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# The Original *Bush v. Gore*: An Historical Perspective on Disputed Elections

Edward B. Foley

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What would happen if in this year's presidential election, we had a dispute over the counting of ballots, like we had in 2000? Would the Supreme Court settle the dispute, as in *Bush v. Gore*, or would it decide this time to leave the matter to Congress? And if so, how would Congress handle it?

The truth is that election law scholars don't know how any such dispute would unfold. Extreme uncertainty plagues the topic of

disputed elections, especially those involving a major statewide race, like one for governor or a state's presidential votes. To understand that uncertainty, and to assess what to do about it, we have to go all the way back to the beginning of our nation's history.

We need to go back to 1792, to New York, and its election for governor that year. It was the first major statewide election to end up in a dispute over the counting of ballots.

Nothing in colonial history had prepared the new nation for this kind of dispute. Electing the Chief Executive of a sovereign state was a novelty. In 1787, the year our Founding Fathers wrote our nation's Constitution, only New York and the New England states elected governors. The rest of the former colonies had their legislatures appoint their chief executive, rather on the model of a prime minister.

So, when the dispute arose over the counting of ballots in New York's gubernatorial election of 1792, the participants knew it was unprecedented. As lawyers looking for precedents, they told each other that there was nothing on point, and that they would need instead to rely on principles to address the problem.

Moreover, the participants knew that how they handled this first dispute of its kind would itself set a major precedent for the future. Rufus King, who had been at the Constitutional Convention in 1787 and who was serving as one of New York's U.S Senators at the time, wrote to Alexander Hamilton: if the law fails us here, "what are we to expect from disputes that will arise in presidential elections."

So we know this dispute was a big deal to those who lived through it, but why over 200 years later is it still important to us? To answer this question, I want to offer a methodological perspective. I'm not a professional historian. My methodology, that of a lawyer, is in some sense the opposite of an historian. I train my students to examine precedents in *reverse chronological* order. The most recent one that answers the legal question is the most authoritative. So, when you find the most recent case with the answer, stop. Look no further.

Thus, in telling you today that it is necessary to go all the way back to the very beginning, to 1792, I'm already telling you something important about the topic of disputed elections. I'm

telling you methodologically just how profound the uncertainty is that bedevils the topic of disputed elections. Its uncertainty is so deep-seated that we can't stop our reverse-chronological search until we get all the way back to the very beginning.

Believe me, I've tried to find a more recent stopping point. When Steve Huefner and I first developed a plan for our book, we thought we could confine ourselves to 20<sup>th</sup>-century precedents. But we quickly realized we could not. For one thing, there is an important case, right at the end of the nineteenth century, in 1899 from Kentucky. A really ugly dispute in a gubernatorial election, in which one of the candidates is assassinated. That dispute gets all the way to the United States Supreme Court, which declines to get involved despite a claim remarkably similar to the one made 100 years later in *Bush v. Gore*. There is a fascinating story about the uneasy relationship of that case to *Bush v. Gore*, a story that has not yet been told, and which we will tell in our book, but that story cannot be told properly without pushing further back in time, to 1876, when our

nation suffered its first major dispute over the counting of presidential ballots, in the Hayes-Tilden election.

So Steve and I then think we can start the book in 1876. But it turns out that you can't understand the disputed presidential election of that year without also understanding what happened four years earlier in 1872, when federal troops intervened to quell armed conflict associated with disputed gubernatorial elections in Arkansas and Louisiana.

**SLIDE: DISPUTED ELECTIONS, PRE-1876 [5 minutes]**

Yet compare 1872 with 1855, two decades earlier, when Wisconsin avoids civil unrest over a disputed gubernatorial election there, because the state's supreme court takes jurisdiction to resolve the dispute peacefully. It's an amazing case. The court orders the incumbent Governor to leave office because of fraudulent election returns.

What explains Wisconsin's successful resolution of an incipient crisis by means of judicial decree, whereas Arkansas and Louisiana descend into ugly armed confrontation? Now you might try to explain

it as a North-South distinction, pointing to the intervening Civil War and the fact that Arkansas and Louisiana in 1872 are struggling through post-war Reconstruction. But that explanation is too easy.

It turns out that, back in the 1830s, Maine and Pennsylvania had disputed gubernatorial elections within a year of each other. In 1837, Maine was able to resolve its dispute peacefully, like Wisconsin, by turning to its state supreme court. In 1838, on the other hand, Pennsylvania was not. Pennsylvania's dispute, like the ones in 1872, descended into ugly armed conflict. In Pennsylvania, they call the episode the Buckshot War. Now Pennsylvania's contrast with Maine in the 1830s obviously can't be explained as the problems of post-Civil War reconstruction in a southern State.

Instead, the juxtaposition of Maine and Pennsylvania in the 1830s shows us something significant and why we need to push back even further to 1792. What is remarkable about all these disputes over gubernatorial elections before 1876 is just how unclear it is how they will be handled. It's not only unclear who will prevail. It's unclear to the participants themselves what institution

ultimately will resolve the dispute and, more importantly, what institution is the proper one that *should* resolve the dispute. In Wisconsin the state supreme court asserts jurisdiction, but it is a bold & unprecedented move, with no guarantee of success ahead of time. The incumbent governor refuses to accept the authority of the court to exercise this jurisdiction, not even letting his attorney show up in court. But in the end he caves, as public opinion rallies to the court's intervention. It's rather like what happened with Nixon after the U.S. Supreme Court ruled in the Watergate tapes case.

In Maine it is even more fortuitous that the state supreme court gets involved. The court did not assert its jurisdiction in the typical way, in response to a lawsuit filed by an aggrieved litigant. Instead, the state's legislature asked for an advisory opinion from the court, to diffuse the controversy. They didn't have to, but it is a good thing they did, because it worked. In Pennsylvania, by contrast, they were unable to find any institution to resolve the situation peacefully. The law called for the legislature's involvement but the legislature could not operate because its own composition was mired in the same

controversy over the election returns that afflicted the governor's election.

This institutional unpredictability is also a feature of the two major disputed presidential elections we've had in our history. It was a surprise in 2000 when the U.S. Supreme Court intervened to be the "decider" in *Bush v. Gore*. Back in 1876, they needed to create a special commission to handle that situation. It was a good effort, flawed in some crucial details, but we can't fault them. It is very difficult to create a new institution to resolve this kind of dispute when you are in the midst of it.

It is remarkable, really, that there would be this institutional uncertainty over something as important as identifying who the next Chief Executive will be. Whether for governor, or President, you think the procedure would be absolutely clear. Yet that's not what history shows.

Instead, we see a crucial gap in the constitutional architecture. The Framers failed to supply an institution suited to handling this type of dispute. Maine, Pennsylvania, Wisconsin, Louisiana, and

Arkansas all struggle to handle the situation in the absence of the needed architecture—some states more successfully than others. But why did the Founding Fathers leave us with this institutional gap? To answer that question, we must go back to 1792, because that is when the Founding Fathers themselves confronted this type of dispute and themselves struggled with this institutional gap. As we'll see, the Founding Fathers themselves are not sure what to do in this situation and how to handle it. Their own inadequacy is an important lesson for us as we confront the institutional uncertainty that continues to vex this field to this day.

### **New York 1792 [13 minutes]**

So what happened back then? The New York gubernatorial election of 1792 was one of the first involving two-party politics, despite the Framers' desires to avoid that development. The incumbent, George Clinton, sought reelection as the candidate of the newly emerging party called the Democratic-Republicans. John Jay was the Federalist candidate. He had been an author of the Federalist Papers, along with Alexander Hamilton and James

Madison. In 1792, he was serving as the first Chief Justice of the United States. His willingness to leave that position to become New York's governor signals the relative importance of the two offices at the time—and signals also this disputed election is indeed comparable in significance to a fight over presidential ballots.

The dispute concerned the ballots cast in Otsego County, where Cooperstown (the home of the baseball hall of fame) is located. If Otsego's ballots were counted, Jay would win by roughly 200 votes. But if not, then Clinton would prevail by about 100. The specific problem involved 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.

#### **SLIDE: TIMELINE OF OTSEGO SHERIFF DISPUTE**

The problem concerned the identity of the individual who undertook this task, Richard Smith, and to understand the problem we need to focus on some specific dates. The ballots were delivered on May 3. They had been cast between April 24 and April 28.

(Voting occurred over several days back then.) But on January 13

Richard Smith, the outgoing sheriff, had announced he would step down. His term ended on February 18. His replacement, Benjamin Gilbert, was named March 30. But Gilbert did not receive his commission and enter office until May 11. Meanwhile, Smith had been elected a town supervisor on April 3, and state law said that a sheriff could not hold that incompatible position. Smith had started to perform the duties of a town supervisor, including supervising the polls while ballots were cast. On May 1, as town supervisor, he ruled on challenges to the eligibility of some voters. But then, on May 3, acting again as sheriff, Smith collected all of the county's ballots from various towns within it, including his own, and deputized a man named Leonard Goes to deliver the ballots to the Secretary of State.

Clinton supporters argued that Smith was not validly acting as sheriff on May 3, and thus the ballots could not count since the law allowed only a sheriff to deliver them. The Clintonians did not dispute the right of a valid sheriff to name a deputy. Nor did they have a problem with the mechanics of the delivery. The boxes were properly sealed. As the controversy unfolded, the Clintonians would

suggest—but never prove, or even offer any direct evidence—that Smith might have tampered with the ballots while they were in his possession. Rather, at the outset (and throughout the controversy) their main point was simply that Smith was not sheriff and therefore could not legally perform the sheriff’s duty of delivering the ballots. The Clintonians contended that, on that ground alone, all the Otsego ballots must be discarded.

Under New York’s election law, the decision whether to count the disputed ballots was in the hands of a Canvassing Committee, whose members came from the state legislature: six Senators and six Representatives. The statute also said that the decision of these Canvassers would be “in all cases binding and conclusive.” This language would become important after the Canvassers ruled.

It also mattered hugely who the Canvassers were. They had been chosen in early April, before the election. The Democratic Republicans controlled both houses of the legislature at the time. In the Senate, however, they agreed to a compromise that gave them and the Federalists 3 Canvassers each. The Federalists thought they

had the same bipartisan deal in the Assembly, but they didn't. They felt hoodwinked or outmaneuvered, but in any event all six of the Assembly's canvassers were Clintonians, for an overall majority of nine to three. As a result, the Federalists were not optimistic.

Nonetheless, they assembled a large team of lawyers in an effort to persuade both the Canvassers and public opinion. The other side did the same. In the words of one historian, "every lawyer" in New York "rummaged through his books for legal argument." At the time, one Federalist lawyer reported to John Jay that the other side was "stuffing the newspapers with dissertations on the subject" and that their legal team was responding in kind. They didn't have CNN back then, but otherwise the public debate on points of law resembled what occurred in 2000. Indeed, each side had its leading legal luminary, just as Bush and Gore had James Baker and Warren Christopher. Back then, the roles of Baker and Christopher were played by the two U.S. Senators from New York. One (already mentioned) was Rufus King; he led the legal fight for Jay. The other was Aaron Burr, who came to Clinton's defense.

The contending legal arguments became a battle over the basic principles of election law, a battle that rages essentially unchanged to this day. The Clintonians argued for a strict enforcement of the election code, in order to protect the integrity of elections. The Federalists countered—and this is their own words—that “the election law should be construed liberally to protect and enforce the rights of suffrage,” so that innocent voters are not wrongly disenfranchised.

Let’s focus on the strongest expression of each side’s position.

**SLIDE: RANDOLPH**

Consider these words of Edmund Randolph, the U.S. Attorney General recruited by Aaron Burr to support Clinton’s position:

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.

Now let's contrast Randolph's language with that of John Trumbull, a Federalist from Connecticut, who had worked as a lawyer with John Adams's and who at the time was in the Connecticut legislature and later would become a state judge:

**SLIDE: TRUMBULL**

The existence of all representative republics is founded on the rights of suffrage. This right is fully established in the Constitution of the State of New-York. The Legislature ha[s] undoubtedly [the] 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.

**SLIDE: TRUMBULL, CONT.**

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; & am of the

opinion that in such case all votes fairly given & honestly returned, ought to be canvassed; for the rights of the free electors ought always to be preferred to the mere forms of law.

Both Randolph and Trumbull are rooting their argument in the fundamental right to vote.

**SLIDE: *forward to return to RANDOLPH***

Randolph sees that right protected through strict enforcement of the laws.

**SLIDE: *forward to return to TRUMBULL***

Trumbull through flexible enforcement. It's the exact same debate that occurred in 2000, occurred in all the litigation here in Ohio in 2004, and again this year. The fact that, as a society, we have not advanced beyond the same basic debate as occurred over 200 years ago is itself significant.

**SLIDE: *forward to return to OSTEGO TIMELINE***

To fully appreciate the strength of this jurisprudential battle as it arose in 1792, you need to know some more facts about the circumstances surrounding the delay of Gilbert's commission as

sheriff to replace Smith. These facts are recounted in a 1995 Pulitzer-prize-winning book by the historian Alan Taylor. The outgoing sheriff Smith was a Federalist, allied with Jay and Jay's running mate for Lt. Governor, Stephan Van Rensselaer. Van Rensselaer will become important in a moment. Also prominent in this drama is Judge William Cooper, the leading figure—really the political boss—of Otsego County at the time, after whom Cooperstown is named. Taylor describes the machinations of these men to keep Gilbert's commission out of Gilbert's hands until after Smith could get custody of all the county's ballots, before Smith's sending them on to the Secretary of State.

Smith's successor, Gilbert, was not a Federalist. He was chosen by the state's appointment board, which was controlled by Clinton as the incumbent Governor. 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 on to Gilbert himself.

But Van Rensselaer purposively held onto it, and in a letter to Cooper he unabashedly explained why:

**SLIDE: Van Rensselaer**

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].

Wow! Van Rensselaer pretends to be playing defense, but he's the one manipulating the electoral process by making sure a partisan loyalist controls the ballots.

**SLIDE: to show store**

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. Then, what is even worse, the person Smith deputed to take the ballots to the Secretary of State, Leonard Goes, was indeed a close and loyal associate of Van Rensselaer's!

The historian Taylor, based on his thorough review of all the available evidence, concludes that in his judgment neither Cooper nor Smith actually meddled with the ballot box while it was in their store. For what it's worth, Smith submitted an affidavit swearing that he "fairly, honestly, and impartially keep them in my possession." But there was much evidence of other kinds of wrongdoing committed by Smith and especially Cooper during the days ballots were cast—including encouraging unlawful voting by individuals not eligible under the law, as well as intimidation of voters and poll watchers who supported Clinton. Still, there was no evidence of tampering with the county's ballots after they were cast. Taylor credits Van Rensselaer with being forthright in his defensive motive to prevent wrongdoing from the other side. So, here's Taylor's conclusion in his own words:

It is very unlikely that Cooper, Smith, or Goes [Smith's deputy and Van Rensselaer's associate] 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.”

Maybe so, but it sure looked horrible. It certainly gave support to the Clintonians’ argument that strict enforcement of the election statute helped to protect the integrity of elections. That concept was not just abstract. The conduct in Otsego was a concrete example of suspicious behavior to be discouraged. Yet the Federalists persisted in claiming that, without any evidence of ballot tampering by Smith or Cooper, to throw out all of Otsego’s ballots just because Smith was no longer formally the county’s sheriff would be to disenfranchise innocent voters—about 1000 of them—based on a mere technicality. “A law quibble,” they called it.

### **Canvassers’ Decision [29 minutes]**

So what happened?

After hearing the arguments from both sides, the Canvassers voted 7-4 in favor of excluding the Otsego ballots and thus certified Clinton the winner. It was a party-line vote—just as the Federalists

had feared—except for one Clintonian who dissented along with the three Federalists. [1 of the 12 Canvassers was inexplicably absent.]

Both the majority and the dissenters issued opinions to explain their votes. Not surprisingly, the majority adopted the integrity argument, while the dissenters embraced the voting rights viewpoint. The majority said that it needed to strictly enforce the requirement that the sheriff be the one to deliver the ballots to the Secretary of State in order to protect the “freedom of elections.” Otherwise, “a provision intended as a security against [election frauds] would be an engine to promote them.” They specifically referred to the unseemly facts surrounding the delay of Gilbert’s commission and the storage of the ballots in Cooper’s store.

**SLIDE: Canvassers (majority)**

These facts, with other suggestions of unfair practices, rendered the conduct of the Otsego election justly liable to suspicion; and the committee was 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.* [their emphasis]

**SLIDE: Canvassers (dissents)**

The dissenters on the Canvassing Committee echoed the argument made to them by Jay's supporters. Three Federalist dissenters wrote: "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 the suffrage be rendered nugatory." The other dissenter, writing separately, made exactly the same point.

**Political maelstrom after Canvassing decision [31 minutes]**

After the Canvassers announced their ruling, a political maelstrom erupted. There was violence in the streets, and threats of much more.

**SLIDE: VIOLENCE AND THREATS OF MORE**

Cooper threatened armed rebellion, saying "a Face of Flint ought to be set against the insult." Another Federalist was even stronger: "Clinton must quit the Chair, or blood must and will be

shed.” An early history, written by one alive at the time, said that “the state seemed menaced with the ascendancy of anarchy and utter confusion.”

This talk of the “bayonet,” as Hamilton put it, was in character for a generation of citizens who had fought—and won—the American Revolution. They were not afraid to take up arms to defend their fundamental right to self-government, and Jay’s supporters saw the Canvassers’ decision as an act of tyranny that robbed them of that right. In the days that followed that decision, in newspapers and in public proclamations, the Federalists repeatedly invoked the Declaration of Independence to support a popular uprising to overturn the Canvassers’ decision.

As lawyers, the Federalist leaders saw no recourse under the existing law, given the statutory provision making the Canvassers’ decision “binding and conclusive.” Ironically, Jay had been the author of New York’s constitution, back in 1777, but the constitution contained no mechanism for its own amendment.

Thus, the Federalists turned to the idea of a new constitutional convention to undo the Canvassers' ruling. Since the legislature was controlled by the Clintonians, it would not call for a constitutional convention. So the Federalists considered calling one themselves, as a direct act of popular sovereignty. According to Rufus King, in a letter written to Hamilton, Jay himself supported this idea. But King and Hamilton did not. King feared that "Clinton will not relinquish the Office [of governor]" even if a convention demands it, and that situation would indeed necessitate armed conflict between the two sides, and King was not at all sure how it would turn out. Hamilton was even more opposed to the convention idea, given how it might spin out of control. He told King that they must talk Jay out of the idea. And they did.

The Federalists settled on a plan to score some political points by making a show of attempting to seek redress from the legislature, even though they knew it to be futile, given the Clintonians' control of the legislature. Nonetheless, at Hamilton's urging, they asked the legislature to investigate the matter—something the legislature would

be unable to refuse. This way, the Federalists could keep public resentment against the Canvassers' decision simmering long enough to prevail in next round of elections.

And that's exactly what happened. The legislature investigated the matter for over three months. The young James Kent led the presentation of the Federalist's case in the legislature. (Within the year, Kent would become Columbia University's first law professor and one of the nation's first leading scholars.) After the investigation was complete, the Clintonian-controlled legislature—in a partisan vote—exonerated the Canvassers of any wrongdoing. Yet the Federalists won control of legislature in new elections a couple of months later. Then, at the next gubernatorial elections, in 1795, Jay ran again and won easily this time. Clinton, however, declined to run again, his reputation tarnished by the partisan way the Canvassers had given him his victory.

### **Lessons of 1792 [36 minutes]**

What, then, are the lessons of this episode? A complete answer must await the full historical survey that Steve Huefner and I are

writing in our book. Still, some possible insights may be suggested. We have already seen a couple of them.

First, it is a mistake to think it was something new in 2000 when armies of attorneys fought over the outcome in Florida. Both candidates “lawyered up” in 1792, just as they did in 2000—and usually do in major disputed elections, as our book will show.

Moreover, “lawyering up” is not necessarily a bad thing. Better to fight with two armies of attorneys than two armies of soldiers. Better to handle the disputes through the rule of law, than through bloodshed and/or mob intimidation—which has occurred on less fortunate occasions.

Second, we have seen that the same basic jurisprudential battle that occurs today in disputed elections occurred the first time our nation faced one of these disputes. And the nature of the debate has not changed, only the particular circumstances. Not hanging chads, but the rules for the sheriff’s delivery of ballots to the Secretary of State.

Moreover, and this is an important point, we have seen that there is no obvious winner to this jurisprudential battle, which has lasted essentially unchanged for over 200 years precisely because there is strength to both points of view. And given the plausibility of each position, when this jurisprudential battle wages in the context of a specific disputed election, as it did in 1792, or again in 2000, each side is thoroughly convinced that their view is correct. The debate cannot be resolved substantively; it can only be settled procedurally. And the only successful way to settle it procedurally is through an institution that is perceived by both sides to be fair.

This brings us to our next—and increasingly important—lesson. In 1792, they did not have a procedure that was seen to be fair for deciding this jurisprudential debate. And this lack of a fair procedure is what caused the calamity. It is not that they had *no* procedure. They did. The law was absolutely clear on the authority of Canvassers to make the final and conclusive determination. But the problem was that the Canvassers were viewed immediately to be an inadequate body to the task, because of the inherent unfairness of

its partisanship. It is that institutional inadequacy that caused the precipitous instability and uncertainty. John Jay, the author of New York's constitution and the Chief Justice of the United States, had to be talked out of seeking extra-constitutional measures to overturn the Canvassers' decision. He and his ardent supporters eventually acquiesced. But the key point is that they were so inclined *not* to acquiesce, and to risk bloodshed for the sake of undoing the injustice. They came very close to the precipice before pulling back.

**[time check: 40 minutes]**

[If an institution perceived to be fair to both sides had ruled in favor of Clinton, there would have been no crisis to diffuse. They could not have claimed that they had been robbed. There would have been no oppression to potentially take up arms against.]

Perhaps the lesson to be learned is simply the sweetness of political revenge. Don't worry if there is no fair institution. If the procedure is unfairly partisan and stacked against you, as a candidate, in one of these situations, then take Hamilton's advice:

accept defeat this time, but beat them politically next time. Some say that's the lesson that Al Gore should have learned in 2000.

But I think that would be the wrong lesson to learn from 1792. Jay and his supporters in New York thought themselves entitled to a fair resolution of the dispute. Jay, as author of the existing constitution, believed in the justice and the rightness of the regime that he had created. So he saw it perverted by the partisan injustice that the Canvassers had perpetrated.

And, here, we are getting closer to the better lesson to be learned. Jay and the other Founding Fathers involved in this crisis had expected the Canvassing Committee to be a fair institution because they had not expected that it would be mired in partisanship. Remember, the Framers famously had thought they had designed institutions in the new constitutional order to avoid the evils of partisanship, or "faction" as they sometimes called it. They thought that separation of powers, with its ancillary doctrine of checks and balances, would be enough to keep interest group politics in check. But it wasn't.

Two-party politics—a polarized us-versus-them mentality—had emerged by 1792, and it affected the existing mechanisms to resolve disputes over the election of a chief executive in ways that the Founding Fathers did not anticipate. The Canvassers could not be trusted because they had become infected with that polarized two-party politics.

Now combine this unexpected emergence of two-party politics with the fact, as mentioned at the outset, that the Founding Fathers had little experience with the election of Chief Executives. Remember: they were new at electing governors. They innocently thought an institution like the Canvassing Committee would be sufficient to the counting of ballots for Chief Executive. They did not have the foresight to create a more robust institution.

This truth applies to both gubernatorial and presidential elections. Recall that 1787 was the year that New York adopted the law that put the Canvassers in place, and that same year the Framers wrote the U.S. Constitution with its provision for the election of a president. The same lack of foresight about the potential effects

of two-party politics occurred in both contexts. This shortsightedness caused the U.S. Constitution to have the same kind of institutional deficiency for presidential elections that existed for New York's gubernatorial election.

Indeed, focusing now for a moment on presidential elections, we see that, after the emergence of the two-party politics that they had hoped to avoid, the Founding Fathers themselves began to realize the significance of their own omission. In one respect, they saw this clearly after the debacle in 1800, when two-party politics caused the mechanism of the Electoral College to freeze-up, in a tie vote between Thomas Jefferson and his running mate, Aaron Burr. [According to the Framers, the device of the Electoral College was supposed to prevent two-party politics from affecting the election of the presidency, but just the opposite occurred. As several early commentators on the Constitution observed, this was the Framers' biggest blunder: a complete frustration of their intentions.]

But even before the election of 1800, the Founding Fathers were beginning to see that their mistake about the Electoral College,

and its inability to forestall two-party politics, would impinge upon the process of presidential elections in another troubling way—in a way directly relevant to our topic today. In the aftermath of 1792, some could see that two-party politics would wreak havoc in the event of a dispute over the counting of presidential ballots—the ballots that would choose the Electoral College. In March of 1800, Charles Pickney—who had been a delegate to the Constitutional Convention—warned that Congress could not be trusted to resolve a dispute over presidential ballots because of the partisanship that would affect this congressional judgment.

A quarter-century later, in the 1820s, James Kent—by then the preeminent scholar and reflecting his experience in the crisis of 1792—wrote ominously the Framers of the Constitution had simply failed to anticipate the problem, adding that this omission “will eventually test the goodness and try the strength of the constitution.” A few years after Kent, another famous early constitutional scholar, Joseph Story, who also served on the U.S. Supreme Court, picked up

Kent's point and put it even more sharply. In the Constitution, Story said,

**SLIDE: Story on Framers' Failure**

No provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes, or the right of the persons, who gave the votes, or the manner, or circumstances, in which they ought to be counted.

**SLIDE: Story on Framers' failure, cont.**

It seems to have been taken for granted, that no question could ever arise on the subject; and nothing more was necessary, than to open the certificates which were produced, and to count the names and numbers, as returned.

Yet it is easily to be conceived, that very delicate and interesting questions may occur, fit to be debated and decided by some deliberative body.”

It is easy for Story to see this in the 1830s, building on what Kent and others had learned after 1792. But it wasn't easy, or apparently even possible, to see it in 1787.

With this insight from Kent, sharpened by Story, we can find the ultimate lesson from 1792. The Framers failed to provide us with adequate institutions to resolve the conflicts that can arise over the counting of votes for Chief Executive. They simply missed the issue, given their inexperience with the election of Chief Executives and their expectation that they had designed sufficient mechanisms to avoid polarized two-party politics. They wanted to build a good and fair constitutional order—a more perfect union, to establish justice. But they left out a necessary piece of the constitutional architecture to achieve this purpose, as John Jay personally discovered in 1792. Yes the omission that afflicted Jay also affects presidential elections, as Kent and Story came to understand. And this omission explains the continuing uncertainty and instability that exists today should we face another such dispute, this year or in the future.

The next time there is a fight over presidential ballots, we won't know if the Supreme Court will intervene, or if Congress will create a new commission, or what else might happen. As a nation, we have never fixed the flaw that surfaced in 1792. But we cannot escape our ongoing predicament unless we fix this flaw. If we are to be true to the Framers' hope for a fair and well-working constitutional system, we must supply the missing piece of constitutional architecture that they could not foresee was necessary. We must give our posterity what our Founding Fathers were unable to give to us or, as we have seen, even to themselves.