

# Presidential elections without Congress, without the people Electoral College, and a step toward popular vote

1/8/22 EHT response at [EdsStuff.info](https://EdsStuff.info) to 1/5/22 article by Foley, McConnell, Pildes and Smith

There are several constitutional Presidential election problems. First, Article II's specification "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors..." leaves open the possibility that a state's electors could be appointed independent of presidential election votes, to make what [Ginni Thomas](#) called a "clean slate."

The main problem addressed here is the case of misbehaving States submitting multiple Electoral Certificates. We start by pointing out that there is no word in the English language for the role cast on Congress by this problem. The now widely used word "certify" implies that for all elections Congress has power over Electoral College results, something definitely not specified in the Constitution. The word "whittle" might be closer to what is needed semantically, but still has too much of the same false connotation.

**Solution 1, New Word:** In gest I suggest that one way to solve this problem would be to invent a new word and say that, Congress's role for the case of misbehaving states is to "singlefy" Electoral College submissions. If a state submits two Electoral Certificates it falls on Congress to somehow down select that to a single submission from the state, (or just state the unusable results from a state are unusable for this election cycle).

The Electoral Count Act of 1877 attempts to require states to "singlefy" results but also stipulates that Congress can resolve dual Electoral Certificates and, probably unconstitutionally, can reject Elector votes on grounds of ineligibility or other ministerial errors.

Congress can not supersede the Constitution or States Rights to give itself power to in any way modify or "certify" Electoral College results, override the vote of an Elector or challenge a State's winner take all policy.

Here's what the Constitution says in Amendment 12 that replaces Article II, Section 1. First, the Legislatures of each state appoint Electors, these Electors choose a President and a Vice President, and these results from each state shall then be transmit as sealed Certificates to the President of the US Senate. The concluding specification is:

**"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the [electoral] votes shall then be counted; -- The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed..."**

An error in the Constitution here is not foreseeing that a state might misbehave and submit more than one Certificate of Electors' results as happened in 1887. This meant there was no useable Electoral College result. The Electoral Count Act of 1887 resolves this problem but itself is wordy and problematic.

In their January 5 column, "How Congress can fix the Electoral Count Act," in the Washington Post, constitutional scholars Foley, McConnell, Pildes and Smith give a needed

review. But they damage and practically reverse the conclusion they are trying to make by referring to "certification of the presidential vote."

No, sorry. The Constitution says that numeric tally of the Electoral College results is the final word. It's arithmetic only. Congress has no authority over a State's choice of Electors or of how those Electors vote. Amendment 12 specifically does not call for any form of Congressional "certification" of the final tally specifying instead only that the counting of the total Electoral College votes shall be in front of but not even by Congress.

Congress has given itself supposed but invalid Constitutional power in some of today's procedural protocols, most clearly in violation being the tenets that it can debate a State's Electoral results or even reject a State's chosen slate of Electors.

The hiccup historically was the one-time need to "singlefy" the Electoral submissions from misbehaving states in 1876. That was during the reconstruction era of severe conflict over slavery when in four states the two waring political parties for Tilden versus Hayes both submitted Electoral results.

Note that this one-time extra-Constitutional need was not to "certify" or "verify" but only to "singlfy" Electoral submissions from states, the need having nothing to do with state procedures or with the final tally.

**Solution 2, Disqualify Misbehaving State:** My second suggestion is that perhaps best would be to eliminate hint of Congressional certification process by simply disqualifying any state that does not submit a single usable Electoral Certificate. With that, we would not have had the 1/6/21 insurrection.

And this is, I think, what Amendment 12 does actually imply. There is no Constitutional requirement that all states *must* participate in Presidential elections, but there is an implied requirement for each state to submit a *usable* Electoral Certificate if it wants to participate.

**Solution 3, De-Personify Electoral College:** My third suggestion and perhaps best but most difficult to achieve is to de-personify the Electoral College system. Needed today is a Constitutional Amendment to specify that States no longer choose a slate of human Electors but instead are allocated impersonal State Presidential Votes or SPVs equal in number, like now, to the number of its US Senators plus House Representatives, the final Presidential election result being the sum of all SPVs from all States, but with a tie rather than lack of absolute majority being passed to the House for resolution. Winner-take-all remains a State option, and final tally of the SPVs from all States should be conducted by the States, not in front of or by Congress. It is only the final total SPV result that should be passed by the States to Congress. This is and so should remain a State's Rights issue.

The first advantage of this third suggestion is that it even more clearly sidelines today's claims and laws for unconstitutional certification by Congress.

It would also be a first step toward Presidential election by popular vote. And, significantly, this third suggestion would put the final step for popular vote election in the hands of States so that it might actually sometime happen. It is States that have the authority for whether they retain or remove winner-take-all, and if they all eventually chose to have their SPVs represent

their citizen vote results, the outcome would then essentially become Presidential election by popular vote. [Warren](#) [Congress missing the chance](#)