

The Electoral College

How it works, possible reforms,
and January 6 events

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The Electoral College

For questions, use Zoom's hand-up function at any time.

At appropriate places, I'll pause to hear questions and reply.

These places are marked by the bold letter **Q** at the end of a slide.

As you are called on, unmute and state your question.

The Electoral College

Established in Article II Section 1 of the Constitution.

“1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

“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:”

The Electoral College

In proportion to population, the formula gives more electoral power to small states. In 1790, Virginia had one elector per 35,600 residents to Delaware's one per 19,700, about 1.8 to 1.

Per the 2020 census, California has one elector per 761,091 residents; Wyoming has one per 192,573. About 3.95 to 1.

The formula gives a Wyoming voter almost 4 times the influence of a California voter.

My state, Colorado, is between at 578,217 residents per elector. Behind Wyoming 3.00 to 1, ahead of California 1.32 to 1.

The Electoral College

An aside.

The constitutional text uses the word elector a lot but does not call the system an electoral college.

The phrase arose in popular culture in the early 1800s.

It first appeared in a federal statute in 1845.

The Electoral College

Another crucial phrase is power to appoint electors “in such Manner as the Legislature thereof may direct.”

The text forbids appointing members of Congress or other federal officials. There is no other federal restriction. Anyone else the state chooses can be appointed.

However, beginning in the 1820s, states used this power to provide for choosing electors by popular vote and to give all of a state’s electors to the candidate who wins the most votes.

Who can be and often is a candidate who wins a plurality of the popular vote, less than 50%.

The Electoral College

These rules make the electoral vote differ from the popular vote.

The 2000 and 2016 winners of the national popular vote lost in the EC because of the two rules—the constitutional rule that gives extra power to small states, and the state law rules that give all of a state's electoral votes to the candidate with the most popular votes.

The Electoral College

In practice, the states' winner-take-all rules are much more important than the small state advantage.

In present political alignments, the two rules usually favor the Republican Party, giving it the minority wins in 2000 and 2016 and making Democratic electoral wins closer than their popular vote margins. This could flip if politics change. A complex question. **Q**

The EC's relation to slavery

Some prominent scholars claim that the EC was adopted to help maintain slavery. Others deny the claim. The record is mixed.

The EC system for electing the President was adopted very late in the 1787 Convention.

The alternative considered was popular election. Its leading proponents were James Madison of Virginia and James Wilson of Pennsylvania. Wilson was the Convention's most consistent advocate of democracy.

The EC's relation to slavery

The North had a larger proportion of voters, so pro-slavery delegates feared that popular election would disadvantage the South and the slavery system.

Elitists opposed popular election out of fear that democracy would impair legal protections for property.

Small states feared that they would lack enough influence in popular elections.

The EC's relation to slavery

The EC satisfied all three classes of opponents of direct election.

Elitists liked control by state legislatures.

Small states liked their over-representation in the EC.

Slavery interests liked the EC's connection to counting slaves as part of a state's population to apportion seats in the House of Representatives. The more House seats, the more electoral votes.

How to count slaves was resolved earlier in the Convention by the notorious 3/5 compromise.

How the EC works

Article II Section 1 Clause 3 defined how the EC was to function. It was defective by failing to require a clear difference between electoral votes for president and vice president.

This caused a formal tie vote for president in 1800 between Thomas Jefferson and Aaron Burr, his running mate. Resolved for Jefferson by vote of the House of Representatives.

The 12th Amendment was adopted in 1804 to fix that problem. On all other specifics about how the EC works, it is identical to Article II.

The Amendment's rules govern the EC now.

How the EC works

U. S. Constitution Amendment 12 (part):

“The Electors shall meet in their respective states and vote by ballot . . . The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed . . .

“ . . . and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; . . . ”

How the EC works

In summary, if the EC vote has no majority, the House of Representatives chooses the President among the top three candidates in electoral votes.

In this vote, each state has one vote regardless of its population or number of House seats. A majority of states needed to win.

A huge advantage for small states in proportion to population. Largest to smallest 10 to 1 in the first election of Washington (1788-89), 19 to 1 in the second (1792-93), and 68.5 to 1 now.

In this vote, a Wyoming voter has 68.5 times the influence of a California voter. And 10.0 times that of a Colorado voter.

How the EC works

Some historians claim that many Convention delegates thought elections would often default to the House.

That would be a shocking method now. In practice it has happened only twice, in 1800 to break the tie between Jefferson and Burr and in 1824 to choose John Quincy Adams over Andrew Jackson when there were four main candidates.

But the provision is still in the Constitution and was relied on in the Trump plan to overturn the 2020 election.

The EC's relation to slavery

That does not eliminate the influence of slavery. Support for it motivated most southern officials most of the time.

The formal question is whether the Convention would have adopted the EC without the votes of slavery interests. Uncertain.

However, even if the EC were not deliberately intended to maintain slavery, it had that effect.

Counting slaves padded the power of the South in the EC and in the House of Representatives.

The EC's relation to slavery and Jim Crow

This was an important reason for almost complete southern domination of the federal government before Lincoln's election and the Civil War.

Including control of the Supreme Court. Recall the Dred Scott case and the Court's enforcement of the fugitive slave system.

After the War, most ex-Confederate states were at first denied readmission to representation in Congress, then admitted with Black citizens allowed to vote and hold office.

During the period called Reconstruction. With the Army in most southern states until 1877.

The EC's relation to Jim Crow

After 1877, southern and border (that is, all former slavery) states devised the system we know as Jim Crow, almost completely suppressing Black votes and Black officials. In place by around 1900.

These states had proportionately greater influence in the EC and House than pre-war, because their Black citizens were now fully included in population counts for EC votes and House seats; not just 3/5. Still very few Black voters.

Somewhat offset because most other states did not join the Jim Crow system; only Kansas and Oklahoma did.

Race and the EC since 1965

Great efforts were made to enforce the 15th Amendment (1871) and overcome the South's suppression of the Black vote but failed until the Voting Rights Act of 1965.

Since then, the EC no longer functions as direct support for racial discrimination.

Indirect issues about voting and race persist and relate to the EC.

These were on display in the 2020 election and its aftermath. We'll look at that later. **Q**

Replacing the EC

Many citizens, a consistent majority in polls, think the EC should be replaced with a system that assures election of the candidate with the most popular votes. Al Gore in 2000, Hillary Clinton in 2016, and three older cases.

Another popular criticism is that the EC induces presidential candidates to campaign actively only in swing states. States safe for one candidate or another are ignored.

If effective, any of the amendments or work-arounds mentioned in the following slides would fix this problem.

Replacing the EC

The sure way is to amend the Constitution. Article V provides for amendment by $2/3$ vote of both houses of Congress followed by ratification by legislatures of $3/4$ of the states or by conventions in $3/4$ of the states or by another method enacted by Congress.

Extremely difficult to achieve. Many proposed EC amendments have been proposed and failed.

Replacing the EC

The closest attempt occurred in 1969, the year Richard Nixon became president.

He won the 1968 election by 110 electoral votes but won the popular vote over Hubert Humphrey by less than 1%. His popular vote was a 43.5% plurality because of the third-party candidacy of George Wallace.

An amendment was proposed to replace the EC with a rule that would declare President the winner of a popular electoral plurality of at least 40%. If no one achieved that level, a runoff election between the two top candidates would follow.

Replacing the EC

The amendment had bipartisan support and was backed by President Nixon. It achieved the needed 2/3 vote in the House but lost in the Senate. There was a filibuster, but the measure needed a 2/3 vote anyway. It got only 54 votes.

Opponents were Jim Crow Democrats from the South and small state senators who wanted to keep their states' disproportionate power. Had southern senators voted in favor, it would have cleared the Senate.

It would have needed ratification by 3/4 of state legislatures. Uncertain.

Replacing the EC

Article V also allows amendment by a constitutional convention “on the Application of the Legislatures of two thirds of the several States” followed by ratification.

As of 2014, the needed 34 state legislatures had called for a convention to adopt a balanced budget amendment. Before and after that year, some of those states repealed their calls. Are repeals valid? Uncertain.

Can a call be limited to subjects named in it, like a balanced budget amendment? Also uncertain. If not, a revising convention could amend anything, including the EC. Ratification would remain an obstacle.

Replacing the EC

Amending the EC would be harder today. It has become a partisan issue because of the Republican minority victories in 2000 and 2016.

Some small state Democratic senators would also oppose. Ratification would be a huge obstacle.

Nevertheless, proposals to amend are introduced into every Congress. House Joint Resolution 14 is a current one. For the text on line, go to [BILLS-117hjres14ih.pdf](#) (congress.gov). **Q**

Replacing the EC

As if political obstacles were not enough, yet another is disagreement about what should replace the EC.

Opponents often argue that proposed amendments would be defective and cause new problems.

Recall that to win under the 1969 proposal required a 40% plurality in the election or a runoff. By contrast, H. J. Res. 14 would make any plurality winner President. Some say this would induce third-party candidacies designed to siphon voters from a front-runner.

Replacing the EC

The major issue is how an amended EC would operate in a very close election such as that in 2000.

There would be attempts to force recounts in many, possibly all, states. And of course lawsuits.

Manipulation of who can vote and how could increase. The system could exacerbate differences among state qualifications.

Resembles Australia's disputes about replacing the Queen as head of state. With whom?

Replacing the EC

There are reasonable ways to address those problems, but they would likely require an act of Congress or wording in an EC amendment to make voter qualifications more nearly equal across the nation.

More on that question to come.

A more modest proposal would amend the EC to require that all states apportion electors by popular vote. For example, were Colorado's vote for President 56%-44% in favor of one candidate, its 10 electoral votes would go 6 to the winner and 4 to the runner-up. Not 10-0, as now.

Replacing the EC

That scheme would maintain the EC advantage of small states, reducing their opposition to change.

The proposal would greatly decrease the chance that loser of the national popular vote would become President. Possible but much less likely than the current scheme. Bush would not have won in 2000 nor Trump in 2016.

Unfortunately, proponents of amendment ignore this softer alternative. **Q**

Reforming the EC

Are there ways to reform the EC without amending the Constitution? One would require states to award electoral votes by popular vote allocated proportionately, like the constitutional amendment proposal I just described.

Any state can do this alone. Maine and Nebraska allow the statewide loser to get a minority of their electoral votes, although less than a proportionate share.

The winner-take-all rule has its distorting effects because of large states. So long as they resist, the system will continue.

Reforming the EC

To eliminate the distorting effect, all or almost all states must allocate electors proportionately.

This might be done by interstate compact or by act of Congress. Uncertain if Congress has the power. Politics would make either method very hard to achieve now. Could it have a chance in a less polarized time?

In any case, there is no movement to attempt it. Later slides refer to this as the proportionality reform.

Reforming the EC

A major and active effort now is the proposed National Popular Vote Interstate Compact (NPVIC). On line under that name.

It seeks an interstate agreement to award member states' electoral votes to the national winner of the popular vote. Even if a state's vote is for the other candidate.

NPVIC becomes an operative agreement when joined by states with a combined electoral vote majority, 270 or more. So far adopted in states and DC with 196, about 73%.

Reforming the EC

A third proposal, called Voter Choice Ballot (VCB), is promoted by Making Every Vote Count (MEVC), website under that name.

It is represented and advised by our classmate Jon Blake, who knows a lot more about it than I do.

In a state that adopts VCB, the presidential ballot asks each voter to make two choices. First is the traditional choice of the voter's preferred presidential ticket.

Reforming the EC

The second part of the VCB presidential ballot asks whether voters want their votes to be allocated to the national popular vote winner regardless of their choice in the first part or to their part-one choice in any case.

A yes-no question. The ballot seems very clear.

If the state's winner differs from the national popular vote winner, VCB looks at yes votes among the state's majority, that is, voters who chose the state's winner but said they wanted their votes to go to the national popular vote winner.

Reforming the EC

If yes votes for the state's winner plus all votes for the state's loser top the vote for the state's winner, the state's electoral vote flips to the state's loser. VCB retains the winner-take-all rule but not its distorting effect.

Example: state X used the VCB ballot, and the national popular vote winner was the Eagle Party candidate. State X voted 53% for the Hawk Party candidate and 47% for the Eagle Party candidate, but 4% of X's voters cast Hawk+yes votes on the VCB ballot. There would be 51% in favor of the national popular vote winner.

Reforming the EC

Do these reforms have a chance? The first question is whether state politics can be mustered to adopt them. The proportional and NPVIC compacts need approval by most states to go into effect.

That is a big barrier in solid red states that will want to preserve the present Republican chance to elect minority presidents.

States can rescind their participation in such compacts. And there are possible state constitutional law barriers to participation that would be tested.

Reforming the EC

VCB can operate if adopted in only one state. It needs many more to get us to a system that will reliably choose the national popular vote winner.

Its proponents argue that its additional choice will be popular, which will induce other states to join.

Especially with voters whose primary choice is a third-party candidate. The second VCB vote lets them participate in the binary choice for president after registering their minor party preference.

Reforming the EC

The proportionality and NPVIC plans require an operative interstate compact. VCB does not.

To become enforceable federal law, an interstate compact needs consent of Congress. Article I Section 10 Clause 3. The filibuster would make this hard to get.

NPVIC proponents argue that congressional consent is not needed because the compact would operate internally in each state and because of the Article II power of state legislators to choose electors. Uncertain.

Reforming the EC

The NPVIC and VCB reforms depend upon an accurate national voter count. As stated earlier, in a close election like 2000, this could provoke demands for recounts and lawsuits.

With Trump's fraud claims, same for any election.

The many differences among state voting laws complicate this problem.

The proportionality reform avoids the problem.

Reforming the EC

Existing federal law, based on Amendments 15, 19, and 26, forbids states from denying the vote by race or sex discrimination or by age to those 18 and older. Amendment 24 outlaws poll taxes.

Otherwise, states have a lot of freedom. Ten or eleven, mostly in the South, impose a lifetime ban on voting by persons with felony convictions who have served their prison time.

Could a federal bill to overturn only that practice get through Congress?

Reforming the EC

Any reform that came close to flipping an election would create an additional incentive for states to manipulate their voting laws.

The 2020 election and President Trump's claim that he won it generated intense discussion of this subject and numerous bills to modify state voting laws—state bills to restrict voting and federal bills to expand it.

Congress has power to make voting laws more uniform, but getting a bill through would be very hard.

Reforming the EC

One federal bill is H.R. 1. It would expand voting rights, change campaign finance laws to reduce the influence of money in politics, limit partisan gerrymandering, and create new ethics rules for federal officeholders.

On March 3, 2021, the bill passed the House of Representatives on a near party-line vote of 220–210, advancing to the Senate. Senate Republicans blocked the bill from proceeding to a vote with a filibuster.

Another pending bill, S. 4, is limited to voting rights. It was also blocked by a filibuster. **Q**

EC Questions in the 2020 Election

New subject—the EC in 2020-21.

The pandemic vastly increased the number of voters who wanted to vote by mail. Traditionally, this was called absentee voting, used by relatively few voters. And subject to procedural hurdles.

In five western states, fully committed to mail voting, this had no effect.

Other states had proposals to ease the rules and procedures to vote absentee. Many acted on them.

EC Questions in the 2020 Election

The President condemned mail voting. Except for elites like himself.

This led to fears that the Postal Service would sabotage mail voting. It did not; mail votes were delivered on time.

The President publicly urged Justice Department lawyers to indict Joe and Hunter Biden. None did.

The recent book by former defense secretary Mike Espy says that Trump looked for a war to start, to aid his chances.

EC Questions in the 2020 Election

No feared problem arose. There was a record turnout, highest percentage of eligible voters since 1900.

Five states (Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin) flipped from Trump in 2016 to Biden in 2020, making Biden the winner.

The President made (and still makes) sweeping claims that he won those 5 plus Nevada; that they were stolen by massive voter fraud.

EC Questions in the 2020 Election

The Trump campaign claimed voter fraud everywhere, but those 5 states were the main focus of efforts to reverse the election after the fact for two reasons.

The vote for Biden was close in all (as it was for Trump in 2016), and all 5 had Republican legislatures.

Trump's plans usually added Nevada as state 6. Its vote was also close, but it had a Democratic legislature.

EC Questions in the 2020 Election

Trump's post-election plans were:

1. To flip those states to him, or
2. To disqualify their votes to give him a majority of the rest, or
3. to throw the election into the House of Representatives, where a majority of state delegations (at least 26) had Republican majorities. The 7 smallest states had only one Representative (5 R, 2 D).

Despite Biden's popular vote margin of over 7 million.

EC Questions in the 2020 Election

Tactics were a series of actions based on the fraud claims plus his lawyers' claims of illegal but not fraudulent voting.

The most straightforward move was lawsuits that sought to overturn elections in the 6 states. Although the fraud claim had a lot of press, it was not even mentioned in most of the 62 lawsuits filed in state and federal courts.

The lawsuits claimed that officials in the 6 states had made pandemic adjustments to voting rules that were contrary to state law and thus to the lawful way to choose electors. They had made voting too easy.

EC Questions in the 2020 Election

The most dramatic case was filed by Texas and other red states against the states contested by Trump as an original action in the Supreme Court.

The Supremes are the trial court for some lawsuits by one state against another. But they have discretion whether to accept a case. In practice they usually limit the cases taken to specified categories such as boundary and water-rights disputes.

The Court rejected the Republican states' case for lack of standing.

EC Questions in the 2020 Election

“FRIDAY, DECEMBER 11, 2020 ORDER IN PENDING CASE 155, ORIG. TEXAS V. PENNSYLVANIA, ET AL.

The State of Texas’s motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections.

“Statement of Justice Alito, with whom Justice Thomas joins: In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction.”

EC Questions in the 2020 Election

Except for a minor ruling on late ballots in Pennsylvania (too few to affect the result, and the votes were thrown out before the courts ruled; not a fraud case), all 62 lawsuits failed.

That is, federal and state courts decided that none of the states had violated state or federal law in any way other than the Pennsylvanian late ballots case.

Lawsuits to contest elections are legitimate when pursued in accordance with legal ethics. Most of these were, but some involved fraudulent evidence. **Q**

EC Questions in the 2020 Election

Another move by the Trump campaign was to urge the Republican legislatures of the 5 states, after the election, to use their power over appointment of electors to replace Biden electors with Trump electors based on his fraud and illegal voting claims. None did.

Trump also pressured the Justice Department to back his fraud claims and act against the 6 states' electors. AG William Barr declined and resigned. His successor Jeffrey Rosen also declined. But Jeffrey Clark, a Trump loyalist in a lower ranking office, took actions in the name of the Department to back Trump. When exposed, he resigned.

EC Questions in the 2020 Election

The most ambitious tactic was to subvert the event to count the electoral votes. The 12th Amendment says 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.”

The Senate President is the Vice President if present or the President Pro Tem. if not. In 2020-21, Vice President Mike Pence or Iowa Senator Charles Grassley.

The date for this event is specified as January 6 in an act of Congress. Even if it is a Sunday.

EC Questions in the 2020 Election

Over the years, Congress passed a number of laws to govern the EC. One provision specifies the November date for our national elections.

Another fixes a date in December, about six weeks later, for EC delegates to convene in each state capital and cast their votes. It has detailed rules for recording the votes and sending certificates of results to Washington.

As we noted, it sets January 6 as the date for Congress to convene and count the votes. And if no candidate gets a majority, the House chooses the president with each state casting one vote.

EC Questions in the 1876 Election

A more controversial law was passed because of the contested election in 1876.

Different officials in three, formerly Confederate, states sent certificates of opposing slates of electors to Congress, and a fourth state (Oregon) included one vote that may have been chosen contrary to state law.

The outcome depended on who would get the 20 contested votes.

EC Questions in the 1876 Election

Returns from the three southern states involved disqualifications of many Democratic votes by Republican governors on one side and violent suppression of Black Republican voters on the other—the Ku Klux Klan was hard at work.

Congress appointed a commission of 15 to determine who should get the 20 votes. It was supposed to be politically balanced but after some maneuvers had an 8-7 Republican majority.

EC Questions in the 1876 Election

By 8-7 votes, the commission gave all contested electors to Republican candidate Rutherford Hayes. He needed all 20 to win 185-184. Hayes defeated Samuel Tilden, so far the only candidate to win a popular majority vote but lose the election.

There would have been serious protests and violence, maybe insurrection, but for a deal made before the commission's votes were announced. Republicans agreed to end Reconstruction and remove the Army from the South. In return, Democrats agreed to accept Hayes' election. **Q**

The 1887 Statute

In 1887, Congress passed the Electoral Count Act (ECA) , a statute intended to address the 1876 difficulties. It includes two controversial provisions, one involved in the 2020 election.

The first provides that states must decide any state law contest about choosing electors at least 6 days before the December date when electors meet and vote.

The 1887 Statute

The second specifies the procedure for the EC vote count ceremony on Jan. 6. It requires the Senate president to open the envelopes containing states' certificates in alphabetical order. And for the votes to be counted.

Then s/he must “call for objections, if any.” Objections must be in writing and signed by at least one Senator and one Representative.

Objections must briefly state reasons to challenge the certificate attacked. When a signed objection is made, the two houses retire to debate it and vote on it. Separately, one state at a time.

The 1887 Statute

Both houses can concurrently reject a contested state certificate if they agree that a vote or votes have not been “regularly given” based on rules in another section of the statute.

If two plausible slates are presented to Congress as occurred in 1876, the two houses can decide which is lawful. Or perhaps that neither is.

The provision allowing Congress to reject state election certificates had to be considered in the Trump campaign’s plan in 2020 because it specified how the ceremony should be conducted.

EC Questions in the 2020 Election

But the campaign knew that it could not rely on ECA because the Democratic House would not vote to reject Biden certificates, and the Republican Senate might not as well (it did not in practice).

Moreover, the statute makes the only legal objections to a certificate that it was not provided in the proper form and manner by the appropriate authority of a state according to state law.

None of the contested state certificates had that kind of defect—assuming that Congress obeyed the law or the courts enforced it.

EC Questions in the 2020 Election

Trump's main plan to subvert the Jan. 6 event was a six-point scheme reportedly assembled by John Eastman, one of his lawyers, at the time a visiting U. of Colorado scholar.

The first stage was for the Republican Party in contested states won by Biden to create rival slates of Trump electors with fake election certificates and submit them to the Archivist of the United States, the official designated to receive state certificates of electoral votes.

In December, this was done in 5 states—Arizona, Georgia, Michigan, Nevada, and Wisconsin.

EC Questions in the 2020 Election

Fake documents were also filed from Pennsylvania and New Mexico, but these GOP counterfeits were referred to as “electors in waiting” in case court challenges to Biden’s win were successful.

The certificates from the other 5 states falsely claimed that the pro-Trump electors were the rightful electors.

Trump’s lawyer Rudy Giuliani oversaw preparation of the certificates. Prosecutors are considering whether certificates in the 5 states were criminal forgeries. State bars are considering ethics charges.

EC Questions in the 2020 Election

The first move planned for Jan. 6 was for VP Pence (or Sen. Grassley) to open the two Arizona envelopes and announce that there were competing certificates for the state, so he would defer a decision on how to count the state's vote until other states had been counted.

This would depart from the procedure required by ECA. The Trump lawyers (in common with many scholars) would claim that the statute's rules are unconstitutional.

Pence would announce the same deferral for votes from the other 6 states that had rival Republican certificates.

EC Questions in the 2020 Election

At the end, Pence would announce that because of disputes about the 7 states, there were no electors validly appointed by them.

Thus the total number of “electors appointed”—the language of the 12th Amendment—would be 454. A “majority of the electors appointed” would therefore be 228. There would at that point be 232 votes for Trump, 222 votes for Biden. Pence would gavel Trump to be re-elected

EC Questions in the 2020 Election

Democrats might object as soon as Pence departed from the ECA procedure. The written Eastman plan did not cover this possibility. Presumably it would have been for Pence as presiding officer to rule them out of order.

Unclear what would have followed, but no clear remedy for the Dems.

Democrats would certainly object at the announcement that votes from the 7 states did not count so that Trump won. The Eastman plan assumed that the Dems would argue that 270 votes were needed to win.

EC Questions in the 2020 Election

That highlights an ambiguity in the constitutional text. Must the denominator defining an EC majority be all possible electoral votes, 538, or only validly cast votes?

Eastman's plan covered both possibilities. If 270 are needed to win, Pence would say, fine. Pursuant to the 12th Amendment, no candidate achieved the necessary majority. That sends the matter to the House, where the "the votes shall be taken by states, the representation from each state having one vote" Republicans controlled 26 or 27 of the state delegations, the majority needed to win that vote. Trump is re-elected.

EC Questions in the 2020 Election

Eastman's plan had a complex alternative to deal with the possibility that Congress would force Pence to follow the ECA plan for the two houses to address objections to each state.

It depended on claiming that the ECA plan was invalid. Pence would suspend the count while Republican state legislators considered and presumably backed the Trump claims of fraud.

The plan specified that Pence should assume these powers without asking Congress or a court to approve them.

How to decide EC Contests

Democrats could have sought judicial review at any stage of the Jan. 6 Eastman plan and would certainly have done so at some point.

The Trump campaign planned to argue that the courts, ultimately the Supreme Court, should decline to hear the case based on a constitutional doctrine under which the Court sometimes defers to Congress or the Executive.

That would leave power in the hands of the Vice President—to reelect himself! Trump said that the Supreme Court justices he appointed would back him up.

EC Questions in the 2020 Election

Pence had no power to invalidate under the words of the Constitution or the statutes. He told the President that he could not reject the certificates and did not try to do so. Although he still says the election was stolen by fraud.

President Trump knew Pence's decision before he urged his crowd to march on the Capitol, saying "If Mike Pence does the right thing, we win the election. . . . He has the absolute right to do it . . . All Vice President Pence has to do is send it back to the states to recertify and we become president." **Q**

EC Questions in the 2020 Election

How did the count proceed?

Apart from the Eastman scheme, plans were made for formal objections to be filed to certificates from the 6 states (not including New Mexico) by Trump-friendly members of Congress. Signed by at least one senator and one representative, as the 1887 ECA statute requires.

State electors are counted in alphabetical order, so Arizona was the first contested state. Pence followed ECA rules and called for objections.

EC Questions in the 2020 Election

A signed objection to the state's Biden certificate was filed, and the two houses retired to debate it.

At that point, the mob attacked the Capitol. The members and Vice President retreated for 6 hours until order was restored.

The mob attack scaled back the plan for objections. After Congress returned and rejected objections to Arizona's certificate, objections by House members to certificates from Georgia, Michigan, Nevada, and Wisconsin lacked a Senator. A joint objection put Pennsylvania's to a vote.

EC Questions in the 2020 Election

In the votes on Arizona and Pennsylvania, 139 Representatives voted to reject at least one Biden certificate as did 8 Senators. Higher numbers had planned to vote against, but some backed off after the attack.

All without any proven or plausible legal basis in the Constitution or statutes.

Eastman is reported to be continuing efforts to reverse the votes in the 5 swing states and flip the election to Trump. Hard to know if this is serious law or just political theater for the Trump faithful.

How to decide EC Contests

For the future, another election could involve problems such as those in 1876-77 or 2020-21 or something else.

The constitutional text says that the President of the Senate opens the certificates, and if no candidate gets a majority electoral vote, the House chooses the President among the top three, each state with one vote.

The only text between those says, in passive voice, that “the votes shall then be counted.” By whom? With what authority? Can a state’s certificate be rejected? By whom? On what grounds? What if there are competing certificates as in 1876?

How to decide EC Contests

The 1887 Electoral Count Act claimed implied power for Congress to resolve these issues, and no Congress since has repealed that scheme.

Many scholars think the two rules in the 1887 statute are invalid because the Constitution gives Congress no authority to decide whether a state's certificate is lawful, nor to cut off a state's authority to decide state law issues about electors 6 days before the electors meet.

Ironically, the Eastman plan agreed that the statute is unconstitutional.

How to decide EC Contests

If the statute is unconstitutional, how can validity of certificates be determined if there is a plausible dispute as in 1876-77?

And how should an implausible attack like 2020-21 be handled?

A key constitutional phrase is “be counted”—that is, Congress is empowered to count votes but not to reject certificates or resolve disputes.

How to decide EC Contests

All scholars (except Eastman?) think there must be judicial review, whether of a decision by Congress under the 1887 statute, or by the VP, or on referral by the VP.

Our modern answer to most legal disputes is judicial review. Most provisions of the original Bill of Rights are also stated in passive voice. Over time, we devised our extensive system for their judicial enforcement—mostly in the last 90 years or so.

Judges can be partisan but are much less likely to be than are politicians. As 2020-21 events showed.

How to decide EC Contests

At all levels of government, state and federal, we rely on judicial review much more than in 1876 and 1887; even more dramatically than in the Nation's early years, when our form of judicial review was being invented.

Today's courts are better trained and equipped and can act more promptly (on Zoom?) than in the 19th Century.

But courts are reluctant to intervene in political fights. Congress should specify judicial review of these questions. This is important because some justices take the view that courts can hear only what Congress says they can.

EC Questions in the 2020 Election

In January of this year, former President Trump admitted in a written statement that he wanted Mr. Pence to “overturn the election” and referred to efforts to amend ECA to prevent something like that from ever happening.

“If the Vice President had ‘absolutely no right’ to change the Presidential Election results in the Senate, despite fraud and many other irregularities, how come the Democrats and RINO Republicans, like wacky Susan Collins, are desperately trying to pass legislation that will not allow the Vice President to change the results of the election?”

EC Questions in the 2020 Election

As Trump indicated, Congress is considering bills to amend ECA to address these issues.

As he also said, Senator Collins is taking the lead.

Unfortunately, the issue is not high on most members' agendas.

Jon Blake is actively involved in the efforts to amend ECA. He will explain these is our follow-up session on June 21.

EC Questions in the 2020 Election

To finish, note that in the April election for president of France, the losing candidate was a far-right populist.

Who conceded her loss on election night without any claim of voter fraud. **Q**