

THE FOUNDERS' *BUSH V. GORE*: THE 1792 ELECTION DISPUTE AND ITS CONTINUING RELEVANCE

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INTRODUCTION: THE GAP IN OUR CONSTITUTIONAL ARCHITECTURE

The 2000 presidential election re-exposed a critical weakness in the Constitution's procedures for determining the winner of the presidency when the outcome is disputed. The Constitution says only that, with both houses of Congress present, the Vice President of the United States (acting as president of the Senate) shall open the certificates of the Electoral College votes sent from the states, "and the votes shall then be counted."¹ Using the passive voice, this clause suggests, without specifying clearly, that the Vice President holds the authority to resolve any dispute over counting the Electoral College votes from the states.² Yet the Vice President may well be one of the competing candidates seeking the office of the presidency, as Al Gore was in 2000, and it is an obvious conflict of interest to give this individual the authority to decide the dispute.

This indeterminate constitutional clause, however, offers no obvious alternative. Do the two houses of Congress vote together as a single combined body, a procedure not contemplated elsewhere in the Constitution and, to my knowledge, unheard of in the practices that have unfolded since the Founding? Surely, the Framers of the Constitution would have spelled out this unusual procedure with a bit more specificity if that is what they had in mind. Yet suppose the two houses vote separately, as is the regular practice with Congress. What if the two houses are split on the issue in dispute? The question of which candidate won the presidency is not like a piece of legislation, which can die unenacted if the two houses do not agree. The nation needs to inaugurate its newly elected President—all the more so since the President's role in protecting national security has inevitably increased in the aftermath of World War II.³

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1. U.S. CONST. amend. XII.

2. For an extensive discussion of the problems that this passage in the Twelfth Amendment has caused, see Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475 (2010).

3. For one of many works that discuss the rise of presidential power since World War II,

Thus, the dispute over which candidate won the White House cannot remain deadlocked, with each house of Congress reaching opposite conclusions. Yet the Constitution itself indicates no method of breaking the deadlock other than to give the decision to the Vice President, who may be biased by partisanship even if not one of the candidates.

The nation was forced to confront this acute constitutional weakness once before, in the context of settling the 1876 presidential election between Rutherford B. Hayes and Samuel J. Tilden.⁴ There, the two houses were at odds, with the Republican-controlled Senate supporting Hayes and the Democratic-dominated House backing Tilden. In ruling for Hayes, Congress broke the logjam by creating a one-time-only Electoral Commission that split 8-7 along party lines. It took Congress another decade to develop a more permanent solution, the Electoral Count Act of 1887, but even the Act's authors recognized that it was an inadequate substitute for a constitutional amendment to eliminate ambiguity over where the ultimate vote-counting authority lies in a disputed presidential election.⁵ During that entire decade, however, Congress could never muster the degree of bipartisan support necessary for a constitutional amendment; thus, it settled for what it feasibly could enact by statute.⁶

The Electoral Count Act was then left to gather dust until 2000, when a fresh look at it demonstrated just how inadequate it was.⁷ Assuming it was even possible to comprehend the Act's exasperatingly convoluted passages—no safe assumption at all—it appeared to provide that, in the event of a House-Senate deadlock, the governor of the state from which the dispute arose should settle the matter.⁸ Apart from the general dubiousness of this proposition (why, after all, should the political party lucky enough to hold the governorship of the affected state get to prevail simply by virtue of this fact?), the proposition was a particularly awkward prospect in 2000 with Governor Jeb Bush of Florida being the brother of the Republican candidate for President in the disputed election.⁹ Additionally, there was no guarantee that a twenty-first-century Congress would attempt to obey the largely indecipherable dictates of a nineteenth-century compromise that was admittedly deficient from the outset. Thus, notwithstanding what was written in the Electoral Count Act, it was possible to predict that the Senate and the House would remain deadlocked over whether Bush or Gore had won heading into Inauguration Day, or beyond, with no mutually accepted tiebreaking mechanism available.

see GARRY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* (2010).

4. See Colvin & Foley, *supra* note 2, at 502-20 (providing details of this dispute).

5. *Id.* at 519-22.

6. The details of the legislative history leading up to the adoption of the Electoral Count Act are discussed in Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 *FORDHAM L. REV.* (forthcoming 2010).

7. Colvin & Foley, *supra* note 2, at 522-25.

8. *Id.* at 522.

9. See *id.*

Into the controversy stepped the U.S. Supreme Court, with the consequence we now know to be *Bush v. Gore*.¹⁰ Whether or not it was a valiant and necessary effort to head off an even worse scenario if the dispute had made it all the way to Congress,¹¹ this 5-4 ruling—in which all nine Justices appeared to abandon their normal jurisprudential positions in order to reach a result favorable for their preferred presidential candidate, and in which the dissenters accused the majority of illegitimacy that would undermine “the Nation’s confidence in the judge as an impartial guardian of the rule of law”¹²—is hardly the model for how one would wish to handle a dispute of this kind. Would it not be so much better if the Constitution gave us a clearly established tribunal tailored to the particularly tricky task of adjudicating a vote-counting dispute in a presidential election? The tribunal should be designed to be evenly balanced and fair to both sides in order to maximize the chance that the losing side perceives the outcome as legitimate even if incorrect from its viewpoint. Were this constitutionally specified tribunal to exist, the operation of democracy would seem so much more successful and orderly than it would if the U.S. Supreme Court instead asserted a jurisdiction many doubt it has—and then exercised its self-asserted jurisdiction in a way that appeared to reflect the partisan bias of its majority.

Now, a decade after *Bush v. Gore*, the nation is no closer to getting this needed constitutional amendment than it was a decade after the Hayes-Tilden debacle. Whether we are ever able to learn from these experiences remains to be seen. Meanwhile, however, we can ask why the Constitution did not provide us with an appropriate tribunal in the first place. Perhaps if we better understand the causes of the defect, we will become better able to effectuate a remedy.

Some of the explanation for the constitutional deficiency will be familiar. It is well-known, for example, that the Framers did not anticipate how party politics would affect presidential elections.¹³ After the Electoral College tie in 1800 between running mates Thomas Jefferson and Aaron Burr, the Twelfth Amendment was necessary to separate Electoral College voting for President and Vice President.¹⁴ But to understand why the Twelfth Amendment did not create a mechanism for resolving the kinds of vote-counting disputes that emerged in 1876 and 2000, it is necessary to dig deeper. An additional part of the explanation lies in the federalist structure of the Constitution and the presidency it established. The Electoral College in each state is an institution of state government, and it is understandable if the Framers (to the extent they thought about it at all) assumed that any disputes over ballots cast for a state’s presidential

10. 531 U.S. 98 (2000).

11. See generally RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001).

12. *Bush*, 531 U.S. at 129 (Stevens, J., dissenting).

13. BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 5-6 (2005); RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* 53 (1969); BERNARD A. WEISBERGER, *AMERICA AFIRE* 14 (2001).

14. TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC 1787-1804* (1994).

electors would be handled within the state's own governmental apparatus.

Yet federalism did not stop the dispute over Florida's presidential electoral ballots from reaching national institutions in either 1876 or 2000. The Framers, too, were lawyers (or at least many of them were), and they were smart enough to know that a litigant dissatisfied with one tribunal's answer would consider whether to pursue the same matter in a more friendly forum. If they had attended to the possibility of fighting over ballots cast for a state's presidential electors, they could have foreseen that one side would attempt to take the fight to Congress if that side was unhappy with how state government had handled it.

Federalism, therefore, is not a full answer to the question. The truth, instead, is that the Founders were not experienced enough with disputed elections even at the state level. Their inexperience in this respect prevented them from anticipating how to handle a dispute over ballots cast for the office of presidential elector. To be sure, the American colonists had some experience with disputes over elections for seats in colonial legislatures.¹⁵ But disputes over legislative elections were relatively easy to handle; the colonists inherited from England the doctrine that a legislative chamber shall judge the qualifications of its members.¹⁶ An elected executive, however, was another matter, whether the executive was the state's own governor or the nation's President. The Founders could not look to their colonial history for experience on how to handle a dispute over any kind of election for a chief executive.

It would take more space than this Article to explain fully how the Founding Generation responded to the problem of disputed chief executive elections once they confronted them. In the fifty years between the Declaration of Independence and rise of Jacksonian democracy (which essentially coincided with the passing of the Founding Generation), there are several significant disputes to assess. Massachusetts, Pennsylvania, and Delaware all had disputed elections that shed some light on why the Founders left the apparatus of electoral democracy incomplete in this crucial regard.¹⁷

Still, no episode in this early period is nearly as significant as New York's disputed gubernatorial election of 1792. This episode directly involved some of the Founders most instrumental to the adoption of the U.S. Constitution, including John Jay and Alexander Hamilton (two of the three co-authors of the *Federalist Papers*). This dispute also received national attention at the time, including commentary from Thomas Jefferson and James Madison.¹⁸ Thus, as a window into the thinking of the Founders on what to do when confronted with a major vote-counting dispute, this particular election is unparalleled. If we can understand how and why the Founders were surprised and perturbed that their

15. See, e.g., MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 135-37 (1943).

16. See generally JOSHUA AARON CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* (2007).

17. These other disputed elections will be discussed in the book that my Moritz colleague Steven Huefner and I are writing on the full history of disputed elections in the United States.

18. See *infra* Part III.D.

own constitutional handiwork failed them at this crucial moment, we will be in a better position to understand why the Founders did not provide for the kind of tribunal needed in 1876 or 2000.

In short, the Founders themselves were sent reeling by their own unexpected version of *Bush v. Gore*. Their own inability to ready themselves for a dispute of this kind helps explain why the nation was unprepared in 2000 when the actual *Bush v. Gore* occurred. Therefore, let us journey back to see what happened when the Founders faced this same kind of dispute. Let us do so in the hope that, by understanding the causes and consequences of their mistakes, we need not repeat them when the next major disputed election arises.

I. SETTING THE STAGE

The New York gubernatorial election of 1792 was one of the first involving the two-party political competition that emerged in the aftermath of the 1787 Constitutional Convention, despite the Framers' desires to avoid that development.¹⁹ Madison famously had discussed the "mischiefs of faction" in the *Federalist Papers*²⁰—and how to avoid a tyranny of "a major[ity] party" through the constitutional separation of powers.²¹ But by 1792 Madison himself had come to embrace the idea that he was a member of one political party, the so-called Democratic-Republicans, set in opposition to another.²² The name of that other party, the Federalists, ironically indicated Madison's rift with his *Federalist Papers* co-authors, Alexander Hamilton and John Jay.

Madison's recognition of two-party competition as emergent by 1792 was not the same as acceptance of two-party competition as a permanent feature of a healthy democracy. On the contrary, Madison believed that his Democratic-Republicans were the true guardians of the liberty won in the Revolution and protected by the Constitution.²³ Conversely, from his perspective, the other party (the Federalists) had betrayed the Revolution and the Constitution. Thus, as he saw it, the task of his Democratic-Republicans was *not* to trade positions with the Federalists as the "legitimate opposition"²⁴ during the period of electoral competition when the other party inevitably was in power. Rather, his side's task was to permanently destroy the Federalists as enemies of the Constitution and return the Republic to the original situation in which no two-party competition existed.²⁵

The Federalists saw their rivals, the Democratic-Republicans, in much the same way. The Alien and Sedition Acts, which came within the first few years

19. See generally HOFSTADTER, *supra* note 13 (on the Founders' antipathy to party).

20. THE FEDERALIST NO. 10 (James Madison).

21. THE FEDERALIST NO. 51 (James Madison).

22. James Madison, *Parties*, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 469 (R. Worthington ed., 1884); see generally ACKERMAN, *supra* note 13; HOFSTADTER, *supra* note 13.

23. HOFSTADTER, *supra* note 13, at 85.

24. *Id.* at 212.

25. *Id.* at 84.

of this new two-party rivalry, prove this point. The political opponents of the Federalists were, in their eyes, seditious enemies of the Republic and its new Constitution.²⁶

This early attitude towards the emergence of two-party competition may help to explain why the actors in the 1792 New York drama behaved as they did. They were not ready for the intense political animosity that developed between the two sides, and when the animosity surfaced, there was no desire on either side to adopt institutional structures built on the premise that two-party competition would remain an ongoing feature of elections in their new constitutional democracy. Instead, both sides wanted to win elections, control the government, and perpetuate constitutional institutions that would be consistent with their idea of politics without party competition.

In New York's gubernatorial election of 1792, the incumbent, George Clinton, was the candidate of the newly emerging Democratic-Republican party.²⁷ His Federalist opponent was the illustrious John Jay, who was then serving as the first Chief Justice of the United States. Jay's willingness to leave that position to become New York's governor signals the relative importance of the two offices at the time—and also indicates that a fight over who won this governorship was comparable to the Founding Generation as a potential fight over the winner of a presidential election.²⁸ Winning the New York governorship, in other words, was a major prize (it was one of the largest and most economically important of the thirteen original states, and back then, of course, the states had much more power than the federal government). Accordingly, the politicians fought over it with every bit as much intensity as their successors would over 200 years later in *Bush v. Gore*.

The dispute focused on the ballots cast in Otsego County, where Cooperstown (the home of the National Baseball Hall of Fame) is located.²⁹ If Otsego's ballots were counted, Jay would win by roughly 200 votes.³⁰ But if not, then Clinton would prevail by about 100 votes.³¹ The specific problem involved

26. *Id.* at 106-07.

27. The main secondary texts on which I have relied are JABEZ DELANO HAMMOND, *THE HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW YORK* (Phinney 4th ed. 1850) (1844); ALAN TAYLOR, *WILLIAM COOPER'S TOWN* (1995); ALFRED F. YOUNG, *THE DEMOCRATIC REPUBLICANS OF NEW YORK: THE ORIGINS* (1967); Carol Ruth Berkin, *The Disputed 1792 Gubernatorial Election in New York* (1966) (unpublished M.A. thesis, Columbia University) (on file with Columbia University Archives).

28. See WALTER STAHR, *JOHN JAY: FOUNDING FATHER* 283 (2005).

29. See JOHN S. JENKINS, *HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW-YORK* 44 (1846).

30. YOUNG, *supra* note 27, at 308. No one could know for sure what Jay's exact total would be, since the ballots had not been counted and would be destroyed without a count of them ever occurring. See *infra* text accompanying notes 53, 152. But given voting patterns in Otsego County at the time, both contemporary observers and subsequent historians have estimated with considerable confidence what the magnitude of Jay's victory would have been.

31. *Id.*

the delivery of the ballots from Otsego County to the secretary of state. New York's election law required the sheriff of each county to be the official responsible for this delivery.

New York's legislature had enacted a statute for regulating elections in 1787, the year of the federal Constitution's adoption. This statute directed that after the polls had closed in each locality, the local election inspectors—what we would call poll workers or precinct officials—would “immediately” enclose and bind with tape the containers holding the ballots.³² After affixing their seal to the containers, the inspectors were required to appoint one of themselves to deliver “without delay” the sealed containers to the county sheriff.³³ The statute, in turn, required the sheriff to collect all these containers and, without opening any of them, put them all together in one box and to deliver that box, closed and affixed with the sheriff's seal, “into the office of the Secretary of this State.”³⁴

The problem with the Otsego ballots is that the outgoing sheriff's term ended on February 18, 1792.³⁵ In fact, he resigned even earlier, on January 13.³⁶ His replacement, Benjamin Gilbert, was named on March 30.³⁷ But Gilbert did not receive his commission until May 11. Thus, as was later determined by the official canvassing committee itself, Gilbert was not “qualified into the office of sheriff” until then.³⁸

On May 3, outgoing sheriff Richard Smith, acting as if he still possessed the powers of that office, had deputized another person to deliver the ballots on his behalf to the secretary of state.³⁹ But a whole month earlier, on April 3, Smith had been elected supervisor of Otsego Township, and under New York law a sheriff could hold no other office. Apparently, Smith was attempting to perform the functions of both offices at the same time when the election took place. In this time period, voting occurred over four days—from April 24 to April 28. On May 1, in his capacity as town supervisor, Smith ruled on challenges to the eligibility of some voters. But then Smith continued to perform the role of sheriff for the purpose of delivering the ballots to the secretary of state. As one historian has vividly put it, “in the most absurd touch, at the end of the polling Smith, acting as supervisor, sealed the Otsego Township ballot box for transfer to the county sheriff; becoming the sheriff, he received that ballot box from himself.”⁴⁰

Because of the legal defects with Smith's status as sheriff, Clinton supporters argued that the ballots from Otsego County had not been delivered to the

32. Act of Feb. 13, 1787, 1787 N.Y. Laws 32.

33. *Id.*

34. *Id.* at 33.

35. TAYLOR, *supra* note 27, at 178. See *infra* APPENDIX for a timeline of the 1792 election dispute.

36. *Id.*

37. *Id.*

38. MATTHEW L. DAVIS, MEMOIRS OF AARON BURR: WITH MISCELLANEOUS SELECTIONS FROM HIS CORRESPONDENCE 335 (1836).

39. TAYLOR, *supra* note 27, at 178.

40. *Id.*

secretary of state in accordance with the requirements of the statute and thus should not be counted. They also complained that the ballots from one town within Otsego County, Cherry Valley, could not be counted because there was a dispute over which of two sets of returns from that town were the correct returns.⁴¹ But this issue was something of a sideshow, as Jay's supporters were prepared to concede that those specific ballots should be discarded, but not the rest from Otsego.⁴² There was no challenge to all of the other Otsego ballots for lack of the required seals.⁴³ The only problem was that the sheriff's seal on the whole box from the county was Smith's. Thus, the fight reverted to the main issue: was Smith entitled to act as the sheriff for purposes of delivering the ballots to the secretary of state—and, if not, must all of the Otsego ballots be discarded for that reason alone?⁴⁴

As the controversy unfolded, the Clintonians suggested—but never proved or even offered any direct evidence—that Smith might have tampered with the ballots while they were in his possession.⁴⁵ They certainly showed beyond a shadow of a doubt that Smith was a Federalist sympathetic to Jay's candidacy and thus had a motive (as well as an opportunity) to commit some ballot tampering.⁴⁶ But the Clintonians did not allege that Smith's partisan conflict of interest was itself a violation of law or even a factor relating to whether Smith had contravened the relevant electoral statute.⁴⁷ Rather, the Clintonians claimed simply that Smith was no longer Otsego's legal sheriff, and because of that technical defect alone, all of the county's ballots must be rejected as null and void.⁴⁸

Under New York's election statute, the decision whether to count the disputed ballots was in the hands of a joint canvassing committee: six senators and six representatives from the state's legislature, with each group appointed by its own chamber.⁴⁹ The statute required this joint canvassing committee to meet at the office of the secretary of state to open the sealed boxes delivered from the county sheriffs and then canvass the votes contained within them.⁵⁰ The only

41. *Id.* at 178-80.

42. *See id.* at 177-80. This account explains that there were in fact two competing sets of returns from the town of Cherry Valley. One had been properly sealed—the one that Smith believed to be the valid one. But he included the other set of returns, not sealed in the container from that town, so that the canvassers could make a final decision on the matter. *Id.*

43. *See* DAVIS, *supra* note 38, at 335-38 (explaining that the canvassing committee described the Otsego ballots as “enclosed in a *sufficient* box” and did not dispute the right of a valid sheriff to appoint a deputy to deliver that box to the committee (emphasis added)).

44. *Id.*

45. *See generally* TAYLOR, *supra* note 27, at 179 (detailing the numerous opportunities Smith and other Federalists had to tamper with the ballot box).

46. *Id.* at 179-80.

47. *Id.* at 180.

48. *Id.*

49. Act of Feb. 13, 1787, 1787 N.Y. Laws 33.

50. *Id.*

explicit provision in the statute for not counting ballots was “if the number of ballots in any inclosure shall exceed the number of Electors contained on the poll lists in the same inclosure,” in which case the committee “shall proceed to draw out and destroy unopened so many of the said ballots as shall amount to the excess, and shall proceed to canvass and estimate the residue.”⁵¹ But the statute also explicitly provided that “all questions which shall arise upon such canvass and estimate, or upon any of the proceedings therein, shall be determined according to the opinion of the major part of the [committee] . . . and their judgment and determination shall in all cases, be binding and conclusive.”⁵² The statute further required the committee, after deciding which candidate had won, “immediately” to “destroy” the “poll-books” and all other voting materials relating to the counting and canvassing of ballots.⁵³ Based on this clear-cut language, both sides to the controversy believed that the joint canvassing committee’s decision would be final and irreversible in any other legal proceeding under the laws and constitution of New York.⁵⁴

51. *Id.*

52. *Id.* at 34.

53. *Id.*

54. In all of the historical research conducted for this project, there has emerged only one tantalizing reference that the Federalist attorneys considered going to court to overturn the canvassing committee’s certification of the election’s outcome. This reference comes in a single sentence of a letter of Josiah Ogden Hoffman, who at the time was a member of New York’s legislature and who later became the state’s attorney general. The letter to Peter Van Schaack, dated June 26, 1792, is held at the New York Historical Society, and a copy is on file with the author. It is also mentioned in a biography of Rufus King. See ROBERT ERNST, *RUFUS KING: AMERICAN FEDERALIST 177* (1968) (“One [Federalist] suggested confidentially that, if a new election were not feasible, the legislature might order a quo warranto, which would leave the legality of Clinton’s election in the hands of the judiciary.”). The relevant passage of the letter reads, “If the legislature cannot order a new election[, i]s not in their power to order a quo warranto & thus leave the decision to our judges[?]”

Quo warranto is an ancient writ used to try the legitimacy of an officeholder’s title to an office. The most important early use of quo warranto in the United States to challenge an incumbent governor’s reelection based on wrongdoing in the counting of ballots occurred in Wisconsin’s gubernatorial election of 1855. See Attorney Gen. *ex rel.* Bashford v. Barstow, 4 Wis. 567 (1855). This Wisconsin Supreme Court decision, which ordered the incumbent governor to vacate his office because he was not the rightful winner of the election, is considered the *Marbury v. Madison* of Wisconsin law. JOSEPH A. RANNEY, *TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN’S LEGAL SYSTEM* 79-80 (1999). In truth, however, it is a much more momentous decision than *Marbury* itself—which, after all, refused to issue an order to the federal executive in that case and instead claimed that the Court lacked the jurisdiction to do so. For a discussion of *Bashford v. Barstow*’s celebrated status in Wisconsin’s history, see chapter 9 of JOHN BRADLEY WINSLOW, *THE STORY OF A GREAT COURT* (1912).

In light of Wisconsin’s subsequent success with the use of quo warranto for its 1855 gubernatorial election, it is thus intriguing to speculate what might have happened if the Federalists had similarly attempted to invoke this ancient writ in New York’s disputed gubernatorial election

Thus, it mattered immensely who constituted this joint canvassing committee. The members had been chosen in early April in advance of the election. The Democratic-Republicans controlled both houses of the state legislature at the time; therefore, they had the power to appoint a majority of canvassers from their party.⁵⁵ They exercised this power in a rather unusual way. In the state senate, a bipartisan compromise had resulted in the appointment of three canvassers from each party.⁵⁶ In the assembly, the Federalists thought they had secured a similar deal, but they got outmaneuvered. As a result, all six of the assembly's canvassers were Democratic-Republicans, for an overall majority of nine to three.⁵⁷

Being savvy politicians, the Federalists saw the composition of the canvassing committee as a bad sign. Robert Troup, a Federalist attorney, played a leading role in advocating Jay's position before the committee and in the court of public opinion.⁵⁸ Troup had been Alexander Hamilton's roommate at Columbia (then called King's College) and had studied law under Jay's tutelage.⁵⁹ One could consider Troup's role roughly comparable to the one that Ron Klain played for Al Gore during the legal fight over the 2000 presidential election.

of 1792. The mere fact that Hoffman briefly contemplated the possibility is therefore significant. But it is important to understand that his suggestion of pursuing quo warranto, which comes in the form of a question, is entirely tentative. Indeed, the very next sentence of Hoffman's letter reveals, "This is quite a new idea in my mind [and I] have thrown it out for your consideration." The suggestion, moreover, seems to have been dropped almost as soon as it was made; no evidence has been uncovered to indicate that either Hoffman or anyone else pursued it further.

It is worth noting as well that even Hoffman's brief suggestion contemplated legislative action as a precursor to seeking a writ of quo warranto in court. Given the exclusive jurisdiction of the canvassing committee under existing New York law, Hoffman was not suggesting that the Federalists could pursue a judicial remedy against the canvassing committee without some additional legislative intervention. In other words, Hoffman never seemed to have in mind the idea of seeking a writ of quo warranto based purely on protecting the fundamental constitutional right to suffrage, even though Federalists at the time were attacking the canvassing committee in constitutional terms. *See infra* notes 113, 116-18 and accompanying text. Instead, Hoffman apparently only thought of quo warranto as a kind of ancillary fix to a potential separation-of-powers problem; it would be necessary for the legislature to overturn a canvassing committee's certification of an election, but if the legislature could not itself issue the overruling order (because doing so would be in the nature of a judicial decree and therefore improper for the legislature to perform itself), perhaps the legislature by statute could empower the judiciary to issue an appropriate quo warranto decree. In any event, historically enticing as it is, Hoffman's tentative suggestion came to naught.

55. Berkin, *supra* note 27.

56. TAYLOR, *supra* note 27, at 177.

57. *Id.*

58. Robert Troup to Jay (May 6, 1792), in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782-1793, at 422-23 (Henry P. Johnston ed., 1891); *id.* at 424-27.

59. JOSEPH BLUNT, AMERICAN ANNUAL REGISTER OF PUBLIC EVENTS FOR THE YEAR 1831-32, at 389-90 (1833).

After hearing the news concerning the partisan make-up of the canvassing committee, Troup wrote Jay on June 10 saying, "My hopes, however, are not very strong, considering the situation of that infamous party."⁶⁰ In another letter, Troup's fears were expressed even more vividly: "I confess that I have serious apprehensions that no motives whatever will be sufficiently powerful to restrain them from so flagrant an attack on the rights of an election."⁶¹ Thus, there was already a fear of a party-line vote.

Another Federalist attorney who helped to advocate Jay's position was James Kent.⁶² At the time, Kent was a relatively junior member of the state assembly.⁶³ He later would become chancellor of New York, the state's highest judicial officer, as well as the first professor of law at Columbia University.⁶⁴ Often called the "American Blackstone" because of his *Commentaries on American Law* modeled after Blackstone's treatment of English law, Kent is an important figure for understanding the Founding Generation's views on how a constitutional democracy should handle a disputed chief executive election, either for governor or president.⁶⁵

Thus, it is significant that Kent, like Troup, focused on the partisan imbalance of the canvassing committee as the critical defect in the state's legal machinery for dealing with the dispute over the Otsego ballots. In a letter to his brother, he wrote:

The Senate did as they ought to do; they chose three friends to Jay: Jones, Roosevelt, and Gansevoort; and three friends of Clinton: Geltson, Joshua Sands, and Tillotson. The Assembly chose six devoted Clintonians, to wit: Jonathan N. Havens, M. Smith, John D. Coe, Pierre Van Cortlandt, Junior, Daniel Graham, and David McCarty. This I deem to have been a corrupt thing in the Assembly.⁶⁶

"Corrupt" is a strong word, but Kent meant it. He thought that the canvassing committee could not fairly and legitimately decide which of the two sides won the election unless the committee's membership was evenly balanced towards both sides: "These canvassers form a court of the highest importance, a court to decide on the validity of elections without appeal. They ought at least to have

60. Robert Troup to Jay (June 10, 1792), *supra* note 58, at 430.

61. Letter from Robert Troup to John Jay (May 27, 1792) (on file with Columbia University Library), available at <http://wwwapp.cc.columbia.edu/ldpd/jay/item?mode=item&key=columbia.jay.11219>. Troup was confident in the merits of Jay's position and thus saw bias as the only obstacle to victory: "my mind, if I had confidence in the integrity of the canvassers, would be in a state of perfect tranquility." *Id.*

62. WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT 43 (Da Capo Press 1970) (1898).

63. *Id.* at 37-42.

64. See generally JOHN THEODORE HORTON, JAMES KENT: A STUDY IN CONSERVATISM, 1763-1847 (1939) (a major scholarly biography of Kent).

65. See *id.*

66. KENT, *supra* note 62, at 44-45.

been equally biased.”⁶⁷ This passage in Kent’s letter is one of the most important from the whole episode. It shows that a major participant in the controversy, who would later become one of the nation’s foremost legal thinkers, recognized that the legitimacy of the dispute’s outcome required the impartiality of the tribunal charged with resolving it. In this context, impartiality required more than sound judicial temperament. It required the physical manifestation of evenhandedness by making sure that the tribunal was composed of equal numbers from each of the two competing political parties.

The phrase “equally biased” is perhaps infelicitous, but it is a personal letter, after all, and it unambiguously gets the point across. Kent recognized that one could not expect partisans to be able to put aside their partisan leanings in the context of a dispute over the outcome of a major statewide election like that for governor (or presidential electors). Therefore, to guard against the likelihood of partisans acting out of partisanship, one needed to put an equal number from each party on whatever “court” had jurisdiction to adjudicate this particular kind of dispute.

Although Kent clearly recognized this important point—and that fact alone is of major significance—we shall see that neither he nor anyone else acted on this recognition. This fact, too, is of extreme importance. Why could the Founders not create an impartial tribunal, which Kent so clearly saw as essential to the legitimacy of an election’s outcome? Even if they could not create this impartial tribunal in 1787, when they wrote the Constitution (and New York’s election statute), why could they not do so after they lived through the disputed gubernatorial election of 1792? That question is a vexing and pressing one.

II. THE LEGAL BATTLE BEFORE THE CANVASSING COMMITTEE

The canvassing committee met from May 29 to June 12 of 1792.⁶⁸ In the run-up to its deliberations, both sides conducted organized and energetic public relations campaigns over whether the committee should count the Otsego ballots. Although they had no television or Internet, they had a multitude of newspapers and pamphleteers, and both sides made maximum use of the available media to press their legal arguments on why they should prevail.⁶⁹

A. *The Use of Lawyers to Win a Disputed Election*

A common belief today is that, prior to the 2000 presidential election,

67. *Id.* at 45. A recent experiment has tested a version of the evenly balanced tribunal that Kent contemplated. See Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEG. & PUB. POL. (forthcoming 2010). One significant feature of this experiment was that its three-member tribunal maintained its evenhandedness while avoiding the risk of deadlock by having the two members from opposite parties choose a neutral tiebreaker to join them. Kent’s plea for an impartial tribunal, by contrast, did not specify any details on exactly how it should be structured.

68. TAYLOR, *supra* note 27, at 180.

69. See Berkin, *supra* note 27.

political candidates did not enlist large teams of lawyers in an effort to litigate their way to victory.⁷⁰ But this current notion is an anachronistic fallacy. A review of previously close presidential elections—including 1884 and 1916, as well as the monumental legal fight over the outcome in 1876—reveals that presidential candidates historically have been prepared to use attorneys to wage a legal battle over counting of ballots when their attorneys advise them that there are potentially winnable legal arguments to make.⁷¹ Similarly, Clinton and Jay used attorneys in 1792 much the same way as did Bush and Gore in 2000. The 1792 legal fight was confined to the jurisdiction of the canvassing committee because New York law unambiguously gave that body exclusive legal jurisdiction over the dispute, whereas Bush and Gore could litigate in multiple forums. But Jay's lawyers would have pursued their legal arguments in other venues, had they been available, and they explored ways to get around the exclusivity of the committee's jurisdiction. The use of lawyers to obtain electoral victory in both 1792 and 2000 has more similarities than differences.

Aaron Burr and Rufus King, the two U.S. senators from the state, each took the most publicly visible role for his candidate's side.⁷² They were the James Baker and Warren Christopher of their day. Burr orchestrated Clinton's legal position, as Baker did two centuries later for Bush.⁷³ King was the illustrious statesman who added gravitas to Jay's position, foreshadowing the role that Christopher was supposed to play for Gore.⁷⁴

As in 2000, Burr and King were but the pinnacles of the two respective armies of attorneys. Burr recruited an array of dignitaries to write legal memoranda in Clinton's defense. Most prominent among these was Edmund Randolph, then Attorney General of the United States. Randolph's role, thus, was a little like Ted Olson's in *Bush v. Gore*.⁷⁵

In addition to King, Troup, and Kent, Jay's team included figures forgotten

70. See generally Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1 (2007) (discussing rise of election litigation since 2000).

71. Edward B. Foley, *Close Presidential Elections: The 1880s & 1916, Disputed Elections Seminar* (Feb. 19, 2010) (unpublished manuscript) (on file with author).

72. See generally Robert Troup to Jay (May 20, 1792), *supra* note 58, at 424-27; DAVIS, *supra* note 38, at 331-57 (detailing the roles of Burr and King).

73. See DAVIS, *supra* note 38, at 333.

From the moment that Colonel Burr was driven to interfere in the controversy, he took upon himself, almost exclusively, the management of the whole case on the side of the anti-federal party. . . . Full scope was allowed for the display of those great legal talents for which he was so pre-eminently distinguished.

Id. (quoting Burr).

74. See generally JEFFREY TOOBIN, *TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION* (2001) (explaining that as events in Florida unfolded, Christopher ended up receding into the background, largely abandoning the effort to push Gore's position to Ron Klain and David Boies).

75. Olson presented the oral argument for Bush in the Supreme Court and would later serve as Bush's Solicitor General.

to most of us today, but who were prominent in their times—for example, William Lewis, who had been a federal judge in Philadelphia,⁷⁶ and John Trumbull of Connecticut, who would become a judge and had been a law partner of John Adams.⁷⁷ Alexander Hamilton also played a role in Jay's camp, although he was largely a behind-the-scenes political strategist.

A smattering of names alone does not convey the scale of the legal effort in the Republic's first major disputed election. As historian Frank Monaghan wrote in his biography of Jay, "every lawyer" in New York City, as well as some from Philadelphia, "rummaged in his books for relevant arguments."⁷⁸ At the time, Troup himself wrote to Jay that while the canvassers were deliberating, "the lawyers, who are friendly to your interests, met, and we determined to address the public on the subject of the Otsego votes and give a formal opinion upon it as lawyers."⁷⁹ The effort was well-orchestrated; Troup boasted, "We have taken a bold and decisive part . . . It threw the Clintonian lawyers also into a ferment; they went about the city to and from the place of canvassing like mad men."⁸⁰

Thus, the energy that motivated each side to win the legal dispute easily matched that of the 2000 election. In one letter to Jay, Troup complained that "Brockholts and his virtuous colleagues are stuffing the news papers with dissertations on the subject."⁸¹ But Troup added that their side was going to match the effort: "Mr. Harrison on our side has written a very ample & able refutation of all the arguments urged in these dissertations & the refutation will appear in tomorrow's paper."⁸² It was, in other words, a paper-based version of the same legal tit-for-tat that occurred on CNN in 2000.

B. Advocacy Based Not on Precedents, But Principles

A full understanding of this combined legal and public relations battle would require a review of all, or at least many, of the newspapers and pamphlets that weighed in on the issue. In the section that follows, we will consider only the arguments of Burr and King as the leaders of each team. But beforehand one general observation is appropriate. It is striking how the lawyers of the time were so evidently fashioning new American arguments to address a new American issue, which was arising for the first time in the context of the post-revolutionary, non-monarchical democratic republic that our founding fathers created for us. As

76. *Biographical Directory of Federal Judges: Lewis, William*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1395&cid=999&ctype=na&instate=na> (last visited Nov. 12, 2010).

77. *Trumbull, John*, in 27 *ENCYCLOPAEDIA BRITANNICA* 324 (11th ed. 1911).

78. FRANK MONAGHAN, *JOHN JAY* 334 (1935).

79. Robert Troup to Jay (June 10, 1792), *supra* note 58, at 429.

80. *Id.*; see also HORTON, *supra* note 64 (illustrating how Kent's papers also reveal the efforts that he, along with other Federalists lawyers, undertook to support Jay's legal position).

81. Letter from Robert Troup to John Jay (June 3, 1792) (on file at the Columbia University Butler Library, Rare Book & Manuscript Division).

82. *Id.*

lawyers, they had been trained to read and cite English precedents, and they did so. But none of those precedents was really on point for the problem at hand: ballots in an election for the chief executive of a free democratic republic. New York was a sovereign state that had declared its independence from Great Britain. To be sure, New York had very recently joined with the twelve other free and independent states of America to form “a more perfect union” at the Constitutional Convention. But electing the governor of New York was not entirely unlike trying to elect the King of England—an impossibility, of course, and thus unprecedented.

It is worth pausing to reflect on just how inexperienced Americans were in 1792 with the phenomenon of a statewide election for governor. Only Connecticut and Rhode Island had elected governors during colonial times, and these had been weak chief executives largely beholden to each colony's legislature.⁸³ The other colonies had royally appointed governors. By 1792, only New York and Massachusetts had strong governors comparable to the chief executive role of the President in the federal government. New York had been electing its governor every three years since 1777, for a total of five elections before 1792, and each of those times Clinton had won decisively.⁸⁴ Massachusetts first elected its governor in 1780, did so annually until 1920, and thus had a dozen gubernatorial elections before 1792, but it did not have a significant *disputed* gubernatorial election until 1806. Thus, New York had no relevant precedent for the Clinton-Jay battle.

New Hampshire had begun electing its governor in 1784, Pennsylvania in 1790, and Delaware in 1792.⁸⁵ That was it—a total of seven states with very limited experience with gubernatorial elections by the time of the Clinton-Jay dispute. The rest of the original thirteen states, mostly in the South, had legislatively appointed governors and would not elect them until well into the nineteenth century.⁸⁶ Thus, in the brief period between the Declaration of Independence in 1776 and the New York election of 1792, there was virtually nothing that the new nation had yet encountered to prepare it for the legal fight between Clinton and Jay before the canvassing committee. In 1782, there had been a dispute in an election for a single seat in Pennsylvania's Supreme Executive Council during the period before that state had a single-person chief

83. JOSEPH E. KALLENBACH, *THE AMERICAN CHIEF EXECUTIVE: THE PRESIDENCY AND THE GOVERNORSHIP* 15 (1966).

84. MICHAEL J. DUBIN, *UNITED STATES GUBERNATORIAL ELECTIONS, 1776-1860: THE OFFICIAL RESULTS BY STATE AND COUNTY* 160 (2003).

85. *Id.* at 26, 146, 215.

86. Here are the years in which each of these states first elected their governors:

Georgia	1825
North Carolina	1836
Maryland	1838
New Jersey	1844
Virginia	1851
South Carolina	1865

executive.⁸⁷ William Lewis, who was from Pennsylvania, drew the rest of the Jay team's attention to that precedent.⁸⁸ But that precedent was of limited utility because it involved an election for a representative from a district to a multi-member body; therefore, it resembled a legislative election much more than the statewide gubernatorial election in New York.

As for the collective experience of the new United States during the entire time that it consisted of British colonies, there was absolutely nothing for the lawyers to draw upon. A leading text on colonial elections flatly states, "The writer has found nothing which would tend to show how contests concerning the election of governor and other general officers were decided."⁸⁹ Thus, the lawyers for Clinton and Jay were without relevant precedents, and they recognized as much. Indeed, they knew that they would be creating the first major precedent for the new Republic on how to handle a disputed statewide election for chief executive. Moreover, they knew that this first important precedent would have relevance for presidential elections as well as gubernatorial ones. Reflecting on the significance of their situation in a letter to Hamilton, King worried that if the law proved inadequate to the task at hand, "what are we to expect from disputes that will arise in presidential elections?"⁹⁰

Given the absence of relevant precedent, the attorneys for Clinton and Jay turned to fundamental principles to support each side's cause. They had invoked fundamental principles in the Declaration of Independence, the Constitution, the supporting *Federalist Papers*, and in all the constitutional promulgations in the states during the revolutionary era. But now, for the first time, they needed principles for how to handle a dispute over ballots that would be decisive in the democratic election of the governor of their state. What is particularly important to us is that they were unable to settle upon a single set of principles. Their dispute was not about how to apply an agreed-upon set of principles to a particular factual situation. Instead, the Clinton and Jay supporters divided over the first principles that should govern their dispute. Moreover, their disagreement over first principles is the beginning of a basic jurisprudential debate in the field of election law that continues to this day. Indeed, it is remarkable how much the basic arguments on both sides of the Clinton-Jay dispute are essentially the same as the basic arguments of the Bush-Gore battle, as well as the Coleman-Franken fight over the 2008 U.S. Senate election in Minnesota.

C. The Arguments of Burr and King

The opinions of Aaron Burr and Rufus King have stature not merely because of their authors' prominence (both being New York's U.S. senators at the time),

87. The 1782 Pennsylvania dispute will be analyzed in the book that Steven Huefner and I are writing; additional research is necessary to develop a full understanding of that episode.

88. *See infra* note 201.

89. CORTLANDT F. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 188 (Burt Franklin ed., 1893).

90. *See infra* notes 184-86 and accompanying text.

but because their opinions were officially sought by the canvassing committee. The canvassers did so because they were from the beginning divided amongst themselves on what to do about the dispute.⁹¹ Thus, they specifically asked Senators Burr and King to address these questions:

1. Was Richard R. Smith the sheriff of the county of Otsego when he received and forwarded the ballots by his special deputy?
2. If he was not sheriff, can the votes sent by him be legally canvassed?
3. Can the joint committee canvass the votes [from the one town, Cherry Valley] when sent to them in two parcels, one contained in a box, and the other contained in a paper, or separate bundle? Or,
4. Ought they to canvass those sealed in the box, and reject the others?⁹²

In response to this request, Burr wrote that Richard Smith was definitely not a de jure sheriff because his exercising authority for that office had expired.⁹³ More importantly, Burr denied that Smith could be considered a de facto sheriff since he had openly repudiated his claim to the office and, more importantly, had openly assumed a different position (that of town supervisor) that was incompatible with service as sheriff. Burr claimed that there was no “urgent public necessity” or imperative that Smith act immediately as sheriff to send the ballots to the secretary of state.⁹⁴ The task could have waited for his replacement’s commission to arrive, or efforts could have been made to move the transmission of that commission more hastily.⁹⁵

In making this last point, Burr was alluding to political machinations in Otsego County that caused the delay in replacing Smith as sheriff. Smith was a Federalist allied with Jay and with William Cooper, the leading figure of Otsego County at the time, after whom Cooperstown is named. In a Pulitzer Prize-winning history of Cooper and his role in New York politics, historian Alan Taylor describes how Cooper connived with Smith and Jay’s running mate for lieutenant governor, Stephen Van Rensselaer, to keep the commission out of the hands of the new appointee, Benjamin Gilbert.⁹⁶

The power to appoint Smith’s successor had been in the hands of a board controlled by Clinton as the incumbent governor.⁹⁷ Consequently, Gilbert, unlike Smith, was emphatically not a Federalist, as Clinton had rejected Federalist recommendations for Smith’s successor (including Smith’s own

91. DAVIS, *supra* note 38, at 332.

92. *Id.* at 335.

93. *Id.* at 340.

94. *Id.*

95. *Id.* (“Mr. Gilbert [the replacement] was qualified in season to have discharged the duty, and, for aught is shown, his attendance, if really desired, might have been procured still earlier.”).

96. TAYLOR, *supra* note 27, at 179.

97. *Id.* at 167.

recommendation).⁹⁸ Van Rensselaer was the only Federalist on the appointment board and managed to get hold of Gilbert's commission, saying that he would be responsible for its delivery to Cooper in Otsego County, to pass it on to Gilbert himself. But Van Rensselaer purposively held onto it so that Cooper could keep Smith as acting sheriff until after the delivery of Otsego's ballots to the secretary of state, *for the specific purpose that the delivery of ballots would be in the hands of Smith, a Federalist*.⁹⁹ Indeed, Van Rensselaer wrote a letter to Cooper unabashedly expressing this plan:

I delayed sending Sheriff Gilbert's commission till after the Election lest by some irregularity your Poll, which in all probability will turn the Election should be rejected. . . . Pray detain the Commission until Smith has deputed some faithful person to deliver the box [of ballots] to the Secretary [of state].¹⁰⁰

Although Van Rensselaer expressed fear that Gilbert, as an anti-Federalist, would use his power as sheriff to swing the election to Clinton, Van Rensselaer was essentially engaged in the same impropriety as Jay's running mate. By his own admission, he was the one using his official power to manipulate the vote-counting process to make sure that a loyal partisan controlled the ballots. Moreover, Smith kept the county's ballots for five days in a safe located in a store he co-owned with Cooper, the county boss and his Federalist ally. To make matters even worse, the person that Smith picked as his deputy to deliver the ballots, Leonard Goes, was a loyal affiliate of Van Rensselaer. Historian Alan Taylor, based on his thorough review of all the available evidence, concludes that in his judgment neither Cooper nor Smith actually stuffed the ballot box for Jay while it was in his hands.¹⁰¹ (For whatever it might be worth, Smith submitted an affidavit swearing that he "did fairly, honestly, and impartially keep them in [his] possession.")¹⁰² Instead, the conspiracy to delay Gilbert's commission seems motivated, as Van Rensselaer expressed, as a kind of insurance policy or preventative measure against letting the ballots fall into the other side's hands. In Taylor's words, "[i]t is very unlikely that Cooper, Smith, or Goes tampered with the ballots, given their confidence that Otsego had produced near unanimity for Jay. They had simply taken excessive precautions to safeguard the precious ballots that would, they anticipated, carry the election."¹⁰³ Maybe so, but it sure looked horrible. It would be as if during the 2000 presidential election, Jeb Bush or Katherine Harris had intentionally delayed the replacement of the custodian of

98. *Id.* at 179.

99. *Id.*

100. TAYLOR, *supra* note 27, at 179.

101. *Id.*

102. Berkin, *supra* note 27, at 27. To refute the charge that Cooper had improper access to the ballots, Smith said that his office had been in Cooper's store for years with the implication that he really could not store them any other place and that there was nothing untoward about it. *Id.* at 28.

103. TAYLOR, *supra* note 27, at 179.

the ballots in Palm Beach County to make sure that the ballots remained in loyal Republican hands.

This background is important for evaluating Burr's argument to the canvassing committee that the formal defect in Smith's status as sheriff mattered and that there should be strict enforcement of the election code to assure the integrity of elections. "The direction of the law is positive," Burr wrote to support his conclusion that "the ballots delivered by the deputy of Mr. Smith cannot be legally canvassed."¹⁰⁴ Burr acknowledged that if the only defect were the ballots from Cherry Valley, they could be set aside, and the remainder could be counted. But the defect in Smith's status applied to all the ballots. In his view, it was not a mere formality. Rather, "considering the importance of the trust in regard of the care of the ballots and the extreme circumspection which is indicated in the law relative to elections,"¹⁰⁵ the "positive" law must be followed. As such, there was no delivery of the Otsego ballots by either a de jure or de facto sheriff, and thus the situation was one in which the "sound discretion" of the canvassing committee "would require that the whole should be rejected."¹⁰⁶ Although Burr hedged a bit by referring to the canvassing committee's authority to exercise "sound discretion" and "judgment," he had no fear that they would choose Jay over Clinton insofar as their hands were not completely tied one way or the other. Nonetheless, in stating his bottom-line conclusion, Burr suggested that the canvassing committee actually had no legal alternative to ruling in Clinton's favor on the ground that the entirety of the Otsego ballots "cannot be legally canvassed."¹⁰⁷

In his opinion to the canvassing committee, Burr did not overtly refer to Van Rensselaer's role in causing a loyal Federalist without any lawful authority to be the one to deliver the Otsego ballots. Burr was the consummate crafty politician and presumably wanted to avoid making enemies unnecessarily. He undoubtedly believed that mentioning the relevant facts of what happened in Otsego County was unnecessary and that his literalist view of election law would resonate with those Clintonians on the canvassing committee who distrusted Van Rensselaer and his Federalist co-conspirators.

By contrast, in advocating Jay's position before the canvassing committee, King premised his argument on the assumption that there had been no allegation of impropriety with respect to the ballots themselves, nor any assertion of ballot tampering while they were in Smith's custody and during their delivery to the secretary of state.¹⁰⁸ Accordingly, King emphasized that the voters should not

104. DAVIS, *supra* note 38, at 340.

105. *Id.* at 341.

106. *Id.*

107. *Id.* at 340.

108. A copy of King's statement to the canvassers is also contained in DAVIS, *supra* note 38, at 336. An original version of both statements can be found in AN IMPARTIAL STATEMENT OF THE CONTROVERSY RESPECTING THE DECISION OF THE LATE COMMITTEE OF CANVASSERS (1792). Despite its title, the "impartiality" of this pamphlet can reasonably be questioned, as it is understood that Burr orchestrated the particular selection of opinions in an effort to influence public opinion

suffer from the deficiencies in Smith's lawful status as sheriff. King thought that under a provision of the New York constitution that permitted sheriffs to hold office for up to four years, it could be argued that Smith was *de jure* sheriff until his successor actually replaced him, which had not yet occurred at the time the ballots were transmitted.¹⁰⁹

But King placed more emphasis on his contention that Smith was entitled to be considered *de facto* sheriff because by deputizing Leonard Goes, he was publicly continuing to act as sheriff "under colour of a regular appointment."¹¹⁰ He bolstered his *de facto* argument by underscoring the necessity of protecting the rights of the voters. As King put it, Smith's actions "ought to be deemed valid" because considering them so is "*necessary* to the carrying into effect the rights of suffrage of the citizens of that county."¹¹¹ Elsewhere in his opinion, King was even more emphatic in stating that the interest of the voters should be paramount in the interpretation and enforcement of the state's election laws. He insisted that "[t]he election law is intended to render effectual the constitutional right of suffrage; it should therefore be construed liberally, and the means should be in subordination to th[at] end."¹¹² Neither David Boies nor any of Gore's other lawyers could have said it better.

Jay's lawyers repeated this basic principle throughout their public campaign. Here is how one missive signed by seven New York lawyers put it: "The law on every occasion should be liberally expounded to protect and enforce the rights of suffrage as constituting the basis on which the freedom of our government depends."¹¹³ Jay's team also repeatedly complained that the other side was resting on a mere technicality, insofar as Burr and Clinton's other allies expressed

to his side of the case. See YOUNG, *supra* note 27, at 318.

109. DAVIS, *supra* note 38, at 336.

110. *Id.* at 337.

111. *Id.* (emphasis in original).

112. *Id.* at 338.

113. This statement appears in a letter signed by the seven lawyers and reprinted in AN IMPARTIAL STATEMENT, *supra* note 108, at 24. The same seven lawyers, however, published a much fuller account of their position. REASONS IN SUPPORT OF AN OPINION OFFERED TO THE PUBLIC RESPECTING THE VOTES OF OTSEGO COUNTY (1792). This pamphlet elaborated:

It [s]hould have been sufficient to have resorted to the right of suffrage as the fundamental principle of our constitution. It might undoubtedly have been argued with great force, that every act of the legislature which *directly* or *indirectly* infringes so essential a right, must be considered a nullity; that every act of the legislature which directs the mode of exercising this right, must be liberally expounded; that, for the preservation of it, wherever the positive law have become impracticable from *unforeseen accidents*, the people are not to suffer, their votes are to be received, and the first offices of the state to be conferred by the will of the majority, the only legitimate source of power.

For these principles we entertain the highest respect. They are derived from an authority superior to any in our books of reports—the authority of the constitution. *Id.* at 4 (emphases in original).

only the argument that Smith's defective status as sheriff was enough to toss out the ballots (and did not raise the underlying facts surrounding Van Rensselaer's impropriety). "A law quibble" is what the Federalists called the Clintonian position.¹¹⁴

D. The Great Debate Between Strict and Lenient Enforcement

From an analysis of the opinions that Burr and King delivered to the canvassing committee, it is easy to see that each side quickly staked out opposing positions on what would become the basic jurisprudential debate in vote-counting disputes throughout the history of election law in the United States. The Clinton team took the view that the New York statute must be enforced strictly in order to protect the integrity of the electoral process. The Jay team countered that the election statute should be enforced leniently to safeguard the right to vote.

One can see this great jurisprudential debate arising in 1792 even more clearly if one examines not just the opinions of Burr and King, but also other especially lucid expressions of the argument from each side. On Clinton's side, there was the opinion of Edmund Randolph, the first Attorney General of the United States. He made Burr's integrity point much more forcefully:

The very sacredness of the right of suffrage exacts a degree of rigor, in insisting on those rules which are designed to be the outworks of its defence. In proportion to its magnitude, is it in the hazard of being abused, since the temptation is more violent. With this belief the legislature called upon the sheriff *officially* to be the fiduciary of the ballots. Through this pure channel, delineated by law, ought they, therefore, to come—Otherwise, subtilty [sic] and refinement may, by degrees, reduce this security against fraud to a mere nullity.¹¹⁵

Randolph, like Jay's supporters, invoked the right to vote. Indeed, he called it sacred. But he claimed that its protection requires the *rigorous* enforcement of the rules for counting and canvassing these votes, including the reporting of local results to the relevant statewide office. Randolph explicitly raised the specter of potential "fraud" in this vote-counting process. Like Burr, however, he did not need to allege specifically that fraud had occurred in Otsego County. Instead, Randolph made the prophylactic point that strict enforcement of these vote-counting rules as a general practice reduces the risk of an election tainted by fraud.

Now contrast Randolph's forceful defense of electoral integrity with a legal opinion supporting Jay's position written by John Trumbull, John Adams's former law partner, who at the time was serving in Connecticut's legislature:

The existence of all representative republics is founded on the rights of

114. See *infra* note 227. Kent also used the phrase "law quibbles" to refer to the Clintonian position. See Letter from James Kent to Moss Kent, Jr. (June 15, 1792) (PDF of original manuscript on file with author).

115. AN IMPARTIAL STATEMENT, *supra* note 108, at 37 (emphasis in original).

suffrage. This right is fully established in the Constitution of the State of New-York. The Legislature have undoubtedly authority to pass laws to guard this right, but not to destroy it; to regulate, but not to prevent the exercise of it; to point out the proper mode in which returns shall be made; but not to devise modes that may be impracticable.

Had the Legislature directly enacted that the votes of Otsego [and the other two] Counties should not be canvassed, every person would consider this act unconstitutional and void.

What the Legislature cannot do by direct statute, they certainly cannot do by construction and implication.

If it therefore becomes impossible in any case, that the statute relative to the return of ballots should literally be complied with, I should consider the law in that instance void; and am of the opinion that in such case all votes fairly given and honestly returned, ought to be canvassed; for the rights of the free electors ought always to be preferred to the mere forms of law.¹¹⁶

Trumbull went on to argue, “Had the Sheriff of any County died before the day of the Election, and no new Sheriff be appointed before the day of return, in which case the County would clearly be without a Sheriff, I should consider a return by the [poll] Inspectors as valid.”¹¹⁷

John Trumbull said that the Otsego ballots should be considered in the same category; therefore, the expiration of Smith’s commission should not interfere with their being counted.¹¹⁸ What is particularly striking about Trumbull’s argument is that he considered the fundamental right to vote not merely an abstract philosophical idea, but a constitutional requirement that is enforceable as constitutional law which supersedes and voids contrary statutory law (in the way that *Marbury v. Madison* would articulate a decade later).¹¹⁹ Furthermore, Trumbull considered the constitutional status of the right to vote as requiring flexible enforcement of statutory rules regarding the voting process when flexibility is necessary to secure the underlying fundamental constitutional right. Thus, from the same basic right to vote in a constitutional republic, Trumbull

116. Trumbull’s statement is contained in a Federalist pamphlet prepared to counter the one orchestrated by Burr. This Federalist counter-pamphlet was somewhat ironically entitled AN APPENDIX TO THE IMPARTIAL STATEMENT OF THE CONTROVERSY RESPECTING THE DECISION OF THE LATE COMMITTEE OF CANVASSERS (1792). This passage from Trumbull is on page 12 of the pamphlet.

117. *Id.* The separate pamphlet of the seven New York lawyers made a similar point: “If the sheriff should die, or refuse to receive the ballots, the people . . . ought not to be without a remedy.” REASONS IN SUPPORT, *supra* note 113, at 5.

118. *Id.* at 13.

119. See *Marbury v. Madison*, 5 U.S. 137 (1803). This same point can be made about the statement of the seven New York lawyers, who were emphatic in saying that “the right of suffrage” comes from the constitution and thus supersedes any contrary statutory law. See REASONS IN SUPPORT, *supra* note 113, at 4.

reasoned to exactly the opposite conclusion from Randolph regarding strict versus lenient enforcement of the statutory rule on delivery of ballots from county to secretary of state.

The debate between Randolph and Trumbull did not concern facts on the ground in Otsego County or even the details about the nature of the particular election statute. Instead, their debate was much more fundamental. It was simply whether, as a matter of general principle, it is better to protect the right of free citizens to participate in electoral democracy by strict or lenient enforcement of statutes that regulate the counting and canvassing of ballots.

This elemental debate between Randolph and Trumbull is the same as the one that occurred between Bush and Gore in 2000 and between the candidates in Minnesota's 2008 U.S. Senate election—as well as any number of other examples throughout U.S. history.¹²⁰ Bush's team, of course, was the one to argue for strict enforcement in 2000. For example, the Bush team argued that “hanging chads” should not count when the rules required voters to remove the chads completely. Conversely, Gore's team called for the counting of these hanging chads in order to protect the voters from disenfranchisement. In the lawsuit over Minnesota's 2008 U.S. Senate election, it was Franken who argued for strict enforcement of the statutes concerning the submission of absentee ballots, whereas Coleman urged lenient enforcement and disregarding of “mere technicalities” so as to avoid the disenfranchisement of well-intentioned and otherwise eligible absentee voters.¹²¹

Thus, the terrain on which this basic jurisprudential battle is fought changes from one election to another. In 2000, it was chads on punch-card ballots. In 2008, it was information that voters were required to fill out on the outer envelopes when submitting absentee ballots.¹²² And in 1792, it was the rules for transmitting ballots from each county to the secretary of state. In each instance, the circumstances are somewhat different with potential policy implications. In the case of the hanging chads, the voters were arguably in a position to protect themselves, as Justice O'Connor observed at the oral argument in *Bush v. Gore*.¹²³

120. In 2010, this same basic debate is playing out again in Alaska in the dispute over misspelled write-in ballots for Lisa Murkowski. Her opponent, Joe Miller, advocates strict enforcement of the state statute that requires voters to complete write-in names as they appear in the declaration of candidacy. Murkowski, conversely, seeks a more lenient implementation of the statutory rule in order to avoid disenfranchising voters who undoubtedly intended to cast their ballot for her. See Kim Murphy, *Alaska Senate Race Could Hinge on a Legal Wrangle*, L.A. TIMES (Nov. 11, 2010), <http://www.latimes.com/news/nationworld/nation/la-na-alaska-senate-20101112,0,1891443.story>.

121. Edward B. Foley, *How Fair Can Be Faster—and Other Lessons of Coleman v. Franken* (2010) (unpublished manuscript) (on file with author).

122. In the latest incarnation of this basic dispute, unfolding as this article is being completed, the particular subject matter is the spelling of a write-in candidate's name. See Becky Bohrer, *Murkowski Camp Cries Foul in Alaska Ballot Count*, ASSOCIATED PRESS (Nov. 11, 2010), <http://www.chron.com/disp/story.mpl/ap/nation/7290902.html>.

123. Transcript of Oral Argument at 57, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949).

In the 2008 dispute over Minnesota's absentee ballots, the situation was mixed and complicated. In some instances, the voters themselves could have filled out the envelopes properly, but other voters received the wrong envelopes from their local election officials and thus could not help but submit their absentee ballots incorrectly.¹²⁴ In 1792, none of the voters in Otsego County were in a position to protect themselves from the fact that Smith was no longer the legal sheriff.

But the relative "culpability" of the voters is only one factor to consider in the debate between strict and lenient enforcement of vote-counting statutes. For example, ballot boxes with broken or missing seals might be entirely the fault of election officials and not innocent voters. And yet one might take the position (as some courts historically have) that the ballots in these tampered boxes cannot be counted, even though discarding them obviously disenfranchises the innocent voters in that particular election. It is a question of balancing the risk to the integrity of the election with the right to vote. In some contexts, the balance might weigh in favor of strict enforcement of the relevant election statute—as the Clintonians were essentially arguing in 1792.

Despite the difference in particular contexts between 1792 and 2000 (or 2008), it is remarkable how little the jurisprudential debate has changed over two centuries.¹²⁵ One can understand that when this debate emerged in 1792, it might have been conducted without nuance or special sensitivity to the particular conditions relevant to weighing the balance between integrity-protection and disenfranchisement-avoidance. After all, in 1792 the jurisprudence of American election law was in its earliest stage of development. But by the time the same debate occurred in the twenty-first century, considerable sophistication and refinement should have been expected, such that the discussion of whether to count hanging chads would be considered distinguishable from the problem of flaws in ballot-box delivery. Yet there was surprisingly little advancement in the argument between strict and lenient enforcement from 1792 to 2000 (or 2008). What the lawyers for Bush and Gore said about protecting the integrity of the electoral process or avoiding the disenfranchisement of voters was the same as what Randolph and Trumbull said in 1792.¹²⁶ The twenty-first century debate between strict and lenient enforcement remains largely generic rather than context-specific and seems to be stuck in essentially the same basic place that it was when the debate began in 1792. The fact that our nation's legal system has not been able to advance the debate beyond where it began, over two hundred years ago, is itself significant.¹²⁷

124. See Foley, *supra* note 121. In the Alaska write-in situation, by contrast, the voters could have protected themselves by spelling "Murkowski" correctly (a task arguably easier than even dislodging chads from punch-card ballots when the machines were already clogged with chads from previous ballots).

125. For an effort to move the debate forward, see Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

126. For a summary of the arguments in 2000, see TOOBIN, *supra* note 74.

127. In recognition of this problem, the American Law Institute has recently authorized a project to examine whether improvement might be made in this regard. The author of this article

E. The Canvassing Committee's Decision

The canvassing committee voted 7-4 in favor of excluding the Otsego ballots and thus certified Clinton as the winner.¹²⁸ (One member of the committee inexplicably was absent.) This vote, as Troup had feared, was essentially along party lines. The Federalist position picked up one more vote than the “three friends to Jay” that Kent had identified.¹²⁹ Interestingly, the fourth pro-Jay vote came from state senator Joshua Sands, who would later run for Congress as a Federalist.¹³⁰ Therefore, if Sands actually was more Federalist than Clintonian when he cast his canvassing committee vote, the 7-4 split could be viewed as 100% partisan in its division. Even so, the five “devoted Clintonians” from the assembly, together with their two faithful partisans from the Senate, controlled the canvassing committee’s outcome.

The committee’s majority and dissenters issued written opinions in support of their respective positions.¹³¹ Not surprisingly, these opinions echoed the arguments made to the committee by each side’s lawyers. Like judges embracing arguments of opposing briefs, the committee’s majority adopted the “integrity” position advocated by Burr and Randolph, whereas the dissenters relied on the same “right to vote” argument as King and Trumbull.

The majority explained its position as to why the statute regarding delivery of the ballots to the secretary of state by a county sheriff must be strictly enforced by refusing to count ballots transmitted in violation of this statutory requirement. Otherwise, “a provision intended as security against impositions would be an engine to promote them.”¹³² They could not accept the contrary proposition, which they believed would obligate them to “canvass and estimate votes, however fraudulently obtained” by any person claiming to be sheriff “though, it [s]hould be evident to them, at the [s]ame time, that he was *not the sheriff*.”¹³³

In raising the possibility of fraud, the majority opinion—in sharp contrast to the submissions by Burr and Randolph on behalf of Clinton—explicitly invoked the ugly facts in Otsego County surrounding the delay of Gilbert’s commission to replace Smith as sheriff. Stating that they had learned the relevant facts from the secretary of state, the majority emphasized that Smith had stored the ballot

has agreed to serve as the reporter for this new ALI project.

128. TAYLOR, *supra* note 27, at 180.

129. See KENT, *supra* note 62. The 7-4 vote can be seen from the original opinions issued by the canvassers. See also YOUNG, *supra* note 27, at 309-10 (describing the 7-4 vote and citing the original documents).

130. THE PAPERS OF ALEXANDER HAMILTON, VOLUME XXV: JULY 1800-APRIL 1802, at 611 n.1 (Harold C. Syrett ed., 1977).

131. See AN IMPARTIAL STATEMENT, *supra* note 108, at 11-12 (official order certifying the election for Clinton), 12-14 (dissenting opinions of Jones et al.), 14-15 (dissent of Joshua Sands), 15-20 (majority opinion).

132. *Id.* at 17.

133. *Id.* (emphasis in original).

box in Cooper's house at the same time Cooper was holding onto Gilbert's commission. "It is also to be fairly inferred," the majority reasoned, "that had proper measures been taken to give notice to Mr. Gilbert, he would forthwith have qualified [and] undertaken the execution of the office."¹³⁴ Given the risk of "*mischiefs*" (ballot tampering by Smith and Copper), the majority asserted, "[i]t did not seem possible . . . by any principle of law, by any latitude of construction, to canvass and estimate the ballots contained in the box thus circumstanced."¹³⁵ Thus, in explaining its view as to why protecting the integrity of the electoral process required strict enforcement of the statute, the majority opinion made the point concretely, whereas Burr and Randolph had not.

The majority again invoked the factual circumstances of the Otsego ballots in summing up its conclusion not to count them:

These facts with other suggestions of unfair practices, rendered the conduct of the Otsego election justly liable to suspicion; and the committee were constrained to conclude, that the usurpation of authority, by Richard R. Smith, was wanton and unnecessary, and proceeded from no motive connected with the preservation of the rights of the people, or the freedom *and purity of elections*.¹³⁶

The majority finished by declaring that "freedom of elections, and the security against frauds" were "general principles" that applied to this situation, "compell[ing] them to reject the votes."¹³⁷ Thus, members of the committee majority were entirely aware that they were relying on what they saw as fundamental principles in reaching this first important decision, thus establishing the first major American precedent concerning the resolution of a disputed statewide election.

The dissenters on the canvassing committee also relied on their perception of first principles. There were two dissenting opinions—one by the "three friends to Jay" identified by Kent and the other by Joshua Sands.¹³⁸ Both dissents made the same substantive point, ultimately invoking, as King and Trumbull did, the fundamental right to vote as the reason for lenient enforcement of statutory rules regulating the counting of ballots. The main dissent argued, "in all doubtful cases, the committee ought, in our opinion, to decide in favour of votes given by citizens, lest by too nice and critical an exposition of the law, the rights of suffrage be rendered nugatory."¹³⁹ Similarly, Sands found that "in all doubtful cases, I conceive the committee ought to decide in favour of the votes given by the citizens."¹⁴⁰

134. *Id.* at 19.

135. *Id.* (emphasis in original).

136. *Id.* (emphasis in original).

137. *Id.* at 20.

138. Perhaps the fact that Sands wrote separately indicates that he had not yet entirely aligned himself with the Federalist party.

139. RANDOLPH, *supra* note 108, at 13.

140. *Id.* at 15.

The two dissents also argued that Smith could be considered at least a de facto, if not de jure, sheriff for the purpose of the statutory rule that the sheriff transmit the ballots to the secretary of state. Otherwise, as the main dissent put it, the county would have been without any person to act in that office, and that was a proposition “too mischievous to be established by a doubtful construction of law.”¹⁴¹ Neither dissent, however, addressed any of the distasteful facts surrounding the delay of Gilbert’s commission or the storing of the ballots at Cooper’s house, upon which the majority opinion so emphatically relied in suggesting the possibility of fraud. Rather, the dissents were content to repeat that at most it was a “doubtful case,” implying that neither the majority nor anyone else had come forth with any direct evidence of ballot tampering by the Federalists in Otsego County.¹⁴² Classifying it as a “doubtful case,” the dissents then fell back upon the basic principle that the enforcement of election laws should err on the side of counting, rather than discarding, the ballots of eligible voters.¹⁴³

In hindsight, it seems fair to say that there were powerful arguments on both sides of the divided canvassing committee. Jabez Hammond, an early and influential historian in New York, reflected on the committee’s decision sixty years after it occurred. Hammond himself was a Democrat who served both as a state judge and member of Congress.¹⁴⁴ Still, known to be scrupulously nonpartisan in his historical judgments, Hammond saw the dissenters on the canvassing committee as having the better of the argument:

To my mind, the reasons assigned by Mr. King and by the minority of the committee in their protest, are strong and convincing. . . . The right of suffrage is a sacred and invaluable right which belongs to the elector, and of which he cannot be divested. . . . And he ought not and cannot be deprived of the effect of it, either by the non-feasance or misfeasance of the agent to whom the law commits the custody and care of his ballot.¹⁴⁵

Hammond’s history, however, does not directly address the concern that fraud might have tainted the Otsego ballots. Subsequent historians have been more ambivalent in their assessment. Although Alan Taylor, in his prizewinning account of Cooperstown, reached the conclusion that the Federalists probably did not manipulate the counting of votes from Otsego, he acknowledged that their unsavory actions raised a legitimate concern that they might have.¹⁴⁶ Likewise,

141. *Id.* at 13.

142. *Id.* at 13-15.

143. *Id.*

144. He also happened to live in Otsego County, though well after 1792. Born in Massachusetts, and only fourteen at the time of the disputed Clinton-Jay election, Hammond practiced law in Vermont before he eventually settled in New York. *See Hammond, Jabez Delno* [sic], BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000127> (last visited Nov. 12, 2010).

145. HAMMOND, *supra* note 27, at 68.

146. TAYLOR, *supra* note 27, at 179.

Alfred Young has observed that the Republicans had a valid point insofar as they believed that “elections laws had to be strictly observed lest precedents dangerous to free elections be established.”¹⁴⁷

Even if there were meritorious arguments on both sides of the case, one can never know the extent to which the members of the canvassing committee were motivated by the merits of the position they took or by the simple fact that taking that position favored the candidate whom they wanted to win for partisan reasons.¹⁴⁸ It is the same problem that plagued the 5-4 Supreme Court decision in *Bush v. Gore*. One could claim that all the Justices, like all the canvassing committee members, were motivated by a sincere effort to reach the right decision as a matter of law, without regard to partisan consideration. But the coincidence between the Justices’ respective views of the law and their respective partisan leanings inevitably made the 5-4 split suspicious in 2000, just as the 7-4 split in 1792 was suspect for equivalent reasons.

There would have been a way to avoid this problem in 1792, as James Kent understood. If the canvassing committee had been constructed to be equally balanced between the two sides of the controversy, then its decision would have been nonpartisan whichever way it ultimately fell. A genuinely neutral and impartial decisionmaker could embrace the merits of either the “integrity” or “right to vote” position without the decision being inevitably tainted with the suspicion that it was the product of bias rather than merit. But New York in 1792 did not have this kind of evenhanded and impartial tribunal for its disputed gubernatorial election, and neither would the United States in 2000 for its presidential election.

III. THE POLITICAL MAELSTROM THAT FOLLOWED

After the canvassing committee announced its decision, there was great public agitation, including threats of violence. This talk of the “bayonet,” which is how Alexander Hamilton described the commotion,¹⁴⁹ was in keeping with the character of this generation of revolutionaries who were not afraid of extralegal means to secure their fundamental right to a representative democracy.¹⁵⁰

147. YOUNG, *supra* note 27, at 305.

148. One historian of New York politics, writing in 1906, was particularly harsh in attributing partisanship as the motivating force behind the canvassing committee’s decision: “This was the first vicious partisan precedent established in the Empire State. It has had many successors . . . but none bolder and more harmful, or ruder and more outrageously wrong.” DEALVA STANWOOD ALEXANDER, 1 A POLITICAL HISTORY OF THE STATE OF NEW YORK 56 (Ira J. Friedman, Inc. 1969) (1909). This historian saw nothing of consequence in Cooper’s conduct in Otsego: “No ballots were missing, no seals were broken, nor had their delivery been delayed for a moment.” *Id.* at 57. Alexander, however, is hardly the only historian to take Jay’s side of the controversy. See, e.g., SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 52 (2005) (characterizing Clinton’s victory over Jay as resulting “only because of flagrant voter fraud”).

149. See *infra* note 172 and accompanying text.

150. The Declaration of Independence, of course, most famously asserts the “right of the

Moreover, it was not just the revolt against England that was revolutionary. The Constitution itself was an unauthorized break from the legal regime of the Articles of Confederation. As such, the great question for Jay and his supporters was whether to take to the streets and demand a new constitutional convention for the state of New York that would undo what they viewed as the partisan atrocity committed by the canvassing committee.¹⁵¹

A. Public Agitation Against the Canvassing Committee's Decision

As upset as Jay's supporters were about the canvassing committee's decision itself, they were perhaps even more enraged by the fact that the committee burned the Otsego ballots as soon as it decided not to count them. To be sure, as we have seen, the committee was entirely within its rights under the relevant statute to do so. Still, the Federalists were outraged that they could never prove exactly how many votes Jay would have won had he not been robbed of what they viewed as his rightful votes from Otsego County.¹⁵² One Jay supporter wrote on the day of the canvassing committee's decision, "We have *as it were* two chief magistrates—one, the governor, by the voice of God, and the people, and another the governor of Mr. Burr and the canvassers."¹⁵³ This author added that "[the canvassers] ought to be impeached."¹⁵⁴ Also on the day of the canvassing committee's decision, Jay's wife wrote to him, "There is such a ferment in the

People to alter or abolish" government, through the use of force if necessary, if government has wrongfully "become destructive" of the "unalienable Rights to Life, Liberty, and the pursuit of Happiness."

151. It is noteworthy that Jay and his supporters did not attempt to go to court to undo the determination of the canvassing committee. To be sure, that avenue seemed unequivocally closed by the statute, which explicitly said that the canvassing committee's "judgment and determination shall in all cases be binding and conclusive." 1787 N.Y. Laws 34. But today, were there a similar statute that purported to block judicial review of the vote-counting process, lawyers nonetheless would seriously consider possible arguments that might offer an end-run around even the most clear-cut statutory preclusion. As we know from the current habeas cases involving the Guantanamo detainees, if a question of constitutional rights is truly fundamental, there is almost always a way for a court to find some basis for jurisdiction to safeguard those fundamental rights. *See, e.g., Boumediene v. Bush*, 553 U.S. 723 (2008) (invalidating Congress's suspension of habeas corpus). To be sure, this is not to suggest that the integrity of the result of a gubernatorial (or even presidential) election is as important as preventing torture and indefinite detention in solitary confinement. Judgments reasonably may vary as to the hierarchy of "fundamentality" among various fundamental constitutional rights. Nevertheless, today's election lawyers certainly would explore the possibility of pursuing so-called "extraordinary writs" as a means of judicial relief before concluding that it would be a waste of time and effort to do so. From what one can discern from the historical record regarding the election of 1792, apart from a tentative suggestion in a single letter, *supra* note 54, Jay and his supporters never considered pursuing a judicial option.

152. *See, e.g.,* N.Y. DAILY ADVER., *infra* note 244 (Kent's speech).

153. Berkin, *supra* note 27, at 24 (emphasis in original).

154. *Id.*

City that it is difficult to say what will be the consequences.”¹⁵⁵ Hammond, in his early history of New York politics, reflected that “the state seemed menaced with the ascendancy of anarchy and utter confusion.”¹⁵⁶

There were also marches, including those by local militia supporting Clinton. Cooper “hinted at armed rebellion,”¹⁵⁷ declaring that “a Face of Flint ought to be set against the insult.”¹⁵⁸ Ebenezer Foote, another Federalist, argued even more strongly that “Clinton must quit the Chair, or blood must and will be shed—and if no innocent blood was to flow, I would not care how soon it began to run.”¹⁵⁹

Some blood did flow. There were fist fights and club battles between Jay and Clinton supporters at local taverns. At one skirmish, pistol shots were exchanged between two partisans. Fortunately, both shots missed. One of the canvassers challenged Van Rensselaer to a duel after the candidate spoke some hot words. Both showed up at the appointed hour, but Van Rensselaer offered a last minute apology, which was accepted.¹⁶⁰

Much of the popular foment was directed towards political action that might undo the decision. Petitions were signed to convince the legislature to overturn the canvassing committee,¹⁶¹ even though the statute gave the legislature no more right to do that than a court. One Federalist writer wrote, “I sincerely hope violent measures will not become necessary,” but he warned that “the independence of this country has been purchased at too dear a price” to let the decision stand.¹⁶² There was also a Federalist plan to ask the legislature to call a convention for the purpose of overturning the canvassing committee, in recognition that the legislature lacked the authority itself.

Frank Monaghan, the historian writing in the early twentieth century, quotes a proclamation written at the house of a shoemaker in Herkimer County. Monaghan characterizes this proclamation as “the most remarkable document of this campaign of protest” because of its explicit invocation of the Declaration of Independence as authority for repudiating the canvassing committee’s decision.¹⁶³ The body’s decision was unlawful, the proclamation reasoned, because it repudiated the fundamental will of the majority of the people, who in their self-preservation were entitled to take “every laudable exertion within the verge of our strength and ability” to remove Clinton from office.¹⁶⁴ Thus, average citizens had no difficulty relying on the “first principles” underlying the founding of the Republic itself as sufficient justification for measures to remedy what they saw as the canvassing committee’s usurpation of the right to self-government that they

155. TAYLOR, *supra* note 27, at 180.

156. HAMMOND, *supra* note 27, at 70.

157. TAYLOR, *supra* note 27, at 181.

158. *Id.*

159. YOUNG, *supra* note 27, at 311.

160. TAYLOR, *supra* note 27, at 181-82.

161. YOUNG, *supra* note 27, at 310.

162. Berkin, *supra* note 27, at 24.

163. MONAGHAN, *supra* note 78, at 340.

164. *Id.* at 336.

had fought so recently (and so hard) to secure.¹⁶⁵ And while this particular proclamation may have been exemplary, it by no means stood alone. Other voices also resorted to revolutionary first principles to defend unrest against the theft of their democracy.

B. The Conduct of the Losing Candidate

Clinton was inaugurated for his new term on July 1.¹⁶⁶ The period between the canvassing committee's decision in the middle of June and the end of July set the stage for the decision that Jay as candidate, and the Federalists as his party, made on how they were going to respond to what they perceived as the theft of Jay's victory. Jay, as Chief Justice of the United States, was riding circuit in New England at the time. He heard news of the canvassing decision on June 18 in Hartford, Connecticut.¹⁶⁷ Appearing to take the news calmly, he wrote to his wife,

The reflection that the majority of the electors were for me, is a pleasing one; that injustice has taken place does not surprise me . . . Having nothing to reproach myself with in relation to this event, it shall neither discompose my temper nor postpone my sleep. A few years will put us all in the dust, and it will then be of more importance to me to have governed myself, than to have governed the State.¹⁶⁸

This letter signals an important theme: better to be magnanimous in defeat, because there will be another election in a few years when political fortunes may turn. As we shall see, Alexander Hamilton became a leading proponent of this view among Jay's advisers.

Meanwhile, back in New York, Jay's wife wrote her husband on June 12: "King says he thinks Clinton as lawfully Governor of Connecticut as of New York but he knows of no redress."¹⁶⁹ This assertion shows the inability of Jay's team to develop a judicial recourse.

On June 15, in *The Daily Advertiser*, "Gracchus" "proposed [that] meetings of electors in all the counties and committees of correspondence should be arranged."¹⁷⁰ Gracchus asserted that if "the ordinary powers of legislation, should prove an incompetent remedy for rescuing the people from a usurped authority; the same powers which established the constitution, must in the last resort

165. *Id.*

166. HAMMOND, *supra* note 27, at 71.

167. MONAGHAN, *supra* note 78, at 336.

168. Letter from John Jay to Sarah Livingston Jay, in WILLIAM JAY, 1 THE LIFE OF JOHN JAY 289 (1833).

169. Letter from Sarah Livingston Jay to John Jay (June 12, 1792), in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 58, at 433.

170. THE PAPERS OF ALEXANDER HAMILTON, VOLUME XI: FEBRUARY-JUNE 1792, at 591 n.3 (Harold C. Syrett ed., 1966).

convene for its preservation.”¹⁷¹

On June 28, Hamilton, while Secretary of the Treasury, wrote to King,

I have not, as you well may imagine, been inattentive to your political squabble. I believe you are right (though I have not accurately examined) but I am not without apprehension that a ferment may be raised which may not be allayed when you wish it. Tis not to be forgotten that the opposers of Clinton are the real friends to order [and] good Government, and it will ill become them to give an example of the contrary.

Some folks are talking of Conventions and the Bayonet. But the case will justify neither a resort to first principles nor to violence. Some amendments of your election law and possibly the impeachment of some of the Canvassers who have given proofs of *premediated* partiality will be very well—and it will answer good purposes to keep alive within proper bounds the public indignation. But beware of extremes!

There appear to be no *definite declared* objects of the movements on foot which renders them the more Ticklish. What *can* you do? What do you *expect* to effect?¹⁷²

Here Hamilton was acting in his role as a somewhat detached adviser. True to character, he was being prudent and cautious. He viewed the Federalists as the party of conservatism, and despite its shared revolutionary heritage with the Democratic-Republicans, he wanted to distance the Federalists from revolutionary means, especially in this instance. He was not averse to a little rabble-rousing for partisan gain, but he did not want it to get too far out of hand. Although he did not say why, he did not believe the facts regarding the theft of Jay’s victory warranted the kind of extreme measures that some Federalists were advocating.

As Jay was traveling back to New York City, he stopped in the town of Lansingburgh, New York (a little north of Albany). He was received by a committee of citizens whose public address in support of him expressed their “sincere regret and resentment at the palpable prostitution of those principles of virtue, patriotism, and duty, which has been displayed by a majority of the canvassing committee, in the wanton violation of our most sacred and inestimable privileges, in arbitrarily disfranchising whole towns and counties of their suffrages.”¹⁷³ They added that “though abuse of power may for a time deprive you and the citizens of their right, we trust the sacred flame of liberty is not far extinguished in the bosoms of Americans as tamely to submit to wear the

171. *Id.*

172. Letter from Alexander Hamilton to Rufus King (June 28, 1792), in HAMILTON, *supra* note 170, at 588-89 (emphases in original). On this letter, King notes, “I have had not agency in promoting the measures adopted respecting the decision of the [c]anvassers. I have however felt the utmost indignation.” *Id.* at 591 n.3.

173. Lansingburgh Committee to Jay, in 3 JAY, *supra* note 58, at 436.

shackles of slavery, without at least a struggle to shake them off.”¹⁷⁴ Thus, by their words, these citizens appeared to be urging Jay to take more aggressive measures to defend his claim of victory.

Jay, however, responded cautiously:

[E]very event is to be regretted that tends to introduce discord and complaint. Circumstanced as I am in relation to the one you mention, I find myself restrained by considerations of delicacy from particular remarks.

The people of the State know the value of their rights, and there is reason to hope that the efforts of every virtuous citizen to assert and secure them will be no less distinguished by temper and moderation, than by constancy and zeal.¹⁷⁵

On July 2, Jay passed through Albany, where another committee of citizens made a similar address:

[A] majority of the Committee of Canvassers, by an unwarrantable stretch of power, rejected the votes of several whole Counties, in direct violation of law, justice, precedent, and the most essential principles of our constitution—their object, as it most glaringly appears, being to secure an administration favourable to their views, in opposition to the voice of a majority of the people.¹⁷⁶

This committee was prepared to exercise restraint, but only up to a point:

[W]e shall wait with a firm and cool deliberation for Legislative interposition to afford or procure redress. . . . [C]ould it possibly happen, that we meet with disappointment, the people must proceed to determine, whether a Chief Magistrate is to be elected by their voice, or by a Committee, the majority of whom were selected and named by a party; and those who may be the cause, must be answerable for the consequences that may follow.¹⁷⁷

Jay's reply to this group hinted a little more at a desire to find some recourse:

[P]rudence dictates a great degree of delicacy and reserve; but there are no considerations which ought to restrain me from expressing my ardent wishes that the important question you mention may be brought to a decision which all that mature reflection as well as manly constancy which its connection with the rights of freemen demands; with all that temper which self-respect requires; and with all that regard to conciliation, benevolence, and good neighbourhood which patriotism

174. *Id.*

175. *Id.* at 437.

176. *Id.* at 438.

177. *Id.* at 439.

prescribes.¹⁷⁸

This speech indicates that he was hedging just enough in case sufficient support developed for more drastic measures to install him in office. Still, he wished to remain noncommittal.

Jay arrived home in New York City on July 10, where he was greeted by much larger crowds with sentiments similar to those he received upstate in Lansingburgh and Albany.¹⁷⁹ His local welcoming committee declared,

This wanton and daring attack upon the invaluable rights of suffrage has excited a serious alarm amongst the electors of the State, and united them in measures to obtain redress. In the pursuit of an object so interesting we shall like freemen act with moderation and order; but at the same time with zeal and perseverance. Whilst we respect the laws, we respect ourselves and our rights and feel the strongest obligations to assert and maintain them.¹⁸⁰

Arguably, receiving this same message in Manhattan was even more significant, given the city's greater population and role as a center of commerce. But Jay already appeared to be backing away from the precipice when he replied to his supporters three days later:

Such is our Constitution, and such are the means of preserving order and good government, with which we are blessed, that, while our citizens remain virtuous, free, and enlightened, few political evils can occur, for which remedies perfectly effectual, and yet perfectly consistent with a general tranquility cannot be found and applied.

I derive great satisfaction from the hope and expectation that the event which at present excites so much alarm and anxiety, will give occasion only to such measures as patriotism may direct and justify; and that the vigilance and wisdom of the people will always afford to their rights that protection for which other countries, less informed, have often too precipitately resorted to violence and commotion.

In questions touching our constitutional privileges, all the citizens are equally interested; and the social duties call upon us to unite in discussing those questions with candour and temper, in deciding them with circumspection and impartiality, and in maintaining the equal rights of all with constancy and fortitude.

They who do what they have a right to do, give no cause of offence; and therefore every consideration of propriety forbids that differences in opinion respecting candidates should suspend or interrupt that mutual good-humour and benevolence which harmonizes society, and softens

178. *Id.* at 440.

179. *See, e.g.*, STAHR, *supra* note 28, at 288 (describing "hundreds" of supporters who greeted Jay on his arrival on Harlem Heights in upper Manhattan).

180. Letter from Nicholas Cruger and the New York Committee to Jay (July 13, 1792), in 3 JAY, *supra* note 58, at 442.

the asperities incident to human life and human affairs.

By those free and independence electors who have given me their suffrages, I esteem myself honoured; for the virtuous, who withheld that mark of preference, I retain, and ought to retain, my former respect and good-will.¹⁸¹

These remarks sound like a concession speech. Jay spoke clearly against violence and for reconciliation. Yet this speech did not close the door entirely to the pursuit of additional measures. In the back of Jay's mind, he still may have been hoping that the idea of a new constitutional convention, which his Federalist friends were exploring, might work.

C. The Consideration of a New Constitutional Convention

Ironically, John Jay himself was the principal author of New York State's first constitution in 1777, shortly after the Declaration of Independence.¹⁸² He was proud of his handiwork, but it clearly failed him as a candidate for governor in 1792. The state constitution's failings were not limited to the fact that its authors did not anticipate the development of a two-party rivalry that would infect the gubernatorial election and, more importantly, institutions of government like the canvassing committee. Even worse, the New York Constitution of 1777 contained no mechanism for any constitutional amendments.¹⁸³

Because Clinton's supporters controlled the state legislature at the time, the Federalists were in no position to get the legislature to adopt any statutory measures to undo the canvassing committee's ruling. Nor would the legislature be inclined to call for a new constitutional convention to replace or amend the 1777 constitution for the particular purpose of nullifying Clinton's re-inauguration based on the committee's divided decision. Thus, if the Federalists were to have any hope of calling a new constitutional convention for this purpose, they needed to figure out how to do so through entirely extralegal means, outside the parameters of the 1777 constitution itself. This idea was the one the Federalists focused on while Jay was traveling back to New York City from riding circuit in New England.

On July 10, the same day that Jay heard from his many agitated New York City supporters, King wrote to Hamilton to convey the news of Jay's travels and the receptions Jay was receiving. In this letter, King characterized Jay as advocating for the idea of a single-purpose constitutional convention (at the same time that Jay was being guarded in his public comments):

The addresses from [A]lbany and other northern Towns, together with Mr. Jay[']s answers leave no room to doubt that the question will be

181. Letter from John Jay to the New York Committee (July 16, 1792), in 3 JAY, *supra* note 58, at 443-44.

182. CHARLES Z. LINCOLN, 1 THE CONSTITUTIONAL HISTORY OF NEW YORK: 1609-1822, at 162-88 (1906).

183. *Id.*

brought to a decision in some way or other—if it can be done under any authority of Law I shall rejoice, because I consider the Determination to be a precedent dangerous to free Elections. Still however I do not clearly see the prudence of an appeal to the People—yet others have no doubts on that subject, and there is reason to conclude that Mr. Jay deems the occasion such as will justify the step should it be found that the powers of government are insufficient to afford a Remedy. He has an idea of a convention for the sole purpose of canvassing the canvassers and their Decision.

But Mr. Clinton is in fact Governor, and though he may not be free from anxieties & Doubts, he will not willingly relinquish the Office—the majority, and a very great one are now against him—should he persist, and the sword be drawn, he must go to the wall—but this my dear Sir, is a dreadful alternative, and what & whom it may affect is altogether uncertain. If this case will justify a recurrence to first Principles, what are we not to expect from the disputes, which must & will arise in the Succession of the Presidency? And how are we able to place confidence in the security of our Government?¹⁸⁴

This letter is rich with details and significance. Here we see King's understanding of the canvassing committee's "[d]etermination" as a "precedent dangerous to free elections" and where, in particular, he saw this precedent as potentially affecting presidential as well as gubernatorial elections.¹⁸⁵ Even so, for what today we would describe as pragmatic reasons, King was not inclined to support Jay's direct "appeal to the [p]eople" through the mechanism of a single-purpose constitutional convention. King thought Jay's belief that a resort to "first [p]rinciples" was morally justified in this situation precisely because "the powers of government [were] insufficient to afford a [r]emedy."¹⁸⁶ But strategically King feared that even if the Federalists were successful in calling this single-purpose constitutional convention, Clinton would refuse to quit the governorship; therefore, "the sword [would] be drawn" and the conflict would end in "dreadful" violence.¹⁸⁷ Thus, out of "prudence," King indicated that he disfavored the pursuit of any extralegal means and wanted to challenge the canvassing committee only "if it [could] be done under any authority of [l]aw."¹⁸⁸ Alas, King was never able to develop any legal avenue of redress.

Kent became another proponent of the single-purpose constitutional convention. Initially, his view was closer to King's, thinking that the Federalists should simply acquiesce for fear of sparking political violence:

The people, in their original character, can, no doubt, rectify the

184. Letter from Rufus King to Alexander Hamilton (July 10, 1792), in *THE PAPERS OF ALEXANDER HAMILTON*, VOLUME XII: JULY-OCTOBER 1792, at 20-21 (Harold C. Syrett ed., 1967).

185. *Id.*

186. *Id.*

187. *Id.* at 20.

188. *Id.*

grievance, but I don't see that the ordinary legislatures have jurisdiction over a contested election to the chief magistracy. The peace of the community requires an ultimate decision somewhere, and if we attempt to declare the chair vacant, we must assume the powers of the convention parliament in 1688, and if the Governor would claim his office under the certificate and law, I see no peaceable way to accommodate. My idea is that we ought, from consideration of peace and prudence, to acquiesce in the authority of the decision. It is highly proper, however, that the people should reprobate the atrocious insult and injury, and pursue with recrimination and punishment the authors of the wrong, as far as the law will tolerate them.¹⁸⁹

This letter shows that from the start Kent had some form of a convention in mind. But he had not yet formulated a way to make the plan palatable to his sense of the need for civic peace. By July 11, the day after King wrote to Hamilton about the idea of a single-purpose convention, Kent was doing the same in another letter to his brother:

I have, since my last letter, revolved in my mind a mode of redress now in contemplation, and I warmly advocate it. It is that a convention be called under the recommendation of our legislature, to take the decision into review and to ratify or annul it and order a new election, as they shall deem proper. This mode is wise, benign, orderly, and republican, and no application can be made to it of the harsh and forbidding name of faction and sedition. I shall espouse it, and I believe firmly that it will succeed. I hope therefore what I wrote before will be no check to your ardent hopes of redress.¹⁹⁰

Kent's support for this idea indicates how seriously it was considered. He was in the legislature at the time and by nature cautious (as his initial inclination showed). If he was on board, the idea was gaining momentum.

By contrast, Hamilton, who was entirely opposed to Jay's concept of a single-purpose convention, responded to King on July 25 that King needed to talk Jay out of this idea:

I received lately a letter from you, in which you expressed sentiments according with my own, on the present complexion of your party politics, as, if a letter of mine to you did not miscarry, you will have seen. I wished that Clinton and his party should be placed in a just light before the people, and that a spirit of dissatisfaction, within proper bounds, should be kept alive; and this for national purposes, as well as from a detestation of their principles and conduct.

But a resort to first principles, in any shape, is decidedly against my judgment. I don't think the occasion will, in any sense, warrant it. It is

189. Letter from James Kent to Moss Kent, Jr. (June 15, 1792), in *MEMOIRS AND LETTERS OF JAMES KENT*, *supra* note 62, at 45-46.

190. *Id.* at 46-47.

not for the friends of good government to employ extraordinary expedients, which ought only to be resorted to in cases of great magnitude and urgent necessity. I reject as well the idea of a Convention as of force.

To rejudge the decision of the Canvassers by a Convention, has to me too much the appearance of reversing the sentence of a Court by a Legislative decree. The canvassers had a final authority in all the forms of the Constitution and the laws. A question arose in the execution of their office, not absolutely free from difficulty, which they have decided (I am persuaded wrongly) but within the power vested in them. I do not feel it right or expedient to attempt to reverse the decision, by any means not known to the *Constitution or laws*. The precedent may suit us to-day; to-morrow we may rue its abuse.¹⁹¹

Hamilton's character as the ever-careful calculator is evident in this letter. Again, he was willing to stoke the flames of public passion a little, as long as it was not too much, and he quickly linked the New York fight between the Federalists and Democratic-Republicans with the national version of the same conflict.¹⁹² But echoing his letter to King a month earlier, which Hamilton feared was lost in the mail, Hamilton elaborated on his belief that "a resort to first principles"¹⁹³—either by force, or even by convention—was unwarranted.

Hamilton's arguments against Jay's idea of a single-purpose convention are nuanced and sophisticated. Seeing the canvassing committee as equivalent to a court, as Kent did, Hamilton believed it wrong that a legislative body (including a constitutional convention) would upset an already adjudicated judicial decision.¹⁹⁴ Legislative revision of judicial judgments, in Hamilton's view, risked replacing the rule of law with the arbitrary tyranny of legislative whims.¹⁹⁵

Hamilton also recognized the existence of two alternative views on whether the canvassing committee's decision was as wrong as Jay's supporters declaimed. Perhaps because Hamilton watched the controversy from afar (he alluded to this fact later in this letter), or perhaps because of his calculating temperament, he saw the canvassing committee's decision as plausible. Hamilton hastened to add that

191. Letter from Alexander Hamilton to Rufus King (July 25, 1792), in 1 *THE LIFE AND CORRESPONDENCE OF RUFUS KING 1755-1794*, at 417 (Charles R. King ed., Da Capo Press 1971) (1894).

192. One national concern of the Federalists was whether they would be able to keep control of the Vice Presidency, which Adams had occupied in Washington's first administration. Clinton's status in New York could affect his prospects as a potential Vice President from the Democratic-Republican party, allied with Madison and Jefferson on economic policies rather than with Hamilton and the Federalists.

193. Letter from Alexander Hamilton to Rufus King (July 25, 1792), *supra* note 191, at 417.

194. *Id.*

195. In this respect, Hamilton's separation-of-powers concern is a precursor of the Supreme Court's decision in *United States v. Klein*, 80 U.S. 128 (1871). See also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (applying the *Klein* doctrine).

he viewed that decision as incorrect, of course (perhaps he doth protest too much), but nonetheless he did not think it could be placed outside the bounds of reason. He probably had heard the facts from Otsego County that would support the canvassing committee's ruling. And because the ruling was within the canvassing committee's exclusive jurisdiction, Hamilton (like King) saw no basis under New York's constitution or laws for overturning the ruling.

Hamilton's letter added an additional argument for opposing Jay's idea for a single-purpose convention. His additional argument is one often heard when the suggestion of a single-purpose constitutional convention is raised—which is that there is no guarantee of confining the constitutional convention to a particular issue. The Framers of the U.S. Constitution knew that truth from their own experience in 1787. Similarly, Hamilton argued that if the Federalists in New York got their wish for a constitutional convention to revise the canvassing committee's decision, the convention might go on to address other issues in ways not to the conservative Federalists' liking:

I am not even sure that [a convention] will suit us at all. I see already publications aiming at a revision of the constitution with a view to alterations which would spoil it. It would not be astonishing, if a Convention should be called, if it should produce more than it is intended. Such weapons are not to be played with. Even the friends of good government in their present mood may fancy alterations desirable [sic] which would be the reverse.

Men[']s minds are too much unsettled every where at the present juncture. Let us endeavor to settle them & not to set them more afloat.

I find that strong minded men here [in Philadelphia] view the matter in the same light with me; and that even Mr Jay[']s character is likely in a degree to suffer by the idea that he fans the flame a little more than is quite prudent. I wish this idea to be conveyed to him with proper *management*. I have thoughts of writing to him.

You see, out of the reach of the contagion, I am very cool and reasonable; if I were with you I should probably not escape the infection.¹⁹⁶

Hamilton raised the thought that Jay's political future might suffer if he tried too hard to contest the canvassing committee's decision. In this respect, he moved away from his lawyerly opposition to the convention idea to opposition grounded in political considerations. Hamilton wanted Jay to be a viable candidate in future elections; this concern is one expressed throughout the history of disputed elections in the United States. Perhaps most famously, Richard Nixon refused to challenge John F. Kennedy's victory in 1960 for fear of being labeled a sore loser, and he won the 1968 presidential election.¹⁹⁷ More recently, some urged

196. Letter from Alexander Hamilton to Rufus King (July 25, 1792), in XII HAMILTON, *supra* note 184, at 99 (emphasis in original).

197. For a review of recent scholarship on the 1960 presidential election, see David Stebenne, *The Election of 1960 Fifty Years Later*, ELECTION LAW @ MORITZ COMMENTARY (Nov. 8, 2010),

Gore in 2000 to back down rather than challenging the certification of Bush's victory in court, but Gore, perhaps to his detriment in 2004 and 2008, did not heed this advice.¹⁹⁸ Of course, going to court in 2000 is not the same sort of extralegal challenge as calling a constitutional convention in 1792.

Still, the larger point remains. Hamilton's concern was not about achieving a just outcome for the election of 1792. Rather, his concern was for positioning the Federalists and their candidates to prevail over the long term. Jay, the jurist, or perhaps just because he was the candidate affected, was having a harder time giving up on the justice of his cause. As a politician, he also recognized the importance of protecting his political reputation, but he was torn by these conflicting sentiments. Thus, as of the end of July, it was still an open question whether Jay would accept Hamilton's advice or, instead, go forward with the convention plan.

Accordingly, Hamilton would not let the matter drop. On July 27, he wrote King again, asking for "all the authorities which were consulted by you when you gave your opinion" on "the question decided by the [c]anvassers" because he (Hamilton) was "[d]esirous of examining [it] accurately."¹⁹⁹ He also wanted those documents "as soon as may be (had)."²⁰⁰ Meanwhile, William Lewis wrote to Hamilton on July 21 of his opinion concerning the legality of the canvassing committee's decision:

My opinion . . . was founded on this Principle, that the important right of Suffrage being Secured to the People by the Laws and Constitution, and not depending on the Conduct of others, they cannot be deprived of it but by their own fault. That the manner of taking, & more especially [sic] of transmitting the votes, *being merely directory*, an Error or wilful [sic] neglect or disobedience in the officer in either of these particulars, will Subject him to punishment for a misdemeanor in office, but will not affect the Election or destroy the rights of the people, where no fraud or unfairness appears in the Conducting of the Election, and it is made Satisfactorily appear that the votes are the same that were given in with[ou]t Alternation Diminution or addition. That this principle applies with great force, where (as in the present Case) the Sheriff was not an Election Officer, nor a Person having anything to do with holding the Election, and where the Election itself is the Substance and the transmitting of the votes is only form. If this were not the Case any Sheriff might at pleasure deprive a whole County of the right of Suffrage! I know of no Case expressly in point, but there are many in the

<http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=7929>.

198. See, e.g., R.W. Apple, *The 2000 Elections: News Analysis; Recipe for a Stalemate*, N.Y. TIMES (Nov. 9, 2000), <http://www.nytimes.com/2000/11/09/us/the-2000-elections-news-analysis-recipe-for-a-stalemate.html> (comparing Gore's situation to Nixon's).

199. Letter from Hamilton to King (July 27, 1792), in 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING, *supra* note 191, at 417.

200. *Id.*

books the Principles of which I think are fully applicable.²⁰¹

In this letter, Lewis did not refer to the idea of calling a constitutional convention or otherwise suggest how he would attack the canvassing committee's decision. But he seemed unwilling to let the matter rest, or at least he still seemed to be smarting from the injury inflicted by the committee.

During this same period of uncertainty, Cooper proposed to Van Rensselaer a new election in Otsego.²⁰² Meanwhile, King wrote back to Hamilton on July 29,

Mr. Jay will be with you this week—you will therefore have an opportunity to converse with him respecting our very unpleasant situation. All the measures which have been pursued have been calculated to induce the Legislature to call a convention to revise the decision of the canvassers. So far as I am able to form an Opinion, a majority of the Assembly are Clintonians, and if so, will not agree to call a convention—should this be the case, the business will then terminate.²⁰³

King seemed to be telling Hamilton that the convention idea was moving forward, but in a manner that would be unable to prevail. This scenario of the convention idea dying in the legislature was not entirely unwelcome to the Federalists. They could score political points by complaining of the injustice wrought by the canvassing committee, yet they would bear no responsibility for extralegal measures that might spin out of control, while at the same time blaming the legislature for doing nothing to redress the injustice.

Even into August, however, there were those still urging Jay and his allies to keep up the fight against the canvassing committee's decision. For example, on August 14, a federal district judge in Rhode Island, Henry Marchant, wrote to Jay,

While New England laments the loss the publick [sic] may sustain in your quitting your present important federal station, they feel as friends to order, decency, and the rights of man, a wish, not merely for your success, but the success of constitutional rights; and would not be happy to find the steady advocates of liberty desert the cause. Example is Precedent; and in our first setting out we should be cautious how we establish bad precedents. Posterity has a demand on us—that the laws and constitution we have been blessed with are not handed down to them mangled or in fetters.²⁰⁴

201. Letter from William Lewis to Alexander Hamilton (July 21, 1792), in XII HAMILTON, *supra* note 184, at 65-66. This letter is the one in which Lewis refers to a Pennsylvania Supreme Court opinion from 1782 concerning an election to the supreme executive council of the state's legislature. The other precedents he mentions in the letter are British.

202. YOUNG, *supra* note 27, at 312.

203. Letter from Rufus King to Alexander Hamilton (July 29, 1792), in XII HAMILTON, *supra* note 184, at 65-66.

204. Letter from Henry Marchant to John Jay (Aug. 14, 1792), in 3 JAY, *supra* note 134, at

This letter is more evidence that members of the Founding Generation nationwide, and not just in New York, knew that they were setting a precedent (good or bad) by how they handled the dispute over the New York gubernatorial election of 1792. This episode was a “first setting out” regarding this kind of controversy, and Judge Marchant wanted Jay to press on and not “desert the cause” of “liberty.” As such, the precedent set would be one protective of “constitutional rights,” rather than leaving them “mangled or in fetters.”²⁰⁵

Nonetheless, according to this author, an even worse precedent would be one that settled disputed elections through violence rather than law. Therefore, Judge Marchant applauded Jay’s constraint in pursuing his cause. Recognizing that a temperate response to the canvassing committee might end in defeat, Judge Marchant saw defeat as preferable to victory by violence:

The delicate, prudent, and cautious manner, so peculiar to you, in which you answered the addresses of your fellow-citizens, has given great pleasure; for while it is our duty to contend against the violations of essential rights, it behooves us that we do not by our own conduct establish the violence we contend against. We had better fail—having done all that faithful citizens and guardians of the laws ought to do, than proceed by methods disgraceful to a good cause.²⁰⁶

Moderation, or perhaps ambivalence, is the mood that this letter ultimately conveys.

Robert Troup wrote to Hamilton, his former roommate, on August 24. Troup was not so moderate or ambivalent, as he had always been the one most vociferous in pressing Jay’s cause. (In this respect, too, his role resembles the one Ron Klain played for Gore two centuries later). Troup, presumably knowing that Hamilton counseled caution, defended his more aggressive stance:

I have as you have learnt taken a very active part ab[ou]t the wicked & abominable decision of the canvassers. I think & have always thought, my good friend, this decision to be subversive of the most sacred right that can be enjoyed under any government. Quickly therefore to submit to it would argue a poverty of spirit & an indifference to the principles of freedom which would fix an indelible stigma upon our characters. I have always imagined & now see no reason for imag[in]ing otherwise that we should not obtain redress. My object has been to make a strong impression upon the public mind of the deep corruption of Clinton & his party and thus to render him odious. We have pretty well succeeded in this object & I trust our success will be more complete. I have no apprehension that we shall endanger the political ship. It is the interest of us all that she should be kept in her present course with a fair wind . . . Be not therefore uneasy—but at the same [time] do not forget that

444-45.

205. *Id.* at 445.

206. *Id.*

allowances should be made for the keen anguish we suffer from the wound we have received.²⁰⁷

In this way, Troup directly responded to Hamilton's concern that pressing forward might cause the situation to spin out of control. On the contrary, according to Troup, there was no danger to the polity if the Federalists convinced the public that justice required redress for Jay.

Hamilton, however, was not persuaded by Troup's plea. He wrote his own note on the back of Troup's letter: "No answer necessary."²⁰⁸ Perhaps Hamilton already knew that Jay's cautious instincts would cause him to side with Hamilton, rather than Troup, on the course of conduct they should take.

D. The View from Virginia

Initially, moderates tended to support Jay's position, and even some Clintonians expressed reservation. From a distance, Jefferson thought that Clinton should repudiate his purported victory: "[it] does not seem possible to defend Clinton as a just or disinterested man if he does not decline the office."²⁰⁹ He thought this even as he knew of the controversy over Cooper's conduct in Otsego.²¹⁰

Historian Jabez Hammond says that Clinton could have acted magnanimously—"if he had advised them to allow the disputed votes, is it probable that a majority of the committee being his personal and political friends, would have rejected them?"²¹¹ Hammond, however, observed what all of us have observed concerning candidates in more recent disputed elections:

The excitement produced by a heated and sharply contested election, in the result of which he was personally concerned, must have biassed [sic] and clouded the otherwise clear and pure mind of the governor. . . . How hard is it for the most pure minded man to adjudicate upon a question against his own wishes and interest? Besides this, the governor would have had to contend, and did have to contend, not only against his own interest and wishes, but against the persuasions and wishes of all those political friends who had steadily and zealously supported him, and whose political prospects greatly depended on the decision of the

207. Letter from Robert Troup to Alexander Hamilton (Aug. 24, 1792), in XII HAMILTON, *supra* note 184, at 292.

208. XII HAMILTON, *supra* note 184, at 273 n.5.

209. STAHR, *supra* note 28, at 287.

210. "The Clintonians," Jefferson informed Madison, "tell strange tales about these votes of Otsego." Letter from Thomas Jefferson to James Madison (June 21, 1792), in 6 THE WRITINGS OF THOMAS JEFFERSON, 1792-1794, at 89 (Paul Leicester Ford ed., 1895). Jefferson was fearful that—as a result of the apparently stolen gubernatorial election in New York—if their party backed Clinton as the candidate for Vice President to replace Adams, "the cause of republicanism will suffer." *Id.* at 90.

211. HAMMOND, *supra* note 27, at 69.

canvassers. Considering therefore, the strength of party excitement, and the weakness of human nature, it is not surprising that Mr. Clinton should have desired that the canvassing committee should decide the election in his favor.²¹²

In other words, Hammond says that no one should expect a politician to act based on honor and virtue when the prize at stake is a major one, like being governor of New York. Like Hammond, we could not have expected George Bush to say that Al Gore really deserved to be declared the winner of Florida's Electoral College votes, and thus the presidency, based on the defect of the "butterfly ballot" alone.²¹³

Most interestingly, Madison expressed a nuanced view on whether Clinton should have "declined the office," as Jefferson claimed. First of all, Madison saw "the spirit of party" on both sides of the controversy based on his reading of the newspapers from New York.²¹⁴ For his part, Madison tried to articulate a detached perspective that was not infected by his own partisanship. "Whether Clinton ought to wave the advantage of forms," Madison wrote in response to Jefferson, "may depend I think on the question of substance involved in the conduct of the Otsego election."²¹⁵ Madison continued, "If it be clear that a majority of *legal* honest votes was given ag't him [against Clinton], he ought certainly not to force himself on the people."²¹⁶ This sentence expressed agreement with Jefferson up to a point. If Jay's supporters were correct that the status of Smith as a sheriff was just a technicality, and the votes from the county were themselves sound, then Madison was siding with Jefferson in thinking that Clinton ought to do the honorable thing and decline to win based solely on a formal defect in the sheriff's status.

Madison, however, saw the situation as more complicated than Jefferson did. Immediately after the sentence just discussed, Madison continued, "on a contrary supposition"—meaning that if one supposed that there was a reasonable doubt whether Jay in fact won "a majority of *legal* honest votes"—then Clinton "[could not] be under such an obligation" to decline the office.²¹⁷ Madison explained that Clinton would actually owe it to his party to fight for the office if there was a plausible claim that he actually won more valid votes. Clinton in this situation, according to Madison, "would be restrained by respect for his party if not by a

212. *Id.* at 69-70.

213. Patrick Buchanan acknowledged that most of the votes he got as a result of the butterfly ballot were, in all probability, intended for Gore—more than enough to put Gore ahead of Bush. Bush could have conceded the election on that basis, and perhaps that would have been the magnanimous thing to do. He did not, and as our political culture has evolved, we would not have expected him to do so.

214. Letter of James Madison to Thomas Jefferson (June 29, 1792), in 15 *THE PAPERS OF JAMES MADISON* 331 (rev. ed. 1983) (1971).

215. *Id.* at 331-32.

216. *Id.* at 332 (emphasis in original).

217. *Id.*

love of power.”²¹⁸ In other words, Madison was making an argument somewhat different from Hammond’s. It is not merely that we can expect politicians to act based on political ambition even when honor or virtue would dictate otherwise. Rather, there are situations in which a partisan politician has a duty to his own party to pursue the party’s interest—even if the party’s interest is not identical to a neutral view of the public interest—as long as there is some doubt about whether or not the party’s interest coincides with the neutral view.

Madison’s position here is quite a change from his *Federalist Papers* antagonism to the spirit of partisanship in general. Madison still wanted the public interest to prevail, and he still believed that a partisan politician must put aside partisan advantage when what the public interest calls for is “clear.”²¹⁹ But here he appeared to be hoping for a political system that could combine two somewhat contradictory features: first, the system would permit politicians to act out of partisan motive when matters are not so clear-cut; yet, second, at the same time the system would figure out which partisan position coincides with an impartial view of the public interest. What Madison failed to provide in this letter to Jefferson was an explanation of the institutional apparatus that will protect the public interest when candidates like Clinton are acting out of partisan motives in circumstances where there appear to be plausible arguments on both sides. Madison did not tell us what to do when, for instance, Jay had good reason to think that he did win a majority of valid votes, whereas Clinton credibly could claim to the contrary. Madison did not discuss the institution of the canvassing committee or consider what to do if it were disproportionately populated by partisans, rather than being a balanced tribunal that would consider the claims on both sides fairly. Madison’s failure to spend more time on this specific New York election is understandable, but the consequences of his doing so remain with us today. His letter to Jefferson on the New York election reveals that his own perspective regarding partisanship articulated in the *Federalist Papers* was no longer operative in his own mind by 1792. Thus, his 1787 conception of constitutional institutions was founded on faulty premises. Yet he never updated his views about what constitutional institutions would be necessary in light of his new conception of the role of partisanship in democratic elections. In short, Madison, as our primary Founding constitutional architect, never designed the kind of tribunal we need to handle a disputed election where the candidates are entitled to press their competing partisan claims regarding which side won more valid votes.

Monroe, Madison’s compatriot in Virginia, offered yet another perspective on the events in New York from that southern state. He confessed to Madison that he could not figure out which side was right: “’Tis difficult to estimate the merits of this controversy especially through the medium by which it is handed to the publick [sic] view.”²²⁰ Were the Otsego facts as the Clintonians alleged,

218. *Id.*

219. *Id.*

220. Letter from James Monroe to James Madison (June 27, 1792), in *THE WRITINGS OF JAMES MONROE, 1778-1794*, at 235 (Stanislaus Murray Hamilton ed., 1898).

laced with the suspicion of ballot-box tampering? Or were the Federalists right to complain of voter disenfranchisement merely “upon the principle of disqualification in the returning officer”?²²¹

Monroe’s uncertainty, however, concerned more than just the facts extending to the legal grounds upon which the dispute should be resolved. “I have not sufficient data to judge of it on general principles, and ’tis not improbable that even these might be acted on by some [s]tate regulation.”²²² Here, Monroe was recognizing that a promulgated provision of New York law (statute, administrative rule, or constitutional text) might specifically address whether or not to count the Otsego ballots given the particular circumstances of this dispute.²²³ If so, Monroe acknowledged that the proper adjudication of this dispute should set aside “general principles” even if one knew what answer they would dictate. General principles of law are to be followed in a dispute of this kind, but only if there is no positive enacted law that supersedes those background general principles.

In this respect, Monroe anticipated an important discussion that has emerged in the wake of *Bush v. Gore* and *Coleman v. Franken*. In the post-2000 debate regarding whether strict or lenient enforcement of election rules is preferable, it has become widely acknowledged that it is better, where possible, to sidestep this debate about “general principles” by relying on specific provisions of state law that address the situation.²²⁴ Thus, scholars urge states to take legislative positions on the debate between strict and lenient enforcement, spelling out their own state-specific resolutions of this debate in as much detail as they can. Insofar as Monroe recognized that it is better to resolve high-stakes disputed elections based on clear rules promulgated in advance rather than by an appeal to “general principles” or (as Madison put it) “right reason,” Monroe was thinking far ahead of his time.

Monroe’s fellow Virginians, Madison and Jefferson, both thought they could figure out what answer “general principles” or “right reason” called for in the New York dispute. Yet as we have seen, even from their detached Virginian perspectives, Jefferson and Madison did not see eye-to-eye on exactly what pure principles of jurisprudence required in this instance. Thus, the gap in the assertion of principles between the Federalists and Clintonians in New York cannot be attributable solely to self-interest.

To be sure, each side in New York advocated its “general principle” based on its partisan position in the particular case. It is ironic, moreover, that in this first major disputed election in U.S. history, each side adopted a jurisprudential posture at odds with its basic principles of political philosophy. The Democratic-Republicans advocated throwing the Otsego votes out, even though philosophically they were more predisposed than the Federalists to enfranchising the average citizen. In this instance, conversely, the Federalists championed voter

221. *Id.*

222. *Id.*

223. *Id.*

224. *See, e.g.,* Hasen, *supra* note 125, at 82.

enfranchisement-enhancing rules despite their philosophical tendency to be the more "law-and-order" party.²²⁵

This irony was not lost on the participants themselves. As we have already seen, Hamilton noted the inconsistency between Jay's pursuit of extralegal measures and his party's general aversion to rabble-rousing.²²⁶ Troup sarcastically complained that the so-called "friends of the People," as the Democratic-Republicans liked to call themselves, would favor tossing out the Otsego ballots based on the defect in Smith's status as sheriff: "The efforts made to prevent the canvassing of these votes . . . upon a mere law quibble are really characteristic of these virtuous protectors of the rights of the people, of the enemies of aristocracy, and the declaimers against ministerial influence."²²⁷

Arguing contrary to the usual philosophy of one's party is, of course, a prominent feature of contemporary election disputes. For example, it was widely observed in the context of the disputed 2008 U.S. Senate election in Minnesota that Al Franken, the Democrat, was favoring a strict enforcement position that would disenfranchise eligible voters, the opposite of the Democratic Party's usual stance regarding election law. On the other hand, Coleman, the Republican, was championing the lenient enforcement position that his party usually opposes.²²⁸ Similarly, what disturbed observers most about the U.S. Supreme Court's 5-4 decision in *Bush v. Gore* was that each side of that 5-4 split took a position opposite to its usual jurisprudential stance.²²⁹ The five members of the majority, who were the conservatives on the Court, issued a ruling antithetical to their typical states-rights philosophy and embraced an expansive interpretation of the Equal Protection Clause that they normally would oppose. Conversely, the four liberal dissenters trumpeted a states-rights argument that they usually would find objectionable as a basis for interfering with enforcement of federal equal protection rights.

Thus, one can cite the disputed election of 1792 as the first in a long line of

225. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 32 (rev. ed. 2009) ("The Federalists . . . tended to oppose any broadening of the franchise; the more egalitarian Jeffersonian Republicans viewed expansion more favorably.").

226. James Kent's biographer put the point more positively: the canvassing committee's decision "gave the angry Federalists an opportunity to pose in a new light as the champions of the people's freedom." HORTON, *supra* note 64, at 69. Kent, in particular, changed his tune regarding democratic populism:

Ordinarily the sight of liberty poles filled Kent with disgust. But the pole set up in Cooperstown before the court-house was an exception. In the autumn of 1792, as he visited the outraged shire of Otsego, he viewed it with approval. It was an emblem of the just indignation of the people at the recent attack upon their liberties.

Id. at 70.

227. Letter from Robert Troup to John Jay (May 20, 1792), in 3 JAY, *supra* note 134, at 424.

228. See Foley, *supra* note 121.

229. See, e.g., Cass R. Sunstein, *Introduction: Of Law and Politics*, in *THE VOTE: BUSH, GORE & THE SUPREME COURT* 1 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

cases in which the two warring parties chose whichever jurisprudential position was most convenient for the particular moment. This observation underscores the need for some impartial institution if the dispute is to be decided based on “general principles” rather than unambiguous statutory directives. In the absence of statutory clarity, there is no single objective truth discernible from “general principles” regarding the resolution of election disputes. The views of the Virginians teach us that. Moreover, in the absence of a single truth derivable from “general principles,” partisans can pick whichever version of “general principles” best suits their immediate electoral need.

Our Founding philosophers, Jefferson and Madison, did not have some pure and well-developed theory of how to handle a disputed election. We cannot simply retrieve the Founders’ understanding of what to do in a case like *Bush v. Gore* and apply that Founding Era philosophy to whatever new disputed election occurs in our own time. Instead, the Virginia response to the New York dispute shows, perhaps more than anything, that the Founding philosophy on how to operate a constitutional democracy was incomplete. The Founders did not leave us a roadmap on how to get through a *Bush v. Gore* (or similar dispute) because they themselves were unsettled on how to handle this kind of situation. Jefferson might do one thing, Madison another—for reasons having nothing to do with the taint of partisanship, but simply because their own understanding of “general principles” and “right reason” were insufficient for specifying an answer for the situation at hand. This truth, above all, is why going forward, our constitutional democracy must design new institutions to address this kind of situation.

E. The Clintonian Counteroffensive and the Federalist Response

Early in the controversy of 1792, it seemed as if there might be some small chance that Clinton would follow Jefferson’s recommendation and graciously accept defeat based on the Otsego ballots.²³⁰ Chancellor Robert Livingston, a leading Clintonian, signer of the Declaration of Independence, and major figure in the state, wrote, “I confess I would have wished that all the votes had been counted whatever might have been the event.”²³¹ But this position did not hold, and the Clintonians began planning their counterattack. By mid-July, Livingston took the position that “[w]hether the canvassers were right or wrong is no longer a question of any moment . . . their determination is conclusive, nor do I know of any constitutional mode of revising the question.”²³² It appears that Livingston’s opinion was that Clinton had no choice but to accept reelection once the prize was given to him, but this rationalization seems politically expedient. Had Clinton renounced the result in mid-July, surely the leading politicians in the state would have devised a bipartisan way to have the canvassing committee reconvene and revise its ruling. But Clinton in 1792, like Bush in 2000, had no interest in going down that accommodationist road.

230. See YOUNG, *supra* note 27, at 317.

231. *Id.* at 313.

232. *Id.* at 314.

Taylor recounts the Clintonians' publication of affidavits against Cooper on June 16, 1792.²³³ "The affidavits collectively depicted Cooper as an overbearing landlord and unscrupulous judge bullying his settlers with his formidable combination of economic and judicial power, packing the polls with unqualified voters, and intimidating Clintonian pollwatchers."²³⁴ The Federalists counterpunched with their own affidavits. One witness changed his story three times, first espousing Clintonian attacks on Cooper, then supporting Cooper, and finally attacking him again.²³⁵ It is difficult from this vantage, over two hundred years later, to determine the truth of the charges and countercharges. At the time, no objective tribunal was available to adjudicate the matter.²³⁶

The fair-minded Hammond certainly describes Cooper's behavior as improper, unlawful, and contrary to the operation of a free and fair election:

The depositions of these witnesses . . . certainly do show gross misconduct in him as a citizen, during the canvass in Otsego, at the election between Jay and Clinton. It was deposed that he encouraged illegal voting in favor of Mr. Jay; that he knowingly had caused men to vote who were not freeholders; that he threatened voters with suits who expressed a wish to vote for Mr. Clinton, and that he menaced a Mr. Cannon, who came to the polls to challenge illegal voters, that if he challenged any one, he (the judge,) would forthwith commit him to jail.²³⁷

But as bad as Cooper's conduct was, in many people's minds it did not make the case for throwing out all the county's ballots because of the sheriff's defect.²³⁸ One historian sympathetic to the Clintonian position, who thought the evidence supported the charges against Cooper, also thought that "the Federalists established by far the better case" concerning the acceptability of ballots from a *de facto* sheriff.²³⁹ The Federalists managed to avoid a legislative condemnation of Cooper through some parliamentary maneuvering; they were able to postpone a vote until Cooper himself had a chance to testify, but that testimony did not occur while the Republicans maintained control.²⁴⁰ In the next election, the Federalists gained a majority, and by then they would not condemn their Otsego ally.²⁴¹

The much larger question than the fate of Cooper's reputation was what, if

233. TAYLOR, *supra* note 27, at 183.

234. *Id.*

235. *Id.* at 184-85.

236. Although the veracity of the affidavits attacking Cooper was never determined, the affiants found themselves criminal defendants in Cooper's court after politically motivated indictments were issued for crimes ranging from keeping a disorderly house to rape. *Id.* at 185-86.

237. HAMMOND, *supra* note 27, at 76-77.

238. See TAYLOR, *supra* note 27, at 192.

239. YOUNG, *supra* note 27, at 320-21.

240. *Id.* at 322.

241. *Id.* at 322-23.

anything, were the Federalists ultimately going to do about what they still perceived as the canvassing committee's blatant theft of Jay's victory? Were they going to go forward with Jay's plan for a single-purpose constitutional convention despite Hamilton's strong objections? Or were they going to try some other means, before the next gubernatorial election in 1795, to unseat Clinton from office? Or would they simply back down altogether and wait patiently for that next election, hoping for decisive but delayed vindication at the ballot box?

In the end, Hamilton got his way. The Federalists abandoned the convention idea and settled instead for legislative grandstanding as a public relations strategy with an eye to the next election.²⁴² In the summer and fall of 1792, the Federalists knew that they did not control the state legislature.²⁴³ Still, with James Kent in the lead, they pursued charges of impeachment against the canvassing committee and demanded a legislative investigation,²⁴⁴ which lasted until January 1793.²⁴⁵ The Clintonian majority, not surprisingly, exonerated the canvassers of any wrongdoing, but the investigation at least allowed the Federalists to air their charges.²⁴⁶ The strategy partially backfired, as the Clintonians retaliated by conducting their own legislative investigation of Cooper and his inappropriately domineering behavior in Otsego.²⁴⁷ These proceedings lasted another few months and would have led to a public censure of Cooper's behavior, but for the successful delay tactics of the Federalists until such time as they gained legislative control.²⁴⁸

242. In Hammond's words, the Federalists chose their legislative strategy "for the purpose of rendering the governor odious, in consequences of the rejection of the Otsego votes." HAMMOND, *supra* note 27, at 77.

243. YOUNG, *supra* note 27, at 310.

244. In arguing for impeachment, Kent made this case to the legislature:

It is generally understood that about 1100 VOTES of the FREE MEN of this STATE were committed to the fire unopened, and the scale of election turned. Such a calamitous event was never surely within the contemplation of either our constitution or laws. If both of them had been duly observed, such an event never could have occurred. Somebody therefore is highly in the wrong, and somebody is highly responsible for maladministration. If such an occurrence had not propagated alarm and enquiry among the people of this state, it would have argued that they either knew not the right of suffrage, or were insensible to its importance.

N.Y. DAILY ADVER., Dec. 27, 1792.

245. YOUNG, *supra* note 27, at 320.

246. *Id.* at 320-21.

247. *Id.* at 321-22.

248. After the Federalists gained control of the legislature in April 1793, they adopted a resolution declaring that the complaints against Cooper's conduct had been "frivolous and vexatious." HAMMOND, *supra* note 27, at 82. But they did not then attempt to unseat Clinton even though his new gubernatorial term would not end until after the election of 1795. *See* ALEXANDER, *supra* note 148, at 61-62. They did attempt to deprive Governor Clinton of some powers of appointment, a partisan move that came back to haunt them once Jay won in 1795. *See id.* Hammond also chided the Federalists for their "unquestionably party vote" in attempting to

If the Federalists had been in control of the legislature in the summer of 1792, would they have used this power in an effort to overturn the canvassing committee's decision, by means of calling a constitutional convention for this single purpose or otherwise? Hammond thought not: "I do not believe that such men as James Kent and many other federal members would, if they had had the power, have ventured at that time, by legislative enactments, to have declared the election of Gov. Clinton[] void. . . ."²⁴⁹ Hammond has the advantage of temporal proximity, but the evidence on this point is hardly conclusive. The sentiment for unseating Clinton was very strong,²⁵⁰ and it just might have been strong enough to propel the Federalists into legislative action if they had possessed that lever to push. In any event, one can never answer this kind of historical counterfactual question with any degree of certainty.

What actually happened is that Jay decisively won the gubernatorial election of 1795.²⁵¹ Clinton did not even run again that year.²⁵² This electoral vindication of Jay proved Hamilton's strategy successful. Jay, Kent, and the other Federalists who felt robbed by the canvassing committee did not achieve in 1792 the electoral justice they were looking for in their initial responses to the committee's ruling. But by cooling their emotions and seeking eventual electoral vindication instead of immediate electoral justice, the Federalists were able the next time to gain the prize that they had been denied.

V. THE AFTERMATH OF THE DISPUTE

Jay was elected governor in 1795²⁵³ and re-elected in 1798,²⁵⁴ using the same election laws that had defeated him in 1792. It was not until 1799 that the Federalists, who were still dominant in the state legislature but who were by then facing political storm clouds on the horizon,²⁵⁵ made changes to the rules for canvassing votes in a gubernatorial election.²⁵⁶ The changes are noteworthy, for they indicate some effort to correct the defects that led to the disaster of 1792. But these changes did not include an "equally biased" tribunal along the lines that Kent thought necessary in order to assure fairness to both parties in an electoral

condemn the legislative investigation of Cooper. HAMMOND, *supra* note 27, at 82-83. Whether or not the charges against Cooper for misconduct at the Otsego polls in 1792 were ever definitively proved to the extent that the Clintonians claimed, Hammond protests that "surely [they were] not frivolous." *Id.* at 83 (emphasis in original).

249. HAMMOND, *supra* note 27, at 77.

250. See ALEXANDER, *supra* note 148, at 60-61.

251. See *id.* at 65.

252. *Id.* at 63.

253. *Id.* at 65.

254. *Id.* at 82-83.

255. The Republicans' desire for less centralized government was gaining popularity with voters. See HAMMOND, *supra* note 27, at 115-20.

256. See Act of Mar. 27, 1799, ch. 51, 1799 N.Y. Laws 362.

dispute of this nature.²⁵⁷ Even Kent himself apparently never pushed for this sort of reform, despite his recognition of its necessity. His failure to do so, along with the collective failure of his Founding Generation in this regard, is the major legacy of this episode. He and they saw partisan bias as the problem underlying the canvassing committee's decision, but he and they were unable to develop an institutional mechanism to solve that problem.

One change that the 1799 law made was to remove county sheriffs from the canvassing process.²⁵⁸ More than that, however, the 1799 law altered the relationship between local and statewide officials in the counting and canvassing of gubernatorial ballots. Rather than having the local ballots themselves transmitted to the secretary of state, a procedure which triggered the 1792 dispute, the 1799 law required that the "inspectors" of the polls in each locality "publicly" canvass the ballots themselves and "set down in writing" the canvassed votes for the gubernatorial candidates.²⁵⁹ The statute then obligated these local "boards of inspection" to certify their written tallies and submit these certificates to the county clerk, as opposed to the sheriff.²⁶⁰ Thereafter, the county clerk was required to submit these local certificates, instead of the ballots themselves, to the secretary of state.²⁶¹

Given these provisions of the 1799 statute, the nature of the statewide canvass necessarily was different—and much more limited—than it had been in 1792. The statewide canvassers could only "aggregate" all the local tallies and review the local paperwork for superficial accuracy.²⁶² Unlike in 1792, they had no ability to decide which local ballots would or would not be counted. In fact, the 1799 statute ordered the local inspectors, "immediately" after completing the certificates of their local canvass, to "destroy the poll books and ballots made and taken at any such election."²⁶³ Thus, although the Federalists in 1792 had been enraged by the immediate destruction of the ballots by the statewide canvassing committee, they now wanted the local officials to engage in the same kind of immediate ballot destruction so the statewide canvassers could never obtain them.

The 1799 statute also changed the identity of the statewide officials responsible for this narrowly circumscribed statewide canvass. No longer was there a joint canvassing committee with six members from each chamber of the state legislature. Instead, a new state canvassing board consisted of three executive officials: the secretary of state, the treasurer, and the comptroller.²⁶⁴

Gone, too, was the earlier statutory language making the canvassing

257. See KENT, *supra* note 62, at 44-45. A current proposal to implement the kind of tribunal that Kent suggested is outlined in FOLEY, *supra* note 67.

258. See Act of Mar. 27, 1799, at 51, 1799 N.Y. Laws 362, 362-63.

259. *Id.*

260. *Id.* at 363.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

committee's 1792 ruling "binding and conclusive."²⁶⁵ The new 1799 statute said "all questions" concerning the canvass "shall be determined by the opinion of a majority of the [new three-member] board."²⁶⁶ The combination of removing the "binding and conclusive" language and the more ministerial nature of the three-person board's authority paved the way for the development of judicial review over this board's decisions during the nineteenth century.

By making these changes, the Federalists may have thought that they had immunized canvassing process from the kind of partisan bias that tainted the 1792 election. If so, however, they were shortsighted. To be sure, the requirement of "publicly" canvassing at the local level was significant. As our nation has learned repeatedly throughout its history, the value of transparency in the administration of the electoral process is not to be underestimated. During the dispute over the 2000 presidential election in Florida, this lesson was learned most forcefully when the so-called "Brooks Brothers riot" occurred after the local board in Miami decided to recount ballots behind closed doors.²⁶⁷ Eight years later, in the dispute over Minnesota's U.S. Senate election, the lesson was learned much more positively when the state canvassing board conducted its recount proceedings in full public view, including televising it over the Internet.²⁶⁸

But the Federalists of 1799 were naïve if they thought that transparent canvassing at the local level, with nothing more than ministerial tallying of local certificates by state officials, would be enough to prevent partisan bias from tainting the canvassing process in a high-stakes election with an apparently razor-thin margin. As ensuing years would eventually show, it would be possible in some circumstances to claim that partisan bias tainted the decisions of local election officials even if those decisions were required to be on public display.²⁶⁹ Moreover, if a dispute of statewide significance emerged over the allegedly improper conduct of local election officials, then what statewide institution would adjudicate that dispute, and would that institution itself be immune from partisan bias? Even if the underlying ballots were immediately destroyed (as required by the 1799 statute),²⁷⁰ creative lawyers, working on behalf of competitive candidates determined to press any claim that might prevail, could concoct arguments that the local error required a new election or some other remedy. If

265. Compare Act of Feb. 13, 1787, ch. 15, 1787 N.Y. Laws 371, 379, with Act of Mar. 27, 1799, ch. 51, 1799 N.Y. Laws 362.

266. Act of Mar. 27, 1799, ch. 51, 1799 N.Y. Laws 362, 364.

267. See Dexter Filkins & Dana Canedy, *Protest Influenced Miami-Dade's Decision to Stop Recount*, N.Y. TIMES, Nov. 24, 2000, at A41.

268. Foley, *supra* note 121.

269. For example, the famous photograph of a Florida ballot counter lifting his glasses to hold a punch-card ballot up to the light, readily available on a "Google images search," did nothing to assuage fears that this exercise of local discretion would improperly swing the 2000 presidential election for Gore. It was precisely this fear that caused the U.S. Supreme Court to rule that these local officials, despite the transparency of the process, had excessive administrative discretion under the Fourteenth Amendment.

270. Act of Mar. 27, 1799, ch. 51, 1799 N.Y. Laws 362, 363.

the statewide institution hearing that argument was predisposed to be sympathetic because of its members' partisan affiliations, then the risk of partisanship tainting the outcome of the election remained despite the reforms of 1799.

It would not be until the middle of the nineteenth century that New York statutory law would build explicit bipartisan representation into the structure of its local electoral institutions²⁷¹—and not until 1894 that New York would put this requirement of bipartisan representation into its constitution.²⁷² In 1799, however, the Founding Generation was not prepared to adopt this type of measure, despite Kent's prescient recognition of the need for a body with bipartisan balance.²⁷³

To build bipartisanship into the structure of an official canvassing board, whether state or local, would be to acknowledge the permanence—even acceptability—of two-party electoral competition to a degree that the Founders were never able to do. Kent might have wanted an equal number of Federalists and Clintonians on the statewide canvassing committee,²⁷⁴ but he never said he wanted a law that would have specifically required an equal number of members from each party on whatever tribunal was authorized to decide whether or not to count the disputed Otsego ballots. To appoint a member of an adjudicatory tribunal (which Kent considered akin to a court) as an explicit representative or affiliate of a political party would have been anathema to his and the Founding Generation's sense of civic and judicial virtue. The temptation to use the power of an adjudicatory office to achieve a partisan victory should be overcome by a resolute commitment to the paramount obligation to act honorably in office.

Ultimately, the Founding Generation saw the problem in 1792 as primarily a personal deficiency in the degree of political virtue possessed by the members of the canvassing committee and those who appointed them, rather than a structural deficiency in the constitutional apparatus designed to compensate for the fact that “men are not angels,”²⁷⁵ and politicians are not always honorable. By 1799, the Founding Generation surely knew that its system of government was afflicted by partisanship. Yet the Founders still hoped that at crucial moments partisan pressures and impulses would be resisted by honorable men acting on the basis of impartial virtue. They did not want to surrender to the cynical expectation that all political conduct, at least in the midst of electoral competition for premier positions such as governor or the President, would be based on partisanship rather than virtue.

The best indication of the desire to hold on to the pre-partisan sense of obligation to impartial virtue comes from Jay himself. The setting was the

271. Delos F. Wilcox, *Party Government in the Cities of New York*, 4 POL. SCI. Q. 682 (1899).

272. CHARLES Z. LINCOLN, 3 THE CONSTITUTIONAL HISTORY OF NEW YORK: 1894-1905, at 129-33 (1906).

273. See *supra* text accompanying note 67.

274. See *supra* text accompanying notes 66-67.

275. THE FEDERALIST NO. 51, at 262 (James Madison) (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

presidential election of 1800. By May of that year, it became apparent that New York would prove decisive in the Electoral College battle between Adams, the Federalist candidate for reelection, and Jefferson, the Democratic-Republican challenger.²⁷⁶ During the previous month's legislative elections in New York, the Democratic-Republicans won a decisive majority of seats.²⁷⁷ Because New York at the time permitted its legislature to appoint the state's presidential electors, everyone knew that all of New York's Electoral College votes were posed to go to Jefferson, not Adams.²⁷⁸ In response, Hamilton formulated a plan that would enable Adams to win at least some of New York's Electoral College votes: Governor Jay would call the lame-duck, Federalist-controlled, legislature back into session to pass a statute that would divide the state into electoral districts, resulting in a popular vote for one of the state's presidential electors in each district.²⁷⁹ Because certain parts of the state were still dominated by Federalists, the lame-duck legislature could draw the district lines in a way that would position Adams to win as many as half of the state's twelve Electoral College votes,²⁸⁰ thereby likely giving Adams an outright overall Electoral College majority nationwide. It was an ingenuous scheme, one worthy of Hamilton as the brilliant partisan tactician, who raised it with Jay in a letter.²⁸¹

Jay, to his credit, would have none of it. He wrote on the back of Hamilton's letter: "Proposing a measure for party purposes, which I think it would not become me to adopt."²⁸² In 1800, therefore, Jay was able to resist partisanship and act instead based on his conception of impartial virtue. His decision made a difference. If he had cooperated, and the lame-duck legislature had acted according to Hamilton's plan, then Adams would have won a majority of Electoral College votes.²⁸³

Jay's decision to act honorably in 1800 may have been affected by the partisan cause of his own defeat in 1792. At least one historian has suggested this link:

Jay was a stalwart Federalist. . . . [H]e regarded the advent of Jefferson and his ideas with as much alarm as Hamilton, and he knew as well as Hamilton that the adoption of the district plan of choosing electors would probably defeat the Virginian; but to call an extra session of the Legislature for the purpose indicated by Hamilton, *would defeat the*

276. See WEISBERGER, *supra* note 12, at 229.

277. 3 JAY, *supra* note 134, at 411.

278. See HAMMOND, *supra* note 27, at 144; WEISBERGER, *supra* note 12, at 238-39.

279. See 3 JAY, *supra* note 134, at 412-13.

280. Even if Adams could not win half of the electoral votes, districting would have assured him at least four electoral votes. See HAMMOND, *supra* note 27, at 144-45.

281. 3 JAY, *supra* note 134, at 412-14.

282. HAMMOND, *supra* note 27, at 145.

283. 3 JAY, *supra* note 134, at 411-14. As it was, Adams fell short, and Jefferson ended up in a tie with Burr, which sent the election to the U.S. House of Representatives. WEISBERGER, *supra* note 12, at 256-57.

*expressed will of the people as much as the action of the state canvassers defeated it in 1792.*²⁸⁴

The point of this passage is clear. It is not that Jay was lacking in strong partisan impulses; rather, he was able to overcome those impulses because of his fidelity to what he believed honor required of him, and his sense of honor was reinforced by his own experience in 1792. Rather than making Jay vengeful, his defeat at the hands of the canvassing committee bolstered his own commitment to do the right thing when he was in a similar position to affect the outcome of a major election. As this historian summed it up, Jay “wisely refused to do what the people of the State had so generally and properly condemned in the canvassers.”²⁸⁵

But Jay’s heroic act of virtue and resistance of partisanship in 1800 signifies the end of an era rather than an example that others would follow in years to come. “[N]ot a governor who followed Jay in these eventful years,” the same historian acknowledged, “would have declined under similar circumstances to concur in Hamilton’s suggestion.”²⁸⁶ The use of official power for partisan electoral objectives quickly became the norm and expectation.

Yet the election law of 1799 was not written to handle that development. It was a product of an earlier era, when there was still some lingering sentiment that officials might act like Jay did in 1800. The Founding Generation simply did not equip New York, nor the nation, for what was needed in a world where partisanship reigned with no resistance from virtue.

VI. THE LESSONS FOR US OF 1792

Our own generation knows what it is like to have partisanship—or at least the appearance of it—taint the adjudication of a major disputed election. Whether we supported Bush or Gore, we were embarrassed by the fact that the U.S. Supreme Court split 5-4 and did so after the Florida Supreme Court split 4-3, with both tribunals (despite their opposite outcomes) seemingly affected by the partisan allegiances of their majorities. We can easily imagine, then, how Jay and his supporters must have felt when they saw themselves dealt the injustice of a partisan 7-4 canvassing committee decision. We can imagine, too, the embarrassment that some of Clinton’s supporters, including his Virginian allies, felt by the partisan way in which he received his electoral victory.

From our vantage point, now a decade after *Bush v. Gore*, we know also the experience of letting several electoral cycles pass without addressing the institutional inadequacies that enable the taint of partisanship to occur. To be sure, we have eliminated hanging chads, butterfly ballots, and some of the other features of our voting process that provided the foundation for *Bush v. Gore* to occur. But those operational reforms are much like eliminating sheriffs from the voting process, as New York did after 1792. Changing the rules for operating

284. ALEXANDER, *supra* note 148, at 98-99 (emphasis added).

285. *Id.* at 93.

286. *Id.*

the voting process does not by itself prevent partisan bias from controlling the resolution of any dispute that might arise concerning the process. Some grounds for a potential dispute are gone. For example, there is now no more fighting over hanging chads, just like there is no more fighting over the transmission of ballots by sheriffs whose commissions have expired. Yet, as we surely understand after Minnesota's experience in 2008, eliminating some grounds for a potential dispute does not eradicate all such grounds. Franken and Coleman learned that they could conduct the same basic dispute over absentee ballots that Bush and Gore did over hanging chads.²⁸⁷ Thus, as a nation, we stand today as New York did in 1800—the electoral reforms that we have adopted in response to the relatively recent crisis still leave us vulnerable to a new episode in which the partisan bias of incumbent officials dictates the outcome of a dispute over the rules governing a major election.

Now a decade into the twenty-first century, we are unlikely to find a John Jay whose virtue in office would save us from this institutional vulnerability. As a nation, since 1800 we have lived through two centuries of incessant two-party electoral competition for the presidency and other high offices. We know also that this two-party competition is not merely permanent; it is, in an important sense not recognized by the Founders, appropriate. Today, neither Democrats nor Republicans are disloyal to the Republic and its Constitution. By contrast, in the 1790s, both Federalists and Democratic-Republicans thought the other party was betraying the principles they had just enshrined in 1787. Today, Democrats and Republicans offer the electorate a choice between left-of-center and right-of-center policies, which the electorate is entitled to oscillate between depending on its collective mood. Thus, we can accept in a way that the Founders could not that politicians inevitably will be partisans—and therefore, fair electoral competition between the two parties requires an institution that protects the resolution of disputed elections from becoming hijacked by politicians from either party seeking an electoral advantage. Unlike the Founders living under the beginning of their own regime in 1790s, we can readily see now that we lack this kind of institution, but that we very much need one.

Looking to the future, as we endeavor to design this missing piece of constitutional architecture and figure out how procedurally to put it into place, we can ask ourselves what particular lessons we should draw from New York's disputed election of 1792. We should not attempt, of course, to learn from this one episode alone. We should instead consider it in the context of the full sweep of disputed elections in U.S. history.²⁸⁸ That history includes, most prominently,

287. In 2010, we are again learning that, much to our surprise, it is also possible to re-wage these basic battles over the spelling of write-in candidates. See *supra* note 120.

288. The historian Alexander, writing in 1906, likened the furor over the canvassing committee's ruling in 1792 as comparable to the commotion that would later occur in the Hayes-Tilden election of 1876: "[T]he people of the State were aroused to the wildest passion of rage, recalling the famous Tilden-Hayes controversy three-quarters of a century later." ALEXANDER, *supra* note 148, at 59. Federalists called Clinton "the Usurper," just as Democrats later would call Hayes "His Fraudulency." *Id.* at 61.

the Hayes-Tilden election at the time of the nation's centennial. It now also encompasses *Bush v. Gore* as well as, most recently, *Coleman v. Franken*. The future should be built on lessons learned from the entire past.

Still, the Clinton-Jay dispute of 1792 was the nation's first major dispute of its kind and, therefore, teaches some distinctive truths. Some of these truths, although significant, are less weighty than others. One such truth is the inevitable propensity towards litigation as partisans attempt to prevail on legal grounds when a close election is mired in a ballot-counting dispute. As we have seen, large legal teams were assembled on both sides in 1792, long before they were in 2000 or 2008. When designing an electoral dispute resolution system for the future, we should accept this propensity rather than wish it would disappear.

Indeed, we should be grateful that candidates turn to lawyers rather than soldiers to fight their battles for control of the coveted high offices during electoral disputes. Relying on attorneys indicates a willingness to settle the dispute according to the rule of law rather than through the force of arms. Perhaps the most positive feature of our nation's experience with disputed elections is that, apart from some notable exceptions in the nineteenth century,²⁸⁹ we have largely escaped the need to rely on troops to quell civil unrest during a dispute over an electoral outcome. Even when candidates have been convinced that the legal procedures used to resolve the dispute were deeply flawed (or, worse, corrupted by partisan bias), they have largely decided to accept the result that the legal procedures generated *simply because the result emanated from those legal procedures*.

Respect for the rule of law is usually enough to cause a candidate to abide by the deeply flawed result. The Hayes-Tilden dispute was one such situation. Tilden considered the 8-7 vote of the Electoral Commission against him both corrupt and unconstitutional—and yet the Commission had been established by a procedurally proper act of Congress, and its constitutionality had not been challenged in a judicial forum.²⁹⁰ Thus, the Commission's ruling had all the authority of a final Supreme Court decree, and Tilden was not about to challenge it. Likewise, Gore and his advisers undoubtedly considered the majority decision in *Bush v. Gore* egregiously wrong if not corrupt, yet it was the product of a conventional writ of certiorari to the Court and thus within the scope of the Court's jurisdiction under law (however improperly that jurisdiction might have been exercised).²⁹¹

In much the same way, Jay and his legal advisers eventually accepted the canvassing committee's 7-4 ruling (even though they considered it egregiously corrupt) because it fell within the committee's jurisdiction under the then-existing election law. In this respect, as some of them recognized at the time, they set an important precedent in favor of settling disputed elections through the rule of law

289. The book that Steven Huefner and I are writing will discuss these nineteenth-century exceptions, including the so-called Buckshot War in Pennsylvania and the Brooks-Baxter War in Arkansas. Our historical research on those episodes is currently in progress.

290. See Colvin & Foley, *supra* note 2, at 515-16.

291. See generally TOOBIN, *supra* note 74.

rather than by resorting to violence. Consider how differently American history might have unfolded if Jay had captured the governor's office through the use of force in 1792, or even if he had simply attempted to do so but his use of force had been crushed. Jay's self-restraint, conversely, may have helped to pave the way for similar self-restraint by Tilden and Gore, among others.

Another lesson to be learned from the Clinton-Jay dispute of 1792 concerns the deep-rooted nature of the jurisprudential debate between strict and lenient enforcement of election statutes. As a review of the 1792 dispute reveals, this basic jurisprudential debate has been with us from the very beginning. The 1792 dispute also demonstrates that this jurisprudential debate involves competing interpretations of our nation's most elementary commitment to the existence of democratic elections. Proponents of both strict and lenient enforcement appeal to the fundamental value of a free and fair vote among citizens. Yet each side of this jurisprudential debate appeals to this fundamental value in a different way.

As a nation, we are essentially stuck in the same place regarding this debate as we were in 1792. The arguments on each side in 2000 and 2008 between strict and lenient enforcement were not much more advanced or sophisticated than they were in 1792. Bush and Franken urged strict enforcement to protect the integrity of the voting process, just as Clinton's supporters did in 1792, and neither added significantly to that side of the debate to what Randolph eloquently wrote on behalf of Clinton. Similarly, Gore and Coleman urged lenient enforcement, like Jay's team did, but none of their arguments against voter disenfranchisement were more nuanced or elaborate than what Trumbull said in support of Jay.

Thus, in the future, if the debate between strict and lenient enforcement is to move beyond the same recitation of these two ancient arguments, there will need to be some mechanism to explain the circumstances in which strict enforcement should prevail as opposed to where lenient enforcement controls. A promising development along these lines is the idea that a respected jurisprudential body like the American Law Institute might formulate a code or set of principles to elucidate these respective situations. This nationally formulated code or set of principles might then become adopted seriatim in the several states. This could become increasingly refined as more and more states settle more and more disputes according to precedents set within this evolving body of collective wisdom, rather than falling back upon the generic debate between strict and lenient enforcement. Hopefully, well-reasoned positive law for the resolution of disputed elections might emerge from this process, along the lines hinted at by James Monroe's observation of the 1792 dispute in New York.

But even if a well-reasoned corpus of law emerged from this kind of process, each state would need an institution that could be entrusted with the fair-minded and evenhanded application of this jurisprudence to whatever particular disputed election might next occur. As James Kent could attest, what good is a well-reasoned corpus of election law if it is susceptible to manipulation by an authoritative tribunal bent on achieving a partisan outcome? Thus, a major lesson to be learned from 1792 is one that we already know: we need impartial institutions to adjudicate high-stake disputed elections like the presidential election of 2000 or Minnesota's U.S. Senate election of 2008. We need these impartial institutions to be structured so that they will not be, or appear to be,

predisposed to tilt their decisions towards one candidate or another based on the partisanship of the governing body.

As important as this institutional lesson is, perhaps an even more important lesson to learn from 1792 is why our nation was not given this kind of institution from the beginning and thus why, insofar as we still do not have one for disputed presidential elections, we are obligated to create one for ourselves and our posterity. Simply put, two-party electoral politics were too new to the Founders in the 1790s for them to address this institutional need. That fact, plus their inexperience with chief executive elections, meant that they were entirely unprepared for partisan influences in a disputed gubernatorial—or presidential—election. They gave no thought to what tribunal would be appropriate in the event that the outcome of a presidential election turned on a dispute over ballots cast for a state’s presidential electors.

The fact that the Founders failed to anticipate this need does not mean that it is not necessary. On the contrary, members of the Founding Generation who lived through the first few decades of the nineteenth century began to understand their omission and its significance. Late in life, Madison himself acknowledged that the Framers of the Constitution had given too little attention to the topic of presidential elections.²⁹²

Even more on point, when Kent wrote his famous *Commentaries on American Law* in the 1820s, he expressly acknowledged that the Framers had failed to consider the possibility of a partisan dispute in the context of counting Electoral College votes for president. Undoubtedly reflecting his own experience in New York’s disputed gubernatorial election of 1792, Kent ominously wrote that a similar type of dispute in a presidential election “will eventually test the goodness[] and try the strength of the [C]onstitution.”²⁹³ In other words, Kent knew that there was a serious hole in the electoral infrastructure created by the Constitution and that the Republic would be vulnerable unless and until this gap were filled.

A few years later, another prominent constitutional scholar of the early Republic, Joseph Story, picked up on Kent’s point and amplified it. Story himself had lived through a disputed gubernatorial election in Massachusetts in 1806—which, like New York’s in 1792, had become mired in partisan efforts to manipulate the outcome by disqualifying ballots of eligible voters. Knowing his own experience there, as well as New York’s earlier episode, Story expressed even more concern about the possibility of a disputed presidential election than Kent had. Although the Framers of the Constitution had made “[n]o provision”

292. See Donald O. Dewey, *Madison’s Views on Electoral Reform*, 15 W. POL. Q. 140 (1962) (discussing letters Madison wrote in the 1820s advocating reforming the Electoral College system). Madison’s letter of August 23, 1823 to George Hay expressly acknowledged Madison’s subsequent judgment that the Constitutional Convention of 1787 did not give adequate attention to the method of presidential elections: “as the final arrangement [for presidential elections] took place in the latter stage of the Session, it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies.”

293. JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 273-74 (3d ed. 1836) (1826).

for the problem because it simply had not occurred to them, Story found it “easily to be conceived that very delicate and interesting questions may occur, fit to be debated and decided by some deliberative body.”²⁹⁴

Therefore, the point is that we must build for the future what the Founders themselves were unable to build for us. In doing so, we would not be contravening their vision for a well-ordered republic. Instead, by adding a missing but crucial piece of constitutional architecture that they omitted, we would be enhancing the project of constitutional democracy that they began for us.

Madison, Jay, Kent, and the other Founders all wanted the operation of constitutional democracy to satisfy justice according to impartial standards. They emphatically did not want their handiwork to become sullied by partisan avarice. Jay, the author of New York’s constitution, certainly did not anticipate that the competition to win a gubernatorial election would become an unfair fight because of partisan manipulation of the institutions established under his constitution.

It turns out that the Founders did not know how to achieve their own objectives in the context of a disputed election for chief executive. Only later would Founders, like Madison and Kent, recognize the need to update their project. Therefore, accepting the invitation of these Founders themselves, we must complete their own work by adding the kind of impartial institution for adjudicating disputed elections that they originally could not foresee as necessary.

294. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE U.S. 327 (1833).

APPENDIX

Timeline of 1792 Election Dispute

Jan. 13	Smith sends resignation
Feb. 18	Smith's commission expires
March 30	Gilbert's commission issued
April 3	Smith elected town supervisor
April 24-28	balloting; Smith supervises polls
April 30	Van Rensselaer gives commission to Cooper
May 1	in new job, Smith rules on ballots
April 29-May 3	ballots in Smith and Cooper's store
May 3	as sheriff, Smith deputizes Goes
May 11	Cooper gives Gilbert commission
May 29-June 12	canvassing committee meets
June 12	Federalists begin to explore options
June 15	"Gracchus" calls for public agitation; unrest begins
June 27-29	Madison, Monroe write their views about the NY dispute
July 1	Clinton inaugurated for new term
July 2	Jay in Albany seems willing to challenge Clinton's victory
July 10	King writes of Jay's single-purpose convention plan
July 16	Jay in New York City backs away from challenge
July 25	Hamilton writes King to oppose Jay's convention plan
Aug. 24	Troup tries to rekindle Federalist challenge; Hamilton nixes it