WHEN PRESIDENTIAL ELECTIONS GO BAD

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INTRODUCTION

Bush v. Gore[1] seems both a distant past and yet one that stays with us. For as fraught as the election controversy became, it was an election that held none of the cataclysmic overtones of our current, deeply polarized politics. The election was largely framed around protecting certain agreed-upon inherited frameworks, largely defined by the legacy of the New Deal. The issues were presented in anodyne fashion as defending the social security "lockbox"[2] and preparing a figurative "bridge to the 21st century."[3] The Democrats were running to the center and the Republicans offered "compassionate conservatism."[4]

Little in that election would portend the controversy that ensued when the margin of victory proved well within the margin of litigation, as Rick Hasen would later develop the concept.[5] Subsequent evidence would show that Governor Bush would likely have prevailed under the established rules of vote counting, even if the Supreme Court had not

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1. 531 U.S. 98 (2000).

2. Patrick Healy, *Debacle: What Al Gore's First Debate Against George W. Bush Can Teach Hillary Clinton*, N.Y. TIMES (Sep. 25, 2016), https://www.nytimes.com/interactive/2016/09/25/us/politics/george-w-bush-al-gore-2000-presidential-debate.html [https://perma.cc/VCS5-FSB6].

3. William J. Clinton, *Remarks to the Democratic National Convention in Los Angeles, California*, THE AM. PRESIDENCY PROJECT (Aug. 14, 2000), https://www.presidency.ucsb.edu/documents/remarks-the-democratic-national-convention-los-angeles-california [https://perma.cc/DB37-5MBL].

4. *See* James Dao, *The 2000 Campaign: The Democratic Candidacy; A Populist Pitch Helps Gore Woo Back His Party's Base*, N.Y. TIMES (Sep. 9, 2000), https://www.nytimes.com/2000/09/09/us/2000-campaign-democratic-candidacy-populist-pitch-helps-gore-woo-back-his-party.html [https://perma.cc/WM6R-SUBF]; George W. Bush, *Address Accepting the Presidential Nomination at the Republican National Convention in Philadelphia*, THE AM. PRESIDENCY PROJECT (Aug. 3, 2000), https://www.presidency.ucsb.edu/documents/address-accepting-the-presidential-nomination-the-republican-national-convention-0 [https://perma.cc/2UU7-RDR8].

5. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937 (2005).

interceded to stop the recounts.[6] At the same time, it is likely that more voters in Florida went to the polls to cast a vote for Vice President Gore, but either erred and had their ballots disqualified, or were misdirected by the infamous butterfly ballot of Palm Beach County.[7]

As the Florida controversies unfolded into the dramatic Supreme Court confrontation, Pam Karlan, Rick Pildes and I found ourselves trying to put to bed the second edition of *The Law of Democracy*. The initial volume included a limited section of remedies in election disputes, focusing mostly on the bounds of equity when balloting is disrupted by emergencies, natural or otherwise. We found ourselves writing and rewriting furiously trying to keep up with events—unsuccessfully. Ultimately, we spun off a separate volume with the title that I have appropriated for this article.[8] As we would soon realize, elections go bad all the time, and they go bad all over the world for reasons having to do with hurricanes, wars, human error, and fraud, to name just a few.

The difficulty of engaging contemporaneously with the Florida events was not just a matter of the press of time. The field that we termed the "law of democracy" was in its infancy and was carving out a niche from the constitutional domains of equal protection and the First Amendment, and out of statutes like the Voting Rights Act and the Federal Election Campaign Act. There were institutions involved in that account, but they tended to be political parties and their candidates, Congress and the courts, and agencies such as DOJ or the Federal Election Commission. The actual mechanics of elections were not on the academic radar, except as they implicated discriminatory voter registration practices, for example. The result was that our first edition of *The Law of Democracy* breathed not a word about protest and contest periods or about recounts except in the extreme cases where elections were voided altogether.

From the perspective of the federal constitutional and statutory law, the inattention to matters of implementation in the local conduct of elections appeared perfectly comprehensible. The era after the Reapportionment Revolution of the 1960s and the Voting Rights Act of 1965 roughly divided the electoral landscape between the right to vote and matters of election administration. The former corresponded increasingly to federal law and demanded exacting judicial scrutiny

6. Doyle McManus, Bob Drogin & Richard O'Reilly, *Bush Still Had Votes to Win in a Recount, Study Finds*, L.A. TIMES (Nov. 12, 2001, at 00:00 ET), https://www.latimes.com/archives/la-xpm-2001-nov-12-mn-3240-story.html [https://perma.cc/S2KJ-5KX3].

7. *See* Walter R. Mebane Jr., *The Wrong Man Is President! Overvotes in the 2000 Presidential Election in Florida*, 2 PERSPS. ON POL. 525 (2004).

8. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (revised ed. 2001).

when implicated.[9] By contrast, election administration was overwhelmingly a matter of state law and reviewed deferentially.[10] Polling places had to open and close at some hour, and the exact times were matters of local practice, unless they were manipulated or varied by the race of the precinct population.[11] The division between matters of local administration and federally protected rights carried over into the attention of the legal academy. For academics, elections meant the constitutional questions raised by *South Carolina v. Katzenbach*,[12] *Buckley v. Valeo*,[13] and later *Shaw v. Reno*.[14] By contrast, the practice of election law generally turned to seemingly mundane matters of candidate eligibility rules, finance regulations, and securing polling workers.

Election breakdowns may be thought of as a subset of the overall problem of emergencies that challenge the institutional capability of society. As with all true emergencies, there will be a need to move beyond the normal way of conducting affairs.[15] No one may be able to predict where the next flashpoint will be. But national elections are events conducted in thousands of polling places with tens of millions participants under the supervision of non-professionals. While the exact location of problems is unknown, what is certain is that there will be problems and that, on occasion, these may be consequential enough to tip the scales of electoral triumph or defeat.

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9. *See, e.g.,* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the constitutionality of the Voting Rights Act of 1965).

10. *See, e.g.,* Roudebush v. Hartke et. al,, 405 U.S. 15 (1972) (refusing to enjoin a recount ordered by a state court).

11. The selective closure of minority-accessed polling places is one of the charges leveled against the consequences of the Supreme Court decision in *Shelby Cnty. v. Holder,* 570 U.S. 529 (2013). *See* Sam Levine & Ankita Rao, *In 2013 The Supreme Court Gutted Voting Rights—How Has It Changed The US?,* THE GUARDIAN (June 25, 2020, at 13:14 ET) https://www.theguardian.com/us-news/2020/jun/25/shelby-county-anniversary-voting-rights-act-consequences [https://perma.cc/S6S7-4URF].

12. 383 U.S. 301 (1966); *see, e.g.*, Michael Halberstam*, The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy,* 62 HASTINGS L.J. 923 (2011); Victor Andres Rodríguez, *Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769 (2003).

13. 424 U.S. 1 (1976); *see, e.g.*, Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U.L. REV. 655 (2017); Curtis K. Tao, *A Compelling Opportunity to Rethink the Flawed Evolution of Contribution Speech*, 51 RUTGERS L. REV. 1345 (1999).

14. 509 U.S. 630 (1993); *see, e.g.*, Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211 (2018); James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443 (1999).

15. For my own work on emergencies and the particular role of courts, see Samuel Issacharoff, *Emergencies, Alein and Domestic*, 2025 U. CHI. LEGAL F. (forthcoming); Samuel Issacharoff & Adam Littlestone-Luria, *Remedy Becomes Regulation: State Making After the Fact*, 74 DEPAUL L. REV. 213 (2025); and Samuel Issacharoff, *Judging in the Time of the Extraordinary*, 47 HOUS. L. REV. 533 (2010).

As a general rule, one does not wait until there is a fire to create a fire department. As with a fire, one tries to define the lines of institutional authority for the exception and not just for the rule, even allowing for the imprecision of how the emergency might manifest. Absent developed protocols, decisionmakers are vulnerable to emotionally-charged misjudgments, overreaction, and compounding the harms that precipitated the crisis.[16] The Romans pioneered the use of institutional divisions of responsibility to both unleash emergency authority and curtail its potential misuse.[17] In the absence of defined emergency procedures, the American default has been to turn to the courts to rough out some mechanism to address the immediate problem, a pattern not only when there are unclear lines of political authority but when there institutional resources are simply insufficient to address problems at the scale presented.[18]

Most democratic countries address the risk of electoral meltdown through some form of centralized administrative authority, either standing alone or under the supervision of apex courts.[19] The general pattern in the U.S. is not to empower administrators or experts, part of a generalized distrust of expertise and greater reliance on partisan officials acting in tension with each other.[20] Nonetheless, we have had four presidential elections in American history that have shaken the foundations or democratic stability. In response to three of the four—notably *Bush v. Gore* being the outlier—the response was to harness some institutional actors that might have been able to fight the last war, and perhaps provide leadership for future skirmishes as the two that looked to the political process (post-1800 political parties; post-1876 Congress) with the two that looked implicitly or explicitly to the courts (post-2000 litigation; post 2020 Electoral Count Reform Act[21]). Examined across time, what emerges is the political acceptance of the greater judicialization of contested elections, even at the point at which judicial engagement might prove outcome determinative in highly-fraught political challenges.

16. This point is particularly well argued in STEPHEN HOLMES, THE MATADOR'S CAPE: AMERICA'S RECKLESS RESPONSE TO TERROR (2007).

17. *See* NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 73-75 (Harvey C. Mansfield & Nathan Tarcov trans., 1996) (1531).

18. I recently applied this methodology to the question of mass tort litigation under the Multidistrict Litigation Act. *See* Issacharoff & Littlestone-Luria, *supra* note 15, at 241-46.

19. *See* SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 125-278 (2015) (chronicling the forms of administrative review of elections in emerging democracies).

20. *See* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 810-17 (2014).

21. Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, 136 Stat. 5233 (2022).

I. POLITICAL PROCESS CURES.

The history of cataclysmic democratic elections begins in 1800, and not just for the United States.[22] The election of 1800 was only the country's second competitive presidential election,[23] but it was also the first time in modern democracies that a head of government was replaced by a challenger as a result of popular selection.[24] Although the election is mostly remembered through the prism of Lin-Manuel Miranda's stunning *Hamilton*, Thomas Jefferson did defeat John Adams, even if the latter does not get a single song in the Broadway rendition of the events.

Instead, what *Hamilton* and the focus on the infamous duel with Aaron Burr identify is that the election proved to be the first time that the Constitution's procedures for presidential succession were stress-tested, and that they almost buckled. Under the Constitution's then-present rules for the Electoral College, each state elector cast two equally weighted votes among the presidential hopefuls, at least one of which had to be cast for a candidate from a state other than the elector's own. The contender who received an absolute majority of electors' votes became president, and the runner-up, vice president.[25] The Republican candidate, Thomas Jefferson, and his running mate, Aaron Burr, beat out the other candidates but received an identical number of electoral votes. Apparently, a Republican elector neglected to follow a nascent practice of casting a throwaway vote to offset Burr from Jefferson by one—hence, the dead heat.[26]

To break the tie, the Constitution prescribed that the House of Representatives would assemble according to state delegations and each delegation would cast one vote. An absolute majority, or nine of sixteen votes, was required to choose the president.[27] The Federalists controlled the House, and they had no interest in voting for Jefferson, who had just defeated the Federalist incumbent. If anything, they had an incentive against breaking the tie, since Congress could designate an acting president—a Federalist, no doubt—if the election went

22. A compelling account is provided in Jill LePore, *Party Time: Smear Tactics, Skulduggery, and the Debut of American Democracy,* THE NEW YORKER (Sep, 10, 2007), https://www.newyorker.com/magazine/2007/09/17/party-time [https://perma.cc/ARW5-6AKT].

23. *See* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 21, 23 (2020).

24. *Id.*

25. U.S. CONST. art. 2, §1, cl. 3 (repealed 1804).

26. Samuel Issacharoff, *Law, Rules, and Presidential Selection*, 120 POL. SCI. Q. 113, 123 n.27 (2005).

27. U.S. CONST. art. 2, §1, cl. 3 (repealed 1804).

unresolved for long enough.[28] The result of the first ballot: eight delegations voted for Jefferson, six for Burr, and two deadlocked (Maryland and Vermont).[29] Nothing changed for six days, during which a further thirty-four ballots were cast.[30]

This is a succession crisis in democratic governance. Under American law, the president serves as both head of state and head of government. Without an independent sovereign to designate the head of government, the entire constitutional process of executive rotation in office was in jeopardy amid broad claims of fraud and deceit.[31] Worse, the young Republic seemed on the brink of fracture as the governors of Pennsylvania and Virginia readied state militias to respond were Jefferson not chosen,[32] while President Adams readied the country for civil war.[33] Ultimately, in the maneuver orchestrated by Hamilton and now known to thousands of theater-goers, Jefferson clinched the thirty-sixth ballot and the dangerous moment passed.[34]

The Twelfth Amendment was ratified in 1804 as an institutional response to the crisis.[35] The Amendment cured the most immediate constitutional defect, which resulted from the joint polling for president and vice-president, by providing that the president and vice president would be elected on separate ballots.[36] But the Twelfth Amendment was far more than a quick fix; it introduced a concept of an electoral slate that would be presented as such in the electoral process. In so doing, the Twelfth Amendment sought to harness the emerging forms of organized politics in the service of electoral stability. As Franita Tolson aptly summarizes, the Amendment changed the Constitution "from an anti-party to a party document."[37]

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28. FOLEY, PRESIDENTIAL ELECTIONS, *supra* note 23, at 24-25.

29. JOHN FERLING, ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800 187 (2004).

30. *Id.* at 193.

31. FOLEY, PRESIDENTIAL ELECTIONS, *supra* note 23, at 25.

32. *Id.*

33. FERLING, *supra* note 29, at 189; Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959, 1987 n.115 (1999).

34. FERLING, *supra* note 29, at 193.

35. *See* U.S. CONST. amend. XII; Franita Tolson, *Republicanism Redefined: The Constitutional Status of Political Parties After the Ratification of the Twelfth Amendment*, *in* RESEARCH HANDBOOK ON THE POLITICS OF CONSTITUTIONAL LAW 310, 312 (Mark Tushnet & Dimitry Kochenov, eds., 2023).

36. *See* Issacharoff, *supra* note 26, at 124. If no presidential candidate claims the majority of electoral votes, the House—organized by state delegations, each with one vote—would choose by majority vote among the three candidates with the greatest electoral vote share, as opposed to five as in the original Constitution. The Amendment also contemplates an analogous process in the Senate if no vice president garners a majority of votes and provides that the vice president would take over if no president was selected by March 4, the designated inauguration date. U.S. CONST. amend. XII.

37. Tolson, *supra* note 35, at 312.12

Famously, the American original constitutional design was built on antipathy toward parties and other factional organizations not committed to a generalized claim of the public good.[38] Accordingly, they set out to structure a national politics without them in the original Constitution.[39] By requiring electors to choose at least one candidate from outside of their state, the framers intended "to cause [them] to identify a second candidate, with the choice based on the elector's conception of the national interest rather than any parochial concerns."[40] But factions quickly formed, and intense two-party competition emerged by the 1796 election.[41]

It was clear by 1803 that the presidential succession procedures needed an overhaul, and Republicans' intent was to channel the political process in an intelligent way to ensure majority rule while also maintaining the federal structure that gave states separate identities.[42] The Twelfth Amendment retained states' control over how electors were selected, allowing the party that controlled the state legislature—elected by a majority of eligible voters—to choose the method that most suited them.[43] Free from the obligation to vote for an out-of-state second choice, electors could simply translate the majoritarian preferences of the voters in their state into the selection of Electors. The framers of the Twelfth Amendment did not resist partisanship; they invited and institutionalized it, counting on political parties to organize states' voting populations and to ensure the geographic spread of electoral support.[44]

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38. JOHN H. ALDRICH, WHY PARTIES?: A SECOND LOOK 97 (2011).

39. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 713-14 (1998); *see* FOLEY, PRESIDENTIAL ELECTIONS, *supra* note 23, at 16.

40. FOLEY, PRESIDENTIAL ELECTIONS, *supra* note 23, at 12; *see id.* at 15 (noting that the design of the electoral college was part of the framers' scheme "to thwart any form of government control by faction").

41. *Id.* at 21; FERLING, *supra* note 29, at 87; ALDRICH, *supra* note 38, at 79; *see* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1015-61 (2010) (describing partisan skirmishes over the neutrality crisis of 1793 and the Jay Treaty). For a thorough analysis of how parties formed between 1787 and 1800, *see* ALDRICH, *supra* note 38, at 70-101. To be sure, the parties of this period were little like the consolidated, commanding electoral forces we are accustomed to nowadays. *Id.* at 99; *see* Freeman, *supra* note 33, at 1968 (describing national politics in the 1790s, not as "warfare between well-defined armies of Federalists and Republicans," but "like a war without uniforms"); FERLING, *supra* note 29, at 87 (noting that "in 1796 the Federalists and Republicans were still so loosely constituted that party discipline was nonexistent"); *id.* at 91 (reporting lack of party discipline in electors' vote casting in the 1796 election).

42. *See* FOLEY, PRESIDENTIAL ELECTIONS, *supra* note 23, at 30.

43. *Id.* at 25.

44. Tolson, *supra* note 35, at 320. Indeed, the Congress that passed the Twelfth Amendment was dominated by Republicans, who wanted to ensure a smooth win for President Jefferson in the fast-approaching election. FOLEY, PRESIDENTIAL ELECTIONS, *supra* note 23, at

As Dean Tolson explains:

> With the Twelfth Amendment, 'We the Voters' became more important than 'We the People' in the theory of republicanism that, through the Guarantee Clause, undergirded the US system of government. The post-Twelfth Amendment acknowledgment of the centrality of the voting population to the accomplishment of partisan end goals—i.e., winning elections and enacting policy under a mandate of popular sovereignty—raised important questions about the constitutional status of political parties. Not only were parties responsible for conveying the preferences of the electorate, the Twelfth Amendment created a structure designed to facilitate the ability of the major party with the most support to choose the president.[45]

The upshot was that the response to the first American electoral crisis was an institutional fix focused on harnessing partisan competition to channel presidential selection. In some sense this was a Madisonian fix for a Madisonian dilemma. Madison had assumed both that ambition would counteract ambition,[46] and that the scale of the Republic would make impossible national political organizations.[47] The Twelfth Amendment accepted the premise of competition (ambition) channeling politics but now integrated rather than attempting to thwart political parties as central players in democratic politics. While the Twelfth Amendment cured the ills that led to the crisis in 1801, an ambiguity respecting the process for counting electoral votes lingered. Like the original Constitution, it merely states that "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."[48] This constitutional defect would play a starring role in the election of 1876, which "may have been the most violent, fraud-ridden, and tumultuous in history," by the lights of former Tenth Circuit judge Michael McConnell.[49]

II. ENTER CONGRESS.

Whereas the crisis of 1800 was caused by a technical defect in the tabulation of presidential votes, the 1876 electoral meltdown was the more typical product of intense partisan rivalry fueling institutional incapacity. Recall that the most significant long-term result of the

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29. "The expectation that republicanism would be filtered through partisan politics is precisely why the Jeffersonians left to each state the decision of how to allocate its electors, recognising [sic] that their party organisation [sic] was dominant in enough states to secure an electoral victory moving forward." Tolson, *supra* note 35, at 320.

45. Tolson, *supra* note 35, at 312.

46. *See* THE FEDERALIST No. 51 (James Madison).

47. *See* THE FEDERALIST No. 10 (James Madison).

48. U.S. CONST. amend. XII.

49. Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 127 (1994).

election of 1800 was the electoral replacement of an incumbent by a challenger and that there was never a question that President Adams had lost and would yield his office. By contrast, the election of 1876 was an intense referendum on the legacy of the Civil War and the unwinding of Reconstruction. The popular vote gave Democrat Samuel Tilden a 250,000vote lead over Republican Rutherford B. Hayes.[50] But Tilden counted on only 184 electoral votes, one vote shy of the minimum votes he needed to become president.[51]

The election came down to a scramble for that one missing electoral vote and the contested zones were Florida, South Carolina, and Louisiana—a "three-ring circus" of disputed elections—as well as one "sideshow" in Oregon,[52] where an elector for Hayes was struck by the Democratic governor because he was a postmaster, and thus constitutionally ineligible to serve as elector.[53] Twenty disputed electoral votes were in play: nineteen from the three southern states, plus the one vote from Oregon, each of which was subject to rival certifications.[54]

Congress held the decisive power to resolve presidential election disputes under the Twelfth Amendment, but that remedy fit poorly onto a divided Congress in a moment of extreme partisan stress. Perhaps not surprisingly in retrospect from our highly polarized era, Congress did not respond as an institution but as party powerbrokers. The Republicans controlled the Senate and the Twelfth Amendment charges the president of the Senate with opening the certifications before the House and the Senate; it does not say *which* votes need to be counted.[55] For their part, Democrats claimed that resolving which votes should be counted devolved to the House under the Twelfth Amendment, which they controlled.[56] The prospect of the two houses of Congress choosing different presidents led to a constitutional crisis.[57]

With the presidency at stake, and unable to resolve the impasse, Congress created a fifteen-member commission to decide which of the certifications should count. The commission was made up of five

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50. Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 2002 n.89 (2003).

51. MICHAEL F. HOLT, BY ONE VOTE: THE DISPUTED PRESIDENTIAL ELECTION OF 1876 172 (2008).

52. *Id.* at 180, 203.

53. *Id.* at 201-03; *see* U.S. CONST. art. II, §2, cl. 2.

54. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1689 (2002); HOLT, *supra* note 51, at 203.

55. McConnell, *supra* note 49, at 127.

56. Steve Vladeck, *59. Justice Davis and the Electoral Commission of 1877*, ONE FIRST (Dec. 25, 2023), https://www.stevevladeck.com/p/59-justice-davis-and-the-electoral [https://perma.cc/V9RN-TGAE].

57. *Id.*

representatives, five senators, and five justices.[58] It was supposed to be evenly split between Democrats and Republicans, with Justice David Davis, known for his independent streak,[59] casting the tie-breaking vote. Democrats in the Illinois state legislature elected Davis to the Senate in a transparent ploy to curry his favor that quickly backfired.[60] Davis dutifully resigned, and the remaining seat went to Justice Joseph Bradley, a Republican.[61] The result was a commission split 8-7 along partisan lines, counting the sitting justices as aligned with the party that moved their judicial appointment. The Committee then voted along exactly these partisan fault lines to give all the disputed electoral votes to Hayes, affording him the requisite 185 electoral votes to eke out the presidency.[62] Though Democrats eventually accepted defeat through the Hayes-Tilden compromise (whose contours are beyond current inquiry), the commission was widely perceived as little more than a partisan endeavor.[63]

Once again, Congress set out to fix the constitutional defect that led to the Hayes-Tilden impasse. This time, it resulted in a statute, the Electoral Count Act (ECA) passed in 1887.[64] The Act placed responsibility for resolving election disputes entirely in the hands of political actors. First, where states produce a definitive result at least six days before the electors meet according to procedures under the state law, then that result is binding upon Congress unless both houses agree there were irregularities and reject them. Second, where there are rival certifications, their resolution is left to the independent judgment of the House and the Senate. If the two disagree, then the return certified by the "executive of the State" is counted.[65] In short, the Act created procedural defaults based on when the election was certified and a presumption that determinations made by the states from which certifications originated would be legitimate. Critically, the Act cleared up the processes for resolving disputed elections but did not seek to involve any new institutional players. The power to select the

58. McConnell, *supra* note 49, at 128.

59. *See* Vladeck, *supra* note 56.

60. *Id.*

61. *Id.*

62. Issacharoff, *Enabling Role of Democratic Constitutionalism*, *supra* note 50, at 2003-04.

63. *Id.* at 2004 nn.97-99 and accompanying text.

64. Act of Feb. 3, 1887, ch. 90, 24 Stat. 373 (codified as amended at 3 U.S.C. §§ 5-7, 15-18 (2000)), *amended by* Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, 136 Stat. 5233 (2022). Because the fix was implemented through statute as opposed to an amendment, there are lingering theoretical doubts about the constitutionality of the Electoral Count Act, a concern that was also raised when the bill was debated. *See* Kesavan, *supra* note 54, at 1659-60 n.18; *see also* ISSACHAROFF, KARLAN & PILDES, *supra* note 8, at 58-60.

65. Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 651-52 (2001). For a more fulsome discussion of the Electoral Count Act's provisions, *see* ISSACHAROFF, KARLAN & PILDES, *supra* note 8, at 26.

president in a disputed election was in the hands of Congress, and Congress alone would serve as the backstop if the process went awry once it left the control of the states over the electoral process.[66]

Legislation seemingly invariably follows lived experience, and the ECA was no exception. The use of a commission as an independent body after the 1876 election had failed to do anything more than reflect the preexisting partisan balance of power. The addition of Supreme Court Justices had only reconfirmed that, with the presidency at stake, seemingly no man rises above the basest political loyalties. That the judiciary is then conspicuously absent from the post-1876 picture is not accidental. Congress concluded that the judges had added no measure of independence in the post-1876 dispute and that involving courts in presidential contests cast too much of a political pall.[67] The crisis of 1876 was ultimately resolved politically, if at great cost. Thus, facing a proposal to involve the Supreme Court where the two houses of Congress disagreed, Congress was quick to consider it and reject it.[68] Senator Sherman, the sponsor of the ECA, explained the rejection of a judicial role in his opening speech:

> [T]here is a feeling in this country that we ought not to mingle our great judicial tribunal with political questions, and therefore this proposition has not met with much favor. It would be a very grave fault indeed and a very serious objection to refer a political question in which the people of the country were aroused, about which their feelings were excited, to this great tribunal, which after all has to sit upon the life and property of all the people of the United States. It would tend to bring that court into public odium of one or the other of the two great parties. Therefore that plan may probably be rejected as an unwise provision. I believe, however, it is the provision made in other countries.[69]

Certainly, one could have concluded from the 1876 commission experience that involving judges is no guarantee that politics will not reemerge in the selection process. But that collapses judges as presumably sagacious individuals with the judicial process. The lesson Congress learned from the Hayes-Tilden challenge was that justices could not be trusted to act in non-partisan ways. Were another election contested down the line, imperiling the institutional stability that comes from a judiciary that is seen as legitimate could make matters worse. This became the prevailing wisdom for over a century. As Justice Breyer wrote in his dissent in *Bush v. Gore*, "[h]owever awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more

66. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 8, at 58.

67. *See* Issacharoff, *Political Judgments*, *supra* note 65, at 652.

68. *Id.*

69. *Id.* (quoting 17 CONG. REC. S817–18 (DAILY ED. JAN. 21, 1886) (STATEMENT OF SEN. SHERMAN)).

accurately than does an unelected Court. And the people's will is what elections are about."[70] I used to agree with this assessment.[71]

This is a serious concern, but it was the wrong lesson. The problem was not that the judiciary was involved *at all*; the problem was the way that justices were brought in. When judges are thrust into a political role—and a hastily conceived one at that—they leave their legitimacy in the courtroom, along with their robes. Judging is a constrained endeavor, held in reasonable check by the oath of office, by the rules of evidence, by the weight of precedential authority, by the need to engage facts and be publicly accountable for decisionmaking. Judges off the bench may take a self-serving lie at golf or shade their tax returns to their advantage. The apparent unwisdom of the commission scheme in 1877 does not imply that *any* role for the judiciary in electoral contestation would necessarily delegitimize the courts. Or, framed differently, it does not follow that judicial involvement would not prove to have a comparative advantage if other institutional actors proved dysfunctional.

III. COURTS BY DEFAULT.

Which brings us to *Bush v. Gore*. This was the first truly contested presidential outcome since Hayes-Tilden, then Vice President Nixon having decided to forego legal challenges in 1960. It was also the first presidential election of the modern media era, with the increasing dominance of highly partisan cable news programming. It is hard to recall an era without social media, and one where the political parties still controlled slating and messaging. But the origins of our current politics were observable on the margins of the political exchanges, especially as the drama played out in the courts and on television.

The 2000 presidential election between George W. Bush and Al Gore also witnessed the hasty abandonment of the "let politics control" approach of the post-1876 ECA. For more than a century, federal courts mostly steered clear of presidential elections, guided by a longstanding view that such disputes were political questions beyond the bounds of justiciability.[72] That changed in *Bush v. Gore*, when the Supreme Court intervened to stop Florida's statewide recount and, in doing so, effectively handed the presidency to Bush.[73] Although the Court 7-2 found that Florida's judicially-crafted emergency procedures

70. 531 U.S. 98, 155 (2000) (Breyer, J., dissenting).

71. *See generally* Issacharoff, *Political Judgments*, *supra* note 65.

72. *See id.* at 651-52 (detailing how "[n]othing in the statutory scheme [of counting electoral votes] envisions a role for courts," and citing Justice Clark's concurrence in Baker v. Carr, 369 U.S. 186, 251-64 (1962), which accepted a role for courts "only after assessing the failure of all other potential avenues of redress").

73. 531 U.S. 98 (2000).

violated the Equal Protection Clause,[74] the sharp ideological divide of the 5–4 ruling on suspending the presidential count was impossible to ignore. The decision appeared a direct repudiation of the core compromise of 1877 that sought to channel the ultimate questions of presidential selection to Congress and not the courts.[75] One of the lasting legacies of Florida 2000 was the speed with which both the Florida and U.S. Supreme Courts abandoned settled institutional pathways in favor of direct judicial management of the fraught election dispute.

As with Tilden in 1876, Gore won the popular vote but not enough states to command a majority in the Electoral College. The Electoral College hinged on Florida and the initial machine tabulation showed Governor Bush to be ahead by just 1,784 votes.[76] Under Florida law, this triggered an automatic machine recount,[77] which reduced Bush's margin to only 327 votes.[78] Gore then requested manual recounts in four Democratic-leaning counties: Volusia, Palm Beach, Broward, and Miami-Dade.[79] The general rule in recounts is to seek review in areas where one is strong, so that random error, if detected, is likely to favor the party seeking review. Consistent with this, the Gore campaign focused on counties that were heavily Democratic and that had electoral features that might result in tabulation error. The four selected counties used punch card ballots, which were susceptible to "hanging" or "dimpled" chads. This could lead to a significant number of "undervotes," or ballots that did not register in the machine count.[80] Gore's problems ran deeper in Palm Beach County, where the infamous "butterfly ballot" may have caused voters unwittingly to select Pat Buchanan instead of, or in addition to, Gore.[81]

The recount process played out in a volatile political environment. Florida Secretary of State Katherine Harris served as Bush's Florida campaign co-chair while Attorney General Bob Butterworth played the same role for Vice President Gore.[82] With otherwise customary administrative rulings potentially tipping the scales of presidential selection, each action took on national significance. On November 21, 2000, the Florida Supreme Court issued its first major intervention, extending the certification deadline to November 26, 2000, to allow manual

74. *See id.* at 103 (finding a violation of U.S. CONST. amend. XIV, § 1).

75. *See* Issacharoff*, Political Judgments*, *supra* note 65, at 651-52.

76. Bush v. Palm Beach. Cnty. Canvassing Bd., 531 U.S. 70, 73 (2000).

77. Fla. Stat. § 102.141(4) (2000).

78. Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1419 (2016).

79. *See Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 73-74 (explaining that Gore had the right to request a recount under Fla. Stat. § 102.166 (2000)).

80. *See* Gore v. Harris, 772 So. 2d 1243, 1256 (Fla. 2000).

81. *See* Raquel A. Rodriguez, *Reflections of Another* Bush v. Gore *Lawyer*, 64 U. MIAMI L. REV. 631, 632 (2010).

82. *See* Kang & Shepherd, *supra* note 78, at 1419; Fla. Stat. § 102.111(1) (2000).

recounts to proceed.[83] On December 4, 2000, the U.S. Supreme Court unanimously vacated the Florida Supreme Court's decision, asking the state court to clarify whether and how it had considered Article II and the ECA.[84] This unusual federal intrusion into a state court's interpretation of state law foreshadowed what was to come. On December 8, the Florida Supreme Court ordered a statewide manual recount of all undervotes.[85] Yet the court declined to impose a uniform standard for determining a "legal" vote, leaving county canvassing boards the responsibility of identifying whether there was "clear indication of the intent of the voter,"[86] thereby laying the foundation for *Bush v. Gore*.

On December 9, the U.S. Supreme Court stayed the recount.[87] Oral arguments in *Bush v. Gore* were held on December 11, 2000,[88] and the Court issued a per curiam opinion the next day, terminating the recount permanently.[89] The majority held that Florida's recount procedures violated the Equal Protection Clause because different counties had applied or could apply different standards when evaluating ballots, which treated voters unequally.[90] The Court concluded that no constitutionally acceptable recount could be completed before the ECA's December 12, 2000, safe harbor deadline.[91] The opinion was intended to be narrow, stating that the equal protection rationale applied only "to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[92] The dissenting justices countered that the Court had sacrificed "confidence in the judge as an impartial guardian of the rule of law,"[93] and declared that the Court's choice to intervene was "a self-inflicted wound a wound that may harm not just the Court, but the Nation."[94]

At the time, scholars and commentators feared that the decision would undermine the Supreme Court's legitimacy.[95] I did not believe the exercise of federal authority over a presidential election was necessarily improper, but I shared some of the concerns about needless

83. *See* Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1240 (Fla. 2000).

84. *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 78.

85. *See Gore v. Harris*, 772 So. 2d at 1247.

86. *See id.* at 1262 (employing the standard from Fla. Stat. § 101.5614(5) (2000)).

87. Bush v. Gore, 531 U.S. 1046 (2000).

88. Kang & Shepherd, *supra* note 78, at 1422.

89. *Bush*, 531 U.S. at 110.

90. *See id.* at 106-07; U.S. CONST. amend. XIV, § 1.

91. *See Bush*, 531 U.S. at 110.

92. *Id.* at 109.

93. *Id.* at 128-129 (Stevens, J., dissenting).

94. *Id.* at 158 (Breyer, J., dissenting).

95. *See* Jeffrey L. Yates & Andrew B. Whitford, *The Presidency and the Supreme Court After* Bush v. Gore*: Implications for Institutional Legitimacy and Effectiveness*, 13 STAN. L. & POL'Y REV. 101, 105-06 (2002); Stephen P. Nicholson & Robert M. Howard, *Framing Support for the Supreme Court in the Aftermath of* Bush v. Gore, 65 J. POL. 676, 692 (2003).

insertion of the Court into an inflamed partisan standoff. My concern at the time was that the Court should have exercised more restraint before wading into the political thicket and allowed the ECA's processes to play out—views consistent with Justice Breyer's dissent.[96]

Implicit in that position was the view that Congress was better positioned institutionally to resolve a highly charged political fight, and that the judiciary stood to be tarnished by its insertion. Assessed from the present day, the current and persistent state of congressional dysfunction calls into question the faith in Congress to be able to function in such an environment. Moreover, the anticipated drop in legitimacy did not materialize. One study found it "impossible to conclude that loyalty towards the Supreme Court plummeted after the presidential election of 2000."[97] The percentage of Americans expressing trust in the Court was 12.5 points higher in 2001 than in 1995.[98] The study concluded that the Court benefited from a "reservoir of good will" that helped mitigate reputational harm.[99] Other studies similarly found little evidence of lasting damage to the Court's institutional legitimacy.[100] The resilience of popular faith in the judiciary and growing skepticism about Congress made the channels selected by the ECA subject to being revisited.

At the same time, the legal theory in *Bush v. Gore* was novel. Although the Equal Protection Clause had been used to challenge malapportionment and other electoral obstacles,[101] it had never before been deployed to strike down a recount process.[102] Then again, despite the claim in *Baker v. Carr* that its equal protection ruling followed well-trod terrain, much of the law of democracy canon consists of crafting other doctrinal areas to fit the particular demands of the electoral process. The decision further implicitly treated the ECA's safe harbor

96. *See* Issacharoff, *Enabling Rule of Democratic Constitutionalism, supra* note 50, at 1986.

97. *See* James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 545 (2003) (comparing the authors' data to a similar survey conducted in 1995).

98. *Id.*

99. *Id.*

100. *See* Yates & Whitford, *supra* note 95, at 116-17; Nicholson & Howard, *supra* note 95, at 692; Amy Semet, Nathaniel Persily & Stephen Ansolabehere, Bush v. Gore *in the American Mind: Reflections and Survey Results on the Tenth Anniversary of the Decision Ending the 2000 Election Controversy*, *in* ELECTION ADMINISTRATION IN THE UNITED STATES: THE STATE OF REFORM AFTER *BUSH V. GORE* 48, 68-69 (R. Michael Alvarez & Bernard Grofman eds., 2014).

101. The very foundation of the Supreme Court's entry into the political thicket of reapportionment was fashioned as an equal protection question. *See* Baker v. Carr, 369 U.S. 186 (1962).

102. *See* Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 2, 7 (2007).

provision as binding,[103] even though it was clearly not designed to mandate state behavior.[104] The statute stated that elector determinations made by the deadline "shall be conclusive" in Congress's count, not that electors must be finalized by then.[105]

Regardless of the majority's attempt to cabin the ruling,[106] or the substantive soundness of its reasoning, *Bush v. Gore* has had lasting institutional effects. Before 2000, "the Court categorically eschewed reviewing the outcomes of elections."[107] And when faced with opportunities to involve itself in electoral processes, "the Court showed tremendous solicitude for state practices, including recounts."[108] Afterward, however, courts increasingly became election administrators. Judges began resolving a number of contested elections, including the 2004 North Carolina superintendent of public instruction race,[109] the 2004 Washington gubernatorial race, and the 2008 Minnesota senatorial race.[110] By 2020, the judiciary's new election referee role would be put to the test of another disputed presidential election.

IV. COURTS BY DESIGN.

The 2020 presidential contest between Donald Trump and Joe Biden presented a direct test of the ability of Congress to arbitrate a contested presidential election under the still standing provisions of the ECA. After losing both the popular vote and Electoral College, President Trump launched an aggressive campaign to remain in power. The post-election turmoil exposed flaws in the ECA[111] and forced a reexamination of the role of courts as a central safeguard against presidential electoral mischief.[112]

In the immediate post-election period, courts became the frontline of the Trump campaign efforts to overturn the voting results. Between

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103. *See Bush*, 531 U.S. at 111.

104. *See id.* at 124 (Stevens, J., dissenting); *id.* at 130 (Souter, J., dissenting); *id.* at 143-44 (Ginsburg, J., dissenting); *id.* at 148-49 (Breyer, J., dissenting).

105. 3 U.S.C. § 5 (2000).

106. *See Bush*, 531 U.S. at 109.

107. Issacharoff, *Political Judgments*, *supra* note 65, at 638.

108. *Id.* (citing Roudebush v. Hartke, 405 U.S. 15, 25 (1972) (lifting a lower federal court's injunction on a recount proceeding under state law)).

109. *See* Robert P. Joyce, *The Last Contested Election in America,* POPULAR GOV'T 43, 46-47 (2007).

110. EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 334-35 (2d ed. 2024).

111. *See id.* at 368-69 (saying that under the procedures of the ECA, the Vice President could potentially attempt to have Congress vote on the validity of all submissions "purporting to be certificates of electoral votes," even if they were bogus); 3 U.S.C. §§ 5-7, 15-18 (2020).

112. *See* FOLEY, BALLOT BATTLES, *supra* note 110, at 360 (observing that "all across the country, from the bottom to the top of the judicial hierarchy, courts told Trump he had no case for overturning Biden's victory.").

November 4, 2020, and January 6, 2021, Trump and his allies filed sixty-two lawsuits challenging various aspects of the election process, such as absentee ballot procedures and poll watcher access rules.[113] The plaintiffs lost all cases but one.[114] When forced into the disciplined channels of litigation rather than the inflammatory domain of social media, the claims of electoral fraud foundered on the customary judicial demands for coherent legal theories and evidentiary proof. In one instance in Pennsylvania, Judge Matthew Brann—a conservative jurist by all accounts—dismissed the Trump campaign's claims as an incoherent "Frankenstein's monster" of legal theories.[115] In Michigan, Judge Linda Parker sanctioned Trump-aligned attorneys for advancing frivolous claims,[116] and decried, "[t]his lawsuit represents a historic and profound abuse of the judicial process."[117] According to the Final Report of the U.S. House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol, "In every State in which claims were brought, one or more judges specifically explained as part of their dismissal orders that they had evaluated the plaintiffs' allegations or supposed proof of widespread election fraud or other irregularities, and found the claims to be entirely unconvincing."[118]

In a very real sense, the post-2020 electoral challenges vindicated the confidence of the *Bush v. Gore* Court that, when push comes to shove, the judiciary was not only necessary but capable of handling even the most controversial election controversies. Not so the first real world test of the ECA under challenge. President Trump's campaign legal advisers pushed an aggressive theory that Vice President Mike Pence could unilaterally reject certified electoral votes during the January 6 counting process. Attorney John Eastman prepared memoranda for Trump, arguing that the Vice President's vote-counting role under the Twelfth Amendment implied the power to resolve disputes

113. *See* H.R. REP. NO. 117-663, at 210-13 (2022).

114. *See id.* at 210 (identifying one winning case "which affected relatively few votes, did not vindicate any underlying claims of fraud, and would not have changed the outcome").

115. *See* Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 906, 910 (M.D. Pa. 2020); Josh Gerstein, Kyle Cheney & Zach Montellaro, *'This Is Simply Not How the Constitution Works': Federal Judge Eviscerates Trump Lawsuit Over Pennsylvania Results*, POLITICO (Nov. 21, 2020, at 20:32 ET), https://www.politico.com/states/new-york/city-hall/story/2020/11/21/this-is-simply-not-how-the-constitution-works-federal-judge-eviscerates-trump-lawsuit-over-pennsylvania-results-1337595. [https://perma.cc/KU7Y-S5SJ].

116. King v. Whitmer, 556 F. Supp. 3d 680, 734 (E.D. Mich. 2021).

117. *Id.* at 688.

118. H.R. REP. NO. 117-663, at 210.

over electors.[119] This theory became the foundation of a coordinated effort to assemble and submit alternate slates of electors in seven swing states that Biden won: Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin.[120]

Although the Vice President's vote-counting role had long been understood as ministerial, neither the Twelfth Amendment nor the ECA explicitly said this.[121] While Trump had no plausible claim to have won the contested states, Pence added uncertainty to the situation by refusing to publicly say how he would handle the concocted alternative electoral slates.[122] This in turn led to the events of January 6, 2021, when Congress met to certify the electoral count, normally a ceremonial act solemnizing the transfer of power. As a technical matter, under the ECA, any state's electors could be challenged with the written objection of one senator and one representative.[123] Some Republican members of Congress dutifully objected to Arizona's and Pennsylvania's electoral votes.[124] As the Senate debated the Arizona objection, the Capitol was overrun and, when order was reestablished, 139 representatives and 8 senators voted to sustain at least one of the objections.[125]

The events of January 6, 2021, revealed two key points of fragility of the ECA under extreme partisan pressure. First, the role of the vice president proved less defined and less procedural than may have been assumed. Second, Congress showed that it might be fractured along partisan lines if any election dispute were bundled into the ultimate question of who should be president. Reform seemed in order,[126] and the easy assumption that disputes could be entrusted to the

119. *See* FOLEY, BALLOT BATTLES, *supra* note 110, at 366; *READ: Trump Lawyer's Full Memo on Plan for Pence to Overturn the Election*, CNN (Sep. 21, 2021, at 17:47 ET), https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html [https://perma.cc/3DQS-6TW3].

120. *See* H.R. REP. NO. 117-663, at 352-53;.FOLEY, BALLOT BATTLES, *supra* note 110, at 386.

121. *See* FOLEY, BALLOT BATTLES, *supra* note 110, at 369 (including a quote from Justice Bradley, "who reflecting on the Hayes-Tilden dispute, had opined: 'the powers of the president of the Senate are merely ministerial' ").

122. *See id.* at 365.

123. *See* 3 U.S.C. § 15 (2018).

124. *See* FOLEY, BALLOT BATTLES, *supra* note 110, at 371, 374.

125. *See* H.R. REP. NO. 117-663, at 464-65; Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html [https://perma.cc/FJ24-LZ2Z].

126. *See* FOLEY, BALLOT BATTLES, *supra* note 110, at 391; *see* SAMUEL ISSACHAROFF, DEMOCRACY UNMOORED: POPULISM AND THE CORRUPTION OF POPULAR SOVEREIGNTY 185-86 (2023).

institutional experience of Congress was also in need of repair.[127] The felt need for reform crossed the partisan aisles as each side faced the prospect of the next presidential election unsure of the role of the vice president and equally uncertain about who would control the Congress.[128]

In the aftermath, Congress enacted the Electoral Count Reform Act of 2022 (ECRA)[129] Among the most important reforms, the ECRA clarified that the Vice President has a purely ministerial role in the electoral vote count.[130] It also raised the objection threshold from one member of each chamber to one-fifth of each chamber.[131]

Most critically for present purposes, the ECRA for the first time gave the judiciary a statutory role in resolving presidential election disputes.[132] The statute authorized expedited judicial review for disputes over elector appointments *before* these disputes come to Congress as part of the last formal step in presidential selection.[133] Presidential candidates may now file suit in federal court, with claims heard by a three-judge panel subject to direct appeal to the Supreme Court.[134] The claims would have to be heard in the state capitol where the dispute arose and the three-judge panel would uniquely be comprised of two appellate judges and one district court judge, unlike other statutory three-judge courts that have only one appellate judge.[135] And the courts are interposed between the time of state certification and the time that Congress meets.[136]

For the first time, the judiciary received a formal role in resolving contested electoral votes. As Professor Cass Sunstein put it, this provision was "designed to ensure a rapid and conclusive resolution of

127. *See* ISSACHAROFF, DEMOCRACY UNMOORED, *supra* note 126, at 166 (noting how "an administrative symbol of orderly democratic governance" had been turned "into cynical partisan theatre").

128. *See* Bob Bauer & Jack Goldsmith, *The Lessons of the Electoral Count Reform Act: Next Steps in Reform*, LAWFARE (Jan. 31, 2023, at 08:31 ET), https://www.lawfaremedia.org/article/the-lessons-of-the-electoral-count-reform-act-next-steps-in-reform [https://perma.cc/Z6YG-75KR].

129. Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117–328, 136 Stat. 5233 (2022) (amending 3 U.S.C. §§ 5-7, 15-18).

130. 3 U.S.C. § 15 (2024).

131. *Id.*

132. Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, 136 Stat. 5233 (2022) (amending 3 U.S.C. §§ 5-7, 15–18).

133. 3 U.S.C. § 5 (2024).

134. *Id.*

135. Under 28 U.S. Code § 2284, a three-judge court must have at least one appellate judge, though the customary practice is for only one appellate judge to sit with two district court judges.

136. *See* 3 U.S.C. § 5(d)(1)(B)(i) (2024).

legal disputes that Congress cannot question."[137] It is hard to avoid the comparison to what the Court did in *Bush v. Gore* in acting preemptively to take a dispute out of the hands of an uncertain—and untrusted—political process. Fast forward twenty years from *Bush v. Gore* and one finds Congress itself falling back on the courts as an institutional backstop against the risk of political meltdown.

CONCLUSION

For as long as there have been elections there have been electoral disputes. The only certainty about dispute resolution in the elections context is that passions will run high and that swift and certain resolution is key to long-term democratic stability. Given that under conditions of genuine democratic contestation, no one can be certain who will be on top in some future setting, the question becomes what institutional arrangements are most likely to dampen partisan passion and allow the task of orderly governance to proceed.

Almost all democratic countries have created some kind of independent electoral administration, frequently under the oversight of the country's highest court. While the exact institutional arrangements vary, the practice is to honor the recommendation of the European Commission for Democracy through Law (known as the "Venice Commission"), the preeminent European institution on democratic best practices. For the Venice Commission, one of the categorical building blocks of a functioning democracy is that "an impartial body must be in charge of applying electoral law."[138]

Standing just about alone, the United States resists the creation of a national electoral body designed to be as independent as possible from political processes. Instead, our election administration turns heavily not on non-partisan control, but on bi-partisan oversight. So long as the major parties generally view each other as operating within the same broad democratic currents, and so long as they watch each other with an uncertain eye as to how momentary gamesmanship might come back against them the next time, the system works tolerably well.

The ECA design can be readily fit within this bipartisan administrative model. When presidential elections go bad, and particularly when they go really bad, the logic of non-specialized administration directs that the customary political institution oversee its resolution, operating under self-interest tempered by long-term commitments to

137. Cass R. Sunstein, *The Rule of Law v. "Party Nature": Presidential Elections, the Constitution, the Electoral Count Act of 1887, the Horror of January 6, and the Electoral Count Reform Act of 2022*, 103 B.U. L. REV. 1171, 1178 (2023).

138. European Commission for Democracy through Law [Venice Commission], *Code of Good Practice in Electoral Matters*, Opinion no. 190/ 2002, CDL-AD(2002)023rev2-cor, at 10 (rev. Oct., 25, 2018).

stable resolutions. The Act created certain procedural presumptions but left resolution to the Vice President, the Senate, and the House: political actors for what are presumably first-order political decisions.

That model broke down in Florida 2000. Both state and federal courts quickly assumed responsibility for the resolution of a fractious presidential dispute. Unstated, but nonetheless central, was the conclusion that the political bodies were not to be trusted with handling a knife's-edge elections. Intervening judicial practice and the 2020 election confirmed that the judiciary is now the backstop of American democracy. Where *Bush v. Gore* was once derided as judicial overreach, the bipartisan passage of the ECRA reflects a broad acceptance that courts must play a role in safeguarding elections. That role has drawbacks. It puts pressure on judicial legitimacy, risks politicizing the courts, and may encourage candidates to litigate their losses. Nevertheless, entrusting Congress to resolve electoral disputes has proven comparatively unacceptable.