



NEW YORK STATE
BAR ASSOCIATION

Report of the New York State Bar Association **Task Force on the Presidential Election**

October 20, 2020

The views expressed in this report are solely those of the Task Force and those of the New York State Bar Association until adopted by the House of Delegates.

**New York State Bar Association
Presidential Election Task Force Report**

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New York State Bar Association Presidential Election Task Force Report

Scott Karson, President

**Jerry H. Goldfeder, Chair
Ava B. Ayers
Wilfred U. Codrington III
James A. Gardner
Deborah Pearlstein
Richard H. Pildes
Jed Shugerman
John Hardin Young**

Report of the Task Force on the Presidential Election “What if....?” Scenarios

Preface

This year the United States is conducting its fifty-ninth presidential election. Pursuant to the Constitution, each state chooses presidential electors who, in turn, elect the president and vice president. Although the selection process varied—and changed—throughout our early history, all states during the previous 145 years have chosen their electors through a popular vote.¹

Today, all fifty states and Washington DC require a vote on the Tuesday after the first Monday in November (this year, November 3)² to choose its slate of presidential electors pledged to vote for president and vice president.³ Except for Maine and Nebraska, whichever candidate⁴ receives a plurality of votes in a state is awarded the state’s full complement of electors; in those two states, the electors are divided based upon the statewide vote and in its congressional districts.

¹ Article II, Section 1 of the United States Constitution provides that

“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 the Congress.”

This permits states to decide how they choose electors, and the United States Supreme Court ruled almost one hundred and thirty years ago that a state may opt to do so as it wishes. *McPherson v. Blacker* 146 U.S. 1 (1892).

² This date is colloquially known, and shall be referred to herein, as Election Day.

³ A majority of states permit early in-person voting or mail-in ballots as well.

⁴ Voters actually vote for a slate of electors pledged to a candidate, whose names are no longer even listed on the ballot.

The electors meet in each state on the first Monday after the second Wednesday in December—this year, on December 14, 2020. Thirty-two states and Washington DC have statutes either requiring electors to vote for their party’s candidates or requiring them to pledge beforehand to do so.⁵ Fifteen states have the authority to sanction electors who vote for someone other than their party’s candidates.⁶ Once the electors have cast their ballots, the results are forwarded to Washington DC.

On January 6, 2021, the states’ votes are tallied at a joint meeting of the newly elected House of Representatives and Senate presided over by the incumbent vice president of the United States.⁷ If a presidential and vice presidential candidate each receives a majority of the electoral votes cast, they are declared elected, and are sworn in at noon on January 20, 2021. If no presidential candidate receives a majority of the electoral votes cast, the House of Representatives elects the president from the top three vote-getters in the Electoral College, each state casting one vote;⁸ currently, a majority of 26 votes is required. If no vice presidential candidate receives a majority of the electoral votes cast, a majority of the United States Senate elects the vice president.

This procedure has worked as designed in all fifty-eight presidential elections, with one notable exception. In two elections (1800 and 1824), no candidate for president received a majority of the electoral votes cast, and the House of Representatives elected the president. Only in one instance (1837) has the United States Senate elected a vice president. In one election (1876), the electoral vote winners in several states were disputed and Congress established a special commission to hear and report regarding the disputes. The commission met and reported to Congress, which adopted the commission’s findings and determined an electoral college winner.

Under this process it is possible for candidates who win the national popular vote to lose the Electoral College. This has happened five times: in 1824 (Andrew Jackson); in 1876 (Samuel J. Tilden); 1888 (Grover Cleveland); 2000 (Al Gore); and 2016 (Hillary Clinton).

The People Vote

After Election Day, and once absentee, military and other mail-in ballots are received, the states count the votes and certify the results based upon the law and procedures of the jurisdiction.⁹ The outcome determines which presidential candidate wins the electoral college votes from the various states.

⁵ See note 16, below.

⁶ The sanction can be automatic replacement, or the possibility of fine or prosecution. See note 17, below.

⁷ If there is no vice president, the president *pro tempore* chairs the session.

⁸ Washington DC, which has three presidential electors, has no vote if the House selects the president.

⁹ Article I, Sec. 4 of the US Constitution provides that the states have the power to regulate the time, place, and manner of national elections, subject to Congress deciding to exercise this power instead. Thus, each state can and does have disparate laws and regulations pertaining to the casting and counting of ballots.

As provided in the Constitution, each state’s electoral college vote is equal to the number of senators and House members to which it is entitled.¹⁰ The Twenty-Third Amendment to the Constitution also permits the District of Columbia to have three electors. United States territories, while playing a role in the presidential nominating process, are not states, and, therefore, have no electoral college votes.

Although the Constitution does not say who is eligible to serve as an electors, it does prohibit members of Congress and other persons “holding an Office of Trust or Profit under the United States” from being an elector.¹¹ Electors are generally chosen by state parties and presidential candidates based upon their loyalty and activism in the party.

In the republic’s early elections, many state legislatures chose the electors directly. But by 1832, all states but one held popular elections to choose their electors,¹² and none did so after 1876. Ballots used to display the electors’ names, rather than names of the presidential and vice presidential candidates for whom the electors would vote, but by the early 20th century most ballots listed the candidates and not the electors.¹³

The Electors Vote and the State Executive Certifies the Electoral Vote

Once a state has counted its votes and resolved any disputes relating to legal issues or the outcome, it certifies the winner of its popular vote.

That being done, on the first Monday after the second Wednesday in December, the winning electors meet in their respective states as designated by their state legislatures.¹⁴ In New York, the electors meet at the state capitol.¹⁵ Traditionally, these electors vote for whom they have pledged their support. Sometimes, albeit very rarely, an elector will vote for a different candidate, or even someone who is not seeking the presidency. Thirty-two states and Washington DC have laws requiring electors to vote for their party’s winning nominee or to pledge beforehand to do so.¹⁶ Fifteen of these states have the authority to sanction so-called “faithless” electors, either by automatic replacement or the possibility of a fine or prosecution. New York currently has no such law.¹⁷

¹⁰ U.S. Const. art. II, § 1, cl. 2.

¹¹ U.S. Const. art. II, § 1, cl. 2.

¹² *Chiafalo v. Washington*, 140 S. Ct. 2316, 2321 (2020).

¹³ *Id.*

¹⁴ 3 U.S.C. § 7; U.S. Const. amend. 12.

¹⁵ N.Y. Election Law § 12-104.

¹⁶ *Chiafalo*, 140 S. Ct. at 2321. *See, e.g.*, Cal. Elec. Code §§ 6906, 18002 (“The electors, when convened, if both candidates are alive, shall vote by ballot for that person for President and that person for Vice President of the United States, who are, respectively, the candidates of the political party which they represent”); Ala. Code § 17-14-31 (requiring electors to pledge to vote for their party’s candidates). A collection of citations to pledge laws can be found at https://www.fairvote.org/faithless_elector_state_laws.

¹⁷ *Chiafalo*, 140 S. Ct. at n.2. *See, e.g.*, Mich. Comp. Laws § 168.47 (“Refusal or failure to vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated the elector constitutes a resignation from the office of elector, his vote shall not be recorded and the remaining electors shall forthwith fill the vacancy.”). The sanction can be automatic replacement, or the

In the 2016 presidential election, three electors from Washington State who had pledged to support Hillary Clinton instead voted for Colin Powell. Pursuant to its state law, Washington fined each of them \$1,000. The electors sued on the ground that state law unconstitutionally infringed upon their freedom to vote as they saw fit. Along with another case originating from Colorado, the Supreme Court heard the matter and ruled that such penalties were not unconstitutional.¹⁸ Electors can thus be compelled to act as “trustworthy transmitters of other people’s decisions.”¹⁹

Several months ago, a bill passed the New York State Senate providing that a faithless elector’s vote would constitute a resignation, and he or she would be replaced.²⁰ That bill is pending before the State Assembly.

Once the electors do vote, they prepare and sign “Certificates of the Vote,” which record their votes.²¹ These Certificates are transmitted to the state’s Secretary of State, the president of the United States Senate (*i.e.*, the vice president, or, in his absence, the Senate’s president *pro tempore*), the Archivist of the United States, and the “judge of the district” in which they have assembled.²² The Certificates must arrive by December 23, 2020, or the president of the Senate will demand copies from the state’s Secretary of State and the judge of the district in which the electors had assembled.²³

Additionally, the state’s “executive” (a term not defined in the federal statute) issues a Certificate of Ascertainment for the winning candidate’s slate of electors.²⁴ The governor sends this Certificate to the Archivist of the United States who then transmits it to Congress,²⁵ formally presenting notice as to which slate of electors has the authority to cast votes for president and vice president when Congress meets on the following January 6th.²⁶

Federal law encourages states to develop their own procedures for resolving disputes as to which slate of electors should be certified.²⁷

possibility of fine or prosecution. *See, e.g.*, N.C. Gen. Stat. § 163-212 (fine of \$500, along with automatic removal and replacement).

¹⁸ *Id.* at 2320.

¹⁹ *Id.* at 2326 (2020)

²⁰ S6886D, available at <https://www.nysenate.gov/legislation/bills/2019/s6886/amendment/d>. *See also* Sen. James Skoufis, “Skoufis Statement regarding Supreme Court Decision on State’s Right to Penalize Faithless Electors” (July 6, 2020), <https://www.nysenate.gov/newsroom/articles/2020/james-skoufis/skoufis-statement-regarding-supreme-court-decision-states-right>.

²¹ 3 U.S.C. § 9; *see* Congressional Research Service, *The Electoral College: A 2020 Presidential Election Timeline* at 2 (Sept. 3, 2020), available at <https://crsreports.congress.gov/product/pdf/IF/IF11641>.

²² 3 U.S.C. § 11.

²³ 3 U.S.C. §§ 12, 13.

²⁴ 3 U.S.C. § 6; *see* Congressional Research Service, *The Electoral College: A 2020 Presidential Election Timeline* (Sept. 3, 2020), available at <https://crsreports.congress.gov/product/pdf/IF/IF11641>.

²⁵ *Id.*

²⁶ 3 U.S.C. § 6.

²⁷ *See generally* 3 U.S.C. §§ 1-18; *see also* Stephen Siegel, *The Conscientious Congressman’s Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004).

What if There is a Dispute as to Which Slate of Electors Has Won?

Each state has its own administrative and judicial system to address disputes that might arise over the accuracy or completeness of the popular vote count within a state, and disputes that raise questions about which slate of electors has been chosen. Such disputes are settled in New York under the Election Law, in the first instance through administrative proceedings at the Board of Elections, and then, if warranted, through proceedings presided over by state courts.

Disputes over the protection of constitutional or federal statutory voting rights may be entertained separately by the federal courts. The main federal law that governs the electoral college process is the federal Electoral Count Act (“ECA”).²⁸ The ECA statutory framework rests on a strong presumption that uncertainty about the outcome of a vote for president will be resolved by state law procedures. The ECA also provides that if a state has “failed” to reach a determination as to who won, its legislature may opt to have the electors appointed in another manner.²⁹ The ECA does not define the term “failed” or whether it is limited to a situation that has prevented a state from holding an election, such as a natural disaster.

The ECA also contains backup provisions specifying how Congress is to go about resolving any disputes over the counting of any state’s electoral votes.

Congress Tallies the Electoral Votes

The Constitution’s Twelfth Amendment provides that after the states transmit their certified electoral votes to the president of the Senate, he or she opens the certificates in the presence of the recently elected Senate and House, meeting jointly. By statute, this happens on January 6, 2021, at 1 p.m. The Amendment then states, in the passive voice, that “the votes shall then be counted.”³⁰

The incumbent vice president³¹ opens the certificates in alphabetical order of the states. The ECA has defined this to mean “all the certificates and papers purporting to be

²⁸ 3 U.S.C. §§ 1 *et seq.*

²⁹ 3 U.S.C. § 2 (“Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.”). During the thirty-six day recount process in Florida after Election Day in 2000, its legislature began proceedings to directly choose a slate of electors pursuant to this statute. The ruling by the Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000) obviated the legislature’s efforts in this regard.

³⁰ This sentence structure permitted Republicans supporting Rutherford Hayes in the 1876 election to argue that the presiding officer had the authority to determine which of the competing slates that year were in fact authorized. Ultimately, that argument failed, and the Electoral Count Act assigns the Senate’s president *pro tempore* more-or-less ministerial role.

³¹ For simplicity, we are referring to the vice president, but, as indicated above, in his absence, the presiding officer is the Senate’s president *pro tempore*.

certificates of the electoral votes.”³² After opening these for a state, the vice president hands them to four “tellers,” two chosen by each chamber of Congress, who read and record the results. The vice president then calls for any objections. Members of Congress must present an objection in writing; that objection must “state clearly and concisely, and without argument, the ground” for the objection; and the objection must be signed by at least one member of the House and the Senate.³³

If an objection is properly made, the House and Senate meet separately, pursuant to each chambers’ own rules, to consider the objection. Congress cannot move on to the next state until all objections have been resolved.

The procedures governing resolution of objections under the ECA are not straightforward. In part, the process depends upon whether a state has submitted one slate of electors to which an objection has been lodged, or multiple slates have been submitted.

Rarely, there are opposing positions within a state as to which candidate won. This can lead a state to submit more than one slate of electors to Congress. In the few instances in our history when this has happened, each slate claims to be legally authorized to vote the state’s electoral votes.

Following the 1872 election, for example, two different bodies in Louisiana claimed to be the final canvassing authority, and each separately certified a different slate of electors, one pledged to the Republican candidate and the other to the Democrat. In 1876, three states -- Florida, Louisiana, and South Carolina -- submitted competing slates of electors. And in 1960, the governor of Hawaii certified two slates of electors at different times, the first, based on an initial counting of the votes, recognizing a slate committed to the Republican candidate; and the second, following completion of the state’s election contest procedures, authorizing the slate committed to the Democrat.

Congress enacted the Electoral Count Act in response to the messy and somewhat questionable resolution of the multiple submissions in 1876. However, the ECA’s procedures are complex, ambiguous, and largely untested, leaving considerable uncertainty about how Congress might deal with disputes arising in the course of the 2020 election.

Thus, whether a disputed slate or multiple slates of electors are transmitted to Congress, the objection process is the same, but different issues come into play.

If a state submits only one slate of electors, Congress must accept and count these votes unless both chambers agree to reject them for limited, specific reasons set forth in the ECA. Assuming these votes have been “lawfully certified” by the state’s executive,

³² 3 USC § 15.

³³ *Id.*

rejection is appropriate only if the votes were not “regularly given.”³⁴ The ECA does not define these terms, however.

When the electoral slate satisfies the ECA’s “safe-harbor” provision,³⁵ the votes should be presumed to be lawfully certified. The “safe-harbor” provision says that, if a state makes a “final determination” by that safe-harbor date as to who won in its state, after having resolved any dispute by “judicial or other methods or procedures” pursuant to state law enacted *prior to Election Day*, that result shall be “conclusive” and controlling when Congress counts the votes. The safe-harbor is six days before the electors must vote. This year the safe-harbor date is December 8th.

Therefore, if there is an objection to a slate, but that state’s determination has satisfied the safe-harbor provision, the ECA instructs Congress to accept that slate (unless, as indicated, the electoral votes were not “regularly given”).

On the other hand, if there are two returns from a state, but only one meets the safe-harbor deadline, the ECA directs Congress to count the return that meets the safe-harbor deadline unless those votes were not “regularly given.”³⁶ If both returns have satisfied the safe-harbor deadline, or neither return is within that deadline, then it is up to the Congress to determine which is to be counted – and both the House and Senate must agree.

Thus, even if a state claims it has satisfied the safe-harbor provision, its determination is conclusive only as to “ascertainment of the electors.”³⁷ This means, for example, that Congress can still question whether the electors were constitutionally qualified to hold office.³⁸ And the safe-harbor provision does not bar Congress from questioning whether the electors followed proper procedure when they cast their votes.³⁹ Moreover, either house of Congress has the power to effectively veto the safe-harbor’s application.⁴⁰ In other words, the safe-harbor only applies if both houses of Congress

³⁴ *Id.*

³⁵ 3 U.S.C. § 5.

³⁶ There has been only one instance following enactment of the ECA in which a state presented dual slates of electors to Congress: in 1960, when the governor of Hawaii certified two different slates at two different times. The president of the Senate at the time, Vice President Richard Nixon (who was a candidate for the presidency) used his discretion as presiding officer to propose a solution – to recognize the votes of the later-certified, Democratic slate of electors on the ground that it represented the final and most accurate determination by the state. Nixon asked that this solution be adopted without objection, to which the members of Congress agreed, obviating the need to go any further under the ECA.

³⁷ Stephen Siegel, *The Conscientious Congressman’s Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004), *discussing and quoting* 3 U.S.C. § 5.

³⁸ *See id.* at 595.

³⁹ *Id.* at 594 (“Congress retained its authority to scrutinize and reject electoral ballots cast corruptly or in violation of constitutional rules. Because a [safe-harbor] determination preceded the casting of electoral ballots, it could not preclude Congress from rejecting electoral votes that were not cast by ballot; not cast on the day required by federal law; cast for a President and Vice President who were both citizens of the same state as the elector; cast for a constitutionally ineligible candidate; or cast as a result of elector bribery or corruption”).

⁴⁰ *Id.* at 607.

agree that it does, in that all of the conditions described above are met and the state's process was not tainted by bribery or corruption or in violation of constitutional rules.⁴¹

If, for whatever reason, the two chambers do not agree about which slate to accept and count, the ECA provides that Congress is to accept that return which has been "certified by the executive of the State."⁴² The executive of a state is most naturally read to mean the governor, but there is some ambiguity as to whether this might be read to mean another official, such as the Secretary of State, to whom existing state law gives the final power of certification. In any event, according to the ECA, if both houses of Congress cannot agree on competing multiple slates of electors, state law in place prior to the election determines who is "the executive of the state" with the power to make the final decision as to which candidate won in its state and which slate of electors to certify.⁴³

Once the separate chambers of Congress have made their respective decisions on the objection, the joint session is reconvened, and, without further debate permitted, the full Congress accepts the slate in question or rejects it.⁴⁴

If this tallying process is not completed on January 6th, Congress may recess until 10 am the next day – but if the counting is not finished by January 11th, no additional recesses are permitted.⁴⁵

When the counting is complete, the vice president announces the vote, "which announcement shall be deemed a sufficient declaration of the persons, if any, elected president and vice president."⁴⁶

What if No Presidential Candidate Receives a Majority of the Electoral Votes? The House of Representatives Elects the President

Whether there are multiple slates or objections, or simply one set of slates from all states, and no candidate receives a majority of the all of the presidential electoral votes accepted and tallied by the Congress, the Constitution's Twelfth Amendment provides that the House of Representatives chooses the president from the three candidates who received the most votes in the Electoral College, each state's delegation having one

⁴¹ *Id.* at 594, 607.

⁴² 3 U.S.C. § 15.

⁴³ This provision has never been invoked.

⁴⁴ This appears to allow the possibility that a state will be left with no electoral votes, which might alter the majority required to elect a president and vice president. The Twelfth Amendment refers to a "majority of the whole number of electors appointed." This situation has not occurred.

⁴⁵ 3 U.S.C. § 15.

⁴⁶ *Id.* There have been times when a vice president announced his own defeat. In modern times, Richard Nixon (1960), Hubert Humphrey (1968), and Al Gore (2000). On the other hand, George H.W. Bush had the pleasure of announcing his own victory (1988).

vote.⁴⁷ This state delegation twist was, like other provisions in the Constitution, a compromise by the Founders to favor and obtain support from the small states – and as an offset to the more populous states’ advantage in the Electoral College scheme.

The House has voted for president only twice. After the 1800 election, this procedure allowed the Federalists, despite losing the election, to vote for Aaron Burr and prevent Thomas Jefferson from winning the presidency until the 36th ballot in the House when Jefferson finally prevailed. The same process decided the 1824 election for John Quincy Adams, even though Andrew Jackson had led in the popular vote and the electoral college vote (but lacked a majority).

The Twelfth Amendment also states that “a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.” A majority of all states is 26 state delegations, and they may choose from among the top three recipients of electoral college votes for president.

The House today is controlled by the Democrats, but Republicans control twenty-six delegations. The configuration of the House that convenes on January 3, 2021 will be determined by this fall’s elections.

If no candidate for president obtains a majority of the electors and the House fails to elect a president by the day a new president is inaugurated on January 20th, the newly elected vice president – assuming there is one -- shall act as president until a candidate is elected.

What if No Vice Presidential Candidate Receives a Majority of the Electoral College Vote? The United States Senate Elects the Vice President

What happens if no candidate for vice president has received a majority of the electoral college vote? The Twelfth Amendment provides that under such circumstances, “the Senate shall choose the Vice-President” from among the top two vice presidential candidates in the electoral college vote. In this case, “a majority of the *whole number* shall be necessary to a choice.”⁴⁸ Currently, fifty-one votes are required, and the senators may choose only from the top two recipients of electoral college votes for vice president. It is not clear whether a presiding vice president could break a tie.

What if There is No Resolution as to Who Has Been Elected by Inauguration Day?

The Twentieth Amendment to the Constitution provides that the terms of the incumbent president and vice president end at noon on January 20, whether or not a new president and vice president have been elected yet.

⁴⁷ “[I]n choosing the President, the votes shall be taken by states, the representation from each state having one vote.” U.S. Const., XII Amend. The same directive was in the original Constitution. U.S. const., art. II. In that it is not a state, Washington DC does not participate in this process.

⁴⁸ U.S. Const., XII Amend. (emphasis added).

The Amendment empowers Congress to enact legislation governing who shall govern if neither a president nor vice president has yet been certified by then. Under the current law, codified in the Presidential Succession Act last amended by Congress in 1947,⁴⁹ the Speaker of the House of Representatives, once they have resigned their seat, becomes acting president, with all “the powers and duties of the office of President,” until a president is qualified. If a Speaker has not yet been elected or is otherwise unable or ineligible to serve, then the president *pro tempore* of the Senate becomes acting president.

The acting president would serve in office until a new president is elected. If during the time an acting president was serving, the Senate elected a vice president, the new vice president would become acting president, displacing the former Speaker.⁵⁰

If neither a new president or vice president were elected during this time, the acting president might have the authority under the Twenty-Fifth Amendment to nominate a new vice president. Although the text of the 25th Amendment suggests that the acting president could do so, the original United States Senate hearings on the Amendment might be read to cast some doubt on this possibility.⁵¹

⁴⁹ 3 U.S.C. § 19.

⁵⁰ U.S. Const., XX Amend.

⁵¹ *See, e.g.*, YALE LAW SCHOOL RULE OF LAW CLINIC, THE 25TH AMENDMENT: A READERS GUIDE 74-75 (2018).

NYSBA TASK FORCE ON THE PRESIDENTIAL ELECTION MEMBER BIOS

- **Jerry H. Goldfeder, Chair**, has practiced election law for forty years and is special counsel at Stroock & Stroock & Lavan LLP. He also teaches election law at Fordham Law School where he twice has been voted adjunct professor of the year.
- **Ava B. Ayers**, director of the Government Law Center at Albany Law School, who teaches classes in administrative law, law of government and professional responsibility.
- **Wilfred U. Codrington III**, a constitutional law scholar with a focus on constitutional reform, election law and voting rights. He is an assistant professor of law at Brooklyn Law School and is a fellow at the Brennan Center for Justice at NYU School of Law.
- **James A. Gardner**, a SUNY distinguished professor, Bridget and Thomas Black professor and a research professor of political science at the University at Buffalo School of Law. His research focuses on election law, federalism and Democratic theory.
- **John “Jack” Hardin Young** was on the Democratic National Committee team that handled the Florida recount during the 2000 election and *Bush v. Gore*. Young, of counsel to Sandler Reiff, is an adjunct professor of comparative election law at William & Mary Law School.
- **Deborah Pearlstein**, professor of law and co-director of the Floersheimer Center for Constitutional Democracy at Cardozo Law, specializes in constitutional law, international law, and U.S. national security law.
- **Richard H. Pildes**, one of the nation’s leading scholars of constitutional law and a specialist in issues facing democracy, is the Sudler Family professor of constitutional law at NYU School of Law.
- **Jed Shugerman**, a professor at Fordham University School of Law, is the author of a book that traces the rise of judicial elections, judicial review, and the influence of money and parties in American courts.