

**NO MORE JANUARY SIXTHS:  
A CONSTITUTIONAL PROPOSAL TO TAKE POLITICS OUT OF  
PRESIDENTIAL ELECTION MECHANICS**

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I. INTRODUCTION

The shocking events of January 6, 2021, in Washington should spark legal reform. But the focus of this essay is not the storming of the Capitol.<sup>1</sup> Rather, this essay focuses on the ill-considered legal *mechanics* for the presidential Electoral vote,<sup>2</sup> through which members of Congress “objected” to the counting of votes for Joe Biden, who won the 2020 election,<sup>3</sup> in the midst of months of haphazard litigation and vague claims of a “steal.”<sup>4</sup> The system that American law uses to count presidential votes was *not* anticipated by the Framers of the Constitution and surely is not a sensible method for concluding the most important election in the world.

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<sup>1</sup> For a chronology of the events of Jan. 6-7, 2021, see Kat Lonsdorf et al., *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NAT’L PUB. RADIO (Jan. 5, 2022, 5:00 AM) <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when> [https://perma.cc/T32G-N7YY] [hereinafter *Timeline*]; see also Shelly Tan et al., *How One of America’s Ugliest Days Unraveled Inside and Outside the Capitol*, WASH. POST (Jan. 9, 2021), <https://www.washingtonpost.com/nation/interactive/2021/capitol-insurrection-visual-timeline/> [https://perma.cc/E2UR-MRNT].

<sup>2</sup> This Essay uses the word “Electoral,” with a capitalized initial “E,” to refer to the presidential Electors (the so-called “Electoral College”), authorized by the Constitution. See U.S. CONST. art. II, § 1 (establishing the means by which presidential electors elect the President); U.S. CONST. amend. XII (amending the election process). The Constitution also uses the word “Electors” to refer to other voters, including the citizens that vote for the House of Representatives. See, e.g., U.S. CONST. art. I, § 2 (providing for the election of members of the House of Representatives). For clarity’s sake, this Essay will use the words “citizens” or “voters” for these other situations.

<sup>3</sup> See 167 CONG. REC. H77 (daily ed. Jan. 6, 2021) (statement of Rep. Paul Gosar) (objecting to counting the electoral votes of Arizona); see also 167 CONG. REC. H98 (daily ed. Jan. 6, 2021) (statements of Rep. Scott Perry and Sen. Josh Hawley) (objecting to counting the electoral votes of Pennsylvania).

<sup>4</sup> For a brief summary of the controversies of the 2020 presidential election, see *United States Presidential Election of 2020 Summary*, ENCYC. BRITANNICA, <https://www.britannica.com/summary/United-States-presidential-election-of-2020> [https://perma.cc/9BUT-8J3F] (last visited May 26, 2022).

This proposal for constitutional reform is guided by four simple principles, explained below in Part II: (1) *ministerial* functions of government should *not* be carried out by elected officials; (2) a constitutional amendment should do *as little as necessary*; (3) amendment should be done in a *politically neutral manner*, applying the Golden Rule; and (4) a revised system should provide for legal *repose*.

In part III, this essay identifies three legal *mischiefs* of the current system and proposes three straightforward constitutional amendments. First, the Constitution should avoid potential mischief by clarifying that only the citizens, not the state legislatures, hold the power to choose presidential Electors. Second, the Constitution should require expeditious state resolution of popular voting disputes; after six weeks, challenges would be barred. Third and finally, law should stop the mischief of Congress's meddling with the Electoral results, which was authorized by the constitutionally questionable Electoral Count Act of 1887;<sup>5</sup> the Constitution should remove Congress entirely from presidential Electoral procedures. The aim is to create a more efficient, democratic, and fairer system, in which the congressional events of January 6<sup>th</sup> will never recur.

## II. THE CONSTITUTIONAL AND LEGAL CANVAS

### A. *January 6 – in 2017 and 2021*

On January 6<sup>th</sup>,<sup>6</sup> congressional supporters of the losing presidential candidate interrupted the Vice President's counting of the Electoral votes with "objections" eleven times,<sup>7</sup> even though federal law clearly did not allow

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<sup>5</sup> 3 U.S.C. § 15.

<sup>6</sup> The date of January 6<sup>th</sup> is specified by the Electoral Count Act of 1887 as the fixed date on which the presidential electoral votes are counted in Congress. *Id.*

<sup>7</sup> See 163 CONG. REC. H186-189 (daily ed. Jan. 6, 2017) (counting eleven objections by various members of the House during the electoral vote count). For news reports of the events of Jan. 6, 2017, see Brenna Williams, *11 Times VP Biden was Interrupted During Trump's Electoral Vote Certification*, CNN (Jan. 6, 2017, 5:45 PM), <https://www.cnn.com/2017/01/06/politics/electoral-college-vote-count-objections/index.html> [<https://perma.cc/5CGX-DKMF>] (reporting on eleven improper objections to the counting of electoral votes for President-Elect Donald Trump); Scott Detrow, *Biden Chides Democrats During Formal Counting Of Electoral Votes*, NAT'L PUB. RADIO (Jan. 7, 2017, 8:08 AM), <https://www.npr.org/2017/01/07/508668086/biden-chides-democrats-during-formal-counting-of-electoral-votes> [<https://perma.cc/DVK4-BZHA>] (reporting former Vice President Biden's responses).

them to do so.<sup>8</sup> The objectors cited vague allegations of foreign interference, fraud, and other faults. The Vice President cut off the interruptions, at points scolding, “It is over!” and “There is no debate in order!” before finally declaring the winner.<sup>9</sup> But these events did *not* occur in 2021; *these events occurred on January 6, 2017*, when a handful of Democrats made a fruitless attempt to forestall the counting of the votes that formally awarded the presidency to Donald Trump. This short-lived demonstration got little media attention.<sup>10</sup> Indeed, one of the interruptions of Biden was by newly inaugurated Democratic congressman Jamie Raskin, of Maryland, a former law professor.<sup>11</sup> Four years later, Raskin was lauded by Democrats for his lead in the unsuccessful impeachment prosecution of President Trump for conduct in January 2021.<sup>12</sup>

On January 6, 2021, Republicans made an even bolder attempt to deny the presidency to Joe Biden. After the houses of Congress convened to count the votes, Trump supporters, emboldened by the President’s baseless assertions that the election was stolen, broke through barriers set up by Capitol police, smashed windows, stormed into the building, and pushed into the two chambers just after they had been evacuated.<sup>13</sup> Although police eventually restored order, Republicans used their power under the Electoral Count Act<sup>14</sup> to object to the votes certified by both Arizona and

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<sup>8</sup> The Electoral Count Act of 1887, 3 U.S.C. § 15, requires both a House representative and a Senator to lodge an “objection” to the counting of a state’s electoral votes.

<sup>9</sup> 163 CONG REC. H186, H187, H190 (daily ed. Jan. 6, 2017) (statements of former Vice President Joseph Biden declaring “[i]t is over,” and “[t]here is no debate in order”). Unlike the Congressional Record, I have added exclamation points to former Vice President Biden’s words to reflect more accurately the tone of his speaking. For an abridged video of the proceedings of Jan. 6, 2017, see Reuters, *Congress Certifies the Electoral College Vote*, THE N.Y. TIMES (Jan. 6, 2017), <https://www.nytimes.com/video/us/politics/100000004857217/congress-certifies-the-electoral-college-vote.html> [<https://perma.cc/ZM3A-Q4SC>].

<sup>10</sup> For example, The New York Times devoted only a video, but no story, to the counting on Jan. 6, 2017, in its Jan. 6, 2017 edition. *See id.*

<sup>11</sup> *See* 163 CONG REC. H186 (daily ed. Jan. 6, 2017) (statement of Rep. Raskin) (improperly objecting to ten of Florida’s twenty-nine electoral votes); *see also* THE N.Y. TIMES, *supra* note 9.

<sup>12</sup> The author spends much time in Takoma Park, Md., hometown of Rep. Raskin. During 2021, the city hosted many front yard signs likening Raskin to Thomas Paine as a defender of democracy. *See e.g.*, Deirdre Byrne, *Photos: Takoma Park Honors Hometown Hero Raskin with Yard Signs*, MONTGOMERY CNTY. MEDIA (Feb. 24, 2021), <https://www.mymcmedia.org/photos-takoma-park-honors-hometown-hero-raskin-with-yard-signs/> [<https://perma.cc/4E7J-5U7L>] (displaying an image gallery of pro-Raskin lawn signs in Takoma Park).

<sup>13</sup> For a timeline of the events of Jan. 6-7, 2021, at the Capitol, see sources cited *supra* note 1.

<sup>14</sup> *See* 3 U.S.C. § 15 (providing for Congressional objections to electoral votes).

Pennsylvania, thus requiring both chambers to vote on whether to accept them.<sup>15</sup> In the Senate, most Republicans voted “no” to the challenges, but in the House a majority of Republicans, including house minority leader Kevin McCarthy (R.-Cal.), voted *against* accepting the Electoral votes in these states.<sup>16</sup>

Had Republicans held a congressional majority, it is impossible to know how the 2021 objections would have turned out, but Republicans could have refused to count the votes of Arizona, Pennsylvania and elsewhere, which might have deprived Biden of the majority of Electoral votes necessary for victory.<sup>17</sup> Under Article II, the election could have been referred to the House for an immediate vote state-by-state,<sup>18</sup> which likely would have awarded the sitting president re-election, trumping the will of the American people in both the popular and Electoral vote.<sup>19</sup>

It is imprudent that the mechanics of counting presidential Electoral votes allow Congress to reject democracy so easily. The Constitution should be amended to create a more fool-proof system.

#### *B. The Constitutional Mechanisms for Presidential Elections*

The U.S. Constitution sets forth the foundational rules for selecting the President by state-chosen Electors. Here is the relevant language of Article II, which sets forth the first mechanism:

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<sup>15</sup> See *id.* (providing for separate sessions of the Senate and House to consider proper objections to electoral votes); see also Harry Stevens et al., *How Members of Congress Voted on Counting the Electoral College Vote*, WASH. POST (Jan. 7, 2021), <https://www.washingtonpost.com/graphics/2021/politics/congress-electoral-college-count-tracker/> [<https://perma.cc/YE8M-2ETL>] (explaining that a majority of Republican senators voted against the objections).

<sup>16</sup> Antonia Noori Farzan, *McCarthy, Scalise Among GOP Members Voting to Challenge Biden's Win*, WASH. POST (Jan. 7, 2021, 2:17 AM), <https://www.washingtonpost.com/politics/2021/01/06/congress-electoral-college-vote-live-updates/#link-BSNDBVLWEVGJFCQJLAK4SXYX2E> [<https://perma.cc/QA58-CDK9>].

<sup>17</sup> See U.S. CONST. art. II § 1 (requiring a presidential candidate to receive a majority of the votes of all “appointed” electors to win the Presidency).

<sup>18</sup> *Id.* (providing that, if no person receives a majority of electoral votes, the election shifts to the House of Representatives, which then votes state-by-state).

<sup>19</sup> Biden outpolled Trump in the popular vote, 51.3% to 46.9%, and won 306 electoral votes to Trump's 232 votes. *Official 2020 Presidential General Election Results*, FED. ELECTIONS COMM'N (2021), <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf> [<https://perma.cc/VA4H-N35W>].

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

...

The 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.<sup>20</sup>

The second and final mechanism is set forth in the Twelfth Amendment, which superseded portions of Article II after the voting debacle of 1800, in which Thomas Jefferson and Aaron Burr unexpectedly tied in Electoral votes.<sup>21</sup> Here is the amended language:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.<sup>22</sup>

The most significant language is the middle sentence: “[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. . . .”<sup>23</sup>

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<sup>20</sup> U.S. CONST. art. II, § 1.

<sup>21</sup> See John J. Turner, Jr., *The Twelfth Amendment and the First American Party System*, 35 THE HISTORIAN 221, 231-32 (1973) (discussing the adoption of the Twelfth Amendment).

<sup>22</sup> U.S. CONST. amend. XII.

<sup>23</sup> *Id.* This language of the Twelfth Amendment on this point repeated the language of the original Article II. See U.S. CONST. art. II, § 1 (“The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.”).

It is noteworthy what powers the Constitution does *not* grant to Congress. There is *no* authority either for Congress or the President of the Senate (who is the Vice President)<sup>24</sup> to certify, reject, or object to the Electoral votes; indeed, it makes clear that states “certify.”<sup>25</sup> Using the terminology of administrative law, Congress appears to hold merely a *ministerial* duty—counting—and not a *discretionary* duty to use its own judgment.<sup>26</sup> Using the plain meaning of the constitutional text<sup>27</sup> and applying the principle of

<sup>24</sup> In a midday speech in front of the White House on Jan. 6, 2021, President Trump stated that if Vice President Michael Pence “does the right thing, we win this election.” Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [https://perma.cc/6MMK-JKWB]. Pence, however, concluded that he could not reject the Electoral votes. See Letter from Vice President Michael R. Pence to Senate colleagues (Jan. 6, 2021) (on file at <https://int.nyt.com/data/documenttools/pence-letter-on-vp-and-counting-electoral-votes/9d6f117b6b98d66f/full.pdf> [https://perma.cc/TLN7-6HTP]). Because of Pence’s restraint, Trump supporters infamously set up gallows for him on the National Mall outside the Capitol and yelled “Hang Mike Pence.” Scott MacFarlane, *Noose Displayed at Capitol Insurrection in FBI’s Custody*, NBC WASHINGTON (Nov. 1, 2021, 7:50 PM), <https://www.nbcwashington.com/news/local/noose-displayed-at-capitol-insurrection-in-fbis-custody/2863204/> [https://perma.cc/U6ZY-NGY5]. Pence himself fled the U.S. Senate chamber after the mob entered the Capitol. See Timeline, *supra* note 1 (“Shortly after 2 p.m. . . . Secret Service agents whisk Pence off the Senate floor.”). Later, Trump stated that he was “disappointed” in his vice president. Christina Zhao, *Donald Trump Blames Election Loss on Pence Certifying Biden’s Win: ‘Disappointed’*, NEWSWEEK (June 21, 2021, 6:24 PM), <https://www.newsweek.com/donald-trump-blames-election-loss-pence-certifying-bidens-win-disappointed-1602766> [https://perma.cc/3NW7-ZM3V]. Trump’s comments raise the question: What could Pence have *tried* to do? Refuse to count the certified votes? Order a new election? Declare Trump president? Such suggestions are as preposterous in a democracy as they are constitutionally counter-textual.

<sup>25</sup> U.S. CONST. amend. XII (states must “certify” their Electoral votes *before* transmittal to Congress).

<sup>26</sup> A duty is *ministerial* when it leaves no room for a discretionary judgment—that is, when it “specif[ies] the precise action that the official must take in each instance.” *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984). In his extensive study of the Electoral Count Act, Vasan Kesavan discussed an alternative interpretation of the Twelfth Amendment—which he calls “thick” interpretation—that would define “count” to include an evaluation of the validity of the votes. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1711-58 (2001). Kesavan eventually rejected this interpretation, *id.* at 1758, which also does not follow the commonsense meaning of the verb “count.”

<sup>27</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)) (“The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”). See also Richard H. Fallon Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1243-51 (2015) (discussing textual, contextual, cultural, and precedential interpretations and meanings of words and phrases in constitutional contexts); David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1565 (1997)

limited powers,<sup>28</sup> Congress should hold no power to overturn the state-certified Electoral count.<sup>29</sup>

Indeed, a sensible interpretation is that once states certify their Electoral votes, the role of Congress is largely *informational* – to announce to the nation the results of the Electoral vote. In the late eighteenth century, when Article II was created, there was no rapid communication; transmittal of the certified state votes by horse to the national capital probably was about as rapid as possible a means of determining the winner of the election.<sup>30</sup>

Today, however, with electronic communication, the counting of Electoral votes may be done by *anyone* as soon as the state Electors act – on a date that Article II specifies must be the same across the nation.<sup>31</sup> There is little reason except ceremony for Congress to count the votes; indeed, throughout U.S. history, little attention has been paid to congressional counting, especially as compared to the votes of the Electoral College in their

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(“[T]he ordinary meaning is an obvious point of agreement in circumstances in which disagreement is too costly. Sometimes it is more important that things be settled than that they be settled right; ordinary meaning provides a way to settle things.”); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23-38 (Amy Gutmann ed., 1997) (advocating for the reasonable construction of a text within the limited range of meaning of its language, such as through the use of canons of construction rather than legislative history, and the importance of preferring an expansive interpretation within those confines when reading the Constitution).

<sup>28</sup> See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting U.S. CONST., amend. X) (“The Constitution created a Federal Government of limited powers. ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’”).

<sup>29</sup> Cf. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 952-58 (1983) (holding that Congress must act in conformity with “express procedures” of the Constitution, and that, in applying this principle, Congress had no authority to create a one-chamber veto of an agency regulation because doing so violated Article I, section 7’s requirement that Congress may act only with the agreement of both chambers).

<sup>30</sup> Although the Continental Congress established a national authority for mail delivery as early as 1775, the famous high-speed Pony Express did not begin until 1860. U.S. Postal Service, *Universal Service and the Postal Monopoly: A Brief History* 2, 9 (2008), <https://about.usps.com/universal-postal-service/universal-service-and-postal-monopoly-history.pdf> [<https://perma.cc/MBN3-CEVM>].

<sup>31</sup> U.S. CONST. art. II, § 1 (“The 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.”)

respective states – where the drafters of the Constitution expected the true judgment would take place in the election of the President.<sup>32</sup>

### C. *Four Guiding Principles for Reform*

This essay holds a narrow focus: it seeks to improve the legal mechanisms for counting the Electoral votes and resolving any disputes in the process. But it is also worthwhile to note what this essay does *not* seek to address. It avoids the great controversies over the value today of the Electoral College (a term never used in the Constitution), the result of which determines the presidency.<sup>33</sup> It also does not enter the minefields of the debate over “voting rights,”<sup>34</sup> including issues such as voter identification requirements,<sup>35</sup> mail-in

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<sup>32</sup> The drafters expected that the state-chosen electors would use independent judgment in choosing a president. For a history of the original intent of the so-called “Electoral College” (a term never used in the Constitution), see e.g., Christina Villegas, *Electing the People’s President: The Popular Origins of the Electoral College*, 47 PERSPS. ON POLI. SCI. 201, 201 (2017) (arguing that the original objective of the Electoral College was to “maintain popular influence over the selection of the president”); Paul Boudreaux, *The Electoral College and its Meager Federalism*, 88 MARQ. L. REV. 195 (2004) (concluding that today’s electoral system does not follow the assumptions of the Framers).

<sup>33</sup> Compare Victoria Sutton, *The Electoral College—Now, More Than Ever*, 13 U. FLA. J.L. & PUB. POL’Y 103 (2001) (supporting the Electoral College system), with Boudreaux, *supra* note 32 (opposing the system). President Trump won the presidency in 2016, as did George W. Bush in 2000, despite not winning the nationwide popular vote. See Fed. Election Comm’n, *Federal Elections 2016*, at 5-6 (2017) (results for Trump and Clinton), <https://www.fec.gov/resources/cms-content/documents/federalections2016.pdf> [<https://perma.cc/8VY6-F5JQ>]; Fed. Election Comm’n, *Federal Elections 2000*, at 11-12 (2001) (results for Bush and Gore), <https://www.fec.gov/resources/cms-content/documents/federalections00.pdf> [<https://perma.cc/5CR9-8DGD>].

<sup>34</sup> In 2021 and 2022, one of the most contentious issues in Congress was the Democrats’ introduction of a voting rights act that would impose vastly greater oversight by federal authorities over state voting practices, especially as to disparate racial effects. See H.R. 4, 117<sup>th</sup> Cong. (2021) (requiring certain states to obtain federal preclearance before enacting changes to voting practices); see also Clare Foran, Ali Zaslav & Ted Barrett, *Senate Democrats Suffer Defeat on Voting Rights After Vote to Change Rules Fails*, CNN (Jan. 19, 2022, 11:38 PM), <https://www.cnn.com/2022/01/19/politics/senate-voting-legislation-filibuster/index.html> [<https://perma.cc/9ZM7-ZTLM>].

<sup>35</sup> See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (upholding states’ ability to impose voter ID requirements); Bernard L. Fraga & Michael G. Miller, *Who Do Voter ID Laws Keep from Voting?*, 84 J. OF POL. 1091 (2022) (analyzing the effect of voter ID laws on suppressing the votes of certain types of people).



voting,<sup>36</sup> and other topics. Rather, this essay’s proposal for constitutional amendment is guided by four simple and limiting principles.

The first principle is that, in governance, certain *ministerial* tasks are best taken by government agencies—that is, non-elected officials.<sup>37</sup> A ministerial task is one that does not involve political judgment, but rather technical conduct, such as counting.<sup>38</sup>

A notable example of the value of this principle is the experience of drawing congressional district boundaries. Applying certain legal requirements,<sup>39</sup> it should be a simple task to draw compact boundaries in a fair manner. But state law often gives this job to political figures; these politicians often exploit their power to help their party – a practice called “gerrymandering” since the early 1800s.<sup>40</sup> In North Carolina in 2021, for example, a Republican legislative majority drew boundaries to maximize the number of districts with a majority of their own party’s voters;<sup>41</sup> meanwhile, in Maryland, the Democratic-controlled legislature drew bizarrely shaped districts to give their candidates an advantage.<sup>42</sup> By contrast, some states

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<sup>36</sup> See, e.g., Scot Schraufnagel et al., *Cost of Voting in the American States: 2020*, 19 ELECTION L.J. 503 (2020) (discussing the relative cost of voting during presidential election cycles after accounting for new mail-in voting laws); Meilan Solly, *The Debate Over Mail-In Voting Dates Back to the Civil War*, SMITHSONIAN (Oct. 20, 2020), <https://www.smithsonianmag.com/smart-news/debate-over-mail-voting-dates-back-civil-war-180976091/> [<https://perma.cc/9X8Z-FZ7N>] (discussing an 1864 clash between Democrats and Republicans regarding the ability of soldiers to vote by mail while deployed).

<sup>37</sup> See, e.g., *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (noting that agencies’ “expertise” in their fields is one reason for deferring to agency interpretation of ambiguous statutes). In the environmental law field, for example, the Administrator of the Environmental Protection Agency is granted the broad authority to use his or her judgment to set national air quality standards “requisite to protect the public health.” 42 U.S.C. § 7409(b)(1).

<sup>38</sup> See sources cited *supra* note 26.

<sup>39</sup> Under the so-called one-person, one-vote doctrine, for example, a state must draw boundaries so that all districts hold nearly identical populations. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding that U.S. House districts, drawn by the states, must be equal in population under the equal protection guarantee of the Fourteenth Amendment).

<sup>40</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494-95 (2019). The U.S. Supreme Court has recognized the phenomenon of partisan gerrymandering but has ruled that the issue is not justiciable by the federal courts. *Id.* at 2494, 2506-07.

<sup>41</sup> See Princeton Gerrymandering Project, *Redistricting Report Card - North Carolina 2021 HSA-9 Final State House Map (HB 976)* (2021), <https://gerrymander.princeton.edu/redistricting-report-card/?planId=recT3qrY4IXWBixSg> [<https://perma.cc/PZ4A-A97B>] (giving a grade of “F” to a North Carolina gerrymander due to a significant Republican advantage).

<sup>42</sup> Princeton Gerrymandering Project, *Redistricting Report Card - Maryland 2021 LRAC Final* (2021), <https://gerrymander.princeton.edu/redistricting-report-card/?planId=rectT3e34TouwaqH0> [<https://perma.cc/GG5N-JL57>] (giving a grade of “F” to a Maryland gerrymander).

have granted the task to an independent, non-partisan commission, such as in Colorado, which has been able to draw district maps that do not give an artificial advantage to either party.<sup>43</sup>

A broader observation might be that modern American politics places a premium on party loyalty and a rejection of bipartisan cooperation.<sup>44</sup> There is no easy solution to the hyperpartisanship of government. But it can be assuaged by avoiding the assignment of ministerial tasks to partisan political figures, such as members of the legislature.

A second guiding principle is that a constitutional amendment should do *as little as necessary*.<sup>45</sup> Aiming small is likely to be practical, in that it avoids stirring up controversies that might block adoption. It also reflects *humility*, under the assumption that smaller amendments are likely to pose fewer risks of great harm. Accordingly, this proposal avoids red-hot controversies, such as those concerning voting rights,<sup>46</sup> which obviously concern more than the mechanics of presidential elections.

A variant of this humility is to retain the federalist aspect of the American constitutional system. The Framers decided that the President should be chosen by a group of Electors, who are selected by each state. States, not the federal government, set rules for voting qualifications,<sup>47</sup> decide whether to

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<sup>43</sup> Princeton Gerrymandering Project, *Colorado 2021 Final Commission Congressional Map* (2021), <https://gerrymander.princeton.edu/redistricting-report-card?planId=recT5HmyimzPdcZFb> [<https://perma.cc/XP54-5D7W>] (giving a grade of “A” to a Colorado redistricting plan).

<sup>44</sup> For example, the Democrats in late 2021 failed to enact perhaps the widest ranging bill in the nation’s history, the so-called Build Back Better bill, in large part because they failed to persuade any of the Republicans. See Lazaro Gamio & Alicia Parlapiano, *How Each House Member Voted on the Social Policy Bill*, THE N.Y. TIMES (Nov. 19, 2021), <https://www.nytimes.com/interactive/2021/11/19/us/politics/social-policy-vote-tally.html> [<https://perma.cc/WH6N-KE56>] (reporting that no House Republicans voted for the social policy bill). The phenomenon of hyperpartisanship may be the result of many factors, including the disappearance of a commonly feared international enemy (roles that Nazi Germany and then the Soviet Union served for much of the last century), the increased vitriol of human interactions in the social media era, see, e.g., BARBARA F. WALTER, *HOW CIVIL WARS START* (2021), and the polarization created by the nation’s first media celebrity president, Donald J. Trump, who had no previous background in public office.

<sup>45</sup> Cf. *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001) (holding that statutes should be interpreted to avoid constitutional problems).

<sup>46</sup> See H.R. 4, 117<sup>th</sup> Cong. (2021), text available at <https://www.congress.gov/bill/117th-congress/house-bill/4/text> [<https://perma.cc/V4FB-XMKR>] (summary also available at this address) (last visited Jan. 11, 2022).

<sup>47</sup> U.S. CONST. art. I, § 2 (noting the existence of state voter qualification rules and using them for voting qualifications for the U.S. House).

allow mail-in voting,<sup>48</sup> resolve popular voting disputes, make rules for Electors,<sup>49</sup> and “certify” the Electoral votes.<sup>50</sup> In the usual event in which one presidential candidate receives a majority of the Electoral votes, the role of the federal government in a presidential election is almost non-existent. The current proposal retains the primacy of the states in the mechanics of presidential elections.

A third principle is that the substance of reform should follow a *politically neutral* approach to decision making. The *golden rule* is a universal principle, sociologists tell us;<sup>51</sup> it asserts that one should act toward others in a way that one would wish to be treated and calls for rules that treat opposing sides equally.<sup>52</sup> An example of political conduct contrary to the golden rule was Senate Republican leader Mitch McConnell’s assertion in 2016 that a Supreme Court opening should not be filled because the president to be elected later that year should have the power to pick the new justice (which deprived Obama-appointed Merrick Garland of a spot on the court) and his conflicting assertion four years later that a Court opening in 2020 should be filled (allowing confirmation of Trump nominee Amy Coney Barrett), despite another election later that year.<sup>53</sup>

The golden rule principle calls for scrupulously partisan neutrality in developing the law of presidential election mechanics. This means procedures that do not appear to favor one party. Accordingly, this essay seeks to avoid the criticisms inherent in, for example, the great debate over popular voting laws, in which both sides argue partisan motivations of the other side.<sup>54</sup>

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<sup>48</sup> See sources on mail-in voting laws, *supra* note 36.

<sup>49</sup> See, e.g., *Chiafalo v. Washington*, 140 S. Ct. 2316 (2019) (noting that states may restrain “faithless” Electors by law).

<sup>50</sup> U.S. CONST. art. II, § 1 (states “certify” before transmitting to the capital).

<sup>51</sup> *Golden Rule*, THE INTERNET ENCYC. OF PHIL., <https://iep.utm.edu/goldrule/> [<https://perma.cc/8H6L-NQBZ>] (last visited Dec. 9, 2021) (noting the global history of the principle).

<sup>52</sup> *Id.*

<sup>53</sup> See John Bresnahan & Burgess Everett, *No Apologies: McConnell Says Barrett a ‘Huge Success for the Country’*, POLITICO (Oct. 27, 2020), <https://www.politico.com/news/2020/10/27/no-apologies-mcconnell-barrett-success-country-432828> [<https://perma.cc/BBD2-SMTE>].

<sup>54</sup> See, e.g., George F. Will, *Democrats’ Big Voting Bill is Constitutional Vandalism*, WASH. POST (June 2, 2021, 8:00 AM), <https://www.washingtonpost.com/opinions/2021/06/02/democrats-big-voting-bill-is-proposal-ignore-constitution/> [<https://perma.cc/J4LU-5TEY>] (asserting that “all laws regulating campaigns are enacted by people with conflicts of interest — interests in

A final guiding principle is that election results should be made final fairly quickly. Law should provide for *repose* – the comfort of knowing that a potential dispute has concluded. In law, perhaps the most notable example of preferring certainty over complete accuracy are statutes of limitations, which impose time deadlines for asserting claims in court. These statutes bar even valid claims that are brought too late for the purposes of encouraging diligent conduct and providing repose.<sup>55</sup> Accordingly, controversies over voting techniques – for example, whether mail-in voting is allowed – should be resolved *before* the election, not after. And legal challenges to votes themselves – such as recounts and disqualifications of voters – should be decided expeditiously, so that the winner may be ascertained.<sup>56</sup> Thus, in 2020, Pennsylvania Republicans had their opportunity to challenge in court the pandemic-spurred loosening of voting rules.<sup>57</sup> But it should not be acceptable for members of Congress to challenge state Electoral votes after the fact, as Republicans tried on January 6, 2021, and as Democrats tried on January 6, 2017.<sup>58</sup>

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advantaging themselves and disadvantaging challengers”); Katie Rogers, *‘We Have No Option’: Biden Calls for Changing Senate Rules to Pass Voting Rights Laws*, THE N.Y. TIMES (Jan. 11, 2022), <https://www.nytimes.com/2022/01/11/us/politics/biden-filibuster-voting-rights.html> [<https://perma.cc/CYL2-MPA2>].

<sup>55</sup> For a discussion of the rationales for statutes of limitation, see, e.g., Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607 (2008-2009) (discussing the rationales for statutes of limitations).

<sup>56</sup> In 2000, after *Bush v. Gore*, 531 U.S. 98 (2000), Vice President Al Gore conceded his defeat to George W. Bush and did not resurrect his challenge, even after revelations of questionable conduct during the Florida vote. U.S. Civil Rights Comm’n, *Voting Irregularities in Florida During the 2000 Presidential Election* (2001), <https://www.usccr.gov/files/pubs/vote2000/report/main.htm> [<https://perma.cc/S347-3ADP>]. Similarly, Vice President Nixon decided not to challenge voting in the 1960 election, which narrowly went to John F. Kennedy. See Peter Carlson, *Another Race To the Finish*, WASH. POST, (Nov. 17, 2000), <https://www.washingtonpost.com/archive/politics/2000/11/17/another-race-to-the-finish/c810a41c-7da9-461a-927b-9da6d36a65dc/> [<https://perma.cc/P4LW-J93M>] (concluding that Kennedy was not the beneficiary of extensive fraud in Illinois, as some asserted).

<sup>57</sup> For a short history of the dispute, see Emily Priviti, *A Contentious Year: How Pennsylvania’s Tumultuous 2020 Election Unfolded*, WITF (Jan. 6, 2021), <https://www.witf.org/2021/01/06/an-election-year-unlike-any-other-how-pennsylvanias-tumultuous-2020-election-unfolded/> [<https://perma.cc/V3TL-QDCB>].

<sup>58</sup> One might retort that an extraordinary revelation of fraud or error would justify a legal response even *after* the election. If there were definitive proof, for example, that a foreign nation hacked states’ computer files (or committed some other large fraud, such as stuffing ballot boxes), this might justify re-doing an election. Such a step is, however, merely a surmise at this point, and is beyond the limited scope of this essay.

### III. THREE PROPOSED CONSTITUTIONAL AMENDMENTS ON ELECTION MECHANICS

This part sets forth three proposals for constitutional amendments. Each amendment is justified by a current legal *mischief* that unwisely allows for politicization of presidential electoral mechanics.

#### A. Remove the Mischief of a State's Ability to Reject Direct Democracy

First, recall that the Constitution provides for a group of state-selected Electors to choose the President:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .<sup>59</sup>

The phrase, “in such Manner as the Legislature thereof may direct,” appears to provide wide discretion. Indeed, in the early years of the republic, many states appointed Electors through a vote of the legislature, not by the people.<sup>60</sup> This form of *representative democracy*, as opposed to *direct democracy*, was a hallmark of the original Constitution.<sup>61</sup> The choice of an Electoral college for the president, as opposed to a direct popular vote, was chosen in large part because of concerns that the people were not qualified to vote directly; the original intent was that states would choose trusted local officials, who then would use their independent judgment in electing a president.<sup>62</sup> Similarly, U.S. senators originally were elected by state legislators.<sup>63</sup> Today, however, all states hold popular elections to decide which candidates receive their Electoral votes.<sup>64</sup>

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<sup>59</sup> U.S. CONST. art. II, § 1.

<sup>60</sup> For example, the New York legislature chose the presidential Electors in the contentious election of 1824. *See, e.g.*, 1824 United States Presidential Election in New York, WIKIPEDIA, [https://en.wikipedia.org/wiki/1824\\_United\\_States\\_presidential\\_election\\_in\\_New\\_York#cite\\_note-CongQrt2-1](https://en.wikipedia.org/wiki/1824_United_States_presidential_election_in_New_York#cite_note-CongQrt2-1) [<https://perma.cc/762H-4JCL>], *citing* CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 254-56 (John L. Moore ed., 2nd ed. 1985).

<sup>61</sup> *See What is Representative Democracy*, IGIGLOBAL, <https://www.igi-global.com/dictionary/representative-democracy/25111> [<https://perma.cc/R73H-65C7>] (last visited Jan. 12, 2022) (discussing the differences in different types of democracy).

<sup>62</sup> For sources on the original intent of the Electoral college, see sources cited *supra* note 32.

<sup>63</sup> For the original language, see U.S. CONST. art I, § 3, *amended by* U.S. CONST. amend. XVII.

<sup>64</sup> All states currently conduct popular votes to choose Electors. *See, e.g.*, Nat'l Archives, *About the Electors*, <https://www.archives.gov/electoral-college/electors> [<https://perma.cc/7ZCT-AAH2>] (last visited Jan. 13, 2022); Robert E. Ross, *Federalism and the Electoral College: The Development of the*

But the current practice has not removed a state's authority, under article II, to choose its Electors through another method. The 2020 presidential contest highlighted the concern. With President Trump's complaints that Democrats were trying to "rig" the election through steps such as allowing voting drop boxes (created largely because of coronavirus concerns), it was suggested that states such as Pennsylvania, which holds a Republican-controlled legislature, could by law remove from citizens the power to vote for Electors.<sup>65</sup> In the end, no state took such a step. But in the aftermath of the election and the explosion of the myth that it was "stolen" from Trump,<sup>66</sup> some states in 2022 have debated new laws to authorize the state legislatures to reverse the vote of its citizens, perhaps after a vague finding of "fraud."<sup>67</sup> It remains to be seen whether such laws will be adopted or how they might be carried out. It is conceivable, however, that the following scenario might occur: in 2024, one presidential candidate in, say, Arizona leads in the polls. But the legislature, which is controlled by the party of the other candidate, declares that "fraud" is imminent and by law revokes the popular vote in favor of appointing a slate of Electors pledged to the other candidate.

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*General Ticket Method for Selecting Presidential Electors*, 46(2) PUBLIUS 147 (2016), <https://doi.org/10.1093/publius/pjv043>. Meanwhile, states have removed the power of electors to exercise independent judgment, which was the original intent. Today, in all states, citizens do not vote for specified individual Electors but rather vote for a presidential *candidate*, whose party has selected a slate of potential Electors that are pledged to vote for the candidates. *See id.* The Supreme Court has upheld the power of states to require that electors vote for the candidate to whom they are pledged – the problem of "faithless Electors." *Chiafalo v. Washington*, 140 S. Ct. 2316 (2019).

<sup>65</sup> In 2021 and 2022, some Republicans have discussed adopting state laws to give the state legislature the authority to choose the presidential Electors. *See* Barton Gellman, *Trump's Next Coup Has Already Begun*, THE ATLANTIC (Dec. 6, 2021), <https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/> [<https://perma.cc/F45Q-N2YG>] (discussing the rise of Republican idea efforts to have legislatures choose the presidential Electors).

<sup>66</sup> Shannon Bond & Bobby Allyn, *How the 'Stop the Steal' Movement Outwitted Facebook Ahead of the Jan. 6 Insurrection*, NAT'L PUB. RADIO (Oct. 22, 2021), <https://www.npr.org/2021/10/22/1048543513/facebook-groups-jan-6-insurrection> [<https://perma.cc/57N8-NYTV>] (discussing the rise of the "Stop the Steal" movement after the November 2020 election).

<sup>67</sup> *See* Gellman, *supra* note 65. As recently as February 2022, a former Wisconsin Supreme Court Justice, who was hired by the Republican-led legislature to study the 2020 election, stated to a legislative committee that the Wisconsin legislature "ought to take a very hard look at the option of decertification of the 2020 Wisconsin presidential election." Jack Kelly & Jessie Opoien, *Gableman Calls for 'Hard Look' at Decertifying 2020 Election, Which is Not Legally Possible*, CAPITAL TIMES, Mar. 1, 2022, [https://captimes.com/news/government/gableman-review-wisconsin-election/article\\_072da18b-84d8-51bd-ba7e-f190f5fde436.html](https://captimes.com/news/government/gableman-review-wisconsin-election/article_072da18b-84d8-51bd-ba7e-f190f5fde436.html) [<https://perma.cc/VBS5-4HUU>].

Such an audacious move would appear to be within the state’s article II power. But it would, I suggest, violate the principle of neutrality and the golden rule. It would be a usurpation of democracy for purely partisan purposes.

The mischief of a state legislature’s power to appoint presidential Electors could be avoided by a simple amendment. Here is a proposed amendment to Article II, section 1 (with lines crossed out to indicate language to be removed, and underlines and bold for words to be added):

Each State shall ~~appoint, in such Manner as the Legislature thereof may direct,~~ **elect** a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . **The Electors shall be chosen through a vote of the citizens entitled to vote in the state, pursuant to state laws on assigning Electors.**<sup>68</sup>

Such a simple amendment would preclude state legislatures from commandeering the power to choose the Electors. However, by including the phrase “pursuant to state laws on assigning Electors,” the amendment would clarify that Electors may be assigned through the “general ticket” method that is used in most states today: citizens vote for a candidate, who has a slate of potential Electors pledged to vote for them; the winning candidate’s slate is assigned by state law to serve as the state’s Electors.<sup>69</sup>

#### *B. Require Expeditious State Resolution of Popular Voting Disputes*

Next, the Constitution should clarify how disputes over the popular vote should be resolved. Relying on the principles of neutrality and repose, the Constitution could clarify that state governments must create systems for deciding controversies, subject to judicial review, and that these controversies be settled *before* the Electoral College vote in December. In conjunction with this constitutional revision, the laws authorizing Congress to count and object<sup>70</sup> could be revoked entirely (which is addressed below in part III of this essay).

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<sup>68</sup> U.S. CONST. art II, § 1.

<sup>69</sup> See Ross, *supra* note 64 (discussing the current system of assigning Electors). This language would retain the power of states to adjust their method of assigning Electors – such as assigning Electors by the proportion of popular votes received – as long as the assignment was based on the popular vote.

<sup>70</sup> 3 U.S.C. § 15.

The reasons for granting states primacy are three-fold. First, the Constitution currently gives most voting responsibilities to the states.<sup>71</sup> Second, states already hold mechanisms for resolving voting controversies.<sup>72</sup> Third, Congress holds no expertise in doing so;<sup>73</sup> indeed, as this essay has argued, a political branch is an inappropriate body to decide voting disputes.

One lesson of the 2020 election is that rules governing the vote should be settled early, both to avoid last-minute jockeying by parties seeking a slight advantage<sup>74</sup> and to allow time for litigating challenges to these rules. At the same time, the coronavirus pandemic of 2020, which pushed states to facilitate voting without standing in line, shows that states need some flexibility to respond to crises.<sup>75</sup> Here is a proposed constitutional amendment to Article II:

**States shall enact regulations for popular voting for presidential candidates and presidential Electors at least six months before the date of the presidential popular election. States may amend these regulations after this date only for extraordinary and urgent circumstances; legal challenges applying the standard of “extraordinary and urgent” shall be promptly decided by the courts. In no event shall the regulations be changed or held invalid after the popular vote.**

The intent here, following the principle of repose, is to stop states from tinkering with their voting rules close to the election. Election day and the days surrounding it should not be hindered by lawsuits over issues such as mail-in ballots, rules over correcting errors, and other problems; these quarrels should be decided well before the election.<sup>76</sup> But an exception for

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<sup>71</sup> Kesavan concluded that the Constitution holds an “anti-Congress principle” and a “pro-state principle” is its system for deciding presidential elections. Kesavan, *supra* note 26, at 1764-74.

<sup>72</sup> See, e.g., Barry C. Burden et al., *The Complicated Partisan Effects of State Election Laws*, 70(3) POLI. SCI. Q. 564 (2017) (analyzing the effects of state voting laws).

<sup>73</sup> Under current law, Congress counts the Electoral votes on January 6 – barely a month after the popular election and just a couple of weeks after the Electoral College votes. Congress is often adjourned during much of this time.

<sup>74</sup> For example, Pennsylvania Republicans argued in 2020 that loosened voting rules were imposed to help Democrats. For a short history of the dispute, see Emily Priviti, *A Contentious Year: How Pennsylvania’s Tumultuous 2020 Election Unfolded*, WITF (Jan. 6, 2021), <https://www.witf.org/2021/01/06/an-election-year-unlike-any-other-how-pennsylvanias-tumultuous-2020-election-unfolded/> [<https://perma.cc/NBH8-PQVZ>].

<sup>75</sup> See, e.g., Leonardo Baccini et al., *The COVID-19 Pandemic and the 2020 US Presidential Election*, 34 J. POPULATION ECON. 739 (2021) (discussing changes to voting rules because of the pandemic).

<sup>76</sup> See Priviti, *supra* note 74 (discussing the myriad of disputes and lawsuits in Pennsylvania, occurring throughout 2020 and 2021).



“extraordinary and urgent” changes – a standard reviewable by state courts – would allow for reasonable responses to emergencies, such as a pandemic.<sup>77</sup>

Next, states should be authorized and compelled to resolve voting disputes – both over the popular vote and the Electoral college vote – in a timely manner. This also follows the principle of repose. Claims that could have been resolved *before* an election should not be raised *after* the vote, such as Rep. Josh Hawley’s January 6, 2021, complaint about Pennsylvania’s expansion of voting rules, or Rep. Jamie Raskin’s January 6, 2017, objection to the qualifications of a Florida Elector.<sup>78</sup>

Next, the Constitution should require that states resolve *quickly* any legal challenge to either the popular election or Electoral College vote, such as through a recount, disqualification of voters, and the like. Such a clarification would fit best within the Twelfth Amendment. Here is a proposed amendment:

**After election day, a state may, pursuant to state laws enacted before the election, engage in a recount of or adjustment to the popular vote. A state official authorized by law must announce the final results of the popular vote within four weeks after election day. Courts shall entertain legal challenges to the results of the final popular vote, pursuant to state and federal laws, and courts are authorized to issue binding orders to the state official, but such challenges must be resolved within six weeks after election day. After this time, any challenge to candidates, the popular vote, Electors, or the Electoral vote is barred. The Electors shall vote in their respective states seven weeks after election day.**<sup>79</sup>

Here is the intent of the amendment. States would, of course, be allowed to recount the popular vote and disqualify certain votes for fraud or other

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<sup>77</sup> See Wendy R. Weiser et al., *Mail Voting: What Has Changed in 2020*, BRENNAN CTR. FOR JUST. (Sept. 17, 2020), <https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020> [<https://perma.cc/8BRB-5SXS>].

<sup>78</sup> See sources cited *supra* note 3 (Hawley’s 2021 objection) and note 9 (Raskin’s 2017 objection).

<sup>79</sup> This amendment would not anticipate every potential crisis, of course. For example, what if the state official authorized to announce the results simply rejected the true results or refused to act? There might be need for additional state laws or court resolution. One possible result might be that the state submitted no Electoral votes to Congress – a result that might favor one candidate, of course, but a Constitution need not – and perhaps cannot – resolve completely every conceivable problem.

good reasons.<sup>80</sup> But they would have only four weeks in which to do so; this would encourage prompt and diligent state action. If a challenger sought judicial review of any state decision, as Trump advocates did across the nation in the aftermath of the 2020 election,<sup>81</sup> they would be entitled to do so. Likewise, if a challenger asserted a claim under federal law, such as the equal protection argument in *Bush v. Gore* in 2000,<sup>82</sup> federal courts would hear the challenge. But this litigation would have to be resolved within six weeks of the election.<sup>83</sup>

What if, after the limitations period, miscounting or fraud were discovered? What if it were found that an Elector violated the constitutional proscription against holding public office?<sup>84</sup> That the presidential candidate was not a natural born citizen, as required by Article II?<sup>85</sup> Or, as President

<sup>80</sup> Here is how the timing would work in practice. After election day in early November, *see, e.g.*, 2 U.S.C.A. § 7, a challenger to the popular vote count would be advised to act promptly, because a state would have only until early December to resolve the challenge, and court claims would have to be decided by the middle of December. The Electors would vote a week later, by the end of December. As proposed in part III of this essay, the U.S. Secretary of State would then officially announce the new president, under the review of the Supreme Court. The president would be inaugurated on January 20. U.S. CONST. amend. XX, § 1.

<sup>81</sup> For a survey of the Trump-inspired litigation, see Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, but not a Wipe-out*, BROOKINGS (Nov. 30, 2021), <https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/> [https://perma.cc/H9ZN-T8X2].

<sup>82</sup> 531 U.S. 98 (2000) (setting aside the Florida Supreme Court's plan for a recount of the popular vote, thus in effect awarding the presidency to George W. Bush). It is worthwhile to note that this Supreme Court decision was made only four days after the Florida Supreme Court's order and only three days after the U.S. Supreme Court granted certiorari. *Id.* at 100.

<sup>83</sup> This proposal recognizes that some complications might remain unresolved. What if a lawsuit were asserted five weeks and five days after the popular election? This proposal would leave to the courts the question of whether to try to resolve such a late claim before the six-week deadline. But the principle of repose calls for a firm deadline.

<sup>84</sup> U.S. CONST. art. II, § 1. Another worthy constitutional amendment might be to outlaw "faithless" Electors who vote for candidates other than those to whom they have been pledged. Some but not all states make such faithless voting unlawful. *See* Chiafalo v. Washington, 140 S. Ct. 2316 (2020) (ruling that states may enforce laws against faithless Electors). Such an amendment might read: "Electors shall vote for candidates in accordance with requirements of state law and in favor of candidates to whom they have been pledged; if they refuse to do so, their votes shall be counted as if they acted in accordance with state law and their pledge." Moreover, considering that Electors no longer hold any autonomy or discretion, there is no need to have *people* chosen as Electors; states could simply award Electoral votes by operation of law. But such constitutional proposals drift close to great debate over the wisdom of the Electoral College, which this essay pointedly does not enter.

<sup>85</sup> U.S. CONST. art. II, § 1.

Trump baldly asserted on January 6, 2021, that “the states want to revote”<sup>86</sup> Under this amendment, and in accordance with the principle of repose, it would simply be too late to complain.<sup>87</sup> Legal uncertainty should not be permitted to hang over the presidential election.

The proposed time limitation would not foreclose *all* legal responses to fraud or other misconduct, however. Criminal penalties would still be available.<sup>88</sup> And if evidence arose that the standing President participated in fraud, this president could be impeached and removed.<sup>89</sup> But the United States should choose its President in a reasoned and expeditious manner that allows for no recourse after the decision has been made final.

### C. *Avoid the Mischief of Congress’s Meddling with the Electoral Results*

Finally, the Constitution should clarify how the Electoral College votes are counted. On both January 6, 2017, and January 6, 2021, members of Congress “objected” to the counting of ballots in favor of Trump and Biden, respectively. Meanwhile, President Trump encouraged Vice President Michael Pence in 2021 to take some unspecified action to change the vote.<sup>90</sup> Allowing Congress the power to reject the results of the Electoral vote poses a great mischief for partisan politicization and a distortion of democracy.

As noted above, the Constitution grants *no* authority for either Congress or the vice president to “object” to, or even “certify,” the votes of the presidential Electors made in their respective states. To the contrary, it appears to give Congress purely ministerial and informational roles. The entirety of Congress’s responsibility (including the president of the Senate, who is the Vice President) is as follows:

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<sup>86</sup> See Donald J. Trump, former United States President, Speech at a rally (Jan. 6, 2021), available at <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [https://perma.cc/CVP5-G7JG].

<sup>87</sup> These deadlines are not too tight. Perhaps the most complicated state popular votes of the past century were those of Hawaii in 1960 and of Florida in 2000. In both instances, state officials showed the ability to recount and resolve disputes expeditiously; the problem was that disjointed litigation was allowed to interfere at various turns. See, e.g., Daniel W. Tuttle, Jr., *The 1960 Election in Hawaii*, 14(1) W. POLI. Q. 331 (1961) (discussing Hawaii’s close vote in 1960); JAMES W. CEASER & ANDREW BUSCH, *THE PERFECT TIE: THE TRUE STORY OF THE 2000 PRESIDENTIAL ELECTION* (2001) (discussing Florida’s close vote in 2000).

<sup>88</sup> See, e.g., 52 U.S.C. § 20511 (providing federal criminal penalties for election interference).

<sup>89</sup> See U.S. CONST. art. I § 3 (providing for the impeachment and conviction of the President).

<sup>90</sup> For a discussion of Trump’s attempt to persuade Pence, see sources cited *supra* note 24.

The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.<sup>91</sup>

This counting task would appear to be simple. But Congress's power has been greatly expanded by the Electoral Count Act of 1887 (ECA).<sup>92</sup> The ECA was enacted largely in response to nineteenth century disputes about Electors at the state level, most notably the controversy of 1876.<sup>93</sup> In this close presidential election, Samuel J. Tilden sought to become the first Democrat in the White House since before the Civil War; that year, under Reconstruction, federal troops still held some sway over southern state governments. After congressional Republicans disputed close popular votes in three southern states – Florida, Louisiana, and South Carolina – the Republican-dominated Congress intervened and established an Electoral Commission (with a Republican majority) to resolve the controversies. Eventually, the Commission decided that all the disputed votes should be awarded to the Republican candidate, Rutherford B. Hayes, giving Hayes a victory, with 185 Electoral votes to Tilden's 184.<sup>94</sup> Although the closed-door

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<sup>91</sup> U.S. CONST. amend. XII. Congress is given a greater role, of course, when no candidate receives a majority of Electoral votes – something that has occurred only two times, the last being the election of 1824, when four candidates received Electoral votes. *The House of Representatives Elected John Quincy Adams as President*, HIST., ART & ARCHIVE: U.S. HOUSE OF REPS., <https://history.house.gov/Historical-Highlights/1800-1850/The-House-of-Representatives-elected-John-Quincy-Adams-as-President/> [<https://perma.cc/YA3D-5K6U>] (last visited Jan. 13, 2022). When no person receives a majority, the U.S. House “immediately” votes from among the top three electoral-vote-getters. Each state receives one vote. U.S. CONST. amend. XII.

<sup>92</sup> The original enactment of ECA was through the Act of Feb. 3, 1887, ch. 90, Pub. L. No. 49–90, § 4, Stat. 373–374, which established a number of procedures concerning presidential Electors. The relevant section for this discussion, which authorized members of Congress to object to certified votes, was recodified by 62 Stat. 672 at 3 U.S.C. § 15.

<sup>93</sup> Any discussion of the ECA should take account the extensive work by Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653 (2002); see also Eric Shickler, Terri Bimes, & Robert W. Mickey, *Safe at Any Speed: Legislative Intent, the Electoral Count Act of 1887, and Bush v. Gore*, 16 J. L. & POL. 717 (2000) (discussing legislative intent of the ECA).

<sup>94</sup> For short histories of the disputed presidential election of 1876, see *The Electoral Vote Count of the 1876 Presidential Election*, HIST., ART, & ARCHIVES: U.S. HOUSE OF REPS., <https://history.house.gov/Historical-Highlights/1851-1900/The-electoral-vote-count-of-the-1876-presidential-election/> [<https://perma.cc/C5NH-FMKL>] (last visited Jan. 13, 2022); Sheila Blackford, *Disputed Election Of 1876*, MILLER CENTER, <https://millercenter.org/the-presidency/educational-resources/disputed-election-1876> [<https://perma.cc/654X-V6AZ>] (last visited Jan. 12, 2022); see also Kesavan, *supra* note 26, at 1688–1691. One of the 1876 disputes arose from Oregon, where a Democratic elector was arguably a federal officeholder and thus ineligible to serve as a presidential Elector. This kind of problem can be resolved by the principle of *certainty*:

facts are unclear, some historians have concluded that the parties made an informal deal in early 1877, under which Hayes was declared President, and in return, the federal government removed troops in the southern states.<sup>95</sup>

The ECA granted Congress a formidable role in handling Electoral votes. After setting forth a specific date for counting – January 6 – the ECA authorizes members of Congress to “object” to a state’s certified votes, as follows:

Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received.<sup>96</sup>

When objections are raised in both the Senate and House, the two chambers then vote separately on the objections.<sup>97</sup> The statute then addresses the issue raised in 1876 – when there are conflicting state certificates:

[T]he two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. . . . [A]nd in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State.<sup>98</sup>

Although the nineteenth century language is verbose and obtuse, it gives the chambers the power to *reject* Electoral votes upon a finding that the votes

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complaints over rules and qualifications should be resolved *before* an election, after which time they should be barred.

<sup>95</sup> Allan Peskin, *Was There a Compromise of 1877?*, 60(1) J. OF AM. HISTORY 63, 64 (1973).

<sup>96</sup> 3 U.S.C. § 15.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* Since the election of 1876, the only other instance of two slates of Electoral votes being sent to Congress was from the new state of Hawaii in 1860: one certificate (awarding votes to Republican Richard M. Nixon) was signed before a recount was completed, and a second after a recount concluded that the true winner was Democrat John F. Kennedy. On Jan. 6, 1961, Vice President Nixon announced that he would count the second certificate with the Kennedy Electoral votes; Hawaii’s three Electoral votes would not have changed the result, in which Kennedy won. See Kesavan, *supra* note 26, at 1691-92. This incident calls for more pointed state laws to resolve voting disputes by a fixed date under judicial review.

are not “regularly given,” apparently with no recourse for judicial review. This is what was attempted on both January 6, 2017, and January 6, 2021.

As argued in the previous subpart, there is no reasonable advantage in having Congress count ballots or try to resolve voting disputes. Neither the Constitution nor the ECA offers any mechanism for having Congress engage in reasoned fact-finding or decide questions of law concerning Electoral College voting.<sup>99</sup> This stands in contrast to states.<sup>100</sup> Indeed, the experiences of congressional meddling in 1876, 2017, and 2021 reveal that the ECA creates the opportunity for great *mischief* of partisan politicization by Congress.<sup>101</sup> The congressional objection mechanism in the ECA – which conflicts with a plain interpretation of the Twelfth Amendment – probably is unconstitutional.<sup>102</sup> It certainly is unwise, and it should be revoked in its entirety.

Because the constitutional amendment proposed in the previous subpart provides for a conclusive and expeditious method of resolving disputes over the Electoral College vote in states, there is no role remaining for Congress – either discretionary, ministerial, or even informational. Accordingly, Congress’s responsibility could be removed entirely with the following excision from the Twelfth Amendment:

~~[States shall make] lists . . . and transmit [them] sealed to the seat of the government of the United States, directed to the President of the Senate;— The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—~~ The person having the greatest number of votes for President,

<sup>99</sup> For example, had the complaints of the Democrats in 2017 or the Republicans in 2021 gained greater support, Congress could have overturned the Electoral results without engaging in any due process of evaluating conflicting evidence, finding facts, or applying law.

<sup>100</sup> For a discussion of state post-election laws, see Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007).

<sup>101</sup> How would the Constitution as amended by these proposals have resolved a dispute such as that of 1876, when two ostensibly valid slate of ballots were sent to Congress? Each state government would be required to resolve such controversies expeditiously, with, probably crucially, the oversight of the courts, which might have to decide which slate was valid under state law.

<sup>102</sup> See Kesavan, *supra* note 26 (concluding that the ECA is unconstitutional). The House of Representatives on September 21, 2022, passed a bill to make modest reform to the ECA. Presidential Election Reform Act, H.R. 8873, 117<sup>th</sup> Cong. (2022). At the time, the Senate was considering a different proposal, S. 4573, 117<sup>th</sup> Cong. (2022). See also Miles Park, *The House Just Passed a Bill That Would Make It Harder to Overthrow an Election*, NPR (Sept. 21, 2022, 5:42 PM), <https://www.npr.org/2022/09/21/1124239193/house-legislation-electoral-count-act-reform> [<https://perma.cc/7EB9-8WBT>] (discussing the bills).

shall be the President, if such number be a majority of the whole number of Electors appointed . . . .<sup>103</sup>

Finally, the simple tasks of counting the Electoral votes and announcing the result could be shifted to a less political component of government. I suggest that the responsibility be granted to a nonpolitical official, such as the Librarian of Congress, who serves a ten-year term.<sup>104</sup> Because any single official might be subject to partisan pressure, the amendment could provide for U.S. Supreme Court review of the Librarian's conduct. But the task of counting would be merely that – to add and formally announce the winner (which all Americans would know, anyway) – and not to make any judgment or adjustment to the Electoral votes of the states. A revised Twelfth Amendment could read as follows:

**States shall announce publicly the results of their Electoral votes, promptly after the Electors vote. Then, the Librarian of Congress shall promptly count the total Electoral votes of the states and announce the result, but this task is solely one of counting, with judicial review by the Supreme Court of the United States; if the Librarian of Congress refuses to carry out this task, it shall be carried out by the Supreme Court of the United States.**

The person having the greatest number of votes for President, shall be the President-**elect**, if such number be a majority of the whole number of Electors appointed . . . .<sup>105</sup>

The process would work as follows: state governments would announce their Electoral tallies immediately after the vote of their presidential Electors.<sup>106</sup> After all 50 states report, everyone would then be able to know the precise Electoral tally.<sup>107</sup> The Secretary of State's job would be purely ceremonial: to formally announce who has been elected. The candidate who

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<sup>103</sup> U.S. CONST. amend. XII.

<sup>104</sup> 2 U.S.C. § 136-1.

<sup>105</sup> U.S. CONST. amend. XII.

<sup>106</sup> Many states broadcast their Electoral proceedings. *See, e.g.*, Katie Hobbs, *2020 Electoral College*, ARIZ. SEC'Y OF STATE, <https://azsos.gov/elections/2020-electoral-college> [<https://perma.cc/M896-2RXB>] (last visited Jan. 17, 2022).

<sup>107</sup> Indeed, because the results of the popular votes, which choose Electors, would have to be made final within six weeks after the election, the identity of the winning presidential candidate would be made clear by this point, at the latest, before the Electoral vote.

has received a majority of Electoral votes would be declared president-elect.<sup>108</sup>

#### IV. CONCLUSION

At bottom, democracy depends on both the law and the goodwill of the people who administer it. If, for example, all the officials of a government – popular vote tabulators, agency heads, the chief executive, and the judges – all oppose the fair counting of votes, then democracy might be doomed in that jurisdiction, and there is little that law could do to save it. But legal rules can avoid some of the worst demons of human nature by sidestepping actions in which politicization can trip up democracy.

For presidential elections, a notable flaw is the congressional counting of Electoral votes, a task that was dangerously expanded in scope by the Electoral Count Act. In a nation of politicians who have been committed to democracy, the statutory ability of Congress to reject Electoral votes has never been employed. On January 6, 2021, however, with the first president in history to clamor that the election was “stolen” from him, the perilous flaws of the system were exposed, only a few hours after the shameful spectacle of the storming of the Capitol and its chambers.

This essay has proposed a simple solution: a return to the original constitutional conception that Congress plays no role in either counting Electoral votes or deciding voting disputes. With a few simple amendments, states could be tasked with resolving expeditiously any quarrel over state voting with judicial oversight. The Constitution could clarify that any dispute be resolved by a date certain. Through such a system, the result of the election and the winner of the presidency would be clear and unchallengeable by the end of December, every four years. No meddling by the federal political branches would be desired or permitted. In this way, the democratic election of the world’s most important officer could be ensured, and the United States would avoid any repeat of January 6.

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<sup>108</sup> If no candidate receives a majority – something that has not occurred since 1824 – the U.S. House would then proceed to its vote, pursuant to the current Twelfth Amendment. U.S. CONST. amend. XII. Under the guiding principle of humility, this essay does not propose to meddle with this mechanism.