of the House during its sittings, unless excused or necessarily prevented; and shall vote on each question put, unless he has a direct personal or pecuniary interest in the event of such question.²⁴²

Under House Rule XV(2) and (4), absent members may be arrested by the Sergeant-at-Arms.²⁴³

But compelling attendance is not compelling voting. Indeed, under House Rule XV(4) and (5)(a), ordinarily Representatives may vote “Present.”²⁴⁴

Moreover, the comment to House Rule VIII(1), quoted above, states:

It has been found impracticable to enforce the provision requiring every Member to vote (V, 5942-5948), and such question, even if entertained, may not interrupt a pending roll call vote (V, 5947). . . .²⁴⁵

Nevertheless, in accordance with the plain meaning of House Rule VIII(1), quoted immediately above, and consistent with the Other Body’s Rules,²⁴⁶ perhaps a House Rule would be in order that compelled Representatives not only to attend, but to vote at the meetings of their respective state delegations to decide how they should vote for President. But as we shall see in a moment, such a rule, though undoubtedly useful, would not necessarily obviate the need for a law, at least in the case of the thirteen one- and two-Representative House state delegations.

²⁴² JEFFERSON’S MANUAL, *supra* note 11, §§ 656–57.

²⁴³ *Id.* §§ 768–70. The context is the absence of a House quorum upon a call of the House. Any House rules for presidential elections should probably make explicit the procedures for invoking the powers of the House Sergeant-at-Arms for compelling in that situation the attendance of absent Representatives.

²⁴⁴ *Id.* §§ 773 & 774.

²⁴⁵ *Id.* § 672 (citations are to HINDS’ PRECEDENTS, *supra* note 64).

²⁴⁶ *See supra* note 241.

Returning to the question of a statute,²⁴⁷ can a distinction be drawn between compelling a Representative's attendance and voting on a bill, resolution, or motion, and voting for President as part of a state delegation? The difficulty with the former is the absence of any objective criteria to determine how the compelled vote is to be cast. In the case of a Representative's compelled vote as part of her or his House state delegation's vote for President, how the people of that state voted for President could provide a rule for decision,²⁴⁸ remembering that (1) under the Twelfth Amendment the states vote for President through their electors, who except in the cases of Maine, Nebraska, and faithlessness, vote unanimously; and (2) the House chooses a President by voting by states. If none of the three highest on the list won a state, there would be no decisional rule for that state's House delegation.

There is also the, admittedly expedient, argument that neither the people of any state nor that state would want to, or should, be deprived of their House delegation's vote for President because of lack of a quorum or of a majority in its delegation, particularly given the Twelfth Amendment quorum requirement of two-thirds of the States, the majority requirement of all the states for the vote, and the possible difficulty of assembling such a majority.

It may not be necessary to deal with the issue of compelling individual Representatives to vote. A statute could, in the case of a House state delegation that, for whatever reason, did not cast its vote for President, deem that state's vote cast or authorize and direct the Speaker to cast that state's vote for President in accordance with that state's popular vote, again assuming one of the three highest on the list won it. This argument would seem to be particularly compelling in the case of the vacancy, disability, or absence of a Representative from one or more of the seven one-Representative states or from one or more of the five two-Representative states, the latter of whose delegations consequently would have difficulty assembling either a quorum or a majority or both, if required to do so.

If one of the three highest on the list did not win that state's popular vote, then perhaps that state's vote should be cast for the na-

²⁴⁷ House Rule X, cl. 1 (j)(11) gives the Committee on the Judiciary legislative jurisdiction with respect to "attendance of members . . ." JEFFERSON'S MANUAL, *supra* note 11, § 679a (citing 4 HIND'S PRECEDENTS, *supra* note 64, § 4077 and 6 HIND'S PRECEDENTS, *supra* § 65. However, a statute that in addition compelled voting for President might also come within the jurisdiction of the Committee on House Administration. *See supra* note 197.

²⁴⁸ *See supra* note 178.

tional winner of the popular vote, including the District of Columbia, because under the Twenty-third Amendment it has the number of electors to which it would be entitled if it were a state, even though, as we have seen, the District's delegate has no vote for President in the House,²⁴⁹ as has been at least once proposed.

²⁴⁹ On June 3, 1980, Representative Joel Pritchard of Washington introduced a sense of the House resolution that "the Members should choose as President the person having the greatest number of popular votes in the November 1980 election of a President." H.R. Res. 694, 96th Cong., 2d Sess. (1980). It was referred to the Committee on House Administration, which took no action. This is consistent with the argument of BENNETT, *supra* note 1.

Akhil Reed Amar and Vikram David Amar argue that state legislators are free to name their electors in accordance with the winner of the national popular vote or to direct that its electors be bound or pledged to vote in accordance with the direct popular national presidential vote. Akhil Reed Amar & Vikram David Amar, *How to Achieve Director National Election of the President Without Amending the Constitution: Part Three of a Three-part Series on the 2000 Election and the Electoral College*, FIND LAW'S WRIT, Dec. 28, 2001, <http://writ.news.findlaw.com/amar/20011228.html>. This may not be correct, because it does not seem to take into account several provisions of the Fourteenth Amendment. See Coenen & Larson, *supra* note 235, at 885–87 (arguing that Section 5 of the Fourteenth Amendment would not permit Congress to take such action); Friedman, *supra* note 216, at 824–26 (discussing the invalidation of the Florida Supreme Court's manual recount order in *Bush v. Gore* on Fourteenth Amendment grounds); Kirby, *supra* note 249, at 496 (discussing Fourteenth Amendment limitations upon state legislatures that have directed that presidential electors be appointed by popular election); Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 537–38 (2001). But see Wechsler, *supra* note 69, at 549 (suggesting that Section 2 of the Fourteenth Amendment "has proved unworkable in practice"). Neither does it take account of 2 U.S.C. § 6 (2006) or the Voting Rights Act of 1965, 42 U.S.C. §§ 1973a(c), 1973c (2006), where applicable. National Popular Vote was also supported by Michael Waldman, *Majority Rule at Last: How to Dump the Electoral College Without Changing the Constitution*, WASH. MONTHLY, Apr. 2008, at 18, but he seems unaware of its flaws as discussed *infra*.

The California Legislature passed Assembly 2948 (Cal. 2006), which would have awarded that state's elector votes to the winner of the National Popular Vote. Rick Lyman, *Innovator Devises End Run Around Electoral College*, N.Y. TIMES, Sept. 22, 2006, at A18. Governor Arnold Schwarzenegger vetoed this bill on September 30, 2006 stating that, "I cannot support [increasing California's relevancy in presidential campaigns] by giving all our electoral votes to the candidate that a majority of Californians did not support." Veto message from Arnold Schwarzenegger, Governor of California, to Members of the California State Assembly (on file with author); see *Veto in California on Electoral College*, N.Y. TIMES, Oct. 3, 2006, at A17.

The California Senate passed National Popular Vote in summer 2007, *National Popular Vote Bills*, BALLOT ACCESS NEWS (Richard Winger, San Francisco, CA), July 1, 2007, <http://www.ballot-access.org/2007/070107.html#9>. The California Assembly did the same on June 30, 2008, but the Governor was expected to veto it, having vetoed the same bill in 2006. *National Popular Vote Plan Bills*, BALLOT ACCESS NEWS, Aug. 1, 2008, <http://www.ballot-access.org/2008/080108.html#4>. Efforts to bypass this veto by initiative seem to have faltered and would probably have been unconstitutional. See *supra* note 178.

The Maryland Legislature passed H.R. 148, "Presidential Elections—Agreement Among the States to Elect the President by National Popular Vote" (2007), available at <http://mlis.state.md.us/2007RS/bills/hb/hb0148t.pdf>, and the Senate Bill 634, available at <http://mlis.state.md.us/2007RS/bills/sb/sb0634t.pdf>. On April 10, 2007, Governor Martin T. O'Malley signed the Act. *The New York Times* editorially supported Maryland's action. Editorial, *Maryland Takes the Lead*, N.Y. TIMES, Apr. 14, 2007, at A14. The Maryland statute is also discussed in Jon S. Cardin, *The National Popular Vote*, WASH. LAWYER, Dec. 2007, at 36. *But see* William Josephson, *Letters to the Editor, Voting Reform: Another Remedy*, WASH. LAWYER, Dec. 2007, at 5.

The June 1 edition of *Ballot Access News* reported that a Colorado House of Representatives committee killed a National Popular Vote bill. *Anti-Electoral College Bills*, BALLOT ACCESS NEWS (Richard Winger, San Francisco, CA), July 1, 2006, <http://www.ballot-access.org/2006/060106.html#7>. In 2007 the Arkansas House and the Colorado Senate voted for the National Popular Vote initiative, as did a North Carolina Senate committee. *See* Margaret Lillard, *N.C. Senate Panel OKs Presidential Popular Vote Plan*, ASSOCIATED PRESS, May 7, 2007.

The Hawaii Governor vetoed a National Popular Vote bill, SB 2898, on April 22, 2008, *National Popular Vote Bills*, BALLOT ACCESS NEWS (Richard Winger, San Francisco, CA), May 1, 2008, <http://www.ballot-access.org/2008/050108.html#7>, but the Legislature overrode it on May 1, *Legislative Vote, National Popular Vote*, BALLOT ACCESS NEWS, June 1, 2008, Vol. 1, at 2.

Montana and North Dakota have rejected National Popular Vote. Brian Charlton, *Hawaii House Avoids Override Vote on Electoral College Bill*, SEATTLE POST-INTELLIGENCER, May 3, 2008.

On January 13, 2008, New Jersey enacted National Popular Vote in Pub. L. 2007, s.334. *See* E-mail from Abbe Gluck, Esq., Special Counsel to New Jersey Att'y Gen., to Devi Kawalek and William Josephson (March 11, 2008 11:17 EST) (on file with author). *Ballot Access News* reports that the Washington State Senate passed a National Popular Vote bill on January 12, and on January 29, the West Virginia bill died in committee. *National Popular Vote Plan Bills*, BALLOT ACCESS NEWS (Richard Winger, San Francisco, CA), Mar. 1, 2008, <http://www.ballot-access.org/2008/030108.html#5>. The Illinois Governor signed HB 1685, a National Popular Vote bill, into law on April 7, 2008. *National Popular Vote Bills*, BALLOT ACCESS NEWS (Richard Winger, San Francisco, CA), May 1, 2008, <http://www.ballot-access.org/2008/050108.html#7>. The Vermont Governor vetoed a National Popular Vote bill on May 16, 2008. *Legislative News*, BALLOT ACCESS NEWS (Richard Winger, San Francisco, CA), June 1, 2008, <http://www.ballot-access.org/2008/060108.html#4>. On May 27, 2008, the Rhode Island Legislature passed one, *id.*, but the Governor vetoed it. *National Popular Vote Plan Bills*, BALLOT ACCESS NEWS (Richard Winger, San Francisco, CA), Aug. 1, 2008, <http://www.ballot-access.org/2008/080108.html#4>.

The Massachusetts Legislation passed HB 678, but adjourned on August 1, 2008, without voting to send the bill to the Governor. *National Popular Vote Plan Bills*, BALLOT ACCESS NEWS (Richard Winger, San Francisco, CA), Sept. 1, 2008, <http://www.ballot-access.org/2008/090108.html#2>.

The Maryland legislation provides for electors to be nominated by political parties and for "a vote for the candidates for the President and Vice President of a political party shall be considered to be and counted as a vote for each of the presidential electors of the political party nominated . . ." H.R. 148, 424th Leg. (Md. 2007). These electors, who may have been elected to vote for Maryland's popular vote winner, are then purportedly required to "cast their votes for the candidates for President and Vice President who received a plurality of the votes cast in [the State of Maryland] the National Popular Vote Total . . ." *Id.*

However, it is not clear that a state's law that purports to bind its electors even in accordance with *its own* popular vote is constitutional. See *Ray v. Blair*, 343 U.S. 214, 231 (1952) (5-2 decision); Opinion of the Justices No. 87, 34 So. 2d 598 (Ala. 1948); Ross & Josephson, *Popular Vote*, *supra* note 1, at 694–98. Compare Amar, *supra* note 143, at 219, 230, with Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 944 n.88 (1992), and Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1089 n.233 (2000). A fortiori, it is not clear that a law requiring electors to vote otherwise would be valid. Stanley Chang seems unaware of the issues raised by efforts to bind elector votes. Chang, *supra* note 178, at 213. David Gringer is aware of the issues, but appears to dismiss them. Gringer, *supra* note 178, at 187 & n.33.

No National Popular Vote elector voting enforcement mechanism is provided. The argument that electors have constitutional discretion has never been authoritatively rejected. Congress has always counted the votes of so-called faithless electors, including in 1969 when the issue was extensively debated in the Senate. See Ross & Josephson, *Popular Vote*, *supra* note 1, at 730–37.

The Maryland statute purports to enter Maryland into an agreement among the states to elect the President by National Popular Vote. Under the U.S. Constitution, interstate compacts generally have to be approved by Congress. U.S. CONST. art. I, § 10, cl. 3. This agreement does not so provide. Chang, *supra* note 178, at 213, states, “The constitutionality of the NPV interstate compact has not been definitively established,” but discusses only the arguments for its constitutionality. See *Virginia v. Tennessee*, 148 U.S. 503, 524 (1893) (stating that Congress need not consent to states’ agreements making minor adjustments to boundaries). Gringer thinks that the constitutional difficulties can be avoided if Congress approves a National Popular Vote interstate compact, apparently even if it is signed by fewer than the three quarters of the states required to ratify a constitutional amendment. Gringer, *supra* note 178, at 226–27; see U.S. CONST. art. V.

Article 4 of the purported agreement says that any member state may withdraw but not if it does so “six months or less before the end of a President’s term. . . .” Because the Constitution in Article II, Section 1, clause 2 gives each state legislature seemingly plenary power to determine how that state’s electors shall be appointed, it is not clear that the power to withdraw could be so limited. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

Indeed, as we have seen, there is a dictum in the *per curiam* opinion in *Bush v. Gore* that implies that a state legislature can cast elector votes even after electors have been chosen by a state’s popular vote. 531 U.S. 98, 104 (2000). This dictum also may call into question the constitutionality of that section of the Electoral Count Act of 1887, codified in 3 U.S.C. § 5, that purports to say that a state cannot change its rules in mid-election. See *supra* note 216.

What if another state, a party to the agreement, breaks it? Can its agreement be enforced? If so, by whom? Where? Again, no enforcement mechanism is provided.

In a close election, the popular vote totals in many states may be disputed. What if these disputes remain unresolved by the time the states’ electors are to meet to cast their votes?

By the Twenty-third Amendment, the District of Columbia was given three presidential elector votes. But the legislative history is crystal clear the Congress did not intend for the District to be considered a state for any purpose. See *supra* note 12. Moreover, Congress did not bind the District’s electors, though it did permit them to pledge their votes. D.C. CODE ANN. § 1-1001.08(g) (2008); Ross & Josephson, *Popular Vote*, *supra* note 1, at 697–98. Yet, provision is made in the purported agreement for the District to join it. This is another issue of which Chang, *supra* note 178, at 212, seems to be unaware.

Plurality is the winning standard under the purported agreement. Many commentators believe that if National Popular Vote became the standard, there would be many

VI. SUMMARY OF RECOMMENDATIONS

The Senate should consider amending its rules to eliminate the possibility of a vice presidential election filibuster.

The House should consider whether or not:

- a. it should meet in Executive Session when it chooses a President;
- b. the state delegations should vote by ballot;
- c. there should be majority or quorum rules for voting by the state delegations;
- d. it should by rule interpret "not exceeding three" to permit it to consider tied candidates and not to reject any candidates, except perhaps in the case of the lack of constitutional qualifications, or if legislation should be enacted to make it clear that that phrase does not confer discretion on the House to reject a presidential candidate, except perhaps in the foregoing cases;
- e. legislation should be enacted authorizing, for example, the Speaker to cast the votes of divided House state delegations; and if so, should the objective criteria for the casting of such votes be for the state's presidential popular vote winner, the national popular vote winner, or in the present case of Maine and Nebraska, for their winners of their congressional districts;
- f. what procedure it should follow to determine that it is deadlocked and cannot choose a President; and
- g. it should amend its rules to make applicable the procedures for invoking the powers of the Sergeant-at-Arms to compel the attendance of absent Representatives when it is choosing a President.

more candidates and reduced pluralities. Most popular vote proposals, therefore, have required a plurality of at least forty percent. Lincoln's and Clinton's first-term percentages were just under and just over forty percent, respectively, though each won comfortable elector vote majorities. See *WORLD ALMANAC 2005*, *supra* note 6, at 594.

Because, as we have seen, the Constitution gives only the states' legislatures the power to appoint electors, the purported agreement's provision that the winning popular vote candidate can appoint electors under certain circumstances is of doubtful constitutionality. U.S. CONST. art. II, § 1, cl. 2.

Gringer, *supra* note 178, at 183, 187-219, 227-29, adds to the foregoing arguments against National Popular Vote arguments that it would violate sections two and five of the 1965 Voting Rights Act, as amended, 42 U.S.C. §§ 1973, 1973c (2006).

Because in the overwhelming number of presidential elections the popular vote winner has also won a comfortable elector majority, the National Popular Vote proposal would make more sense if it were limited to (1) elections in which no presidential candidate has an elector majority, thus avoiding presidential elections by the gerrymandered House or (2) to that case *and* to the case in which the National Popular Vote winner also has a substantial plurality. Also, the purported agreement among the states does not appear to serve any useful purpose.

Taming the Electoral College contains the best case for National Popular Vote. BENNETT, *supra* note 1. Professor Bennett and I believe that it might be possible to draft a National Popular Vote proposal that avoids at least some of the above flaws.

The Congress should consider legislation eliminating the presidential succession gaps discussed in this Article. As Elizabeth Garrett said:

The impetus for the Electoral Count Act was the debacle of the Hayes-Tilden election and the strong desire to avoid designing structures of deliberation and decisionmaking in an ex post way²⁵⁰

We have previously described the legislative process that led to the enactment of the Electoral Count Act in detail.²⁵¹ That process lasted more than a year, even though the Congress presumably had benefited from its two previous unsuccessful legislative efforts.

The issues raised and discussed in this article are substantial and of extraordinary public importance. The Senate and House of Representatives need to take the time to consider these issues and resolve them by rule wherever possible and by legislation when necessary. Such consideration should not be part of a mad partisan scramble under heavy time pressure to meet the short deadlines between a general election on the first Tuesday after the first Monday in November, the convening of the new Congress on or about January 3, and the beginning of the terms of the new President and Vice President on January 20.²⁵²

250 Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975, 986 (2001).

251 Ross & Josephson, *Popular Vote*, *supra* note 1, at 722–24.

252 Editorial, *If the House Picks the President*, N.Y. TIMES, June 11, 1992, at A22.

A somewhat related issue also cries for congressional action: the possibility that a catastrophe might befall the House that coincides with House election of a President.

The Constitution provides differently for the filling of Senate and House vacancies. Under the Seventeenth Amendment, “the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.” U.S. CONST. amend. XVII. However, with respect to the House, “When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.” U.S. CONST. art. I, § 2, cl. 4. The amendment of 2 U.S.C. § 8 in 2005, Act of Aug. 2, 2005, Pub. L. 109-55, § 301, 19 Stat. 508, § 8 simply provided that “the *time* for holding elections . . . to fill a vacancy . . . *may* be prescribed by the laws of the several States” (emphases added).

As amended, 2 U.S.C. § 8(b) provides that when the Speaker of the House “announces that vacancies in the representation from the States in the House exceed 100[,]” “extraordinary circumstances” have occurred. The executive authority of the respective states “shall” issue writs of election to take place generally not later than forty-nine days after the Speaker’s announcement. The political parties are to nominate candidates not later than ten days after the Speaker’s announcement, unless the state provides for primaries or other methods of nomination.

The flaws in these provisions include the absence of any requirement that the Speaker make the announcement and the assumption that there will be a Speaker who can do so. Obviously, should the extraordinary circumstances occur during the time the

House is to elect a President, whether or not it will be reconstituted in time depends on how the states' executives decide to implement the "not later than 49 days" requirement.

Presumably, if the Senate needs to be reconstituted, the states' executives will do so in time for the Senate to elect a Vice President who can then act as President. *See supra* Part II.

For a discussion of the legal issues, see Paul Taylor, *Alternatives to a Constitutional Amendment: How Congress May Provide for the Quick, Temporary Filling of House Member Seats in Emergencies by Statute*, 10 J. L. & Pol'y 373 (2002). For a discussion of the politics of the enactment of Public Law 109-55, see Avi Klein, *Death Wish: If terrorists attack Congress, America could have no legislative branch. House Republicans are fine with that*, WASH. MONTHLY, Nov. 2006, at 19.