ON THE UNENFORCEABILITY OF THE ELECTORAL COUNT ACT

Chris Land· & David Schultz**

I. INTRODUCTION

"It is much more material that there be a rule to go by than what the rule is; that there may be a uniformity of proceeding in business not subject to the caprice of the Speaker or captiousness of the members."[1]

It goes without saying that the rules that govern how our country elects a president each quadrennium are something that should be as clear as possible and accepted as binding by all. Otherwise, an incipient constitutional crisis is born.

The value of rules and procedures are most evident when an issue is hotly contested, when consequences are uncertain, and when the stakes are at their highest. From our country's first constitutional crisis in the 1800 election through the imminent 2016 contest, presidential contenders have been highly motivated to seek every advantage possible, and in the

· Deputy Legislative Counsel, Nevada Legislature; University of Minnesota Law School, J.D., *cum laude*; Institute of Advanced Legal Studies, University of London, LL.M., *with distinction*; Florida State University, B.S., *summa cum laude*.

** Professor of Political Science, Hamline University; Adjunct Professor of Law, University of Minnesota Law School.

[1] CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H. DOC. NO. 111-157, at 129 (2011) (quoting Thomas Jefferson).

event of a disputed election result, each candidate would have irresistible motives to attempt to trade on ambiguities and flaws in the counting process.

Procedure is a funny thing. Invariably hidden among substantive decision-making the vast majority of the time, the means used to navigate inflexion points are largely an afterthought. When consequences are most uncertain, however, and stakes at their highest, the adaptability and flaws of our procedural frameworks are mercilessly laid bare.

A hidden imperfection for the first one hundred years of the Republic, the 1876 presidential election exposed our Constitution's original failure to provide a framework for resolving electoral disputes, bringing about a constitutional crisis in a bitterly contested post-Civil War climate. After employing a constitutionally unique Electoral Commission to award a disputed Electoral College majority to Rutherford Hayes, Congress agonized over the creation of a procedural framework for ten years—finally passing the Electoral Count Act in 1887.[2] The Act placed on a statutory footing the method of appointing state electors, the form in which votes were to be submitted, and most importantly, a number of restrictive procedures that both Houses of Congress were required to follow when tabulating the results.[3]

The Electoral Count Act was then consigned to the dustbin of history by everyone except the most astute election law scholars until the United States again faced a razor-thin presidential contest in 2000. While scrutiny of the Act by the United States Supreme Court in *Bush v. Gore*[4] largely centered on the timing of certification to receive "safe harbor" deference,[5] procedural objections that took place in Congress during the subsequent count gave rise to a number of key constitutional questions that have somehow evaded the academy[6] over the past

---

[2] 24 Stat. 373 (codified at 3 U.S.C. §§ 1–21 (2011)).

[3] *Id.*

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

[5] *Id.* at 113.

[6] *See* Vasan Kesavan, *Is the ECA Unconstitutional?*, 80 N.C. L. REV. 1653, 1719 (2002) (arguing that the Electoral Count is meant to be a ministerial duty and that neither House has the authority to judge validity). Kesavan devotes one

fifteen years. Whether the 2016 presidential election will provide an opportunity to resolve these questions is not presently known. However, in a political era that is highly partisan and polarized,[7] and with only a handful of states really being contested in the presidential race,[8] a close and disputed election in one state could expose flaws in the Act far more intense and consequential than 2000.

Largely unique among the United States Code and other congressional procedures,[9] the Act purports to restrict the authority of both the House of Representatives and Senate to control their internal discretion and procedures during the quadrennial count. The Supreme Court, however, has historically held that Article I, Section 5's constitutional grant that "[e]ach House may determine the Rules of its Proceedings . . ."[10] represents the plenary power of each House to govern its internal parliamentary activities—including adjournment, amendment, and debate.[11] As a result, an irreducible conflict centered on non-delegation, entrenchment, and the separation of powers lies in wait between the Electoral Count Act and the Houses' independent Article I procedural authority.

---

sentence to the issue of whether the ECA's procedural provisions are enforceable. *See also* Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003) (omitting any discussion of the Electoral Count Act or the 2000 election).

[7] *See generally* SARAH BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2003) (discussing the rise of partisan gridlock and politics in America and Congress); THOMAS E. MANN AND NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012) (same).

[8] *See e.g.*, STACEY HUNTER HECHT & DAVID SCHULTZ, PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER (2015) (establishing that the presidential race has effectively been reduced to contests in ten or so states).

[9] *See* Part IV(c) *infra* for analogous provisions and discussion about why the Electoral Count Act does not have an anti-entrenchment provision.

[10] U.S. CONST. art. I, § 5, cl. 2.

[11] *See* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1683 (2002).

In order to test the limits of this conflict, this article will first consider the important threshold question of whether the institution that actually counts electoral votes is a constitutionally unique entity or merely a simultaneous meeting of the House and Senate. Neither a plain-text reading of the Constitution, nor congressional intent support the Joint Session reading. Part III will then examine the Electoral Count Act's ("ECA") genesis and relevance through the 1876 election, analyzing the 1877 Electoral Commission's role, and contending that this mixed-branch commission was a permissible exercise of the Rules Clause at the outer limits of congressional delegation.

Part IV will then consider the core issue of whether sections 15 through 18 of the ECA are unenforceable in light of non-delegation doctrine, the Rules Clause, and our system of separated powers. Finally, Part V will proceed to assess the justiciability of these issues in the context of the upcoming 2016 presidential election, arguing that they must be within reach of our federal courts. This article thus contends that the ECA unconstitutionally impinges on Congress's internal procedural authority and is unenforceable, adding ever more uncertainty to an electoral system that has already engendered three constitutional crises in our Nation's history.

II. WHAT INSTITUTION COUNTS OUR ELECTORAL VOTES?

It is necessary that we first outline the framework provisions that govern the counting of Electoral College results and the institutions textually charged with this duty. Amendment XII governs the formal process of electing our chief executive.[12] Before its adoption in 1804 following the aftermath of the 1800 Jefferson-Burr tie,[13] Article II governed this process.

---

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

[13] Art. II states that electors should "vote by ballot for two persons," unaware of the likelihood that the Presidential and Vice Presidential candidates of a party were likely to get the same number of votes. In the previous elections in 1792 and 1796, the Vice Presidential vote was split, which did not occur in 1800. *See, e.g.*, Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. L. REV. 925, 928–30 (2002) (outlining the 1800 crisis). *Accord* TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT:

Consequently, Amendment XII provides that "[t]he President of the Senate [the sitting Vice President] shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."[14]

A number of critical constitutional questions can be raised from this provision. The President of the Senate obviously plays an important role in the count, but does this authority extend to the power to make parliamentary rulings? Does he or she have substantive decision-making authority over which votes should be counted,[15] or is this textually demonstrable power merely ministerial, with validity determined by the houses individually or as a group?[16] Additionally, and most crucially for our discussion, is the body assembled to count the votes a unique constitutional entity, that is, a "Joint Session of Congress" with independent procedural authority imbued on this body, or is it merely the House of Representatives and Senate assembled in the same place and retaining their individual powers?

THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804 (1994). A Democratic-Republican elector was reportedly given the task of abstaining from voting for Aaron Burr to prevent a tie, but failed to do so. Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1535–42 (2014) (discussing 1800 and arguing that the adoption of this amendment infused the presidency with a political character that absent from the original text of Article II).

[14] U.S. CONST. amend. XII, cl. 2.

[15] *See infra* note 41 and accompanying text.

[16] A number of theories about where this authority lies were offered by Members of Congress in the ten years between the 1877 Electoral Commission and the passage of the ECA, namely: (1) the President of the Senate; (2) the House (Presidential Electoral votes only) and the Senate (Vice Presidential votes); (3) the House and Senate as a corporate body with each member having one vote; (4) the House and Senate with each chamber having one vote; (5) no one, until Congress appoints a counter by concurrent resolution or legislation (the accepted proposal, e.g., the ECA). *See* Stephen A. Siegel, *The Conscientious Congressman's Guide to the ECA of 1887*, 56 U. FLA. L. REV. 542, 551–52 (2004). The second proposal seemingly strikes the best balance between efficiency and a robust framework that respects the institutional powers of each House. This method is also supported by Amendment XII's division of authority among the House and Senate in case of a tie.

If this quadrennial count was intended by the Founders to be a separate institution, with members of Congress and the Vice President serving as ex officio[17] members, then it undoubtedly would have a great deal of procedural freedom to develop a new method for counting presidential results, making many of the issues discussed *infra* superfluous.[18] Viewing the House and Senate as ex officio members of a Joint Session is supported by some evidence from the 1787 Constitutional Convention, which, in an early version, drafted this key provision to read "[t]he President of the Senate shall *in that House* open all the certificates, and the votes shall be then and there counted."[19] Representative (and Founder)[20] Albert Gallatin similarly made a motion in the Sixth Congress to provide that any decision on the legality of electoral votes would be made by a majority of Representatives and Senators present—removing any distinction between the Houses.[21] In

---

[17] Ex officio refers to an authority exercised "by virtue or because of an office." *Ex Officio*, BLACK'S LAW DICTIONARY 267 (3d pocket ed. 2006).

[18] This authority could even be contextually drawn from the Rules Clause, U.S. CONST. art. I, § 5, cl. 2, which grants both the House and Senate the plenary power to craft their own procedures. In this way, it would be a stretch to argue that the Constitution had created an independent constitutional organ and had failed to give it the power to establish parameters of operation. The Supreme Court has also recognized that legislative bodies possess significant inherent authority to exercise the functions necessary for their operations. *See* Buckley v. Valeo, 424 U.S. 1, 127–28 (1976); Watkins v. United States, 354 U.S. 178, 187 (1957) (describing the subpoena and contempt process as inherent legislative powers first recognized in the British House of Commons and Lords' "absolute and plenary authority over their privileges."); SEC v. Comm. on Ways and Means, No. 14-MC-193, 2015 U.S. Dist. LEXIS 154302 (S.D.N.Y. Nov. 13, 2015); Comm. on the Judiciary v. Miers, No. 08-CV-409, 558 F. Supp. 2d 53 (D.D.C. Jul. 31, 2008).

[19] Max Farrand, *The Records of the Federal Convention of 1787*, 25 HARV. L. REV. 198, 529 (1911) (book review) (emphasis added). *See also* Kesavan, *supra* note 6, at 1723–24 (arguing that the Electoral Count is meant to be a ministerial duty and that neither House has the authority to judge returns' validity); Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1 (1968).

[20] *See* Marsh v. Chambers, 463 U.S. 783, 790 (1983) (finding that "substantial weight" should be given to interpretations of the Constitution by the first Congresses composed of Founding-era members).

1886, a year before the passage of the ECA, Sen. James George also remarked that counting

> is not a legislative function which ought to be considered separately by the two Houses, but it is rather in the nature of a judicial function; . . . it would be an anomaly surely in Anglo-Saxon jurisprudence, . . . [that] the rendering of an operative judgment upon the ascertainment of a fact should be committed to two separate tribunals [(the House and the Senate)], each acting independently of the other, and each having a veto upon the other.[22]

Consequently, if the House and Senate are classified as a constitutionally independent Joint Session, this body likely has the authority to develop special, binding procedures for counting electoral votes—e.g., the ECA. This stems from the Rules Clause, inherent legislative authority,[23] and that the observation that our Constitution is largely silent on the detailed method to be used. Congress is also granted the express authority "[t]o make all laws which shall be necessary and proper for carrying into execution . . . and all other powers vested by this Constitution," including the ex officio authority delegated to Congress to count electoral returns.[24]

This view, however, fails to consider important textual evidence. No clear indication exists providing that a Joint Session or convention[25] is to count the votes; quite the opposite

---

[21] *See* SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 26 (1877); Kesavan, *supra* note 6, at 1725.

[22] 17 CONG. REC. 2429 (1886) (remarks of Sen. James Z. George).

[23] *See supra* note 16 and accompanying text.

[24] U.S. CONST., art. I, § 8, cl. 18.

[25] In Germany, the *Bundesversammlung* (Federal Convention) elects the Federal President and is a special constitutional entity comprised of the *Bundestag* (the lower House of Parliament) and delegates nominated by *Lander* (state) governments. *See* GRUNDGESETZ [GG] [BASIC LAW], at art. 54, cl. 1–4, *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html.

in fact, as the House and Senate are individually named in the counting provisions contained in Article II[26] and Amendment XII.[27] Secondly, and perhaps most crucially, Clauses 3 and 4 of this Amendment also provide that the House and Senate shall separately elect the President and Vice President in the event of an Electoral College tie, or if the second place finisher in the House vote fails to attain a majority of votes, respectively.[28] Evidence cited *supra* from Rep. Gallatin's motion that purported to grant the Houses, as a corporate body, the joint authority to judge the validity of electoral votes was also expressly rejected by the Federalist Congress in 1801.[29] Congressional interpretation of this provision throughout the history of our nation has also affirmed this provision to mean that both the House and Senate are largely separate entities.

The Supreme Court has recognized that both the President and Congress infrequently rely on past practices or interpretations as justification for their authority, in areas of textual obscurity.[30] In this way, the "gloss which life has written upon them [the words of the Constitution]," can make "a systematic, unbroken . . . practice, long pursued" worthy of great deference by the Supreme Court, as long as it otherwise comports with the text of the Constitution.[31] Both the ECA and

---

[26] U.S. CONST. art. II, § 1, cl. 3 ("The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates . . . .").

[27] U.S. CONST. amend. XII, cl. 2 ("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 . . . .").

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

[29] SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 26 (1877). This motion would hardly have been dispositive had it been carried, however. Congress is a legislature of enumerated powers, and any authority assumed must stem from an express or implied power, meaning that Marshall's Supreme Court would have had the last word in 1801.

[30] *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 531 (2008); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1954) (Frankfurter, J., concurring).

[31] *See Youngstown*, 343 U.S. at 610–11.

its forerunner, the Electoral Commission Act of 1877,[32] exclusively refer to both the Senate and House as separate organs,[33] providing that in the event of a properly raised[34] parliamentary objection during the actual count, the Houses must withdraw to their chambers to separately decide its merits.[35]

Based on this gloss[36] and the 117-year lifespan of the ECA as a framework for finalizing presidential elections in Congress, as well as the textual indications discussed *supra*, the House and Senate would likely be viewed, for constitutional purposes, as separate bodies with independent authority meeting together to count the certificates of vote submitted by the states for President and Vice President.

It is important to also note briefly that the ECA may have a grave constitutional defect even if an independent body exists that is empowered to make rules for counting the votes. Section 17 of the ECA provides that "the two Houses separate to decide upon an objection."[37] This provision—other than affirming the principle that the Houses are actually meeting together as separate entities—could represent an unconstitutional delegation of the Joint Session's authority.[38] In this narrow

---

[32] Act Creating an Electoral Commission, 19 Stat. 227 (1877).

[33] *See* Electoral Count Act, 3 U.S.C. §§ 2-7 (2011).

[34] An objection seconded by at least one senator and representative. *See* 3 U.S.C. § 15; *see also* Part IV *infra*.

[35] *See* 3 U.S.C. §15.

[36] Admittedly, the Supreme Court could theoretically use this doctrine to hold the ECA binding on both Houses, and outside the remit of the Rules Clause, because the ECA has been in place and largely obeyed by Congress since 1887. *See* Part V *infra*. However, it would be hard to square this with the Constitution's textual grant in the Rules Clause and Non-Delegation Doctrine, since bicameralism and presentment would involve the President in an area committed to Congress by the Constitution.

[37] 3 U.S.C. § 17.

[38] In this context of a Joint Session, this result follows because the House and Senate are individually empowered by the Electoral Count Act to make final—and possibly conflicting—decisions on the objection. In the event the House and Senate came to opposite conclusions, the governor of the disputed state would cast the deciding vote. *See* 3 U.S.C. § 15; Edward B. Foley, *2016: How John*

context, this analysis does not consider collateral questions on whether counting was originally envisioned by the Constitution to be a ministerial act,[39] or even if the President of the Senate may have a role in deciding the fate of individual returns.[40] Nevertheless, this article will proceed under the assumption that both the Constitution and established historical practice views the House and Senate as separate constitutional entities in the count.

III. TILDEN OR BLOOD: THE ELECTORAL COMMISSION AND THE LIMITS OF DELEGATION

A. THE 1876 ELECTION

Constitutions regulate the day-to-day workings of government, but the inherent value of our system of separated powers is perhaps best displayed when out-of-the-ordinary events appear, placing stress on institutional actors and exposing flaws in inflexion points of decision-making. Chief among the small handful of constitutional crises that our nation has experienced are the 1876 and 2000 presidential elections, both of which largely centered on the disputed electoral votes of the state of Florida.[41]

With an election grounded in lingering feelings of sectionalism and the bitter legacy of the Civil War,[42] neither Democratic candidate Samuel Tilden, nor Republican

---

Kasich Could End Up Picking the Next President, POLITICO, Mar. 20, 2016, http://www.politico.com/magazine/story/2016/03/the-bizarre-130-year-old-law-that-could-determine-our-next-president-213645 (observing that the text of the Electoral Count Act is "bizarre," "tangled," and "unintelligible.").

[39] This theory relies on the definition and context of the word "count," and early 19th century counts. *See generally* Kesavan, *supra* note 6, at 1711–17.

[40] *See* U.S. CONST., amend. XII; Eric Schicker, Terri Bimes & Robert W. Mickey, *Safe at Any Speed: Legislative Intent, The ECA of 1887, and Bush v. Gore,* 16 J.L. & POL. 717, 735–36 (2000).

[41] *See* WILLIAM REHNQUIST, CENTENNIAL CRISIS, 4 (2004). The 1800 election also meets this criteria. *Id.*

[42] *See id.* at 86.

Rutherford Hayes were particularly enthusiastic to become chief executive in 1876.[43] Election night saw many observers predicting a Democratic victory, and early returns from both New York and Ohio confirmed that Tilden was the frontrunner.[44] Nevertheless, Democratic leaders D.A. Magone and Sen. William Barnum sent out panicked telegrams to the *New York Times* office at approximately 3:45am on Wednesday, November 8, 1876 asking for the latest electoral vote estimate.[45] Curious as to why Democratic officials were worried in spite of favorable predictions made across the board, the Republican-leaning *Times* informed their party's leadership, who immediately wired field agents in Florida, South Carolina, Louisiana, and Oregon—all of which had to be won in order to elect a Republican to the presidency—"urging them to hold their States—[and] that the election depended on it."[46] With an Electoral College majority at 185 votes in 1876,[47] Tilden banked 184 votes and Hayes stood at 163 after election night.[48] As a result, Democrats only needed to win one state or disqualify a single elector, which would throw the election into a Democratic

---

[43] Walker Lewis, *The Hayes-Tilden Election Contest,* 47 A.B.A. J. 36, 36 (1961).

[44] REHNQUIST, *supra* note 41, at 94.

[45] Lewis, *supra* note 43, at 37.

[46] *Id.* Modern analysis speculates that "without the strenuous adjustments" made by Republicans shortly after the election, at least one of these states would have gone Democratic—electing Tilden. *Id.* The nature of these adjustments can only be speculated, but it likely involved at least some amount of selective counting by canvassing boards, ballot-box tampering, or similar fraud. *See id.* at 37-38.

[47] The total number of electors in the Electoral College is a function of the number of states in the union and their populations. *See* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in 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."); Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173 (2011).

[48] Lewis, *supra* note 43, at 38.

House of Representatives and quickly make Tilden President-Elect.[49]

Reconstruction-era Republican governors heavily controlled the election apparatus in Florida, Louisiana, South Carolina, and Oregon and "the only way the Democrats could influence an official was to buy him"—and hope to not be outbid.[50] In the weeks after the election, Republican "visiting statesmen" from northern states went south to help officials "oversee" canvassing, and by December 1876, Florida, Louisiana, South Carolina, and Oregon each submitted multiple sets of electoral votes to Congress for consideration, with at least one Democratic and Republican slate from each state.[51] As a result, both Hayes and Tilden independently had a claim to the presidency that was backed by dozens of potentially fraudulent certificates of vote.[52]

While Congress was preparing to meet to conduct the count, this fact became widely known and Candidate Hayes asserted that the Constitution granted the (Republican) President Pro Tempore of the Senate[53] the sole authority to determine which returns to count.[54] Tilden feverishly disagreed, arguing that never before had this officer been permitted to decide upon disputed electoral votes, and that the decision had been previously made in Congress through an objection from the floor.[55] Tilden felt that the best strategy to ensure he won the Presidency was to make no concessions and allow Congress

---

[49] *See* U.S. CONST. amend. XII.

[50] Lewis, *supra* note 43, at 37.

[51] *Id.*

[52] *See* REHNQUIST, *supra* note 41, at 101–12.

[53] As mentioned *supra,* the Vice President, in his ex officio role as President of the Senate, is constitutionally charged with presiding over the count. However, the Vice Presidency was vacant from 1875–77, so this responsibility would have fallen on Sen. Thomas Ferry in his role as President Pro Tempore of the United States Senate. *See Ferry, Thomas White*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGR., http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000095 (last visited Jan. 23, 2016).

[54] *See* Part II *supra*.

[55] Lewis, *supra* note 43, at 163.

to count the vote regularly, throwing out the disputed states.[56] Because no candidate had a majority, a Democratic House would elect him president before Republicans took control on March 4, 1877.[57]

Nevertheless, even though congressional leaders of both parties felt strongly that their respective candidates should be elected, they also agreed that productive steps should be taken to resolve the crisis before open conflict erupted.[58] As a result, President Grant and the House and Senate approved the creation of a statutory commission in the Electoral Commission Act by wide majorities in January 1877.[59] The Commission was composed of five House members, five Senators, and five Supreme Court justices, split evenly on party lines, with the four justices named specifically in the Act electing a fifth justice—widely acknowledged to be "independent" and "apolitical" David Davis.[60] Most importantly, the Act provided that the Commission's recommendations disposing of the disputed votes must be accepted as binding by the House and Senate.[61] Unknown to Congress at the time of passage, however, Davis was appointed to the U.S. Senate by the Illinois Legislature—as a Republican—the day before the Commission was created, giving him the opportunity to demur from this partisan affair.[62] Democrats became furious at this turn of events because each of the remaining justices that could fill the seat were Republican. Justice Joseph Bradley soon replaced Davis, and predictably the Commission voted 8-7 along party lines to grant each of Louisiana, South Carolina, Oregon, and Florida's disputed electoral votes to Hayes.[63]

---

[56] REHNQUIST, *supra* note 41, at 116.

[57] *Id.*

[58] *Id.*

[59] Act Creating an Electoral Commission, 19 Stat. 227 (1877).

[60] Lewis, *supra* note 43, at 39.

[61] *Id.* This provision also likely would have been unenforceable.

[62] *Id.* at 40.

[63] Lewis, *supra* note 43, at 163, 167. For an additional viewpoint of the proceedings of the Electoral Commission, *see* J. HAMPDEN DOUGHERTY, THE

With House rules much different than today,[64] Democrats caused "wild disorder" during the count on March 1, 1877, successfully disrupting floor proceedings and blocking consideration of the Electoral Commission report—even to the extent that, "for hours Speaker Randall could not even make himself heard."[65] Southern Democrats were then reportedly promised by Republican leaders in a backroom deal that Reconstruction and the federal troops stationed throughout the South would be withdrawn in exchange for allowing Hayes to be placed in the White House.[66] As a result, Democratic leaders began to allow Randall's "determined, arbitrary, and dictatorial" parliamentary tactics to bring an end to debate and other dilatory motions made from the floor.[67] After eighteen hours of wild controversy, the Commission report was finally adopted, giving Hayes the narrowest winning margin in Electoral College history—185 to 184.[68]

ELECTORAL SYSTEM OF THE UNITED STATES 136–213 (1906) (recounting the proceedings of the Electoral Commission).

[64] For example, the filibuster and disappearing quorum were common tactics used by the minority party until Speaker Thomas Reed largely curtailed these practices in the early 1890s and began to impose the procedural controls marked by the rise of the Committee on Rules and a strong speakership. *See, e.g.*, ROBERT REMINI, THE HOUSE: A HISTORY OF THE HOUSE OF REPRESENTATIVES 245 *et seq.* (2006).

[65] Lewis, supra note 43, at 167.

[66] *See, e.g.*, ROY MORRIS, FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876 (2004).

[67] Lewis, *supra* note 43, at 167. Rep. Blackburn of Kentucky remarked, "Mr. Speaker, the end has come. . . . Today is Friday. Upon that day the Savior of the world suffered crucifixion between two thieves. On this Friday constitutional government, justice, honesty, fair dealing, manhood, and decency suffer crucifixion amid a number of thieves." *Id.*

[68] *Historical Election Results,* NAT'L ARCHIVES & REC. ADMIN., http://www.archives.gov/federal-register/electoral-college/votes/index.html (last visited May 7, 2016).

B. A SEPARATION OF POWERS PERSPECTIVE ON THE ELECTORAL COMMISSION

The Rules Clause of Article I grants each House of Congress a wide remit to establish, modify, and amend the rules of procedure they will employ to carry out their constitutional lawmaking duty.[69] The idea that a legislative body has inherent plenary control over its own procedures has deep roots in British constitutional traditions,[70] initially born of the desire of the House of Commons to stand alone from the House of Lords in the fourteenth and fifteenth centuries and develop rules diverging from royal tradition.[71] Based on this spirit, the Rules Clause "vest[s] control over . . . key procedural elements of the enactment process in each House at any point in time."[72]

Within this textual grant of power, Congress has near-absolute authority, granting each chamber the freedom to take different approaches to similar procedures. For example, Article I, Section 7, Clause 2 provides that every bill shall "pass" the House of Representatives and Senate.[73] However, both the House and Senate take varying perspectives on what counts as passage, with the House sometimes employing the "deem and

[69] *See* U.S. CONST. art. I, § 5, cl. 2.

[70] John C. Roberts, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermuele*, 91 CAL. L. REV. 1773, 1790 (2003).

[71] *See also supra* note 16 and accompanying text.

[72] Roberts, *supra* note 70, at 1794.

[73] U.S. CONST.

pass" method,[74] and the Senate relying on the sixty-vote cloture requirement as a de facto threshold for passage.[75]
The House and Senate also take much different approaches to determining the presence of a quorum.[76] Article I expressly defines a quorum as a majority of Representatives and Senators respectively and requires that all bills pass both the House and Senate before delivery to the White House for signature or veto (bicameralism and presentment).[77] Nevertheless, something less than a voting quorum frequently passed legislation in the late 19th century and was held constitutional.[78] Differing procedures also exist regarding length of debate[79] and

---

[74] *See* WALTER J. OLESZEK, CONG. RESEARCH SERV., "SELF-EXECUTING RULES" REPORTED BY THE HOUSE COMMITTEE ON RULES (2006), http://usgovinfo.about.com/library/PDF/self_executing.pdf (updated Dec. 21, 2006). This method avoids a formal vote on the underlying legislation, and the legislation is "deemed" passed by a favorable vote on the resolution reported by the House Rules Committee that establishes the time allocated for debate, number of amendments, allowable points of order, and other parameters of debate. *See also* Ronald J. Krotoszynski, *Deconstructing Deem and Pass: A Constitutional Analysis of Enactment of Bills by Implication*, 90 WASH. U.L. REV. 1071, 1072–78 (2013).

[75] *See, e.g.,* MARTIN B. GOLD, SENATE PRACTICE AND PROCEDURE 33–64 (2013).

[76] Article I provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business . . . ." U.S. CONST. art. I, § 5, cl. 1. However, the House interprets this provision as requiring positive action from the floor. *See* Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 727–29 (1989). The presiding officer of the Senate may only ascertain the presence of a quorum after cloture on a piece of legislation has been invoked—otherwise the Secretary of the Senate must call the roll after a motion suggesting the absence of a quorum. *Id.*

[77] *See* U.S. CONST. art. 1 at § 5, cl. 1; § 7, cl. 2.

[78] *See, e.g.,* United States v. Ballin, 144 U.S. 1 (1892) (discussing the "disappearing quorum" and the frequent tactic used by minorities at that time to be present in the Hall of the House of Representatives but fail to vote. Speaker Thomas Reed subsequently ordered the Clerk of the House to record non-voting members as present and the Supreme Court accepted this as constitutional, even though only a minority of the full House had actually voted.).

[79] *See generally* Gold, *supra* note 75.

suspension of the rules.[80] Embracing these nuances, federal courts have given each House of Congress, as a separate constitutional actor, a wide berth in reviewing their specific rules of procedure, as long as they comport with other textual requirements of the Constitution.[81]

It follows that Congress' use of the Electoral Commission as a fact-finding tool in the midst of the 1876–77 constitutional crisis is likely a valid exercise of the Rules Clause, while also representing the outer limit of potential congressional delegation in this area. The Commission's mandate was to hear testimony from counsel representing Tilden and Hayes, to gather evidence pertaining to the validity of electoral votes from the disputed states, and to issue a final report.[82] Pursuant to this mission, the Electoral Commission was little more than a fact-finder operating on behalf of Congress, in much the same way that committees routinely operate. Committees allow Congress to solve the collective-action problems normally encountered when dealing with large groups of people, allowing legislators to also gain specialized knowledge in a policy area, making the legislative process more effective.[83] However, it

---

[80] *See* R.K. Gooch, *The Legal Nature of Legislative Rules of Procedure*, 12 VA. L. REV. 527, 538 (1926).

[81] *See, e.g., Ballin*, 144 U.S. at 5 ("[T]here should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House. . . . The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."); NLRB v. Canning, 134 S. Ct. 2550, 2574 (2014); Yellin v. United States, 374 U.S. 109, 114 (1963); Bach, *supra* note 72, at 730 (noting that "the Supreme Court has been reluctant to entertain challenges to these interpretations and superimpose its own judgments"); Gregory Fredrick Van Tatenhove, *A Question of Power: Judicial Review of Congressional Rules of Procedure*, 76 KY. L.J. 597 (1987).

[82] *See* U.S. ELECTORAL COMM., PROCEEDINGS OF THE ELECTORAL COMMISSION (1877), http://books.google.com/books?id=DBJCAAAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

[83] *Watkins*, 354 U.S. at 200 (observing that committees "act as the eyes and ears of the Congress in obtaining facts upon which the full legislature can act.");

could be argued that, from a constitutional perspective, the Electoral Commission was doing something more significant than gathering facts or taking testimony—it was performing a judicial-like function in passing upon the validity of votes integral to the function of another coordinate branch and resolving a dispute between adverse parties.[84] Could this added feature mean the Commission was unconstitutional?

Not all instances of a body of Congress acting in a quasi-judicial role are unconstitutional. In 1989, Mississippi federal district judge Walter Nixon was serving a felony sentence for perjury but had nevertheless refused to resign his office after congressional leaders warned him that impeachment and removal were imminent.[85] The House of Representatives unsurprisingly impeached him, and the charges were dutifully sent to the Senate for trial.[86] The Senate, pursuant to its rules, appointed an Impeachment Trial Committee to "receive evidence and take testimony," holding four days of hearings, during which ten witnesses were called.[87] The Committee then presented the Senate with a complete transcript of the proceeding, reported the uncontested facts, and summarized the contested issues for the full body to make a final determination of Nixon's fate.[88] Subsequently removed from office by the requisite two-thirds majority, Nixon brought a federal suit, claiming that because the Senate had "the sole Power to try all Impeachments,"[89] use of the word "try" meant that a judicial-like fact-finding proceeding was required before the full Senate,

---

see also Adrian Vermuele, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 382 (2004).

[84] *See supra* note 15.

[85] Nixon v. United States, 506 U.S. 224, 226 (1993).

[86] *Id.* at 226–27 (1993).

[87] *Id.* at 227.

[88] *See* REPORT OF THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST WALTER L. NIXON, S. DOC NO. 164, 101ST CONG., 1ST SESS., at 18-19 (1989).

[89] U.S. CONST., art. I, § 3, cl. 6.

and that the body had unconstitutionally delegated this textual demand to the Impeachment Trial Committee.[90]

The Supreme Court, agreeing with the D.C. District Court and Court of Appeals below, found that this controversy was moot—the Senate had the "sole" power of impeachment, and commiserate with this plenary grant of power,[91] the Senate is free to define "try" in any manner it chooses,[92] including the use of a committee to carry out the fact-finding function.[93] Justices Blackmun and White, as part of a unanimous Court, specifically emphasized that the use of a committee to carry out part of the impeachment process was a permissible exercise of the Rules Clause, as long as the Senate as a whole had the final word.[94] The Senate's ultimate control over this process was likely dispositive, since much in the same way federal magistrate judges often first issue reports and recommendations in federal civil suits that are later reviewed by a district judge,[95] senators had the opportunity to conduct a de novo review of the record made by the Impeachment Trial Committee and had a final, independent say in removing Nixon from his position as a judicial officer of the United States.

Nixon stands for the proposition that the Senate has broad leeway in trying impeachments as a legislative body, even though this is a quasi-judicial function. This case accentuates

---

[90] *Nixon*, 506 U.S. at 229 (recounting Petitioner's argument that "'Try' means more than simply 'vote on' or 'review' or 'judge.' In 1787 and today, trying a case means hearing the evidence, not scanning a cold record.").

[91] *Id.* at 235–36. The Justices of our Supreme Court are even subject to this power.

[92] *Id.* at 230.

[93] Interestingly, the Senate only uses this committee method during the trial of inferior officers. During the impeachment of President Clinton in 1999, the full Senate acted as both a fact-finder and jury. *See generally* IMPEACHMENT OF PRESIDENT WILLIAM JEFFERSON CLINTON: CONSTITUTIONAL PROVISIONS; RULES OF PRACTICE AND PROCEDURE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS, S. DOC. 106–2, 106th Cong., 2d Sess. (1999).

[94] Nixon v. United States, 506 U.S. 224, 250 (1993) (Blackmun & White, JJ., concurring).

[95] *See, e.g.*, 28 U.S.C. § 636 (B)(1)(A–B) (2009) (outlining the authority of a federal magistrate judge).

both the freedom and the limitations placed on Congress' power to delegate pursuant to the Rules Clause. Both the House and Senate are inherently free to use any method of internal delegation they think prudent or well-adapted to aid the execution of their constitutional responsibilities, but the individual Houses, as corporate bodies, must maintain the final authority to approve or reject a decision.[96] Even though the House and Senate may change how they interpret and accomplish these tasks, it may not surrender ultimate control to another entity, either internal or external of Congress. Therefore, the Senate may not delegate its authority to conduct impeachment trials to the House, nor would the House be permitted to allow the Senate to elect a president in case of no candidate receiving a majority. These duties are textually conferred by the Constitution to each house, in the same way that both the House and the Senate are given the independent authority by the Rules Clause to determine how they will conduct business.[97]

As a result, the Impeachment Trial Committee utilized by the Senate and the 1876 Electoral Commission are both within Congress' power of delegation and rulemaking, but simultaneously stands for the outer boundary of this authority. Any transfer of dispositive control or influence on procedure matters wholly internal to the House or Senate to an actor outside the membership of the House or Senate, respectively, would fundamentally impinge the procedural sovereignty vested in each house by the Rules Clause. In this way, Justice Souter's *Nixon* concurrence noted that some procedures employed by Congress could potentially act beyond the scope of their

[96] *See generally Nixon,* 506 U.S. 224 (1993).

[97] U.S. CONST. art. I, § 5, cl. 2. *See, e.g.*, U.S. CONST. art. I, § , cl. 6 (impeachments tried by the Senate); amend. XII (the House elects a president in the absence of an Electoral College majority). *See also* INS v. Chadha, 462 U.S. 919, 959 (1983) ("With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of [legislative] power subject to the carefully crafted restraints spelled out in the Constitution.").

constitutional authority, requiring judicial intervention to return the separation of powers to its previous state.[98]

IV. THE PROCEDURAL PROVISIONS OF THE ELECTORAL COUNT ACT

A. THE 2000 ELECTORAL COUNT

As polls closed across Florida on the evening of November 7, 2000, many news organizations quickly predicted that Vice President Al Gore would be awarded Florida's twenty-five[99] electoral votes, based on exit polling and turnout.[100] This prediction was later reversed in favor of Texas Governor George W. Bush, and later declared too close to call in the early hours of November 8, with Gore trailing Bush by approximately 1,784 votes.[101] The weeks that followed saw recounts in four Florida counties and numerous lawsuits challenging the counting methods utilized to determine voter intent.[102] The Florida Supreme Court eventually decided these challenges against Governor Bush, prompting his legal team to seek certiorari in the U.S. Supreme Court days before the ECA's safe harbor[103] deadline—a point in which deference would be granted to the election results certified by Florida's (Republican) Secretary of

---

[98] *Id.* at 253-54 (Souter, J., concurring) (stating that "a coin toss" or "summary determination that an officer of the United States was simply 'a bad guy'" might warrant review).

[99] For comparison, Florida only had four electors in the 1876 presidential contest. Charles Fairman, *Five Justices and the Electoral Commission of 1877*, at 57–58, *in* VII HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund & Stanley N. Katz, eds. 1988).

[100] *See e.g.*, Steve Bickerstaff, *Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election*, 29 FLA. ST. L. REV. 425, 434 (2001).

[101] David Barstow & Don Van Natta, Jr., *Examining the Vote; How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES (July 15, 2001), http://www.nytimes.com/2001/07/15/us/examining-the-vote-how-bush-took-florida-mining-the-overseas-absentee-vote.html.

[102] *See* Bickerstaff, *supra* note 98, at 435.

[103] 3 U.S.C. § 5 (2011).

State six days prior to the nationwide meeting of the Electoral College in December.[104]

Many were in front of their televisions on December 12, 2000 when the United States Supreme Court finally put a period on the contest. In a deeply polarized 5-4 decision, justices held that the diverging tabulation standards being used in Florida's recounts were an equal protection violation and that insufficient time before the safe harbor deadline existed to make changes to the counting standards[105]—effectively granting Bush victory because of his marginal lead in the vote totals.

However, the election's true legal coda did not occur until three weeks later, on January 6, 2001. Congress, meeting to count the nation's electoral votes pursuant to the Twelfth Amendment, had the task of opening the electoral certificates of vote from each of the fifty States and the District of Columbia. Members waited with baited breath as President of the Senate Al Gore and congressional vote-tellers worked their way through the alphabet down to Florida.[106] As one of the tellers remarked that "this is the one we have all been waiting for,"[107] Gore dutifully read the certificate from Florida that sealed his 271-266 defeat in the Electoral College.

At that moment, Rep. Alcee Hastings (D-FL) rose to object to the inclusion of the Sunshine State's twenty-five electoral votes, seeking to offer a formal challenge to their validity based on the litigated counting irregularities and alleged

---

[104] Schicker, *supra* note 40, 720–22 (2000). The Electoral College met in its respective locations in each of the fifty states on Dec. 18 that year. *Id.*

[105] Bush v. Gore, 531 U.S. 98, 111 (2000). Interestingly, the United States Supreme Court did not even need to grant certiorari because the Florida Legislature intended to convene shortly before the safe harbor deadline to award the state's electors to Bush. *See* Ronald Brownstein, *Florida Lawmakers Cite Broad Powers to Award Electors to Bush*, L.A. TIMES (Nov. 28, 2000), http://articles.latimes.com/2000/nov/28/news/mn-58208. Since *Bush v. Gore* is today seen as an example of a politically polarized judiciary and the opinion is widely believed to have little precedential value, allowing Florida's democratically elected representatives to solve this issue may have been a more prudent course.

[106] *See* 147 CONG. REC. H30 (daily ed. Jan. 6, 2001) (outlining the events of the 2001 electoral vote count).

[107] *Id.* at H34 (statement of Rep. Chaka Fattah (D-PA)).

electoral fraud.[108] Seventeen other objections and points of order were made by House members in the ensuing minutes, ranging from challenging the presence of a quorum,[109] moving to withdraw the House of Representatives from the count to hold a formal debate on voting irregularities,[110] and even

---

[108] *Id.*

[109] *Id.* at H32 (statements of Rep. Ted Deutsch (D-FL) and Vice President Al Gore)

> Mr. DEUTSCH. 'Mr. Vice President, there are many Americans who still believe that the results we are going to certify today are illegitimate.' The VICE PRESIDENT. 'The gentleman will suspend. If the gentleman from Florida has a point of order, he may present the point of order at this time. Otherwise, the gentleman will suspend.' Mr. DEUTSCH. 'Mr. Vice President, I will note the absence of a quorum and respectfully request that we delay the proceedings until a quorum is present.' The VICE PRESIDENT. 'The Chair is advised by the Parliamentarian that section 17 of title 3, United States Code, prescribes a single procedure for resolution of either an objection to a certificate or other questions arising in the matter. That includes a point of order that a quorum is not present. The Chair rules, on the advice of the Parliamentarian that the point of order that a quorum is not present is subject to the requirement that it be in writing and signed by both a Member of the House of Representatives and a Senator. Is the point of order in writing and signed not only by a Member of the House of Representatives but also by a Senator?' Mr. DEUTSCH. 'It is in writing, but I do not have a Senator.' The VICE PRESIDENT. 'The point of order may not be received.'

See also id. at H35–36, 47.

[110] *Id.* at H35 (statements of Rep. Cynthia McKinney (D-GA) and Vice President Al Gore)

> Ms. McKINNEY. 'Mr. President, I object to Florida's electors, and in view of the fact that debate is not permitted . . . and pursuant to title 3, I move that the House withdraw from the joint session in order to allow consideration of the facts surrounding the slate of electors from Florida.' The VICE PRESIDENT. 'The Chair will remind the Members of the joint session that even though a Member's motion may affect only one House, the statutory principle of bicameral signatures must, nevertheless, be applied. The gentlewoman

remarkably attempting to overturn the parliamentary rulings of Vice President Gore on the previous motions by appealing to the full membership of the House and Senate.[111]

Each was overruled perfunctorily, with Gore meekly advising each that "reading the Electoral Count Act as a coherent whole"[112] required that he overrule each objection because they were not seconded by a senator, in writing, pursuant to the statutory requirements of the ECA.[113] Beyond the political fervor in the air of the Hall of the House of Representatives on this day, and Democratic expressions of "solidarity"[114] with Vice President Gore, these overruled objections give rise today to the fundamental question of whether the ECA is constitutionally enforceable in light of the Rules Clause, entrenchment, and the doctrine of non-delegation.

> will suspend. Reading sections 15 through 18 of title 3, United States Code, as a coherent whole, the Chair holds that no procedural question is to be recognized by the presiding officer in the joint session unless presented in writing and signed by both a Representative and a Senator. Is the gentlewoman's motion in writing and signed by a Member and a Senator?'
>
> Ms. McKINNEY. '*Mr. President, the motion is in writing, it is at the desk, and because it involves the prerogatives of the House, therefore Senate assent is not required.*' The VICE PRESIDENT. '*The Chair will advise the gentlewoman respectfully that reading sections 15 through 18 of title 3, U.S. Code, as a whole, the Chair holds that no procedural question, even if involving only one House of Congress, is to be recognized by the presiding officer in the joint session, unless presented in writing and signed by both a Representative and a Senator*. Because the gentlewoman's motion is not signed by a Senator, on the basis previously stated, the motion may not be received. The Chair thanks the gentlewoman from Georgia.' (emphasis added).

[111] *Id.* at H36 (statement of Rep. Alcee Hastings (D-FL)) ("Mr. President, point of order. Would the President advise whether or not there is an opportunity to appeal the ruling of the Chair?"). Appealing the ruling of a presiding officer is a rarely-used, last-ditch motion in parliamentary procedure.

[112] 3 U.S.C. §§ 15–18 (2011).

[113] *See, e.g.*, 147 CONG. REC. H35 (daily ed. Jan. 6, 2001) (ruling of President of the Senate Al Gore).

[114] *Id.*

B. NON-DELEGATION DOCTRINE

Leaders of large organizations are busy people. They frequently have large staffs, however, enabling them to delegate many of the tasks for which they are formally responsible by allowing others to act with their authority. When all authority is concentrated in one individual, this arrangement is perfectly acceptable because the executive cannot arrogate further powers—he/she possesses them already. In a system of separated powers, however, when governmental authority is divided as a structural protection, delegation to another constitutional actor can result in controversy over the propriety of government action and an imbalance of authority.

James Madison noted in *Federalist No. 51* that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[115] Affirming the importance of these structural protections, Madison further established that:

> the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others . . . [also] to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions.[116]

Non-delegation doctrine holds that "[o]ur Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die* [indefinitely],"[117] even though it might be more efficient in a time of crisis. Changes to our separation of powers may only be made via constitutional amendment or an unlikely radical shift in the Supreme Court's

[115] THE FEDERALIST NO. 51 (James Madison).

[116] THE FEDERALIST NO. 47 (James Madison).

[117] Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

jurisprudence.[118] As a result, the legislative and other functions of Congress are divided and entrenched both within our all-too-familiar three branches of government,[119] but also within Congress itself.

The structural feature of this internal separation of powers promotes accountability in that "when decisions are properly made in [the right House of] Congress, electoral controls on individual members"[120] are extremely powerful, allowing the public to readily identify where decisions that affect their lives are being made. This horizontal division of powers among the House and Senate represents the Founders' belief that Congress was more likely to aggrandize power than any other entity in the Federal Government.[121] Even though Congress works together as a bicameral body to enact legislation, a number of tasks exists that are unicameral, for example, origination of revenue legislation in the House of Representatives (Article I, Section 7, Clause 1), impeachment and trial (House: Article I, Section 2, Clause 5; Senate: Article I, Section 3, Clause 6–7), treaty ratification (Article II, Section 2, Clause 2), and officer confirmation (Article II, Section 2, Clause 2–3). Based on one interpretation of the Orders, Resolutions, and Votes Clause,[122] it is even conceivable that one House of Congress may independently enact legislative vehicles with the

---

[118] *See generally* Patrick M. Garry, *The Unannounced Revolution: How the Court Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689 (2006).

[119] Admittedly, Congress delegates some policymaking authority in permitting agency regulations and other aspects of administrative law. However, as the Supreme Court has noted, Congress must provide a broad "intelligible principle" for agencies to promulgate binding rules, thereby fulfilling its policymaking role. *See Mistretta*, 488 U.S. at 372. Otherwise, an unconstitutional delegation has occurred. *See Id.*

[120] *See* George I. Lovell, *That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine*, 17 CONST. COMMENT. 79, 83 (2000). For example, members of the public might be more likely to hold their Congressperson accountable for a tax increase, or their Senator for an unpopular Supreme Court justice. *See also* James O. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 325 (1976).

[121] *See* Freedman, *supra* note 118, at 309; *infra* note 126.

[122] U.S. CONST. art. I, § 7, cl. 3.

force of law after an express delegation through bicameralism and presentment.[123] These powers were allocated in large part based on the Founders' considerations of institutional competence,[124] the need to satisfy both large and small states at the founding,[125] and the belief that no one actor should possess the entirety of the national legislative power.[126]

In *INS v. Chadha*, the Supreme Court considered a provision in the Immigration and Nationality Act that permitted either the House or Senate to individually abrogate a deportation suspension order of the Attorney General via ordinary resolution.[127] The Court subsequently held that this veto was sufficiently legislative (i.e., individual modification of immigration law—not unlike a private bill) to mandate passage via bicameralism and presentment.[128] Consequently, the Nationality Act provision authorizing this one-House action was an unconstitutional delegation by both the President and Congress.[129] Similarly, the Court held in *Clinton v. City of New*

---

[123] This theory persuasively argues that this clause is currently interpreted by the federal courts in a duplicative manner when compared with the Bicameralism and Presentment Clause, art. I, § 7, cl. 2, and that the original meaning of this Clause should be read in light of British parliamentary taxation practices and contextual evidence from the Founding era. *See generally* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3*, 83 TEX. L. REV. 1263 (2005).

[124] *See* Powell v. McCormack, 395 U.S. 486, 532, 535 (1969).

[125] FARRAND, *supra* note 19 at 177-80.

[126] This belief was underscored by the fact that many of the Framers believed that late eighteenth century state legislatures enacted far too many ill-considered laws. *See, e.g.*, THE FEDERALIST NO. 62 (James Madison) ("the facility and excess of law-making seem to be the diseases to which our governments are most liable."); THE FEDERALIST NO. 73 (Alexander Hamilton) ("The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments, has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense, has been inferred and proved.").

[127] *See* INS v. Chadha, 462 U.S. 919, 923-29 (1983).

[128] *Id.* at 951.

York that the Line Item Veto Act's grant of authority to the President to cancel individual appropriations was defective because President Clinton had "effectively amended an act of Congress by repealing a portion of it."[130]

These cases establish that the Supreme Court has been careful to restrain Congressional actions to change the internal composition of its powers, whether an external delegation (the President), or an internal shift (one House veto). One commentator has carried this conclusion further, noting that "all the separation of powers cases seem to go against Congress."[131] One area the Court has been reluctant to journey into, however, are internal Congressional rules, as each House is issued a near-plenary grant of authority by the Constitution to set the procedures under which it will operate.[132] The Rules Clause is granted near-absolute deference because judicial review of congressional procedures has historically been limited to the narrow situations when "*its rules ignore constitutional restraints* or violate fundamental rights."[133]

---

[129] *Id.* (holding that "[t]he Constitution sought to divide the delegated powers of the new Federal Government . . . to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.").

[130] Clinton v. City of New York, 524 U.S. 417, 436 (1998). *See also* Garry, *supra* note 116, at 716.

[131] Garry, *supra* note 116, at 717. A recent notable case where Congress prevailed in a separation of powers case is *NLRB v. Canning*, 134 S. Ct. 2550 (2014) (finding that the Senate's own definition of 'recess' was dispositive to whether the Recess Appointments Clause was triggered).

[132] *See supra* part III(b); United States v. Nixon, 506 U.S. 224, 250 (1993) (Blackmun & White, JJ., concurring) ("the Constitution itself . . . provides the Senate ample discretion to determine how best to try impeachments."); *see also* Chris Land, *That's Not What I Bargained For: Legislative Materials, Comparative Intent, and the Nature of Statutory Bargains*, 17 EUR. J.L. REFORM 424 (2015) (discussing the comparative effect of legislative procedure on statutory interpretation outcomes).

[133] United States v. Ballin, 144 U.S. 1, 5 (1892) (emphasis added).

C. RULEMAKING STATUTES

"I'll let you write the substance, you let me write the procedure, and I'll screw you every time."[134]

One of the reasons the Supreme Court found the legislative veto unconstitutional in *Chadha* was that the statute improperly allowed one legislative institution to act without the required consent of other players through bicameralism and presentment.[135] Based on the principles set forth in in this case, as well as *Clinton* and *Nixon*, the "single, finely wrought and exhaustively considered"[136] framework of our constitutional design means the powers of the House and Senate cannot be transferred, altered, diminished, or increased. The House cannot demand a vote on a Supreme Court nominee, nor could the Senate impeach and try an officer by itself. Most importantly, it follows that neither house can transfer or limit control of its internal, enumerated Rules Clause authority.

Let us consider the Electoral Commission Act of 1877 and the Electoral Count Act of 1887. Section 2 of the 1877 Act provided that the Electoral Commission's report disposing of the controversial certificates of vote was privileged—requiring that after the Commission's decision had been made, "such decision shall be read and entered in the journal of each house, and the counting of the votes shall proceed in conformity therewith, unless, upon objection made thereto in writing by at least *five Senators and five members of the House of Representatives*."[137] The Act provided that "no debate shall be allowed and no question shall be put by the presiding officer, except to either house on a motion to withdraw," and,

---

[134] *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary*, 98 CONG. REC. 312 (1983) (statement of Rep. John Dingell).

[135] INS v. Chadha, 462 U.S. 919, 959 (1983) ("There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President.").

[136] *Id.* at 951.

[137] Act of January 29, 1877 Creating an Electoral Commission, § 2, 19 Stat. 227 (1877) (emphasis added).

> [T]hat when the two houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State . . . each Senator and Representative may speak to such objection or question ten minutes, and not oftener than once; but after such debate shall have lasted two hours, it shall be the duty of each house to put the main question without further debate.[138]

The ECA mirrors many of the same provisions used by the Electoral Commission. First, in order to receive objections, any motion made during the count must be presented in writing and signed by both a Senator and Representative.[139] Similarly, section 17 provides that no debate shall occur in the main assembly, and that both members of the house and senators cannot speak for longer than five minutes after withdrawing from the count to consider the objection, and that the "main question" of upholding or sustaining the objection is to be put to each individual house after two hours of debate.[140] Finally, section 18 of the ECA provides that neither debate nor motions shall be entertained, except on a motion to withdraw—provisions nearly identical to the 1877 Commission Act.[141]

---

[138] *Id.* at §§ 3–4.

[139] 3 U.S.C. § 15 (2011) (providing that "[u]pon 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. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision.").

[140] Unsurprisingly, the ECA is also dangerously unclear as to what would happen if the House and Senate deadlocked. Use of the conference committee model would potentially be an option, but again this would be yet another issue that would have to be resolved by Congressional leaders in the midst of a hotly contested political environment.

[141] It is patently apparent, as a matter of basic parliamentary privilege, that Vice President Gore improperly refused to entertain a motion for the House to withdraw/adjourn that was offered during the January 2001 count. *See*

Congressional rulemaking statutes, like the ECA, are uncommon, but not unheard of in the United States Code.[142] Numerous frameworks enacted by Congress delineate a special procedure for the House or Senate to follow in considering particularly controversial areas of policy.[143] Naturally, this legislation serves a valuable collective action benefit, allowing the procedural statute to serve "a coordinating function between the two Houses, announcing focal points (such as numerical deadlines) so that legislators from one house may shape their behavior."[144] In this way, when considering policy areas of great sensitivity or complexity, Congress has attempted to minimize initial disagreements over how a decision is to be made,[145] allowing it to focus instead on substantive policy, much like the ECA has sought to streamline the inherently political process of ratifying the winner of a presidential election.

Rulemaking statutes are not the "silver bullet" they were intended to be, however. From the first procedural statute

---

Electoral Count Act of 1887, 24 Stat. 373 (current version at 3 U.S.C. §5 (2011); CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H. DOC. NO. 113-181, at 413 (2015) (asserting that a motion to adjourn is highly privileged, and even takes precedence over other motions that "affect[] the rights of the House collectively, [or] its safety, dignity, and the integrity of its proceedings.").

[142] *See*, *e.g.*, Constitution, Jefferson's Manual, and Rules of the House of Representatives, H. Doc. No. 113-181, at 1125–1305 (2015); Gold, *supra* note 75, at 4–5; *see also* Steven S. Smith, Call to Order: Floor Politics in the House and Senate (1989) (discussing the use and importance of floor rules to structure Congressional debates).

[143] *See, e.g.*, Defending Public Safety Employees' Retirement Act, 129 Stat. 319 (2015) (containing the "fast-track" Trade Promotion Authority that establishes limited procedures for Congressional disapproval of executive trade agreements); Congressional Review Act, 110 Stat. 847 (1994) (codified at 5 U.S.C § 802(c) (2009)) (noting that thirty senators must sign a motion placing a joint resolution on the calendar of the Senate to disapprove an agency rule); Nuclear Waste Policy Act of 1982, 96 Stat. 2201 (1982) (codified *at* 42 U.S.C. § 10135(d) (2010)) (providing procedures for Congress to disapprove of the siting of a nuclear waste repository).

[144] Adrian Vermeule, *The Constitutional Law of Congressional Procedure,* 71 U. CHI. L. REV. 361, 428 (2004).

[145] *See* Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. L. ISSUES. 717, 734 (2005).

enacted as part of the Reorganization Act of 1939 through the Trade Promotion Authority passed in 2015,[146] most procedural provisions[147]—other than the ECA—found in the U.S. Code include an anti-entrenchment provision that specifically states that the enacted procedure is promulgated pursuant to the Rules Clause of the Constitution, and that *either house is free to follow, modify, or ignore the statutory procedure at any time without further action or amendment to the statute*.[148] In this way, these rules are "essentially hortatory or directory; they have no legal effect on the rule-prescribing power of the houses" whatsoever.[149]

Metzenbaum v. FERC[150] addressed the nature of these procedural statutes, in a controversy where the plaintiffs asked the D.C. Circuit to invalidate a statute enacted in violation of an earlier rulemaking provision contained in the Alaska Natural Gas Transportation Act. The reviewing court held that the two houses retained completed control over their own rules—*especially* in situations when an earlier provision enacted as statutory law purported to entrench itself.[151] No such provision exists in the ECA, and yet this act was nevertheless enforced as

---

[146] Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 561, 564.

[147] A handful of other rule-making statutes do not have anti-entrenchment disclaimers. *See, e.g.*, Aviation Investment and Reform Act, Pub. L. No. 106-181, § 106(c), 114 Stat. 61 (2000); Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 104-52, § 632(c), 109 Stat. 468 (1996); Commercial Space Launch Act Amendments of 1988, Pub. L. No. 100-657, § 5(a), 102 Stat. 3900; *see also* Bruhl, *supra* note 6, at 363.

[148] *See, e.g.*, Defending Public Safety Employees' Retirement Act of 2015, Pub. L. No. 114-26, 129 Stat. 319, 355; Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933, 1016 (codified at 19 U.S.C. § 3805 (2011)); Congressional Review Act, Pub. L. 104-121, 110 Stat. 871 (1996) (codified at 5 U.S.C. § 802(g) (2009)); Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10135 (d)(1)(b) (2010); Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978, 2001 (codified at 19 U.S.C. § 2191(a) (2014)).

[149] Vermeule, *supra* note 117, at 428. Practice in the states also supports Congress' view. *See* Bruhl, *supra* note 6, at 367 n.98 (providing examples of hortatory procedural statutes from Georgia, Iowa, California, and Massachusetts).

[150] Metzenbaum v. FERC, 675 F.2d 1282 (D.C. Cir. 1982).

[151] *Id.* at 1287.

absolutely binding in the face of sustained House objections during the January 6, 2001 count.

Similarly, long standing precedent of both houses recognizes that rulemaking statutes are generally hortatory. Persuasive authority used by the House Parliamentarian to advise the Speaker states that the House of Representatives has previously deferred to procedural statutes enacted in the same session of Congress.[152] This reasoning is presumably rooted in the fact that a provision is more normatively legitimate when it has been expressly ratified by the members of the current legislature. Likewise, while the Reorganization Act of 1946[153] broadly establishes committee jurisdiction and other procedural rules in statute, the Senate has acknowledged that it is authorized by the Rules Clause to change procedures enacted in this statute via a simple one-house resolution because they govern operations that are wholly internal to Congress.[154]

Custom and usage[155] of the Houses also emphasizes that Congress has ignored "statutized" rules in the past when found to be cumbersome or inexpedient. Speaker James Orr ruled in 1858 that a statute providing that Congress would consider bills appropriating funds to claimants who were victorious in the newly established Court of Claims was unenforceable and that claims bills would no longer be placed on the House Calendar.[156] Two years later, a Member-elect objected to the adoption of House rules before the Clerk of the House and members were

---

[152] *Hinds' Precedents of the House of Representatives*, vol. 1, § 245 (Washington, D.C.: Government Printing Office, 1907).

[153] Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (codified as amended in various sections at 28 U.S.C.).

[154] *See* S. RES. 274, 96th Cong. (1979); Bruhl, *supra* note 6, at 366; S. REP. NO. 107-139 at 54 (2002) (stating in a report of the Senate Committee on Finance on the Trade Act of 2002 that the disclaimer clause found in the Bill "simply confirms what is the case under Article I, section 5, clause 2 of the Constitution of the United States [the Rules Clause]. . . . Because the rules of proceedings in each House are determined by that House and do not require the consent of the other Chamber, each House may change its rules independently of the will of the other Chamber.").

[155] This term refers to the internal precedents, traditions, and interpretations of a legislative body's own rules that are later relied upon as persuasive authority.

[156] 4 HINDS' PRECEDENTS 143, § 3298.

sworn, citing a 1789 statute[157] that required that oaths be the first order of business after an organizational session was convened.[158]

Over a century later, Rep. Trent Lott reportedly objected to consideration of additional aid to the Nicaraguan Contras in 1986 on the basis that the resolution failed to comply with an existing statute providing for fast-track procedures for international aid.[159] Speaker Tip O'Neill issued a parliamentary ruling that stated that the rule reported out by the House Committee on Rules and accepted by the full body had abrogated the prior statute.[160] Five years before, the House ignored the Alaskan Natural Gas Transportation Act's statutory procedure[161] for approval of a regulatory waiver, prompting review by the D.C. Circuit in *Metzenbaum*.[162]

D. THE UNENFORCEABILITY OF THE ELECTORAL COUNT ACT'S PROCEDURAL PROVISIONS

Let us now return to our preliminary question of whether the Electoral Count is comprised of two separate constitutional institutions or a unique Joint Session of Congress. If a Joint Session existed, Congress would be free, as ex officio members

---

[157] Act of Sept. 24, 1789, 1 Stat. 23 (1789).

[158] 1 HINDS' PRECEDENTS, *supra* note 149, § 245.

[159] 132 CONG. REC. H1848 (daily ed. Apr. 16, 1986).

[160] *Id.* (recounting Speaker O'Neill's remarks that "[t]he House is not operating under that statute, and that statute does acknowledge that the House has the constitutional right to change the procedure at any time under its rulemaking authority. The Committee on Rules and the House have changed the procedure."); *see also* 133 CONG. REC. 1189–90 (daily ed. Mar. 11, 1987) (statement of Rep. Trent Lott) ("Mr. Speaker, what in heaven's name is going on around this House that we can't abide by our own process and rules we established, by law, just five months ago, for dealing with this issue. . . . The only way prescribed by that law that the aid could not be released would be by the enactment of a joint resolution of disapproval."); Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT'L L. 69, 99 (1988).

[161] Alaska Natural Gas Transportation Act of 1976, Pub. L. 94-586, 90 Stat. 2903, 2909 (codified as amended at 15 U.S.C. § 719f(d)(5)(B) (2011)).

[162] Metzenbaum v. FERC, 675 F.2d 1282,1284-86 (D.C. Cir. 1982).

of this separate constitutional organ,[163] to enact rules governing its operations because none exist in the Constitution. Because no unique body exists, the Electoral Count is merely a meeting of the House of Representatives and Senate in the same room. As a result, the House and the Senate, as the same entities, are still bound by the other textual requirements of the Constitution, one of which requires that the House and Senate have absolute authority over their own internal procedures, a provision not suspended during the hours in which Congress ratifies the election of our next president. This plenary authority requires that the House and Senate be free to debate, make motions, and withdraw from the count at any time as they wish, the ECA notwithstanding, subject, of course, to motions passing by the requisite majority of that house.

The inclusion of anti-entrenchment provisions in the Congressional Review Act, Nuclear Waste Policy Act, the Reorganization Acts of 1939[164] and 1946, the Congressional Budget Impoundment and Control Act of 1974,[165] and the majority of other rulemaking statutes allows either House of Congress to ignore its own mandate, and is fully compliant with the Rules Clause because each House still maintains the absolute authority to determine their individual rules of procedure. Instead, lacking this provision, the ECA purports to entrench itself, violating the Rules Clause and improperly involving another legislative chamber and the President.

Integral to the non-delegation doctrine is that fact that another constitutional actor cannot have dispositive control over another institution's textually enumerated authority. Because the ECA is statutory law subject to bicameralism and presentment, requiring the President's approval improperly delegates to our chief executive a veto over internal Congressional procedures which our separation of powers

---

[163] This scenario is much like the German Federal Convention. *See supra* note 25.

[164] Reorganziation Act of 1939, Pub. L. No. 76-19, 53 Stat. 561. The act was the first use of statutory legislative rule-making and employed an unconstitutional legislative veto. *Id.*

[165] 2 U.S.C. §§ 634-645(a) (2009). This provision, known as the "Budget Act" is the modern framework for the adoption of an annual budget to govern congressional appropriations.

prohibits.[166] More importantly, pursuant to Vice President Gore's interpretation of the ECA in 2001,[167] the Senate has dispositive control, vis-à-vis the House, over whether an objection to Florida's electoral votes was debated, the determination of the presence of a quorum in the House during the meeting, and even the power of the House to independently leave the count. Such a result is inconsistent with the Rules Clause and runs counter to most other statutory rule-making provisions, and in any event, is clearly unenforceable based on the parliamentary traditions of both houses.

Rigid enforcement of the Electoral Count Act's provisions by a member of one house (e.g., President of the Senate Al Gore) against members of another house (e.g., the House objectors) therefore improperly delegates procedural control of a standalone House of Congress to the other chamber—abrogating the fundamental individual constitutional prerogatives[168] of both the House and the Senate. Moreover, the ECA cannot be amended or ignored by one House of Congress alone since any scenario requires the involvement of another actor—short of a constitutional crisis, that is.[169]

Enforcement of the ECA's procedures also impermissibly entrenches these measures, as individually applied to either the House or Senate.[170] A basic principle of constitutional law, one

---

[166] *See* SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 229-30 (1877); Siegel, *supra* note 16, at 561.

[167] Again, Gore's January 6th ruling requiring a senator to sign a motion to withdraw from the count appears to be irreconcilable with section 5 of the ECA (providing that either House may withdraw without the consent of the other).

[168] 147 CONG. REC. H35 (daily ed. Jan 6, 2001) (objection of Rep. Cynthia McKinney).

[169] This is perhaps the greatest flaw of the ECA. Changes would require the acquiescence of the President of the Senate during the count that the ECA is hortatory, or a statutory amendment achieved through bicameralism and presentment.

[170] Requiring the consent of another actor in amending rules that are subject to a lower internal threshold (e.g., a motion to waive or amend the rules of the House or Senate made by one of the members of the body and approved by that House). *But see* Bruhl, *supra* note 6, at 355-77 (asserting that the entrenchment of legislative rules is not burdensome because of Rules Clause authority to abrogate, but incorrectly failing to observe that the ECA has been enforced against the House of Representatives without any measures to change

of "the most familiar and fundamental principles, so obvious as rarely to be stated,"[171] is that "one legislature may not bind the legislative authority of its successors."[172] Each sequential legislature has equal lawmaking authority, and statutes purporting to limit changes that future lawmakers can make or requiring a supermajority for amendment, can be repealed entirely by ordinary statutes by a simple majority, the text of the original law notwithstanding.[173] It follows from this proposition that legislatures are free to adopt new rules of procedure at the opening of a session or subsequently during a session depending on preexisting rules.[174] Though less clear to nineteenth century legislators, because rule-making statutes were largely foreign to them, a number of Congressmen stated during debate on the ECA that this measure would attempt in vain to entrench procedures that would bind future Congresses.[175] As Vice President Gore restricted the ability of the House to exercise its vested Article I procedural rights, this action effectively entrenched the text of a statute above the Constitution, limiting the authority of the House to unilaterally change this onerous limitation,[176] because it must gain the assent of both the Senate

---

this provision short of the concurrence of the Senate or an amendment to the ECA).

[171] Roberts, *supra* note 66, at 1777 (citing Charles A. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191 (1972)).

[172] United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 90 (1765)).

[173] *See* Posner & Vermeule, *supra* note 11, at 1695-96. *See generally* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1775 (2003).

[174] *See* Posner & Vermeule, *supra* note 11, at 1683; CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE, *supra* note 138; GOLD, *supra* note 75.

[175] 8 CONG. REC. 164 (1878) (statement of Sen. Augustus Garland) (noting in debate on a precursor to the ECA that "an act passed by a previous Congress assuming to bind . . . a succeeding Congress need not be repealed *because it is void*; and for that I reason I oppose this bill") (emphasis added)*; see also* Siegel, *supra* note 16, at 560.

[176] Consequently, to avoid encountering one or more non-delegation issues, the House or Senate could only overturn this interpretation through the courts. This is because, for the reasons discussed *supra*, a re-interpretation of the Electoral Count Act and the Rules Clause by the President of the Senate would

and the executive, itself a violation of the non-delegation doctrine.[177] For many Members of Congress who voted for the ECA in 1887, an unenforceable law was better than no law[178] because it would at least create a reference point that might allow Congress to avoid a repeat of the 1877 saga. However, in this case, an unenforceable law might actually be *worse* than no law at all.

V. JUSTICIABILITY AND THE 2016 ELECTION

Split governments are exceedingly common in the United States, with either the Republicans or Democrats frequently controlling one House of Congress and the other party controlling the White House and the remaining chamber or some combination of one or more of these bodies. One party has only controlled all three constitutional lawmaking entities—the Presidency, the House, and Senate—for six of the last sixty-one years since 1955. Usually a recipe for political compromise or deadlock, the Electoral Count Act could instead turn this separation of political power into a lurid constitutional nightmare.

Imagine this scenario: the Senate flips to narrow Democratic control in the November 2016 elections[179] and the Democratic nominee runs an incredibly close race with the Republican contender and is leading in the Electoral College with Florida's votes again hotly disputed. In this way, the Democrats now control the Senate[180] *and the Vice Presidency*[181]

---

impermissibly grants him or her control over house procedure. Additionally, any amendment to the Electoral Count Act would have to follow the normal process of bicameralism and presentment. In this setting, a constitutional amendment might be most appropriate.

[177] *See* Posner & Vermeule, *supra* note 11, at 1699.

[178] Siegel, *supra* note 16, at 564.

[179] *See*, *e.g.*, Nate Cohn, *Republicans Risk Five Key Senate Races With Supreme Court Stance*, N.Y. TIMES (Feb. 15, 2016), http://www.nytimes.com/2016/02/16/upshot/supreme-court-vacancy-looms-over-five-key-senate-races.html?partner=rss&emc=rss&_r=0.

[180] Control of the U.S. Senate would flow to the Democratic Party at the beginning of the 115th Congress on January 3, 2017 before the certificates of vote from the Electoral College are counted. *See* 2 U.S.C. §§ 1, 7 (2009).

while the Republican candidate's party continues to control the House. The count is tied up in Florida's courts, and as a result, the Florida Attorney General and Secretary of State independently certify two certificates of vote, one Republican and one Democratic.[182] Therefore, the actions of Congress will be dispositive in deciding which slate of electors to validate.

Vice President Joe Biden naturally seeks to take advantage of every opportunity to award the Democratic candidate the disputed electors, while the Republican House wants to debate the subject, or better still, obstruct the count long enough to throw the election into the House, pursuant to Clause 3 of Amendment XII.[183] Vice President Biden, based on the precedents[184] set by the 2001 count, refuses to entertain House Members' motions to adjourn or withdraw from the count to hold a debate,[185] and no Democratic or Republican senator offers to concur—similar to 2001 when no Democratic senator could be found to second the House Members' objections. House Members, with the election genuinely in dispute, leave the count in protest and Vice President Biden awards the electors to the Democratic candidate. With its

---

[181] The term of the President and Vice-President does not expire until noon on January 20 of each quadrennium. *See* U.S. CONST. amend. XX.

[182] 3 U.S.C. § 5 (2011) (requiring that Congress grant deference to electoral votes submitted by a state's governor by a prescribed deadline). This is nearly the same scenario that happened in 2000. This argument, however, assumes that the Florida Legislature did not act unilaterally to award the state's electors to a candidate, as the Florida Legislature considered in 2000. *See supra* note 103. An interesting argument can be made that this provision also governs the procedure by which electoral votes are counted in Congress, treading on the houses' procedural sovereignty. If this section was found to be procedural (vs. substantive), it would likely be unenforceable as well.

[183] U.S. CONST. amend. XII, § 1, cl. 3.

[184] *See* DESCHLER'S PRECEDENTS, H. DOC. 94-661, 94TH CONG., 2D SESS. (1994). These parliamentary rulings are persuasive authority, as presiding officers are generally free to rule as they wish and can be overruled by an appeal from the floor, although Vice President Gore ruled that appeals were not permissible during the 2001 count. *See* 147 CONG. REC. H36 (daily ed. Jan. 6, 2001).

[185] Again, the text of the Act, at § 5, states that a motion to withdraw does not require the concurrence of a senator, however, the 2001 count places the practical validity of this provision in question as Vice President Gore ignored it.

General Counsel in tow, the House, meeting down the corridor in Statuary Hall in the Capitol, passes a resolution[186] that disclaims the authority of the ECA and the Senate to bind its internal procedural discretion, and authorizes a lawsuit[187] to challenge the Vice President and the Senate's unilateral actions. A constitutional crisis over the enforceability of the ECA's procedural provisions is born.

Few expected an obscure voting mechanism in South Florida and equal protection doctrine to decide the 2000 election. If the political history of our country teaches us anything, it is that flaws in our election system eventually are exposed—and what can happen will eventually happen. The parties are incredibly motivated to use whatever means at their disposal to win an election, especially the Presidency, and our election law framework must be robust enough to account for every risk. Returning to our hypothetical, the General Counsel of the House of Representatives quickly scribbles out a motion for injunctive relief on a notepad and then walks across Constitution Avenue to the federal district court. Quickly passed upward, will the Supreme Court even reach the merits of the House's claim that the Act and the actions of the Senate are unenforceable?

The seminal doctrine governing controversies that involve a political question is the familiar case of *Baker v. Carr*.[188] In this case, the Warren Court laid out six criteria for

---

[186] The institutional standing of Congress as a whole is unchallenged. *See generally* ALISSA M. DOLAN & TODD GARVEY, CONG. RESEARCH SERV., CONGRESSIONAL PARTICIPATION IN ARTICLE III COURTS: STANDING TO SUE (2014). However, the individual standing of one House, though itself an independent Art. I organ, has not been resolved by the Supreme Court, though it is likely that standing exists if an ordinary resolution is based manifesting assent. *See id*. at 13-14; United States House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. Sept. 9, 2015) (holding that the House of Representatives, as a whole, has standing to bring an action for non-appropriation against the executive).

[187] It is generally assumed that one house of Congress may authorize a lawsuit on its behalf through an ordinary resolution. *See* Memorandum Opinion, *Burwell*, No. 14-CV-1967, 2015 U.S. Dist. LEXIS 119712, at *45-54 (D.D.C. Sept. 9, 2015) (holding that "disregard for that reservation [appropriation power] works a grievous harm on the House, which is deprived of its rightful and necessary place under our Constitution. The House has standing to redress that injury in federal court."); DOLAN & GARVEY, *supra* note 183.

[188] Baker v. Carr, 369 U.S. 186 (1962).

determining whether the Court should reach the merits of a question or abstain from entering the political "thicket."[189] The *Baker* doctrine is a monument to judicial restraint, and consequently, the federal judiciary is hesitant to intervene in a controversy when the coordinate constitutional actors involved "possess ample political resources with which to protect their interests."[190]

Any possible institutional dispute between the House and Senate during an Electoral Count would not likely be resolved by normal political processes because this question would fundamentally be a challenge over the inherent powers of the Houses and the enforceability of the ECA—i.e., a classic affirmation of the Court's role "to say what the law is."[191]

In *Chadha,* the House of Representatives, arguing that a one-house legislative veto was constitutional, stated that the Supreme Court's review—of a procedure internal to Congress—was beyond the reach of the courts because the legislative process was textually committed to Congress, a coordinate political department, and that this case was fundamentally "an assault on the legislative authority [of Congress] to enact" the provision, citing the first, and most commonly used, *Baker* factor.[192] The Burger Court, however, disagreed, finding that the separation of powers dispute inhering among the Executive and Congress rendered this case a justiciable political question, and that "if this [argument] turns the question into a political

---

[189] *Id.* at 217, 330. The six *Baker* factors are: (1) "textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

[190] Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 209 (1990).

[191] NLRB v. Canning, 134 S. Ct. 2550, 2560 (2014) (quoting Marbury v. Madison, 5 U.S. 137 (1803)).

[192] INS v. Chadha, 462 U.S. 919, 941 (1983).

question, virtually every challenge to the constitutionality of a statute would be a political question," also remarking that "no policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute."[193]

When the Court decided similar separation of powers issues in *Bowsher v. Synar* and *Clinton v. City of New York*, no non-justiciable political issues were found, in spite of the lead role granted to Congress in these areas.[194] The remaining *Baker* factors militate in favor of review as well, since the standards for reviewing the ECA are well-defined (constitutionality/enforceability and the Rules Clause) (factor 2), separation of powers disputes are classically judicial (factors 3–4), and finally, because a judicial decision is critical to decide the presidency (factors 5–6).

In addition to the *Baker* factors, the Court's previous reticence to examine internal Congressional matters must also be weighed. In *Field v. Clark*, the Court established the "enrolled bill rule," which held that courts will not look beyond the text of a bill and the signature of the presiding officers to examine possible procedural defects in passage, for example, whether a tax provision really passed both chambers, or was mistakenly inserted by just one and sent to the President.[195] Similarly, in *Ballin*, justices examined the constitutionality of House rules meant to defeat the disappearing quorum, and found that the Rules Clause was ambiguous in this area—delegating this issue to the House's discretion.[196] The *Nixon* Court also relied on this deferential doctrine to say that the method employed by the Senate to "try" a judge during impeachment proceedings was exclusively an issue for our upper chamber.[197]

---

[193] *Id.*

[194] *See* Bowsher v. Synar, 478 U.S. 714 (1986); Clinton v. City of New York, 524 U.S. 417 (1998).

[195] Field v. Clark, 143 U.S. 649, 672 (1892).

[196] United States v. Ballin, 144 U.S. 1, 6 (1892).

[197] Nixon v. United States, 506 U.S. 224, 235–36 (1993) (White & Blackmun, JJ., concurring).

The Court's deference in this area is not absolute, especially when an inter-branch controversy,[198] much like our hypothetical, is raised. Our case would involve both vertical and horizontal separation of powers issues, as between the House and Senate horizontally and among Congress and the President. In 1932, the Court considered the validity of an officer's appointment after the Senate confirmed a nominee and subsequently asked President Hoover to return the nomination for reconsideration in *United States v. Smith*.[199] The Hughes Court recognized that "[i]n deciding the issue, [we] must give great weight to the Senate's present construction of its own rules" authorizing the Senate to demand reconsideration.[200] Nevertheless, this controversy was found justiciable, even though reconsideration was an internal procedural matter, because "the construction to be given the rules affects persons other than members of the Senate"[201]—separation of powers and Appointments Clause grounds.[202] Our 2016 hypothetical would be an analogous controversy.

The 1892 *Ballin* quorum decision also established boundaries on the Court's "expansive" deference[203] to the internal workings of Congress, stating that Congress "may not by its rules ignore constitutional restraints."[204] In the same way, the Rules Clause expressly grants absolute procedural freedom to each House of Congress, and the ECA's procedural limitations, combined with the actions of the Senate in our

---

[198] An inter-branch dispute exists because Congressional actions affect the appointment of an executive branch officer, i.e. the President, in much the same way as United States v. Smith. United States v. Smith, 286 U.S. 6 (1932) (Brandeis, J.).

[199] *Smith*, 286 U.S. 6.

[200] *Id.* at 33. *See also* Gregory Fredrick Van Tatenhove, *A Question of Power: Judicial Review of Congressional Rules of Procedure*, 76 KY. L.J. 597, 609-10 (1987).

[201] *Smith*, 286 U.S. at 33.

[202] *Id.*

[203] *See* John C. Roberts, *Are Congressional Committees Constitutional?*, 52 CASE W. RES. L. REV. 489, 532 (2001).

[204] United States v. Ballin, 144 U.S. 1, 5 (1892).

hypothetical enforcing them, acts to patently ignore this constitutional restraint on regulations limiting the Houses' authority.

Most importantly, it is also important to acknowledge, from a pragmatic perspective, that if a constitutional crisis in the 2016 election occurred, only the federal courts would likely be detached and respected enough to be capable of resolving the crisis—short of an unlikely Congressional compromise—and that much like *Bush v. Gore*, some institution must be universally accepted by all parties in our government to have the last word. While our federal judiciary would normally be reticent to insert themselves into such a contested political issue, failure to do so in this scenario would lead to the collapse of workable government. Accordingly, understanding the separation of powers concerns inherent in this case and the nature of the constitutional issues raised by the ECA, it is likely that review of the Act's procedural provisions would be a justiciable question in this unique setting.

VI. CONCLUSION

"*It is the height of folly to shut our eyes to this danger. . . . The only safe solution to this problem is their removal by a constitutional amendment that shall make plain and simple every step in the process, both State and national.*"[205]

Individuals experiencing a major transition in their lives often find similarities reminding them of the past in their new environments, underscoring the force of the popular expression, "the more things change, the more they stay the same."[206] So it is with our system of electing a president. It is not an accident that a heated dispute surrounding the Electoral Count Act erupted during the 2001 Electoral Count or that three of the United States' major constitutional crises centered on disputed elections. A lack of detail surrounding the procedures to be used in electing a president is perhaps the greatest failing of the Founders.

---

[205] *See* DOUGHERTY, *supra* note 63, at 402 (quoting Sen. Henry L. Dawes in 1876).

[206] Quote widely attributed to Jean-Baptiste Alphonse Karr, LES GUÊPES (Jan. 1849).

Alexander Hamilton noted in 1788 that selection of a chief executive was "almost the only part of the system, of any consequence, which has escaped without . . . the slightest mark of approbation from its opponents."[207] In spite of this optimism, through the decisions and compromises of 1800, 1876-1877, and 2000, we have inherited an electoral system that places a premium on ambiguity and *ad hoc* fixes. After the 1800 election uncovered a fatal defect in Article II, Amendment XII was ratified—allowing electors to vote separately for president and vice president, but failing to detail the specific procedure Congress should use to tabulate this choice. This ambiguity laid the seeds for crisis in 1876-1877 when the State of Florida and four others submitted multiple (likely fraudulent) certificates of vote, leaving Congress to hurriedly cobble together an ad hoc Electoral Commission to resolve this dispute, in the midst of many calling for "Tilden or Blood!"[208] Congress then agonized for ten years over an effective policy alternative to this chaos, finally enacting the Electoral Count Act in 1887. However, as the 2000 election has shown, this Act contains numerous ambiguities and constitutional defects itself, laid bare by the procedural objections raised in the Hall of the House of Representatives during the Electoral Count on January 6, 2001.

A basic framework of election law entrenches two key principles.[209] First, the system establishes a structure through which the mechanics of an election can operate, indicating decision-making points for candidates and robustly accounting for all possible alternatives.[210] This principle, above all, ensures fairness and predictability in our system of laws, with both winner and loser accepting the validity of the process, even if they are disappointed with the result. Election jurisprudence, secondly, must protect the procedural equality of voters, ensuring both a meaningful right to cast a vote and the

---

[207] THE FEDERALIST NO. 68 (Alexander Hamilton).

[208] ROY MORRIS JR., FRAUD OF THE CENTURY, at picture 23 (2004).

[209] *See* John Copeland Nagel, *The Appearance of Election Law,* 31 J. LEGIS. 37, 38 (2004).

[210] *Id.*

unshakable assurance that his/her choice will be weighed the same against all others.[211]

Through perpetuating the ambiguities inherent in our presidential election system and raising numerous constitutional concerns, the procedural provisions of the ECA fall short of these ideals. The ECA's procedural mandate to the House and Senate fails to respect the notion of political equality. Our "finely wrought" Congressional system mirrors the interests and rights of the people and States,[212] and a statute that impermissibly deprives one Congressional actor, that is, the House or Senate depending on the circumstances, of its procedural prerogatives lessens the ability of our representatives to influence the machinery of government in the manner intended by the Constitution. Fundamentally, the fatal flaw of the ECA's procedural provisions is its simultaneous delegation of the rostrum during the Electoral Count to the President of the Senate, while simultaneously providing no means for the House (or potentially the Senate) to assert its independent constitutional prerogatives.

Unlike the hopes of Thomas Jefferson,[213] a candidate engaged in a heated dispute over a state's electoral votes cannot be assured of an orderly or predictable process during the Electoral Count because the ECA's procedural mandate strips each House of Congress of its procedural authority, unconstitutionally countermanding the text of the Rules Clause.

Some might believe that an unenforceable law is better than no law at all.[214] However, in the context of resolving a contested presidential election, an unenforceable law inevitably leads to chaos since candidates and their surrogates[215] will not hesitate to challenge the validity of a 117-year old statute that is facially unenforceable. A strong procedural framework seen to

---

[211] *Id.*

[212] This duality is reflected in our Electoral College system, in which voters select a slate of electors who in turn vote on a state-weighted basis for President and Vice President.

[213] *See supra* note 1 and accompanying text.

[214] Siegel, *supra* note 16, at 564.

[215] Members of Congress in this case.

be fair and known to have teeth is the best prophylactic against chaos.

Understanding the Supreme Court's recent separation of powers formalism,[216] the ECA today represents "a torpedo planted in the straits with which the ship of state may at some time come into a fatal collision."[217] A procedural framework that respects our system of separated powers, affirms the institutional prerogatives of Congress, and comports with the text of the Constitution must give rise to procedures that can withstand the stiffest challenge during a contested election, when both the stakes are paramount and legal creativity is high. Improving the ECA now and allowing our policymakers to negotiate changes in the best interests of the country "when the political facts of the moment are least likely to distort our considered legal judgment"[218] is crucial.

A familiar national discussion has existed for a long time on whether the Electoral College should be discarded in favor of popular election—making the Congressional count moot.[219] However, if we choose to retain this system, the Electoral Count Act should be discarded, and a new constitutional amendment ratified establishing a clear, scrupulously detailed method for counting electoral votes in Congress, addressing the procedural posture of the Houses, and outlining how disputes will be resolved.

Shortly after his narrow victory was ratified by the Electoral Commission in 1877, President-Elect Rutherford Hayes remarked that "[b]efore another Presidential Election, this whole subject . . . ought to be thoroughly considered, and a radical change made. It is probable that no wise measure can be

---

[216] *See* Garry, *supra* note 118, at 717.

[217] Kesavan, *supra* note 6, at 1812 (quoting HOUSE SPEC. COMM., COUNTING ELECTORAL VOTES, H.R. MISC. DOC. 44–13, at 443 (1877) (remarks of Sen. Oliver Morton)).

[218] *Id.*

[219] *See*, *e.g.*, Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L. REV. 1237 (2012); Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173 (2011).

devised which does not require an amendment of the Constitution."[220]

Over a century later, the heightened threshold for a constitutional amendment will allow the country to arrive at a true national consensus, and put an end—at long last—to a hovering uncertainty that continues to linger over our presidential elections and a history of untimely constitutional crises.

[220] RUTHERFORD BIRCHARD HAYES, DIARY & LETTERS OF RUTHERFORD BIRCHARD HAYES: NINETEENTH PRESIDENT OF THE UNITED STATES 70–71 (D. MCKAY CO. 1964).