Georgia Law Review

Volume 55 | Number 4 Article 3

2021

Electoral Votes Regularly Given

Derek T. Muller
University of Iowa College of Law

ELECTORAL VOTES REGULARLY GIVEN

Derek T. Muller[*]

Every four years, Congress convenes to count presidential electoral votes. In recent years, members of Congress have objected or attempted to object to the counting of electoral votes on the ground that those votes were not "regularly given." That language comes from the Electoral Count Act of 1887. But the phrase "regularly given" is a term of art, best understood as "cast pursuant to law." It refers to controversies that arise after *the appointment of presidential electors, when electors cast their votes and send them to Congress. Yet members of Congress have incorrectly used the objection to challenge an assortment of pre-appointment controversies that concern the underlying election itself. This Essay identifies the proper meaning of the phrase "regularly given," articulates the narrow universe of appropriate objections within that phrase, and highlights why the failure to object with precision ignores constraints on congressional power.*

[*] Professor of Law, University of Iowa College of Law.

TABLE OF CONTENTS

I. INTRODUCTION

On January 6, 2021, Congress began counting electoral votes, as it does every four years. When Vice President Mike Pence read the certificate of the vote of the state of Arizona, Representative Paul Gosar stood to object to the certification, and the Clerk of the House read aloud the objection: "We, a Member of the House of Representatives and a United States Senator, object to the counting of the electoral votes of the State of Arizona on the ground that they were not, under all of the known circumstances, regularly given."[1] Senator Ted Cruz joined this objection and took a slight bow as those in favor of the objection cheered.[2]

The problem? It wasn't the proper objection. Messrs. Gosar and Cruz didn't challenge the regularity of the votes. They were challenging the certification process behind the choice of the electors.[3] It was the latest in a string of twenty-first century legal errors, replicated later that day by Representative Scott Perry and Senator Josh Hawley.[4] It was the same error committed by Representative Stephanie Tubbs Jones and Senator Barbara Boxer in 2005,[5] and the same error attempted by myriad Democrats in 2001 and 2017.[6] It reflects a paucity of understanding about what "regularly given" electoral votes are—and what they are not.

The Electoral Count Act of 1887[7] sets forth the procedures for counting electoral votes. The Senate joins the House in a special

---

[1] 167 CONG. REC. H77 (daily ed. Jan. 6, 2021) (statement of Rep. Paul Gosar and Sen. Ted Cruz).

[2] For a brief video of these events, see NBC News, *Republicans Object to Counting of Electoral College Votes from Arizona*, YOUTUBE (Jan. 6, 2021), https://www.youtube.com/watch?v=NBOVyfjuExY&ab_channel=NBCNews.

[3] *See* Brian Naylor, *Arizona Is 1st State for Republican Elector Challenge*, NPR (Jan. 6, 2021, 1:15 PM), https://www.npr.org/sections/congress-electoral-college-tally-live-updates/2021/01/06/953931288/arizona-is-1st-state-for-republican-elector-challenge (noting that the challenge to state certification was a challenge "to Arizona's electors").

[4] 167 CONG. REC. H98 (daily ed. Jan. 6, 2021) (statement of Rep. Scott Perry and Sen. Josh Hawley).

[5] 151 CONG. REC. 198 (2005) (statement of Rep. Stephanie Tubbs Jones and Sen. Barbara Boxer) ("We . . . object to the counting of the electoral votes of the State of Ohio on the ground that they were not, under all of the known circumstances, regularly given.").

[6] *See, e.g.*, 163 CONG. REC. H188 (daily ed. Jan. 6, 2017) (detailing Texas Rep. Sheila Jackson Lee's objection to North Carolina's electoral certification for Donald Trump).

[7] Pub. L. No. 49-90, 24 Stat. 373.

joint session.[8] Section 15 of the Act opaquely offers the President of the Senate an opportunity to "call for objections, if any" to the reading of the certificate of the electoral votes of a state.[9] Objections must be "in writing," and "state clearly and concisely, and without argument, the ground thereof."[10] The Senate withdraws from the joint meeting, and each chamber debates whether to sustain the objection.[11] It requires the agreement of both chambers to sustain an objection.[12]

In particular, when one slate of electoral votes has been received, Section 15 explains:

> [N]o electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.[13]

"Lawfully certified" is best understood as referring to the state's process of certification. It includes congressional deference to states that resolve controversies over the appointment of electors six days before the electors meet.[14] In contrast, "regularly given" refers to the "votes," and it suggests a narrower scope—one that has not been the focus of congressional objections in recent years.[15]

The distinction matters. After the "determination" of the "appointment"[16] of presidential electors, those electors are identified in a "certificate of . . . ascertainment of the electors appointed,"[17]

---

[8] 3 U.S.C. § 15 (2018).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See, e.g.*, *supra* notes 1, 4–6 and accompanying text.
[16] 3 U.S.C. § 5 (2018).
[17] *Id.* § 6.

which is transmitted to Congress. If a state has resolved all controversies over the appointment of electors at least six days before the Electoral College meets—the "safe harbor" deadline[18]—such appointment "shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."[19] If Congress objects to a state's electoral votes on the grounds that they were not "lawfully certified," it must first address the question of the safe harbor deadline. And if a state has "lawfully certified" pursuant to the Act, those votes "shall" not be rejected.

In the 2020 election, Arizona represented that all controversies were resolved by December 8, 2020—the safe harbor deadline—even as other court challenges remained pending.[20] If a member of Congress wanted to challenge whether the state's election was "lawfully certified," it must overcome the Electoral Count Act's "safe harbor" rule that the state's resolution "shall be conclusive." Electoral votes "regularly given," however, have no such condition.

In one respect, this Essay's claim is modest. It assumes Congress's power (1) to count electoral votes and (2) to determine whether to count electoral votes—two assumptions that have been questioned in recent years.[21] If Congress has that power, it can define how it goes about exercising it, including through the Electoral Count Act. And so, this Essay examines only how the phrase "regularly given" in the Act should be construed. Congress may have broader power, or it may choose to limit its power—but, for purposes of this Essay, the text of the Act drives the analysis.

---

[18] *See, e.g.*, Derek T. Muller, *Restraining Judicial Application of the "Safe Harbor" Provision in the Electoral Count Act*, 81 OHIO STATE L.J. ONLINE 221 (2020) (arguing that this provision is merely a rule for how Congress will count electoral votes and should not be interpreted as a judicially enforceable or binding rule on state legislatures).

[19] 3 U.S.C. § 5 (2018).

[20] DOUGLAS A. DUCEY, CERTIFICATE OF ASCERTAINMENT FOR PRESIDENTIAL ELECTORS (2020), https://www.archives.gov/files/ascertainment-arizona.pdf.

[21] I sketch out justifications for Congress's power in *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559 (2015).

II. THE MEANING OF "REGULARLY GIVEN"

The definition of "regularly given" in the Electoral Count Act has been elusive.[22] But, as this Part will show, the best understanding of "regularly given" is "cast pursuant to law," with "law" referring to the federal Constitution, federal law,[23] and state law.

A. HISTORICAL USE OF "REGULARLY GIVEN" IN LAW

"Regularly given" is a legal phrase that was routinely used in the late nineteenth century. Notice was "regularly given."[24] Taxes were "regularly given."[25] A judgment could be "regularly given."[26]

---

[22] *See, e.g.*, Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309, 352–53 (2019) (noting that there may be "confusion or disagreement" over what "regularly given" means); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1659 (2002) ("The meaning of the phrase 'regularly given' in § 15 is far from clear." (footnote omitted)).

[23] For present purposes, this Essay sets aside the debate about the extent to which Congress can bind itself. The Electoral Count Act—at the very least—provides guidance for Congress about how to behave when counting electoral votes. If Congress chooses a different set of rules, it should be explicit when doing so, rather than act as if it is operating within the existing rules.

[24] *See, e.g.*, Banet v. Alton & Sangamon R.R. Co., 13 Ill. 504, 507 (1851) ("Notice was regularly given of the opening of the books for the subscription of the capital stock."); Ostrander v. Darling, 27 N.E. 353, 355 (N.Y. 1891) ("They are therefore brought within the express provisions of the act which makes them conclusive evidence that the notice to redeem was regular, and regularly given and published, according to law."); Baker v. Pike, 33 Me. 213, 214 (1851) ("The notice given to the attorney during the trial to produce that writ was ineffectual and unimportant; and any notice more seasonably and regularly given would have been equally so, because that writ does not appear to have been in the possession of the plaintiff, or subject to his control."); Bennett v. Brundage, 8 Minn. 432, 432–33 (1863) ("This notice was regularly published up to the 28th of January, 1859, on which day the sale was postponed to the 5th day of March, 1859, at the same hour and place, of which postponement, notice, in connection with the original notice, was regularly given and published to 5th day of March, when the sale occurred."); *Ex parte* Dickson, 64 Ala. 188, 189 (1879) (stating "that notice of the settlement was regularly given, and the parties in interest appeared in court on that day").

[25] *See, e.g.*, Ordinary for Use of E.H. Worrill v. Adams, 44 Ga. 347, 350 (1871) ("*Provided*, that said debt has been *regularly given in for taxes and the taxes paid*, it shall be a condition precedent to recovery on the same . . . .").

[26] *See, e.g.*, Hemingway v. Peter, 25 Mich. 202, 204 (1872) ("Wherever that rule is applicable, it is evident that no final judgment as to costs can be regularly given until the amount of damages is found."); Thompson v. Reasoner, 24 N.E. 223, 224 (Ind. 1890) ("A

Testimony can be "regularly given."[27] In context, it simply means some act or exchange that arises pursuant to law. The "given" also suggests a transfer from one to another—notice to an opposing party, taxes to the one who holds the debt, a judgment to the parties. And the "regularity" of the "giving," in these historical contexts, means that the "giving" occurred according to law.

Consider one gloss in Georgia in 1872: "But does 'regularly given in for taxes' mean given in each year for taxes? 'Regularly given in' surely means given in according to rule; law is a rule of action. Then, according to law, what is the law applicable to such a case?"[28]

In these contexts, the phrase is also used to describe the act or exchange itself, and not the circumstances behind it. A judgment, for instance, could be "regularly given," even if in error.[29] Notice to request the production of a document could be "regularly given," even if the notice could not be complied with because a party lacked possession of the document.[30]

The best construction of votes "regularly given" is that the votes were cast pursuant to law. It does not look at the circumstances behind the votes. Instead, it merely looks at the votes themselves.

B. ACADEMIC DISCUSSION OF "REGULARLY GIVEN"

Professor Beverly Ross and William Josephson focus on the statute's legislative history to support the view that "regularly given" means "lawful."[31] Their scrutiny of contemporaneous history supports the argument that "regularly given" refers to post-

---

judgment regularly given, although it may be erroneous, is nevertheless the act of the court; and any one who proceeds to enforce it may avail himself of its protection until it is reversed."); Multnomah St. Ry. Co. v. Harris, 9 P. 402, 402 (Or. 1886) ("The judgment against the said Rothschild and M.M. Harris appears to have been regularly given, and I think is valid beyond question . . . .").

[27] *See, e.g.*, Laramie Coal & Ice Co. v. Eastman, 38 P. 680, 681 (Wyo. 1894) ("The testimony, having been regularly given under the sanction of an oath, does not lose the character of a deposition because the witness failed to subscribe it.").

[28] Macon & Augusta R.R. Co. v. Little, 45 Ga. 370, 383 (1872).

[29] *Thompson*, 24 N.E. at 224.

[30] Baker v. Pike, 33 Me. 213, 214 (1851).

[31] *See* Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 729 (1996) ("[L]egislative history confirms the textual analysis. Congress asserted power to determine who the lawful electors are and if their votes are regularly given or lawful. No substantive distinction between 'regularly given' and 'lawful' was made.").

appointment controversies, not pre-appointment ones. Consider the views of a nineteenth century contemporary:

> [T]he law authorizes the two Houses by concurrent resolution to reject the votes of the electors for President and Vice-President if they agree that these have not been *regularly* given; *i.e.*, the two Houses cannot reject the return on account of fraud or defect in the election of the electors or in the determination of a controversy thereover, but may do so on account of irregular action on the part of the electors themselves in giving their votes for President and Vice-President.[32]

Their conclusion, however, would limit Congress's power not to count votes. Congress would only have power not to count votes when "explicit constitutional requirements are violated";[33] and only in instances where "a state itself has not authoritatively determined the question" of an elector's appointment or where a state has, by statute, expressly provided the conditions that votes are not "regularly given," such as the act of a faithless elector.[34]

Professor Stephen Siegel's impressive work on the Electoral Count Act likewise distinguishes between "post-appointment" and "pre-appointment" controversies.[35] He contends that the Act reserves to Congress the power to reject electoral votes when they are not "regularly given" (that is, post-appointment) or when the governor has not "lawfully certified" the electors' appointment (that is, pre-appointment).[36] Professor Siegel identifies the "regularly given" exception as extending to those circumstances in which "the electors' conduct in office violated constitutional or statutory requirements."[37]

---

[32] John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633, 649 (1888).

[33] Ross & Josephson, *supra* note 31, at 713; *see also id.* at 746 ("Congress should refuse to count elector votes only in cases of constitutional irregularities.").

[34] *Id.* at 746.

[35] *See generally* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004) (outlining the Act's provisions as they were originally understood by the enacting Congresspersons).

[36] *Id.* at 616, 619.

[37] *Id.* at 627.

Vasan Kesavan, whose lengthy article rejects the Electoral Count Act's constitutionality, argues that "regularly given" should be construed "narrowly," and should extend "only to include problems of the electoral certificate and to exclude problems of the electoral vote, clarifying that the joint convention may judge the authenticity of the electors' acts, but not the electors' acts themselves."[38] But this interpretation stems not from the Electoral Count Act itself. Instead, this interpretation arises from a gloss Kesavan believes saves the Act from what he argues is an otherwise unconstitutional scope.[39]

Yet all commenters, regardless of methodology, agree that "regularly given" means something narrower than any legal disapproval of the electoral votes cast by a state.

C. A NARROW SCOPE FOR "REGULARLY GIVEN"

Members of Congress should heed what "regularly given" means, and how to distinguish it from other objections that might reside elsewhere in the Electoral Count Act—or maybe nowhere at all. Congress could amend the Act to specify those circumstances in which votes might not have been "regularly given." One could imagine a circumstance where this list would fail to communicate the relevant information to Congress, and Congress would refuse to count the votes. Counting the votes is largely (and rightly) a ministerial task in the contemporary era. But residual—even if remote—opportunities exist to consider whether to count votes. These opportunities are few, as there are few opportunities to challenge electoral votes after the electors have been appointed. And even in the absence of amending the statute, members of Congress should heed the following categories as appropriate objections in situations when electoral votes might not be "regularly given."

First, the elector cast a vote for a candidate ineligible to be elected to that office. The president must be a natural born citizen, at least thirty-five years of age, and fourteen years a resident of the

---

[38] Kesavan, *supra* note 22, at 1811.

[39] *See id.* (noting that this narrow construction is part of a revision to make the Act constitutional).

United States.[40] No person constitutionally ineligible to the office of president is eligible to be vice president.[41] A dead candidate is ineligible, and Congress might validly choose not to count votes for that candidate.[42] Congress could refuse to count votes for a candidate who was impeached and barred from future office, or whose conduct resulted in disqualification under the Fourteenth Amendment.[43] These two categories are more controversial in the scope and circumstance of application to the office of president, but it remains, in my judgment, squarely with the House to determine eligibility.

If the elector votes for candidates who both reside in the elector's state, Congress also must develop a remedy—disqualify one vote or both. In the face of an otherwise ambiguous record, state electors in the past have clarified that no voters may cast two votes for candidates. In 1872, for instance, Benjamin Gratz Brown was a Missouri native; Missouri's fifteen electors cast eight votes for Brown for president, six votes for Thomas Hendricks, and one vote for David Davis. They then cast six votes for Brown for vice president, five votes for George Julian, three votes for John M. Palmer, and one vote for William Groesbeck.[44] In theory, up to six electors could have cast votes for Brown for both president and vice president. Because Brown was a Missouri inhabitant, those votes would have been invalid. But Missouri submitted an explanation with its list of electoral votes: "And it is hereby further certified that none of said electors who voted for B. Gratz Brown for President

---

[40] U.S. CONST. art. II, § 1, cl. 5; *cf.* 10 ANNALS OF CONG. 119–20 (1800) (debating a bill prescribing the method of deciding disputed presidential elections).

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

[42] Congress, for instance, refused to count electors' votes cast for Horace Greeley after Greeley had died. *See* CONG. GLOBE, 42d Cong., 3d Sess. 1286–87, 1297–98 (1873) (rejecting the electoral votes of states that voted for Horace Greeley). That said, the Twentieth Amendment's succession rules may incline Congress toward counting such votes in the future and allowing the succession process to play out. *See generally* John Rogan, *Reforms for Presidential Candidate Death and Disability from the Conventions to Inauguration Day* FORDHAM L. REV. (forthcoming 2021) (arguing for Congress to change the line of succession to respond to when the presidential nominee dies before inauguration).

[43] *See* U.S. CONST. amend. XIV, § 3 ("No Person shall . . . hold any office . . . under the United States, or under any State, who . . . shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.").

[44] ELECTORAL VOTE RECORDS OF THE 42D CONGRESS (1872) (on file with author).

voted for him for Vice President."[45] Upon learning of this certification, the objection was dropped, and Congress counted Missouri's electoral votes.[46]

Second, the elector cast a vote at the wrong time or in the wrong place. Congress fixes the "[d]ay on which" electors give their votes.[47] Federal law specifies that date as the "first Monday after the second Wednesday in December."[48] The U.S. Constitution is silent as to the place or the specific time, but states determine both, and federal law expressly directs states to determine the place electors should meet.[49] In 1856, five Wisconsin electors were unable to cast their votes on the day prescribed by law due to a blizzard, so they cast their votes the next day when they arrived in Madison.[50] Their votes were counted in Congress over several objections.[51]

Third, the elector cast a vote in the wrong manner. The manner of holding elections includes voting by ballot,[52] and voting for president and vice president by distinct, separated ballots.[53] In the past, disputes have bubbled up over whether electors cast their votes according to law. Mississippi's votes in 1872, for instance, were challenged on the grounds that the electors failed to vote by ballot, but the votes were ultimately counted.[54]

Fourth, the electors did not report their votes to Congress according to law. The Twelfth Amendment instructs electors to "make distinct lists of all persons voted for as President, and of all

---

[45] CONG. GLOBE, 42d Cong., 3d Sess. 1300 (1873).

[46] *Id.*

[47] U.S. CONST. art. II, § 1, cl. 4; *see also* Siegel, *supra* note 35, at 670 (identifying a possible basis for an objection as a vote that was not cast "on the day set by federal law").

[48] 3 U.S.C. § 7 (2018).

[49] *Id.*

[50] CONG. GLOBE, 34th Cong., 3d Sess. 660 (1857) (statement of Mr. Jones) ("[T]he reason why they did not assemble on the prescribed day was in consequence of the terrific storm by which their progress was impeded, and which prevented them from reaching the seat of government in time to cast their votes on the day prescribed by law.").

[51] *See id.* at 644–60 (explaining the happenings of 1856 election with respect to Wisconsin electors).

[52] *See* U.S. CONST. amend. XII ("[The Electors] shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President . . . ."); Siegel, *supra* note 35, at 670 (describing as a post-appointment challenge a complaint that the elector did not vote by ballot).

[53] *See* U.S. CONST. amend. XII (specifying the use of "distinct ballots").

[54] CONG. GLOBE, 42d Cong., 3d Sess. 1287–88 (1873).

persons voted for as Vice-President, and of the number of votes for each."[55] Those lists are to be signed and certified by all electors, and "transmit[ted] sealed to the seat of the government of the United States, directed to the President of the Senate."[56] Congress has further specified that the electors shall sign six certificates,[57] seal them,[58] and dispose of them in a particular manner, including one to the President of the U.S. Senate.[59] If no votes are received by the fourth Wednesday in December, the President of the Senate must send a messenger to retrieve the list of votes.[60] These tasks are primarily ministerial. But if Congress does not receive the electoral votes, it would be fair for Congress to conclude that it should not count that state's votes.

Fifth, the elector's vote was the product of duress, bribery, corruption, or other improper influence. If evidence surfaces after the election that the electors were bribed or compelled by extraneous influences in casting a vote, Congress might choose not to count it.[61] It could examine post-appointment influences to determine whether the vote was freely given or the product of an improper influence.

Each of these objections tracks an instance where the electoral vote might not be "regularly given"—that is, not cast pursuant to law. But they are a confined set of circumstances.

III. RECENT CONFUSION IN CONGRESS

This Essay has argued that "regularly given" refers to a limited set of post-appointment controversies. If members of Congress wish to object to a state's electoral votes on the grounds that the votes were not "regularly given," they must rely on a narrow list of categories. Members of Congress, however, have not been so thoughtful.

---

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

[56] *Id.*

[57] 3 U.S.C. § 9 (2018).

[58] *Id.* § 10.

[59] *Id.* § 11.

[60] *Id.* § 12–13.

[61] *See* Siegel, *supra* note 35, at 670 (describing "bribery or corruption" as a valid, post-appointment challenge).

No matter the form of the objection during the counting of electoral votes, the President of the Senate must accept an improper "regularly given" objection.[62] This role is ministerial—upon a written objection, the two chambers separate to debate the objection.[63]

In 1969, Congress entertained the first formal objection under the Electoral Count Act. A North Carolina elector cast a presidential vote for George Wallace instead of Richard Nixon, whom he was supposed to support.[64] Members of Congress objected to counting this vote as not "regularly given." Senator Edmund Muskie argued that the phrase "regularly given" "involves the vote," and the state had "no opportunity" to examine the regularity of the vote when the secret ballots were cast.[65] Senator Sam Ervin responded that the vote was cast "regularly," that is, "in the manner provided by the Constitution."[66] During the debate, members of Congress routinely cited law—including state law—for the proposition that the electoral vote was cast according to law.[67] Congress ultimately

---

[62] *See* Siegel, *supra* note 35, at 650 n.667 ("[S]hould members of Congress object to receiving a state's vote on the ground that the vote was not regularly given because of concerns about the way the votes in the presidential election were recounted by county canvassing boards, the Senate President may not rule the objection out of order even though the objection that the vote was not regularly given applies only to the electors' post-appointment behavior.").

[63] *See supra* notes 9–12 and accompanying text.

[64] *See* 115 CONG. REC. 198 (1969) (statement of Sen. Edmund Muskie) ("[O]nly one objection will be filed . . . to the vote of the elector from North Carolina who was elected an elector on a Nixon slate, but who cast his vote for George C. Wallace . . . .").

[65] *Id.* at 201.

[66] *Id.* at 207.

[67] *See, e.g.*, *id.* at 164 (statement from the Deputy Att'y Gen. N.C.) ("[U]nder the North Carolina statutes a presidential elector is not required to cast his vote for any particular candidate."); *id.* at 166 (statement of Mr. Fountain) ("There is no requirement in the Constitution of the United States, the constitution of North Carolina, the United States Code, or the statutes of North Carolina that binds a presidential elector to any one candidate. Nor to my knowledge has a decision binding our electors been issued by any competent court. Therefore, regardless of whether we agree or disagree with Dr. Bailey's decision, Congress is powerless to act as proposed."); *id.* at 167 (statement of Mr. Wyman) ("At the Federal level unless and until this is changed by constitutional amendment, or to a lesser extent within the several States by State law, electors are legally free to vote as they individually see fit."); *id.* at 168 (statement of Mr. Fish) ("[N]either is there a requirement in the law of North Carolina binding an elector to vote for the winner of the popular vote, nor was any challenge to the elector's action made in North Carolina."); *id.* at 169 (statement of Mr. Schwengel) ("In this case, North Carolina's laws do not specifically bind the electors to the outcome of the

counted the vote.[68] Nevertheless, Congress's formal objection was appropriate for consideration: should Congress count the vote, or was the vote not "regularly given"?[69]

In the twenty-first century, however, members of Congress began to import the notion that "regularly given" included *any* objection to the electors' votes, pre-appointment or post-appointment. In other words, members of Congress argued that votes were not "regularly given," even if those votes were cast pursuant to law.

In 2001, an attempted objection filed by Representative Sheila Jackson-Lee and three other House members indicated that Florida's electoral votes were not "regularly given" due to an incorrect certification from the Governor and due to violations of the Voting Rights Act of 1965.[70] Representative Eddie Bernice Johnson filed another attempted objection that the votes were not "regularly given" because a plurality of the votes were actually cast for Al Gore and Joe Lieberman, not George W. Bush and Dick Cheney.[71] These attempted objections were never entertained because no member of the Senate joined them.[72]

In 2005, Representative Stephanie Tubbs Jones and Senator Barbara Boxer lodged an objection to Ohio's electoral votes "on the ground that they were not, under all of the known circumstances, regularly given."[73] The heart of the objections, however, were that the electors were "unlawfully appointed," in the words of the Democratic staff report of the House Judiciary Committee, led by

---

popular vote."); *id.* at 202 (statement of Mr. Muskie) ("I understand that the statute is not expressly binding."); *id.* at 215–16 (statement of Mr. Mundt) ("Dr. Bailey broke no law, because the only law that could be applicable to him as an elector would be the law of North Carolina; and the law of North Carolina stands silent on the point.").

[68] *See id.* at 246 (showing that the Senate voted to reject the objection and count the vote).

[69] Siegel, *supra* note 35, at 644 n.640.

[70] 147 CONG. REC. 123 (2001) (statements of Reps. Jackson-Lee, Meek, Johnson, and Cummings); *see also* Siegel, *supra* note 35, at 617 n.462 (discussing this objection, but noting that "this was an inappropriate ground for objecting" because "there was no post-appointment misbehavior by Florida's electors").

[71] 147 CONG. REC. 123 (2001).

[72] *See id.* at 101 (statement of Mr. Hutchinson) ("[T]he fact that no Senator has indicated a willingness to join in that objection indicates that . . . we are ready to move on and accept the results of the election . . . .").

[73] 151 CONG. REC. 198 (2005).

Representatives John Conyers.[74] Debate turned on matters like lines at the polling places, faulty voting machines, and other allegations concerning the popular election in Ohio.[75]

In 2017, members of Congress attempted to object to the electoral votes from Alabama, Florida, Georgia, Michigan, Mississippi, North Carolina, South Carolina, West Virginia, Wisconsin, and Wyoming.[76] Nearly every proffered reason focused on pre-appointment controversies. In Alabama, for instance, Representative McGovern complained that the certificate was not "regularly given *and* that the electors were not lawfully certified," citing "illegal activities engaged in by the Government of Russia" and "widespread violations of the Voting Rights Act."[77] Like in 2001, no Senator joined the objections.[78]

Only one attempted objection came close to a post-appointment controversy, but it was wrong on the facts and the law. Representative Jackson-Lee explained that she opposed Wisconsin's electoral votes as not "regularly given," because, *inter alia*, the electors "fail[ed] to comply with 3 U.S.C. § 9, which requires that 'electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President[.]'"[79] Wisconsin's electors, however, did have distinct lists, albeit on a single certificate. "For President," the certificate identified 10 votes for Donald J. Trump; "For Vice President," in a separate tally below that, it identified 10 votes for Michael R. Pence.[80] Many other states do the same, offering two distinct lists

---

[74] DEMOCRATIC STAFF OF H. JUDICIARY COMM., PRESERVING DEMOCRACY: WHAT WENT WRONG IN OHIO (2005), *reprinted in* 151 CONG. REC. 200, 217 (2005).

[75] *Id.*

[76] 163 CONG. REC. H186–89 (daily ed. Jan. 6, 2017).

[77] *Id.* at H186 (emphasis added).

[78] *See, e.g.*, *id.* (statement of Vice President Biden) (rejecting Rep. McGovern's objection to the certification of Alabama's electoral votes because it was not signed by a Senator); *supra* note 72.

[79] *Id.* at E33 (alteration in original); *see also id.* at E32 (citing Article II, the Twelfth Amendment, and 3 U.S.C. § 9 as the basis for the objection).

[80] PRESIDENTIAL ELECTORS OF WIS., CERTIFICATE OF VOTE CAST FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES (2016), https://www.archives.gov/files/electoral-college/2016/vote-wisconsin.pdf.

on one single certificate.[81] The Electoral Count Act anticipates this, too, as the electors sign "six certificates of *all the votes given by them*," and "*each*" certificate contains "two distinct lists."[82] There is no requirement for twelve certificates, nor six two-page certificates. While Representative Jackson-Lee's objection was wrong on both the facts and the law, it was, at least, the only attempt to lodge an objection citing a post-appointment controversy.

In 2021, Members of Congress claimed to examine post-appointment "regularly given" electoral votes but actually focused on substantive pre-appointment challenges,[83] while others conflated "regularly given" with "lawfully certified," even though "lawfully certified" was not the formal objection presented.[84] The formal objections to Arizona's and Pennsylvania's electors had a kitchen sink quality to them, covering topics ranging from critiques of judicial decisions ahead of the election to allegations of fraud.[85]

Members of Congress have with almost unwavering consistency cited pre-appointment challenges as the basis for refusing to count electoral votes. However, the ready-made objection in the Electoral Count Act, and the one these congresspersons most commonly cite, allows objections only to post-appointment disputes.[86]

---

[81] *See 2016 Electoral College Results*, NAT'L ARCHIVES, https://www.archives.gov/electoral-college/2016 (last updated Jan. 11, 2021) (providing all 2016 Electoral College certifications and votes by state).

[82] 3 U.S.C. § 9 (2018) (emphasis added).

[83] *See, e.g.*, 167 CONG. REC. S31 (daily ed. Jan. 6, 2021) (statement of Mrs. Lummis) ("I remain deeply concerned that the electoral votes of the Commonwealth of Pennsylvania were not 'regularly given' under Pennsylvania law, as required by the Electoral Count Act. Serious concerns have been raised about the constitutionality of Pennsylvania's vote-by-mail statute.").

[84] *See id.* at H84 (statement of Mr. Johnson) ("Since we are convinced that the election laws in Arizona and some other key States were changed in this unconstitutional manner, we have a responsibility today. The slates of electors produced under those modified laws are thus unconstitutional. They are not 'regularly given' or 'lawfully certified,' as required by the Electoral Count Act, and they are invalid on their face.").

[85] *See, e.g.*, *id.* at H85 (statement of Mr. Gosar) (stating that the Dominion voting machines have "a documented history of enabling fraud"); *id.* at H91 (statement of Mr. Bishop) (criticizing the "unreviewed decisions of State and Federal trial judges inclined by partisanship or having limited experience with the Electoral Clause").

[86] *See supra* notes 35–37 and accompanying text.

IV. "REGULARLY GIVEN" AND THE DENOMINATOR PROBLEM

The form of the objection matters. Because "regularly given" objections focus on post-appointment controversies, those objections acknowledge the validity of an elector's appointment in the first place. An elector's appointment is crucial to determining whether a presidential candidate has received "a majority of the whole number of Electors appointed," as the Twelfth Amendment requires[87]—a determination that sometimes is called the "denominator problem."[88] That is, if there is a dispute about electoral votes, how many votes are needed to yield a majority—and how many votes are in the denominator when determining what is a majority? Traditionally, if Congress rejects the *appointment* of the elector, those votes are not included in the denominator.[89] And if Congress rejects the *vote* of a validly appointed elector, those votes are included in the denominator.[90]

A. THE ELECTION OF 1872

One puzzle is how the electoral votes of Arkansas and Louisiana were treated in the 1872 election. Congress decided whether to count these votes under the twenty-second joint rule, not the

---

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

[88] *See* Neil H. Buchanan, Michael C. Dorf & Laurence Tribe, *No, Republicans Cannot Throw the Presidential Election into the House so That Trump Wins*, VERDICT (Sept. 30, 2020), https://verdict.justia.com/2020/09/30/no-republicans-cannot-throw-the-presidential-election-into-the-house-so-that-trump-wins (noting that because the Twelfth Amendment only requires a majority of electors "appointed," even if a state's electoral votes are not counted, a candidate can still win the majority of electors actually appointed).

[89] *See id.* (noting, in the context of the 2020 presidential election, that if Pennsylvania's 20 electors were set aside, "its 20 votes [would be] subtracted from both the numerator *and* the denominator," allowing a candidate to win with just 268 electoral votes).

[90] *See* ELIZABETH RYBICKI & L. PAIGE WHITAKER, CONG. RSCH. SERV., RL32717, COUNTING ELECTORAL VOTES: AN OVERVIEW OF PROCEDURES AT THE JOINT SESSION, INCLUDING OBJECTIONS BY MEMBERS OF CONGRESS 4–5 (2020), https://fas.org/sgp/crs/misc/RL32717.pdf ("In [1873], the two houses . . . had decided not to count the electoral votes from Arkansas and Louisiana. Nonetheless, the number of electoral votes allocated to Arkansas and Louisiana evidently were included in 'the whole number of electoral votes' for purposes of determining whether President Grant had received the majority required for election.").

Electoral Count Act (which wasn't enacted until 1887).[91] The precedent illuminates a potential ambiguity in congressional treatment of electoral votes, but the better argument on the record suggests that disputes over whether electors were properly appointed removes those electors from the denominator of votes cast.[92]

The objection to counting Arkansas's votes was two-fold: (1) the official returns of the election in Arkansas, made according to the laws of that state, showed that the people certified by the secretary of state as elected were not Arkansas's electors, and (2) the returns read by the tellers were not certified according to law.[93]

The House considered a lengthier resolution about Arkansas that was replaced with a shorter resolution, "short and crisp"[94] in the style of the Senate: "*Resolved*, That the electoral vote of Arkansas be counted."[95] The resolution passed the House 103–26, with 111 not voting.[96] In the Senate, the question was presented "that the vote of Arkansas shall not be counted," which passed 28–24, with 21 not voting.[97] Because the two houses could not agree to count the votes, Arkansas's electoral votes were not counted.

The form of the objection was the "vote . . . shall not be counted," but the objection really turned on two objections to the *appointment of the electors*, suggesting they were not entitled to cast votes in the first place. The objection claimed that the electors "were not elected," and that the returns declaring them electors "are not certified according to law."[98] Either objection strikes at the appointment of the electors. And if the electors never were

---

[91] *See* Siegel, *supra* note 35, at 552–53 (describing the twenty-second joint rule, which gave Congress unfettered "power to determine all questions regarding electoral votes").

[92] *See* RYBICKI & WHITAKER, *supra* note 90, at 4 (describing the treatment of these electoral votes in the 1872 election as an "exception" to the denominator problem).

[93] *See* CONG. GLOBE, 42d Cong., 3d Sess. 1303 (1873) (statement of Sen. Rice) ("I object to the counting of the votes of the State of Arkansas, because the official returns in said State, made according to the laws of said State, show that the persons certified to by the secretary of State as elected, were not elected as electors for President and Vice President at the election held November 5, 1872; and secondly, because the returns read by the tellers are not certified according to law.").

[94] *Id.* (statement of Mr. Garfield).

[95] *Id.*

[96] *Id.* at 1303–04.

[97] *Id.* at 1292.

[98] *Supra* note 93.

appointed, Arkansas never submitted anyone whose votes could be counted in the first place.

The allocation of Louisiana's electors was another point of contention. Congress received two sets of returns. One, signed by the secretary of state, identified electors who cast eight votes for Grant for president and eight votes for Wilson for vice president. Another, signed by the governor and the assistant secretary of state, identified electors who presented eight blank ballots for president and eight votes for Benjamin Gratz Brown for vice president.[99]

Seven members of Congress filed objections. Two objected to the blank and Gratz electors.[100] Three objected to the Grant and Wilson electors.[101] Two objected to counting *any* electors from the State of Louisiana.[102] After some back and forth, the Senate approved this resolution: "*Resolved*, That all the objections presented having been considered, no electoral vote purporting to be that of the State of Louisiana be counted."[103] It was approved 33–16, with 24 absent.[104] The House took much longer than the Senate, then haggling over the resolution for Louisiana and the matter in dispute.[105] The Senate's decision on Louisiana returned to the House, at which

---

[99] CONG. GLOBE, 42d Cong., 3d Sess. 1302 (1873).

[100] *See id.* at 1303 (statement of Sen. West) ("I object to the reception . . . of the electoral vote . . . upon the ground that said certificate was not made in pursuance of law."); *id.* (statement of Mr. Sheldon) ("I also object to the counting of the votes cast . . . for the reason that the certificate of the Governor showing them to have been chosen electors is not signed by the person who was at that time assistant secretary of State . . . and for the further reason that at the time said certificate was executed there had not been made any count, canvass, or return of the votes cast . . . .").

[101] *See id.* (statement of Senator Carpenter) (objecting because (1) "there is no proper return of votes cast," (2) "no State government in said State . . . is republican in form," and (3) "no canvass or counting of the votes . . . had been made prior to the meeting of the electors"); *id.* (statement of Mr. Potter) (objecting because there was "no certificate from the executive authority of that State"); *id.* (statement of Senator Trumbull) (objecting because "their election is not certified to by the proper officers; that Bovee, who signed the certificate . . . was not secretary of State at the time of making said certificate, nor in possession of the office of secretary of State nor of the seal of said State" and because the certificate "is untrue in fact, as appears by the admissions of said Bovee before the committee of the Senate").

[102] *See id.* (statement of Mr. Stevenson) (objecting "because it does not sufficiently appear that the electors were elected according to law"); *id.* (statement of Senator Boreman) (objecting "for reasons set forth in the report of the Committee on Privileges and Elections").

[103] *Id.* at 1292.

[104] *Id.* at 1293.

[105] *Id.* at 1303–05.

point the House, in the words of one member, recognizing "that the electoral vote of Louisiana cannot be counted,"[106] expeditiously moved to adopt, "*Resolved*, That, in the judgment of this House, none of the returns reported by the tellers as electoral votes of the State of Louisiana should be counted."[107]

Given two competing slates of electors, Louisiana's electoral vote hinged on which set Congress deemed validly appointed. The decision to count neither set suggests that Congress could not agree that anyone was lawfully appointed.[108]

The record, however, reflects competing interpretations. The Congressional Globe records show 366 electoral votes, of which a majority is 184.[109] The House Journal reports the same: 366 as the whole number of electors, of which a majority is 184.[110]

The Senate's Journal, however, reflects that the tellers reported that the whole number of electors appointed was 352, of which a majority is 177.[111] The 352 total excludes eight electoral votes from Louisiana and six electoral votes from Arkansas.[112] The actual tellers' sheets,[113] as held by the National Archives, reflect the same.

---

[106] *Id.* at 1305 (statement of Mr. Speer).

[107] *Id.*

[108] *See id.* (noting that "[t]he resolution was adopted").

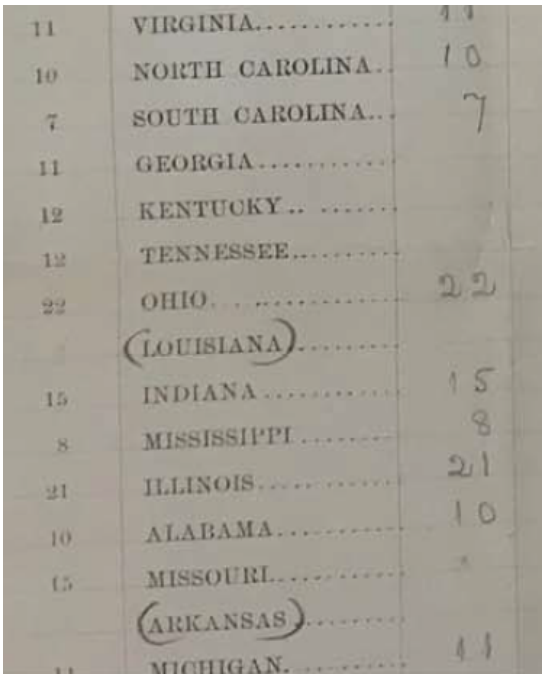
[109] *Id.* at 1306.

[110] H.R. JOURNAL, 42d Cong., 3d Sess. 384 (1873).

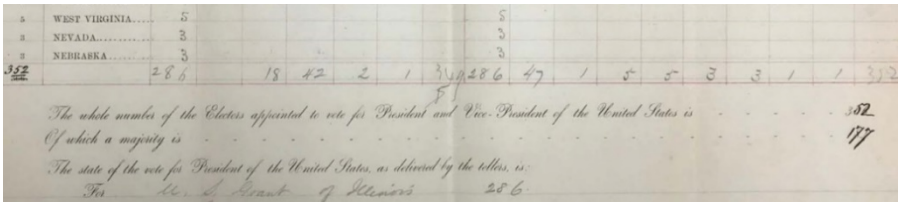
[111] S. JOURNAL, 42d Cong., 3d Sess. 345–46 (1873); *see also* Siegel, *supra* note 35, at 654 n.680 ("The Senate's and House's disparity in treatment . . . is a troubling precedent, particularly because it is the only occasion on which Congress rejected a state's electoral vote, rather than giving alternate counts or choosing between competing slates.").

[112] *See id.* at 345 (showing that Louisiana and Arkansas's electoral votes were not registered for either candidate or in the total number of electoral votes available).

[113] Both images of the tellers' sheets included below are drawn from ELECTORAL VOTE RECORDS OF THE 42D CONGRESS (1872) (on file with author).



The tellers' sheet reflects that the tellers placed parentheticals around Louisiana and Arkansas, and the tellers removed the preprinted "number of electoral votes" from the preceding column. The bottom of the page had preprinted figures of 366 total votes and 184 as a majority. But the tellers wrote over those figures in ink with the numbers 352 and 177.



The Congressional Research Service has identified the 1873 precedent as an "exception" to the rule.[114] It notes that the denominator for a "majority" was based on "the number of electoral

[114] RYBICKI & WHITAKER, *supra* note 90, at 4.

votes counted by the tellers."[115] Citing the *Congressional Globe*, the Congressional Research Service noted the unusual reporting identified above.[116] But it need not be considered an exception. It is, at the very least, an inconsistent reporting of Congress's precedent from the election. The best reading, in my judgment, is that the teller sheets—the actual report from members of Congress tasked with tabulating the votes—reflect the judgment of Congress, regardless of what was publicly announced or later printed.

B. "REGULARLY GIVEN" OBJECTIONS YIELD FEWER OPPORTUNITIES FOR CONGRESSIONAL MEDDLING

In the election of 1872, the "denominator problem" would not have altered the outcome.[117] The problem arises when different methods of calculating the denominator could lead to different outcomes. And by characterizing appointment problems as counting problems, objectors wrongly increase the power of the House to choose the next president.[118]

Imagine a hypothetical Electoral College in which Carrie Candidate defeats Norman Nominee 282–256. The whole number of electors appointed is 538, a majority of which is 270. During the counting of electoral votes, members object to counting 20 electoral votes from Pennsylvania for Carrie Candidate on the grounds that voter fraud and irregularities call into doubt whether those electors were the actual winning slate.

If the objection is that these electors were not lawfully appointed, those electors should be taken out of both the numerator and denominator in the calculation of electoral votes. That is, the

---

[115] *Id.*

[116] *Id.* at 4–5 & n.9.

[117] *See id.* at 5 ("President Grant was victorious by whichever standard was used. He received 286 electoral votes out of the 352 electoral votes counted, or out of the potential 364 electoral votes if the contested votes from Arkansas and Louisiana were included . . . .").

[118] Siegel emphasizes that members of Congress "avoided addressing the issue in the [Electoral Count Act]." Siegel, *supra* note 35, at 654. But he recognizes that "[i]f the problem were in an elector's appointment, that may differ from the problem with the way an appointed elector behaved in office." *Id.* at 653 n.678. The form of the objection informs the Twelfth Amendment analysis, as this subpart demonstrates. While the Electoral Count Act is the mechanism for translating objections into outcomes, the Twelfth Amendment outlines the consequence of those objections.

electors were never "appointed," and under the Twelfth Amendment Congress ascertained "a majority of the whole number of electors *appointed*."[119] If the objection is sustained, Carrie Candidate receives 262 electoral votes to Norman Nominee's 256. But now, the whole number of electors appointed is 518, a majority of which is 260. Carrie Candidate still wins a majority.

But if the objection that these electors were not lawfully appointed is concealed within an objection to the counting of votes cast by these electors (i.e., that their votes were not "regularly given"), the scenario changes. If the objection is sustained, Carrie Candidate still leads 262–256. But the appointment of the electors was not the formal objection, and Congress still recognizes 538 lawfully appointed electors. That means a candidate still needs 270 electoral votes to win the election, and the tally becomes 262 for Carrie Candidate, 256 for Norman Nominee, and 20 uncounted. No candidate has received a majority, and the House chooses the next president in a contingent election (with a similar scenario in the Senate to choose the next vice president).[120] It is much easier to throw an election to the House in such a scenario.

Abuse of the "regularly given" objection increases the likelihood that Congress chooses the next president and vice president. When a member of Congress objects to a vote as not "regularly given," it should be construed as an objection only to the vote cast, not to the appointment of the elector. This interpretation is more consistent with the text of the Twelfth Amendment and makes it more difficult to meddle in the outcome of the election.

V. CONCLUSION

There are many other objections that members of Congress may wish to raise in the counting of electoral votes. Whether those are constitutionally permissible or wise matters of policy is for another article. But under the Electoral Count Act, "regularly given"

---

[119] U.S. CONST. amend. XII (emphasis added).

[120] *See* Elaine Kamarck, *What Happens If Trump and Biden Tie in the Electoral College?*, BROOKINGS: FIXGOV (Oct. 21, 2020), https://www.brookings.edu/blog/fixgov/2020/10/21/what-happens-if-trump-and-biden-tie-in-the-electoral-college/ ("If there is no winner in the Electoral College, Article 2, Section 1, Clause 3 states that the decision goes to the House of Representatives while the Senate picks the vice president.").

confines the objections of members of Congress to a discreet body of controversies. Pre-appointment controversies, in contrast, typically benefit from the protection of the "safe harbor" deadline.

In a way, these objections feel anachronistic. Political parties vet their candidates, who then face extensive public exposure, so we should not anticipate that ineligible candidates would receive a material number of electoral votes. Formal requirements are closely adhered to by the states—even in times of pandemic.[121] The National Archives provide extensive procedural instructions and detailed checklists for states to ensure their compliance.[122] Moreover, thanks to the U.S. Supreme Court's decision in *Chiafalo v. Washington*, it appears that states may enforce rules that replace faithless electors,[123] reducing concerns that electors will vote for ineligible candidates or under the influence of bribery. At the very least, they provide the narrow universe for objections, and they offer a principled basis for members of Congress to reject extraneous objections in future presidential election counting controversies.

---

[121] *See, e.g.*, *New York's Electors to Meet in Person With Virus Precautions*, ASSOCIATED PRESS, Dec. 11, 2020, https://apnews.com/article/joe-biden-donald-trump-new-york-albany-hillary-clinton-0e68113895704443a1b36a77acfa24c0 ("Gov. Andrew Cuomo, one of the state's 29 electors, said Friday that state law [concerning where electors cast their ballots] requires an in-person meeting at the State Capitol . . . .").

[122] *See For State Officials*, NAT'L ARCHIVES, https://www.archives.gov/electoral-college/state-officials (last updated Aug. 6, 2020) (detailing the responsibilities of state officials in the electoral vote certification process).

[123] *See* 140 S. Ct. 2316, 2320 (2020) (holding that "a State may . . . penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote"); Baca v. Colo. Dep't of State, 140 S. Ct. 2316 (2020) (mem.) (same).