

THOMAS JEFFERSON COUNTS HIMSELF INTO THE PRESIDENCY

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INTRODUCTION

“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.”¹

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¹ U.S. Const. art. II, § 1, cl. 3.

We last glimpsed the dangers lurking in these lines during the electoral crisis of 2000. As sitting Vice-President, Al Gore was the President of the Senate on January 6, 2001. So it fell to him to “open all the Certificates” and preside over the vote count.

What if there had still been a dispute over the electoral votes from Florida? Consider the following scenario: After much *Sturm und Drang*, the Florida courts decide that Gore is the winner, but the Florida legislature grants the state’s twenty-five electoral votes to George W. Bush. These rival authorities transmit competing electoral college certificates to Washington D.C., ready to be opened when the moment of truth arrives. Pursuant to constitutional command, the Vice-President “open[s] all the Certificates.” What happens next?

The constitutional text does not speak clearly. It authorizes the Vice-President to “open” the certificates but leaves the extent of his further powers hidden in the passive voice: “and the Votes shall then be counted.”

These textual penumbras can be enlightened by precedents that have gone largely unnoticed for two centuries: the electoral vote disputes of 1796 and 1800. On these two occasions, John Adams and Thomas Jefferson found themselves in Al Gore’s position. As Vice-Presidents in the preceding administration, they were presiding over a vote count in which they were leading candidates, and in both instances, they used their power to make rulings that favored their own election as President of the United States. This Article will present the first in-depth treatment of these precedents,² emphasizing the dramatic moment when Thomas Jefferson made a questionable ruling that enhanced his chances of becoming the next President of the United States, rather than John Adams or Charles Cotesworth Pinckney.

Adams’s decisions in 1797 were perfectly sensible but frame an analysis of Jefferson’s problematic conduct the next time around. Vermont had cast four electoral votes for Adams and his running mate Thomas Pinckney, but the legality of the state’s action had been publicly impugned and privately questioned by newspapers and politicians from both political parties.

² See *infra* note 5.

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When Adams opened the formal certificates from Vermont they seemed completely regular, containing no hint of legal deficiency. Despite their facial perfection, Adams provided members of Congress a formal opportunity to challenge Vermont's four electoral votes before announcing that he had won the election by three votes over Jefferson. He declared himself President only after the Republicans remained silent.

Thomas Jefferson was remarkably aggressive as President of the Senate. Georgia's certificate—granting four electoral votes to Jefferson and four electoral votes to Aaron Burr—was constitutionally defective on its face, a deficiency that was announced on the floor of Congress and reported by leading newspapers of the day.³ To resolve all doubts, we have located Georgia's certificate in the National Archives, and it does indeed reveal striking constitutional irregularities. Nevertheless, and in contrast to Adams, Jefferson failed to pause before counting Georgia's four electoral votes into the Republican column, declaring the final vote as if nothing were amiss.

This ruling had serious consequences. With the Georgia votes included, the official tally was Jefferson seventy-three, Burr seventy-three, Adams sixty-five, Charles C. Pinckney sixty-four, and John Jay one. To resolve this tie, the two leading candidates went to their famous runoff in the House, which was only resolved in Jefferson's favor on the thirty-sixth ballot.

Had Georgia's ballot been excluded, the vote count for Jefferson and for Burr sinks to sixty-nine each, and this would have made a big difference under the electoral ground rules framed in Philadelphia. As we will explain,⁴ these rules would have admitted all five candidates into a runoff in the House. Including Adams, Pinckney, and Jay in the runoff would have dealt a serious blow to Jefferson's prospects. The Federalists would no longer have been stuck with Aaron Burr as the only alternative to their archenemy Jefferson. They could have rallied around a much more attractive "compromise" candidate: Charles Pinckney of South Carolina. Without the

³ For further discussion of these matters, see *infra* notes 52–56 and accompanying text.

⁴ See *infra* note 30 and accompanying text.

decisive use of his power as President of the Senate, Jefferson might never have become President of the United States.

This point was appreciated by contemporaries, but has dropped out of modern constitutional consciousness.⁵ After bringing this forgotten precedent into public view, we will consider its potential relevance for future Electoral College crises, using a variation on *Bush v. Gore*⁶ as an analytic platform.

I. ORIGINAL MISUNDERSTANDINGS

This Part sets the stage for Jefferson's moment of truth as President of the Senate in 1801. Why did the Framers choose the sitting Vice-President to preside over the vote count in the first place? What were the rules, and animating ideals, of the Electoral College prior to enactment of the Twelfth Amendment?

A. Founding Blunders

The vice-presidency gave the Framers a lot of problems. They believed that a backstop was needed for the President, but they

⁵ The Vermont problem is mentioned in passing in a variety of sources. J. Hampden Dougherty, *The Electoral System of the United States* 33–34 (1906); 2 John J. Lalor, *Cyclopedia of Political Science, Political Economy, and of the Political History of the United States* 63, 68 (New York, Charles E. Merrill 1893); David A. McKnight, *The Electoral System of the United States* 65, 260, 290 (Philadelphia, J.B. Lippcott & Co. 1878); 1 Edward Stanwood, *A History of the Presidency from 1788 to 1897*, at 51–52 (Charles Knowles Bolton ed., Augustus M. Kelley 1975) (1898); 16 *The Papers of James Madison* 152, 429 n.2 (J.C.A. Stagg et al. eds., 1989) [hereinafter *Madison Papers*]; 2 *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776–1826*, at 959 n.23 (James Morton Smith ed., 1995) [hereinafter *Smith*]; C.C. Tansill, *Congressional Control of the Electoral System*, 34 *Yale L.J.* 511, 516 (1925); L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 *Dick. L. Rev.* 321, 326 n.23 (1961). Professor Manning Dauer is the only scholar to explore the incident in some depth, scrutinizing some, but not all, of the reports about the Vermont issue. See Manning J. Dauer, *The Adams Federalists* 103–06 (1953).

Jefferson's decision in 1800 has received even less attention, even though the legal problems were more acute and the stakes were much higher. There are only a few mentions of the Georgia incident. See House Spec. Comm., *Counting Electoral Votes*, H.R. Misc. Doc. No. 44-13, at 30 (1877) [hereinafter *Counting Electoral Votes*]; Dougherty, *supra*, at 35–36; Wroth, *supra*, at 326 n.23. These various sources largely cite one another. Vasani Kesavan mentions the issue more recently, citing to the preceding sources as well as to Professor Ackerman's unpublished manuscript, *America on the Brink*. Vasani Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 *N.C. L. Rev.* 1653, 1656 n.3, 1707 & n.230 (2002).

⁶ 531 U.S. 98 (2000).

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were hard-put to figure out what to do with him while the President was alive.⁷ For want of anything better, they assigned him the largely ceremonial office of President of the Senate.

But, alas, this office was not entirely ceremonial, and the Framers simply did not think through the full ramifications of this point. They recognized that the Senate would generate tie votes from time to time, and expressly granted the President of the Senate a tie-breaking vote.⁸ They failed, however, to consider other moments when the Vice-President might wield real power.

Their most obvious blunder involves impeachment proceedings. The Founders recognized the absurdity of allowing the Vice-President to preside over the Senate when the President was on trial for “high Crimes and Misdemeanors.”⁹ He was inevitably an interested party in this affair, rising to the presidency if the incumbent were convicted. Given his personal stake in the matter, it was inappropriate for him to preside over the trial as President of the Senate, and so the text explicitly designates the Chief Justice as the presiding officer.¹⁰

They failed, however, to consider that the Vice-President might also be impeached. Rather than designating the Chief Justice to preside over these trials as well, the text leaves this task to the President of the Senate.¹¹ Read literally, the Constitution seems to

⁷ We explain later why the vice-presidency was a functional imperative, given the Framers’ ingenious voting system. See *infra* notes 26–29 and accompanying text.

⁸ U.S. Const. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”).

⁹ U.S. Const. art. II, § 4 (authorizing “remov[al] from Office” of “[t]he President, Vice President and all civil Officers of the United States . . . on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors”).

¹⁰ U.S. Const. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

¹¹ Article I, § 3, clause 4 of the United States Constitution designates the Vice-President as “President of the Senate,” while Article I, § 3, clause 6 explicitly designates the Chief Justice as presiding officer “[w]hen the President . . . is tried” in an impeachment, yet does not expand this exception to include vice-presidential impeachments. It is true, of course, that Article I, § 3, clause 5 authorizes the Senate to choose other officers, including a President Pro Tem, and implicitly authorizes the latter to preside “in the absence of the Vice President.” This provision would allow the Vice-President voluntarily to vacate his place at the podium during his impeachment trial, but nothing in the text requires this. Even if the Vice-President passed the gavel

authorize the Vice-President to preside over his own impeachment.¹²

Our present problem reflects the same sort of technical incompetence. Although the Vice-President may be perfectly acceptable as a ceremonial leader of the Senate, he is a natural candidate in the next presidential contest. It is an obvious mistake to designate him as the presiding officer over the electoral vote count. The temptations for abuse of power are too great—especially since the textual description of the vote count procedure is so inadequate. Even if the text had been elaborated with great precision, it was still wrong to give one candidate any sort of strategic advantage over his rivals. The designation of the President of the Senate as presiding officer was nothing more than a thoughtless extension of a ceremonial post to a position of power.

If anyone had focused on the matter, the Convention could have cured the lapse easily. There was an obvious solution: The Constitution expressly replaced the Vice-President with the Chief Justice when it comes to presiding over the Senate during presidential impeachments. Just as the Chief Justice displaced him on these occasions, he could have replaced him at the electoral vote count.¹³

to the President Pro Tem, that senator could be a blatant partisan who might use his power either to protect or to destroy the incumbent. Rather than allowing the President Pro Tem to intervene, the Framers should have placed the Chief Justice in control of vice-presidential, as well as presidential, impeachments.

¹²We are certainly not the first to make this point. See Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* 64–65 (1996); Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 *U. Pa. L. Rev.* 1341, 1357 & n.72 (1983); Stephen Carter, *The Role of the Courts in Separation of Powers Disputes*, 68 *Wash. U. L.Q.* 669, 675 (1990); Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 *Const. Comment.* 245, 245–46 (1997); Richard M. Pious, *Impeaching the President: The Intersection of Constitutional and Popular Law*, 43 *St. Louis U. L.J.* 859, 862 n.15 (1999). But see Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 *Stan. L. Rev.* 113, 122 n.59 (1995) (arguing that general conflict-of-interest principles prevent Vice-Presidents from presiding over their own impeachment trials); John D. Feerick, *The Vice-Presidency and the Problems of Presidential Succession and Inability*, 32 *Fordham L. Rev.* 457, 462 & n.30 (1964) (noting that “[p]resumably” the President Pro Tem of the Senate would preside).

¹³The Founders had demonstrated a general awareness of the problems of asking an official to serve as a judge in his own case. See, e.g., *The Federalist No. 10*, at 47 (James Madison) (Clinton Rossiter ed., 1999) (“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”).

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But the Convention never spotted this problem, or its obvious cure, and the forces of intellectual inertia propelled the President of the Senate into an unsuitable role. This failure is understandable, if not precisely excusable. The Convention spent an enormous amount of time on methods for selecting the President, repeatedly failing to find a solution that commanded enduring support. Hoping to get out of Philadelphia, the delegates finally pushed the problem onto the docket of a special committee, chaired by David Brearley, charged with solving previously irresolvable issues.¹⁴ Despite the pressures of time, the delegates did spend most of two days—September 5 and 6, 1787—on the Brearley proposals,¹⁵ but two days were not nearly enough to confront all the problems involved in their novel design. There were many larger questions at stake than the role of the President of the Senate. With their eyes wandering to the exits, the Framers never focused on the absurdity of their job assignment.¹⁶

So our problem arises as the result of technical incompetence at the Founding—which does not make it any less of a problem.

B. A World Without Parties

To set the stage further, consider the larger structure within which John Adams and Thomas Jefferson were operating at the moment of the vote count. We must return to the original understanding of the Electoral College before the enactment of the Twelfth Amendment. This requires something more than the mas-

¹⁴ Called the “Committee of Postponed Parts,” the Brearley group was selected on August 31, 1787. 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 280 (Jonathan Elliott ed., J.B. Lippincott Co. 1941) (1836) [hereinafter *Elliot*]. It was composed of eleven elected members, one from each participating state. *Id.*

¹⁵ 2 *The Records of the Federal Convention of 1787*, at 505–31 (Max Farrand ed., 1937) [hereinafter *Farrand*].

¹⁶ By far the best treatment of the Electoral College is provided by Professor Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 *J. Am. Hist.* 35 (1986). Slonim is particularly effective in demonstrating how the Electoral College cleverly solved a host of key problems at the time—most notably (1) enabling the small states and the slave states to extend to the presidency the disproportionate voting power they had won previously in the design of Congress, while (2) allowing the Convention to accommodate separation-of-powers principles. *Id.* at 51–58. A discussion of these dimensions is beyond the scope of this Article.

tery of a few antiquated rules. These rules were based on an entirely different vision of American politics, and we will not get very far without grasping how this Founding vision differs from our own.

For modern Americans, the two-party system is a pillar of democratic life. Fair competition between political parties is viewed as the great engine for disciplining despotic power. For us, an election without party competition is no election at all.

This was not so for the Founders. They equated party with faction, and thought parties an unmitigated evil. Worse yet, they did not reach this judgment after soberly considering the democratic case for party competition. Nothing resembling the modern party system had yet emerged as a historical reality.¹⁷

Nor did classical republican theory encourage the Founders to glimpse the future that lay just over the horizon. The great republican writers of the past—Aristotle and Cicero, Machiavelli and Harrington—presented very different visions of the well-ordered state. They were alike, however, in one crucial respect: Each equated party division with factional strife and deemed it the great nemesis of civilization. Republics died when leaders factionalized, with each cabal placing its narrow interests ahead of the public good. The result was an escalating cycle of instability and incivility, culminating in the despotic ascendancy of a Caesar or a Cromwell. The fundamental challenge was somehow to induce leaders to put the public good ahead of their own—and to sustain the unity of the Commonwealth against the ever-present dangers of factional disintegration.¹⁸

These classical teachings resonated with the Founders' revolutionary experience. During their struggle against England, political division meant weakness before the imperial foe and bordered on betrayal: We will all hang separately if we do not hang together. This attitude, once formed and battle-hardened, was difficult to transcend.

¹⁷ Even in England, the words "Whig" and "Tory" referred largely to extended groupings of elite families, locked in factional struggle for power and patronage. L.B. Namier, *The Structure of Politics at the Accession of George III* (1929). For an appreciation of Namier as a political historian, see Linda Colley, *Lewis Namier* 46–71 (1989).

¹⁸ For a penetrating survey of eighteenth-century opposition to the notion of political parties, see Richard Hofstadter, *The Idea of a Party System* 1–39 (1969).

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Even Madison did not attempt to do so. His work at the Constitutional Convention and in *The Federalist* linked party with faction, condemning it as evil.¹⁹ Madison's aim was to use Enlightenment political science to design a better constitutional machine to constrain the beast.²⁰ Rather than organizing a sound two-party system, the Madisonian republic tried to create a space for leaders to transcend the rule of faction altogether. The Constitution's basic tactic is divide-and-conquer. By creating government on a continental scale, the Framers hoped to make it difficult to organize large parties: Rather than one or two continental groupings, there would be a host of self-interested factions pushing and shoving for power. This labile structure would make it possible for patrician civic leaders like George Washington to rise above the fray and govern in the public interest. Rather than draft a Constitution for a *two-party democracy*, the Framers sought to organize a *non-party republic*.²¹

Though this notion is strange to us, the original design of the Electoral College makes no sense without it. For us, it seems only natural for the major parties to take on the primary burden of selecting the leading candidates for the presidency, but this was a non-starter for the Framers. Rather than delegating this task to political parties, they hoped to design a scheme by which great statesmen would transcend the dynamics of faction. The model for such a leader, of course, sat before them as the presiding officer of the Constitutional Convention: George Washington. The challenge was to construct a system that would enable others like him to rise to the top.

The problem was made more acute by the nature of eighteenth-century society. Politics, much more so than now, was emphatically local. Commercial and landed elites might compete for attention in each of the states, but few local leaders would have the opportunity to prove their mettle on a national basis.

¹⁹ For a general discussion on the role of faction at the time of the Founding, see Gordon S. Wood, *The Creation of the American Republic 1776–1787*, at 559–60 (1969).

²⁰ See 1 Bruce Ackerman, *We the People: Foundations* 165–99 (1991).

²¹ Hofstadter, *supra* note 18, at 40–73; Daniel Sisson, *The American Revolution of 1800*, at 23–69 (1974).

As the Founders well understood, the war against England provided the revolutionary generation with exceptional opportunities to project themselves onto the continental stage. By virtue of their service in the patriots' army, Washington and others had demonstrated their republican virtue—or lack of it—to an attentive audience in all thirteen states. The difficulties of wartime coordination also required civilian politicians to engage in extraordinary levels of interstate interaction as well as mutual assessment. But in ordinary times, would there be a steady supply of such “Continental Characters”?²²

The more optimistic members of the Convention predicted that “Continental Characters will multiply as we more & more coalesce,”²³ but others were not so sure.²⁴ Unless steps were taken, each state's electors might join together and vote for a favorite son, leading to perplexity when all the votes were counted. This is where the Founders tried to economize on the short supply of true leaders through clever institutional engineering. Why not give *two* votes to each elector, but allow him to cast only one for a citizen from his own state? As Gouverneur Morris explained, “one vote is to be given to a man out of the State, and as this vote will not be thrown away, the votes will fall on characters eminent & generally known.”²⁵

The vice-presidency became a functional imperative at this stage in the constitutional design. If the Framers had trusted electors to ignore local favorites, they might well have dispensed with the of-

²² 2 Farrand, *supra* note 15, at 501 (remarks of James Wilson, Sept. 4, 1787).

²³ *Id.* (remarks of James Wilson, Sept. 4, 1787); see also *id.* (remarks of Abraham Baldwin, Sept. 4, 1787) (discussing how “increasing intercourse among the people of the States, would render important characters less & less unknown”).

²⁴ George Mason was the most emphatic, asserting that a winner would fail to be selected “nineteen times in twenty.” *Id.* at 500 (remarks of George Mason, Sept. 4, 1787); see also *id.* at 512 (remarks of George Mason, Sept. 5, 1787).

²⁵ *Id.* at 512 (remarks of Gouverneur Morris, Sept. 5, 1787). Morris was Pennsylvania's representative on the Brearley Committee of Postponed Parts, which was responsible for the Electoral College plan but did not make a formal report in support of its recommendations. Since Morris's arguments mesh so tightly with the Committee's proposal, it is likely that they were broadly shared, especially since analogous points were made earlier in the Convention by other members of the Brearley Committee. See *id.* at 113 (remarks of Hugh Williamson, July 25, 1787); *id.* (remarks of Gouverneur Morris, July 25, 1787); *id.* at 114 (remarks of James Madison, July 25, 1787).

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ficie.²⁶ Instead of creating a do-nothing (and politically mischievous) President of the Senate, they could have responded to the problem of presidential death or resignation by simply designating an official—perhaps the Secretary of State, perhaps the Speaker of the House—to serve as acting President until a special election could be held. In fact, this was the method used by the Second Congress to resolve the succession problem if both the President and Vice-President died or resigned.²⁷

The Framers' ingenious two-vote system, however, invited the creation of two distinct offices. Without the vice-presidency, electors might leave one of their ballots blank and vote the other for a native son. But with the second spot in existence, the electors would hardly let it go to waste. One can imagine the thought process: "Of course George Washington is an out-of-stater, but I might as well vote for the best man since the Constitution requires me to move beyond our favorite sons. And in any event, I did get a chance to cast a ballot for our regional favorite, the Honorable John Q. Squire, who might even have a chance to be Vice-President!" Although most Vice-Presidents would likely waste their time in office as senatorial figureheads, this was beside the point. The underlying goal was to construct a clever system for selecting a *President* with a broad-based reputation for political virtue. When Elbridge Gerry (himself a future Vice-President) expressed a desire to eliminate the office, another delegate—Hugh Williamson of North Carolina—responded that "such an officer as

²⁶ See generally Amar & Amar, *supra* note 12, at 113–26 (arguing that Cabinet officials should follow the Vice-President in presidential succession). In the context of our argument, the Founders could have saved the step of creating a Vice-President and gone straight to Cabinet succession.

²⁷ The first succession statute contemplated a special election in such circumstances, designating the President Pro Tempore of the Senate to serve in the interim. Act of March 1, 1792, ch. 8, §§ 9–10, 1 Stat. 239, 240–41 (repealed 1886). In 1886, Congress passed a law removing the President Pro Tempore and the Speaker of the House from the line of succession, and placed members of the Cabinet in the line of succession. Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1 (repealed 1947). This statute also allowed Congress to decide whether to call a special election to pick a new President. *Id.* In 1947, Congress passed a new law redesigning the line of succession after the Vice-President, which also eliminated all authority for a special election. See 3 U.S.C. § 19 (2000). The Twenty-fifth Amendment, effective in 1967, provides a procedure for replacing the Vice-President in a rapid fashion, hopefully rendering unnecessary the invocation of the provisions of the 1947 statute. U.S. Const. amend. XXV.

vice-President was not wanted. He was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time.”²⁸

The original design had a second clever feature. Suppose, as was the case in both 1796 and 1800, that the College contained 138 members who cast 276 votes. Under the 1787 Constitution, the top choice could become President even if his name appeared on only *seventy* of the 276 votes.²⁹ The point of the Enlightenment machine was to construct the impression that the President was a man of truly national character even if the pickings were pretty slim. A man could become President when he was the second choice of a bare majority of electors.

Even this clever expedient could sometimes fail to produce the simulacrum of a George Washington. Politics might become so state-centered that no candidate could gain even a minimal level of national support. How to proceed?

The Brearley Committee proposed a back-up procedure under which the President would be selected by the Senate from the top five vote-getters in the Electoral College.³⁰ But the Senate had already been granted many special powers, and granting it still more threatened to give the entire system an “aristocratic complexion.”³¹ This objection proved persuasive, leading to the most peculiar voting system known to our constitutional system. The Convention shifted the locus of authority from the Senate to the House, but retained the Senate’s principle of equality in state voting power. For

²⁸ 2 Farrand, *supra* note 15, at 537.

²⁹ U.S. Const. art. II, § 1, cl. 3 (“The Electors shall meet in their respective States and vote by Ballot for two Persons. . . . The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed. . . .”) (amended 1804). The Twelfth Amendment, effective in 1804, changed this rule. U.S. Const. amend. XII (“The Electors shall meet in their respective states, and vote by ballot for President and Vice-President . . . they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each The person having the greatest number of votes for President, shall be the President. . . . The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed.”).

³⁰ 2 Farrand, *supra* note 15, at 494.

³¹ *Id.* at 524 (remarks of Hugh Williamson, Sept. 6, 1787); see *id.* at 527 (remarks of Roger Sherman, Sept. 6, 1787); *id.* (remarks of George Mason, Sept. 6, 1787).

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presidential purposes only, each state delegation in the House would cast a single vote—Delaware’s single representative and Virginia’s large delegation counting equally³²—and the balloting would proceed until a candidate received the votes of an absolute majority of the states.³³

This transformation of the people’s House into a state-centered assembly may seem odd to us, but it made quite a bit of sense within the overall Founding framework. To put the point in numerical terms: If no single candidate garnered as many as seventy of the 276 votes cast by 138 electors, this would indicate that American politics had taken an emphatically decentralizing turn. As a consequence, should not the back-up mechanism likewise decentralize by giving an equal vote to each state in the Union?

Perhaps, though, strong nationalists like Madison and Hamilton were not convinced. They tried to eliminate the back-up procedure, or at least reduce the frequency of its use.³⁴ These efforts were successfully resisted by the small states, which feared that electors from three or four large states might otherwise be in a position to dictate the presidential choice when a consensus candidate

³² In 1800, for example, Virginia’s population of 807,557 (and its twenty-two representatives) and Delaware’s population of 64,273 (and its one representative) would each be afforded a single vote in the House runoff. U.S. Census Bureau, *Historical Statistics of the United States: Colonial Times to 1957*, at 13, 693 (1960).

³³ The Senate retained the power to select a Vice-President. U.S. Const. art. II, § 1, cl. 3 (“In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.”) (amended 1804). The Twelfth Amendment altered this scheme. U.S. Const. amend. XII (“The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President.”).

³⁴ 2 Farrand, *supra* note 15, at 513 (remarks of James Madison, Sept. 5, 1787) (“Mr Madison considered it as a primary object to render an eventual resort to any part of the Legislature improbable.”). Later in the day, Madison and Williamson moved to amend the Brearley proposal to enable the Electoral College to name the President if “r of the Electors should vote for the same person.” *Id.* at 514. In 1800, this would have permitted a presidential candidate to gain office on the basis of forty-six out of the 276 ballots cast by the electors. Hamilton would have gone further, eliminating the back-up procedure entirely and awarding the presidency to the Electoral College winner regardless of the number of his electoral votes. *Id.* at 525 (remarks of Alexander Hamilton, Sept. 6, 1787).

was lacking.³⁵ If no national figure could gain one of the two places on a majority of the electors' ballots, the small states insisted on a runoff in the House in which each state counted equally. Under this scenario, the large states might dominate the process of nomination, but the small ones had a large say in the final decision.

All this may have seemed sensible enough, but the time devoted to hammering it out led the Convention to slight a second design issue. This did not involve the failure of a candidate of continental stature to emerge from the Electoral College, but a mathematical oddity arising from the complexities of the emerging design. Since the Founders had given each elector two votes in their desire to overcome localism, it was now mathematically possible for several candidates to turn up on a majority of ballots—indeed, two could end up in a dead heat, with each winning, say, seventy-three votes apiece. How to break *this* tie?

This question raises issues distinct from those involved when *no* presidential candidate has gained widespread support. In the no-majority case, the small states might reasonably suppose that the leader in the Electoral College would be a “favorite son” from a large state. After all, these local favorites could fish from a larger pool of electors than notables from small states, and so they would get to the top of a long list of candidates of merely local eminence. Since the small states would not play a major role in nominating candidates, it was reasonable for them to insist on greater importance in the final selection.

But the small states had no similar grievance when two candidates tied with the same majority vote total. Under this scenario, *both* candidates would have won their seventy-three votes by collecting electors from states of all sizes. In contrast to the no-majority case, there was no obvious bias against the small states in the tied-majority case. It follows that the Founders' odd voting rule—under which each state delegation in the House cast a single

³⁵ The anxieties of the small states served as a leitmotiv throughout the Convention's interminable discussions of the presidential selection problem. See Slonim, *supra* note 16, at 48–51, 55–56. Indeed, when Madison proposed to dilute the required Electoral College majority, he immediately encountered the objection that his amendment “would put it in the power of three or four States to put in whom they pleased.” 2 Farrand, *supra* note 15, at 514 (remarks of Elbridge Gerry, Sept. 5, 1787). Madison's proposal lost by a vote of nine-to-two. *Id.*

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ballot to select a President—was distinctly undermotivated in the tied-majority context. While it might have been sensible to give equal voting power to big Virginia and little Delaware when no candidate gained broad national support, this curious rule made little sense when two broad-based candidacies gained precisely the same number of votes.

Generally speaking, the delegates were quite skilled at identifying fine-grained issues of institutional design. Indeed, they spotted an analogous issue in an earlier debate on presidential selection, but nothing came of it.³⁶ If they had given themselves adequate time, some sharp-eyed delegate likely would have remarked upon the distinctive character of the tied-majority case. Time was running short, however, when the Brearley proposals came to the floor, and no one focused on the problem in the rush to resolve a host of more contentious issues.³⁷

The Founders' lapse can be extenuated if we recall that they were legislating for a world without national political parties. In such a world, centuries might go by without a dead-heat between

³⁶ On August 24, 1787, the Convention was considering a plan under which the President would be selected by a joint session of the House and Senate, each member casting a single ballot, and the delegates spotted a potential problem posed by a tie vote. 2 Farrand, *supra* note 15, at 403 (“Mr. Read moved ‘that in case the numbers for the two highest in votes should be equal, then the President of the Senate shall have an additional casting vote’, which was disagreed to by a general negative.”).

³⁷ The window of opportunity for issue-spotting was particularly narrow, given the proposal that came to the floor. Recall that the Brearley Committee had initially proposed that the Senate, not the House, be given the task of selecting a President under the back-up procedure. See *supra* note 30 and accompanying text. If the Senate had retained this task, the Convention would have had no choice but to maintain a voting rule that granted equality to each state. It was only when the Convention voted to shift the locus of selection authority to the House that new design options, and concomitant complications, arose. But this vote occurred on September 6, toward the end of the Convention's debates. Here is Madison's report of the critical colloquy:

Mr. Williamson suggested as better than an eventual choice by the Senate, that this choice should be made by the Legislature, voting *by States* and not *per capita*.

Mr. Sherman suggested the House of Reps. as preferable to “the Legislature”, and moved, accordingly,

To strike out the words “The Senate shall immediately choose &c.” and insert “The House of Representatives shall immediately choose by ballot one of them for President, the members from each State having one vote.”

Col: Mason liked the latter mode best as lessening the aristocratic influence of the Senate.

2 Farrand, *supra* note 15, at 527.

two candidates with the national stature required to win a majority. Did not the Convention have better things to do than create wheels within wheels for dealing with such an unlikely possibility?

Rather than create an entirely new voting system for the tied-majority case, the Convention modified only one feature of its standard House runoff to take it into account. If the odd case did arise, the Constitution provides that only the two candidates locked in the tie would enter the House runoff. When all candidates fell short of a majority, however, the five leading candidates enter the runoff (even if the top two were tied).

Since this rule-within-a-rule is central to our story, the relevant constitutional text deserves careful scrutiny:

The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no person have a Majority, then from *the five highest on the List the said House shall in like Manner chuse the President*.³⁸

Since these rules are rather complex, we explore their operation through a series of mathematical examples. Begin with the case of perfect compliance, where the electoral vote count proceeds without a legal hitch. During both the elections of 1796 and 1800, there were 138 electors casting 256 votes for President. So long as we assume perfect compliance, the operation of the runoff rules is straightforward. The magic number is seventy: “a Majority of the whole Number of Electors *appointed*.” If the two leading candidates tie with seventy votes or more, the text requires a two-man runoff; if they get sixty-nine or less, it requires the two leaders to join in a race involving the top five candidates.

Matters get trickier when there is imperfect compliance, since there are two different ways in which a state may fail to register its electoral preferences. The first scenario arose in 1796 and involved Vermont. The problem—or so it was alleged—was that the state had failed to appoint its four electors in a legally valid fashion. As

³⁸ U.S. Const. art. 2, § 1, cl. 3 (amended 1804) (emphasis added).

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we shall see, this charge was rejected. If the attack on Vermont had been upheld, however, the total number of electors “appointed” by the states would have amounted only to 134, not 138. This reduction, in turn, would have required a change in the “magic number” of electoral votes needed to avoid a five-candidate runoff. With only 134 electors “appointed,” the constitutional majority required was no longer seventy, but sixty-eight, votes.

A different result obtains under the second scenario of imperfect compliance, which arose in 1800 and involved Georgia. This time around, nobody alleged that Georgia had failed to make a valid appointment of its four electors. The difficulty arose only at the second stage—the four electors did not cast ballots that satisfied the formal requirements laid down by the Constitution. While this might have resulted in the disqualification of the four Georgia votes, it did *not* require a recalculation of the “magic number.” Since Georgia’s electors had undoubtedly been “appointed,” the number of electors from the entire Union remained at 138, and candidates required a majority of at least seventy votes to avoid a five-man runoff in the House.

This point would create a big problem when Jefferson presided over the electoral vote count of 1801. But we are now talking about 1787. As the days grew short in September, nobody at the Convention worried about the outside chance that an incumbent Vice-President, sitting as the President of the Senate, might manipulate an oddball rule to push himself into a House runoff with one rival rather than four. There were many more serious things to think about, as the Framers contemplated the fierce struggle for ratification that lay ahead.

II. THE VERMONT PRECEDENT

Washington’s presence at the head of the Constitutional Convention assured the delegates that their larger vision of a non-party republic was a living reality. Here was a man who had proved his public spirit through years of selfless service on the battlefield. This demonstration of “public character,” not any display of partisan wiles, would predictably win him a unanimous vote for the presidency.³⁹ Once he had set the nation on the right course, would the

³⁹ See James W. Ceaser, *Presidential Selection* 41–88 (1979).

constitutional machine assist his successors in sustaining his example of nonpartisan statesmanship?

Washington was grimly determined to try. He included both Hamilton and Jefferson in his first Cabinet, and desperately sought to keep these great rivals in harness. But it was not to be. By the end of his first administration, the two party leaders were already locked in highly charged ideological conflict, and by the time Washington left office, the division between Federalists and Republicans had come to dominate the political scene.⁴⁰ The ink was hardly dry on the Constitution before its fundamental political premise began to disintegrate. America was becoming a proto-modern two-party democracy, raising entirely unexpected challenges to the Founding design for a republic dominated by non-party notables.⁴¹

A. The Rise of Party

Washington's Farewell Address nicely framed the transition to this new order.⁴² On the one hand, it was a great act of nonpartisan statesmanship—in refusing a third term in office, Washington established a precedent against the pernicious tendency toward presidencies-for-life. On the other hand, partisan politics provided a backdrop to Washington's grave farewell. He postponed his announcement until September 17, 1796. This put the Republicans at a serious disadvantage in the presidential election campaign, as Jefferson and his supporters were not prepared to contest Washington's decision to continue in office.⁴³ Nevertheless, the Republicans almost managed to defeat John Adams, Washington's Vice-President and a man devoted to Washington's non-party ideal, who

⁴⁰ For a recent blow-by-blow account of the politics of the 1790s, see Bernard A. Weisberger, *America Afire: Jefferson, Adams, and the Revolutionary Election of 1800* (2000).

⁴¹ To be sure, there were many respects in which the two-party competition of the 1790s differed from that of subsequent periods. Professor Ackerman explores this matter at greater length in his other work. See Bruce Ackerman, *America on the Brink: The Constitutional Crisis of the Early Republic 25–43* (2001) (unpublished manuscript) (on file with the Virginia Law Review Association).

⁴² A perceptive treatment of both the politics and substance of the Farewell Address is provided in Stanley Elkins & Eric McKittrick, *The Age of Federalism 489–97* (1993).

⁴³ See generally *id.* (discussing partisan aspects of Washington's Farewell Address).

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was now obliged to make his way in the ascendant world of party politics.

Adams's official position as Vice-President and his past service to the country made him an obvious candidate, but Alexander Hamilton was the true leader of the Federalist Party. Hamilton attempted to manipulate the Founders' ingenious two-vote system to deprive Adams of the presidency without allowing Thomas Jefferson to take the prize.⁴⁴ His scheme involved propelling the Federalists' second candidate, Thomas Pinckney of South Carolina,⁴⁵ to first place in the Electoral College. If every Federalist elector in the north voted for both Adams and Pinckney, this would allow South Carolina to put its favorite son ahead by voting for Pinckney but not Adams. To achieve this end, Hamilton engaged in some devious maneuvers that created a problem when the time came for the President of the Senate to count the votes.

For Hamilton's scheme to succeed, he needed to convince the northern Federalists to resist the temptations of regional favoritism in their second ballot choices and cast their ballots for Pinckney as well as Adams. Professor Manning Dauer tells the story:

[Hamilton] attempted to supply the stimulus which would cause the electors to support Pinckney. In the Boston *Centinel* of December 7, just as the electors were meeting, the following paragraph appeared, under a New York date line of November 26: "We have good authority to believe the election of electors in Vermont is invalid—being grounded on a *Resolve* of the Legislature, not a law."

Underneath this there appeared a note by the editor declaring that it was certainly to be hoped that this would not be true. If so, it shows the "necessity of union in the electors."⁴⁶

The editor's implicit logic was clear enough. Since the race with the Republicans was going to be close, the loss of Vermont's four votes

⁴⁴ The best account is provided by Dauer, *supra* note 5, at 92–111.

⁴⁵ Not to be confused with Charles Pinckney, who ran as Adams's running mate in 1800. Thomas Pinckney had recently returned home after negotiating a popular treaty with Spain. See Frances Leigh Williams, *A Founding Family: The Pinckneys of South Carolina* 304–09 (1978).

⁴⁶ Dauer, *supra* note 5, at 103.

for Adams and Pinckney might mean that the only Federalist who could beat Jefferson was Pinckney, aided by South Carolina's favorite-son vote. While South Carolina's desertion of Adams might be regrettable, surely Pinckney was better than Jefferson.

Hamilton's rumor failed to generate its desired effect.⁴⁷ Despite the disheartening news from Vermont, only thirteen of Massachusetts's electors voted a straight Adams-Pinckney ticket.⁴⁸ The other three voted for Adams but then cast a ballot for regional favorites—as did ten other Federalist electors from northern states. As a consequence, Pinckney lagged far behind Adams in the electoral vote—he received only fifty-nine votes to Adams's seventy-one. This gave the vice-presidency to Jefferson, with sixty-eight votes. Jefferson's running mate, Aaron Burr, was also victimized by favorite-son voting, and gained only thirty votes.⁴⁹

Though Hamilton's stratagem failed to produce northern solidarity for Pinckney, it did succeed in casting a shadow on the vote-counting ritual. If Vermont's four votes were ruled invalid, Adams would lose the presidency to Jefferson by a single vote, sixty-eight to sixty-seven.⁵⁰ With remarkable speed, the Framers' technical

⁴⁷ Hamilton also impugned the Vermont vote in personal correspondence. On December 1, 1796, he wrote to Jeremiah Wadsworth of his plan to throw the election to Thomas Pinckney, stating that:

Judge *Tichenor* in passing through informed me that from something which had occurred to his recollection while here he feared that the votes of Vermont would be lost for want of being warranted by a subsisting legislative Act. If so, Adams will not have sufficient votes to prevent the question going to the House of Representatives & then we can be at no loss for the result. The whole number I venture to *depend* on for Adams (including Vermont & *two* in Pennsylvania) is 73. Take off Vermont and there will be 69 which is less by one than the whole number of Electors.

It may be said that Georgia also is irregular. This I do not consider as certain. But if so at first there was time enough to discover & rectify it. Not so as to Vermont. Besides who will take care to have the necessary *authentic* proof from Georgia? From *Vermont* it can be had & our patriots are not likely to neglect it. Letter from Alexander Hamilton to Jeremiah Wadsworth (Dec. 1, 1796), in 20 *The Papers of Alexander Hamilton* 418, 418 (Harold C. Syrett ed., 1974) (footnote call numbers omitted). The editor of Hamilton's papers notes that "Tichenor" is Isaac Tichenor of Vermont, later a Federalist senator and then governor of the state. *Id.* at 419 n.3.

⁴⁸ 3 *Annals of Cong.* 1543 (1797).

⁴⁹ *Id.* at 1543–44 (reporting entire tally).

⁵⁰ If Vermont's selection of its electors had in fact been invalid, Jefferson's sixty-eight votes would have sufficed to gain him the presidency without a runoff. Without Vermont's four electors, only 134 Electors would have been validly appointed, and a

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blunders were coming home to roost. It was a serious enough mistake to allow the sitting Vice-President to preside over his own election returns in the gentlemanly world of non-party notables. But this error was compounded once the vice-presidency had become swept up in the overheated context of a new and unfamiliar form of party competition. How would the system respond to the challenge?

B. Rumors and Restraint

The four Vermont electors for President and Vice-President cast their ballots on December 7, 1796⁵¹—two full months before John Adams was scheduled to preside over the vote count on February 8, 1797. As word of the Vermont votes trickled out of Montpelier to the larger world, newspapers and politicians throughout the country attacked their validity.⁵² The New York *Minerva & Mercantile Evening Advertiser* began the controversy on November 26:

majority of these amounted to sixty-eight votes. U.S. Const. art. II, § 1, cl. 3 (“The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors *appointed . . .*”) (amended 1804) (emphasis added). See *supra* note 38 and accompanying text for further discussion.

⁵¹ The original electoral votes from Vermont state this date explicitly. For a report describing our inspection of the Vermont electoral votes, and where they can be found, see *infra* note 106.

⁵² We reviewed the following newspapers: (1) *Columbian Centinel* from Boston, Massachusetts: Editions from June 1796–March 18, 1797 were examined because Professor Dauer quotes this newspaper as covering the situation surrounding the Vermont votes, Dauer, *supra* note 5, at 103–04; (2) *South-Carolina State Gazette*: Editions from July 4, 1796–February 1797 were examined because it is a southern newspaper, and a Vermont newspaper story stated that there were no problems with the Vermont votes and that it was all part of some sort of southern plot; (3) *Columbian Mirror & Alexandria Gazette*: Editions from October 1796–February 1797 were examined because it is another southern newspaper and one published in Thomas Jefferson’s home state (Jefferson had much to gain if the Vermont votes were deemed invalid); (4) *Kentucky Gazette*: Editions from December 1796–March 1797 were examined to determine if there was any mention of the problems with the Kentucky electoral votes, discussed *infra* note 75, and also because it was another (at least quasi-) “southern” newspaper; (5) *Greenleaf’s New Daily Advertiser*: Editions from October 1796–February 1797 were examined because its publisher, Simon Greenleaf, was a prominent Republican, see Jerome Mushkat, Matthew Livingston Davis and the Political Legacy of Aaron Burr, in 3 *American Cities* 109, 109 (Neil Larry Shumsky ed., 1996), and problems with the Vermont votes would have worked in favor of the Republican party; (6) *Aurora & General Advertiser*: Editions from June 1796–February 1797 were examined because it was printed in the capitol city at the time of the election; and (7) *Gazette of the United States*: Editions from June 1796–February 1797

We have good authority to believe the election of Electors in Vermont is invalid—being grounded only on a *Resolve* of the Legislature, not a law. This is supposed to have been known to the ‘Patriots,’ of that State at the time. It being now too late to correct the mistake, it has leaked out in whispers.⁵³

Newspaper attacks on the Vermont vote continued through December.⁵⁴

were examined because it was the leading Federalist newspaper published in the capitol city.

⁵³ *Minerva & Mercantile Evening Advertiser* (New York), Nov. 26, 1796, at 3.

⁵⁴ On November 30, the *Gazette of the United States* reported that “Vermont, who has chosen electors, is to have no vote on the occasion.” *Gazette of the United States* (Philadelphia), Nov. 30, 1796, at 3. As we have seen, Professor Dauer emphasizes a December 7 story from the *Columbian Centinel*. Dauer, *supra* note 5, at 103–04. Here is the full *Centinel* text:

The account received in town yesterday of the probable loss of the *Vermont* votes for President and Vice-President, may have an unfortunate effect on the decision of the Electors of this State. Every one feels deeply interested in the event, and the subject was yesterday discussed in the different private circles. Too many opinions have appeared to preponderate in favour of supporting Mr. PINCKNEY, at the risque of sacrificing Mr. ADAMS; but it will become the electors to consider that the voice of the people at large ought to be their guide. If we mean to make our contribution respectable in the eyes of Europeans, if we mean to prove that a republican government signifies the expression of the public voice, we must make it appear that the public voice designates the man who is to fill the first office in our government. If this is not the case, we had better at once trust all to the benevolence of Providence, for ours will become a government of chance, and of the worst kind of chance. Not only our national dignity, but all our essential interests depend upon our respective offices being filled by the men contemplated by the people; and if ever this great principle is done away, the loss of our liberties must soon follow. Besides all this, are we not to consider a little what is due to Mr. ADAMS? Will it be grateful, will it be just to act as if we looked upon him only as a convenience; that we think it will be well enough to have him for President, but as well to have any body else? More than all, and we ought seriously to weigh it, Mr. ADAMS it is ascertained by the best information from the different States, will have a greater number of votes than Mr. JEFFERSON even if *Vermont* is out of the question. Shall a momentary pusillanimity in Mr. ADAMS’s friends put Mr. PINCKNEY in the presidential chair? Shall we by grasping at a shadow, lose the substance? No, Mr. RUSSELL, firmness is expected in the electors, and from their characters we may fairly presume they will not disappoint the public.

Columbian Centinel (Boston), Dec. 7, 1796, at 2. The *Aurora & General Advertiser* of December reported that “[t]he Vermont election is said to be illegal from the non-existence of any law or resolution under which the Electors could act. The law under which they voted four years ago was temporary, and from a mistaken impression that it was of a permanent nature the electors of that State find themselves unauthorized.” *Aurora & General Advertiser* (Philadelphia), Dec. 12, 1796, at 2. On December 17,

These reports contained three charges. The first denied that Vermont had enacted a valid law authorizing the procedure by which it had selected its electors. Though it was broadly recognized that Vermont had passed such a law in 1791, “We understand that the law alluded to made provision only for the election in 1792, and of course then expired.”⁵⁵ The second claimed that Vermont’s appointments were invalid because they were made through a “resolve” rather than a formal legislative enactment.⁵⁶ The third argued that Vermont had violated a 1792 federal statute requiring the states to appoint their electors within a period of “thirty-four days preceding the first Wednesday in December.”⁵⁷

however, the *Aurora* wrote that “[w]e have heard no reason for setting aside the Vermont Electors, that appears of importance sufficient to produce so disagreeable an effect.” *Aurora & General Advertiser* (Philadelphia), Dec. 17, 1796, at 2; see also Letter from Joseph Jones to James Madison (Dec. 15, 1796), in 16 *Madison Papers*, supra note 5, at 428, 429 (“[T]he probabi[li]ty is that if Vermont has no choice that J. will have the majority necessary to his appointm[en]t.”).

Newspapers of all political persuasions reported on the problem. The “decidedly Republican” *Aurora & General Advertiser*, David Hackett Fischer, *The Revolution of American Conservatism* 419 (1965), carried the most stories, while the “moderately Republican” *Kentucky Gazette*, id. at 423, carried only one. *Aurora & General Advertiser* (Philadelphia), Nov. 29, 1796, at 2; *Aurora & General Advertiser* (Philadelphia), Nov. 30, 1796, at 2; *Aurora & General Advertiser* (Philadelphia), Dec. 12, 1796, at 2; *Aurora & General Advertiser* (Philadelphia), Dec. 15, 1796, at 2; *Aurora & General Advertiser* (Philadelphia), Dec. 17, 1796, at 2; *Aurora & General Advertiser* (Philadelphia), Dec. 29, 1796, at 2; *Kentucky Gazette*, Jan. 18, 1797, at 2.

The “decidedly Federalist” *Columbian Centinel*, Fischer, supra, at 414, ran a story; the “decidedly Federalist” *Gazette of the United States*, id. at 419, discussed Vermont; the “moderately Federalist” *Columbian Mirror & Alexandria Gazette*, id. at 420, carried a story; the “moderately Federalist” *South-Carolina State Gazette*, id. at 422, ran a story; and the “very moderately Federalist” *Minerva & Mercantile Evening Advertiser*, id. at 417, discussed the Vermont problem. *Columbian Centinel* (Boston), Dec. 7, 1796, at 2; *Gazette of the United States* (Philadelphia), Nov. 30, 1796, at 3; *Columbian Mirror & Alexandria Gazette* (Boston), Dec. 27, 1796, at 3; *South-Carolina State Gazette*, Dec. 20, 1796; *Minerva & Mercantile Evening Advertiser* (New York), Nov. 26, 1796, at 3.

⁵⁵ *Aurora & General Advertiser* (Philadelphia), Dec. 29, 1796, at 2; see 2 Smith, supra note 5, at 959 n.23; *Aurora & General Advertiser* (Philadelphia), Dec. 17, 1796, at 2.

⁵⁶ *Aurora & General Advertiser* (Philadelphia), Dec. 17, 1796, at 2.

⁵⁷ Act of March 1, 1792, ch. 8, § 1, 1 Stat. 239, 239; see also U.S. Const. art. II, § 1, cl. 4 (“The Congress may determine the Time of chusing the Electors . . .”); *Aurora & General Advertiser* (Philadelphia), Dec. 17, 1796, at 2 (making this argument).

None of these charges had legal merit. We have personally examined the Vermont archives⁵⁸ and we have determined that the 1791 statute regulating presidential electors was not a temporary measure for 1792 but a standing procedure for the indefinite future. Under its terms, Vermont's electors would be selected by a majority of the members of a "Grand Committee" consisting of "the Governor and Council and House of Representatives."⁵⁹ There

⁵⁸ We examined various materials in Vermont. At the State Department of Libraries, we examined: (1) compilations of laws passed by the Vermont state legislature from 1778–1799; (2) records of state legislative proceedings from 1778–1799; (3) the public papers of Thomas Chittenden, a leading figure in Vermont politics; (4) Vermont electoral statistics; (5) records of the Council of Censors, a body created by the Vermont Constitution of 1786 and charged with overseeing the legislative and executive branches of Vermont for compliance with the state Constitution; (6) editions of the *Vermont Journal* from January 1796–March 1797; (7) editions of the *Rutland Herald* from January 1796–March 1797; and (8) editions of the *Vermont Gazette* from January 1796–March 1797. At the Secretary of State's office in Montpelier, we searched the personal papers of prominent Vermonters from the 1790s, additional personal papers relating to the 1796 presidential electors, and records of the Governor and Council of Censors. At the Vermont Historical Society in Barre, the personal papers of additional prominent Vermonters from the 1790s were examined. Scholarship on early Vermont was also consulted. See, e.g., Roy Barse, *Vermont: A Guide to the Green Mountain State* (1966); Hosea Beckley, *The History of Vermont* (Brattleboro, Vt., Geoge A. Salisbury 1846); Cora Cheney, *Vermont: The State with the Storybook Past* (1976); Charles Edward Crane, *Let Me Show You Vermont* (1937); Walter Hill Crockett, *Vermont: The Green Mountain State* (1921); *Men of Vermont* (Jacob G. Ullery ed., Brattleboro, Vt., Geoge A. Salisbury 1894); Perry H. Merrill, *Vermont Under Four Flags* (1975); Earle Newton, *The Vermont Story* (1949). Finally, we also consulted materials in the archival collections of John Adams (October 1796–February 1797), Aaron Burr (October 1796–February 1797), and Alexander Hamilton (October 1796–February 1797).

⁵⁹ 5 Journals and Proceedings of the General Assembly of the State of Vermont 1791–1792, at 82–83 (1970) [hereinafter Vermont General Assembly Proceedings] ("The bill entitled, An Act Directing the Mode of Appointing Electors to Elect a President and Vice-President of the United States, was read the second time, accepted, and sent to his Excellency and Council for revision and concurrence, or proposals of amendment."); id. at 87–88 ("The following bills returned from Council concurred, and passed into laws of this State . . . An Act Directing the Mode of Appointing Electors to Elect a President and Vice-President of the United States."). The statute provides:

An Act Directing the Mode of Appointing Electors to Elect a President and Vice President of the United States. November 3d, 1791. It is hereby Enacted by the General Assembly of the State of Vermont, That the Electors for electing a President and Vice President of the United States be appointed by the ballots of the Governor and Council and House of Representatives met in grand Committee and that those persons to the number which they have right to ap-

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is abundant evidence indicating that this procedure was followed in 1796.⁶⁰

The distinctive character of the Vermont procedure also refutes the complaint that the electors were selected through a “resolve” rather than ordinary legislation. Since Vermont’s Governor cast a ballot for the electors along with members of his council and the Vermont House of Assembly, the “Grand Committee” was not an ordinary legislative body capable of enacting statutes. The Grand Committee chose electors by means of a “resolve” because it was specifically delegated this authority by the validly enacted 1791 statute. And finally, it simply is not true that Vermont had violated the federal statute by selecting its electors before the beginning of the prescribed thirty-four day period. The records reveal that the Grand Committee made its choices on November 4, 1796, thirty-three days before “the first Wednesday in December.”⁶¹

This was not enough, however, to make the charges unimportant. The newspaper accounts were sufficient to generate a cloud of suspicion. If the Republicans had chosen to press the issue, it

point who shall have a majority of the votes of said Grand Committee shall be declared to be duly appointed Electors of this State for the purposes aforesaid. 15 Laws of Vermont 1791–1795, at 43 (1966).

⁶⁰ 7 Vermont General Assembly Proceedings, supra note 59, at 350 (1973) (“On motion of Mr. *Farrand*, Resolved, That his Excellency the Governor and Council be requested to join the House of Representatives in grand committee tomorrow afternoon, to proceed by ballot to make choice of electors, to elect the president and vice-president of the United States.”); id. at 354 (“Agreeably to the order of the day, the Governor, Council and House of Assembly, joined in grand committee for the purpose of proceeding, by ballot, to the choice of electors to elect the president and vice-president of the *United States*. . . . The ballots being duly and severally taken, Capt. Elijah Dewey was declared duly elected, first; Col. Elisha Sheldon, second; John Bridgman, Esq., third; and Oliver Gallup, Esq., fourth; electors to elect the president and vice-president of the United States.”).

Newspaper reports confirm this. On November 7, *The Rutland Herald* reported that “On Friday last the following Gentleman were chosen electors for the choice of a President for the United States. ELIJAH DEWEY, ELISHA SHELDON, JOHN BRIDGMAN, and OLIVER GALLUP, E’qr’s.” *Rutland Herald* (Vermont), Nov. 7, 1796, at 3. On November 17, the *Gazette of the United States* ran a story under a November 7 Rutland dateline stating that “On Friday last, the following gentlemen were chosen Electors for the choice of a President for the United States. Elijah Dewey, Elisha Sheldon, John Bridgman, and Oliver Gallup, Esqrs.” *Gazette of the United States* (Philadelphia), Nov. 17, 1796, at 3. These are the four names that appear on Vermont’s electoral vote.

⁶¹ Act of March 1, 1792, ch. 8, § 1, 1 Stat. 239, 239; 7 Vermont General Assembly Proceedings, supra note 59, at 350, 354 (1973).

would have been difficult for Adams or anybody else to respond decisively at the time of the vote count. Consider especially the first of the three complaints—that the original Vermont protocol was a one-shot regulation designed specifically for the 1792 election, without legal force for 1796. The only way to learn the truth would have been to send a messenger to Vermont to inspect all the legislative records, but a round-trip journey to Montpelier would have taken weeks.⁶² All sorts of mischief might have been attempted in the meantime.

If the Republicans had raised a formal objection, therefore, Adams would have confronted a very real political problem—but not an irresolvable one. He could have responded by rejecting the Republicans' complaint on the basis of a legal presumption. After all, there was nothing formally defective on the face of Vermont's electoral documents.⁶³ And so the President of the Senate might announce that the state's papers were entitled to a presumption of legal regularity that could not be rebutted without a compelling showing of an underlying substantive problem. This might seem plausible, but the credibility of such a ruling would have been undercut by Adams's self-interest in the affair. Whatever he might say, and however justifiable, his ruling would have eliminated further inquiry into votes that provided his crucial margin of victory.

This would have been a particularly awkward moment for such a ruling because 1796 marked the first contested presidential election in the nation's history. There were warring political parties. If Adams counted himself into the presidency, the Constitution would be off to a very bad start, even if the country accepted the legitimacy of the outcome.

Only the self-restraint of the Republican leadership permitted the Constitution to avoid this early test of credibility. Rather than demagogue the issue, Jefferson self-consciously retired it from public view. The Vermont controversy simmered in the newspapers

⁶² Clifford L. Lord & Elizabeth H. Lord, *Historical Atlas of the United States* 79 (1944).

⁶³ There was little doubt, closer to election time, that Vermont wished to cast its votes for Adams. For example, the *South-Carolina State Gazette* reported on November 19 that "[t]he Legislature of Vermont choose[s] the Electors for that State. That they will be true Federalists is undoubted." *South Carolina State Gazette*, Nov. 19, 1796.

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throughout December,⁶⁴ and uncertainty about the Vermont vote was reflected in the ongoing informal tallies of the electoral vote. Since Jefferson was at Monticello throughout this period,⁶⁵ Madison was functioning as the operational leader in Philadelphia and regularly wrote to his chief for marching orders. His letter of Christmas Day 1796 begins with the caveat: "I can not yet entirely remove the uncertainty in which my last [letter] left the election. Unless the Vermont election of which little has of late been said, should contain some fatal vice, in it, Mr. Adams may be considered as the President elect."⁶⁶ Jefferson replied on January 16, 1797:

I observe doubts are still expressed as to the validity of the Vermont election. Surely in so great a case, substance & not form should prevail. I cannot suppose that the Vermont constitution has been strict in requiring particular forms of expressing the legislative will. As far as my disclaimer may have any effect, I pray you to declare it on every occasion foreseen or not foreseen by me, in favor of the choice of the people substantially expressed, and to prevent the phaenomenon of a Pseudo-president at so early a day.⁶⁷

Jefferson's words were decisive: The Vermont controversy dropped from public view during the run-up to the formal vote count on February 8, with Republican newspapers conceding the victory to Adams.⁶⁸

⁶⁴ See supra note 54 and accompanying text.

⁶⁵ Although Jefferson was a leading contestant for the presidency in 1796, he "remained at Monticello until the twentieth of February; then rode for Philadelphia, arriving on March 2, 1797." Nathan Schachner, *Thomas Jefferson* 587 (1964). This means that he did not witness the vote-counting ritual in February. Indeed, Jefferson wrote a letter to Madison on January 30 with a Monticello dateline saying that he did not wish to come to Philadelphia even for the inauguration ceremonies in March (asserting that he need not attend). Letter from Thomas Jefferson to James Madison (Jan. 30, 1797), in 16 *Madison Papers*, supra note 5, at 479, 479. He evidently changed his mind later. There is no evidence that he was aware of Adams's precedent.

⁶⁶ Letter from James Madison to Thomas Jefferson (Dec. 25, 1796), in 16 *Madison Papers*, supra note 5, at 435, 435.

⁶⁷ Letter from Thomas Jefferson to James Madison (Jan. 16, 1797), in 16 *Madison Papers*, supra note 5, at 461, 461.

⁶⁸ In the December 21 edition of *Greenleaf's New Daily Advertiser*, the Vermont votes were reported and a story with a Rutland dateline appeared stating that "[o]n Wednesday, the electors for the choice of a President and Vice-President of the United States, met in this town.—We are informed that all their votes were for the

Jefferson's decision adds some useful complexity to our larger story. We have stressed how the Framers' failure to anticipate the two-party system threatened to throw the constitutional system into a severe crisis. But Jefferson's letter suggests that the survival of classical republican ideals—condemning faction, praising civic unity—tempered the very crisis that the Framers had failed to anticipate. Both Adams and Jefferson were hardly political innocents, and they were perfectly prepared to compete for power in the new partisan environment. Nevertheless, they remained powerfully attracted to the animating spirit of the Founding. When push came to shove, they sometimes—not always—managed to put these principles into practice in ways that softened the party assault on the non-party Constitution of 1787.

Jefferson's January 16 letter was one such instance.⁶⁹ There can be no doubt that he was right: The country could ill afford "the phaenomenon of a Pseudo-president at so early a day."⁷⁰

Hon. JOHN ADAMS, and the Hon. THOMAS PINCKNEY, Esqrs." Greenleaf's New Daily Advertiser (New York), Dec. 21, 1796, at 3. On December 22, the *Gazette of the United States* and *Greenleaf's New Daily Advertiser* both counted Vermont's votes for the Federalists in their electoral vote chart. *Gazette of the United States* (Philadelphia), Dec. 22, 1796, at 3; *Greenleaf's New Daily Advertiser* (New York), Dec. 22, 1796, at 3. The *Aurora & General Advertiser* from that day ran a story stating that "[f]rom good authority we are [unreadable word] that the Electors of the State of Vermont have voted for John Adams and Thomas Pinckney." *Aurora & General Advertiser* (Philadelphia), Dec. 22, 1796, at 2. The editions of the *Gazette of the United States* over the next two days counted the Vermont votes, and the same is true of the December 24, 1796, editions of the *Columbian Centinel* and *Greenleaf's New Daily Advertiser*. *Gazette of the United States* (Philadelphia), Dec. 23, 1796, at 3; *Gazette of the United States* (Philadelphia), Dec. 24, 1796, at 3; *Columbian Centinel* (Boston), Dec. 24, 1796, at 2; *Greenleaf's New Daily Advertiser* (New York), Dec. 24, 1796, at 3.

⁶⁹ In previous correspondence with Madison, Jefferson had already suggested an unwillingness to press partisanship too far in an effort to obtain the presidency. His letter of December 17 contemplated the possibility that some of Adams's enemies in the Federalist party might seek to deprive Adams of the electoral votes that were rightly his, leading to a Jefferson-Adams dead-heat. Once again, Jefferson was explicit in his instructions: "I pray you and authorize you fully to solicit on my behalf that mr. Adams may be preferred. He has always been my senior from the commencement of our public life, and the expression of the public will being equal, this circumstance ought to give him the preference." Letter from Thomas Jefferson to James Madison (Dec. 17, 1796), in 16 *Madison Papers*, supra note 5, at 431, 431-32.

⁷⁰ Letter from Thomas Jefferson to James Madison (Jan. 16, 1797), in 16 *Madison Papers*, supra note 5, at 461, 461.

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We will return to this theme in discussing the main subject of this essay: Jefferson's use of his power as Senate President to give himself a significant advantage in the Electoral College crisis of 1801. Before turning to this forgotten story, there is an additional lesson to be learned from our prelude.

C. Vote-Counting Day in Philadelphia

Without a doubt, most of the suspense had disappeared, but there was still a potential for intrigue on February 8, 1797, the day the votes were counted to pick the second President of the United States. Newspapers had ceased printing stories about the Vermont votes, but Adams and his supporters could not know for sure whether the Republicans were planning some last minute tricks. The stakes were enormous. If the Vermont electors had not been validly appointed, Adams would lose the state's four votes and Jefferson would become President by a margin of sixty-eight to sixty-seven.⁷¹

The constitutional mathematics raised a strategic question for Adams: Would he provide his political enemies an explicit procedural opportunity to raise the Vermont matter and its potentially devastating consequences? Or would he make it as hard as possible for the Republicans to mount a challenge?

The *Annals of Congress* describes the proceedings:

The President of the Senate [John Adams] then thus addressed the two Houses:

Gentlemen of the Senate, and of the House of Representatives:

By the report which has been made to me by the tellers appointed by the two Houses to examine the votes, there are 71 votes for John Adams, 68 for Thomas Jefferson, 59 for Thomas Pinckney, 30 for Aaron Burr, 15 for Samuel Adams, 11 for Oliver Ellsworth, 7 for George Clinton, 5 for John Jay, 3 for James Iredell, 2 for George Washington, 2 for John Henry, 2 for Samuel

⁷¹ If Vermont's 1791 electoral statute had lapsed, then it had not validly appointed its four 1796 Electors, leaving only 134 remaining in the pool. Under the Constitution, this meant that Jefferson's sixty-eight votes were sufficient for him to prevail without a runoff. See *supra* note 50.

Johnston, and 1 for Charles C. Pinckney. The whole number of votes are 138; 70 votes, therefore, make a majority; so that the person who has 71 votes, which is the highest number, is elected President, and the person who has 68 votes, which is the next highest number, is elected Vice President.

The President of the Senate then sat down for a moment, and rising again, thus addressed the two Houses:

In obedience to the Constitution and Law of the United States, and to the commands of both Houses of Congress, expressed in their resolution passed in the present session, I declare that

John Adams is elected President of the United States, for four years, to commence with the fourth day of March next; and that Thomas Jefferson is elected Vice President of the United States, for four years, to commence with the fourth day of March next.⁷²

“The President of the Senate then sat down for a moment.” Four years earlier, Vice-President Adams had also presided over the vote count, but the *Annals of Congress* contains no similar notation.⁷³ Indeed, no such pause is noted in any of the first fourteen presidential vote counts. It would seem, then, that Adams’s action

⁷² 6 *Annals of Cong.* 2097–98 (1797) (second emphasis added). Some of the accounts of vote-counting day in 1797 simply copy the *Annals of Congress* report that Adams sat for a moment. 2 *Abridgment of the Debates of Congress* 63 (Thomas Borden ed., New York, D. Appleton & Co. 1857); *Counting Electoral Votes*, supra note 5, at 15 (reporting proceedings of Feb. 8, 1797); McKnight, supra note 5, at 392; *Presidential Counts*, at xxii (New York, D. Appleton & Co. 1877). Others are identical in substance to the *Annals* but provide abbreviated versions, leaving out various details. These omit any mention of Adams’s momentary pause but do not contradict the fuller accounts. *H. Jour.*, 4th Cong., 2d Sess. 685–86 (1797); *S. Jour.*, 4th Cong., 2d Sess. 320 (1797); *Presidential Counts*, supra, at 6, 9; *Aurora & General Advertiser* (Philadelphia), Feb. 9, 1797, at 3.

⁷³ The various accounts of Adams’s conduct in 1793 are briefer than in 1797, and it is possible that Adams indeed sat for a moment but that this action was not recorded. *Counting Electoral Votes*, supra note 5, at 10–11; 3 *Annals of Cong.* 874–75 (1793); *H. Jour.*, 2d Cong., 2d Sess. 701–02 (1793); *S. Jour.*, 2d Cong., 2d Sess. 485–86 (1793); 1 *Abridgment of the Debates of Congress*, supra note 72, at 385–86; McKnight, supra note 5, at 390–91; *Presidential Counts*, supra note 72, at xxii, 3. No explicit mention, however, is made of such behavior.

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was deliberate. Only one previous scholar has explicitly noted this incident: “Mr. Adams himself could certainly not raise the question of the validity of the Vermont votes; but he seems to have given an opportunity for objections if anyone should see fit to raise them.”⁷⁴

A deflationary interpretation is available—perhaps Adams was only marking a transition between two phases of the proceeding, symbolizing that the vote count had concluded and the time had come for a final and authoritative declaration of the result. Yet this seems unlikely. Adams was no fool: By sitting down, he was putting himself at the mercy of the Republican opposition in a close election.⁷⁵ He would not have paused unless he harbored some doubts about his authority as President of the Senate to resolve disputed issues unilaterally.

Thomas Jefferson would take a different view four years later.

III. THE ELECTION OF 1800

When John Adams opened the documents from Vermont in 1797, they were in perfect order. Thomas Jefferson faced a different situation when he opened Georgia’s electoral votes in 1801: The certificate was illegal on its face. We begin by setting the problem in a larger context before focusing on Jefferson’s response.

⁷⁴ 1 Stanwood, *supra* note 5, at 52.

⁷⁵ There may also have been technical problems with the Kentucky electoral votes in 1797. Several sources state that Adams announced that there was only one copy of Kentucky’s electoral votes. 6 *Annals of Cong.* 2096 (1797); 2 *Abridgment of the Debates of Congress*, *supra* note 72, at 62; *Counting Electoral Votes*, *supra* note 5, at 14–15; McKnight, *supra* note 5, at 392. After inspection of the National Archives collection of electoral votes, it appears that there are, in fact, duplicate copies of the Kentucky votes in the archives, but perhaps the duplicate was missing on vote-counting day in 1797.

There was also debate about events in Pennsylvania. Two Jefferson supporters may have been elected, but their returns were submitted late and two Federalists presented themselves as the legitimate electors. Letter from Joseph Jones to James Madison (Dec. 15, 1796), *in* 16 *Madison Papers*, *supra* note 5, at 428, 429 n.1. In the end, it does not appear to have mattered all that much, as one of the two Federalist electors voted for Jefferson regardless. Letter from Thomas Jefferson to T.M. Randolph (Jan. 9, 1797), *in* *Jefferson Papers* 17286–87, available at <http://memory.loc.gov/ammem/mtjhtml/mtjsr1.html> (on file with the Virginia Law Review Association).

A. The Run-Up

Washington's delay in announcing his Farewell Address constrained the ferocity of party competition in 1796. With the Great Man departing the scene at the end of September, the two sides had little time to escalate their struggle to fever pitch. Four years later, partisan battle reached one of its historic highs.⁷⁶

For both parties, the very future of the republic was at stake. For the Federalists, the Republicans were vicious factionalists who sought revolutionary upheaval along Jacobin lines.⁷⁷ For the Republicans, the Federalists were cryptomonarchists, aping English models at home and damaging the republican cause abroad.⁷⁸ Both sides reacted with extreme measures that testified to their high anxiety. Republican politicians in Kentucky and Virginia issued resolutions calling for extraordinary state actions to check the abuse of Federalist power, while Federalist judges threw Republican newspaper editors into jail for seditious libel.⁷⁹

As the moment of electoral truth neared, the written Constitution failed to discharge its most basic function. Whatever else it may or may not accomplish, a written constitution is supposed to provide everyone with undisputable rules of the game—telling

⁷⁶ Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 Sup. Ct. Rev. 109, 111 (“With the exception of the Civil War and the periods immediately preceding and succeeding it[,] . . . America probably has not known a time when its politics were conducted with such vehemence and hatred.”).

⁷⁷ See, e.g., Alexander DeConde, *The Quasi-War* 10–12, 28, 41 (1966).

⁷⁸ See, e.g., Letter from Thomas Jefferson to Phillip Mazzei (Apr. 24, 1796), in *7 The Writings of Thomas Jefferson* 72, 75–76 (Paul L. Ford ed., New York, G.P. Putnam's Sons 1896) (referring to the Federalists as an “Anglican[,] monarchical, & aristocratical party”). A North Carolina newspaper put it this way:

Thomas Jefferson first drew the declaration of American independence;—he first framed the sacred political sentence that all men are born equal. John Adams says this is all a farce and a falsehood; that some men should be born Kings, and some should be born Nobles. Which of these, freemen of Pennsylvania, will you have for your President? Will you, by your votes, contribute to make the avowed friend of monarchy, President? —or will you, by neglectfully staying at home, permit others to saddle you with Political Slavery? Adams has Sons who might aim to succeed their father; Jefferson like Washington has no son. Adams is a fond admirer of the British Constitution, and says it is the first wonder of the world. Jefferson likes better our Federal Constitution, and thinks the British full of deformity, corruption and wickedness. Once more fellow citizens!

Edenton State Gazette of North Carolina, Nov. 24, 1796.

⁷⁹ This familiar story is well summarized in Weisberger, *supra* note 40, at 200–24.

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them what they must do to win elections, and how to determine who has lost. When judged by this key criterion, the Philadelphia Convention was a miserable failure.

The rise of two-party competition had transformed the Framers' clever effort at institutional engineering into a constitutional nightmare. Failing to anticipate the rise of national parties, the Convention had focused on a different set of problems when designing its system of presidential selection. In the Framers' estimation, their big problem was state provincialism, and so they had developed their complex two-vote scheme to mitigate its effects. Despite the impact of political parties on the election of 1796, the system managed to operate more or less as the Framers envisioned. With second votes scattering on behalf of regional favorites, the number-two spot went to Thomas Jefferson, leader of the Republican party but also a "continental character" of the sort they wanted to guide the nation.

As the 1800 race intensified, though, the electoral system became the object of intense partisan manipulation. On the state level, parties used their political power to manipulate the process of selecting electors—shifting to legislative selection, or changing the mode of popular choice, depending on their perception of partisan advantage.⁸⁰ The Federalists attempted the same maneuver on the national level, where they were in firm control of the presidency and both houses of Congress. Under the leadership of Federalist Senator James Ross, the Senate passed a bill establishing a special committee to "inquire, examine, decide, and report upon" irregularities that might occur in connection with the electoral vote.⁸¹ This "Grand Committee" was to include six senators, six representatives, and the Chief Justice of the United States.⁸² It was

⁸⁰ Tadahisa Kuroda, *The Origins of the Twelfth Amendment* 72–82 (1994).

⁸¹ Counting Electoral Votes, *supra* note 5, at 18. Such irregularities included: the constitutional qualifications of the persons voted for as President and Vice-President of the United States, upon the constitutional qualifications of the electors appointed by the different States, and whether their appointment was authorized by the State legislature or not; upon all petitions and exceptions against corrupt, illegal conduct of the electors, or force, menaces, or improper means used to influence their votes; or against the truth of their returns, or the time, place, or manner of giving their votes.

Id.

⁸² *Id.* at 17.

to meet in secret⁸³ and its report would serve as the “final and conclusive determination of the admissibility or inadmissibility of the votes given by the electors for President and Vice-President of the United States.”⁸⁴

Passed on a party-line vote of sixteen to twelve in March 1800, the bill would have become law but for Congressman John Marshall’s intervention in the House. Speaking before a House select committee,⁸⁵ Marshall raised constitutional objections to the proposed bill.⁸⁶ His amendments stripped the Committee of its authoritative status, giving the last word to both houses of Congress, meeting separately. The Committee’s rejection of a state’s electoral vote would be upheld only if a majority of both houses accepted its recommendation.⁸⁷ Marshall’s success in weakening the proposal angered the more extreme Federalists. His measure passed the House but was rejected on another party-line vote in the Senate—with hard-line Federalists insisting that a Committee rejection be upheld if only one house supported its recommendation.⁸⁸ This demand led to an impasse, and the Ross initiative came to nothing, leaving the President of the Senate and Congress to confront the painfully inadequate constitutional text if a vote-counting problem should arise.⁸⁹

⁸³ *Id.*

⁸⁴ *Id.* at 18.

⁸⁵ 10 *Annals of Cong.* 670, 674 (1800).

⁸⁶ See 2 Albert J. Beveridge, *The Life of John Marshall* 453–57 (1916).

⁸⁷ 10 *Annals of Cong.* 670, 674; see *Counting Electoral Votes*, *supra* note 5, at 24; *Aurora & General Advertiser* (Philadelphia), Feb. 19, 1800, at 2 (reprinting the bill’s text in full).

⁸⁸ See 2 Beveridge, *supra* note 86, at 456; Kuroda, *supra* note 80, at 80–82.

⁸⁹ As sitting Vice-President, Jefferson was, of course, an interested observer, and was unimpressed by Marshall’s efforts to control the Grand Committee:

[T]he bill for the election of the Pres and V P has undergone much revolution. Marshall made a dexterous manoeuver; he declares against the constitutionality of the Senate’s bill, and proposes that the right of decision of their grand committee should be controllable by the *concurrent* vote of the two Houses of congress; but to stand good if not rejected by a concurrent vote. You will readily estimate the amount of this sort of controul. The committee of the H. of R., however, took from the Committee the right of giving any opinion, requiring them to report facts only, and that the votes returned by the states should be counted, unless reported by a concurrent vote of both Houses. In what form they will pass them or us, cannot be foreseen.

Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800) in *Jefferson Papers* 18274, available at <http://memory.loc.gov/ammem/mtjhtml/mtjser1.html> (on file

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This ticking time-bomb was momentarily forgotten once the electoral returns started rolling in. In contrast to 1796, electors had sworn off the practice of substituting a favorite son for their party's vice-presidential candidate. With four years of battle under their belts, every elector voted a straight party-line ticket, with one exception. The Federalists wasted one of their second ballots on John Jay, giving John Adams a one-vote edge over his running mate Charles Cotesworth Pinckney, and neatly avoiding a House runoff if they won a majority.

The Republicans were less astute. All of their electors voted a straight ticket, giving Jefferson and Burr an equal number of votes and throwing the race into the House. "[A]fter the most energetic efforts, crowned with success, we remain in the hands of our enemies by want of foresight in the original arrangement"⁹⁰—so wrote Jefferson to Monroe on December 20.

Almost two months remained before the day designated for the formal vote count, Wednesday, February 11, 1801.⁹¹ This was a period of feverish activity, as Republicans and Federalists prepared their forces for the looming House runoff between Jefferson and Burr. If the protagonists had been aware of a problem with Georgia's electoral votes, they would have engaged in a related round of strategic maneuvering. Without Georgia's four electors, Jefferson and Burr could only claim sixty-nine valid votes apiece. As we have explained,⁹² this would have forced them into a five-man runoff that included Adams, Pinckney, and Jay.⁹³ The possibility of a five-man race should have provoked an intense round of politicking—and yet we have found absolutely no documentary evidence of any such activity. In contrast, there *is* voluminous evidence detailing efforts by Federalist and Republican politicians to gain support from

with the Virginia Law Review Association). Jefferson seems to have misread Marshall's bill, which required both houses to uphold the Committee's decision before a full rejection could occur. Jefferson asserts that the Committee's decision would be valid unless both houses affirmatively rejected their findings.

⁹⁰ Letter from Thomas Jefferson to James Monroe (Dec. 20, 1800), *quoted in* Dumas Malone, *Jefferson and the Ordeal of Liberty* 496 (1962). This letter can be found at the Library of Congress, Jefferson Papers 18511 (available at <http://memory.loc.gov/ammem/mtjhtml/mtjser1.html>).

⁹¹ Act of March 1, 1792, ch. 8, § 5, 1 Stat. 239, 240.

⁹² See *supra* note 30 and accompanying text.

⁹³ *Id.*

House members in the two-man race between Jefferson and Burr they believed was in the offing.⁹⁴ The silence about the five-man possibility is deafening—no one seems to have anticipated the constitutional pitfalls awaiting Jefferson when he opened the ballots on February 11.

Our conclusion is bolstered by Jefferson's confident treatment of an administrative matter. To ensure that all the electoral votes arrived in Washington in time, the governing statutes authorized the Secretary of State, then John Marshall, to "send a special messenger" if any state's electoral certificates had not arrived by the "first Wednesday in January."⁹⁵

The states were sending envelopes containing their ballots to Jefferson, in his capacity as President of the Senate.⁹⁶ On December 28, he wrote Marshall that no special messengers would be required.⁹⁷ Jefferson's confidence was perfectly understandable—as we will see, the outside of the envelope from Georgia bears no indication of the constitutional problems contained within.⁹⁸ Moreover, it was perfectly understandable that Jefferson would go no further than the surface of the envelope, as the Constitution explicitly required him to "open all the Certificates" in full view of the House and Senate,⁹⁹ and he would have raised suspicions about ballot-tampering had he taken a peek beforehand.

The emerging situation was the mirror image of the Vermont scenario of 1797. The complaints about Vermont were raised in the newspapers long before Adams opened the envelopes.¹⁰⁰ This gave the sitting Vice-President an opportunity to consider in advance how to conduct himself at the moment of truth. The potential legal

⁹⁴ Professor Ackerman recounts their scheming at length in a forthcoming book. See Ackerman, *supra* note 41, at 60–132.

⁹⁵ Act of March 1, 1792, ch. 8, § 4, 1 Stat. 239, 240. (empowering the Secretary of State to send a messenger to a state only if "a list of votes" had not been received by the first Wednesday in January).

⁹⁶ U.S. Const. art. II, § 1, cl. 3.

⁹⁷ Letter from Thomas Jefferson to John Marshall (Dec. 28, 1800), in 6 *The Papers of John Marshall* 45, 45–46 (Charles F. Hobson et al. eds., 1990) ("I have the honor to inform you that a list of the votes for President & Vice-president of the US. has come to my hands from every state of the union; and consequently that no special messenger to any of them need be provided by the department of state.").

⁹⁸ See *infra* notes 122–23 and accompanying text.

⁹⁹ U.S. Const. art. II, § 1, cl. 3.

¹⁰⁰ See *supra* note 54.

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difficulty was made easier by the fact that the Vermont ballot was formally perfect.¹⁰¹ And strategically, the stakes had been lowered dramatically when, thanks to Jefferson's behind-the-scenes intervention, the Republicans were no longer publicly complaining about the legality of the Vermont votes. When Adams provided his political enemies with a formal opportunity to protest at the vote-counting ritual, he could be quite confident that his enemies would not exploit the situation, and if they did, that he could legally justify a decision to place the Vermont votes in his column.

Things were different in 1801. When the obvious defect in Georgia's ballot became evident on February 11, everybody would be in for a surprise, and high-stakes decisions would be required in a matter of minutes. Worse yet, the written Constitution served only to exacerbate the explosive situation. Rather than providing clear rules for resolving electoral vote problems, it explicitly handed the gavel to the worst possible presiding officer—the man with the most to gain by including Georgia's defective ballot—and failed to provide him with *any* rules to govern the tough cases.

B. Jefferson's Problem

Whatever its other obscurities, Article II of the Constitution contains some plain instructions for each state's electors: "And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate."¹⁰² Call this the *electoral vote*, and it is the document that created legal problems for Georgia in 1800.

A few statutory requirements are also relevant. George Washington's first election preceded the first session of Congress, but in 1792 Congress enacted a framework law for future contests. The statute instructs the "executive authority of each state" to create a second document that certifies the names of the electors who have been selected by the state.¹⁰³ Call this the *certificate of ascertainment*. The statute instructs the electors to enclose this certificate

¹⁰¹ Of course, Adams could not have known this in advance.

¹⁰² U.S. Const. art. II, § 1, cl. 3.

¹⁰³ Act of March 1, 1792, ch. 8, § 3, 1 Stat. 239, 240.

with their electoral vote.¹⁰⁴ Once they have placed both documents in an envelope for delivery to the President of the Senate, they must also “certify[]” on the envelope “that a list of the votes of such state for President and Vice President is contained therein.”¹⁰⁵

The Georgia electors fulfilled both of these statutory requirements in 1801, but their electoral vote—the key document required by the Constitution—dramatically fails to comply with the requirements of Article II and the norms established by the uniform practice of the states in every early election.¹⁰⁶ In 1796, for example, this is what Georgia’s vote looked like:¹⁰⁷

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § 2. A further detail: The electors are actually instructed to create three copies of the relevant documents, and place them in three separate envelopes containing three superscriptions. One set is personally delivered and one is mailed to the President of the Senate; the third goes to a local federal district judge for safekeeping. *Id.* § 2. Likewise, the state executive is instructed to prepare three copies of the certificate of ascertainment, one copy to be included in each set of electoral documents prepared by the electors. *Id.* § 3.

¹⁰⁶ We have inspected every vote certificate submitted by the state Electors in the course of the first six elections. With the exception of Georgia’s in 1800, each is in perfect order. At our request, the Library of Congress has prepared a microform of these early electoral votes. See Electoral Vote Records, Film. No. 189 (on file with the Yale Law Library) [hereinafter “Electoral Vote Records”].

The first election, held in 1788, preceded the first session of Congress as well as the Act of 1792. New Hampshire submitted only the letter from the Electors required by Article II, with no letter from any “executive authority” as would have been required by the Act of 1792. Act of March 1, 1792, ch. 8, § 3, 1 Stat. 239, 240. Two states (Georgia and Maryland) did not send two copies of each item to the Capitol, as would later be required by the Act of 1792. *Id.* § 2. But in all other respects, the state documents fully comply with the rules laid down in the subsequent statute.

¹⁰⁷ For those who find the script difficult to decipher, this document states that the Electors (whose four names appear below) met at a “place directed for the Electors to meet for the Election of President” and that “We the underwritten Electors do certify the above [four votes for Jefferson and four votes for George Clinton] to be a true” list of their votes.

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||

State House, Louisville, Georgia Wednesday, 7th Decem^r 1796

. At a Poll opened at this place, being the
 place directed for the Electors to meet for the Election
 of President and Vice President of the United States -
 the following ballots appeared

For Thomas Jefferson of Virginia. 1111 - four
 George Clinton of New York. 5555 - four

the under written Electors do certify the above
 to be the true State of the Poll held for the purpose
 as mentioned

J^o Jackson
 Edm^d Blair
 Cha^s Abernethy
 Wm B. Bennett

Figure 1

As the Constitution prescribes, the upper half of the document contains “a List of all the Persons voted for, and of the Number of Votes for each.”¹⁰⁸ The bottom half complies with the second part of the constitutional command: “which List they shall sign and certify.”¹⁰⁹ Georgia’s 1796 submission also contains a certificate of as-

¹⁰⁸ U.S. Const. art. II, § 1, cl. 3.

¹⁰⁹ *Id.*

certainment from the Governor certifying the four electors whose signatures appear on the electoral vote.¹¹⁰

In contrast, Georgia's envelope of 1800 contains a single sheet of paper, not the two provided by every other state. On one side of the sheet, there is a legally perfect certificate of ascertainment, signed by Governor James Jackson, identifying the state's four electors in the standard fashion. There is, however, no physically distinct electoral vote. The only indication of the electors' preferences appears on the obverse side of the certificate of ascertainment. This is what it looks like:

¹¹⁰ We have inspected the original documents at the National Archives in Washington, D.C.

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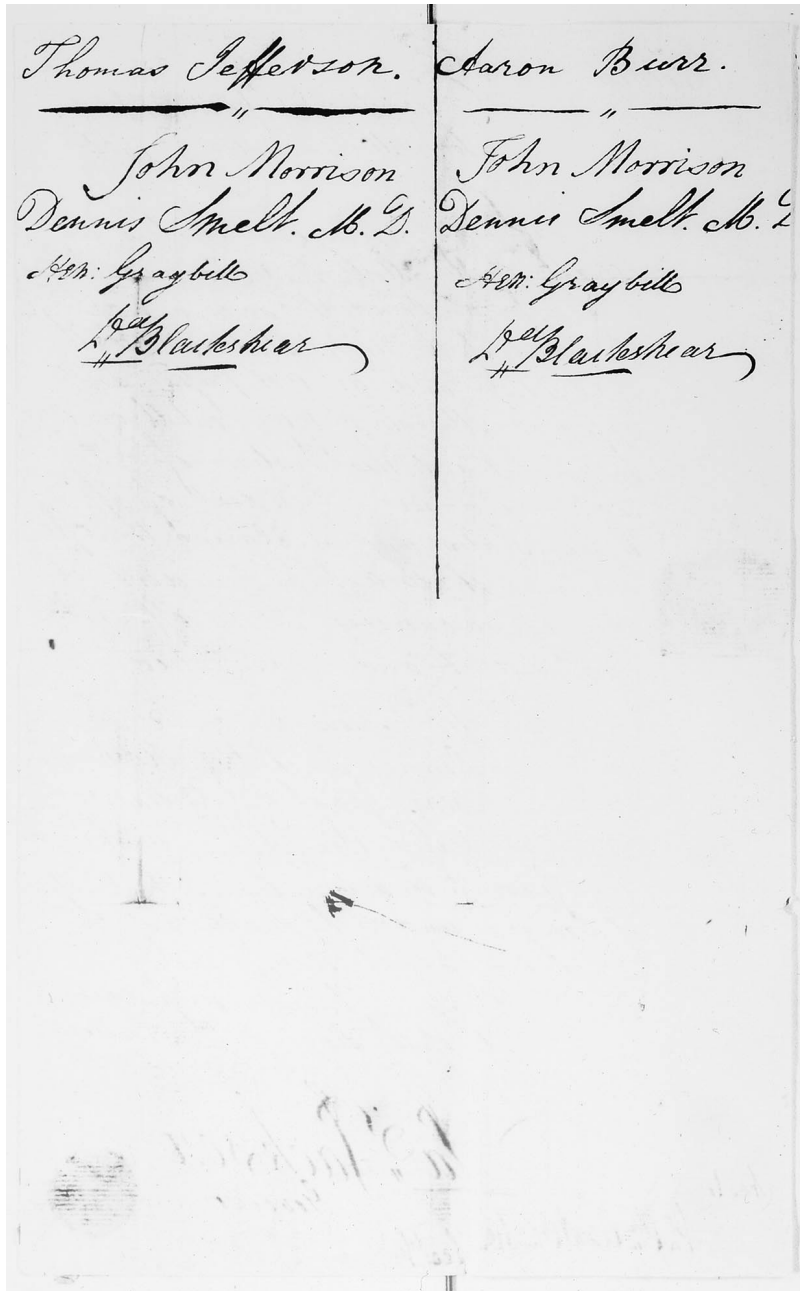


Figure 2

To what extent does this primitive document satisfy the constitutional requirements? If we restrict ourselves to the four corners of the document, the answer is: not at all. To be sure, there is a “list” of four names under the headings “Jefferson” and “Burr,” but there is no statement certifying that the four individuals were *casting the state’s electoral votes* for these two candidates.

To clarify the formal deficiencies, simply measure the Georgia “vote” against the terms of the constitutional text. The Georgia document indeed contains a “List,”¹¹¹ but it does not say that it represents a list of “the Persons voted for.”¹¹² The four names appearing below “Jefferson” and “Burr” are those of the individuals certified by Governor Jackson, but the electors themselves have not “sign[ed] and certif[ied]” that the list actually represents a true statement of their preferences.¹¹³

These constitutional requirements are purely technical, but they are not trivial. To the contrary, when read as part of the grander constitutional scheme, they seem quite important. Immediately after the Constitution imposes elaborate formalisms on each state’s electoral vote, it proceeds to a provision that should, by now, be familiar: “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.”¹¹⁴

Given the opacity of this provision, formalism might be just the thing needed to ensure its smooth operation. Since the text does not explicitly contemplate complex disputes over the validity of electoral votes, perhaps the best way to make it operational is to impose a crisp rule on the President of the Senate. When opening each ballot, he should assure himself that the voting papers comply

¹¹¹ U.S. Const. art. II, § 1, cl. 3.

¹¹² *Id.*

¹¹³ In the language of Article II and the Act of 1792, the “sign, certify, and transmit” language is modified by the pronoun “they,” clearly referring to the electors. U.S. Const. art. II, § 1, cl. 3 (stating that “*they* [the electors] shall sign and certify, and transmit” the electoral votes) (emphasis added); Act of March 1, 1792, ch. 8, § 2, 1 Stat. 239, 239–40 (stating that the electors “shall make and sign three certificates of all the votes by them given, and [the electors] shall seal up the same certifying on each that a list of the votes of such state for President and Vice President is contained therein”). This makes perfect practical sense—would the Framers or the authors of the 1792 Act have wanted the electors to draft and certify part of the package and have some unnamed other complete the process?

¹¹⁴ U.S. Const. art. II, § 1, cl. 3.

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with the formal constitutional and statutory requirements. If they do, the vote “shall then be counted;”¹¹⁵ if not, it should not. Any other approach threatens to involve the President of the Senate in an uncertain proceeding in which he might be an interested party. The formalist’s premise of a smoothly functioning machine, moreover, was regularly fulfilled during the early years of the republic: Each state in every prior election had submitted technically perfect electoral votes and certificates of ascertainment.¹¹⁶

Yet formalism has the vices of its virtues: The disqualification of an entire state is a very serious matter. In 1800, Georgia was a frontier region without great legal sophistication.¹¹⁷ If the Georgians had merely made a technical error in expressing their choice of Jefferson and Burr, would it not be wrong to disqualify them? Worse yet, the blunder had decisive national ramifications, transforming a two-man House runoff into a five-man race. Why should the nation’s fate hinge on some backwoods blunder?

But *was* the mistake merely technical?

Viewing the matter from Washington, D.C., it would have been hard to know for sure. First of all, no other frontier state had ever made such a legal mistake. Tennessee, for example, had a much shorter history of organized government than did Georgia, but it had had no trouble complying with the explicit commands of the Constitution and the 1792 Act. Here is Tennessee’s 1800 ballot.¹¹⁸

¹¹⁵ *Id.*

¹¹⁶ See supra note 106 and accompanying text.

¹¹⁷ See infra note 120 and sources cited therein.

¹¹⁸ This document states that:

Pursuant to [their] duty as Electors for the State of Tennessee, having convened in Knoxville on the first Wednesday of December in the year [one thousand] eight hundred and being legally qualified, we do certify that we voted by ballot for President and Vice President of the United States. And upon counting, the votes they were as follows [three for Jefferson and three for Burr].

The signatures of the electors appear below this statement. Electoral Vote Records, supra note 106.

Pursuant to our duty as Electors for the State of Tennessee, having convened in Knoxville on the first Wednesday of December in the year eighteen hundred, and being legally qualified; We do certify that we voted by ballot for President and Vice President of the United States. And upon counting the votes they were as follows.—

For Thomas Jefferson of the State of Virginia three votes.—

For Aaron Burr of the State of New York three votes.—

Given under our hands at Knoxville in the State of Tennessee this third day of December, One thousand eight hundred.

Dan Smith,
John Locke
B. Love

Figure 3

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Not only did Georgia's ballot stick out like a sore thumb, but there was something particularly suspicious about it: Its electoral vote had been plastered on the backside of the certificate of ascertainment. This anomaly raises the disturbing possibility of a classic "bait and switch" operation. Under this scenario, Georgia's four electors actually did what everybody else did: They prepared a proper ballot, put it into the envelope with the certificate of ascertainment, and then signed the outside of the envelope.¹¹⁹ At this point, some devious character enters the scene, removes the standard ballot, and casts four defective votes for Jefferson and Burr on the backside of the remaining certificate. He then seals the envelope and sends it on its merry way.

The missing electoral document was not only suspicious in itself. The "bait and switch" scenario put the legal deficiencies of the ersatz ballot in a new and disturbing light. Criminals do not spend much time reading the Constitution. If a fraudster had removed the genuine ballot prepared by the true electors, it is not surprising that he created a legal mess when writing up his counterfeit. On this scenario, Georgia's legal mess was the result of a fraudster's elimination of the genuine item originally prepared by the true electors.

Worse yet, Georgia was already notorious for shady dealing. In the Yazoo scandals, the state's leading politicians had sold vast tracts of public land at ridiculously low prices: "[O]nly one of the legislators voting for [the Yazoo act] had not been bribed in some way by the land companies."¹²⁰ To be sure, Georgia's voters had re-

¹¹⁹ The text is simplifying in one particular. Remember that the statute required the preparation of three sets of documents—two to be delivered to the President of the Senate and one to a local federal district judge. See *supra* note 105.

¹²⁰ C. Peter McGrath, *Yazoo 7* (1966). Georgia was very much a frontier state at the time, without a great deal of legal talent. See generally W.W. Abbot, *The Royal Governors of Georgia: 1754–1775* (1959); T.S. Arthur & W.H. Carpenter, *The History of Georgia, from Its Earliest Settlement to the Present Time* (Philadelphia, Lippincott, Grambo & Co. 1852); Kenneth Coleman, *The American Revolution in Georgia: 1763–1789* (1958); James F. Cook, *The Governors of Georgia: 1754–1995* (1995); 2 Walter G. Cooper, *The Story of Georgia* (1938); 1 Warren Grice, *Georgia Through Two Centuries* (E. Merton Coulter ed., 1966); Amanda Johnson, *Georgia as Colony and State* (1938); 2 Charles C. Jones, Jr., *The History of Georgia* (Cambridge, The Riverside Press 1883); Spencer B. King, Jr., *Georgia Voices: A Documentary History to 1872* (1966); Albert B. Saye, *New Viewpoints in Georgia History 1732–1789* (1943);

cently swept the corrupt politicians out of office,¹²¹ but could Jefferson, sitting from a great distance in Washington, D.C., be confident that their replacements were not playing similar games?

So much for the dark side. There were other bits of concrete evidence that pointed in a more reassuring direction. Pursuant to statutory instructions, Georgia's four electors had "certif[ied]" on their envelope to the President of the Senate "that a list of the votes . . . for President and Vice President [was] contained therein."¹²² As Figure 4 suggests, these four signatures match quite well with their namesakes on the defective ballot illustrated in Figure 2:

George Gillman Smith, *The Story of Georgia and the Georgia People: 1732 to 1860* (1900).

¹²¹ McGrath, *supra* note 120, *passim*.

¹²² Act of March 1, 1792, ch. 8, § 2, 1 Stat. 239, 239–40.

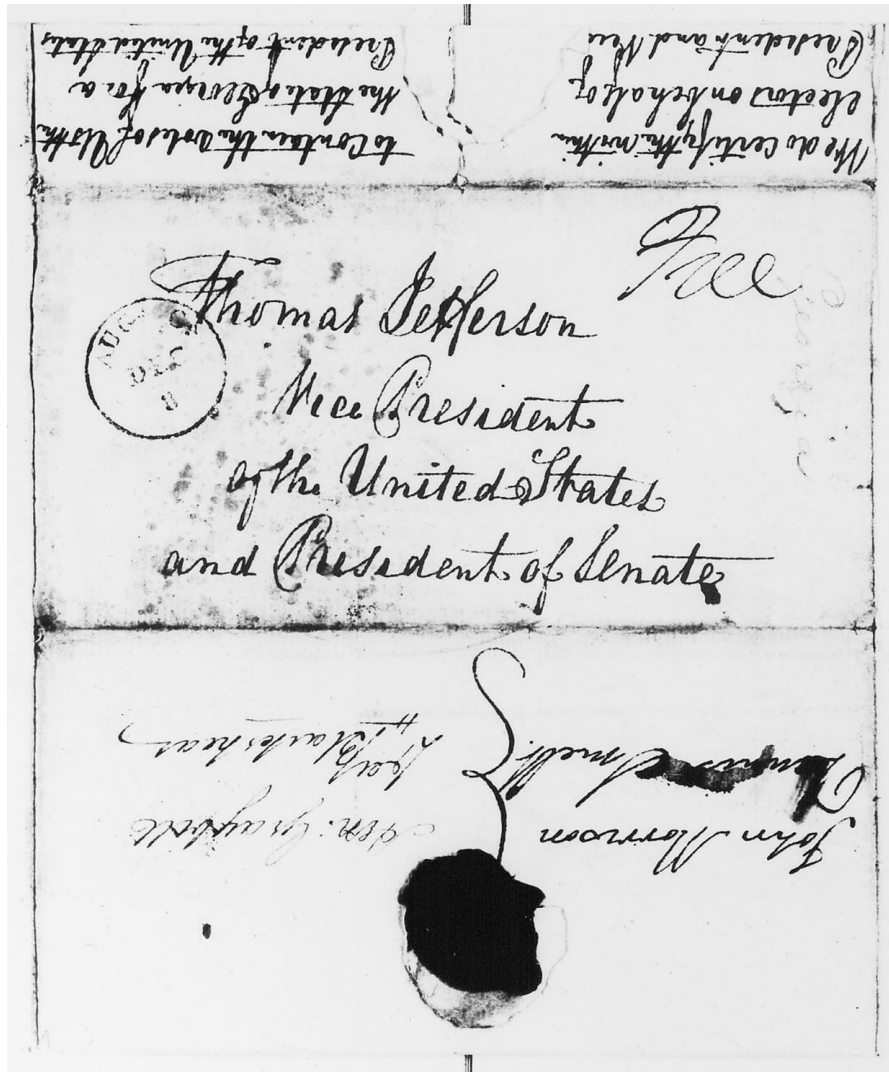


Figure 4

The history of mankind is littered with clever forgeries, and even today, handwriting analysis is more art than science. Nevertheless, if Jefferson were to compare the ballot with the envelope, he would not detect evidence of an obvious forgery. So perhaps the

unconstitutional Georgia ballot was indeed the result of mere legal incompetence rather than gross skullduggery.

This benign interpretation is supported by a final consideration. All through January, newspapers were reporting regularly that Jefferson and Burr had won all four of Georgia's electoral votes.¹²³ Given the broad publicity, surely the Federalists would have launched a vocal protest if they thought they had really won. The election of 1800 was one of the closest, and most partisan, in American history. If any of the Georgia electors had actually voted

¹²³ There were five newspapers in Georgia at the time (the *Augusta Chronicle*, the *Augusta Herald*, the *Columbian Museum & Savannah Advertiser*, the *Georgia Gazette*, and the *Louisville Gazette*, the last of which became the *Louisville Gazette & Republican Trumpet* in April 1800), and we examined every edition of all five spanning the period of January 1800 to February 1801. We also examined editions of every newspaper in print anywhere in the country over the period of January to March 1801, as well as every edition of the *Gazette of the United States* published in 1800.

Our conclusion: In the months leading up to the election, there was some uncertainty about the ultimate result, but as election day neared, the reports consistently indicated that Georgia would vote for Jefferson and Burr. On May 9, the *Columbian Museum & Savannah Advertiser* reported that Georgia would give four votes to Thomas Jefferson and four votes to Charles Pinckney in the upcoming election. *Columbian Museum & Savannah Advertiser*, May 9, 1800, at 2. On July 22, by contrast, the same publication reported that Georgia would give four votes each to Thomas Jefferson and Aaron Burr without explanation. *Columbian Museum & Savannah Advertiser*, July 22, 1800, at 3. On November 8, 1800, the *Augusta Herald* reported that Georgia would give four votes to Jefferson, while on November 11, 1800, the *Gazette of the United States* reported that Georgia would give two votes to Jefferson, two votes to Burr, two votes to Adams, and two votes to Pinckney, citing the "Columbian Mirror" as its source for the report. *Augusta Herald*, Nov. 8, 1800, at 2; *Gazette of the United States* (Philadelphia), Nov. 11, 1800. Four days later, the *Gazette* reported that Jefferson would receive four votes and that four votes would be "scattering." *Gazette of the United States* (Philadelphia), Nov. 15, 1800, at 3.

But by November 19, the *Louisville Gazette & Republican Trumpet* reported that "it is now reduced to a certainty, that Mr. Jefferson will get the four votes of this State, for president," before repeating the names of the four electors the state legislature apparently picked originally: Morrison, Smelt, Graybill, and Lumpkin. *Louisville Gazette & Republican Trumpet*, Nov. 19, 1800, at 3. The *Augusta Herald* edition for November 26 repeated this information. *Augusta Herald*, Nov. 26, 1800, at 3. In its December 10 edition, the *Augusta Herald* discussed how each state had voted in the presidential election, and reported that Georgia had voted for Jefferson. *Augusta Herald*, Dec. 10, 1800, at 3. The same day, the *Louisville Gazette & Republican Trumpet* reported that "the State of Georgia w[ill] furnish four votes for Jefferson." *Louisville Gazette & Republican Trumpet*, Dec. 10, 1800, at 1. On December 26, the *Gazette of the United States* reported that the "Electors of President and Vice-President in the State . . . [of] Georgia, have given a unanimous vote for Mr. Jefferson and Mr. Burr." *Gazette of the United States* (Philadelphia), Dec. 26, 1800, at 3.

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for Adams or Pinckney, common sense suggests that they never would have remained silent as they saw their votes publicly misrepresented. Once the Georgia envelope was opened, clever lawyers might debate endlessly about the possibility of a “bait and switch” operation, yet for the sober statesman, the public silence in the period leading up to February 11 might seem more eloquent than anything lawyers might say afterward.

This final point seems the most powerful argument supporting a decision to credit Jefferson and Burr with Georgia’s four electoral votes in 1801. But is it sufficiently powerful to outweigh all the arguments on the other side?

This was the key question facing Jefferson as he confronted his constitutional responsibilities as Senate President. How did he respond?

C. Jefferson’s Decision

A glance at the official report of the vote count in the *Annals of Congress* is not the slightest bit revealing:

Mr. SPEAKER, attended by the House, then went into the Senate Chamber, and took seats therein, when both Houses being assembled, Mr. RUTLEDGE and Mr. NICHOLAS, the tellers on the part of this House, together with Mr. WELLS, the teller on the part of the Senate, took seats at a table provided for them, in the front of the President of the Senate.

The PRESIDENT of the Senate, in the presence of both Houses, proceeded to open the certificates of the Electors of the several States, beginning with the State of New Hampshire; and as the votes were read, the tellers on the part of each house, counted and took lists of the same, which, being compared, were delivered to the President of the Senate, and are as follows:

| STATES. | Thomas Jefferson. | Aaron Burr. | John Adams. | Charles C. Pinckney. | John Jay. |
|----------------------|-------------------|-------------|-------------|----------------------|-----------|
| New Hampshire - - - | - | - | 6 | 6 | |
| Massachusetts - - - | - | - | 16 | 16 | |
| Rhode Island - - - | - | - | 4 | 3 | 1 |
| Connecticut - - - | - | - | 9 | 9 | |
| Vermont - - - | - | - | 4 | 4 | |
| New York - - - | 12 | 12 | | | |
| New Jersey - - - | - | - | 7 | 7 | |
| Pennsylvania - - - | 8 | 8 | 7 | 7 | |
| Delaware - - - | - | - | 3 | 3 | |
| Maryland - - - | 5 | 5 | 5 | 5 | |
| Virginia - - - | 21 | 21 | | | |
| Kentucky - - - | 4 | 4 | | | |
| North Carolina - - - | 8 | 8 | 4 | 4 | |
| Tennessee - - - | 3 | 3 | | | |
| South Carolina - - - | 8 | 8 | | | |
| Georgia - - - | 4 | 4 | | | |
| | 73 | 73 | 65 | 64 | 1 |

Recapitulation of the votes of the Electors.

| | | | | | |
|-----------------------------|---|---|---|---|------|
| Thomas Jefferson | - | - | - | - | - 73 |
| Aaron Burr | - | - | - | - | - 73 |
| John Adams | - | - | - | - | - 65 |
| Charles Cotesworth Pinckney | | | | - | - 64 |
| John Jay | - | - | - | - | - 1 |

The PRESIDENT of the Senate, in pursuance of the duty enjoined upon him, announced the state of the votes to both Houses, and declared that THOMAS JEFFERSON, of Virginia, and AARON BURR, of New York, having the greatest number, and a majority of the votes of all the Electors appointed, and, being

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equal, it remained for the House of Representatives to determine the choice.

The two Houses then separated; and the House of Representatives, being returned to their Chamber, proceeded, in the manner prescribed by the Constitution, to the choice of a President of the United States¹²⁴

There is no indication of a problem with the Georgia ballot. In contrast to John Adams in 1797, Jefferson does not sit down after the vote count to give others a chance to raise an objection.¹²⁵ He immediately pushes the proceedings to the next stage: a House runoff between Burr and himself for the presidency. So far as the *Annals* and all of the other official versions are concerned, there was no problem with the Georgia vote.

The newspapers tell a different story. Here is the account from the Philadelphia *Aurora & General Advertiser*: “The Tellers declared there was some informality in the votes of Georgia, but believing them to be the true votes, reported them as such.”¹²⁶ The *Aurora* was the leading Republican paper of the time, noteworthy for its partisanship in a partisan age.¹²⁷ Since its story cast a shadow (however slight) on Jefferson’s claim to an Electoral College majority, it certainly would not have fabricated the incident out of whole cloth.

The *Aurora*’s report was copied verbatim in Boston, New York, Philadelphia, and even Savannah, by newspapers of every political leaning.¹²⁸ At least one other paper—Boston’s *Mercury and New-*

¹²⁴ 10 Annals of Cong. 1023–24 (1801).

¹²⁵ None of the reports of Jefferson’s actions from that day indicate that he paused or sat down. Counting Electoral Votes, supra note 5, at 30–31, 33; 10 Annals of Cong. 1023 (1801); H. Jour., 6th Cong., 1st Sess. 796–99 (1801); S. Jour., 6th Cong., 1st Sess. 124–25 (1801); 2 Abridgment of the Debates of Congress, supra note 72, at 531; McKnight, supra note 5, at 393; Presidential Counts, supra note 72, at xxii, 11, 16.

¹²⁶ *Aurora & General Advertiser* (Philadelphia), Feb. 11, 1801, at 2.

¹²⁷ Fischer, supra note 54, at 419 (identifying the *Aurora* as a “decidedly Republican” newspaper).

¹²⁸ *Columbian Centinel* (Boston), Feb. 21, 1801, at 2; *Columbian Museum & Savannah Advertiser*, Feb. 27, 1801, at 3; *Pennsylvania Gazette* (Philadelphia), Feb. 18, 1801, at 2; *Philadelphia Gazette & Daily Advertiser*, Feb. 14, 1801, at 3; *Spectator* (New York), Feb. 18, 1801, at 3. The *Centinel* and *The Philadelphia Gazette & Daily Advertiser* were “decidedly Federalist,” Fischer, supra note 54, at 414, 419. *The Spectator* and the *Pennsylvania Gazette* were “moderately Federalist.” Id. at 417, 419. The

England Palladium—published a story that varied the language slightly: “The votes from Georgia, were rather informal—but accepted.”¹²⁹ To further enhance verisimilitude, all the newspapers put a precise time on their report: “half past 3 o’clock, p.m.”¹⁵⁰

No newspaper explicitly described Jefferson’s role in the affair. Those following the *Aurora* flashed a searchlight on the “tellers.” It was these gentlemen, two from the House and one from the Senate, who “declared [that] there was some informality . . . but believing them to be the true votes, reported them as such.”¹³¹

As a constitutional matter, however, the tellers lacked the authority to make a binding decision. Article II does not mention their existence, let alone vest them with any decisionmaking authority.¹³² Moreover, the official proceedings did not give the last word to the tellers, but to Jefferson:

The PRESIDENT of the Senate, *in pursuance of the duty enjoined upon him*, announced the state of the votes to both Houses, and declared that THOMAS JEFFERSON, of Virginia, and AARON BURR, of New York, having the greatest number, and a majority of the votes of all the Electors appointed, and, being equal, it remained for the House of Representatives to determine the choice.¹³³

Columbian Museum and Savannah Advertiser was “very moderately Federalist.” *Id.* at 422. Again, the *Aurora* was “decidedly Republican.” *Id.* at 419.

¹²⁹ *Mercury & New-England Palladium* (Boston), Feb. 24, 1801, at 2.

¹³⁰ See *supra* notes 127–28.

¹³¹ See *supra* notes 126, 128.

¹³² A bill introduced on February 14, 1800, attempted to define the duties of the tellers, granting them strictly ministerial authority:

[T]o receive the certificates of the Electors from the President of the Senate, after they shall have been opened and read, and to note in writing, the dates of the certificates, the names of the Electors, the time and place of their meeting, the number of votes given, and the names of the persons voted for; and also, the substance of the certificates from the Executive authority of each state, accompanying the certificates of the Electors

A Bill Prescribing the mode of deciding disputed elections of President and Vice President of the United States, S., 6th Cong. (1800), microformed on 6th Congress, 1799–1801: Senate Bills (Library of Congress). For reference to the date of introduction, see Counting Electoral Votes, *supra* note 5, at 16; S. Jour., 6th Cong., 1st Sess., 23, 31 (1800). In any event, it failed to pass Congress. Kuroda, *supra* note 80, at 78–82.

¹³³ 10 *Annals of Cong.* 1024 (1801) (emphasis added).

We are now in a position to present a stripped-down version of our story:

Strong evidence demonstrates that the tellers told Jefferson (apparently loud enough for the news to get out to the public¹³⁴) that there was a problem with the Georgia vote. Our inspection of the original documents tells us that they were right. Nevertheless, Jefferson asserted his authority, as President of the Senate, to proceed in the face of this report. He decisively resolved the issue by counting Georgia's vote as part of the final tally, even though he was an interested party in the affair. Despite the extraordinary character of this action, nobody rose to protest.¹³⁵

If we limit ourselves to strictly contemporaneous sources, this is all we are entitled to say—more than enough, as we shall see, to raise a host of historiographic and constitutional issues. Before broadening the inquiry, we trace the remarkable fate of this incident in American history. After all, it is no small thing to learn that Thomas Jefferson counted his rivals out of the race in the House runoff for the presidency. This remarkable fact, however, has somehow eluded the devoted attentions of generations of Jefferson lovers and Jefferson haters.¹³⁶ And it would have eluded our atten-

¹³⁴ McKnight describes the likely behavior of the tellers: "We all know that the custom of the tellers at a meeting is for one to count out aloud the votes as they are given and for the others to record them; this is undoubtedly what they did here on this extraordinary and unique occasion." McKnight, *supra* note 5, at 292. Other sources also indicate that the tellers read the votes aloud. The analytical introduction to *Presidential Counts* states that "[i]n practice, the tellers have read the votes, one by one, after they have been opened or the seals sometimes broken, sometimes unbroken, by the presiding officer, or in some instances the packages with unbroken seals handed over by the presiding officer." *Presidential Counts*, *supra* note 72, at xiii.

¹³⁵ These conclusions about the order of events are based on an extensive review of all available accounts of vote-counting day from the first election up through that of 1840, including (1) *Annals of Congress* (vote-counting day from 1789–1821); (2) *Journal of the House of Representatives* (vote-counting day from 1789–1817); (3) *Journal of the Senate* (vote-counting day from 1789–1817); (4) *Abridgment of the Debates of Congress* (vote-counting day from 1789–1801 and 1809–1841); (5) *Gales & Seaton's Register of Debates in Congress* (vote-counting day from 1825–1833); and (6) *Counting Electoral Votes* (vote-counting day from 1789–1841). Our survey extended to various secondary sources, including Dougherty, *supra* note 5; McKnight, *supra* note 5; Stanwood, *supra* note 5; and *Presidential Counts*, *supra* note 72.

¹³⁶ See, e.g., John W. Burgess, *The Law of the Electoral Count*, 3 *Pol. Sci. Q.* 633 (1888); C.C. Tansill, *supra* note 5. There is only one scholar whose writing suggests that he may have examined the actual electoral documents in the National Archives.

tion as well, except for the serendipitous discovery of a remarkable book by Matthew Livingston Davis.¹³⁷ Written in 1836, Davis's two-volume *Memoirs of Aaron Burr* contains a graphic description of the scene:

On the 11th of February the ballots were opened. During the performance of this ceremony a most extraordinary incident occurred. As it is known to but few now living, and never been publicly spoken of, it has been deemed proper to record it here, as a part of the history of that exciting contest.

The Aurora of the 16th of February, 1801, remarks, that "the tellers declared that there was some informality in the votes of Georgia; but, believing them to be true votes, reported them as such." No explanation of the nature of this informality was given; nor is it known that any has ever been given since.

....

... Mr. Jefferson was the presiding officer. On opening the package [of] endorsed Georgia votes, it was discovered to be totally irregular. The statement now about to be given is derived from an honourable gentleman, a member of Congress from the state of New-York during the administration of Mr. Jefferson, and yet living in this state. He says that Mr. Wells (a teller on the part of the Senate) informed him that the envelope was blank;

He does not, however, mention the legal problems with the Georgia vote, perhaps because he is not a lawyer. Kuroda, *supra* note 80, at 202 n.48 (1994) (including a citation to the actual Georgia electoral votes of 1800). None of the biographies of Jefferson or studies of the 1800 presidential election mentions the February 11 incident. We searched a multitude of Jefferson biographies available at the Library of Congress, and none of them contain any references to the incident. See, e.g., Joyce Appleby, *Thomas Jefferson* (2003); Alen Axelrod, *Life and Work of Thomas Jefferson* (2001); Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* (1996); Dumas Malone, *Jefferson and His Time* (1948); Dumas Malone, *Thomas Jefferson as Political Leader* (1963); Nathan Schachner, *Thomas Jefferson: A Biography* (1951); Weisberger, *supra* note 40.

¹³⁷ Not entirely serendipitous: Professor Ackerman was preparing to write a book on the constitutional implications of the Jeffersonian "Revolution of 1800," and was systematically researching the biographies of the leading protagonists in the struggle. See Ackerman, *supra* note 41. There are lots of biographies of lots of protagonists, however, and it would have been easy to have missed the reference in a single tome.

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that the return of the votes was not authenticated *by the signatures of the electors, or any of them, either on the outside or the inside of the envelope, or in any other manner*; that it merely stated in the inside that the votes of Georgia were, for Thomas Jefferson *four*, and for Aaron Burr *four*, without the *signature of any person whatsoever*. Mr. Wells added, that he was very undecided as to the proper course to be pursued by the tellers. It was, however, suggested by one of them that the paper should be handed to the presiding officer, without any statement from the tellers except that the return was informal; that he consented to this arrangement under the firm conviction that Mr. Jefferson would announce the nature of the informality from the chair; but, to his utmost surprise, he (Mr. Jefferson) rapidly declared that the votes of Georgia were *four* for Thomas Jefferson and *four* for Aaron Burr, without noticing their informality, and in a hurried manner put them aside, and then broke the seals and handed to the tellers the package from the next state. Mr. Wells observed, that as soon as Mr. Jefferson looked at the paper purporting to contain a statement of the electoral vote of the state of Georgia, his countenance changed, but that the decision and promptitude with which he acted on that occasion convinced him of that which he (a federalist) and his party had always doubted, that is to say, Mr. Jefferson's decision of character, at least when his own interest was at hazard.¹³⁸

How much weight should be given to this astonishing account?

On its face, it is double hearsay. Davis heard the account from an anonymous New York Congressman who had heard it from Wells. There were three tellers at the proceedings: Federalist William Wells from the Senate, Federalist John Rutledge, and Republican John Nicholas from the House. Our search of the principal archives containing Davis's papers, and those of the tellers, has failed to uncover further corroboration.¹³⁹ Worse yet, Davis was a

¹³⁸ 2 Matthew L. Davis, *Memoirs of Aaron Burr with Miscellaneous Selections from His Correspondence 71–73* (New York, Harper & Bros. 1836).

¹³⁹ Senator Wells's papers are located at the Historical Society of Delaware in Wilmington, Delaware and at the University of Pennsylvania. Representative Nicholas's papers are located at Columbia University, the Library of Congress, and the University of Virginia. Representative Rutledge's papers are located at Duke University, the Library of Congress, and the University of North Carolina at Chapel Hill. See also

long-time Burr loyalist and an active and life-long Jefferson-hater.¹⁴⁰ During his moderately successful career in New York politics, he certainly did not have a standout reputation for integrity.¹⁴¹ When publishing a posthumous selection of Burr's papers, he aimed to put his hero in the best light, sometimes destroying or altering originals for this greater good.¹⁴²

Nevertheless, Davis is sometimes careful in his treatment of sources. While he excludes Burr's love letters from his book, he is scrupulous enough to announce the omission in his Preface¹⁴³—a

Robert K. Ratzlaff, John Rutledge, Jr., *South Carolina Federalist, 1766–1819* (1982) (summarizing Rutledge's political life); Patrick J. Furlong, John Rutledge, Jr., and the Election of a Speaker of the House in 1799, *24 Wm. & Mary Q.*, 3d ser., 432 (1967) (reproducing a letter written by Rutledge). Jefferson's papers are scattered, but most are now online, and all are indexed at the Library of Congress. Davis's papers are located at the New York Historical Society.

We also searched archival collections for John Adams, Aaron Burr, Alexander Hamilton, Robert Goodloe Harper, Thomas Jefferson, James Madison, John Nicholas, Wilson Cary Nicholas, Charles Pinckney, Thomas Pinckney, John Rutledge, Jr., and Samuel Smith.

¹⁴⁰ Davis was sharply critical of Jefferson's victory in 1800. See Letter from Matthew L. Davis to Albert Gallatin (Jan. 2, 1801), *in* Matthew Livingston Davis Papers (New York Historical Society); Letter from Matthew L. Davis to Edward P. Livingston (Feb. 4, 1804), *in* Matthew Livingston Davis Papers (New York Historical Society). He frequently criticized Jefferson for his "lack of good character" and "unethical impulses." See *id.* His strong partisanship was undoubtedly sharpened when Jefferson rejected Burr's nomination of Davis to the lucrative position of naval officer for the New York City Custom House. See Howard Lee McBain, *De Witt Clinton and the Origin of the Spoils System in New York 140–44*, reprinted in *28 Studies in History, Economics and Public Law* 1 (1907).

¹⁴¹ Mushkat, *supra* note 52, at 107 ("Davis, as most historians view him, was a man who could never resist a shady deal or a dishonest dollar, a man whose political acumen was constantly available for sale to the highest bidder.").

¹⁴² Professor Mushkat notes that Davis "destroyed many letters that he considered damaging, altered others, and generally operated on the premise that future generations had no right to know the real Aaron Burr." *Id.*; see also Worthington C. Ford, *Some Papers of Aaron Burr*, 29 *Proc. Am. Antiquarian Soc'y* 43, 44–45 (1919) ("[T]he righteous indignation of every student of the Burr period is fittingly directed against [Davis]. To dip casually into a collection and select almost accidentally a few papers would be a procedure to shame a modern investigator . . . He took unpardonable liberties with the text of some which he did print.").

¹⁴³ Here is his statement:

It is a matter of perfect notoriety, that among the papers left in my possession by the late Colonel Burr, there was a mass of letters and copies of letters written or received by him, from time to time, during a long life, indicating no very strict morality in some of his female correspondents. These letters contained matter that would have wounded the feelings of families more extensively than

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punctilio that other editors of the era would have considered unnecessary. A similar candor marks his report of the vote-counting episode of 1801. He does not puff up the truth value of his account, but clearly states that it is double hearsay, leaving it up to the reader to assess its ultimate validity.¹⁴⁴ What is more, Davis did not create the story out of whole cloth. The *Aurora* does say what he says it says¹⁴⁵ and, most crucially, our inspection of the original documents in the National Archives confirms the key fact that the Georgia ballot was legally defective, and blatantly so.

Davis goes beyond our contemporaneous sources in one important particular. While the newspapers focus on the tellers' public announcement of Georgia's deficiency, Davis highlights Jefferson's aggressive action to preempt further consideration of the matter. Should we believe Davis on this point?

Perhaps the final answer is tucked away in some forgotten archive. Until some lucky researcher hits pay-dirt, it certainly will elude us. Moreover, Davis's hearsay report does contain errors on other matters. While Federalist Senator William Wells was indeed the teller designated by the Senate, he did not discover that "the envelope was blank; that the return of the votes was not authenticated by the signatures of the electors, or any of them, either on the outside or the inside of the envelope, or in any other manner."¹⁴⁶ As Figure 2 demonstrates, the electors did sign their names, as required by statute, on the outside of the envelope.¹⁴⁷ Davis is also incorrect in asserting that the Georgia ballot "merely stated in the inside that the votes of Georgia were, for Thomas Jefferson *four*, and

could be imagined. Their publication would have had a most injurious tendency, and created heartburnings that nothing but time could have cured.

As soon as they came under my control I mentioned the subject to Colonel Burr; but he prohibited the destruction of any part of them during his lifetime. I separated them, however, from other letters in my possession, and placed them in a situation that made their publication next to impossible, whatever might have been my own fate.

¹ Davis, *supra* note 138, at v.

¹⁴⁴ Davis states that he edited Burr's papers "with the most scrupulous regard to [his] own reputation for correctness." *Id.* According to Davis, the Burr Memoirs "stated facts, and the fair deductions from them, without the slightest intermixture of personal feeling." *Id.*

¹⁴⁵ *Aurora & General Advertiser* (Philadelphia), Feb. 16, 1801, at 2.

¹⁴⁶ 2 Davis, *supra* note 138, at 72.

¹⁴⁷ See *supra* note 113 and accompanying text.

for Aaron Burr *four*, without the *signature of any person whatsoever*.”¹⁴⁸ As we have seen, the paper does contain signatures, but the signatories do not specify that they are casting an electoral ballot, much less certify their ballot by the standard method.

It is easy to make too much of such discrepancies, which often afflict hearsay reports as they proceed from one speaker to the next. As Senator Wells’s report moved to an anonymous Congressman and then to Davis, some noise entered the signal, but not to the point of overwhelming the basic story: Georgia’s ballot *was* obviously defective. And if this much of the message came through, one should hesitate before dismissing the further report of Jefferson’s explicit ruling.

After all, the Constitution delegated to Jefferson, and only Jefferson, an affirmative role in the vote-counting ritual.¹⁴⁹ While it is debatable whether the text gave him the authority to make a decisive ruling, it is abundantly clear that the tellers had absolutely no authority to resolve the matter, and it was perfectly logical for them to relieve themselves of the decisional burden by handing the ballot to Jefferson. Once they had done so, no responsible presiding officer would have proceeded without examining the suspect ballot papers. Davis’s report, while melodramatic, comports with the common sense of the situation.¹⁵⁰

¹⁴⁸ 2 Davis, *supra* note 138, at 72.

¹⁴⁹ U.S. Const. art. II, § 1, cl. 3 (“*The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.*”) (emphasis added).

¹⁵⁰ A final detail of Davis’s account requires separate consideration. He says that, after hurriedly counting the Georgia vote into the Republican column, Jefferson “handed to the tellers the package from the next state.” 2 Davis, *supra* note 138, at 73. It is possible (though not likely), however, that Georgia’s envelope was opened last.

The electoral votes were not counted in state alphabetical order. Instead, a peculiar geographic ordering had become customary. In 1797, for example, John Adams began in the South with Tennessee and worked his way northward. Counting Electoral Votes, *supra* note 5, at 12–13; S. Jour., 4th Cong., 2d Sess. 320 (1797); 2 Abridgment of the Debates of Congress, *supra* note 72, at 62–63; Presidential Counts, *supra* note 72, at 9. In 1801, Jefferson began with New Hampshire and worked his way southward. Counting Electoral Votes, *supra* note 5, at 30, 33; 10 Annals of Cong. 1023–24 (1801); H. Jour., 6th Cong., 2d Sess. 796–98 (1801); S. Jour., 6th Cong., 2d Sess. 124–25 (1801); 2 Abridgment of the Debates of Congress, *supra* note 72; Presidential Counts, *supra* note 72, at xxii, 11, 16.

Georgia might be deemed the southernmost state on some reckonings, thereby suggesting that its envelope would have been opened last. Georgia’s votes were counted last, after South Carolina’s, in 1793. Counting Electoral Votes, *supra* note 5, at 10; H.

What is more, we have uncovered another evidentiary source testifying to Jefferson's involvement. Apparently, his decisive action was memorable enough to survive as an oral tradition in Congress as late as 1876, when Senator Hannibal Hamlin recalled the event:

[T]here was no certificate accompanying the return that the Electors met and balloted. It had nothing on its face to show that the votes were given for anybody. Clearly it did not conform to the Constitution, but it was counted as shown by the record.

There was a tradition that the tellers handed it back to Mr. Jefferson, who returned it to them, and decided that it must be counted.¹⁵¹

In contrast to Davis, Hamlin reports the details surrounding Georgia's ballot with perfect accuracy. Despite the passage of seventy-five years, he says—correctly—that the Georgia envelope contained a certificate of ascertainment, but that the ballot “had nothing on its face to show that the votes were given for anybody.”¹⁵² His invocation of “tradition” seems to go back to a source that is independent of Davis.

Of course, these two post-1801 sources contribute their confirming testimony thirty-five and seventy-five years after the fact. Nev-

Jour., 2d Cong., 2d Sess. 702 (1793); S. Jour., 2d Cong., 2d Sess. 485 (1793); McKnight, *supra* note 5, at 390–91. But in 1797, all reports except one indicate that Georgia was counted third (after Tennessee and Kentucky). Counting Electoral Votes, *supra* note 5, at 13; 9 S. Jour., 4th Cong., 2d Sess. 320 (1797). But see H. Jour., 4th Cong., 2d Sess. 686 (1797) (listing Georgia last). In 1805, Georgia was counted before Tennessee, Kentucky, and Ohio (which had not been in the Union for the 1800 election), and occupied this position for quite a while. Counting Electoral Votes, *supra* note 5, at 36; 14 Annals of Cong. 1195 (1805); H. Jour., 8th Cong., 2d Sess. 137 (1805); S. Jour., 8th Cong., 2d Sess. 453 (1805); Presidential Counts, *supra* note 72, at 19, 21.

Accounts dealing with February 11, 1801, disagree on the order of voting. Several sources list Georgia last in the state-by-state vote graphs. Counting Electoral Votes, *supra* note 5, at 30; 10 Annals of Cong. 1023 (1801); S. Jour., 6th Cong., 2d Sess. 125 (1801); 2 Abridgment of the Debates of Congress, *supra* note 72, at 531; Presidential Counts, *supra* note 72, at 11, 16. Yet others place it third-to-last, followed by Kentucky and Tennessee. H. Jour., 6th Cong., 2d Sess. 799 (1801); Stanwood, *supra* note 5, at 63. This placement is more consistent with Georgia's treatment in the immediately preceding and succeeding electoral counts.

¹⁵¹ McKnight, *supra* note 5, at 293.

¹⁵² *Id.*

ertheless, modern historians have entirely failed to take it into account, allowing the entire episode to fall out of sight and mind for more than a hundred years.¹⁵³

Our story is constructed out of three categories of material. *Official documents* demonstrate the illegality of the Georgia ballot, and that counting them was necessary in pushing the electoral vote totals for Jefferson and Burr beyond the crucial threshold of seventy votes. They also reveal that Jefferson, “in pursuance of the duty enjoined upon him” as President of the Senate,¹⁵⁴ expressly found that he and Burr had gained “a majority of the votes of all the Electors appointed.”¹⁵⁵ Only on this basis did he send the matter to “the House of Representatives to determine the choice”¹⁵⁶ for President in a runoff limited to two, rather than five, candidates. *Contemporaneous newspaper reports* establish that Jefferson did not make his decision inadvertently, but that the tellers clearly and publicly announced the defect in the Georgia vote. *Subsequent hearsay accounts* confirm that Jefferson made a focused and self-conscious decision about the Georgia ballot, and resolved the question in a manner that dramatized the intrinsic weakness of the Founding design.

But enough detective work. The next Part considers the larger constitutional significance of the Georgia episode. We examine this question on two fronts: first putting Jefferson’s decision in its concrete historical context, and then considering its enduring implications as a precedent for future Electoral College disputes.

IV. JEFFERSON IN CONTEXT

So the Founders made some serious mistakes, as did Thomas Jefferson. Constitutional muckraking isn’t much the fashion in these hagiographic times, but it is tough to ignore some embarrassing questions: Surely the Framers should have been clever enough to note the danger of appointing the fox to superintend the chicken coop? Surely Jefferson should have been more up-front about ex-

¹⁵³ See *supra* notes 5, 136.

¹⁵⁴ 10 Annals of Cong. 1024 (1801).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

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cluding his Federalist rivals from the House runoff on the basis of a transparently defective ballot?

And yet, there is another side to our story. Placed in a greater historical context, Jefferson's decision may come to seem something more than a sorry tale of shabby self-dealing. Difficult though it may be to believe, Jefferson may have chosen the most statesmanlike way out of an impossible situation.

There are even extenuating circumstances surrounding the initial blunder by the Founders: It *was* stupid to place the President of the Senate in the chair, but the outcome in 1801 might well have been worse had the Founders made a different institutional choice in 1787. Or so we shall argue.

A. Substance Over Form

Begin by recalling Jefferson's response to the controversy swirling around the Vermont ballot in 1796. Adams was a mere three votes ahead, and Vermont's total of four represented his margin of victory. Nevertheless, Jefferson refused to quibble his way into the presidency. Remember his words to Madison: "Surely in so great a case, substance & not form should prevail. . . . I pray you to declare it on every occasion foreseen or not foreseen by me, in favor of the choice of the people substantially expressed, and to prevent the phaenomenon of a Pseudo-president at so early a day."¹⁵⁷

Jefferson's self-restraint in 1797 casts new light on his apparent self-dealing in 1801. Perhaps he was acting, in both cases, on the same principle: do not allow legal quibbling to produce "the phaenomenon of a Pseudo-president" not rooted in the "choice of the people." In 1797, this principle meant supporting Adams; in 1801, himself.

But, of course, this recharacterization begs a substantial question: How could Jefferson be so sure that the defect in Georgia's ballot was merely formal, and not the result of fraudulent misrepresentation?

The question turns primarily on the weight properly accorded a single fact: During the final run-up to the vote count, Georgia's votes for Jefferson and Burr seemed a foregone conclusion. News-

¹⁵⁷ Letter from Thomas Jefferson to James Madison (Jan. 16, 1797), in 16 Madison Papers, *supra* note 5, at 461, 461.

papers around the country were regularly placing them in the Republican column without controversy.¹⁵⁸ Nobody in Washington had made any contrary suggestions. Given the ferocity of partisan combat at the time and the closeness of the election, the deafening silence had a plain meaning: No smoke equals no fire. For a man of the world—and Jefferson was nothing if not a man of the world—there was an obvious inference. If the Federalists weren't complaining, then there was nothing to complain about. Despite the formal deficiencies, Georgia's votes should count in the Republican column, with form giving way to substance.

Of course, Jefferson's judgment call may have been wrong, and one of us has traveled to Georgia on a factfinding mission to explore the matter further.¹⁵⁹ Our conclusion: The state's four electors indisputably voted for Jefferson and Burr, "to the great satisfaction of a large concourse of people assembled on the occasion."¹⁶⁰ This report by Governor Jackson is abundantly confirmed in local

¹⁵⁸ See *supra* note 123.

¹⁵⁹ Our review included an examination of the following materials: (1) the papers of eight of the most prominent Georgia political figures of the period (Georgia Historical Society, Savannah) (additionally, each of the other collections was searched for papers concerning these eight personalities); (2) every edition of every Georgia newspaper from January 1800 to February 1801 (University of Georgia Hargrett Library for Rare Books and Manuscripts, Athens); (3) records of the Georgia Senate and the Georgia House of Representatives for 1799 and 1800; and (4) a book containing the Governor's outgoing official correspondence covering the period between January 1799 and March 1801 (Georgia Department of Archives and History, Atlanta). A broad range of secondary literature was also examined. See *supra* note 120 and sources cited therein; see also E. Merton Coulter, *Abraham Baldwin: Patriot, Educator, and Founding Father* (1987); William Omer Foster, Sr., *James Jackson: Duelist and Militant Statesman* (1960); Harvey H. Jackson, *Lachlan McIntosh and the Politics of Revolutionary Georgia* (1979); George R. Lamplugh, *Politics on the Periphery: Factions and Parties in Georgia, 1783–1806* (1986); Walter McElreath, *A Treatise on the Constitution of Georgia* (1912); Albert Berry Saye, *A Constitutional History of Georgia: 1732–1968* (1970); E. Merton Coulter, *Edward Telfair*, 20 *Ga. Hist. Q.* 99 (1936); Patrick J. Furlong, *Abraham Baldwin: A Georgia Yankee as Old Congressman*, 56 *Ga. Hist. Q.* 51 (1972); George R. Lamplugh, *George Walton, Chief Justice of Georgia, 1783–1785*, 65 *Ga. Hist. Q.* 82 (1981); George R. Lamplugh, "Oh the Colossus! The Colossus!": James Jackson and the Jeffersonian Republican Party in Georgia, 1796–1806, 9 *J. Early Republic* 315 (1989); Edwin Bridges, *George Walton: A Political Biography* (1981) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Chicago Library).

¹⁶⁰ Letter from Governor James Jackson to Abraham Baldwin (Dec. 5, 1800), *in* *Abraham Baldwin Papers* (University of Georgia at Athens).

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newspapers.¹⁶¹ There is no question about it: If Georgia's votes had not been counted in Washington, form would have indeed triumphed over substance.

We have been less successful in finding out why the Georgians failed, on this one occasion, to comply with constitutional rules consistently followed elsewhere. It is clear, however, that the Georgians had been particularly inattentive to federal requirements during the 1800 campaign. At an earlier stage, the legislature had passed a statute providing for the selection of electors as part of the general election scheduled in early October.¹⁶² In taking this step, it violated a federal law requiring all states to pick their electors "within thirty-four days preceding the first Wednesday in December."¹⁶³ When the bill reached Governor Jackson's desk, he identified the legal problem and vetoed the plan.¹⁶⁴ The legislature then refused to hold an additional election within the thirty-four-day window, and chose to select the four electors itself.¹⁶⁵

¹⁶¹ On November 19, the *Louisville Gazette & Republican Trumpet* reported that "[i]t is now reduced to a certainty that Mr. Jefferson will get the four votes in this state for president." *Louisville Gazette & Republican Trumpet*, Nov. 19, 1800, at 3. Reports that Georgia voted for Jefferson and Burr appear in various editions of the *Augusta Herald* and the *Georgia Gazette*. *Augusta Herald*, Dec. 13, 1800, at 3; *Augusta Herald*, Dec. 27, 1800, at 2; *Augusta Herald*, Jan. 3, 1801, at 3; *Augusta Herald*, Jan. 17, 1801, at 2; *Augusta Herald*, Jan. 28, 1801, at 2; *Georgia Gazette*, Jan. 8, 1801, at 3.

¹⁶² *Journal of the Ga. S.* 29 (Nov. 30, 1799).

¹⁶³ Act of March 1, 1792, ch. 8, § 1, 1 Stat. 239, 239.

¹⁶⁴ *Journal of the Ga. S.* 39 (Dec. 5, 1799); see also *Augusta Herald*, Nov. 5, 1800, at 3 (referencing this problem with the proposed law). We have been unable to identify any Georgia law enacted before 1800 that regulated the selection of presidential electors.

¹⁶⁵ *Journal of the Ga. H.R.* 62–63 (Nov. 5, 1800); *Journal of the Georgia Senate* 7–8 (Nov. 5, 1800). On November 18, both houses of the Georgia state legislature met and picked John Morrison, Dennis Smelt, Henry Greybill, and John Lumpkin as presidential electors. *Journal of the Ga. H. R.* 81 (Nov. 18, 1800); *Journal of the Ga. S.* 25 (Nov. 18, 1800).

There is another ambiguity. David Blackshear cast one of the electoral votes from Georgia, but he was not chosen as one of the original electors. On November 18—the day the state legislature picked Smelt, Morrison, Greybill and Lumpkin—Governor Jackson may have discovered that Lumpkin could not serve due to family illness, and he may have appointed Blackshear in Lumpkin's place. In the Abraham Baldwin Papers, there is an official gubernatorial document (complete with seal) that mentions the "executive appointment of David Blackshear as an Elector for President and Vice President in the room of John Lumpkin." James Jackson, Gubernatorial Statement (Nov. 18, 1800), in *Abraham Baldwin Papers* (University of Georgia at Athens). The

Unfortunately, the Governor was not equally vigilant when the electors assembled before a “large concourse” to cast their ballots. Nobody intervened to correct Georgia’s legal error, but there was no doubt about the underlying intent of the electors.¹⁶⁶ Jefferson was on solid ground in refusing to make a federal case out of frontier ineptitude.

B. Prudence and Publicity

But Jefferson did not merely place Georgia’s votes into the Republican column; he did not publicly acknowledge the existence of any sort of problem. In contrast to John Adams four years earlier, he did not give his opponents a clear opportunity to raise the issue. Instead, he immediately proceeded to cut his Federalist opponents out of the runoff.¹⁶⁷ Although Jefferson’s decision turned out to be substantively sound, surely it was procedurally defective?

Perhaps not. Though Jefferson did not speak, the tellers announced the existence of the problem *before* handing him the Georgia document, and loud enough for the newspapers to carry the story throughout the land.¹⁶⁸ Two of the three tellers were Federalists, and one of them—if Davis is to be believed—was shocked by Jefferson’s rapid disposition of the affair.¹⁶⁹ He certainly was in a position to stop the vote count and raise a formal objection if he chose, but he did not do so.

There is every reason to suppose that the Georgia delegation was among the members of the House and Senate whose “presence” is constitutionally required at the vote-counting ceremony. Two of these Georgians—Benjamin Taliaferro of the House and

University of Georgia archival staff seems to have dated this document November 18, but the document itself states that the Governor “caused the great seal of the said State to be put and affixed at the State House in Louisville this tenth day of December in the year of our Lord one thousand eight hundred.” *Id.* We think the later date is more plausible, especially since the Governor’s outgoing correspondence book contains a letter addressed to Lumpkin and the other three electors dated November 19, 1800. Letter to Dennis Smelt, John Morrison, Henry Gr[e]ybill, and John Lumpkin (Nov. 19, 1800), *in* Governor’s Letter Book of Gov. James Jackson: March 25, 1800–March 2, 1801, at 141 (Ga. Dep’t of Archives and History) (1940).

¹⁶⁶ See *supra* note 123.

¹⁶⁷ 10 *Annals of Cong.* 1023–24 (1801).

¹⁶⁸ See *supra* note 134 and accompanying text.

¹⁶⁹ See *supra* note 138 and accompanying text.

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James Gunn of the Senate—had been elected as Federalists.¹⁷⁰ Surely one or another would have protested if he believed that the electors had actually voted a Federalist ticket. No intense partisanship was required to raise this point had it been well founded.

It is wrong, then, to accuse Jefferson of exploiting his position to keep his opponents in the dark. His official silence helped conceal his ruling from posterity, but the Georgia problem was not a secret to the assembled congressmen. Jefferson had simply shifted the burden of going forward to the Federalists in the audience. If they wished to create a “Pseudo-president” by raising some legal quibbles, it was up to them to make a clear and focused objection. Jefferson certainly was not going to do anything to make their task any easier.¹⁷¹

Jefferson’s silence seems particularly sensible in the context of the confused legal situation prevailing in 1801. Just the year before, Congress tried to pass a statute creating an explicit procedure for dealing with electoral vote challenges,¹⁷² but it failed to achieve consensus,¹⁷³ leaving everybody with the painfully ambiguous words of the Constitution as a guide. The text simply does not specify who is to have the last word. Though the President of the Senate

¹⁷⁰ Professor Dauer has Taliaferro listed as a Federalist. Dauer, *supra* note 5, at 323. The other member of the House of Representatives besides the Federalist Taliaferro, James Jones, had died before vote-counting day, but he was also a Federalist. *Id.* Senator Gunn, present on vote-counting day, was a Federalist. See Gunn, James, 1753-1801, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000526> (last visited Jan. 30, 2004) (on file with the Virginia Law Review Association). A book that provides information on all senators from Georgia does not list Gunn’s partisan affiliation, but does say that he engaged in a duel with arch-Republican Georgia Governor and Senator James Jackson. Josephine Mellichamp, *Senators from Georgia* 23 (1976).

¹⁷¹ The principle of passivity established by Jefferson remains in force today. Under rules established by the Electoral Vote Count Act of 1887, the chair does not raise any questions regarding the legitimacy of electoral votes. Rather, a protest must be signed by at least one representative and one senator before its consideration will be in order. It should also be noted, however, that the Act requires the Senate President to apprise the assembled individuals of their opportunity to raise challenges. 3 U.S.C. § 15 (2000) (“Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one senator and one member of the House of Representatives before the same shall be received.”).

¹⁷² See *supra* note 81 and accompanying text.

¹⁷³ See *supra* note 88 and accompanying text.

“opens” the votes, he is not expressly authorized to do more; though vote counting occurs in the “presence” of the two houses, they are not expressly granted any sort of decisionmaking authority, let alone decisive power.¹⁷⁴

Jefferson’s silence allowed everybody to resolve the matter without a heated legalistic battle. And there can be no question that the battle would have been heated. The Federalists had a clear majority in Congress.¹⁷⁵ This gave them an overwhelming interest in stretching the constitutional language to give the final word to the House and Senate; while Jefferson, outraged by the partisan theft of four crucial votes, would have had every incentive to insist upon an expansive reading of his own power to “open” the votes.

As the parties struggled in legal limbo, they would soon confront another danger. There was no obvious method by which to resolve their argument. They would be facing an infinite regress: On the one hand, the President of the Senate could claim the right to decide whether the President of the Senate possessed the contested power; and on the other, senators and representatives might insist that their “presence” at the vote count authorized them to override the President’s ruling.

Worse yet, dispatching a factfinding mission to Georgia was not feasible. It was the dead of winter, and a snowstorm was swirling around the half-built Capitol.¹⁷⁶ Even during calmer weather, it would take a week or two to travel on terrible roads all the way to Augusta, the state capitol.¹⁷⁷ Only three weeks remained, however, before the inauguration of a new President. Time would run out

¹⁷⁴ See supra notes 114 and 149 and accompanying text.

¹⁷⁵ The presence of a Federalist majority in the House of Representatives was demonstrated on February 9, two days prior to the vote count, when the chamber met to set the rules for the anticipated House runoff. By a vote of fifty-four to forty-five, the Federalists set a rule that the “doors of the House shall be closed during the balloting” (Rule 5th), and insisted by a vote of fifty-three to forty-seven that the House “shall not adjourn until a choice is made” (Rule 4th). See *Historic Documents on Presidential Elections: 1787–1988*, at 76–78 (Michael Nelson ed., 1991); see also Letter from Samuel Tyler to Gov. James Monroe (Feb. 9, 1801), in *Original Letters*, 1 Wm. & Mary Q., 1st ser., 99, 102 (1892) (noting that “the Feds had a majority of six votes” and had little difficulty getting their version of the rules adopted).

¹⁷⁶ See James Rogers Sharp, *American Politics in the Early Republic* 267 (1994).

¹⁷⁷ Lord & Lord, supra note 62, at 79.

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before a delegation could complete its factfinding mission and return with a report to the nation's capitol.¹⁷⁸

With factfinding unfeasible, and the constitutional text obscure, the proceedings might have simply disintegrated amidst a cloud of bitter legalisms—the worst possible result. The nation was already in an uproar over the Electoral College tie that had thrown the presidency into the House. Confusion would have been compounded if the House runoff had been postponed indefinitely while partisans quarreled without any obvious means of closing the debate. The year 1801 marked the first time in American history that a political party was called upon to yield power to its rival. Even without a prolonged debate over Georgia, it took almost a week for the House to choose Jefferson over Burr on its thirty-sixth ballot.¹⁷⁹ During this short period, the country was teetering on the brink of violence. It is not at all clear whether the forces for violent resolution could have been kept in check much longer.¹⁸⁰

There was a good deal of constitutional prudence in Jefferson's decision to keep silent. Any express ruling from the chair invited his opponents to initiate a counterproductive struggle between the President of the Senate and the two houses of Congress over their relative competence in the affair. In contrast, the notice from the tellers hit just the right note—placing the burden on the Federalists to raise an objection if there was any factual basis for supposing that Georgia's electors had cast their ballots for the Federalist candidates.

The wisdom of Jefferson's decision is confirmed by another pregnant silence over the next few weeks. As we have seen, leading newspapers all around the country reported the problem with

¹⁷⁸ The 1792 Act required the electors to send another envelope, containing a copy of their ballot and the certificate of ascertainment, to a local federal district judge. Act of Mar. 1, 1792, ch. 8, § 2, 1 Stat. 239, 239–40. It seems likely that these documents contained the same defects as those delivered to Washington, but we have not been able to locate them. If our suspicions are correct, a hypothetical factfinding mission would have required a good deal of time before getting to the bottom of the matter. Even had the district judge opened his envelope to find a formally perfect electoral ballot, it still would have taken too long for the mission to conclude its investigation and return to Washington before Inauguration Day.

¹⁷⁹ 10 Annals of Cong. 1028 (1801).

¹⁸⁰ The reality of mob violence and the risk of civil war is discussed at length in Ackerman, *supra* note 41; see also Sisson, *supra* note 21, at 423–37 (providing a broad range of evidence).

Georgia's ballot.¹⁸¹ Yet we have found no newspaper that contained even a hint of an objection to Jefferson's resolution of the issue—and this at a time when so many other aspects of the Electoral College crisis generated ceaseless controversy. The ready acceptance of this decision testifies to Jefferson's wisdom in avoiding a grand institutional confrontation that had no easy constitutional answer.

C. Pinckney for President?

To make a final point, suppose that Jefferson had single-mindedly pursued a formalist course. Once alerted to the problem by the tellers, he publicly inspects the documents and proclaims that the plain meaning of the Constitution requires him to disqualify the Georgia votes.¹⁸² This would have left Jefferson and Burr with only sixty-nine votes remaining in their respective columns—one shy of the seventy needed to exclude Adams, Pinckney, and Jay from the House runoff.¹⁸³ A shift to a five-man runoff would have been legally significant, but would it have changed the final outcome?

Winning the runoff proved difficult for Jefferson even when Burr was his only opponent. Thanks to another Founding blunder, the House making the choice was the lame-duck body elected in 1798—a year when the Federalists scored significant election victories.¹⁸⁴ Although the party had suffered a number of defections, it still controlled the House when its members voted in ordinary fashion.

But the runoff was decided under special constitutional rules giving each state delegation a single vote.¹⁸⁵ This placed the Federalists at a strategic disadvantage—too many of their congressmen were bunched in too few states. When some Federalists defected to Jef-

¹⁸¹ See supra note 128 and accompanying text.

¹⁸² Note that the law required all electors to vote on the first Wednesday in December and did not provide for any sort of re-vote. Act of Mar. 1, 1792, ch. 8, § 2, 1 Stat. 239, 239–40.

¹⁸³ See supra note 30 and accompanying text (describing conditions for two-candidate and five-candidate runoffs).

¹⁸⁴ 1798 was the year of an emerging conflict with France, and the Federalists utilized nationalist sentiment as a potent political weapon against the Republicans, who had been consistently pro-French in their foreign policy. See Ackerman, supra note 41, at 61–62.

¹⁸⁵ See supra Section I.B.

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person, the party could deliver only six states to Burr, while their great antagonist won the vote of eight states. This would have generated an easy victory for Jefferson but for another technical glitch by the Founders. The Constitution required the winning candidate to gain an absolute majority of all state delegations without considering the possibility that some delegations might divide equally. Had the Framers focused on this issue, perhaps they would have awarded a half-vote to each of the contending candidates. The absence of specific instructions had a devastating impact in 1801, however, when two of the states—Vermont and Maryland—split evenly and failed to cast a ballot.¹⁸⁶ As a consequence, Jefferson fell one vote short of the nine required, and the initial ballot resulted in a deadlock: eight for Jefferson, six for Burr, and two not voting.¹⁸⁷

The second ballot revealed a drop in Jefferson's support. Eleven Federalists initially voted for Jefferson in recognition of the obvious fact that he, rather than Burr, was the Republican candidate for President. When Jefferson fell short, five of these congressmen returned to their party, giving Burr a two or three vote majority.¹⁸⁸ Luckily for the Republicans, this shift in individual votes did not change the balance of power in any state delegation, and the impasse continued until the thirty-sixth ballot, with the Federalists desperately searching for a few additional votes. In the words of Congressman James Bayard, a key Federalist leader, "By deceiving one Man (a great blockhead) and tempting two (not incorruptible) [Burr] might have secured a majority of the States."¹⁸⁹

¹⁸⁶ 10 Annals of Cong. 1028 (1801).

¹⁸⁷ *Id.*

¹⁸⁸ Under House rules, each member of a state delegation cast a secret ballot, and so there is no formal record of the votes of individual representatives. A Republican newspaper, however, the *National Intelligencer and Washington Advertiser*, published lists of the three ballots attributing votes to individual members. *National Intelligencer and Washington Advertiser*, Feb. 13, 1801, at 3; *National Intelligencer and Washington Advertiser*, Feb. 16, 1801, at 2; *National Intelligencer and Washington Advertiser*, Feb. 18, 1801, at 3. It reported that Jefferson won the individual vote by a margin of fifty-five to forty-nine on the first ballot, but that five defections occurred on the second and subsequent ballots. *Historic Documents on Presidential Elections: 1787–1988*, supra note 175, at 85–88. Given the extreme partisanship prevailing at the time, it would be a mistake to accept the *Intelligencer's* count as authoritative. If there is any sort of bias in this report, however, it seems likely that a Republican newspaper would understate the extent of Federalist defection on the second ballot.

¹⁸⁹ Letter from James A. Bayard to Alexander Hamilton (Mar. 8, 1801), in 25 *The Papers of Alexander Hamilton* 344, 345 (Harold C. Syrett ed., 1977).

Jefferson did prevail in the end,¹⁹⁰ but the transformation of the runoff into a five-candidate affair would have made this final victory more difficult. Burr was not the Federalists' candidate of choice—they backed him only as a last-ditch effort to stop their archenemy Jefferson. With a five-man runoff, they could back real Federalists, and this might have made a difference. As we have seen, six Federalist congressmen were unwilling to vote for Burr, but they might have been happy to vote for Adams. At the very least, their blocking coalition would have had even more staying power.¹⁹¹ In addition, after fifty or sixty ballots, the exhausted House might have broken the impasse by selecting a compromise candidate from among the three remaining contenders.

At this point, the Federalists' vice-presidential candidate—Charles Cotesworth Pinckney—would have likely emerged as an exceptionally attractive dark horse. Pinckney was the sort of “continental character” the Founders envisioned as President, with a long and distinguished record of public service. He had had a fine career as a military officer during the Revolution¹⁹² and he served as a delegate to the Constitutional Convention.¹⁹³ He also had es-

¹⁹⁰ Professor Ackerman provides a blow-by-blow account of Jefferson's victory in his forthcoming book. See Ackerman, *supra* note 41.

¹⁹¹ Professor Manning Dauer's research indicates one way to assess this point, as he provides a table indicating the party affiliation of each member of the House of Representatives. Dauer, *supra* note 5, at 288–331. If one were to assume that all Federalists voted for the leading Federalist candidate in the five-man runoff, it is an easy matter to use Professor Dauer's data to determine how the sixteen states would have voted. The result: eight states vote Federalist (Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, Rhode Island, and South Carolina); six states vote Republican (Kentucky, New Jersey, New York, Pennsylvania, Tennessee, and Virginia), and two states are evenly split (North Carolina and Vermont). This contrasts with the real-world results in the two-man runoff—where eight states voted for Jefferson, six voted for Burr, and two split. 10 *Annals of Cong.* 1028 (1801).

Strict party-line voting, however, might not have prevailed if the Federalists had been afforded an opportunity to vote for a Federalist candidate, and we provide a more individualized analysis below. See *infra* note 199. Nevertheless, the hypothetical party-line vote provides a rough sense of the order of magnitude of the shift that would have been involved. Note, however, that the Dauer data does not yield a clear victory to the Federalist candidate: The Constitution requires a total of nine votes, and the hypothetical Federalist wins only eight. It is this conclusion that leads us to speculate about Pinckney's emergence as a compromise candidate in the text that follows.

¹⁹² Marvin R. Zahniser, Charles Cotesworth Pinckney: Founding Father 47–70 (1967).

¹⁹³ *Id.* at 87–96.

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established a record of moderation during the 1790s—supporting his party when it came to the war with France,¹⁹⁴ but opposing it when it came to the oppressive Alien and Sedition Acts.¹⁹⁵ He would have had the wholehearted backing of the formidable Alexander Hamilton.¹⁹⁶ Indeed, once Adams left the scene, Pinckney became the Federalist standard-bearer for the presidential elections of 1804 and 1808.¹⁹⁷ Last but not least, Pinckney was a South Carolinian, making him an especially attractive compromise candidate. The bulk of Jefferson's support was in the South.¹⁹⁸ Had it become clear that Jefferson could never win nine state delegations, his followers

¹⁹⁴ *Id.* at 136–64.

¹⁹⁵ Letter from William Vans Murray to John Quincy Adams (Mar. 22, 1799), in *Annual Report of the American Historical Association for the Year 1912*, 529, 529–30 (1914).

¹⁹⁶ Pinckney admired Hamilton. E.g., Letter from Charles C. Pinckney to James McHenry (Oct. 31, 1798), in *George Washington Papers* (Library of Congress) (“I knew that [Hamilton’s] talents in war were great, that he had a genius capable of forming an extensive military plan, and a spirit courageous & enterprising, equal to the execution of it.”) (on file with the Virginia Law Review Association). Hamilton conducted an aggressive campaign to elect Pinckney. He wrote letters to his comrades telling them of his decision to support the South Carolinian. See Letter from Alexander Hamilton to Theodore Sedgwick (May 10, 1800), in *24 The Papers of Alexander Hamilton*, supra note 189, at 475, 475 (“I will never more be responsible for [Adams] by my direct support—even though the consequence should be the election of Jefferson. . . . The only way to prevent a fatal scism in the Federal party is to support G[eneral] Pinckney in good earnest.”) (emphasis omitted); Letter from Alexander Hamilton to Charles Carroll (Aug. 7, 1800), in *25 The Papers of Alexander Hamilton*, supra note 189, at 60, 60 (“As between Pinckney & Adams I give a decided preference to the first.”). He traveled to New England and wrote to others of the support in the North for Pinckney. Introductory Note to Letter from Alexander Hamilton to Benjamin Stoddert (June 6, 1800), in *24 The Papers of Alexander Hamilton*, supra note 189, at 574, 574–85; Letter from Alexander Hamilton to Charles Carroll (July 1, 1800), in *25 The Papers of Alexander Hamilton*, supra note 189, at 1, 1–2; Letter from Alexander Hamilton to Oliver Wolcott, Junior (July 1, 1800), in *25 The Papers of Alexander Hamilton*, supra note 189, at 4, 4–5 (“I have been in Massachusetts, New Hampshire & Rhode Island. There is little doubt of Federal Electors in all. But there is considerable doubt of a perfect Union in favour of Pinckney. The leaders of the first class are generally right but those of the second class are too much disposed to be wrong. It is essential to inform the most discreet of this description of the facts which denote unfitness in Mr. Adams. I have promised confidential friends a correct statement. To be able to give it, I must derive aid from you. Any thing you may write shall if you please be returned to you. But you must be exact & much in detail.”).

¹⁹⁷ For a description of Pinckney's role as the Federalist standard-bearer in the 1804 and 1808 campaigns, see Zahniser, supra note 192, at 234–60.

¹⁹⁸ In the two-candidate runoff, Jefferson won all southern states except for South Carolina. See *10 Annals of Cong.* 1028 (1801).

might have bitterly consented to the selection of another southerner of great distinction.¹⁹⁹

All of this is sheer speculation, but Pinckney's dark-horse candidacy gains a measure of reinforcement from one of our sources. Writing thirty-five years after the event, Davis concludes his hearsay account by putting words in the mouth of Senator William Wells, one of the three tellers: "Mr. Wells further stated, that if the votes of Georgia had not been thus counted, as it would have brought all the candidates into the House, Mr. Pinckney among the number, Mr. Jefferson could not have been elected President."²⁰⁰ Although Davis has been proven correct on his basic point about Georgia, his story contains too many other minor errors to justify

¹⁹⁹ A hypothetical scenario involving party-line voting in a five-candidate race was presented previously. See *supra* note 191. We shall now analyze the real-world voting in the two-candidate race and consider how Pinckney's compromise candidacy might have induced a swing in his direction. South Carolina consistently voted for Burr in the two-man runoff, and it seems obvious that the state would have been more than happy to shift to Pinckney, a favorite son. Pinckney also had obvious attractions for North Carolina, whose delegation was split five to five along party lines. While the state in fact cast its vote for Jefferson in the two-man runoff, Pinckney would have been a far more attractive candidate than Burr. Indeed, at least one newspaper report predicted that the state would split evenly when Burr was the only alternative. *American & Daily Advertiser* (Baltimore), Jan. 15, 1801, at 2. A North Carolina vote for Jefferson was hardly foreordained, especially if he had repeatedly demonstrated his incapacity to win the nine votes needed to win the presidency.

The same is true of Georgia. Benjamin Taliaferro was elected as a Federalist but often voted with the Republicans, see Dauer, *supra* note 5, at 315–25, and voted for Jefferson over Burr in the runoff. *National Intelligencer* (D.C.), Feb. 13, 1801, at 3. Nevertheless, he would have been under intense pressure from the Federalist establishment to vote for Pinckney as a compromise candidate.

With North Carolina and Georgia in his column, in addition to the block of six who voted for Burr, Pinckney would have required only one more swing vote. Potential support seems greatest from two states—Tennessee (voting one to zero for Jefferson) or Maryland (splitting four-to-four between Jefferson and Burr). *Id.* New Jersey was also teetering three-to-two during the Jefferson-Burr struggle, see *id.*, and one of its Republicans, James Linn, was frequently mentioned as a potential defector to the Federalist cause. See Letter from Thomas Jefferson to James Madison (Dec. 19, 1800), in 17 *Madison Papers*, *supra* note 5, at 444, 444–45 ("It is thought by some that . . . Linn of N.J. will come over."); see also Morton Borden, *The Federalism of James A. Bayard* 88 (1955) ("Mr. Linn of [New] Jersey is . . . at present with us, which gives the vote of that State—but might be thrown off.") (citing Letter from John Dallas to Alexander Dallas (Jan. 15, 1801), in *Alexander J. Dallas Papers* (Historical Society of Pennsylvania)).

²⁰⁰ 2 Davis, *supra* note 138, at 73.

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great confidence in this particular.²⁰¹ Nevertheless, his decision to mention Pinckney should not be discounted entirely. Whatever his other failings, Davis was politically astute. He would not have included the reference if he thought the dark-horse candidacy was a complete nonstarter.

So there it is: With Jefferson and Adams battling to a hopeless impasse in the five-candidate runoff, the third President of the United States might well have been Charles Cotesworth Pinckney.

Consider the resulting uproar when it was discovered, weeks later, that Jefferson actually had won all four Georgia votes, and that his constitutional punctilios as President of the Senate had led to his own defeat by Federalist partisanship in the five-man runoff. The resulting crisis would have been far worse than those occurring in the aftermath of Hayes-Tilden in 1876 or Bush-Gore in 2000. Both of these crises bitterly disappointed the losers, but they could never prove, beyond a reasonable doubt, that they had actually won the underlying electoral votes in controversy. In contrast, Jeffersonians would have been in a position to establish, to a certainty, that their candidate had been denied the presidency on a mere technicality.

Perhaps, however, the operation of a final constitutional gimmick might have saved the situation. If the House of Representatives had selected Adams or Pinckney, it would have been up to the Senate to select the Vice-President under yet another set of rules. The Constitution generally gives this office to the defeated presidential candidate with the most votes, but the Senate is authorized to choose among candidates “who have equal votes” after the President has been selected—Jefferson or Burr in this case.²⁰² If the Senate had sought to console Jefferson with the number two spot, a national crisis might have been avoided if Pinckney (or Adams) had responded to the subsequent news from Georgia by vol-

²⁰¹ See *supra* notes 146–48 and accompanying text.

²⁰² U.S. Const. art. II, § 1, cl. 3 (“In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.”) (amended 1804).

untarily allowing the Vice-President to become the fourth President of the United States.²⁰³

If Pinckney or Adams refused to resign the country might, however, have found itself on the brink of civil war. Even during the two-man runoff, Republican governors were organizing military force in the event the House Federalists managed to reject Jefferson. Jefferson himself was making some very dark threats during the impasse.²⁰⁴ But in the end, the Federalists chose to abandon Burr rather than push the country over the edge. Would they have shown similar restraint had their favorites remained in the running? This was a crisis the infant republic did well to avoid.

D. Jefferson and the Rule of Law

When we first discovered Georgia's electoral ballot in the National Archives, we believed we had a first-rate scandal on our hands. The meaning of it all seemed painfully clear: Jefferson egregiously violated the express terms of the Constitution in the pursuit of overweening ambition. His presidency was born of constitutional original sin. In its own way, this was as bad as Sally Hemings.

The more we have pondered, however, the less we have been scandalized. To be sure, it is always a serious matter to ignore the rules laid down by the text, even when they are incompetently drafted. But in our constitutional tradition, the rule of rules is only one component of a more complex understanding of the rule of law.²⁰⁵ Placed in full historical context, Jefferson's decision provokes renewed appreciation for the complexities of constitutional interpretation, with three distinct dimensions salient in the present case. The first—*principle*. As his actions in 1796 demonstrate, Jefferson was

²⁰³ At the time, the Senate was composed of nineteen Federalists and thirteen Republicans. U.S. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1957*, at 692 (1960). In contrast to the runoff in the House, each senator was to cast an individual vote. It was thus theoretically possible that the Federalists would have awarded the vice-presidency to Burr rather than Jefferson, but this seems quite unlikely.

²⁰⁴ See, e.g., Letter from Thomas Jefferson to James Monroe (Feb. 15, 1801), in *Jefferson Papers* 998, available at <http://memory.loc.gov/ammem/mtjhtml/mtjser1.html> (on file with the Virginia Law Review Association). For a comprehensive examination of the explosive situation, see Ackerman, *supra* note 41, at 93–135.

²⁰⁵ But see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. Chi. L. Rev.* 1175 (1989) (emphasizing the importance of rule-following in our legal tradition).

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serious about avoiding the “the phaenomenon of a Pseudo-president.”²⁰⁶ Invalidating the Georgia ballot on a legal technicality would have been at war with this principle. Jefferson had ample reason to believe that Georgia had in fact cast its votes for the Republican ticket. He was correct to use his power as Senate President to assure that the vote-counting ritual in Washington corresponded to the true electoral decisions made in the states. The second—*prudence*. Jefferson was confronting a genuinely difficult institutional question. A high-visibility ruling on the Georgia ballot would have provoked an intense struggle between the President of the Senate and the Houses of Congress over their respective constitutional prerogatives. So long as notice of the Georgia problem had been conveyed to the opposition, was it not wise for Jefferson to avoid such a counterproductive struggle if at all possible? The third—*pragmatism*. Strict compliance with the formal rules risked genuinely catastrophic consequences. Sending all five candidates into the House runoff could have pushed the country to the brink of civil war.

All in all, it was not the best moment for a rule of rules unvarnished by principle, prudence, or pragmatism to prevail. By recognizing this, Jefferson provides a glimpse into the meaning of constitutional statesmanship well worth bringing to light after all these years.

E. Dumb Luck

A dose of historicism adds nuance to our earlier critique of the Founding blunder—or better, blunders—in connection with the construction of the Electoral College. Recall that the most significant mistake involved the Founders’ failure to anticipate the rise of national political parties. Others were more perceptive, most notably Edmund Burke, who had already begun to reflect on this great change in political practice.²⁰⁷ Had the Founders been equally far-

²⁰⁶ See supra note 157 and accompanying text.

²⁰⁷ See Edmund Burke, *Thoughts on the Cause of the Present Discontents* (1770), in 1 *Select Works of Edmund Burke* 69, 145–56 (Francis Canavan ed., 1999). Professor Richard Hofstadter, the most acute historian of this subject, could not find anybody in late eighteenth-century America who shared Burke’s views. Hofstadter, supra note 18, at 29–35.

sighted, they would never have chosen their “two-vote” scheme for the Electoral College.

Putting this big mistake to one side, it was still silly to give the sitting Vice-President a central position in the vote count. Had the Convention considered the likelihood that the President of the Senate might run for the presidency, they would have changed the text in a minute. But they did not, so they did not do so, and this failure is nothing to brag about.

Nevertheless, the Georgia episode adds an ironic gloss to this Founding blunder. To see our point, suppose that the Framers had adverted to the problem and consider how they most probably would have solved it: If the sitting Vice-President was a poor choice to supervise the ballot count, who should be his replacement?

The obvious pick was the Chief Justice—the only constitutional official possessing the impartiality required of the vote-counting job. Indeed, the Founders made this choice when confronting a similar problem in designing the impeachment process. The impeachment trial took place before the Senate, and the President of the Senate would preside unless the Convention made a special exception for his removal from the chair. The Founders spotted the absurdity of allowing the sitting Vice-President to preside over a proceeding that could make him President. Article I, Section 3 explicitly provides that “When the President . . . is tried, the Chief Justice shall preside.”²⁰⁸ They undoubtedly would have made an identical substitution had they focused on the identical problem raised by the vote-counting ritual.

This is the point at which our paradox emerges: Had the Founders possessed greater foresight, the result would have turned out

²⁰⁸ U.S. Const. art. I, § 3, cl. 6. For an explanation of this language, see William Rawle, *A View of the Constitution of the United States of America* 206 (Philadelphia, H.C. Carey & I. Lea 1825) (“As the vice president succeeds to the functions and emoluments of the president of the United States whenever a vacancy happens in the latter office, it would be inconsistent with the implied purity of a judge that a person under a probable bias of such a nature, should participate in the trial—and it would follow that he should wholly retire from the court.”). For an echo of this sentiment, albeit in the context of factional politics, see *The Federalist* No. 10, at 47 (James Madison) (Clinton Rossiter ed., 1961) (“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”).

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much worse. Jefferson's replacement as chair on February 11 would have been John Marshall, whom the Federalists had placed in office only the week before.²⁰⁹ While the Founding blunder placed Jefferson in an awkward position, our ultimate conclusion is that he made the best of a bad situation—elevating substance over form and preventing a legitimation crisis of the first magnitude. In contrast, Chief Justice Marshall would almost certainly have acted differently. A confirmed Jefferson-hater,²¹⁰ he would have found himself in the delightful position of making a *technically correct* ruling against Georgia that favored Federalist interests. Since the Constitution explicitly requires that all the electors “sign and certify” their state's return, and clearly designate the persons they were “vot[ing] for,” the formal case was open and shut: “Sorry Georgia, but you don't count (and, alas, given the execrable postal service southwards, your formal deficiency cannot be cured by March 4).” So the Chief Justice rules that the vote total stands at sixty-nine for Jefferson and Burr, one short of a majority, and the Federalists get their men into the runoff.

To be sure, Marshall was eminently capable of transcending formalism when it got in the way of his constitutional vision, but this vision certainly did not include Thomas Jefferson as President of the United States. Not even the most partisan Jeffersonian could reasonably complain if the *Chief Justice*, following the express commands of the Constitution, declared that there were only sixty-nine valid votes in favor of Jefferson and Burr. After all, had not the Founders put the Chief Justice in the chair precisely to assure that vote counting would proceed in strict compliance with the law?

No less important, the Jeffersonians would have been in no position to launch an effective challenge to Chief Justice Marshall's decision. The Federalists controlled both houses of Congress and would have voted down any Republican motion to overrule the

²⁰⁹ See 2 Beveridge, *supra* note 86, at 557–58.

²¹⁰ See generally James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (2002) (discussing the lasting political battle between the two); Ackerman, *supra* note 41 (detailing Marshall's extraordinarily partisan conduct during February 1801).

chair.²¹¹ If the Framers had done their homework, therefore, the vote count would have provided Marshall with a splendid opportunity to enter history, slightly prematurely, as a great defender of the written Constitution—but with a very different result.

Consider a few scenarios. Suppose that, despite Chief Justice Marshall's ruling, Jefferson emerged victorious from the five-man runoff. Marshall then would have been clearly marked by Jefferson as Public Enemy Number One. With the President threatening reprisals, would Marshall have had the courage to write *Marbury v. Madison*?²¹² Would his fellow Justices have joined him in this premeditated assault on the Jeffersonian presidency? And even if they had pushed forward, would the Supreme Court have emerged unscathed? After all, Jefferson's campaign to sweep the Federalist Justices from the Court only failed when the Senate refused to impeach Justice Samuel Chase in a very close vote.²¹³ Jefferson would have prosecuted this campaign even more fiercely had his great judicial antagonist sought to block his way to the presidency during the vote count controversy.

Chief Justice Marshall's prospects would have been no less grim had his ruling led to the victory of his patron Adams,²¹⁴ or his friend Pinckney.²¹⁵ At best, the Chief Justice would have tied his judicial reputation to a ruling that would have been reviled by a large portion of the population; at worst, his decision of February 11 would

²¹¹ This contrasts with the institutional impasse that would have resulted if the Federalist Congress had sought to overrule Jefferson's explicit ruling. See *supra* Section IV.B.

²¹² 5 U.S. (1 Cranch) 137 (1803).

²¹³ See Simon, *supra* note 210, at 216–19. For a recap of this event, see Ackerman, *supra* note 41, at ch. 5.

²¹⁴ Despite his ascent to the bench, Marshall accepted Adams's request to continue serving as his Secretary of State and was discharging his office in an extraordinarily partisan fashion. In early February, the Federalists in Congress and the administration had rammed through a Judiciary Act creating a set of lower circuit courts. In his capacity as Secretary of State, Marshall played a leading role in filling these new positions with Federalist cronies, including two of his brothers-in-law—James Keith Taylor of Virginia and William McClung of Kentucky. See 2 Beveridge, *supra* note 86, at 560 n.2; 6 *The Papers of John Marshall*, *supra* note 97, at 78 n.2; Ackerman, *supra* note 41, at ch. 2.

²¹⁵ Pinckney often corresponded with Chief Justice Marshall, discussing the best ways to promote Federalist interests. See, e.g., Letter from John Marshall to Charles C. Pinckney (Nov. 20, 1800), in 6 *The Papers of John Marshall*, *supra* note 97, at 16, 16–17.

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have helped precipitate a bloody conflict over presidential succession.²¹⁶

As we contemplate these scenarios it is impossible to mistake the contribution of dumb luck to the affair—“dumb luck” in the technical sense. By “dumb” we mean that the Founders were mistaken in putting the Vice-President in a constitutional situation marked by an egregious conflict of interest; by “luck” we mean that we are all lucky that they were dumb, since if they had been smarter, things would have come out worse, possibly much worse.

V. JEFFERSON’S GHOST

Perhaps our discovery has historical value, but does it have enduring legal significance?

At the very least, the story serves as a cautionary tale. The republic avoided a serious crisis in 1801, yet there is no reason to rely on dumb luck when lightning strikes again. We urgently require a constitutional amendment removing the sitting Vice-President from the chair. And yet, despite the 2000 fiasco, there has been no serious effort to focus on the time bomb that might explode the next time around if the existing vote-counting process operates without judicial interference.

This failure has a single cause: the Supreme Court’s unanticipated intervention in the electoral contest between George W. Bush and Albert Gore. While an Electoral College crisis is never exactly fun, 2000 was the perfect year for it to happen. The country was enjoying an unparalleled period of peace and prosperity. The leading contenders made every effort to blur their underlying disagreements. Nobody supposed that there was much at stake in the choice between Bush and Gore. If the Supreme Court had not intervened, Congress would have solved the succession problem in one way or another, but in a way that would have emphasized the obvious anachronisms and irrationalities of the existing system. As the television cameras introduced countless viewers to the arcana of the electoral count, everybody would agree on one thing—it was a clear mistake to allow Vice-President Al Gore to preside over his own contest with Bush, and we should pass a constitutional amendment to eliminate such absurdities from future contests.

²¹⁶ See Ackerman, *supra* note 41.

Judge Richard Posner is precisely wrong, then, in asserting that the looming electoral-count crisis on Capitol Hill serves as the only sound justification for the Supreme Court's decision in *Bush v. Gore*.²¹⁷ The next vote-counting disaster probably will strike at a much less propitious moment in the history of the republic—a time when ideologically polarized political parties may be struggling for the White House under conditions of grave economic or international distress. At such a moment, Judge Posner's talk of crisis might have real substance. When this time comes—in 2004 or 2084—the Supreme Court may be unwilling or unable to save the day, and Americans will be forced to accept the antique legal arrangements the politicians of 2000 failed to address. Whatever the jurisprudential merits of Judge Posner's vaunted “pragmatism,” his particular brand is particularly short-sighted. The election crisis of 2000 provided the “optimal” opportunity to generate the political energy needed to spur constitutional amendment. If *Bush v. Gore* has any sound justification, Judge Posner has not found it.²¹⁸

A. From Cautionary Tale to Legal Precedent

It appears then, that we are stuck with what the Founders have given us,²¹⁹ at least until the next crisis forces the issue to the forefront of public concern. This disheartening conclusion returns us to our motivating question: Since the original constitutional structure continues to guide us, should Jefferson's decision serve as an important *legal precedent* in interpreting its requirements?

Begin with the case for an affirmative answer. As we have seen, the constitutional text does not clearly allocate decision-making power between the President of the Senate and the Congress. Worse yet, the text's opacity merely serves as the tip of the Founding iceberg—the sad truth is that nobody was thinking about the

²¹⁷ 531 U.S. 98 (2000). See generally Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (2001) (arguing that the Supreme Court's decision was justified by pragmatic considerations of political stability).

²¹⁸ In this he is not alone. See, e.g., *Bush v. Gore: The Question of Legitimacy* (Bruce Ackerman ed., 2002) (presenting perspectives on various justifications for the Supreme Court's decision to end the 2000 presidential election).

²¹⁹ Of course, the Twelfth and Twenty-Second Amendments importantly altered the original mechanisms for presidential selection, but they do not speak to the particular issue in question here: the power of the Senate President to resolve questions arising with regard to the vote count. U.S. Const. amend. XII; U.S. Const. amend. XXII.

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problem in Philadelphia, and that is why the text is so unsatisfactory. Given this failure, even textualists should accord substantial weight to subsequent practice in resolving constitutional indeterminacies.²²⁰ Ought implies can: If you can't follow the text, you should respect the conscientious practice of leading statesmen who have attempted to make sense of textual perplexity.

The fact that Jefferson exercised the (textually arguable) authority, therefore, as Senate President on the Georgia matter seems very significant as a legal matter.²²¹ What is more, Jefferson's ruling

²²⁰ For a case study on the dangers of a misguided textualism, see Kesavan, *supra* note 5, at 1696–1759. Kesavan declares that the text forbids the President of the Senate from serving as the presiding officer of the vote count, despite the fact that he is the only officer explicitly mentioned by the text, and despite two centuries of unbroken practice in which he has performed this role without the slightest challenge. Instead, Kesavan disqualifies the Senate President on the basis of emanations from other constitutional clauses that do not explicitly speak to the problem. *Id.* at 1696–1701.

Worse yet, he does not propose a plausible presiding officer substitute, instead stating that “[t]he answer to this question is simpler than it appears: One of the senators and representatives then and there present at the electoral count.” *Id.* at 1701. In any disputed election, however, each political party will want to have one of its own members serve as the presiding officer, and Kesavan does not say much about how best to choose among the applicants for the job. He states merely that “[e]ach parliamentary body has, almost by definition, the right to choose its presiding officer,” *id.*, but fails to consider that there are two parliamentary bodies involved and that they will predictably disagree about whether a senator or representative should take the chair.

Early commentators also discussed the subject. Chancellor Kent stated that “the president of the senate counts the votes, and determines the result, and that the two houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors.” 1 James Kent, *Commentaries on American Law* 258–59 (New York, O. Halsted 1826). He also said that the Senate President has this power “in the absence of all legislative provision on the subject.” *Id.* at 258.

Much more importantly, subsequent Congresses have clearly understood the Constitution to imply that the Senate President should serve as presiding officer, owing to the fact that the Constitution commands him to open the electoral vote packages. Despite Kesavan's repeated claims to have divined the one true meaning of the “text,” his interpretations seem far less plausible than those that Congress has consistently adopted over the course of two centuries.

²²¹ The constitutional opinions of early Congresses have often been interpreted as matters of great importance. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (noting that records of the early Congresses provide “‘weighty evidence’ of the Constitution’s meaning” (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983))); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 630–31 (1935) (looking to the laws of early Congresses for support of its decision); *Myers v. United States*, 272 U.S. 52, 174–75 (1926) (stating that opinions of the First Congress “have always been regarded . . . as of the greatest weight” in constitutional interpretation). This is hardly the place to

might well have made a difference to the outcome—one of his rivals could have emerged victorious from a five-man runoff. This greatly enhances the precedential significance of his ruling. While there have been quite a few counting controversies over the centuries, almost all of them did not make the slightest difference to the electoral outcome.²²² With the stakes nonexistent, there was no pressing reason for the participants to take the constitutional issues seriously. They were more inclined to resolve the matter quickly, so that the vote count could proceed to its predestined announcement of the victorious presidential candidate.²²³ Not so in 1801, when the four Georgia votes were of the greatest strategic importance.

The fact that it was *Jefferson* in the chair also matters. Putting hagiography to one side, he had devoted his four years as President of the Senate to drafting that body's first set of rules for parliamentary procedure²²⁴—rules that continue to influence the practice of both the Senate and House of Representatives even today.

Finally, it would be wrong to dismiss and characterize Jefferson's ruling as merely self-interested. To the contrary, his decision can

consider, in general, when this reliance is justified as a matter of constitutional theory. It suffices to say that it is justified in the present case.

²²² The principal incidents are usefully summarized in *Kesavan*, supra note 5, at 1679–94. Although we find *Kesavan*'s interpretations of the Constitution unpersuasive, his piece contains an admirably exhaustive review of the relevant primary and secondary literature.

²²³ Indeed, on several occasions, the President of the Senate has declared the results in a manner that expressly deprived his resolution of any precedential status. The practice began in 1821. Missouri had selected its electors before it had been formally admitted as a state by Congress. When its electoral vote was opened, the propriety of counting it was challenged. In response, the President of the Senate announced that Monroe had been elected President regardless of whether Missouri's vote was counted. See *Kesavan*, supra note 5, at 1681–83. The Senate President finessed the matter in an identical fashion during the vote count of 1837, in which the votes of Michigan were at issue. *Id.* at 1685.

Vice-President Nixon took a similar approach when a late recount of the Hawaii vote revealed that the Kennedy-Johnson ticket had carried the state. As Senate President, he refused to count the earlier electoral vote that had been awarded to the Nixon-Lodge ticket on the basis of the pre-recount vote count. In counting the state's electors for his opponents, he declared that “[t]he Chair has knowledge, and is convinced that he is supported by the facts.” See 107 Cong. Rec. 290 (1961). He explicitly stated, however, that he was counting these votes merely to avoid further delay, and “without the intent of establishing a precedent.” *Id.*

²²⁴ Thomas Jefferson, *A Manual of Parliamentary Practice for the Use of The Senate of the United States* (D.C., Samuel Harrison Smith 1801).

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be defended from the multiple perspectives of principle, prudence, and pragmatism.²²⁵

So it would seem that if precedent is important anywhere in constitutional law, it would be important here—where a constitutional statesman of the first rank, having spent years reflecting on matters of parliamentary procedure, makes a ruling that illuminates a constitutional question that the Framers had so evidently failed to confront, let alone resolve, with any clarity.

So much for the affirmative case for precedential significance. Are there any serious counterarguments? The most salient objection involves Jefferson's failure to announce his ruling publicly. Does not his refusal to take public responsibility for his decision undermine its enduring significance?

This objection would be compelling if the legal deficiencies of the Georgia ballot had been kept secret. If the House and Senate had been kept in the dark, this would indeed deprive Jefferson's decision of any precedential value. It would indicate that Jefferson himself believed that he was engaging in a devious maneuver that could not withstand the test of public reason.

But this is not what happened. The newspaper accounts make it perfectly clear that the tellers put the assembled House and Senate on notice of the Georgia deficiency.²²⁶ Jefferson did not make his decision secretly. He simply shifted the burden to the senators and representatives to raise objections. While he might have gone further, in the manner of John Adams, his failure to do so was prudent under the circumstances.²²⁷ The assembled senators and congressman had an opportunity to make an objection, and they did not make use of it.

Moreover, Jefferson publicly took responsibility for the entire vote count: “[I]n pursuance of the duty enjoined upon him,” he declared that he and Burr had won “a majority of the votes of all the Electors appointed.”²²⁸ He could not make this declaration without counting the four Georgia votes in the Republican column. So the

²²⁵ See *supra* notes 205–06 and accompanying text.

²²⁶ See *supra* notes 126–31.

²²⁷ Even today, a challenge to an electoral vote requires at least one senator and one representative to come forward and make his objections explicit. Otherwise, the President of the Senate counts the vote. See *supra* note 171.

²²⁸ 10 *Annals of Cong.* 1024 (1801).

fact that he had made a ruling on the Georgia matter was obvious to anybody interested in counting the votes—and surely the senators and congressman observing Jefferson were, like all politicians, good at vote counting. No less important, the newspapers put the country on notice of the Georgia deficiencies, and, despite the bitter partisanship of the time, nobody seems to have protested Jefferson's decision.²²⁹

In short, Jefferson's actions not only illuminate a constitutional question left unresolved by the original constitutional text, but they also resolved a potentially explosive problem in a manner that garnered public consent. What more can we ask of a legal precedent?

It is true, of course, that the relevant documents disappeared for more than a century before they were rediscovered. This might be important if other precedents had accumulated during the interim that were inconsistent with Jefferson's ruling. If this had occurred, it might be wiser to ignore the rediscovered early precedent rather than disturb well-established arrangements.

In the real world, however, the law remains unsettled. Apart from 1801 and 2001, there is only one other case where the powers of the Senate President posed a genuinely consequential issue. This involved the Hayes-Tilden crisis of 1877, and as we shall see, the resolution reached in 1877 should serve as a very important gloss on the meaning of 1801.

It is one thing to recognize that the decision of 1801 is not the only relevant precedent; it is quite another to say that it should not count as a precedent when the Founding machinery once again explodes in our face.

B. The Gloss of 1877

The Hayes-Tilden election hit the nation at a bad time. The country was in the throes of a vicious economic depression, and the election returns threatened to inflame the passions of the recent Civil War. For the first time since 1860, the Democratic candidate, Samuel Tilden, had won the popular vote by a convincing margin of 250,000.²³⁰ Yet his victory was jeopardized by a dispute over eighteen electoral votes from three southern states still under the

²²⁹ See *supra* notes 126–31.

²³⁰ See Allan Nevins, *Abram S. Hewitt* 320 (1935).

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(very shaky) control of Republican Reconstruction governments.²³¹ If all eighteen found their way into the Republican column, Tilden would be deprived of his popular victory by a single electoral vote.

With the Democrats clamoring at the gates of power, millions of Republicans saw the impending vote count in apocalyptic terms inherited from the Civil War. For these true believers, the Democratic party was the party of treason, threatening to profane the temple of the Union—a prospect to be avoided at all costs. What is more, the antiquated electoral machinery afforded them an opportunity to bar the barbarians from the White House.

While the Democrats had won landslide victories in the House after the Panic of 1873, the Republicans remained in control of the Senate.²³² This provided them with a tempting constitutional technique for maintaining control over the presidency. Vice-President Henry Wilson had died in 1875, but the Republicans could still appoint the President Pro Tem of the Senate, who would then preside over the vote-counting ritual.²³³ Their man in the chair could count the challenged Republican electors into the Hayes column while senators and representatives cheered and booed, but the Democrats could do little to change the outcome. Although the Democratic House might vote to overrule the chair, the Republican Senate would not support such a move—even if it were constitutional.

To be sure, the precedent set by Thomas Jefferson in 1801 was not widely known at the time.²³⁴ Nevertheless, there was a good deal of respectable constitutional opinion that expansively interpreted the Senate President's power to "open" the electoral certificates, transforming it into a grander authority to resolve with some finality doubtful questions arising in the vote-counting process. Indeed, some Democrats had explicitly endorsed this view in congressional debates held before the Hayes-Tilden election revealed

²³¹ Charles Fairman, *Five Justices and the Electoral Commission of 1877*, at 40–47, 57–116 (1988).

²³² Democrats did not gain control of the Senate until the election of 1878. See 2 *Congressional Quarterly, Guide to Congress* 828 tbl. 30-1 (5th ed. 2000).

²³³ They selected Senator Thomas Ferry, a Michigan Republican. 1 Stanwood, *supra* note 5, at 388.

²³⁴ Some memory traces clearly remained, however. See *supra* note 151 and accompanying text.

its short-run partisan implications.²³⁵ This put Republicans in the delicious position of quoting Democratic politicians while their Senate President Pro Tem pushed Hayes into the White House.²³⁶

Delicious but dangerous—how would the country react to such blatant partisanship? Fortunately, we will never know. In a remarkable show of political restraint, the Republican leadership refused to abuse the power of the Senate presidency for partisan ends. Instead, they reached out to House Democrats to pass the first statute in American history to regulate the vote-counting ritual.²³⁷

The constitutional rationale for statutory action was based on the structure of the text: “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.”²³⁸ Since the last provision grants the federal government a distinct “counting power,” but the preceding clauses do not clearly state how counting should proceed, Congress may enact appropriate legislation under the Necessary and Proper Clause.²³⁹

²³⁵ See, e.g., 44 Cong. Rec. 1803 (1876) (statement of Sen. William Pinkney Whyte). Not all Democrats were in agreement, however. See, e.g., 43 Cong. Rec. 970 (1875) (statement of Sen. Bayard).

²³⁶ Republicans surely enjoyed reading of the views of Democratic Party Chairman Abram Hewitt, who, *after* the Hayes-Tilden deadlock, had been vocal in asserting that the Senate President could not decide matters himself, but rather should work with “Congress to go behind the certificate and open the same to go into the merits of all cases.” Allan Nevins, *Abram S. Hewitt* 327 (1935).

²³⁷ The Democratic-controlled House, in response to a resolution proposed by Republican Representative George McCrary of Iowa, adopted legislation establishing a committee to consider how to resolve the situation. 44 Cong. Rec. 91–92 (1876). The Republican-controlled Senate then voted to establish its own committee. 44 Cong. Rec. 258 (1876). Starting on January 12, the two committees met together, and their collaborative efforts eventually generated the statute. 44 Cong. Rec. 613 (1877); 44 Cong. Rec. 1050 (1877).

²³⁸ U.S. Const. art. II, § 1, cl. 3.

²³⁹ U.S. Const. art. I, § 8, cl. 18. One does not need to look hard to find references to this clause as the basis for action to regulate the electoral count. 43 Cong. Rec. 974–75 (1875) (statement of Sen. Edmunds); 43 Cong. Rec. 971–73 (1875) (statement of Sen. Thurman); 10 *Annals of Cong.* 29–32 (1800). A decade later, the drafters of the Electoral Count Act assumed that the Necessary and Proper Clause was the part of the Constitution that gave them the authority to act. 48 Cong. Rec. 5461 (1884); *Counting Electoral Votes*, *supra* note 5, at 455 (statement of Sen. Edmunds). Consistent congressional practice of the past 125 years presupposes the Act’s constitutionality, as does the recent Supreme Court decision in *Bush v. Gore*, 531 U.S. 98, 110–11 (2000), whose reasoning depends critically on Florida’s presumed unwillingness to sacrifice

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This straightforward rationale provided the Republican leadership with a solid platform for constructing a far more impartial procedure, calculated to assure the country of the integrity of the selection process. The proposed statute established a fifteen-man Electoral Commission comprised of five members of the House of Representatives, five senators, and five Justices of the Supreme Court. Each house was to appoint three members from the majority party and two from the minority—leading to a five-five split in the congressional delegation. The proposed statute also named four of the five Justices—two Democrats and two Republicans—and charged them with the task of naming a fifth as potential tie-breaker.²⁴⁰ Although their choice was formally open, it was perfectly obvious who they were supposed to choose: Justice David Davis of Illinois. While he had begun his career in national politics as Abraham Lincoln’s campaign manager in 1860, Davis had drifted away from the party’s mainstream. By 1876, he was broadly

the benefits provided to its electoral vote by the statute’s “safe harbor” provision.

Nevertheless, Vasan Kesavan urges us to reject this consistent practice in favor of an implausible interpretation of the constitutional text. Recall that the Constitution grants Congress power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other powers vested by this Constitution in the Government of the United States.” U.S. Const. art. I, § 8, cl. 18. According to Article II, officers of the government are plainly vested with the power to “open” and to “count” the electoral ballots. U.S. Const. art. II, § 1, cl. 3. Nevertheless, Kesavan asserts that it “is more than doubtful” that this grant counts as a “power” within the meaning of the Necessary and Proper Clause. Kesavan, *supra* note 5, at 1737.

Kesavan’s comments fail to convince. He points to the fact that Article II does not explicitly use the word “power,” or some verbal analogue, in granting vote-counting authority. *Id.* at 1735–38. But why should this verbal technicality matter? Authority to count the votes is a “power” within the ordinary meaning of the term, and Kesavan gives no special reason for a narrowing construction, especially provided the generous interpretation traditionally given to the scope of the clause. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Kesavan adds that the constitutional concept of “power” requires that its holder have discretion in its exercise and that, in his view, the vote counters have no such discretion—they are simply to determine which votes are valid, and count only those. Kesavan, *supra* note 5, at 1737 n.351. Even if Kesavan were correct in viewing the power as nondiscretionary, it still remains a power, and a statute is still “necessary and proper” given the text’s failure to make clear who should exercise the power in doubtful cases. In our view, it would require a far more compelling argument to override the deference that is due to the consistent practices of the Congress and the Supreme Court.

²⁴⁰ Act of January 29, 1877, ch. 37, § 2, 19 Stat. 227, 228.

considered to be an independent with Democratic leanings, someone who would be fair to Tilden's claim.²⁴¹

All things considered, the Republicans' proposed statute made the most of the constitutional materials available. By placing the final decision in Davis's hands, the leadership had effectively eliminated the prospect of partisan self-dealing by the President of the Senate. To be sure, the statute was cleverly designed to preserve the Senate President's symbolic centrality. He was assigned the task of "open[ing]" the ballots, but should a protest be voiced from the floor, he was instructed to pass the contested ballot to the Commission and await its decision before completing the vote count.²⁴² The Commission's decisions, in turn, could be overruled by a majority vote of each house of Congress acting separately,²⁴³ but this was unlikely given the split in party control. The danger of self-dealing posed by the Senate President had been subordinated to a Commission carefully designed to achieve an impartial result.

This fact was widely appreciated as the Senate bill made its way to the House for consideration. Just before the final vote in the House, Henry Payne, a Democratic leader and future member of the Electoral Commission,²⁴⁴ urged his skeptical colleagues to consider the alternative: Without the statute, the Senate President might fill the constitutional vacuum with "a bold and unjustifiable usurpation."²⁴⁵ Other thoughtful Democrats supported this plea. Here is Henry Watterson:

I regard Tilden's case as a good one; but I shall vote for the bill with the full consciousness that the action of the commission may bitterly disappoint me If it does, I shall still have discharged [my] duty in that manner which was best calculated to preserve constitutional forms and keep the peace of the country at a time

²⁴¹ Fairman, *supra* note 231, at 48–49; Willard L. King, *Lincoln's Manager: David Davis 290–93* (1960).

²⁴² Act of January 29, 1877, § 2, Ch. 37, 19 Stat. 227, 228–29 (1877). The case of single returns was to be handled by the two houses meeting separately, with a majority vote of each required to reject the return. *Id.* § 1.

²⁴³ *Id.* § 2.

²⁴⁴ Fairman, *supra* note 231, at 10, 47–48.

²⁴⁵ 44 Cong. Rec. 1050 (1877).

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when the Republic was menaced and the people were not prepared for war.²⁴⁶

And so a bipartisan group of leaders carried off a grand act of constitutional statesmanship, with the House joining the Senate to head off the possibility of willful abuse of power by the Senate President. This represented a remarkable act of self-restraint on the Republican side.²⁴⁷ They had sacrificed the certainty of a Hayes presidency, through manipulation by the Senate President, for a mere possibility from the Commission. But in return, they obtained a greatly enhanced sense of constitutional legitimacy for the next President of the United States.

Unfortunately, this triumph of statesmanship has been entirely lost in the fog of controversy subsequently generated by the actions of the Electoral Commission. The key to the entire plan was the appointment of Justice Davis—the only man on the Supreme Court with a plausible claim to political neutrality. To nearly everyone's surprise, a Democratic-Greenback coalition in Illinois elected Davis to the United States Senate on January 25, just as the Electoral Commission bill was being enacted by Congress.²⁴⁸ When Davis resigned from the Commission to take his Senate seat, he was replaced by Joseph Bradley—a distinguished jurist, but one plainly associated with the Republican party.²⁴⁹ This allowed the Democrats to charge him with the rankest partisanship when he joined the seven other Commission Republicans in party-line votes in support of all eighteen of the Republican electors, over the heated dissent of the seven Commission Democrats.²⁵⁰

The Democrats' cries of pain were only to be expected. It always hurts to lose. It remains an open—and probably unanswerable—

²⁴⁶ *Id.* at 1007.

²⁴⁷ Unsurprisingly, the Republican rank and file was relatively unenthusiastic about ceding the power of the Senate President to a bipartisan commission. While the entire Senate voted 47 to 17 in favor of the bill, the Democrats supported it by a lop-sided margin of 26 to 1, while the Senate Republicans divided narrowly with 21 in favor and 16 opposed. *Id.* at 913. Similarly, House Democrats voted 186 to 18 in favor while House Republicans voted against by a margin of 85 to 52, with the final count at 191 in favor and 86 opposed. Roy Morris, Jr., *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876*, at 218 (2003).

²⁴⁸ Morris, *supra* note 247, at 217–18.

²⁴⁹ *Id.* at 218–19.

²⁵⁰ See *id.* at 222–25.

question whether Bradley in fact succumbed to political pressures. Despite a vigorous effort by Charles Fairman to defend Bradley's integrity,²⁵¹ the Commission still remains under a dark cloud in legal circles.²⁵² Whatever one makes of Bradley's performance, it should not taint the statesmanship of those who created the Commission as an alternative to a ruling by the Senate President. While Bradley's decision was bound to be controversial, a blatantly partisan decision by the President Pro Tem of the Senate would have been far worse—inflicting grievous damage on the Hayes presidency and the slow process of post-war reconciliation.

One can only hope that similar statesmanship prevails the next time around, and that a new Electoral Commission is convened to resolve the problem. The 1877 statute, however, was a one-shot deal, and when Congress finally enacted a more permanent statute, it did not entirely eliminate the risk that the Senate President might once again dominate the vote-counting ritual.

C. The 1887 Act

Controversy over the Electoral Commission generated a decade of congressional debate, which finally gave rise to the Electoral Count Act of 1887.²⁵³ Operating once again under the Necessary and Proper Clause, the statute shifted a great deal of the decisional burden from the President of the Senate to the two houses of Congress. Speaking broadly, if a state submits a single return, the President of the Senate counts the ballot unless objections are raised and a majority in each house votes to reject it.²⁵⁴ If a state

²⁵¹ Fairman, *supra* note 231, at 123–58.

²⁵² See, e.g., Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 *Tex. L. Rev.* 1985, 2004 (2003) (“Although the Commission was seen by many to be completely fraudulent, the Democrats ultimately did accept its results, in exchange for an understanding that President Hayes would effectively end Reconstruction and would not run for re-election . . .”). All of the leading books by historians echo Issacharoff's comments. See Morris, *supra* note 247, at 222–25; Lloyd Robinson, *The Stolen Election: Hayes Versus Tilden: 1876*, at 164–68 (2001); C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (2d ed. 1966).

²⁵³ 3 U.S.C. § 15 (2000).

²⁵⁴ *Id.* The “safe harbor” provision enacts into law a preference for picking electors by passing state laws governing the selection process. 3 U.S.C. § 5 (2000). This statutory provision encourages states to pass laws “prior to the day fixed for the appoint-

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submits two or more returns, the President's job is also straightforward if majorities of both houses agree on the ballot that should be counted. Matters get murkier when the Houses disagree. In this case, the statute instructs the President to count the ballot certified by "the executive"²⁵⁵ of the state. But what should he do if "the executive" signs two or more returns?

The statute is silent, but the problem is real—especially where different members of "the executive" are elected independently. For example, Florida's Democratic Attorney General Robert Butterworth strongly supported Gore,²⁵⁶ and Republican Secretary of State Katherine Harris produced opinions that notoriously favored Bush.²⁵⁷ Suppose that the United States Supreme Court had remained on the sidelines and that the Florida court recount had given Gore's electors a razor-thin majority. As matters became more heated, Governor Jeb Bush may well have decided to sign this second return, but even if he refused, the Florida Supreme Court could have authorized the Attorney General to certify the return and send it on to the President of the Senate. When Senate President Al Gore opened the ballots on vote-counting day, he would have found two Florida returns signed by members of the "executive"—one for Bush and the other for Gore. Under the 1887 statute, each house must separately decide between the rival slates.

ment of the electors" and discusses the more favorable treatment a state abiding by that rule will receive in Congress. *Id.*

²⁵⁵ 3 U.S.C. § 15 (2000) ("But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.").

²⁵⁶ See, e.g., Mireya Navarro, *A Staunch Gore Ally Influences Florida Ballot Fight*, N.Y. Times, Nov. 16, 2000, at A27; Don Van Natta, Jr. & David Barstow, *Election Officials Focus of Lobbying From Both Camps*, N.Y. Times, Nov. 18, 2000, at A1 ("In Volusia County, the only Florida county to complete a full hand recount, the state's attorney general, Robert A. Butterworth, placed an unsolicited phone call a week ago to elections officials, advising them that they had the legal authority to go forward with a manual recount.").

²⁵⁷ See, e.g., David Barstow, *Data Permanently Erased From Florida Computers*, N.Y. Times, Aug. 8, 2001, at A10; Richard L. Berke, *2 Sides Maneuver: Republican Rejects Offer That 2 Sides Accept a Count by Hand*, N.Y. Times, Nov. 16, 2000, at A1 ("Ms. Harris . . . announced . . . that it was 'my duty under Florida law' to reject requests from several counties to update their totals.").

If they were to disagree—which was likely, but not certain²⁵⁸—the issue would have quickly returned to the President of the Senate. What next?

Foreseeing this scenario, one of us signed a public statement urging Congress to follow the precedent of 1877 and create a new Electoral Commission.²⁵⁹ This should be the remedy of choice the next time around, but if statesmanship fails, the ghost of Thomas Jefferson will return to center stage and we shall all be obliged to conjure with the meaning of his actions on that fateful day of February 11, 1801.

Jefferson's precedent will not be squarely on point. The future President of the Senate will be required to act only after the issue has divided the House and Senate. In contrast, Jefferson resolved the Georgia matter without consulting the two houses, and we cannot know how he might have responded had one or both houses challenged his decision.

Nevertheless, there can be no denying that Jefferson did more than “open” the Georgia ballot on that fateful day. He asserted his authority to decide the merits on a contestable issue. If some future Senate President were to claim a similar authority, he or she would not be wrong in pointing to Jefferson's precedent.

If he follows Jefferson's lead, however, he cannot be allowed to go halfway. Jefferson used his power for a particular end—“to prevent the phenomenon of a Pseudo-president.”²⁶⁰ This should be the touchstone for any future President of the Senate. If he abuses

²⁵⁸ On January 3, 2001, the Republicans controlled the House of Representatives by a margin of 223 to 211, whereas the Democrats controlled the evenly-divided Senate, with Gore casting the deciding vote (and Lieberman casting one of the fifty Democratic votes). See Helen Dewar & Juliet Eilperin, *Divided Congress Takes Oath with Promises of Unity*, Wash. Post, Jan. 4, 2001, at A8. It would be a mistake however, to assume strict party-line voting. Representatives and senators alike would have been swayed by prevailing sentiment in their own districts, as well as their own views on the merits. After all, Gore was the clear winner in the popular vote, and it is impossible to guess how heavily public opinion would have emphasized this point if the Supreme Court had not prematurely terminated the debate.

²⁵⁹ See Emergency Committee of Concerned Citizens 2000, *The Election Crisis*, N.Y. Times, Nov. 10, 2000, at A31 (“Perhaps a bipartisan National Electoral Commission of the Congress and the Supreme Court will have to settle the matter, based on the precedent set in resolving the disputed election of 1876.”). This was signed by Professor Ackerman, among others.

²⁶⁰ Letter from Thomas Jefferson to James Madison (Jan. 16, 1797), in 16 Madison Papers, *supra* note 5, at 461, 461.

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his authority to create a “Pseudo-president” by blatantly political vote counting, he would be converting Jefferson’s precedent into a fig-leaf for a desperate act of political usurpation.