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RULE BY LAW UNDER A FLAWED SYSTEM TO ELECT A PRESIDENT

Trump's legal challenges to keep Biden from assuming the presidency have generated widespread concern about the fragility of democracy. Now that most of those challenges have failed, however, pundits are celebrating that once again rule by law has prevailed in this exceptional nation. That reassurance obscures the fact that laws unique to the United States have produced an electoral system that renders the nation's democracy particularly fragile. Trump's repeated and continuing legal challenges result from a system for electing a president that in 1888 the constitutional scholar John W. Burgess called the "most complicated bit of governmental machinery which the modern world has to exhibit" ("The Law of the Electoral Count," *Political Science Quarterly* 3 [1888]). The problems are not limited to the electoral college. By adhering to various provisions in the Constitution, our system consists of multiple steps and gives substantial powers to each state while reserving some authority for Congress. Legal challenges can be mounted at each step and in each jurisdiction.

For instance, although the liberal media declared Biden the official president-elect after the recent electoral college tally, he is not legally president-elect until, as the Constitution requires, the president of the Senate counts the votes in a joint session of Congress. At that session, by law, the results of any state can still be challenged, and there is no prescribed penalty if Mike Pence decides not to perform his job. If there is no official count, Nancy Pelosi would be acting president "until a President or Vice President shall have qualified" (Twentieth

Amendment). That outcome would breed chaos and destroy any pretense that the people choose the president through their votes.

As Burgess put it 132 years ago, “It is almost marvelous that any people should have preserved political unity for a century under such a loose and decentralized system of election of its chief magistrate." Unfortunately, instead of giving the public insight into how and why we have inherited that system, the historians upon whom the media relies too often indulge in what Burgess calls “chauvinistic piety” in their praise of our founding fathers' understanding of democracy's fragility.

Just how unreliable the historical experts hired by networks can be is illustrated by Jon Meacham’s claim that "The framers intended America's to be a popular, not a legislative, government. The voters acting through the electoral process, not lawmakers in a parliamentary setting, were to determine the occupancy of the presidency" (*Impeachment* 81). In fact, nowhere does the Constitution mention a role for votes by the people. Art II, sec 1, 2 of the Constitution leaves it up to each state to decide how to determine electors. "Each State shall appoint, *in such manner as the Legislature, thereof may direct*, a Number of Electors." Because at the time the founders had no inkling that political parties would nominate both a president and a vice president, Art II, sec 1, 3 established a procedure in which electors chosen by the states would cast ballots for the two persons considered most qualified, one of whom could not be from their state. The highest vote-getter would be president, provided the votes were a majority of those cast. The person with the next highest number of votes would be vice-president. The assumption was that often no candidate would receive a majority, in which case the House, voting by states, would elect the president from the five candidates with the highest totals.

Although in a Nov. 22, 2020, LA *Times* op-ed historian Joseph Ellis claims that "even the founders hated the electoral college," Alexander Hamilton praised the undemocratic system for affording "a moral certainty" of electing a man "in an eminent degree endowed with the requisite qualifications" (Federalist 68). Nonetheless, the rise of political parties and the fiasco of the election of 1800 by which vice-presidential candidate Aaron Burr was almost elected over Thomas Jefferson led to the Twelfth Amendment. Still mostly in force, that amendment supersedes Art II, sec 1, 3, by separating the tallies for president and vice-president, but it continues to give the House, voting by state, the power to choose the president if no candidate receives a majority of electoral votes. That procedure allowed John Quincy Adams in 1824 to win election in the House even though Andrew Jackson had a clear plurality of electoral college votes. At the time, six of the 24 states, including New York, did not choose electors by popular vote. In 1828, with only Delaware and South Carolina maintaining that system, Jackson overwhelmingly defeated Adams, who followed his father's lead and refused to attend his successor's inauguration.

The media's historical experts are at a loss to provide an accurate account of the system's flaws in part because the narrative they spin to explain how the nation corrected the founding fathers' worst blunder—the recognition of slavery—does not work for the system to elect a president. In the slavery narrative, a new founding father, Lincoln, instituted a "second founding" that redeemed the nation through emancipation and made way for the Reconstruction amendments giving freedmen citizenship along with civil and political rights. But Reconstruction more than any other period exposed the flaws in our electoral system. The result was the 1887 Law of the Electoral Count that tried to correct those flaws. Instead, with most of its provisions still in force, that law created new problems, prompting Burgess's fears that our unwieldy system

"means the accumulation of error until nothing sort of revolution can correct it. It means the congestion of the body politic until nothing but blood-letting can relieve it."

In what follows I look at the elections of 1868, 1872, and 1876 to detail some of the flaws Reconstruction reveals. Burgess's writings register the paradoxes of that important time in the nation's history. A learned scholar, Burgess is sometimes called "the father of American political science." Although he was a devoted member of the Republican Party, considered at the time the defender of freedmen's rights, he denounced "the blunder crime of Reconstruction" and passionately opposed extending suffrage to African Americans. Nonetheless, W.E.B. DuBois, who profited from Burgess's legal expertise, concluded that "subtract from [him] his belief that only white people can rule and he is in essential agreement with me" (*Black Reconstruction*).

In 1868 Grant comfortably defeated his Democratic opponent from New York, causing outgoing Andrew Johnson to boycott Grant's inauguration that in those days took place March 4. Grant most likely owed his popular majority to the Reconstruction Acts of 1867. Those acts allowed African Americans to vote in the South and kept Texas, Mississippi, and Virginia from participation because Congress had not yet recognized their new constitutions. Some reconstructed states that participated also had laws disfranchising various ex-Confederates. Nonetheless, 1868 saw widespread violence to suppress freedmen's votes. To avoid that violence and out of fear of a Democratic victory, Florida's Republican legislature chose to appoint electors without a popular vote. (On Dec 14, 2020, CNN inaccurately reported that since 1864 all states have had popular elections.)

In 1872 Grant overwhelmingly defeated Horace Greeley, another Democrat from New York. But the election raised a red flag. The United States' system avoids an interregnum by having only one president at a time, which is why the ceremonies of inauguration are so

symbolically important. There is, however, substantial time between the day the last votes are cast and the official designation of a president-elect. Although it did not affect Grant's victory, Greeley died before the electoral college met. Without constitutional guidance, his electors voted for a variety of people. But what if it had been Grant who died? The Twentieth Amendment makes a provision in case the president-elect dies, but there is no official president-elect until the president of the Senate officially counts the electoral votes.

Another ominous sign came in Louisiana and Arkansas. Because of challenges to Reconstruction rule both states had competing certifications. With Grant's substantial majority, Congress decided not to count either state. But that decision left two questions unanswered. (1) To keep the House from choosing the president a candidate has to have a majority of electoral votes. Does a decision not to count a state's electors reduce the majority or does the majority remain the same? (2) How should disputes over electors in a state be decided? The second question had to be answered four years later when four states had disputes that would decide the election.

1876 pitted Republican Rutherford B. Hayes against another New York Democrat: Samuel Tilden. The winner needed 185 electoral votes. After votes were cast, Tilden had clearly won the popular vote and needed only one of the disputed electors to prevail. Disputes in the South were a direct result of Reconstruction politics. Although Ron Chernow has recently championed Grant as a supreme defender of African American rights, by 1876 the commander-in-chief had allowed Democrats to control all but three southern states by instructing federal troops not to intervene in those states' politics. The "redeemed" states all voted Democratic. The states Republicans still tried to control-- Florida, Louisiana, South Carolina—produced competing claims to electors. Oregon had a different dispute.

At the time, Democrats controlled the House and Republicans controlled the Senate. To decide the disputes and allow the official count to proceed, in late January Congress passed a law that created a fifteen-member special commission: five members of the House (three Democrats and two Republicans); five members of the Senate (two Democrats and three Republicans); and five associate justices of the Supreme Court. Two of the justices were Democrats; two were Republicans. These four were to choose the fifth member. It was assumed that they would name Justice David Davis, a Democrat appointed by Lincoln. But Illinois appointed him a Senator, and Justice Joseph Bradley was selected. Bradley was a Republican, but his stand on a recent case that declared unconstitutional most of a law designed to combat the KKK won him favor with Democrats. The commission decided the disputes in alphabetical order.

Although decided last, South Carolina was most favorable for Hayes. Democrats were in position to regain the statehouse, but had a weak case for the presidency. Florida and Louisiana were more complicated. In Florida the canvasing board was made up of two Republicans and one Democrat. It and the Republican governor certified a narrow majority for the Republican electors by throwing out ballots deemed questionable. Democratic electors were certified by the Democratic attorney general, the state legislature, and the state supreme court, all of which protested the uncounted ballots. In Louisiana Democrats relied on a preliminary count that indicated a significant majority for Tilden. But the Republican governor and certifying board gave Hayes a narrow victory by declaring results in two entire parishes and parts of many others fraudulent because of irregularities and violent intimidation of African American voters.

In both Florida and Louisiana, the commission ruled for Hayes in an 8 to 7 vote along party lines. The rationale was that the Constitution gave states the authority to count its own votes, and the commission refused “to go behind the returns.” That reasoning put states’ rights

Democrats in the awkward position of arguing that an arm of Congress should interfere with a state's official count. But Democrats did not despair because Tilden needed only one vote, and, if the commission remained consistent, it seemed as he would get it in Oregon.

The popular vote for Oregon's three electors went Republican. But the Constitution declares that that those "holding an Office of Trust or Profit under the United States" cannot serve as an elector, and one Republican was a local postmaster. He resigned before he cast his vote; nonetheless, the Democratic governor and secretary of state certified 2 Republicans and 1 Democrat. So far the commission had accepted the certification by governors, which would give Tilden the vote he needed to be elected. But this time, along the same party lines, the commission accepted the Republicans' certification of the canvassing board for 3 Republicans, ruling that Congress, for whom it was acting, did not have the power to go behind the returns but did have the authority to decide if a state's certification was valid. On February 28, 1877, the commission followed the same logic in South Carolina and ruled for Hayes. On March 2 Congress met and the president of the Senate officially counted the votes making Hayes president-elect by one vote.

The LA *Times* gives a standard media summary of the election's consequences. Hayes, according to columnist Nicholas Goldberg, "agreed in 1877 to withdraw all federal troops from the South in exchange for Southern Democratic support. With that Reconstruction was officially over and white supremacy made its comeback in the South" (Dec, 11, 2020). These two sentences exhibit a plethora of factual errors and misleading implications. Troops were not *withdrawn* from the South; they were ordered not to interfere in state politics. More important, as we have seen, by 1876 Grant had already allowed Democrats to control all but three states. By March 1877 he agreed with Hayes to abandon the three contested southern states. That decision

was made independent of any agreement with white Southerners. There was no declaration that Reconstruction was officially over. In fact, in his inaugural address Hayes supported "home rule" only if "Southern whites agreed to recognize the political and civil rights of the Negro." To be sure, negotiations between southern Democrats and supporters of Hayes took place, but they were primarily about governmental subsidies for railroads, waterways, and commercial development. As Eric Foner wrote 30 years ago, "The abandonment of Reconstruction was as much a cause of the crisis of 1876-77 as a consequence."

The consequences of 1877 for elections continue today. The LA *Times* insists that the 1877 dispute, "hardly compares" to today because at that time there was "legitimate concern about voter suppression" (Dec 15, 2020). On the contrary, the comparison reveals why the usually reliable Neal Katyal is wrong when on MSNBC he called Trump's efforts to throw out African American votes "un-American." Suppressing the African American vote is an American tradition, enabled in part by our electoral system. The divisive tactics of Trump's legal team exploit flaws in that system exposed by 1877. Paradoxically, however, in 1877 Republicans refused to count ballots in an effort to counter violent suppression of African American votes, while in 2020 Trump draws on their precedent to demand that votes in largely African American districts not be counted.

The Reconstruction era also bequeathed to the nation the 1887 Law of the Electoral Count that was designed to patch up bad feelings resulting from a "stolen election." Not content with regaining control of all former Confederate states, southern whites justified not counting African American votes by pointing to Republicans' refusal to count ballots in 1877. Seemingly unaware of that deep-seated resentment, political scientist Bruce Ackerman and Representative Ro Khanna proposed avoiding "partisan warfare" by appointing a 2020 commission modelled on

1877 (“A way to head off a contested election” [LA Times]). Ignoring the crucial dispute in Oregon and inaccurately implying that the commission replaced the joint session of Congress, they fail to acknowledge that the nineteenth-century constitutional scholar George Ticknor Curtis insisted that the commission was unconstitutional. If today’s Congress had tried to create a new commission, it likely would have resulted in yet one more legal challenge, one that might have succeeded.

Ackerman and Khanna’s misunderstanding is underscored by their recommendation that Chief Justice Roberts chair a new commission even though the 1877 law explicitly excluded the Chief Justice to emphasize the commission’s legislative, not judicial, function. Because the commission was an arm of Congress, its decisions had no binding judicial precedent. In 1887 with Democrats in control of the presidency and the House and Republicans in control of the Senate, Congress tried to imagine procedures that would avoid the controversy generated by the commission. Most of the 1887 law is still in force, and election law experts can better explain how it is employed today than I. I can, however, summarize its relation to 1877.

The 1887 law has one positive reform. 1877 highlighted how the constitutional requirement for an official count at a joint session of Congress risked having a filibuster endlessly delay election of a president. The 1887 law limits debate and delaying tactics and gives the president of the Senate power to preserve order. Nonetheless, the law was designed to affirm states’ rights. States’ rights advocates were so sensitive about Congress telling states what to do that the section outlining how states can avoid disqualification of their certifications is couched in tortuous, hypothetical language.

There are elaborate instructions on how Congress, without recourse to a commission, can disqualify a state’s certification or adjudicate between competing certifications. Burgess,

describes some of that language as “very confused, almost unintelligible.” The effort to give different roles to each branch of Congress while uniting their constitutional functions led Burgess to compare “this strange organization” to “the Siamese twins.” The “monstrosity” of this “Eng and Chang Congress,” he attributes to two competing principles of constitutional law. “The one is the proposition that the constitution itself provides for the counting of the electoral vote; and the other is that the constitution vests Congress in the power to provide by legislation for the count of the vote. . . . The only wonder is that we did not get a set of articulated triplets, instead of twins, out of this miscegenation of parent ideas.”

Confused language and unresolved constitutional principles serve the interests of those intent on undermining democracy. The point is not that Trump will succeed. The point is that a flawed system, unique to the United States, allows him to sow discord. An opportunity was lost at Reconstruction’s “second founding” when racist President Andrew Johnson and abolitionist Senator Charles Sumner, enemies on almost all matters, agreed that a constitutional amendment was needed to abolish the electoral college. Unfortunately, given the power the flawed system grants to the states, there is almost no chance for such an amendment today. The whole world is watching, parts of it gleefully.