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**SAFE AT ANY SPEED: LEGISLATIVE INTENT,
THE ELECTORAL COUNT ACT OF 1887, AND *BUSH V. GORE***

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Legislative Intent, The Electoral Count Act of 1887, and *Bush v. Gore*

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One of the key issues in the showdown over the 2000 presidential election was the meaning and implications of the Electoral Count Act, passed by the U.S. Congress in 1887. Prior to the 2000 election, few observers had even heard of the statute. However, it played a significant role in the U.S. Supreme Court's December 12, 2000 decision ending the Florida recount, which effectively brought the presidential race to a final, if belated, conclusion.¹ Specifically, the Court interpreted the Act's provision offering a safe harbor to states that conclusively determine any election contests by December 12 as precluding any further recounts, regardless of the Florida Supreme Court's ability to resolve the equal protection issue that was the other major linchpin of the Court's decision.

Bush v. Gore has already ignited a firestorm of controversy among political partisans and analysts. In order to assess this decision dispassionately, it is critical that the scholarly community develop a better understanding of the Electoral Count Act.² We argue that the interpretive approach advanced by McCubbins, Noll, and Weingast (1992, 1994; hereafter "McNollGast") can help identify the legislative intent behind the Act.³ By focusing attention on the pivotal actors in a legislature and by providing criteria for distinguishing informative statements by legislators from uninformative ones, the McNollGast approach offers a fruitful methodology for exploring this case. Although used in the past to explore statutes adopted in the modern Congress, the approach can be applied to a variety of legislative situations, including the late nineteenth-century Congress and state legislative deliberations. Doing so requires sensitivity to the details of the legislative process in each case—the identities of the pivotal actors vary

¹ The Act also played a role in *George W. Bush v. Palm Beach County Canvassing Board, Et. Al.*, the U.S. Supreme Court's December 4, 2000, *per curiam* ruling.

² The only scholarly study of the Act's adoption is Burgess (1888), which deals only briefly and indirectly with the issues central to *Bush v. Gore*. See also Wroth (1960-61).

³ Although legislative intent may not be the only proper criterion for interpreting such a statute, many would agree that intent should be at least one important consideration in statutory interpretation.

depending on procedural nuances in a given legislature and historical moment. But the same basic analytic apparatus remains nonetheless useful.

Based on a close reading of Congress's deliberations, we find that the enacting coalition that adopted the 1887 Act intended the safe harbor provision to provide but one of several mechanisms by which a state could ensure that its electors' votes would be counted. Gaining the approval of pivotal actors required that the legislation include additional mechanisms that were intended to ease concerns that the Act trampled upon states' rights. Rather than intending the safe harbor to set a firm deadline that states would not dare miss, Congress intended the provision to provide a rule of evidence to be used by Congress in considering disputes. It provided additional rules of evidence in subsequent sections of the Act so that if a state missed the safe harbor date, it could still expect to have its votes counted. We also find that the coalition that enacted the 1887 Act rejected proposals for federal court involvement in the resolution of disputes concerning electors.

The paper proceeds as follows. Section one briefly reviews the Supreme Court's interpretation of the 1887 statute in *Bush v. Gore*. Section two summarizes the McNollGast approach. Drawing on the *Congressional Record*, newspapers, and analyses of key votes, Section three applies this approach to the Electoral Count Act of 1887 in order to tackle two key issues: the meaning of the Act's 'safe harbor' provision; and the role of federal courts in disputes over electoral votes. Section four briefly considers Florida's election statutes. Section five concludes.

I. The Supreme Court's Reasoning and the 1887 Electoral Count Act

After 36 days of suspense, heated debates over hanging chads, absentee votes, and butterfly ballots, on December 12 the U.S. Supreme Court handed down its decision to end the statewide recount of votes in Florida, thereby resolving the election controversy in George W. Bush's favor. The Supreme Court ruling had two major elements: First, the recount ordered by the Florida Supreme Court violated the equal protection clause of the Constitution, and therefore was invalid. Second, the Court ruled that it was infeasible to remand the case back to the Florida Supreme Court with instructions to resolve the equal protection issue, because doing so would cause the state to miss the December 12th deadline included in the Electoral Count Act of 1887.

This Act provided a regulatory apparatus for the ascertainment and counting of lawful electoral votes by Congress, as stipulated in Article II of the U.S. Constitution and the 12th Amendment.⁴ In so doing it clarified the leading role of states in resolving disputes involving their electors. The Act also moved back by about one month the date of the meeting of the electors in order to give states more time to resolve any such disputes.⁵ Section two of the Electoral Count Act created a "safe harbor" for states that resolved disputes concerning their electoral votes in a timely manner. This section appears in Title 3, Section 5 of the U.S. Code (3 U.S.C. § 5). It reads:

⁴ The pertinent text of Art. II, § 1 reads as follows: "Each State shall appoint in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in Congress...The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States." The 12th Amendment stipulates that after the electors meet in their respective states and cast their ballots, the lists of their votes are sent to the President of the Senate, who "shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

⁵The Act changed the meeting date from the first Wednesday in December to the second Monday in January. When the inauguration date of the President was moved up from March to January in 1934, Congress moved the electors' meeting date back to mid-December (Congressional Record, May 29, 1934, 9900; June 4, 1934, 10344).

“If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern 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.”

Subsequent sections of the Electoral Count Act specified the procedures that Congress would follow should a state fail to meet the safe harbor. For example, it provided that if two or more sets of electors are sent from a state, and the state has not made a final determination as to who are the lawful electors as provided in section two,⁶ the electors certified by the state’s governor will be counted unless both chambers decide by concurrent resolution that such electors are not the lawful electors of the state. If neither slate has the governor’s seal, then the state’s votes are only counted if the two chambers agree as to which slate is valid.

The key issue arising from the Electoral Count Act was this: should the “safe harbor” provision be interpreted as setting a firm deadline beyond which any recounts cannot proceed? In *Bush v. Gore*, the majority answered decisively in the affirmative. Chief Justice Rehnquist, in a concurring opinion joined by Justices Scalia and Thomas, argues that “in Presidential elections, the contest period [in Florida election law] necessarily terminates on the date set by 3 U.S.C. § 5 for concluding the State’s ‘final determination’ of electoral controversies” (7). They also note that while the Florida Supreme Court had acted with considerable speed in handling the current controversy, “the federal deadlines for the Presidential election simply do not permit even such a shortened process” (11). The use of the words “deadlines” and “permit” are noteworthy here, as will be shown below.

⁶ In other words, the state did not have a process that resulted in a final decision by the safe harbor date.

At other points in the concurring opinion, Rehnquist and his colleagues take a somewhat less strict interpretation of the safe harbor provision, but one that still mandates an end to the recounts. On this view, the intent of the Florida legislature in crafting the state's election statutes is critical. Rehnquist writes that "the scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the 'legislative wish' to take advantage of the safe harbor provided by 3 U.S.C. § 5" (10). While Rehnquist does not examine the Legislature's deliberations to adduce this legislative wish, he argues that "surely when the Florida Legislature empowered the courts of the State to grant 'appropriate' relief, it must have meant relief that would have become final by the cutoff date of 3 U.S.C. § 5" (11).

Both the Rehnquist concurrence and the majority *per curiam* opinion also emphasize that the Florida Supreme Court itself had indicated that the legislature intended to take advantage of the "safe harbor." The *per curiam* opinion observes that the "Supreme Court of Florida has said that the legislature intended the State's electors to 'participat[e] fully in the federal electoral process,' as provided in 3 U.S.C. § 5. ... That statute, in turn, requires that any controversy or contest that is intended to lead to a conclusive selection of electors be completed by December 12" (12). It adds that "because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe harbor benefits of 3 U.S.C. § 5," the remedy of remanding the case back to the Supreme Court "contemplates action in violation of the Florida election code" (12). In a similar vein, the Rehnquist concurrence cites the "legislative intent identified by the Florida Supreme Court to bring Florida within the 'safe harbor' provision of 3 U.S.C. § 5" (12).⁷

⁷ In *Bush v. Palm Beach County Canvassing Board*, the Justices had noted that "a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law" (6). The Bush brief in *Bush v. Gore* cites this twice (Brief for Petitioners, *Bush v. Gore*, No. 00-949, p. 17 and p. 35, fn. 15).

The justices were referring to the following statement in *Gore v. Harris*, the Florida Supreme Court’s December 8th *per curiam* opinion: “we consider these [election] statutes cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5” (5). The Florida Court then quotes section two of the 1887 Act, but does not specify that the legislature viewed this provision as setting a firm deadline and does not specify the implications of this “cognizance” for the legislature’s design of its election laws. The “participate fully” language appears in *Palm Beach County Canvassing Board v. Harris*, the first Florida Supreme Court ruling. In that November 21 ruling, the Florida Court noted that the state’s statutes allow the Secretary of State to disregard a county’s amended vote tally only if accepting the returns would preclude a candidate from contesting the resulting certification, or if doing so would preclude “Florida voters from participating fully in the federal electoral process” (36). The Florida Court footnoted 3 U.S.C., sections 1-10, but did not elaborate on what might preclude such full participation. Although the U.S. Supreme Court’s December 12 decision cites this intent to “participate fully,” it is worth noting that the Florida Supreme Court is extremely vague as to what this means. Examining the legislative history of the 1887 statute—and of Florida’s election laws—is necessary to determine whether missing the December 12 safe harbor date was understood by Congress or the state legislature to jeopardize such full participation.⁸

The assumption in the Supreme Court *per curiam* opinion and the Rehnquist concurring opinion appears to be that if the legislature wished to have Florida participate fully in the electoral process, it must have intended all controversies concerning its electors to be resolved by the safe harbor date. To buttress this claim, the Rehnquist opinion cites Justice Wells’ dissent in

⁸ After all, it was possible that the Legislature was cognizant of the safe harbor provision, but also valued ensuring a full and fair determination of controversies concerning electors. Cognizance of the safe harbor would only necessarily imply valuing it more highly than the latter concern if missing the safe harbor date left a reasonably high chance of the state’s being disenfranchised.

the second Florida Supreme Court case. Rehnquist quotes Wells' assertion that failing to meet the safe harbor creates "the very real possibility of disenfranchising those nearly six million voters who are able to correctly cast their ballots on election day" (*Gore v. Harris*, 56). In a footnote, Wells adds that "there is no legislative suggestion that the Florida Legislature did not want to take advantage of this safe harbor provision" (56, fn. 30). Of course, Wells cites no evidence that the Legislature intended to take advantage of the safe harbor; such an intention, however, would seem obvious if one assumes that failing to meet the safe harbor date makes it reasonably likely that Congress would reject a state's electors. Yet the validity of this assumption is not self-evident. The question, again, is whether the authors of the 1887 law intended states to interpret the legislation in this manner.

To persuade, the Rehnquist/Wells interpretation faces two chief hurdles. First, it is necessary to establish that the authors of the 1887 statute themselves viewed the Act as imposing a responsibility on each state to resolve all controversies by the safe harbor date, or else face a genuine risk of having its electoral votes rejected. Against this view, Congress may have considered the safe harbor date as one possible avenue for having a state's votes counted, but with the intention that there be an effective back-up for the state should it not meet the safe harbor date. Second, it is necessary to argue that the Florida legislature valued attaining the safe harbor more than it valued a full, careful review of any election contest. While this view is plausible, it is worth noting that in 1960, Hawaii did not finish determining its electors until after the safe harbor date, yet Congress counted its slate (Wroth 1960-61: 341-42). Furthermore, in 1961, more than seventy years after passage of the Electoral Count Act, Wroth found in his review of state electoral statutes that "in only two states are the election contest provisions

certain to produce a final result” in time for the safe harbor provision (1960-61: 341).⁹ Though somewhat dated, this finding suggests that many states have not made receiving safe harbor protection a priority in framing their election statutes. It thus would appear advisable to examine the Florida legislature’s own deliberations in order to ascertain its intent.

While Justice Breyer’s dissenting opinion disputes the majority’s reading of the 1887 statute, it does not directly respond to these two issues and instead emphasizes the question of the U.S. Supreme Court’s jurisdiction in this matter. Breyer argues that the 1887 Act “foresees resolution of electoral disputes by *state* courts” (the reference to judicial or other methods in section two) and “nowhere provides for involvement by the United States Supreme Court” (*Bush v. Gore*, Breyer dissent, 10). Breyer also claims that the 1887 statute specified that if a state misses the safe harbor, Congress is the “body primarily authorized to resolve the remaining disputes” (10). To defend his position, Breyer quotes the committee report in the House on the legislation, which notes that the “power to determine [the legality of a state’s electoral votes] rests with the two Houses, and there is no other constitutional tribunal” (11). Breyer also quotes Representative Andrew Caldwell (D-TN), who argued that the Congress is the “ultimate tribunal” to decide disputes concerning electors (11).

We examine three issues in this paper: What did Congress intend when it wrote the Electoral Count Act? More specifically, did it intend the “safe harbor” provision to provide a firm deadline that states could only miss at the risk of serious consequences? Or did Congress intend to provide assurances that a state missing the safe harbor could still expect to have its votes counted? Second, what role did the authors of the 1887 Act intend for the Supreme Court

⁹Those two states were Connecticut and Iowa. Testifying before Congress in 1977, Wroth reported that, to his knowledge, this situation had not changed significantly in the intervening sixteen years (Hearings Before the Committee on the Judiciary, United States Senate, 95th Congress, 1st Session, 1977, p. 130).

in resolving disputes over electors? Third, did the Florida legislature, in enacting its election law statutes, express a “legislative wish” to take advantage of the safe harbor?

While we do not argue that legislative intent should necessarily be the sole criterion in statutory interpretation, the Supreme Court itself relied heavily on inferences concerning legislative intent, and it is thus useful to assess the validity of these inferences. Discerning legislative intent is complicated by the vague language in the 1887 Act. The safe harbor itself uses the odd hypothetical language that “if any state shall have provided” for resolution of its controversies, such a determination will be conclusive if completed six days prior to the electors’ meeting date. Nowhere does the Act directly state whether the safe harbor is intended to provide a firm deadline. Nor does the text of the Act specify whether the U.S. Supreme Court should have a role in resolving electoral disputes. These textual ambiguities suggest that a closer examination of the legislative history, using the approach outlined by McNollGast, may be helpful. Similar ambiguities exist in the Florida statutes, which make no mention of the 1887 statute and its “deadline,” but this absence leaves open the possibility that the authors of the election statutes were mindful of the federal provisions (as noted in Wells’ dissent). Thus, a close examination of the legislative history may help resolve the question of intent in the Florida statutes as well.¹⁰

II. McNollGast’s “Positive Canons” Approach to Statutory Interpretation

In a series of articles, McNollGast outline a novel approach to the difficult task of discerning legislative intent. Their approach aims to resolve several problems: How can one discern intent when a legislature is a collectivity made up of individuals with potentially

¹⁰ Unfortunately, the information available for the Florida legislative history is less complete than for the 1887 statute. As a result, our analysis of the Florida election code is only preliminary at this point.

conflicting preferences (or, in the case of the Congress, two collectivities)? Given that any legislation that emerges is likely to be a compromise among numerous members, how can one find any coherent intent whatsoever? Furthermore, members may have incentives to dissemble when they describe the effects of legislation. As a result, how can one know which member statements to trust as valid indicators of legislative intent?

In responding to these difficulties, McNollGast (1992: 705-6) argue that legislation is analogous to a contract, and the “parties to a statutory contract are the members of the legislative coalition that enacted the statute ... The intent of a statute is to codify the agreement of the enacting coalition with respect to the policy adopted.” Discerning legislative intent therefore requires that one first identify the members of the enacting coalition that struck the legislative bargain, and then determine the preferences of the coalition’s members and the compromises that were required for these members to agree on the specific language adopted.

Identifying the members of the enacting coalition depends on familiarity with the rules and procedures that structure the legislative process. Most obviously, the enacting coalition for legislation in the U.S. Congress consists of a floor majority in both the House and the Senate; without the approval of the floor, no legislation can be adopted. The president’s veto power also generally makes him part of an enacting coalition; his preferences can only be disregarded if there is a two-thirds supermajority in both chambers that is willing to go against the president’s preferences.

McNollGast (1994: 18) observe that the most important feature of congressional procedure is that legislation “must survive a gauntlet of veto gates in each chamber, each of which is supervised by members chosen by their peers to exercise gatekeeping authority.”¹¹ As a

¹¹ A member with gatekeeping authority is empowered to block a proposal from moving forward in the process. In effect, a gatekeeper has the authority to enforce the status quo as the outcome.

result, the enacting coalition also consists of those members who had veto power over the legislation; such members are “pivotal” because legislation cannot be approved without their assent. In the Congress of the 1970s and 1980s, McNollGast attribute such gatekeeping power to committee chairmen (through their control of committee agendas), committee and subcommittee majorities (since legislation must generally be approved in both committee and subcommittee to reach the floor), the House Rules Committee (which controls scheduling in the lower chamber), and majority party leaders in both chambers (again, due to their control of scheduling). If the House and Senate pass different versions of the same bill, a conference committee also may have veto power. Finally, as noted above, the legislation must be approved by a floor majority in each chamber.

Excepting the floor approval stage, it is worth noting that it is generally possible under House and Senate rules to overcome specific gatekeepers.¹² For example, in the contemporary House, a discharge petition, if signed by a majority of members, can be used to force a bill from committee to the floor. However, such moves are costly to implement, and thus it is often easier to accommodate a recalcitrant committee than to discharge it (Cooper 1988).¹³ In any case, it is probably better to interpret the various “gatekeepers” in the McNollGast model as likely members of an enacting coalition. In any given situation, it is possible that a gatekeeper was “rolled” by his colleagues and thus lacked influence.

Indeed, McNollGast also offer guidelines for determining those members who were outside the enacting coalition. Members who voted against the bill on final passage, sponsored or voted for unsuccessful amendments that were designed to kill or gut the bill, spoke against the

¹²Furthermore, Senate committees and party leaders lack the same degree of gatekeeping authority as in the House. At the same time, an additional obstacle to legislation in the Senate is the need for a supermajority to overcome a filibuster.

¹³As discussed below, discharging a House committee was even more difficult in the 1880s.

bill in committee or on the floor, or filed minority reports in committee opposing the bill are each outside the enacting coalition. The preferences of such members should not be considered in interpreting statutory intent. Furthermore, “pivotal” members (that is, gatekeepers) whose legislative language is altered later in the process can be regarded as outside the enacting coalition (at least with respect to the provisions that were changed). McNollGast (1992: 721) conclude that “the most useful conceptualization of the enacting coalition is the union of all of the actors who approved the legislation at each of the veto points.”

Once one identifies the enacting coalition, it is necessary to determine the influence on the outcome of each member of the coalition. McNollGast argue that an enacting coalition member’s influence on legislation depends on three factors:

1. whether the member has gatekeeping power over the legislation;
2. the amount of information that the member possesses about proposed alternatives and the preferences of other members; and
3. the details in the differences in policy objectives among members.

The first two considerations generally suggest that members (especially the chairmen) of the relevant committees considering the legislation will be especially important participants in the enacting coalition. They not only enjoy gatekeeping power, but also typically are the legislature’s experts on the issue and thus have an informational advantage over other members. Majority party leaders also will often be particularly influential due to their gatekeeping power and their knowledge concerning members’ preferences. The impact of the third consideration will depend on the specific configuration of member preferences relative to the status quo policy. However, McNollGast (1992: 711-12) emphasize that analysts “must not focus only on the preferences of the ardent supporters [of legislation], but also *on the accommodations that were necessary to gain the support of the moderates*” (emphasis in original). Since a floor majority is

ultimately required in each chamber, the “views, expectations, and utterances of the marginal supporters of legislation” are critical (1992: 713). In other words, it is insufficient to focus solely on committee and party leaders; the pivotal voter on the floor—the median voter, when policy can be arrayed along a single issue dimension—enjoys decisive influence as well.¹⁴

In addition to helping identify the members of the enacting coalition and their relative influence, McNollGast argue that their approach can assist in determining the true preferences of the enacting coalition’s members and their understanding of what the legislation is intended to accomplish. As noted above, the critical problem is that members may have incentives to make statements on the floor or elsewhere that are not accurate reflections of their own preferences or of the statutory bargain itself. For example, a member who preferred that the bill delegate more power to an agency than ultimately provided for in the adopted legislation might make a statement on the floor that suggests that the legislation does, in fact, delegate such power to the agency. This statement might be intended to influence the agency or the courts, or it might simply be intended to show constituents that the member fought as hard as possible for their favored policy. But such a statement clearly is not a reliable guide to the intent of the legislation.

This does not mean that all member statements are untrustworthy. The key is whether a member is subject to punishment if she makes a false or misleading statement (McNollGast 1994: 26). McNollGast argue that a chamber or its majority party will only delegate special gatekeeping powers to a member if it can trust that member’s statements when she is acting in her capacity as an agent of the chamber or party. If such a member abuses this trust by misrepresenting her preferences or the nature of the legislative bargain, she risks losing her reputation as a reliable source of information and may even face removal from her gatekeeping

¹⁴When one adds veto threats and the Senate cloture rule, the identity of the pivotal voter(s) on the floor becomes more complicated, but can still be determined given information about member preferences and the location of the status quo (see Krehbiel 1998).

position. Therefore, McNollGast conclude that the “the findings, interpretations, and proposals of agents of the majority, as reported to the House and Senate for review, are meaningful, and statements by these agents that are not contradicted or rejected at some later stage are implicitly approved by their parent chambers when the bill itself is approved” (1992: 726). Operationally, this means that the statements included in a committee report or made by a bill’s manager on the floor can generally be trusted as indicative of legislative intent (1994: 28).¹⁵

Along these lines, McNollGast suggest that a key source of evidence of legislative intent can be found in the responses that a bill manager gives to questions from members on the floor. Such responses allow the manager to clarify confusing elements of the bill. In making such responses, the bill manager is acting in her capacity as an agent of the floor, and therefore has an incentive to be truthful. By contrast, a bill’s sponsor—assuming she is not also the bill’s floor manager—may have incentives to misrepresent the bill’s effects because she is not acting as an agent of the floor, and therefore does not face punishment.¹⁶

Member actions can also be indicative of legislative intent. For example, when members reject an amendment, they are taking costly action that is informative. Such action tells us that the rejected language cannot be the basis for interpreting intent. Instead, rejected amendments, by ruling out certain interpretations, can help determine the contours of the statutory bargain ultimately adopted (McNollGast 1994: 21).

In sum, the McNollGast approach to statutory interpretation provides guidelines for identifying members of the enacting coalition, their relative influence on the legislative bargain,

¹⁵The bill manager on the floor is generally the chair of the committee (or, more recently, subcommittee) with jurisdiction over the legislation.

¹⁶The same member may be both the lead sponsor and the bill manager. McNollGast suggest that such a member’s statements can be trusted when she is acting in her official capacity as the bill manager, but not necessarily otherwise. The reason is that it is not an equilibrium to punish all false statements, but is an equilibrium to punish false statements when made by members acting as agents of the floor or of their party (see McNollGast 1994 for details).

and the main contours of that bargain. The McNollGast approach has, of course, been subject to several critiques (see, e.g., Bates 1994, Jorgensen and Shepsle 1994). For example, Bates (1994) notes that the leaders of the legislative coalition might attempt to anticipate the courts' preferences (since the courts will interpret the law) and therefore might have incentives to articulate "points of view that themselves are strategically contrived" to influence the courts (Bates 1994: 42). In such a case, it is quite possible that the members of the enacting coalition would approve of such contrived interpretations, due to the shared need to influence the courts. Jorgensen and Shepsle (1994) add that McNollGast wrongly assume that contradictions or ambiguity in legislation are due to members' finding it inefficient to spend all of the time necessary to fully clarify their meaning. Instead, it may be the case that members deliberately "create confusion about statutory meaning rather than enact a compromise between contending approaches" (1994: 44-45). An enacting coalition will take such an action when its members cannot agree on a compromise and would prefer to take "its chances by giving the courts a free shot at policymaking" (1994: 45). The more general point is that since an enacting coalition is a collectivity, it may not always be appropriate to assume that legislation embodies a coherent meaning. Finally, Jorgensen and Shepsle challenge McNollGast's assumption that bill managers' time-horizons are sufficiently long such that they will have a strong incentive to speak truthfully about their own preferences and the legislative bargain struck. They note instead that the gains from misrepresentation may outweigh the bill manager's valuation of her reputation or gatekeeping authority (1994: 47).

The force of such critiques likely depends on specific circumstances. In this case, we find no evidence that members were seeking to influence court interpretations; instead, the widely shared belief appears to have been that the U.S. Supreme Court would stay out of

disputes over electors (see below). In any case, it was not until 1892 that legislative history became legitimized as a canon of statutory interpretation, and therefore it is highly unlikely that members of Congress in 1887 made strategic statements of intent looking ahead to influencing the courts.¹⁷ With respect to the Jorgensen and Shepsle critiques, we find no evidence that member disagreements were so fundamental that they were unable to find compromises and therefore deliberately chose to adopt contradictory language. Instead, the 1887 law appears to represent a classic case in which legislators find language that compromises their differences in a reasonably coherent manner. And while in other circumstances bill managers may have incentives to misrepresent their own preferences or the bargain struck by an enacting coalition, in the case of the 1887 Act, it is telling that the Senate approved Senator George F. Hoar (R—MA) to serve as bill manager for versions of the legislation over three consecutive Congresses. If Hoar had strategically strayed from the truth in his floor statements, it is doubtful that his colleagues would have assented to this repeated delegation of gatekeeping authority.¹⁸

A final cautionary note, however, is that we do not assert that legislative intent should necessarily be the decisive criterion in statutory interpretation. But to the extent that such intent is a significant criterion, McNollGast offer analytic tools that can, at a minimum, narrow the range of plausible interpretations. Applied with sensitivity to the particular complex of rules and procedures at work in a given legislature at a given historical moment, this approach clearly

¹⁷ *United States v. Holy Trinity Church*, 143 U.S. 457 (1892).

¹⁸ Of course, it is possible that he chose to wait until the last ‘round’ of floor deliberations to misrepresent. However, Hoar’s interpretation of the bill did not shift appreciably across the three Congresses in which he served as bill manager. A further point is that Hoar served as bill manager for numerous important measures during his long Senate career (1877-1904); the Electoral Count Act appears not to have been of special importance to him. In that regard, it is noteworthy that Hoar makes no mention of the Act in his two-volume autobiography (Hoar 1903).

seems superior to simply weighting all member statements equally, or alternatively throwing out all member statements as useless and uninformative.¹⁹

III. Applying McNollGast to the Electoral Count Act of 1887

The Electoral Count Act was passed in 1887, after nearly a decade of often-contentious debate in both houses of Congress. There were impassioned disagreements over numerous issues, which ranged from highly technical matters to ponderous speculations of constitutional meaning. The debate turned on two main axes: First, what should be the relative balance of power between federal and state authority concerning the counting of electoral votes? Second, how should congressional oversight of the electoral count be distributed both internally (across the two chambers), and shared with the federal judiciary? While the debate over the Electoral Count Act was lengthy and highly complex, we remain focused on only two of the many questions involved: the meaning of the safe harbor provision, and the role of federal courts in state-level disputes over electoral votes.

To understand the legislative intent behind the Electoral Count Act, it is first necessary to identify the pivotal actors, which in turn requires sensitivity to the details of the legislative process in the 1880s. In the House, committee gatekeeping was extremely strong in the late nineteenth century: prior to 1910, efforts to discharge committees could not reach the floor without the Speaker's approval (Cooper 1988; Alexander 1916). Within committees, the chairman controlled the meeting schedule and there were no rules in place to force a recalcitrant

¹⁹ For reviews of recent debates concerning the role of legislative history in statutory interpretation, see: the symposium on formalism, *University of Chicago Law Review* (Summer 1999); William W. Buzbee, "The One-Congress Fiction in Statutory Interpretation," *University of Pennsylvania Law Review* 149 (Nov. 2000); James J. Brudney, "Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?," *Michigan Law Review* 93 (October 1994); Peter L. Strauss, "The Courts and the Congress: Should Judges Disdain Political History?," *Columbia Law Review* 95 (1995); William D. Eskridge, Jr., "The New Textualism," *U.C.L.A. Law Review* 37 (1990); and Richard A. Posner, "Statutory Interpretation—In the Classroom and the Courtroom," *University of Chicago Law Review* 50 (1983).

chairman to consider a bill.²⁰ The committee with jurisdiction over the Electoral Count bill was the Select Committee on Law Respecting Election of President and Vice-President; in the 49th Congress (1885-87), the Select Committee was chaired by Democrat Andrew Caldwell of Tennessee. Once a bill was reported from committee, the Speaker had virtually complete control over its chances of reaching the floor. This was because the Speaker's power of floor recognition had expanded tremendously in the 1870s and early 1880s (Alexander 1916; Peters 1997). Although certain committees enjoyed privileged access to the floor—including the committee with jurisdiction in this case—there were more than a dozen privileged committees, meaning that the Speaker could generally still avoid bills that he wished to block.²¹ It is also worth noting that the Speaker controlled committee assignments in this era, making it unlikely that a committee would report a bill that the Speaker opposed in the first place.²² As has always been the case, approval of a floor majority was necessary for a bill's passage. This suggests the floor median was also a pivotal actor. But in the 1880s, the minority also had considerable tools of obstruction in the House, and there are numerous instances in which a determined minority blocked legislation favored by a floor majority (Peters 1997; Alexander 1916). This suggests that legislation fiercely opposed by the minority was unlikely to pass as well. In sum, the Speaker, committee chairman, full committee, and floor majority should each be regarded as

²⁰ Rules changes adopted in 1931, 1946, and 1970 provided mechanisms for committee members to counter a chairman's recalcitrance (see Schickler 2001).

²¹ A privileged committee technically must be recognized when it brings a bill to the floor. However, if several privileged committees ask recognition, the Speaker enjoys discretion concerning which to recognize. The Speaker could use this discretion to delay indefinitely a privileged committee's bills (Cooper 1988).

²² Unlike the contemporary Congress, the Rules Committee was not a pivotal actor in the 1880s—its authority to bring measures to the floor was only gradually becoming established in this era, and it was not until the early twentieth century that the Committee's endorsement became an important pathway to the floor (Cooper 1988; Alexander 1916). In any case, the Speaker chaired and appointed the other members of the Rules Committee.

pivotal in the 1880s House. In addition, an intense and unified minority could also generally block legislation.

In the Senate, the situation was a bit more complicated. As in the House, committee chairmen controlled the agendas of their committees. But committee gatekeeping was weaker than in the House because nongermane amendments could be used to bring measures to the floor in the face of committee obstruction.²³ Nonetheless, such tactics were rarely used, and therefore it is probably correct to regard Senate committees as enjoying disproportionate influence, even if their gatekeeping powers were imperfect (Kravitz 1974). The Senate Committee involved in this case was Privileges and Elections; it was chaired by Hoar from 1881 to 1887. A further distinction between the House and Senate is that there was no well-defined floor leadership in the Senate at this time. Committee chairmen typically competed for floor time in an open and unpredictable process (Gamm and Smith 1999). As a result, party leaders were not pivotal actors in controlling access to the floor. But much like the House, in addition to the requirement of a floor majority for passage, it was also true that the minority could obstruct Senate business. Indeed, even a small minority could bring Senate business to a halt (due to the absence of debate limitations). However, this prerogative was only occasionally exercised in the 1880s, suggesting that only an intense minority would be a major obstacle to passage of legislation (see Burdette 1940; Binder and Smith 1997). In sum, the key actors in the Senate are the committee chairman and full committee, along with the floor median. Since the House and Senate adopted conflicting versions of the electoral count bill, the members of the conference committee appointed by each chamber also emerge as critical actors.

²³ In other words, if a committee held up a bill, that bill's provisions could be attached as a nongermane floor amendment to other legislation pending on the floor.

The legislative history of the Electoral Count Act dates back to the initial efforts by Congress to respond to the Hayes-Tilden debacle of 1876. In that case, Florida, Louisiana, and South Carolina each sent dueling sets of electoral votes to Congress, which reflected the presence of two state governments in Louisiana and South Carolina and of conflicting decisions by Florida authorities (Foner 1988: 576). In addition, the eligibility of an elector from Oregon came under dispute. If Hayes won all of the disputed electors, he would have a narrow majority. Under existing rules and precedents, it was clear that both chambers had the power to agree on which set of electors to count. But with a Democratic House and a Republican Senate, such agreement was not forthcoming. As a result, the two chambers created an Electoral Commission to conduct fact-finding and decide upon the disputed electors. Its decision would be binding unless overturned by simple majorities in both chambers. The Commission sided with Hayes, ending the battle. But the Commission expired at the end of the contest, and thus it was unclear how Congress would deal with future controversies.

The status quo following the resolution of the 1876 election was this: in case of a dispute over electors, the two chambers could jointly agree on which electors to count. But if the two chambers disagreed, there were no permanent mechanisms for resolving the dispute, and the state would risk disenfranchisement.²⁴ Hoar, acting as the bill's Senate floor manager, explained that under current law, he knew of no way "in which the vote of any State can be counted except by the concurrent assent of the two Houses of Congress" (*Congressional Record* [CR], February 1, 1886, 1020; see also CR, March 17, 1886, 2427). Senator James Pugh (D-AL), who also served on the Committee on Privileges and Elections from 1881-87 and who joined Hoar on the

²⁴Under the twenty-second Joint Rule, which was in effect from 1865-75, a state's votes could only be counted if both chambers concurred. Although the rule had lapsed prior to the 1876 imbroglio, in practice it still appeared that a state's votes would be rejected absent agreement between the House and Senate on which votes to count.

conference committee that framed the final version of the 1887 law, had noted earlier that “under the existing condition and without any legislation upon the subject,” a state would be disfranchised in case of a House-Senate disagreement (CR, April 6, 1882, 2647). Senator John Sherman (R-OH) was the main dissenter from this view. Sherman argued that in case of a House-Senate disagreement, the President of the Senate was empowered, under the 12th Amendment to the Constitution, not merely to count the votes, but to ascertain which votes were to be considered lawfully given (CR, January 21, 1886, 817). But even Sherman acknowledged that the Senate President’s power to make such decisions was far from universally accepted and would quite possibly be challenged by the House and Senate, and in the courts (817). As a result, even under Sherman’s interpretation of the status quo, a state faced a serious risk of disfranchisement in case of a House-Senate disagreement concerning its electors (CR, January 21, 1886, 815-18).

In the years following the Hayes-Tilden controversy, the Senate passed bills that closely resembled the Electoral Count Act of 1887 on four occasions: 1878, 1882, 1884, and 1886. In each case, the Senate had a Republican majority, though support for the bill was bipartisan the final three times it passed. The 1878 version was never taken up in the Democratic House. The 1882 version died in the then-Republican House when the Select Committee on Law Respecting Election of President and Vice-President proposed an alternative that proved unpopular on the floor (see below). In 1884, the House, again Democratic-controlled, passed an alternative version that differed substantially from the Senate bill. A conference committee ensued, but the two chambers were unable to reconcile their differences. Finally, in 1886, the still-Democratic House passed a bill that differed only incrementally from the Senate bill. The conference

committee resolved most of the differences in favor of the House, and the Electoral Count Act was approved by both chambers and signed into law on February 4, 1887.

The repeated consideration of this bill over the course of a decade provides a rich legislative history for exploring the key questions outlined above: Did Congress intend the safe harbor provision to set a firm deadline for states? In other words, did Congress envision that states would face a serious risk of disenfranchisement should they fail to meet the safe harbor provision? Furthermore, what role should the federal courts play in resolving disputes over a state's electors?

The Safe Harbor: Initial Proposal

Turning first to the safe harbor provision, the legislative history is quite clear that overcoming the critical obstacle of House resistance required amendments that made the safe harbor provision less of a firm deadline to states and that instead provided mechanisms so that a state missing the safe harbor date could still expect to have its electoral votes counted.

The versions of the bill passed in the Senate in each Congress differed only modestly from one another. The initial version of the safe harbor language, proposed and adopted in 1878, was as follows:

Section four: "Each State may provide, by law enacted prior to the day in this act named for the appointment of the electors, for the trial and determination of any controversy concerning the appointment of electors, before the time fixed for the meeting of the electors, in any matter it shall deem expedient. Every such determination made pursuant to such law so enacted before said day, and made prior to the said time of meeting of the electors, shall be conclusive evidence of the lawful title of the electors who shall have been so determined to have been appointed, and shall govern in the counting of the electoral votes, as provided in the Constitution and as hereinafter regulated" (CR, December 9, 1878, 51).

Notice that the proposed legislation afforded a high degree of protection to a state that made a determination pursuant to section four (which later became section two). However,

subsequent sections of the bill provided that if a state failed to meet the safe harbor, but submitted just one return, it still would be afforded a degree of protection since only an affirmative vote of both chambers could reject its slate. But if the state had competing returns and it either had not provided for a final determination in time, or if there was a dispute concerning who has the authority to make such a final determination—such as when two state tribunals each claimed this power to resolve disputes—then the state’s votes would only be counted if both chambers agreed on which electors were valid (CR, December 9, 1878, 51). As we will see below, pivotal actors, particularly in the House, found this proposal unacceptable, and the Electoral Count Act only passed after the language was refined to grant added protection to states that failed to meet the safe harbor provision.

Senate Changes to the Safe Harbor Proposal

Ironically, the most important Senate change to this initial language occurred in 1884, but appears not to have been noticed by members during the Senate’s floor debate. The versions adopted in 1878 and 1882 had specified that a state’s determination of its electors would be conclusive if that decision were made prior to the time fixed for the meeting of the electors.²⁵ However, the version of the bill reported unanimously by the Privileges and Elections Committee in 1884 specified that such a determination needed to be made six days before the meeting of the electors in order to be considered conclusive evidence (CR, June 12, 1884, 5076).

²⁵The full text of the 1882 safe harbor provision reads as follows: “That each State may, pursuant to its laws existing on the day fixed for the appointment of the electors, try and determine before the time fixed for the meeting of the electors any controversy concerning their appointment, or the appointment of any of them. Every such determination made pursuant to such law so existing on said day, and made prior to the said time of meeting of the electors, shall be conclusive evidence of the lawful title of the electors who shall have been so determined to have been appointed, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated” (CR, February 3, 1882, 859).

The senators themselves appear not to have viewed this as a noteworthy change. Committee chairman Hoar, who was the bill's floor manager in the 47th, 48th, and 49th Congresses, assured members on the floor that the 1884 proposal was "*verbatim et literatim*" the precise bill passed at the last Congress (CR, January 16, 1884, 430). It then passed on a voice vote following essentially no floor debate. It is not at all clear why Hoar failed to mention the change moving up the safe harbor date to six days before the meeting of the electors. However, the fact that no one subsequently criticized Hoar for this omission suggests that it was more likely an oversight than an intentional misrepresentation.²⁶

The Senate Committee made a handful of additional changes to the bill in February 1886 after several days of contentious floor debate had resulted in the bill's being sent back to Committee for reconsideration. The main complaints on the floor were voiced by John Sherman and committee member William Evarts (R-NY). Sherman objected that in the case of dual returns and no clear determination under the safe harbor provision, a state could be disenfranchised by the actions of a single chamber. He worried that this created an incentive for the House, in particular, to refuse to recognize a state's electors, since the failure of either candidate to obtain an electoral college majority would give the House the power to decide the presidency.²⁷ Evarts echoed this concern, expressing "great repugnance" at the notion that failure of the two chambers to agree on a state's votes could result in that's states disenfranchisement (CR, February 2, 1886, 1058). Evarts proposed an amendment that, he argued, would minimize the state disputes that might lead to such problems. The Evarts

²⁶ As discussed below, the six-day provision was discussed in the House in 1886 but an effort to delete it was overwhelmingly rejected.

²⁷ There was some disagreement on the floor as to whether the refusal to count a state's electors would result in a reduction in the total number of electoral votes required for election (see CR, January 21, 1886, 816-21; Burgess 1888). The Electoral Count Act did not address this issue; instead, it sought to make it less likely that a state's votes would be rejected.

amendment provided that as soon as a state has ascertained the electors appointed under its laws, the state's governor has the duty of sending a certificate with these results to the Secretary of State of the United States and to provide the electors themselves with copies of this certificate. Evarts explained that such an executive certification would signify the "distinct and authentic action of the State," and this would "at least instruct the minds of the two Houses of Congress when they are called upon to determine as to who are the appointed electors and who are not" (1062).²⁸ The criticisms made by Sherman, Evarts, and a handful of other senators generated sufficient dissatisfaction that the Senate voted 30 to 22 to recommit the bill to the Privileges and Elections Committee for further consideration (1064). Interestingly, Democrats and Republicans voted quite similarly on the recommittal motion, suggesting that the issues at stake were not partisan.²⁹

Hoar reported a revised version of the bill back to the floor on February 25, 1886. The Committee had accepted the Evarts executive certification amendment with only minor editing. Each state's governor would now have the duty of certifying and reporting the state's results promptly after its electors were ascertained (CR, March 16, 1886, 2387). The Committee also responded to Evarts' additional concern that the previous bill seemed to require that state determinations of electors be made by a judicial process. As a result, the new bill replaced the word "tribunal" with the word "authority." It also deleted the phrase "try and determine" from section two, and instead specified that state determinations of controversies concerning electors could be made by "judicial or other methods" (2387). Hoar explained that this had been done

²⁸Evarts claimed that given such an action by a state's governor, "the opportunities for doubt as you approach the mere opening of the votes and the hasty and unsatisfactory scrutiny of the mere contents of those opened envelopes would all disappear; for we should have, under as high a public authority as could be commanded and promptly after the final act of the State in the process of elections, this declaration communicated to this Government and made public by this Government" (CR, February 2, 1886, 1057).

²⁹ Democrats voted 13 to 9 in favor of recommittal. Republicans voted 17 to 13 for recommittal. An analysis of the vote shows support for recommittal was unrelated to party, ideology (as measured by first and second-dimension NOMINATE scores; see Poole and Rosenthal 1997), and region.

because of Evarts' belief that the earlier reference to tribunals and trials invited "a judicial interference with what, in the judgment of that Senator, should be a political process" (CR, March 17, 1886, 2427). Thus, the bill would now explicitly allow each state to use whatever method it preferred—judicial or political—to determine its electoral controversies.

The Select Committee made one additional change when it reported the bill back on February 25. This change also appears to have been made in response to opposition to Congress prescribing how states would resolve disputes over electors. The earlier versions of the safe harbor provision had each begun with the phrase "Each State may provide, by law..." for the settlement of its electoral controversies. In the preceding Congress, William Eaton (D-CT), then the chairman of the House Select Committee on Law Respecting Election of President and Vice-President, had objected strongly to this language, asking "by what authority does this Congress undertake to tell your State, my friend, how it shall choose its electors and determine whether they are electors or not?" (CR, June 12, 1884, 5078). Thus, in February 1886, the Senate Select Committee altered the safe harbor language slightly in an effort to make it clear that Congress was not dictating to the states how they should go about managing their determination of electors. The safe harbor provision now began with the phrase, "If any State shall have provided," in place of "Each state may provide." Hoar did not explain the reasons for inserting this hypothetical language. However, observers at the time claimed that the motivation was to neutralize concerns about states' rights. For example, the *New York Times* noted that this change was made because "it was urged with respect to this [provision] that Congress had nothing to do with the granting of authority to States to pass laws" (February 26, 1886). Similarly, Burgess (1888: 636), in a detailed review of the Act's passage, claimed that the change in language occurred because the "may provide" language had "offended the states-rights sensitivities of the

majority of the House” and thus had been a barrier to the bill’s approval at the conference committee stage in 1884. Although such assessments by third parties do not have standing in the McNollGast apparatus, it is doubtful that both the *Times* and Burgess would misrepresent the Select Committee’s action. Furthermore, the Committee made the change while revising the bill to meet concerns about protecting states from disenfranchisement, suggesting that states’ rights was a major issue at that moment.³⁰ Following all of these changes, the bill passed on a voice vote with little controversy (CR, March 17, 1886, 2430).

Hoar’s comments on the bill prior to its passage illuminate the Senate’s intent. The bill manager explained that “in case the State itself has provided by its own law an instrumentality for the final determination of all such questions ... the decision of the State is to be taken as valid in all cases” (CR, March 17, 1886, 2427). Hoar’s use of hypothetical language—“*in case the State*”—suggests an intent to make the safe harbor voluntary for the states. Hoar also noted that if there is but one return from a State, “that return shall not be rejected without the concurrence of both Houses” (2427).³¹ In other words, a state sending one set of electors but not meeting the safe harbor date could still expect its votes to be counted unless both Houses overruled its decision. Hoar acknowledged one limitation of the bill: it would not provide for the counting of a state’s votes “where there are two rival State governments and those rival State governments present two competing sets of electors” (2427). But Hoar emphasized that this problem is also “a criticism of the existing state of the law” and claimed that “it is utterly impossible to deal with” given present political conditions (2427).

To sum up, Hoar and his colleagues on Privileges and Elections were pivotal actors shaping the electoral count legislation. The Committee majority and its chairman were willing to

³⁰Over the entire course of deliberations on the legislation, the *Congressional Record* contains no floor discussion in either chamber of the “if any state” formulation.

³¹This provision was in each version of the Senate bill from 1878 through 1887.

accept a version of the safe harbor that simply assured conclusivity to a state determination reached in a timely manner and that spelled out procedures for Congress to follow should a state miss the safe harbor. Floor passage in 1886 required accommodating the concerns of marginal supporters, such as Evarts, who believed that the original committee bill did too little to ensure that a state's electors would be counted should the state miss the safe harbor. Hoar proved willing to accommodate Evarts because he viewed the status quo as unacceptable (see above). The provision for executive certification of electors helped assuage Evarts' concerns and allowed the bill to pass without much controversy.³² In effect, the Senate began the process of providing additional mechanisms to minimize the likelihood of controversies leading to a state's disenfranchisement.

Deliberations in the House

The main storyline in the House was that passage required even further amendments to the Senate bill, so that each state's electoral votes would be better protected in case it missed the safe harbor. Thus, the Select Committee reported a handful of amendments to the Senate bill when it brought the measure to the floor in December 1886. First, it provided that if a single lawful return were certified by a state, the two Houses would be strictly unable to reject the votes of its electors. This changed the Senate provision that a state not enjoying safe harbor protection could have its votes overruled if both chambers concurred. Second, it provided that if there were two returns of electors from a state, and that state had failed to resolve its dispute under section two, then the electors certified by the state's governor would be counted, unless both Houses concurred that those electors were not the lawful votes of the state. By contrast, the

³²In addition, the committee accommodated Evarts' concern that the bill appeared to prescribe that states use judicial methods to resolve disputes. The change from "Each state may" to "If any state" was also likely made in response to concerns about infringing upon states' rights.

Senate bill provided that the state's votes would only be counted if both Houses agreed on which votes to count.³³ Select Committee Chairman Caldwell claimed that "the apprehension that this bill contains anything inimical to State rights is fanciful and unreal ... The object of the proposed amendments to the Senate bill is to remedy any lurking danger in its provisions, which it may be apprehended is ready to spring, lion-like, upon States" (CR, December 7, 1886, 31).

Committee member John Eden (D-IL), who also helped manage the bill on the floor and later served on the conference committee with the Senate, explained that the Senate bill allowed three contingencies in which the two Houses could refuse to count the vote of a State, and claimed that "the House committee has undertaken to remedy this defect by a limitation of the power of the two Houses to reject the vote of a State" (CR, December 8, 1886, 49). Specifically, the Senate had allowed the two chambers to overrule a state submitting but a single return, if that state had not made a final determination under section two. The Senate bill also provided that in case of competing returns and no safe harbor determination, the state's votes would only count if both chambers agreed. Eden noted that the Committee's amendments neutralized these two contingencies (49), and left "but one contingency in which the vote of a State may be rejected ... In the one instance only, where a question arises as to which of two or more authorities, acting under the second section of the bill, and having made conflicting decisions as to lawfully appointed electors from the State, is the concurrent action of both Houses required to decide as to the legally appointed electors from a State" (50). That is, if there were dueling state governments, as in the Reconstruction period, the State faced a genuine risk of disenfranchisement. Otherwise, Eden emphasized that even if there are dueling returns and "no determination has been made under its laws who, of the opposing forces, were lawfully

³³ The Committee also proposed an amendment specifying that the Senate President lacks the authority to count the electoral votes. Although not relevant to the issues explored in this paper, this provision was accepted by the House and included in the final bill.

appointed electors of the State, the bill as amended requires the votes of those electors regularly given, who hold the certificate of the governor under the seal of the State,” to be counted, unless both chambers concurrently reject these votes (50).

On the twelve-member Select Committee, a few members believed that the bill still did not go far enough in protecting states’ rights. Samuel Dibble (D-SC), speaking for these members, disagreed with the Committee’s decision to specify that, in the case of a single return from a state, that return must be “lawful” for it to be counted (CR, December 8, 1886, 47). Caldwell disagreed, arguing that it “is certainly absurd to try to deny to Congress the power to remedy an unlawful return, although it might be the only return” (CR, December 7, 1886, 31). Nonetheless, the Committee agreed to drop the word “lawful” on the floor, though the word returned in the final conference version (see below). More importantly, Dibble complained about the requirement that a state’s final determination be made six days prior to the meeting of the electors in order to receive safe harbor protection. Dibble claimed that “up to the day of election, the day when the electors are to cast their votes, the State power as to appointment can not be interfered with in any manner, shape, or form by the Congress ... or by any other power” (CR, December 8, 1886, 46). Dibble proposed a floor amendment to strike the six-day requirement. Eden spoke for the committee majority in opposing the amendment. As the second-ranking Democrat on the Select Committee and as one of three House members sent to the conference committee, his defense of the bill provides a useful indicator of the legislative intent behind the safe harbor provision. Eden argues that Dibble and his colleagues misconstrued the safe harbor as amounting to “an attempt upon the part of Congress to dictate to States the mode of appointing electors” (50). Rather, he argued, “[t]his bill only provides that if states shall have settled all controversies relative to the appointment of electors, within a given

time before the meeting of the electors and by a tribunal of its own selection, the votes of the electors thus appointed and regularly given shall be counted.... If any State neglects to use the means within its power to identify who are its legally appointed electors, the two Houses of Congress ... are to resort to other provisions of the bill to determine who are the legally appointed electors of the State. *The bill contemplates no exclusion of electoral votes from the count because of the failure of a State to settle disputes as to the lawful vote of the State*” (50; emphasis added). Thus, the Committee majority consciously designed the House bill to provide additional mechanisms to safeguard the counting of a state’s electoral votes should that state not meet the safe harbor provision. Committee Republican William Cooper (R-OH)—who became the third conference committee member (along with Caldwell and Eden)—also defended the bill from Dibble’s attacks in terms that emphasized its obeisance to states’ rights. Cooper argued that the committee majority goes “to the utmost verge of safety in providing against any possible invasion of the right of a State” (48).

The floor accepted the committee’s amendments to the bill but rejected efforts by Dibble to add any further protections for the states. The committee amendment barring even a concurrent vote of both chambers from overturning a state’s electors, in the case of a single set of returns, was approved on a teller vote, 101-86 (CR, December 9, 1886, 76).³⁴ The House also voted 30 to 26 to approve the committee amendment providing that the governor’s certificate will be decisive in the case of dueling returns and no safe harbor determination, unless overturned by both chambers (77). Meanwhile, the Dibble amendment to strike the six-day provision was rejected on a voice vote (76), indicating little support for his view that this provision infringed upon states’ rights. Dibble also proposed an amendment that the governor’s

³⁴Opposition came from members who believed that this provision went too far in protecting states’ rights (see CR, December 8, 1886, 52).

certified set of electors could not be overturned, even by a concurrent vote of the two chambers. This amendment was rejected by an 89 to 7 margin (76), suggesting that most members believed the committee's executive certification provision afforded adequate protection to the states. The bill then passed on a voice vote (77).

Conference Committee Changes

The House-Senate differences were resolved in a conference committee. As noted above, Caldwell, Eden, and Cooper represented the House. Hoar, Edmunds, and Pugh represented the Senate. The conference committee accepted the substance of the House amendments, though with some minor changes. Caldwell brought the conference committee report to the House floor on January 14, 1887. With respect to the House amendment making it impossible for Congress to reject a state's votes if that state had submitted just one set of returns, the conference committee inserted the word "lawful" (thus requiring that the one return be lawful) and specified that the two Houses "concurrently may reject votes which have not been regularly given by certified electors" (CR, January 14, 1887, 668). The House conferees' official statement explained that "taken as a whole this amendment will insure the counting of lawfully certified votes of States" (668).³⁵ The conference committee also reworded the House amendment dealing with executive certification. The House conferees' statement noted that the changes in wording were intended "to clear up any ambiguity in the section and define accurately the meaning of Congress as to the decision of all questions as to counting the votes of States from which there are more than one return, or paper purporting to be a return, and when there has been no determination of the question in the States by making certain the counting of votes cast by

³⁵ It is worth noting that even if a state's electors enjoy safe harbor protection under section two, they are still subject to this "regularly-given" requirement (as provided in section four of the Electoral Count Act, which is now 3 U.S.C. § 15).

lawful electors appointed by the laws of the State. It takes the concurrent votes of both houses, deciding that the votes are not lawful votes, in order to reject them. And, in the case of the two Houses disagreeing, then the electors whose appointment has been certified by the executive of the State shall be counted” (668). This was, in substance, the House executive certification provision. The House conferees’ statement concluded that “the general effect of all these amendments, and of the bill as reported to the House, is to provide for the decision of all questions that may arise as to its electoral vote to the State itself; and where, for any reason, that fails, then the Houses circumscribe their power to the minimum under any circumstances to disenfranchise a State, and such result can only happen when the State shall fail to provide the means for the final and conclusive decision of all controversies as to her vote” (668). The conference report was agreed to by voice vote in both chambers and signed into law by President Grover Cleveland on February 4, 1887.

Evaluating the Safe Harbor’s Legislative History

In evaluating this legislative history, the key issue concerned how difficult it would be to reject a state’s votes in the case that the state failed to provide a determination under the safe harbor provision. In terms of the preferences of pivotal actors, it is clear that the Senate Committee, Chairman Hoar, and the Senate as a whole, were willing to accept a bill that allowed the distinct possibility of a state’s electors being rejected in this eventuality. The Senate bill that emerged from Committee, even with the modifications made following the objections of Sherman and Evarts, allowed a majority of both chambers to overturn a state’s electors in the case of no determination under the safe harbor provision, even if that state had submitted only one return. More importantly, in the case of disagreement between the Houses and double

returns from the state, no returns would be counted absent a resolution of the conflict by the state under the safe harbor provision. However, the House Committee found these provisions unacceptable, and demanded the inclusion of the additional protections for the states discussed above. This decision was affirmed when the House floor adopted the committee's amendments. The compromise ultimately reached in the conference report sided with the House position. The acceptance of these amendments by Hoar and his Senate colleagues suggests that while they were willing to accept a bill with fewer protections for the states, they preferred the bill as amended by the House to the status quo.³⁶ In McNollGast terminology, the House Committee and the House floor median were marginal supporters of the legislation, and enactment required that their demands be accommodated.

To this point, the preferences of two potentially pivotal actors have not been mentioned. First, the Speaker of the House, John Carlisle (D-KY), played little overt role in the process. He made no statements about the bill on the floor in 1886, and newspaper accounts of the bill do not attribute any role to the Speaker. However, Carlisle appointed Caldwell and the other members of the Select Committee, and also made the conference committee appointments. Had Carlisle opposed the committee version, he might have appointed different conferees.³⁷ It is also worth noting that Carlisle was a states-rights Democrat (Barnes 1931), and thus would have been unlikely to support a bill that many Democrats regarded as infringing upon the states. Therefore,

³⁶Interestingly, when Sherman and Evarts first raised their objections in January 1886, Hoar proposed a provision similar to the executive certification clause ultimately adopted (CR, February 1, 1886, 1021-24). However, when the bill was recommitted to his Select Committee, he appears to have dropped the idea, which was never voted on in the Senate. This suggests, however, that Hoar may have preferred the House provision to the bill approved in the Senate.

³⁷Although the Speaker is supposed to appoint bill supporters to conference committees, in practice he enjoys a fair amount of discretion in choosing conferees (see Chiu 1928; Peters 1997).

it is unlikely that Carlisle's preferences departed significantly from those of Caldwell and the House Committee.³⁸

The other potentially pivotal actor who has not been discussed is President Grover Cleveland. But floor debate concerning the bill never mentions Cleveland. Newspaper coverage also omits discussion of the president's position. Furthermore, Cleveland's official papers contain no messages or other entries concerning the bill. There is thus no evidence that the President took any position on the bill, and it appears doubtful that he exercised any influence in shaping its contents. Along these lines, it is also worth noting that the basic outlines of the Senate bill remained unchanged through the administrations of three presidents: the Republicans Hayes (1878) and Arthur (1882, 1884), and the Democrat Cleveland (1886). In each case, the president's preferences were not discussed on the floor.³⁹

Therefore, consideration of the Speaker's preferences and of the role of the president does not change the basic story: the safe harbor provision was intended to provide one mechanism by which a state could ensure that its votes would be counted. However, the House, its Select Committee, and conferees were unwilling to accept a bill that did not provide additional mechanisms so that a state could be confident of its votes' counting, even if the state missed the safe harbor date. Even within the Senate, the criticisms voiced by Sherman and Evarts forced the Privileges and Elections Committee to report a revised version in February 1886 that was more sensitive to each state's right to determine its mode of selecting its electors.

³⁸Carlisle's voting record indicates policy preferences quite close to Caldwell and Eden (based on his first- and second-dimension NOMINATE scores; see Poole and Rosenthal 1997 on these measures).

³⁹This may be indicative of the different institutional position of nineteenth century presidents in contrast to contemporary presidents: though active at times, nineteenth century presidents were not necessarily expected to take a position on all major legislation. Only Arthur mentioned the bill in his official messages to Congress. In three of his Annual Messages, Arthur advocated passage of legislation to regulate the counting of the electoral votes. However, he made no effort to dictate the terms of the legislation. Indeed, in his December 1884 Annual Message, Arthur noted that "any of the measures of relief thus far proposed would be preferred to continued inaction" (Messages and Papers of the Presidents, 1899: 4822).

But the critical constraint was the House—the failure to reach a conference agreement in 1884 and the success in 1886, only after accepting nearly all of the House amendments, suggests that the states-rights Democrats who enjoyed majority control in the lower chamber were unwilling to accept any bill that seemed to trample upon a state’s control of its electoral process.⁴⁰

The Role of Federal Courts in the 1887 Act

Although the 1887 Act explicitly provided that states could settle their controversies by “judicial or other methods,” it made no mention of federal courts. Did this mean that the authors of the Act intended no role for the federal judiciary? The legislative history is once again instructive. It shows that members considered and rejected the notion of federal courts’ reviewing controversies concerning the electoral count. However, it is worth emphasizing that legislative intent need not be decisive in this matter, given that the courts may have a constitutional responsibility to intervene under certain circumstances. Still, the legislative history provides no support for federal judicial intervention and indicates a desire to keep the courts out of the process.

The possibility of federal court involvement was first considered in 1882, when the Republicans controlled both chambers of Congress. The bill proposal from the House Committee, chaired by Thomas Updegraff (R-IA), provided that after Congress counted the electoral votes, the losing presidential candidate could appeal the decision in federal circuit court, and appeals of the circuit court decision would go to the U.S. Supreme Court (CR, June

⁴⁰ Newspaper accounts of the bill’s passage emphasized that the bill intended to ensure that each state controlled the selection of its own electors and to minimize the role of Congress. For example, the *New York Times* noted that “the amendments affecting the main provisions of the bill are only intended to make them more specific in respect to the exclusive authority of the States to determine what their own Electoral vote is. This cannot be made too specific” (January 15, 1887, 4; see Burgess 1888 for a similar assessment by a contemporary observer). Although such observations have no standing in the McNollGast framework, they nonetheless are consistent with our findings from examining the legislative history.

20, 1882, 5143). Several members attacked this proposal on the floor (5144-49). Thomas M. Browne (R-IN) sponsored an amendment to strike these objectionable sections, dispensing “with all that portion providing for the adjudication of the Presidential title by a judicial tribunal” (5155). Abram Hewitt (D-NY), a Democrat on the Select Committee, noted that none of his party’s members backed the idea of a “trial of title” for the presidency (5148-49). The future Speaker Carlisle also attacked the provision, declaring that “I have never believed it was wise, or could under any circumstances be entirely safe, to entrust the decision of a great political question like this—because it is a political question—to the courts and to the juries of the country” (5149).⁴¹ Therefore, while we lack direct information on the future Speaker’s views on many specific elements of the 1887 Act, there is good reason to doubt that he would have accepted a bill that anticipated a role for the federal courts. The Browne amendment was approved on a voice vote, suggesting that a substantial majority of House members opposed this type of federal judicial intervention following the vote count.⁴² Nor, it should be mentioned, was such a role suggested for the judiciary before the vote count.

The idea of a role for the Supreme Court came up once again in the House in 1884. Samuel Peters (R-KS) sponsored a floor amendment to the Select Committee bill, providing that the Supreme Court would attend the counting of electoral votes, and that in case of disagreement between the House and Senate, the Court would consider the issue and make a ruling on the lawful slate of electors (CR, June 21, 1884, 5468). This amendment was intended to provide a mechanism to resolve one of the main difficulties in the Hoar bill—how to ensure that a state

⁴¹ Carlisle endorsed sections one to eight of the House bill in 1882, which included the safe harbor and procedures for resolving disputes should the safe harbor not be met. He opposed sections nine through thirteen, which provided for federal court review of Congress’s decisions concerning the electoral count (CR, June 20, 1882, 5149).

⁴² The *New York Times* also condemned the idea of involving the Supreme Court in such disputes, noting the “impolicy of exposing the Supreme Court to the violent prejudice which a decision by it would arouse” (June 21, 1882).

that missed the safe harbor would not be disenfranchised when the House and Senate disagree on its electors? But the House rejected the Peters proposal on a voice vote, again indicating widespread opposition to a role for the Supreme Court in resolving such controversies (CR, June 24, 1884, 5550). Within the McNollGast framework, the rejection of this language indicates that the contours of the legislative bargain ultimately reached excluded such a role for the courts (McNollGast 1994: 21).

In 1886, the idea was again raised that the Supreme Court might be used to adjudicate disputes when the House and Senate disagreed on a state's electors. Senator Sherman proposed that there be a joint House-Senate vote in case of disagreements between the chambers, but noted the possibility that the Supreme Court might instead be asked to resolve such disputes. Sherman emphasized, however, that "there is a feeling in this country that we ought not to mingle our great judicial tribunal with political questions and therefore this proposition has not met with much favor" (CR, January 21, 1886, 817). He added that if the Court were to decide such heated controversies, "it would tend to bring that court into public odium in one of the other of the two great parties. Therefore that plan may probably be rejected as an unwise provision" (818). Hoar went a bit further than Sherman in saying that he personally would not oppose the Supreme Court's acting as an arbiter in case of House-Senate disagreements, but he concluded that "it is perfectly hopeless to expect to get any legislation to that effect" (CR, February 1, 1886, 1022). Evarts, who served on the Senate Committee, aptly summarized this opposition, noting that "I can not look with any complacency upon a reference to the Supreme Court or any judicial tribunal" should the two chambers disagree. "I must regard, as I do sincerely, the whole transaction from the beginning to the end, and the declaration of the result, a political transaction

to be governed by such moderation and duty and faculties as are reposed in those who fill the political stations that are to act upon the great transaction” (CR, February 2, 1886, 1058).

The House Committee report in 1886 also leaves little room for federal judicial interference with decisions concerning electors. As noted by Justice Breyer, the report asserted that “the power to determine rests with the two Houses, and there is no other constitutional tribunal. Congress prescribes the details of the trial and what kind of evidence shall be received, and how the final judgment shall be rendered” (CR, December 7, 1886, 30). Along these lines, Caldwell stated on the floor that “the ultimate tribunal to decide upon the election of President should be a constituent body” representing states and the people (30). The floor debate provides no evidence of dissatisfaction with this position. The enacting coalition that adopted the Electoral Count Act of 1887 anticipated that states would attempt to resolve their own disputes concerning electors, but that if a state failed to do so, it was up to Congress to decide the dispute.

We have shown that the legislative history provides little support for federal court involvement in addressing disputes concerning electors; on the contrary, members of Congress explicitly rejected efforts to allow for such a judicial role. Indeed, it is intriguing that members of Congress viewed their own job as analogous to a judicial proceeding. On several occasions, the bill’s managers and other members active in shaping the Act emphasized that the safe harbor was intended to provide rules of evidence for Congress to use as it exercised this judicial function, rather than to control the actions of the states. Thus, George Edmunds (R-VT), when managing the bill on the Senate floor in 1878, explained that the safe harbor provision “regulates the mode of procedure, it defines the rules of evidence, and calls upon the court [that is, the Congress], if you call it a court, to respect the act and deed of the State which is authenticated in a certain way” (CR, December 9, 1878, 54). A few years later, Democrat Pugh (who, as noted

above, served on the Select Committee and later joined Hoar and Edmunds on the conference committee that wrote the final bill), explained that this bill is the first effort to specify “the evidence Congress was to accept as conclusive or otherwise, in counting or rejecting any disputed electoral vote” (CR, April 6, 1882, 2646). Pugh labeled this a major concession to states’ rights, while emphasizing the additional concession that, even absent a safe harbor determination, a concurrent vote was required to reject a state’s electors in case of a single set of returns (2646).⁴³ In the House, the future Speaker Carlisle noted in 1882 that the bill prescribes “rules of evidence and rules of procedure, as distinguished from rules of decision upon the subject. It undertakes simply to declare the manner in which contested elections for electors shall be or may be determined, and what effect the decisions of State tribunals shall have as evidence upon that subject” (CR, June 20, 1882, 5149). This reinforces the argument that Congress intended the Electoral Count Act to help resolve disputes over electors, but not to impose definite obligations upon the states. It also suggests the extent to which members intended to maintain Congress’s ultimate authority to determine the electoral count, while providing maximum protection for the states through the adoption of favorable rules of evidence for resolving disputes.

IV. Florida’s Election Laws and the 1887 Act

Florida’s election code makes no mention of the safe harbor provided in the Electoral Count Act of 1887. We examined the legislative history of the most recent revision of the election code to assess whether there is any evidence that members demonstrated an intent to take advantage of the Electoral Count Act’s safe harbor provision, or even if members were aware of the Act’s potential relevance to their deliberations.

⁴³ As discussed above, the final bill had even further protections for the states.

In 1999, the Florida legislature passed House Bill 281, which substantially revised Section 102.168 of the Florida election code. In the words of the Florida Supreme Court, these changes “preserved existing rights of unsuccessful candidates and made important additional changes to strengthen the protections provided to unsuccessful candidates in a contest action to be determined. Moreover, rather than restraining the actions of the trial court hearing the contest, the legislative amendment codified the grounds for contesting an election, entitled any candidate or elector to an immediate hearing and provided the circuit judge with express authority to fashion such orders as are necessary to ensure that each allegation in the complaint is investigated, examined or checked” (*Gore v. Harris*, 9-10). Since the 1999 Act provided additional grounds for contests, and changed the legal process and standards involved in deciding such contests, this would seem to be the most likely moment when legislators would have expressed some intent relative to their presidential electors and the safe harbor.

To investigate this question, we obtained and reviewed the final committee analysis of the 1999 measure, and the 1997 Interim Report on electoral reform, upon which the 1999 bill was based.⁴⁴ A close reading of both documents shows that no mention was made of the safe harbor provision. More broadly, no mention was made of the relationship between Florida’s contest proceedings and the federal election calendar. Instead, the statute was framed with local election disputes at the forefront of members’ minds, and it appears that no attention was paid to the potential federal issues.

We plan to conduct a more detailed examination of the legislative history of the 1999 statute in future work. We also plan to examine the 1989 Florida statute modifying the election code, though that revision appears to have been less relevant to the issues involved in *Bush v.*

⁴⁴ Florida House of Representatives, Committee on Election Reform, *1997 Interim Report: Election Contests and Recounts* (Tallahassee, October 1997).

Gore.⁴⁵ In addition, we will explore the legislative history of the 1951 Florida statute that was the most general revision of the election code adopted since the 1887 statute came into being. It seems reasonable to hold that if the legislature, in enacting its election regulations, was at all cognizant of the safe harbor provision and had expressed any intent of taking advantage of that provision, we would find such evidence in examining at least one of these statutes. For now, however, we are aware of no such evidence of legislative intent in Florida. It is also worth noting that the Florida legislature submitted *amicus* briefs for both *Bush v. Palm Beach County Canvassing Board* and *Bush v. Gore*. Neither offered any textual support for the notion that the Florida legislature had a ‘legislative wish’ to make the safe harbor. If such evidence existed, it is likely that it would have appeared in these briefs.⁴⁶

V. Discussion

Our detailed analysis of the legislative history of the Electoral Count Act of 1887 provides no support for the U.S. Supreme Court’s interpretation of the safe harbor provision. Rather than intending the bill to impose a firm deadline on the states, the enacting coalition in 1887 made sure to provide several mechanisms for a state to have its votes counted. Particularly important was the House’s insistence that in the case of dueling returns and no safe harbor determination, it would take a concurrent vote of the two chambers to overturn the electors certified by the state governor. But the inclusion of hypothetical language in the Act—“if any

⁴⁵The 1989 Act was relevant to the earlier *Bush v. Palm Beach County Canvassing Board* decision.

⁴⁶Brief of the Florida House of Representatives and Florida Senate as *Amici Curiae* in Support of Neither Party and Seeking Reversal, *Bush v. Palm Beach County Canvassing Board* (November 27, 2000); Brief of the Florida House of Representatives and Florida Senate as *Amici Curiae* in Support of Neither Party and Seeking Reversal, *Bush v. Gore* (December 10, 2000).

State shall have provided”—also speaks to key members’ concern for avoiding trampling upon the states’ ability to control their own electoral process.⁴⁷

Given this legislative history, it would seem incumbent upon those claiming that the Florida Legislature intended to take advantage of the safe harbor provision to provide some explicit evidence to that effect, rather than simply assuming that any rational legislature would have necessarily adopted laws designed to meet the safe harbor deadline. Our brief analysis of the 1999 Florida statute provides no support for the notion that the Legislature had such an intent when it adopted its election laws, though more work on this question is needed.

Our analysis of legislative intent does not speak to whether the Supreme Court should have intervened on equal protection grounds in *Bush v. Gore*. However, it does strongly indicate that the enacting coalition of the Electoral Count Act of 1887 would, at a minimum, have suggested tailoring that Court’s intervention as narrowly as possible to the equal protection issue, as well as avoiding any actions that detracted from the state’s ability to determine its own dispute and Congress’s ability to weigh all of the relevant evidence in evaluating the decision of the state.

⁴⁷ The same can be said for the House amendment forbidding even a concurrent vote from rejecting a state’s lawfully-certified electors in the case of a single set of returns and no determination under the safe harbor provision.

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