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How Not to Count Votes

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Rutherford B. Hayes defeated Samuel Tilden by one electoral vote in the presidential election of 1876. In Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876, *Roy Morris, Jr. concludes that the election was stolen from Tilden by Republican partisans serving on the canvassing boards in the three Southern states—Florida, Louisiana, and South Carolina—that were still under the control of Republican governments backed by the federal army. But in* Centennial Crisis: The Disputed Election of 1876, *Chief Justice William H. Rehnquist defends the integrity and the actions of the Supreme Court Justices who served on the special Electoral Commission that Congress established to resolve the disputed claims about the election. The 1876 election, and the analogous difficulties attending the 2000 election, demonstrate the need to consider who counts votes in contested elections, and how to best balance the sometimes competing needs of independence, expertise, and timeliness.*

CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876. By William H. Rehnquist. New York: Alfred A. Knopf, 2004. Pp. 274.

FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876. By Roy Morris, Jr. New York: Simon & Schuster, 2003. Pp. 311.

INTRODUCTION

Two weeks before the 1876 presidential election, Republican candidate Rutherford B. Hayes confided in his diary that "danger is imminent: A contested result. And we have no such means for its decision as ought to be provided by law."[1] Hayes could not have imagined how prophetic his words would soon become, for he defeated Samuel Tilden by one electoral vote—185 to 184—only after it was determined that all four contested states—Florida, Louisiana, Oregon, and South Carolina—had cast their votes for Hayes. Tilden's supporters insisted that Democratic votes

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1. Letter from Rutherford B. Hayes to William Henry Smith (Oct. 22, 1876) *in* 3 Diary and Letters of Rutherford Birchard Hayes: Nineteenth President of the United States 370, 370 (Charles Richard Williams ed., 1924) [hereinafter Hayes Diary and Letters]. Hayes added that "[w]e should not allow another Presidential election to occur before a means for settling a contest is provided." Id. See also Harry Barnard, Rutherford B. Hayes and His America 314 (1954) (quoting Cincinnati journalist Murat Halstead's pre-election day remark that "[a] disputed presidential election would Mexicanize us. There is incalculable ruin in it").

had been wrongfully ignored in the three Southern states, while the Republican supporters of Hayes complained that African Americans had been intimidated from voting for Hayes in those states. The dispute was not resolved by any of the extant constitutional provisions or federal statutes, but rather by the 8-7 vote of a special commission that Congress established solely for the purpose of resolving the election. Congress accepted that result just before Hayes was inaugurated on March 4, 1877.

Of course, all of this was echoed in the 2000 presidential election, which elicited its own cries of a stolen election and accusations hurled at the parties involved in deciding it, especially the Supreme Court of the United States. The parallels between the 1876 and 2000 elections were recognized in *Bush v. Gore*[2] itself. Justice Breyer wrote in dissent that

> the participation in the work of the Electoral Commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process.[3]

Many more lessons of the presidential election of 1876 are recounted in two books that have appeared since the events of 2000: Chief Justice William H. Rehnquist's *Centennial Crisis: The Disputed Election of 1876*,[4] and Roy Morris, Jr.'s *The Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876*.[5] Rehnquist and Morris note the many historical parallels between 1876 and 2000, while identifying some critical differences as well.[6] Chief Justice Rehnquist declined to respond to Justice Breyer's reference to the 1876 election in *Bush v. Gore*, but Rehnquist does so in his book, defending the work of the Electoral Commission and of the Supreme Court Justices who sat on it. Likewise, while Rehnquist does not specifically address the plea for a law to resolve contested presidential elections that Hayes recorded in his diary shortly before the election of 1876, Rehnquist suggests that any quest for a means of resolving such elections will be in vain. "Perhaps when such a dispute erupts, there is no means of resolving it that will satisfy both sides."[7] Rather than surrendering to that belief, I want to analyze the different institutions that have attempted to resolve disputed elections, sketch the criteria for evaluating their work, and outline the lessons that emerge from the story of the presidential election of 1876 as told by Chief Justice Rehnquist and Roy Morris, Jr.

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2. 531 U.S. 98 (2000).

3. Id. at 157 (Breyer, J., dissenting).

4. William H. Rehnquist, Centennial Crisis: The Disputed Election of 1876 (2004).

5. Roy Morris, Jr., The Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876 (2003).

6. Rehnquist and Morris each begin their books with a list of the historical parallels between 1876 and 2000. See Rehnquist, supra note 4, at 3–6; Morris, supra note 5, at I–2.

7. Rehnquist, supra note 4, at 6.

1. The Election of 1876

Rehnquist and Morris tell this story from their differing perspectives as the Chief Justice of the Supreme Court of the United States—and thus an active participant in the disputed 2000 election[8]—and as a popular Civil War historian and political correspondent. Both books provide a rich description of the events that led Hayes, the Republican governor of Ohio, to face Tilden, the Democratic governor of New York, in the general election of 1876, the centennial year of the creation of the United States.[9] Hayes prevailed on the seventh ballot in the Republican Party convention against the early favorite, Maine Representative James G. Blaine—who inspired the eponymous state constitutional "Blaine Amendments" that trouble us to this day[10]—because of Blaine's inability to clear his name from a scandal involving his sale of railroad bonds. Tilden had a much easier road to the Democratic nomination as a result of his reputation as a reforming governor who had successfully battled the corruption of Boss Tweed and Tammany Hall in New York City. The general election became a referendum upon two distinct concerns: the widespread corruption of the Grant Administration and the struggle to reestablish state governments throughout the defeated states of the Confederacy. Tilden appealed to those throughout the country who were fed up with the corrupt mess in Washington and to white Southerners who sought to recapture the control of their state governments from Republican carpetbaggers and from newly free African Americans. Hayes was the champion of those who feared the election could undo everything the Civil War—just eleven years past—had achieved for African Americans at the cost of much bloodshed, still vividly remembered by the many Union soldiers now voting in the North. The Republican strategy, as Rehnquist describes it, was "to impress on the electorate that while every Democrat had not been a rebel, every rebel had been a Democrat."[11] Left unstated was what Morris describes as "a more pressing problem, one that affected everyone. That problem was race."[12] Racial violence and threats of racial violence had persisted in the decade after the Civil War, and they increased as both parties sought to win the Southern states whose votes could be critical in a close election.

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8. See Bush v. Gore, 531 U.S. at 111 (Rehnquist, C.J., concurring).

9. For an overview of the period and the issues of concern in 1876, see Morris, supra note 5, at 19–45; Rehnquist, supra note 4, at 7–32, 80–93. Biographical sketches of each candidate appear in Morris, supra note 5, at 57–68 (discussing Hayes); id. at 84–108 (discussing Tilden); Rehnquist, supra note 4, at 33–51 (discussing Hayes); id. at 58–79 (discussing Tilden).

10. See Locke v. Davey, 124 S. Ct. 1307, 1314 n.7 (2004) (noting the argument that "Washington's Constitution was born of religious bigotry because it contains a so-called 'Blaine Amendment,' which has been linked with anti-Catholicism").

11. Rehnquist, supra note 4, at 85.

12. Morris, supra note 5, at 28. Throughout his book, Morris details the role that race, and racial violence, played in the election. See id. at 28–30, 33–34, 41–44, 128–30, 146–55, 178–81, 190–92, 244–49.

Rehnquist observes that as election day approached, "[f]or the first time in twenty years, the Democratic Party in 1876 had at least an even chance of electing its candidate for President."[13] Even so, the *Chicago Tribune* proclaimed that "Republican confidence was never more unwavering than now," though it added an ominous cautionary note: "provided the Confederate Tildenites permit a fair and honest election."[14] Finally, on election day Tilden emerged as the undisputed victor in seventeen states containing a total of 184 electoral votes, and Hayes clearly prevailed in seventeen states with a total of 163 electoral votes. Tilden won all of the former Confederate states that had emerged from reconstruction (Alabama, Arkansas, Georgia, Mississippi, North Carolina, Tennessee, Texas, and Virginia), the border states (Delaware, Kentucky, and Maryland), three Northeastern states (Connecticut, New Jersey, and New York), and the three scattered states of Indiana, Missouri, and West Virginia. Hayes won a belt of states ranging from the West (California, Colorado, and Nevada), through the Plains (Kansas and Nebraska), the Midwest (Illinois, Iowa, Michigan, Minnesota, Ohio, and Wisconsin), and Pennsylvania, plus five states in New England (Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont).[15] The winner was unclear in the three Southern states that were still under the control of Republican governments backed by the federal army: Florida, Louisiana, and South Carolina. Additionally, while Hayes won the popular vote by about 1,000 votes in Oregon, one of his electors there was also serving as a deputy postmaster, thus violating the constitutional prohibition upon electors holding federal office.[16] Hayes would prevail only if he won all twenty of the uncertain electoral votes: Louisiana's eight electoral votes, South Carolina's seven, Florida's four, and the disputed elector in Oregon. Conversely, Tilden would be elected if he captured just one of those twenty electoral votes.

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13. Rehnquist, supra note 4, at 32.

14. Id. at 91–92. For a succinct explanation of the constitutional system for electing the president, see Abner Greene, Understanding the 2000 Election: A Guide to the Legal Battles that Decided the Presidency 15–18 (2001).

15. See id. at 95–96 (listing states won by each candidate); Presidential Elections 1876–1888, *in* National Atlas of the United States, available at http://nationalatlas.gov/elections/elect06.pdf (last visited Sept. 19, 2004) (on file with the *Columbia Law Review*) (map showing electoral votes by state and candidate).

16. See U.S. Const. art. II, § 1, cl. 2 (providing that no "Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector"). As Rehnquist explains, the deputy postmaster resigned his position after election day in an effort to cure the constitutional problem. Oregon's Democratic governor sought to name the runner-up candidate—a supporter of Tilden's—to the elector's position, but "[t]he clear intent of [the state election statute] was that the remaining electors should fill the vacancy," and those two Republican electors chose another elector who voted for Hayes. Rehnquist, supra note 4, at 109–12. Similar problems arose with electors in several other states. See id. at 174–75 (discussing a Hayes elector from Florida who had resigned as a United States shipping commissioner before the election); id. at 178–79 (noting an unsuccessful Democratic assertion that a Wisconsin elector was a federal employee). The issue was even litigated in state court in Rhode Island. See infra text accompanying note 49.

The presidency hung in the balance as various parties struggled to identify—or create—the winner as soon as the results became known on election night. Morris begins his book with the tale of how nearly every newspaper throughout the nation proclaimed Tilden the winner on the day after election day, save one: the *New York Times*. Morris describes how John C. Reid, the managing editor of the *New York Times*, was instrumental in convincing Republican leaders on election night that Tilden may not have won the election despite the initial returns suggesting as much. Reid, explains Morris, was "a dyed-in-the-wool Republican partisan whose wartime exposure to southern Democrats, in the person of the Confederate cavalrymen who had captured him outside Atlanta, Georgia, in the summer of 1864 and carried him off to Andersonville Prison, had left him with a permanent hatred for all things Democratic."[17] Seizing upon an intercepted telegram from Democratic leaders indicating doubt about the winner in several states, a few busy Republicans in New York City—including former Union Army General Daniel E. Sickles[18]—quickly wired Republican officials in Florida, Louisiana, Oregon, and South Carolina that "[w]ith your state sure for Hayes, he is elected. Hold your state."[19] Morris offers an especially detailed account of what happened in those four states after election day as state canvassing boards and state courts encountered—and sometimes were populated by—partisans of doubtful integrity. The canvassing boards declared Hayes the winner in each state, but Morris concludes that Tilden was almost certainly the rightful winner in Louisiana, probably the victor in Florida by an even closer vote than occurred in 2000, and perhaps the winner in South Carolina, too.

Rehnquist emphasizes what happened once the United States Senate received conflicting certifications of the electors from those states. Not surprisingly, he devotes special attention to the role of the five Supreme Court Justices who joined five senators and five representatives on a special electoral commission that Congress established in January 1877 to arbitrate the electoral disputes. Also not surprisingly, Rehnquist is less willing than Morris to say who really won the election. Rehnquist instead makes the legal case for the Electoral Commission's refusal to conduct a de novo review of what happened in each of the three Southern states,

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17. Morris, supra note 5, at 14.

18. Morris describes how Sickles had been "the personal protégé of President James Buchanan" until Sickles shot the son of Francis Scott Key, who was having an affair with Sickles's wife. Id. at 10. "Sickles was acquitted of his crime by reason of temporary insanity, the first time such a legal defense had been used successfully in an American court of law." Id. Sickles then lost a leg but received a Medal of Honor for his military service at Gettysburg, became a Radical Republican who was the military commander of South Carolina after the Civil War until removed by President Johnson, and was appointed by President Grant as "the American minister to Spain, where his notorious dalliance with that country's deposed queen, Isabella II, subsequently earned him the not entirely undeserved or unwelcomed nickname 'the Yankee King of Spain.'" Id. at 10–11.

19. Rehnquist, supra note 4, at 97.

and he champions the integrity of Justice Joseph Bradley, who was vilified for casting what was regarded as the tie-breaking eighth vote for Hayes on the commission. The truth will never really be known, but I, at least, am persuaded that Louisiana's electoral votes should have been awarded to Tilden instead of Hayes (as Morris insists), or that Louisiana's votes should have been rejected altogether (as had occurred in the previous presidential election in 1872), because of the apparent fraud committed by the state's canvassing board. Without Louisiana's electoral votes, neither candidate would have received a majority of the total electoral votes, and therefore the Democratic-controlled House of Representatives would have exercised its constitutional duty to select a new President. Either way, Samuel Tilden would have been the nineteenth President of the United States.

II. WHO COUNTS VOTES?

The outcome of the 1876 presidential election depended upon who received the most votes. But counting the votes—both the popular votes in each state and the electoral votes of all of the states—was itself a contested exercise. Like 2000, when much of the attention concerned factual and legal disputes about which ballots counted as popular "votes" in Florida, the disputes in 1876 involved questions about which popular and electoral votes were properly included and excluded during the official tabulation. The exercise of judgment in answering those factual and legal questions makes the determination of who counts the votes crucial. Indeed, many of the writers describing the presidential election of 1876 emphasized the "who counts the votes" question.[20] That question raises precisely the sort of structural constitutional issue whose importance is so well explained by Judge Wilkinson.[21] Alas, as Rehnquist observes, the counting of votes in presidential elections suffers from the fact that "[t]he Constitution was silent as to *who* would do the counting."[22]

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20. See, e.g., James Monroe, The Hayes-Tilden Electoral Commission, 72 Atlantic Monthly 521 (1893). Monroe wrote that:

> [t]he practical question in all men's minds, and on nearly all men's tongues, was, by whom shall it be decided who has been elected President of the United States? Who shall determine what are the proper electoral votes, distinguishing between those that are genuine and those that are spurious? Who shall count the votes and declare the result?

Id. at 522.

21. See J. Harvie Wilkinson III, Our Structural Constitution, 104 Colum. L. Rev. 1687 (arguing that structural issues deserve more emphasis in constitutional analysis).

22. Rehnquist, supra note 4, at 99; see also 5 Cong. Rec. 896 (1877) (statement of Sen. Morton) (remarking that "the framers of the Constitution anticipated none of this trouble"); Milton Harlow Northrup, A Grave Crisis in American History: The Inner History of the Origin and Formation of the Electoral Commission of 1877, 62 Century Mag. 923, 923 (1901) ("In vain men turned to the Constitution for light and help. On the subject of disputed votes for President of the United States that instrument was dumb."). Rehnquist was referring to the competing theories of who counts electoral votes, but the

The supporters of Hayes and Tilden relied upon different constitutional provisions that would entrust the counting of the electoral votes to the supporters of their respective candidates. If no candidate receives a majority of the electoral votes, Article II of the Constitution charges the House of Representatives with electing the President, providing that "the Votes shall be taken by States, the Representation from each State having one Vote."[23] Tilden and congressional Democrats believed that the House should simply vote according to this provision, for both the House and the majority of state delegations within the House were within Democratic control.[24] But the Twelfth Amendment, approved in 1804 after the contested election of 1800, directs the President of the Senate "in the presence of the Senate and House of Representatives [to] open all the certificates and the votes shall then be counted."[25] Republicans claimed that the President of the Senate possessed the responsibility for choosing among the competing certificates that were presented from Florida, Louisiana, Oregon, and South Carolina. That would leave the decision to Thomas W. Ferry, a Republican senator from Michigan who had become the Senate's president upon the death of Vice President Henry Wilson in 1875. The parties insisted upon the correctness of their conflicting positions, and the resulting stalemate created profound anxiety throughout the nation and even fear of another civil war.[26]

Constitution is no more expansive regarding the state institutions charged with counting the popular votes in presidential elections.

23. U.S. Const. art. II, § 1, cl. 3.

24. According to Morris, "Samuel Tilden devoted most of his energy in the month of December [1876] to overseeing the preparation of a massive, book-length study of previous presidential elections[,] *The Presidential Counts*," which defended the right of the House to decide the election. Morris, supra note 5, at 203–04; see also 2 The Writings and Speeches of Samuel J. Tilden 386–452 (John Bigelow ed., 1885) [hereinafter Writings and Speeches] (reprinting Tilden's historical study of "Who Counts the Electoral Vote?"). The Democrats had taken control of the House with a landslide victory in the congressional elections of 1874. See Rehnquist, supra note 5, at 27. Additionally, between 1865 and 1873, Congress counted electoral votes pursuant to a joint rule that required both the House and the Senate to concur in any objections to a particular electoral vote, but that rule was repealed before the election of 1876. Id. at 100. Morris adds that the Twelfth Amendment further provides that the Senate elects the vice president if the electoral college fails to do so. In 1877, the Republicans held a majority in the Senate, so William A. Wheeler—who ran with Hayes—would have become vice president under President Tilden. See Morris, supra note 5, at 201 n.*. The same scenario could have occurred if the election of 2000 had been sent to the Congress, with the House electing President Bush and the Senate electing Vice President Lieberman. See Greene, supra note 14, at 176.

25. U.S. Const. amend. XII.

26. See Rehnquist, supra note 4, at 248 ("Until Congress passed the law creating the Electoral Commission, realistic threats of violence—of armed partisans marching on Washington—were heard from several quarters."). Rehnquist also quotes the conclusion that historian James Ford Rhodes reached in 1906: "The mass of adherents on each side, which was clearly indicated by the closeness of the vote in many Northern States, shows what a terrible internecine conflict would have followed a bloody affray of the floor of Congress." Id. at 109 (quoting 7 James Ford Rhodes, History of the United States 243 (1906)).

Rehnquist and Morris demonstrate the failure of all the efforts to achieve an accepted resolution of the presidential election of 1876. None of the players charged with resolving the election of 1876 acquitted himself well. More tellingly, none of the institutions that had an opportunity to judge the election succeeded in doing so in a manner that settled the question in the popular mind. The stories told by Rehnquist and Morris about the election feature distinct institutions that were in a position to resolve the election: local election officials, state canvassing boards, state court judges, federal court judges, the specially created Electoral Commission, and Congress. Each failed in turn.

A. *Local Election Officials*

The initial counting of the popular vote was conducted by the local precinct and county officials in each state. In Florida in 1876, for example, the process worked like this:

> First, the people vote at various places in the counties. At sunset on election day the precinct polls, as these voting places are called, are closed. The precinct officers count the votes, certify the result and forward that certificate together with the ballots of each precinct to the county seat. When all the precincts of the county are in, a county canvassing board certifies the total result shown by all the precinct reports. This certificate is then sent to the seat of State government, and the ballots themselves are filed at the seat of the county.[27]

Moreover, as Tilden himself explained, neither the local precinct officials nor the county officials "has any power or duty but that which is most purely and simply ministerial. They can merely compute from the documents before them, and in their respective returns report the result."[28] The work of these local officials escaped most of the controversy in 1876, and neither Morris nor Rehnquist emphasizes them.

B. *State Canvassing Boards*

State law creates canvassing boards—also known as returning boards—that are charged with reviewing the local returns and determining how many votes each candidate receives in an election. Those state canvassing boards were quite new in 1876.[29] Neither Rehnquist nor Mor-

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27. Elbert William R. Ewing, History and Law of the Hayes-Tilden Contest Before the Electoral Commission: The Florida Case, 1876–77, at 13 (1910).

28. Writings and Speeches, supra note 24, at 469.

29. Jeremiah Black, the former Attorney General of the United States who served as one of Tilden's counsels before the Electoral Commission, painted a dim view of the new state canvassing boards:

> As early as 1870, and before that, the handwriting was seen on the wall which announced that a large and decisive majority of all the votes, black and white, had determined to break up this den of thieves [of corrupt Republicans ruling Southern state governments]. They must therefore prepare for flight or punishment, unless they could contrive a way of defeating the popular will

ris has any praise for the activities of the boards that counted the presidential votes in Florida, Louisiana, and South Carolina in 1876. Charges of partisanship, incompetence, and attempted bribes abounded. In Louisiana, "Tilden's electors had leads of anywhere from 6,300 to 8,957 votes" when the state canvassing board began to review the local returns.[30] The Republicans, however, insisted that the Tilden votes had been fraudulently exaggerated, and more importantly, that Democratic intimidation denied scores of African Americans their votes. Morris relates that 157 witnesses testified before the board about Democratic abuses, testimony the board believed despite the later indications described by Morris that the claims were fictitious:[31]

> Citing "systematic intimidation, murder, and violence toward one class of voters, white as well as black, of such a character as to have scarcely a parallel in the history of this state," the board threw out the entire votes from East Feliciana and Grant parishes, as well as sixty-nine partial returns from twenty-two other parishes.[32]

Altogether, the board disallowed 13,211 votes for Tilden and only 2,412 votes for Hayes, thereby allowing Hayes to overcome Tilden's initial lead and carry the state's eight electoral votes.[33]

The result was the same in the other two disputed states. In South Carolina, the state canvassing board devoted most of its attention to the governor's race and to the elections to the state legislature, which "was empowered to declare the winner of the gubernatorial contest."[34] Hayes held "a narrow margin" in the presidential elector voting, which he retained after the canvassing board completed its work.[35] The Florida board acted after Hayes had been declared the victor in Louisiana and South Carolina, so everyone understood the sudden importance of the state's three electoral votes.[36] Morris explains that "[t]he chief difficulty

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> whenever and however it should be expressed. Then the Returning Board was invented.
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> This was a machine entirely new, with powers never before given to any tribunal in any State. Its object was not to return, but to suppress, the votes of the qualified electors, or change them to suit the occasion.

J.S. Black, The Electoral Conspiracy, 125 N. Am. Rev. I, 11–12 (1877).

30. Morris, supra note 5, at 176.

31. Id. at 187.

32. Id. at 191–92. Morris explains that "Louisiana law gave the returning board the absolute authority to decide which votes to count and, more important, which votes to throw out." Id. at 185. Further, "[i]n both the gubernatorial election of 1872 and the legislative election of 1874, the board had shamelessly overturned apparent Democratic majorities, causing a controversy that reached all the way to the White House." Id. at 149.

33. Id. at 182.

34. Id. at 180. Morris provides an extremely lucid explanation of the battle for the South Carolina governorship. See id. at 174–75, 179–83, 197, 202–03, 214–15, 245.

35. Id. at 180.

36. A vivid illustration of why Florida was allotted only three electoral votes—in contrast to the state's twenty-five electoral votes in the 2000 election—is seen in "sparsely populated Dade County, whose announced totals of nine votes for Hayes and five for

facing the canvassing board was the sheer closeness of the numbers, which were subject to challenge—and manipulation—by both sides."[37] The board's initial count gave Hayes a forty-three vote lead, which produced newspaper headlines throughout the country announcing Hayes as the new President. Tilden then took a ninety-four vote lead when corrected returns were substituted for Baker County.[38] Democrats continued to insist upon the exclusion of 219 Hayes votes allegedly added after the polls closed in Alachua County,[39] and one leading Republican observer—"twice-wounded Civil War hero" General Francis Barlow—agreed with them until national Republican officials recalled him from the state.[40] The board kept the 219 votes from Alachua County, and it "ruled in favor of the Republicans" with respect to "[a]llegations [that] ranged from ballot-tampering to illegal participation by black juveniles to improperly filed returns."[41] Thus, shortly after midnight on December 6—the date federal law set for the meeting of the electoral college—the Florida state canvassing board declared that Hayes had won the state by 924 votes.[42]

C. *State Courts*

State courts played a relatively modest role in resolving the 1876 election, especially when compared to the litigation in the Florida courts 124 years later. In both Florida and South Carolina, the state canvassing boards were sued by the disappointed gubernatorial candidates and presidential electors. In December 1876, the Florida Supreme Court ruled in favor of George Drew, the Democratic candidate for governor, holding that the canvassing board had wrongfully disregarded allegedly fraudulent returns.[43] The Tilden electors then filed a quo warranto action in Florida state court as soon as the state canvassing board certified Hayes as

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Tilden brought peals of laughter from both sides of the room" where the canvassing board met. Id. at 193–94; see also Rehnquist, supra note 4, at 104 (noting that in 1876 "[t]he population of Key West was 10,000; Jacksonville a little under 7,000; Tallahassee just over 2,000; and Tampa less than 1,000," while "Miami would not even become an incorporated city until 1896").

37. Morris, supra note 5, at 192.

38. Id. at 194.

39. Id.

40. Id. at 195. Morris notes that the ballot box containing the 219 questionable votes had been kept overnight in the home of the local Republican county chairman, who later declined a Republican invitation to testify about the matter lest the party lose its claim to the votes. Additionally, "two poll inspectors admitted later that they had been bribed to sign the erroneous returns." Id. at 192.

41. Id. at 196.

42. Id. at 197.

43. See State ex rel. Drew v. McLin, 16 Fla. 17, 49 (1876) (holding that "[w]hether irregularities or fraud in an election will authorize the rejection of a vote cast, counted and returned in a genuine, *bona fide* return, is a question of law not within the power of this Board to determine"); see also id. at 61–63 (subsequent opinion of the court rejecting the board's "protest" of the court's decision).

the winner.[44] They "obtained a ruling from a state trial court that they were the ones properly chosen,"[45] but the Republicans appealed and the effect of the trial court's decision soon became a contested issue before the federal Electoral Commission.[46] In South Carolina, the state supreme court issued an order "to prohibit the [canvassing] board from doing anything other than merely sanction the existing vote totals" in the state legislative elections.[47] The board ignored the court's order, so the court ordered the arrest of the board members for contempt of court, but the members were quickly released by a federal writ of habeas corpus.[48] In Rhode Island, where Hayes won an easy victory in the popular vote, the state supreme court ruled in late November 1876 that a Hayes elector was disqualified because he already held another federal office—to wit, a commissioner of the United States Centennial Commission—but the court rejected the suggestion that the elector's position went to the Tilden elector who had come in second in the voting. Instead, the court held that state law vested the authority to replace the elector with the state legislature, which promptly selected another elector for Hayes.[49]

D. *Federal Courts*

The federal courts had even less of an impact upon the resolution of the 1876 election than the state courts. The statute establishing the Electoral Commission expressly preserved the right of any affected party to initiate litigation arising from the presidential election in federal court.[50] Even so, for reasons that remain unknown, there was no federal litigation

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44. Quo warranto is "[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed." Black's Law Dictionary 1285 (8th ed. 2004); see also Ewing, supra note 27, at 117–30 (defending the propriety of the use of quo warranto to determine Florida's electors in 1876).

45. Rehnquist, supra note 4, at 106.

46. See 7 Charles Fairman, History of the Supreme Court of the United States: Five Justices and the Electoral Commission of 1877, at 62 (Supp. 1988) (noting that "on December 6—the day when the Hayes electors cast their votes—an information in quo warranto had been brought in the circuit court for Leon County by the four who claimed to have been elected to vote for Tilden"); id. at 66 (adding that a judgment in the quo warranto case was issued "almost two months later," and "an appeal was pending" while the Electoral Commission met in February 1877).

47. Morris, supra note 5, at 180–81.

48. Id. at 181–82; cf. State ex rel. Barker v. Bowen, 8 S.C. 400, 408 (1877) (dismissing a quo warranto action brought by South Carolina's Tilden electors).

49. See In re Corliss, 11 R.I. 638 (1876).

50. See Act of Jan. 29, 1877, ch. 37, § 6, 19 Stat. 227, 229, which provides that

> nothing in this act shall be held to impair or affect any right now existing under the Constitution and laws to question, by proceeding in the judicial courts of the United States, the right or title of the person who shall be declared elected, or who shall claim to be President or Vice-President of the United States, if any such right exists.

Id. During the debate on the Electoral Commission bill, Senator Sherman observed that "a case might be made on a disputed presidential election to be carried first to the circuit

in any of the contested states. Rehnquist notes that the Senate debated a proposed constitutional amendment that would have authorized the Supreme Court to decide the election.[51] Toward that end, former Missouri Senator Carl Schurz wrote Hayes that "the result will be accepted as legal, just and legitimate by every American citizen," if the Supreme Court counted the votes.[52] But the proposal failed. On the other hand, federal judges, as opposed to federal courts, came to play a key role in deciding who would serve as the next President.

E. *The Electoral Commission*

The parties immediately disputed the correct constitutional procedure for the counting of the electoral votes when the lame-duck 46th Congress convened on December 4, 1876.[53] The first effort to break the stalemate occurred on December 7, when George W. McCrary, a Republican from Iowa, introduced a resolution calling for the creation of a committee to resolve the crisis. McCrary's resolution asserted that

> [i]t is of the utmost importance that all differences of opinion and all doubt and uncertainty upon these questions should be removed, to the end that the votes may be counted and the result declared by a tribunal whose authority none can question and whose decision all will accept as final.[54]

The House quickly agreed, as did the Senate, and in early January the two committees began working together to devise a mechanism for

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court of the United States and then, by appeal, to the Supreme Court of the United States." 5 Cong. Rec. 821 (1877) (statement of Sen. Sherman). On the other hand,

> if any such right existed, the Supreme Court of the United States was disqualified from acting thereon as the highest branch of the Federal judiciary, by virtue of the fact that five of its nine members sat with, deliberated upon the questions which came before, voted with, and adjudicated with the Commission.

Ewing, supra note 27, at 39.

51. See Rehnquist, supra note 4, at 114; see also, e.g., 5 Cong. Rec. 113–29, 140–44 (1876) (debating proposals to authorize the Supreme Court to decide the presidential election). Another alternative would have been to organize a new Article III court "to try this very case." 5 Cong. Rec. 820 (1877) (statement of Sen. Sherman).

52. See Morris, supra note 5, at 212 (quoting Schurz).

53. The lame-duck nature of the Congress did not cause many problems, thus averting the issues that plagued the lame-duck Sixth House that elected Thomas Jefferson in February 1801. See John Copeland Nagle, The Lame Ducks of *Marbury*, 20 Const. Comment. 317, 323 (2003).

54. 5 Cong. Rec. 91 (1876). Morris quotes only the part of McCrary's resolution that describes the duty of the committee, see Morris, supra note 5, at 202, omitting the telling language quoted above about the need for the committee. The antecedents of a special commission can be seen in an unsuccessful 1800 Federalist proposal to have the Chief Justice chair a "Grand Committee" given "power to examine and finally decide all disputes" about presidential elections. A.M. Gibson, A Political Crime: The History of the Great Fraud 21 (New York, William S. Gottsberger 1885). See generally Northrup, supra note 22, at 923 (giving account of "the inner history of the origin and formation of the Electoral Commission" written by the Secretary of the Special Committee of the House of Representatives).

resolving the impasse. The joint committee "immediately began discussing plans to name an independent Electoral Commission to adjudicate the crisis and decide who should be the next president."[55] The consensus in favor of a special independent commission soon became mired in the determination of the commission's membership. Each proposal to staff the commission with various combinations of members of Congress and Supreme Court Justices was scrutinized for any indication of the ultimate decision that the commission would be likely to produce. Moreover, neither Tilden nor Hayes approved of the commission, preferring to rest upon the force of their respective constitutional claims to the presidency. Tilden particularly objected to a proposal to select the Supreme Court Justices by lot, remarking that "I may lose the presidency, but I will not raffle for it."[56]

Finally, on January 17, 1877, the joint committee agreed upon an electoral commission that would include five senators, five representatives, and five members of the Supreme Court. The ten congressional members were evenly divided among Democrats and Republicans.[57] So were four of the Supreme Court members who were identified by their circuit: Justices Clifford and Field were Democrats (appointed by Presidents Buchanan and Lincoln, respectively) while Justices Miller and Strong were Republicans (both appointed by President Lincoln). The statute empowered those four justices to select a fifth justice who would serve as the fifteenth member of the commission.[58] Justice Davis was supposed to have been the fifth member of the commission because he was widely—though not universally—viewed as an independent. Morris writes that "[n]o one, perhaps not even Davis himself, knew which presidential candidate he preferred."[59] With that understanding, Congress approved the bill to establish the commission, and President Grant

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55. Morris, supra note 5, at 213.

56. Id. at 216; Rehnquist, supra note 4, at 115.

57. See Act of Jan. 29, 1877, ch. 37, § 2, 19 Stat. 227, 228 (describing the procedure for the appointment of the members of the Electoral Commission). The congressional members of the Electoral Commission included

> Democratic representatives Eppa Hunton of Virginia, Henry Payne of Ohio, and Josiah Abbott of Massachusetts; Democratic senators Thomas Bayard of Delaware and Allen Thurman of Ohio; Republican representatives James A. Garfield of Ohio and George Hoar of Massachusetts; [and] Republican senators George Edmunds of Vermont, Frederick T. Frelinghuysen of New Jersey, and Oliver Morton of Indiana.

Morris, supra note 5, at 219.

58. See Act of Jan. 29, 1877, ch. 37, § 3, 19 Stat. at 228 (providing that the Electoral Commission shall include "the associate justices of the Supreme Court of the United States now assigned to the first, third, eighth, and ninth circuits" and that those justices "shall select, in such manner as a majority of them shall deem fit, another of the associate justices of said court"). Chapter 7 of Rehnquist's book is devoted to a biographical sketch of each of the justices who served on the Electoral Commission. See Rehnquist, supra note 4, at 143–62.

59. Morris, supra note 5, at 218.

signed it into law on January 29. Morris notes that "[m]ost Democrats in Congress voted for the bill (186 for and 18 against), while most Republicans voted against it (85 against, 52 for)," but he does not adequately explain why.[60] Perhaps the best explanation is that "[m]ost Democrats welcomed the Electoral Commission bill, perceiving that it provided Tilden's only chance to be President."[61] By contrast, Hayes insisted that the commission was unconstitutional.[62] Whatever the motivation, "the Electoral Commission scheme was generally regarded as a Democratic victory."[63]

The Democratic hopes were dashed on the very day that Congress approved the bill: Justice Davis accepted an appointment to the United States Senate that was offered by the Democratic state legislature of Illinois, and so he declined to serve on the commission. Chief Justice Waite had already been ruled out by the Democrats, so the four Justices on the

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60. Id. To be sure, Morris is not alone in his inability to explain why congressional Democrats supported the creation of the Electoral Commission. Tilden's biographer, writing in 1895, commented that

> [h]ow so large a number of the Democrats in Congress were induced to supersede the constitutional machinery for counting the electoral votes, for a device not only unknown to the Constitution, but in all its important bearings inconsistent with it, can only be explained as we explain most of the blunders which are woven into the web of every human life. Some yielded through ignorance, some for want of reflection, some to quiet a controversy about the result of which they were indifferent or apprehensive, some to serve personal ends at home that seemed more important to them than the presidential issue, while upon otbers, many, if not all, these considerations may have been not without their influence.

John Bigelow, The Life of Samuel J. Tilden 63 (New York, Harper & Bros. 1895); see also Gibson, supra note 54, at 38 (claiming that "[t]he strangest thing, probably, that ever occurred in political history was the acceptance by Democratic senators and Representatives of the rehabilitated Federal device of 1800 to count out the candidates the people had selected and to count in the ones the people had repudiated").

61. Michael Les Benedict, Southern Democrats in the Crisis of 1876–1877: A Reconsideration of Reunion and Reaction, 46 J. S. Hist. 489, 509 (1980). The subsequent Democratic spin insisted that "[t]he Democrats consented to this in the belief that no seven Republicans could be taken from the Court or from Congress who would swear to decide the truth and then uphold a known fraud." Black, supra note 29, at 23–24.

62. See Rehnquist, supra note 4, at 116 (indicating that Hayes viewed the commission as an unconstitutional interference with the Senate's prerogative to determine which votes to count); Diary Entry (Jan. 21, 1877), *in* 3 Hayes Diary and Letters, supra note 1, at 404 (writing that "[t]he leading constitutional objection to it, perhaps, is that the appointment of the Commission by act of Congress violates that part of the Constitution which gives the appointment of all other officers 'to the President'").

63. Louis W. Koenig, The Election That Got Away, Am. Heritage, Oct. 1960, at 6, 99. Thus, comments another observer,

> [i]f it was wrong to leave questions to a commission, it was a Democratic wrong. If the mode of choosing the commissioners in the House and Senate was a blunder, it was a Democratic blunder. . . . In a word, if there was fraud anywhere in the measure, it was the work of an immense majority of the Democrats in both Houses of Congress.

Monroe, supra note 20, at 537.

commission selected Justice Bradley for the fifth position. Bradley was a New Jersey Republican appointed to the Court by President Grant in 1870. Morris insists that "Bradley had a very large skeleton in his closet," namely an 1870 circuit court ruling in a railroad bankruptcy case that favored Tom Scott, who was now busily lobbying federal officials for funding of a railroad from Texas to the Pacific coast.[64] But most contemporary observers viewed Bradley as fairminded and nonpartisan.[65]

That perception vanished once the commission actually completed its work. According to the law establishing the commission, on February 1, Congress began counting the electoral votes of each state alphabetically until it reached the four states—Florida, Louisiana, Oregon, and South Carolina—for which there were competing sets of electors. The decision concerning those states was referred to the commission, which heard lengthy arguments from each side on the legal issues presented in the case. Generally, the Hayes supporters insisted that the commission must accept each state's official certification of the canvassing board's determination at face value, while the Tilden advocates "asked the commission to go behind the returns and investigate the true facts of the case."[66] The statute establishing the commission had provided simply that the commission had the same power to count the electoral votes that Congress enjoyed under the Constitution.[67] Nonetheless, Morris recounts the Democratic belief "that a clear majority of the committee [that had devised the commission] had agreed to the premise 'that the action of the [Canvassing] Boards must be inquired into and should be reversed if substantial justice should seem to demand such action,'" a belief that was not reduced to writing and that "the Republicans now denied."[68] Unlike Morris, most historians have treated the failure to define the powers of the commission as a conscious congressional decision to finesse the issue and thus not to prejudge the outcome of the election dispute. As one writer explained, while debating the Electoral Commission bill, the Sen-

64. Morris, supra note 5, at 219.

65. See Fairman, supra note 46, at 123 (concluding that "[a]long with Waite and Strong, [Bradley] was the least 'political' among the members of the Court"); id. at 124 (quoting a Democratic newspaper in Nashville describing Justice Bradley as "a fair judicial officer from whom a strictly legal opinion is to be expected on a point of law and a fair determination upon a matter of fact"); Rehnquist, supra note 4, at 222 (observing that "Bradley was the closest substitute for a political Independent as could be had among the remaining members of the Court"); Koenig, supra note 63, at 103 (remarking that "Bradley's appointment proceeded with the blessings of [Democratic National Committee chair Abram] Hewitt and even of Tilden"). Rehnquist indicates, however, that not everyone was convinced of Bradley's impartiality. See Rehnquist, supra note 4, at 159 (quoting a newspaper editorial describing Bradley as "a partisan to whom his party never looked in vain").

66. Morris, supra note 5, at 221.

67. See Act of Jan. 29, 1877, ch. 37, § 2, 19 Stat. 227, 229 (providing that the Electoral Commission shall have "the same powers, if any, now possessed . . . by the two Houses [of Congress] acting separately or together").

68. Morris, supra note 5, at 222.

ate "voted down, during the same hour of one day, two antagonistic propositions upon this subject; namely, the proposition that the Commission should have the right to go behind the returns from a State, and the proposition that it should not have such right."[69]

The ten members of Congress and the four Supreme Court Justices chosen based upon their political affiliations voted as expected, yielding a seven-to-seven split. Justice Bradley cast the tie-breaking eighth vote in favor of the position advanced by Hayes.[70] That vote earned both him, personally, and the Supreme Court, as an institution, the contempt of contemporary Democrats and subsequent historians, who denounced the partisanship of his vote and the entire process. For example, Morris denounces the "fifteen-man Electoral Commission that was every bit as partisan and petty as the shadiest ward heeler in New York City or the most unreconstructed Rebel in South Carolina."[71] Rumors emerged that Justice Bradley had switched his vote after a late-night visit from Republican leaders the night before.[72] More tellingly, as noted above, Justice Breyer wrote in his *Bush v. Gore* dissent that the participation in the work of the electoral commission by five justices, including Justice Bradley, "did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled members of the Court in partisan conflict, thereby undermining respect for the judicial process."[73]

But Chief Justice Rehnquist is far more forgiving of the episode in his book, defending both the reasonableness of Justice Bradley's legal conclusion and the work of the Electoral Commission. Rehnquist cites "[t]wo contemporaneous sources" that "confirm at least the reasonableness, if not the outright correctness, of Bradley's stance."[74] First, Rehnquist quotes Justice Davis—the quintessential independent—as endorsing Bradley's legal conclusion. Second, Rehnquist reports that a pre-election congressional debate concerning the counting of electoral votes yielded "substantive agreement on both sides of the aisle that in its consideration of an objection Congress could not 'go behind' the certifications sent in by the states,"[75] which is what Tilden requested, but Bradley refused to

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69. Monroe, supra note 20, at 526.

70. See Proceedings of the Electoral Commission and of the Two Houses of Congress in Joint Meeting Relative to the Count of the Electoral Votes Cast December 6, 1876 for the Presidential Term Commencing March 4, 1877, at 1019–42 (1877) [hereinafter Electoral Commission Proceedings] (text of Justice Bradley's opinion concerning the contested states).

71. Morris, supra note 5, at 2.

72. Morris seems to give these rumors some credit in his discussion. See id. at 223–25. Rehnquist, by contrast, writes at length to exonerate Justice Bradley from any such improper influences. Rehnquist, supra note 4, at 180–200.

73. 531 U.S. 98, 157 (2000) (Breyer, J., dissenting).

74. Rehnquist, supra note 4, at 185.

75. Id. at 185–86.

allow. Rehnquist also extols the federalism justifications for deferring to the official electoral decisions of each state:[76]

> Thanks to the Electoral Commission created by Congress and acquiesced to by Hayes and Tilden, the nation avoided serious disturbance or bloodshed and went about on its business. This outcome was a testament to the ability of the American system of government to improvise solutions to even the most difficult and important problems.[77]

Thus Rehnquist concludes his book by expressing his belief that the Supreme Court Justices who served on the Electoral Commission "did the right thing."[78]

F. *Congress*

Still, the Electoral Commission did not decide the election. It remained for Congress to bless the decision of the commission, which completed its work just four days before the March 4 date then prescribed in the Constitution for the new President's inauguration.[79] The statute establishing the Electoral Commission provided that the commission's decision would be binding unless both houses of Congress overturned it,[80] and the Republican majority in the Senate had no intention of doing so. The Democrats in the House thus lacked the power to reject the commission's decision, but they retained the ability to filibuster the formal counting of the electoral votes that was necessary to elect Hayes as President. Morris describes how a spurious second certificate, claiming that Vermont—just four states from the end of the alphabet of states—had cast its five electors for Tilden, delayed the proceedings for one critical day.[81] And when the House and Senate separated to consider an unsuccessful challenge to one of the Wisconsin electors for Hayes, a representative from Texas moved to have the House simply elect Tilden as President pursuant to the House's powers under Article II—just as Tilden himself "had been demanding for the past four months."[82] The motion was tabled.[83] The count was completed in the early morning hours of Friday, March 2, but only after frustrated Democrats voiced sentiments such as

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76. Id. at 181–83 (stating that the "concept of state sovereignty played an important role" in the dispute).

77. Id. at 219.

78. Id. at 248.

79. The Twentieth Amendment changed the presidential inauguration date from March 4 to January 20. See U.S. Const. amend. XX, § 1; John Copeland Nagle, A Twentieth Amendment Parable, 72 N.Y.U. L. Rev. 470 (1997).

80. See Act of Jan. 29, 1877, ch. 37, § 2, 19 Stat. 227, 229 (providing that Congress shall count the electoral votes "in conformity" with the Electoral Commission's decision unless "the two Houses shall separately concur in ordering otherwise").

81. Morris, supra note 5, at 235–36.

82. Id. at 236–37.

83. On March 3, the House passed a resolution declaring that Tilden had been "duly elected President of the United States," id. at 242, but by then the count had been completed, and Hayes soon took the oath of office.

this: "Today is Friday. Upon that day, the savior of the world suffered crucifixion between two thieves. On this Friday constitutional government, justice, honesty, fair dealing, manhood, and decency suffer crucifixion amid a number of thieves."[84]

Whether Hayes or his supporters made any deals to convince congressional Democrats to acquiesce in his election has become the stuff of historical legend. On February 26, several leaders of both parties met at the Wormley Hotel in Washington to discuss the prospect—and perhaps the promises—of a Hayes presidency. The popular legend, fueled by C. Vann Woodward's 1951 book *Reunion and Reaction*,[85] suggests Hayes signaled to Southern Democrats that his administration would remove the hated federal military presence from Southern states, thus returning the state governments to local control but effectively dooming the new rights of the recently freed African Americans there. As Morris explains, "a popular legend has developed of a shadowy cabal of white politicians cynically selling out the futures of four million black southerners in return for Rutherford B. Hayes's ascension to the White House," a legend that "endures, at least in part, because of the irresistible irony of such a plot being hatched in a hotel owned by one of the wealthiest black entrepreneurs in Washington."[86] That view was echoed by a generation of historians, and perhaps more importantly, one of Rehnquist's predecessors: Earl Warren, who wrote in 1972 that "the compromisers of the Hayes-Tilden affair totally abandoned the group on whose behalf the Civil War had been fought and the Reconstruction amendments enacted."[87] Morris, however, concludes that "Hayes, whatever his faults, would never have agreed to such an arrangement, particularly when the scent of victory was in the air. . . . Like many other high-level political deals, the Wormley

84. Id. at 237 (quoting Kentucky congressman Joseph C. Blackburn).

85. C. Vann Woodward, Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction 3–22 (1951).

86. Morris, supra note 5, at 234.

87. Earl Warren, Notre Dame Law School Civil Rights Lectures, 48 Notre Dame Law. 14, 36 (1972). Nor was Chief Justice Warren the only judge to casually accept Woodward's hypothesis. See Seminole Tribe v. Florida, 517 U.S. 44, 120 (1996) (Souter, J., dissenting) (referring to "the Compromise of 1877, when the Republican Party agreed effectively to end Reconstruction and to withdraw federal troops from the South in return for Southern acquiescence in the decision of the Electoral Commission that awarded the disputed 1876 presidential election to Rutherford B. Hayes"); Williams v. City of New Orleans, 729 F.2d 1554, 1580 n.28 (5th Cir. 1984) (Wisdom, J., dissenting) (citing Woodward and asserting that President Hayes's removal of federal troops from the South, his presidential appointments, and contemporary congressional legislation "raise the inference that the compromise extended beyond the removal of federal support of Republican regimes in Louisiana and South Carolina as a quid pro quo for the blessing given President Rutherford B. Hayes"); Builders Ass'n v. City of Chicago, 298 F. Supp. 2d 725, 726 (N.D. Ill. 2003) (writing that "the Tilden-Hayes election of 1876 and judicial acceptance of the separate-but-equal doctrine led to almost a century of segregation of African Americans and their exclusion from the mainstream of American society").

agreement was more a mutual concession of the obvious than a device for controlling larger events."[88]

G. *Other Alternatives*

Several other means of resolving the contested presidential election of 1876 were discussed but not employed. One possibility was for either Hayes or Tilden to relinquish his claim to the presidency, but that suggestion does not appear to have been taken seriously by either candidate or his supporters.[89] Alternatively, several observers proposed that a new election be held to produce the definitive result that had failed to emerge from the voting on November 6.[90] New elections are a common remedy when the results of the original election are hopelessly uncertain or demonstrably fraudulent.[91] But no such proposal gained any traction in 1876 and early 1877, and neither Rehnquist nor Morris even mentions that as a possible solution. A third possibility would have been to decide the election by lot. The closest the discussions in 1876 came to that idea was the proposal to choose the members of the Electoral Commission by lot, but Tilden quickly rejected that idea.[92] It is baffling to imagine the presidency being determined by lot, yet state law sometimes provides for precisely that device for deciding tied elections for other offices today.[93]

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88. Morris, supra note 5, at 234.

89. For example, a Hayes biographer reports that one of Hayes's closest college friends

> thought that Hayes and Tilden should meet as gentlemen, face to face, secretly, and decide between themselves who should have the office. But that kind of solution, like many another, was sophomoric . . . . The office of President of the United States was not to be filled as if it were the same as choosing the head of the Nu Pi Kappa at old Kenyon [Hayes's alma mater].

Barnard, supra note 1, at 337 (footnote omitted).

90. See Walker Lewis, The Hayes-Tilden Election Contest (pt. 2), 47 A.B.A. J. 163, 166 (1961) (suggesting that "there might be a new election" if the electoral count was not completed by March 4); Northrup, supra note 22, at 925 (listing "the propriety of a new election" as one of the topics to be considered by the House committee charged with identifying the best means for resolving the 1876 presidential election dispute); cf. Diary Entry (Mar. 16, 1877), *in* 3 Hayes Diary and Letters, supra note 1, at 427, 428 (listing "[a] new election" as one of four possibilities for resolving the situation in Louisiana and South Carolina).

91. See generally Samuel Issacharoff et al., The Law of Democracy: Legal Structure of the Political Process 1038–46 (rev. 2d ed. 2002) (discussing cases ordering new elections).

92. See Morris, supra note 5, at 216; Rehnquist, supra note 4, at 115; see also Northrup, supra note 22, at 927 (indicating that congressional Democrats would never "consent that the great office of President should be raffled off like a Thanksgiving turkey").

93. See, e.g., Fla. Stat. Ann. § 105.051(1)(c) (West 2002) ("If the vote at the general election results in a tie, the outcome shall be determined by lot."); N.M. Stat. Ann. § 1-13-11 (Michie 2003) ("In the event of a tie vote between any candidates in the election for the same office, the determination as to which of the candidates shall be declared to have been nominated or elected shall be decided by lot."); Wis. Stat. Ann. § 5.01(4)(a) (West 2004) ("If 2 or more candidates for the same office receive the greatest, but an equal number of votes, the winner shall be chosen by lot . . . ."); cf. Akhil Reed Amar, Note, Choosing

The final means of deciding the election was the one that all rejected but all feared: The threat of a violent resolution of the conflict pervaded the times. In the words of historian James Ford Rhodes, "[s]ome Senators and Representatives derided the idea of danger; but anyone, who lived through those days in an observing and reflecting mood, or anyone, who will now make a careful study of the contemporary evidence, cannot avoid the conviction that the country was on the verge of civil war."[94] Happily, "aside from an anonymous shot through Hayes's parlor window, no violence was displayed throughout the entire crisis."[95] But the fear of a violent resolution of the contested election animated the efforts to find an alternative solution.

Of course, the difficulty in resolving the disputed election could have been avoided by not holding an election. The Constitution does not mandate that the President of the United States be selected by a popular election.[96] One state did not hold a presidential election in 1876: Colorado. As Morris relates, Congress approved Colorado's admission as a state on August 1, 1876, just three months before the election. Moreover, "[t]o spare the cost of holding two separate elections less than a month apart, Congress had already authorized the new legislature to choose the state's presidential electors."[97] The Republicans won the election to de-

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Representatives by Lottery Voting, 93 Yale L.J. 1283 (1984) (proposing a system where the winner would be chosen by a random drawing from ballots cast, allowing greater protection of minority rights; a candidate garnering 60% of the popular vote would have a 60% chance of winning overall, but the candidate with 40% of the popular vote would still have a chance to win).

94. Rehnquist, supra note 4, at 109 (quoting 7 Rhodes, supra note 26, at 231); see also Diary Entry (Mar. 14, 1877), *in* 3 Hayes Diary and Letters, supra note 1, at 425, 427 (diary entry from President Hayes's first week in office stating that "I do not think the wise policy is to decide contested elections in the States by use of the national army"); Brooks D. Simpson, Ulysses S. Grant and the Electoral Crisis of 1876–1877, Hayes Hist. J., Winter 1992, at 5, 13 (indicating that President Grant "sincerely believed that the Democrats were trying to do on the national level what they had successfully accomplished in several Southern states—subvert the electoral process through terrorism").

95. Allan Peskin, Was There a Compromise of 1877?, 60 J. Am. Hist. 63, 73 (1973).

96. See Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.").

97. Morris, supra note 5, at 156. The story gets even more interesting beyond what Morris reports. Democrat Thomas Patterson owed his election as Colorado's territorial representative to Congress in 1874 to a split within the Republican ranks between supporters of Jerome Chaffee of Denver and Henry Moore Teller of Golden. "Chaffee had enjoyed a close personal relationship with President Ulysses S. Grant's territorial appointees. However, an apparent breakdown in the relationship occurred after Chaffee reportedly quarreled with Grant over a poker game, and the president began to remove Chaffee's friends from their influential positions." Robert E. Smith, Thomas M. Patterson, Colorado Statehood, and the Presidential Election of 1876, 50 Colo. Mag. 153, 154 (1976). In response, Chaffee "called for statehood for Colorado to eliminate the influence of the president on territorial affairs." Id. at 155. Patterson exploited the Republican party's divisions in 1874 to become "the first Democratic territorial delegate to go to Congress

termine control of the state's legislature, and that legislature awarded Colorado's three electoral votes to Hayes, without which he would have lost the election. Those three votes might not have existed because "[t]he Democratic majority in the U.S. House of Representatives could have easily delayed Colorado's admission until after the presidential election, but the party was misled by the territory's lone congressional delegate, fellow Democrat Thomas Patterson, who assured them that the state would vote Democratic in 1876."[98]

III. Criteria for Choosing Who Should Count Votes

The subtitle of Morris's book refers to "the stolen election of 1876," yet Morris never identifies who stole the election or how a similar theft could be avoided in the future. The failure of each of the institutions involved in the resolution of the 1876 presidential election is echoed in the similar charges leveled in 2000. Such contested elections demand an institutional structure that possesses the popular confidence to resolve them. With considerable understatement, Rehnquist writes that "[t]here was profound dissatisfaction with the process on the part of the losing parties in both 2000 and 1876."[99] He then adds, "Perhaps when such a dispute erupts, there is no means of resolving it that will satisfy both sides."[100] I am not yet prepared to surrender to such a pessimistic conclusion. Elections for government officials, popular initiatives, corporate boards, and countless other public and private matters are decided all the

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from Colorado." Id. at 157. Once there, Patterson persuaded eleven House Democrats to join the House Republicans to produce the two-thirds majority necessary for Congress to pass the Colorado Enabling Act in early 1875. Id. at 159. The voters of Colorado approved statehood on July 1, 1876, and President Grant proclaimed Colorado a state on August 1. See Proclamation No. 6, 19 Stat. 665 (1876). Then, in October 1876, the Republicans swept nearly two-thirds of the seats in the election for the new state legislature. See The State of Colorado, N.Y. Times, Oct. 17, 1876, at 7 (reporting that the Republicans had won 32 of 49 House seats and either 19 or 20 of 26 Senate seats). The legislature promptly chose three electors for Hayes. But the saga did not quite end there, for the *New York Times* warned in early December that

> [i]t seems probable that the House will begin its efforts at confusion with the Presidential election by trying to deprive Colorado of its character as a State. Some quibble has been invented regarding an informality in the Enabling act, and on the strength of this it is reported that the House will . . . seek to lay the foundation of a plan for throwing out the Electoral votes of that State.

Editorial, N.Y. Times, Dec. 3, 1876, at 6. Apparently nothing ever materialized of that threat, for neither Morris nor Rehnquist even mentions it.

98. Morris, supra note 5, at 155–56. The closeness of the 1876 election had other effects as well. It prompted both political parties to contest every state in the next election, and the resulting pandering to gain California's six electoral votes in 1880 eventually helped produce the Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943), which barred Chinese immigration primarily at the behest of racist Californians. See generally Andrew Gyory, Closing the Gate: Race, Politics, and the Chinese Exclusion Act (1998).

99. Rehnquist, supra note 4, at 5–6.

100. Id.

time without the suspicion that plagued the presidential elections of 1876 and 2000. But we have yet to heed the advice that Hayes offered four days after election day in 1876: "All thoughtful people are brought to consider the imperfect machinery provided for electing the president. No doubt we shall, warned by this danger, provide, by amendments of the Constitution, or by proper legislation, against a recurrence of the danger."[101] Any more perfect machinery must employ unbiased decisionmakers who are expert in the factual and legal questions that may arise and able to reach a decision in a timely manner.

A. *Bias and Independence*

The successful resolution of a contested election must achieve fairness to the parties involved and the appearance of fairness to the general public. The avoidance of a biased decisionmaker is perhaps the most fundamental criterion for achieving those goals. The appearance of bias, in turn, is often linked to the independence of the decisionmaker. Partisan affiliation was viewed as nearly dispositive of the conclusion that an individual would reach throughout the 1876 dispute. Even before the election, Senator Bayard expressed his fear that a colleague was

> over-sanguine in supposing that that day of political millennium has arrived in which he and his party friends, and I and mine, shall be able to look at facts imbued with all the color of party feeling, yet decide them as though we were entirely indifferent to the result of our decision.[102]

Charges or assumptions of partisanship attached to each of the institutions that played a role in deciding the presidential election of 1876.

The state canvassing boards elicited the most vociferous complaints of partisanship. The board members' political affiliations were frequently noted at the time of the election, and are often mentioned by Rehnquist and Morris. The South Carolina board consisted of five Republican elected officials, including three officials "who ultimately would rule on their own cases" for reelection.[103] The Florida board included two Republicans—the elected Secretary of State and Comptroller—and the elected Democratic Attorney General. Thus, one writer has asserted that "[i]n a complete travesty of integrity, the board voted for Hayes by virtue of its Republican majority."[104] Morris asserts that "the South Carolina and Florida boards seemed ripe for partisan manipulation" because they "were composed of generally respected, if partisan, individuals," yet those

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101. Diary Entry (Nov. 11, 1876), *in* 3 Hayes Diary and Letters, supra note 1, at 374, 377.

102. 7 Fairman, supra note 46, at 56 (quoting Sen. Bayard).

103. Morris, supra note 5, at 177.

104. Louis C. Kleber, The Presidential Election of 1876, 20 Hist. Today 807, 811 (1970); see also Koenig, supra note 63, at 100 ("Never deterred by the weight of the evidence, no matter how overwhelming, the board consistently and ruthlessly used its discretionary powers in favor of the Republicans.").

boards "were pillars of Athenian probity and good governance compared to the Louisiana returning board."[105] Four Republicans served on the Louisiana board, and they had neglected their statutory obligation to name a Democrat to the remaining fifth spot on the board that had been vacated when the sole Democrat "had resigned two years earlier, charging the board with rampant corruption."[106] Rehnquist agrees that "[t]he composition of the [Louisiana] board was not one to inspire confidence in the Democrats," and that "there was strong evidence that at least in Louisiana a partisan returning board had fraudulently disallowed more than enough returns to deny [Tilden] the state's electoral votes."[107] "The charge against the board," explains Rehnquist, "was not simply incompetence, or negligence, but fraud—deliberate tampering with the returns to produce the outcome desired by the board."[108] Morris provides abundant evidence that the members of the canvassing boards in Florida, South Carolina, and especially Louisiana acted in pursuit of the partisan interests, which Rehnquist never really denies.[109]

The few state courts involved in the 1876 presidential election fared somewhat better in the court of popular opinion. "Surprisingly," Morris writes, "the all-Republican" South Carolina state supreme court ruled that the state canvassing board had wrongfully thrown out thousands of votes for the Democratic gubernatorial candidate.[110] But while the small role that the courts played in deciding the election generated little controversy, the bitter complaints of partisanship aimed at the five Supreme Court Justices who sat on the Electoral Commission show that judges were hardly immune from claims or assumptions of bias.

According to most observers, the Electoral Commission was built with the expectation that the Democratic and Republican members would favor Tilden and Hayes, respectively.[111] Even so, it is still striking

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105. Morris, supra note 5, at 177–78.

106. Id. at 178.

107. Rehnquist, supra note 4, at 107, 180–81.

108. Id. at 181.

109. See Morris, supra note 5, at 174–99; Rehnquist, supra note 4, at 103–12; see also Gibson, supra note 54, at 17 (stating that "[i]n each of those states there were Returning Boards composed of unprincipled men who would not hesitate to do anything necessary to perpetuate their party in power, provided they were protected and rewarded").

110. Morris, supra note 5, at 180–81.

111. See, e.g., 5 Cong. Rec. 893 (1877) (statement of Sen. Morrill) (objecting to the "selection of four of the judges according to their ancient political affinities"); id. at 888 (statement of Sen. Christiancy) (stating that many "politicians and partisans in and out of Congress [assumed] that all the members of the commission . . . will necessarily . . . be governed in their decision by the partisan views, partisan bias, or partisan prejudices of the political parties to which they respectively belong"); id. at 868 (statement of Sen. Sargent) (insisting that "these judges are selected for their political opinions"); id. at 820 (statement of Sen. Sherman) (arguing that the justices "were selected for their political opinions"); id. at 800 (statement of Sen. Morton) (claiming that the justices "were chosen by circuits, as I understand it, not because of geographical distribution, but because of the political antecedents of the men who preside in those circuits"); Lewis, supra note 90, at 39 (asserting that "[i]mpartiality seems to have been a minor consideration and it was freely

how casually Chief Justice Rehnquist refers to the partisan affiliation of the Justices as sufficient evidence of how they would decide the issue in 1876, notwithstanding their sworn obligation to adhere to the law instead of their own political preferences. For example, he refers to Justice Strong as "a Republican commissioner."[112] More generally, Rehnquist concludes that "on the one hand the justices were selected to add to the Commission a less obviously partisan aura than the congressional members, but they were named also with a view that the members of the Court were not wholly apolitical."[113] Rehnquist's statements are surprising given the explicit statutory oath the members of the Electoral Commission took to "impartially examine and consider all questions submitted to the commission."[114] Rehnquist's assumption also contradicts the minority view expressed during the debates involving the establishment of the Electoral Commission, which insisted that the Justices of the Supreme Court would never act in a partisan fashion. Senator Edmunds, for example, argued that the Justices "presumably would bring to the discharge of whatever duty you impose upon them the greatest amount of impartiality and respect for orderly government that could be found in any tribunal that might be selected."[115]

But the members of the commission did not disappoint the majority's expectations, voting 8-7 along party lines. Hayes observed that "the decision is by a strictly party vote—eight Republicans against seven Democrats! It shows the strength of party ties."[116] Justice Bradley, in turn, was

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assumed that the Justices would be biased"); Peskin, supra note 95, at 72 (arguing that the Democrats "could not appeal to the law because the Republicans dominated the Supreme Court"); George C. Rable, Southern Interests and the Election of 1876: A Reappraisal, 26 Civil War Hist. 347, 357 (1980) (writing that "[t]he Republicans . . . had . . . the Supreme Court on their side"). Several similar statements are quoted in Milton Northrup's record of the deliberations of the committees that created the Electoral Commission. See Northrup, supra note 22, at 929 (reporting that Abram Hewitt, chair of the Democratic National Committee, argued that "[t]hose recently appointed on the bench are too fresh from the domain of politics to have gotten over a natural bias they took with them").

112. Rehnquist, supra note 4, at 170.

113. Id. at 222.

114. Act of Jan. 29, 1877, ch. 37, § 2, 19 Stat. 227, 228.

115. 5 Cong. Rec. 122 (1876) (statement of Sen. Edmunds); see also id. at 898 (1877) (statement of Sen. Blaine) (arguing that the Supreme Court "would be regarded by men of all parties as a trustworthy repository" for the election decision because of the Court's "presumed impartiality"); id. at 888 (statement of Sen. Christiancy) (insisting that the justices serving on the Electoral Commission "will at once feel the importance, the vital importance of exercising judicial impartiality"); id. at 878 (statement of Sen. Conkling) (describing the effort to create "a provisional tribunal . . . with impartiality as great as could be obtained by the instrumentalities of humanity"); id. at 141 (1876) (statement of Sen. Edmunds) (asking "how is it possible in this Republic to remove further from political bias, further from excitement, passion, [or] interest" than by entrusting it to the Supreme Court); Northrup, supra note 22, at 930 (indicating that Senator Thurman "believe[d] that those who expect partizan [sic] decisions from these judges will be disappointed"); id. at 931 (stating that Senator Bayard concluded that any "estimate that is founded on the political prejudice of any one of these judges will be found wanting").

116. Diary Entry (Feb. 8, 1877), *in* 3 Hayes Diary and Letters, supra note 1, at 413–14.

denounced as a Republican partisan as soon as he voted in favor of the arguments advanced by Hayes. Rehnquist quotes one newspaper editorial that claimed Justice Bradley "will be known in history as the infamous eighth man who, without scruple and without shame, cast his vote every time to uphold the frauds of the Returning Boards, and violently contradicted his own positions to maintain the corrupt conspiracy."[117] For his part, Bradley himself later wrote

> [s]o far as I am capable of judging my own motives, I did not allow political, that is, party, considerations to have any weight whatever in forming my conclusion. I know that is difficult for men of the world to believe this; but I know it, and that is enough for me.[118]

Bradley added, "We must take the world as it is, and having done what we conceived to be our duty, trust the rest to a higher power than that [that] rules the ordinary affairs of many in society."[119]

True or not, claims of partisanship informed Justice Breyer's dissent in *Bush v. Gore*, where he warned that the Supreme Court suffered an institutional blow from the perceived partisanship of its members.[120] There were ample warnings of such a result from congressional opponents of the establishment of the Electoral Commission. Senator Sherman wrote Hayes shortly before Congress approved the commission, stating that "[t]he worst feature is the degradation of the Supreme Court by picking out the strongest partisans on both sides and requiring them to agree upon an umpire."[121] But Chief Justice Rehnquist defends the ser-

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117. Rehnquist, supra note 4, at 187.

118. 7 Fairman, supra note 46, at 194 (quoting an 1882 letter from Bradley to Henry B. Dawson) (alteration in original).

119. Id. at 195.

120. See 531 U.S. 98, 157–58 (2000) (Breyer, J., dissenting). For previous judicial expressions of the same concern, see Mistretta v. United States, 488 U.S. 361, 401 n.26 (1989) (quoting Earl Warren, The Memoirs of Earl Warren 356 (1977) (concluding that "the service of five Justices on the Hayes-Tilden Commission had demeaned" the Court)); Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1263 n.19 (9th Cir. 1988) (asserting that "[t]he federal judiciary suffered" from the service of the justices on the Electoral Commission). Nonetheless, it appears questionable that the Court's popular reputation has suffered since *Bush v. Gore*, and the Court has certainly disabused any suggestion that it always defers to the legal arguments of the Bush Administration. See, e.g., Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (holding the Bush Administration's policy of enemy combatant detention unconstitutional in several respects).

121. Letter from Senator John Sherman to Rutherford B. Hayes (Jan. 18, 1877), *in* 3 Hayes Diary and Letters, supra note 1, at 404, 405; accord 5 Cong. Rec. 867–68 (1877) (statement of Sen. Sargent) (arguing that the bill "degrades the Supreme Court and brings it into contempt" because "we associate in the minds of the people the idea that they are political judges. We give them to think that these men are partisans"); id. at 161 (1876) (statement of Sen. Bogy) (arguing that "you would be destroying the Supreme Court by bringing it into the arena of politics"); id. at 141 (statement of Sen. Merrimon) (worrying that the proposed commission "would involve the Supreme Court more or less in politics and political considerations" and "the court will be brought into contempt, and soon lose much of the moral weight and power that it has on the American mind at this time"); id. at 124 (statement of Sen. Morton) (suggesting that the Supreme Court's involvement in the

vice of the five justices on the commission nonetheless. He rejects the accusations of partisanship by Justice Bradley. He recognizes that the appearance of partisanship may exist regardless of the truth of such charges. But Rehnquist argues that any institutional harm the Court suffered from the 1876 presidential election was outweighed by the importance of having the Justices involved in the peaceful resolution of the election controversy. "They may have tarnished the reputation of the Court," Rehnquist admits, "but they may also have saved the nation from, if not widespread violence, a situation fraught with combustible uncertainty. In the view of this author, in accepting membership on the Commission, they did the right thing."[122]

Few had any doubt that Congress or the congressional members of the Electoral Commission would vote along partisan lines. Rehnquist writes that "[e]ach of them, like Sir Joseph Porter in the Gilbert and Sullivan opera *H.M.S. Pinafore*, 'always voted at his party's call,' and no one was the least bit surprised that they did so."[123] Senator Edmunds was equally blunt, objecting that the congressional members of the Electoral Commission were "from the very nature of their positions, Senators and Representatives, more or less partisans, and whose judgments, therefore, must be, be they as pure as human nature ever is or can be, affected by the views and wishes they entertain of what they would like to have done."[124] That these assumptions persisted, despite the oath taken by each member of the Electoral Commission to judge the election dispute impartially, shows the persistence of claims of partisanship, which, of course, proved to be correct.

Considerations of the independence of those charged with deciding a contested election have a prospective element as well. Many Democrats and subsequent historians have complained that President Hayes rewarded many of the people who secured his election with federal offices.[125] Morris, for example, describes how Lew Wallace—a Republican who supervised the count in Florida and who later gained fame as the author of *Ben-Hur*—was "[i]n due time . . . rewarded for his efforts, being appointed territorial governor of New Mexico in 1878."[126] In fact, another study describes how Wallace became bitter waiting to receive an

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electoral dispute would place the Court "in a position where its motives will always be impugned").

122. Rehnquist, supra note 4, at 248.

123. Id. at 220.

124. 5 Cong. Rec. 122 (1876) (statement of Sen. Edmunds); see also Keith Ian Polakoff, The Politics of Inertia: The Election of 1876 and the End of Reconstruction 285 (1973) ("There was never any question that the congressional members of the commission would be strictly partisan in their judgments.").

125. See, e.g., Gibson, supra note 54, at 202–13 (listing the offices to which the supporters of Hayes were later appointed); Morris, supra note 5, at 243–44 (describing how some "cabinet appointments went to men who, directly or indirectly, had helped Hayes successfully press his case before the Electoral Commission").

126. Morris, supra note 5, at 196.

appointment from President Hayes, and how one was forthcoming only after Wallace began to wreak havoc with Republican plans to retain a House seat in his native Indiana.[127]

The need for an unbiased and independent party to judge a contested election presumes that such a party exists. Congress went to extraordinary lengths to establish the Electoral Commission with the hope that it could rebut any concerns about partisanship, only to see the commission vilified when it ruled along party lines. But imagine what might have happened if Justice Davis had served on the commission as had originally been planned. Davis was regarded as the ideal neutral party: A Republican appointed by his friend President Lincoln, Davis had since displayed an interest in the Democratic Party, and he enjoyed "the grace of impartiality."[128] Democrats were decidedly more enthusiastic than Republicans about Davis.[129] "Days were spent" by the joint committee that designed the Electoral Commission "in hair-splitting discussion of the political bias of Justice Davis."[130] But Davis mooted that dispute by accepting the nomination of Democrats in the Illinois state legislature to serve in the United States Senate, thus depriving national Democrats of the key vote on the Electoral Commission and leading the way for Justice Bradley to replace him there.

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127. See Lee Scott Theisen, A "Fair Count" in Florida: General Lew Wallace and the Contested Presidential Election of 1876, 2 Hayes Hist. J. 21, 26–29 (1978). Morris also suggests that promises of federal offices helped Hayes to receive the Republican nomination in the first place. According to Morris, the supporters of Benjamin Bristow's presidential aspirations were induced to shift their allegiance to Hayes during the Republican convention via a deal that "was finalized with the confidential proffer of a Supreme Court nomination for Bristow's floor manager, John M. Harlan." Morris, supra note 5, at 77; see also id. at 79–80 (describing how Harlan, "his Supreme Court nomination stashed safely in his back pocket," soon delivered Kentucky's votes to Hayes).

128. Monroe, supra note 20, at 528. See generally Rehnquist, supra note 4, at 132–42 (providing a biographical sketch of Justice Davis).

129. Rehnquist quotes Milton Northrup's account of the joint committee's discussion of Justice Davis:

> The Republicans tenaciously argued that Justice Davis was, to all intents and purposes, a Democrat, and that his selection should be charged up against the Democrats. Just as strenuously the Democratic committeemen insisted that he occupied a midway position between the parties, and therefore could with entire propriety serve as the fifth wheel of the commission coach.

Rehnquist, supra note 4, at 118 (quoting Northrup, supra note 22, at 927). But see Henry Watterson, The Hayes-Tilden Contest for the Presidency: Inside History of a Great Political Crisis, 86 Century Mag. 3, 18 (1913) (article written by a former Democratic Representative stating that "[t]he day after the inauguration of Hayes my kinsman, [and future Justice] Stanley Matthews, said to me, 'You people wanted Judge Davis. So did we. I tell you what I know, that Judge Davis was as safe for us as Judge Bradley. We preferred him because he carried more weight.'").

130. Northrup, supra note 22, at 933.

B. *Expertise*

Expertise is another important consideration in selecting the appropriate party to decide an election. Modern administrative agencies, for example, are designed to exploit the expertise of their officials in performing the task delegated to them. Election canvassing boards may operate in the same way, relying upon the assumption that the members of the board are sufficiently familiar with the kinds of questions that arise in the context of questionable votes and elections. On the other hand, juries decide factual questions in most legal disputes even though most citizens lack any special training in such matters, so it is conceivable that juries could be called upon in disputed elections as well. Moreover, no amount of expertise or training would equip any decisionmaker to answer questions for which the evidence is unavailable. The imperfect machinery for collecting and counting votes complicated all of the efforts to decide the presidential elections of 1876 and 2000, as well as countless other less prominent elections.

Many of the questions that arose in the context of the 1876 presidential election were questions of law. As described by Rehnquist, Justice Bradley's decisive vote rested upon careful legal reasoning:

> [Bradley] stated that the two houses of Congress could certainly inquire whether the certificate presented had actually been signed by the executive, or whether the certificate contained a clear mistake of fact. The certificate, Bradley said, was a document of high authority, but not conclusive as to such cases. But in the present case there was no claim that the certificate of the Governor [of Florida] had been forged, or that there was any mistake of fact in it, or that it was willfully false and fraudulent. If erroneous at all, its error stemmed from erroneous proceedings of the canvassing board. But the canvassing board had been authorized by Florida law to decide which returns [were] to be counted and had some authority to disregard false or fraudulent returns. The state itself could provide for any sort of election contest challenging the returns of the board so long as it was concluded by the time that the electors were to cast their vote in December. Here, of course, the state proceedings had occurred after that date.[131]

Indeed, Rehnquist quotes Justice Davis—the idealized neutral party who declined to serve on the Electoral Commission—as privately remarking that "[n]o good lawyer, not a strict partisan, could decide otherwise" than Justice Bradley.[132] But Tilden's supporters relied upon established legal principles as well. Rehnquist summarizes Justice Clifford's argument "that, legally, 'fraud vitiates everything.' In other words, if the

131. Rehnquist, supra note 4, at 173. Rehnquist's book omits any reference to the decisive nature of the date for counting Florida's electoral votes 124 years later in Bush v. Gore, 531 U.S. 98, 110 (2000) (concluding that "any recount seeking to meet the December 12 date will be unconstitutional").

132. Rehnquist, supra note 4, at 185.

canvassing board had acted fraudulently, it was just as if it had not acted at all."[133] An understanding of these conflicting legal positions was essential for whoever decided the election.

For some, the existence of a legal dispute necessitates the involvement of judges. "This was a dispute; disputes are traditionally resolved by courts."[134] So writes Chief Justice Rehnquist in explaining why "[i]t was quite natural for Congress to turn to the justices of the Supreme Court as members of the Electoral Commission."[135] But Supreme Court Justices are not the only people capable of understanding the factual or legal issues raised in a contested election. As Judge Wilkinson explains, "our Structural Constitution confers the priceless values of self-governance upon many different entities."[136] Thus "[t]he threshold question for a judge under the Structural Constitution is not, 'How should I resolve this case?' It is rather, 'To whom does the Constitution entrust the resolution of this issue?'"[137] Chief Justice Rehnquist knows that, of course. The adjudication of contested elections is precisely the kind of question the Constitution sometimes commits to institutions besides federal judges.[138] The need for expertise, in short, does not inevitably point toward judges as the ideal parties to resolve contested elections. Indeed, Justice Bradley insisted in his Electoral Commission opinion that "it is a grave question whether any courts can thus interfere with the course of the election for President and Vice-President."[139] And Justice Breyer wrote in *Bush v. Gore* that "[h]owever awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court."[140]

C. *Timeliness*

Any historical evidence uncovered today will not change the fact that Rutherford B. Hayes, not Samuel Tilden, served as the nineteenth President of the United States. Such evidence would be untimely, for elections must be resolved much more rapidly than most other matters presented to the courts, the legislature, or executive agencies. Consider that the median civil lawsuit requires more than nine years to be decided

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133. Id. at 174. Afterward, Justice Field complained that "[i]t is the first time, I believe, that it has ever been held by any respectable body of jurists, that a fraud was protected from exposure by a certificate by its authors." Id. at 189.

134. Id. at 119.

135. Id.

136. Wilkinson, supra note 21, at 1706.

137. Id. at 1707.

138. See U.S. Const. art. I, § 5, cl. 1 (providing that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members").

139. Electoral Commission Proceedings, supra note 70, at 1024.

140. 531 U.S. 98, 155 (2000) (Breyer, J., dissenting).

by a federal court,[141] or that Congress itself sometimes takes an entire session to resolve a dispute about the election of one of its members. The luxury of such time is not available in a presidential election when the dates imposed by law and mounting popular pressure may demand a decision before all of the evidence needed to make the best decision is available. As one observer of the 1876 election explained, "It was more important that the presidential issue should be decided effectively than that it should be decided rightly."[142]

The vote counting in the 1876 presidential election was constrained by two dates fixed by federal law. First, the electors had to meet by December 6. Second, the Constitution provided that the new president was to take office on March 4. The state canvassing boards hurried to complete their work by the December 6 deadline. In Florida, the board finished just hours before the deadline. Congress, then, acted to count the electoral votes in order to meet the March 4 deadline. The Electoral Commission's proceedings reflected the need to act in time for Congress to validate—or reject—the results.

Rehnquist writes that "it is not possible to say how time-consuming even an inquiry into the claims of fraud would have been, or how clear-cut any result would have been" if the Electoral Commission had looked beyond the official certificates presented by the contested states.[143] But Rehnquist suggests the process could have been lengthy, given the ever-expanding scope of the questions involved:

> The Democrats emphasized the likelihood of fraud—that returning boards had disallowed proper votes in order to reach a desired result. The Republicans spoke of intimidation of black voters—would this, too, be a permissible issue? If so, there was an added difficulty in that the chain of causation was much more indirect and difficult to prove. If night riders had gone through a town two weeks before the election, would claims be

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141. See Judicial Facts and Figures, Table 4.7: U.S. District Courts. Civil and Criminal Median Times (Month)—Filing to Disposition, available at http://www.uscourts.gov/judicialfactsfigures/table4.07.pdf (last visited Sept. 11, 2004) (on file with the *Columbia Law Review*) (reporting statistics for 2003).

142. Monroe, supra note 20, at 527. For a more recent expression of tbat idea, see Rodriguez v. Cuellar, No. 04-04-003335-CV, 2004 Tex. App. LEXIS 6145, at *21 (Tex. App. July 12, 2004) ("The purpose of an election contest is to determine whether the outcome of an election is correct. However, elections are politically time sensitive, and legislative remedies for contested elections are to be strictly followed." (internal citations omitted)). Of course, election disputes are not the only context in which timeliness is especially important. See, e.g., Zajaczkowski v. Zajaczkowska, 932 F. Supp. 128, 130 (D. Md. 1996) (asserting that "any dispute involving custody of a cbild be decided quickly").

143. Rehnquist, supra note 4, at 184. Tilden supporter and former Attorney General Jeremiah Black mocked the concern that "it would be troublesome, and require a great deal of time, to ascertain who was duly appointed by the people. It was much easier to accept the false vote and say no more about it." Black, supra note 29, at 25. Black insisted "there was no difficulty in it." Id.

> entertained that black voters refrained from voting because of this?[144]

Rehnquist only begins to identify the issues that could have been raised in a comprehensive review of the election. President Grant remarked that "if all eligible voters had been free to vote their preferences, the Republicans would have triumphed in Mississippi, North Carolina, and Arkansas."[145] Grant later added Alabama, Connecticut, and New York to the list of states in which Hayes "had been 'clearly elected by the legal vote.'"[146] Ten years after the election, Hayes himself wrote:

> In 1876 the Republicans were equitably entitled to the advantages of the Fifteenth Amendment under which, if it had been obeyed and enforced, they would have had a majority of the popular vote of the country and at least 203 electoral votes to Tilden's 166. This includes Louisiana, Florida, Mississippi, Alabama, and South Carolina among the Republican States.[147]

Then, in 1890, a Mississippi judge remarked that "[i]t is no secret that there has not been a full vote and a fair count in Mississippi since 1875—that we have been preserving the ascendancy of the white people by revolutionary methods."[148] How long would it have taken to judge those claims about what really happened on election day in 1876? Again, an effective means of resolving a disputed election must reach its conclusion quickly enough to establish who is entitled to serve in an office once it becomes vacant.

IV. CONCLUSION

Whether Hayes or Tilden actually "won" the election of 1876 will never be known, for it depends both upon evidence that has long since disappeared and assumptions about the proper scope of any inquiry into a fair election. And the focus upon the contested states of Florida, Louisiana, Oregon, and South Carolina obscures the many other historical contingencies that could have swayed the election one way or the other, such as the admission of Colorado as a state just in time for the new state's legislature to select three Hayes delegates.

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144. Rehnquist, supra note 4, at 184.

145. Simpson, supra note 94, at 9.

146. Id. at 13.

147. Diary Entry (Dec. 10, 1886), *in* 4 Hayes Diary and Letters, supra note 1, at 297, 297; see also Letter from Rutherford B. Hayes to S. Shellabarger (Jan. 2, 1877), *in* 3 Hayes Diary and Letters, supra note 1, at 399, 399 (asserting that "[o]n the Louisiana vote our *equitable* right to the State is indisputable. . . . If we go back of the Returning Board, why not go into the merits? How would Louisiana have voted if the election had been fair?").

148. Barnard, supra note 1, at 302 (quoting Francis Butler Simkins, A History of the South 315 (2d ed. 1953)). In contrast, Morris insists that many African Americans willingly voted for Tilden in 1876. See Morris, supra note 5, at 148 (writing that "Louisiana Democrats made a concerted and somewhat successful effort to appeal to black voters who had grown increasingly disgusted by years of Republican misrule and neglect").

According to Morris, "[i]n the post-election campaign to assert his right to the presidency, Hayes was far busier and more effective than Tilden—one might almost say that his actions were presidential."[149] Hayes also proved to be a better President than many expected. Morris relates how one individual Democrat remarked after Hayes completed his presidential term that "he has done so well that I sometimes almost wish he had been elected."[150] But Hayes labored through his single term in office with enduring references to "'His Fraudulency,' 'the Great Usurper,' and 'Rutherfraud B. Hayes.'"[151]

The institutions involved in deciding the 1876 presidential election failed to do so in a manner that gained the acceptance of the nation. It was really the state canvassing boards in Florida, Louisiana, and South Carolina that decided the election. The Electoral Commission deferred to those decisions, and Congress deferred to the Electoral Commission. Morris makes a strong case that the boards were poor judges of the election, and I agree that it was those boards that miscounted the votes. Rehnquist ably defends both the integrity of the Electoral Commission and the commission's legal rationale for not recounting the votes that were officially submitted to Congress by the contested states. But the failure of the commission to command the approval of history confirms that Hayes was right when he called for a better institutional arrangement for deciding contested elections.

What that arrangement should be remains to be determined. Impartiality, expertise, and timeliness are central to any system for resolving disputed elections. Indeed, the resolution of contested elections also presumes some understanding that the result of the election is in doubt. As Morris writes,

> [h]ad it not been for the dramatic, late-night intervention of two canny Republican politicos and a bitterly partisan newspaper editor, the election would never have been contested in the first place, and the nation would not have been subjected to four long months of bold-faced political chicanery masquerading as statesmanship.[152]

Rehnquist and Morris have contributed greatly to our understanding of the flaws in our system for deciding presidential elections by their careful review of the events following election day 1876. The lessons of that history, and of its virtual repeat in 2000, encourage further consideration of whether there is a better way of judging disputed elections—ideally before another one occurs.

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149. Morris, supra note 5, at 207.
150. Id. at 252.
151. Id. at 2, 241.
152. Id. at 3.