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## Lost Opportunity: Learning the Wrong Lesson From The Hayes-Tilden Dispute

Nathan L. Colvin

Edward B. Foley

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# LOST OPPORTUNITY: LEARNING THE WRONG LESSON FROM THE HAYES-TILDEN DISPUTE

Nathan L. Colvin\* & Edward B. Foley\*\*

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\*J.D., The Ohio State University Michael E. Moritz College of Law; B.A., Miami University.

\*\* Director, *Election Law @ Moritz*; Robert M. Duncan/Jones Day Professor of Law, The Ohio State University Michael E. Moritz College of Law. This article grew out of a paper presented in Professor Foley's Seminar on Disputed Elections and relates to his long-term scholarly interest in the topic. The themes of this paper, as well as related work from the long-term project, were presented at the Fordham symposium, and the authors are extremely grateful for the feedback and intellectual stimulation received at the symposium. Likewise, this specific paper was also presented at an Ohio State Legal History Workshop, and the authors thank the workshop participants for their helpful comments. Matt Steinke, of the Moritz Law Library, provided valuable assistance in researching historical materials. The authors, of course, are responsible for any errors.

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#### INTRODUCTION

A clear, efficient, and fair mechanism for resolving election disputes is an important aspect of smooth presidential succession. It is also something that our Constitution has lacked from its inception, and the adverse consequences of its absence were most recently apparent in the 2000 election. The 1876 Hayes-Tilden election, which required an Electoral Commission to resolve disputes about presidential electors, was the most severe manifestation of this presidential succession gap. As such, it also should have represented the best opportunity to fix the problem. Indeed, shortly after the Senate passed the Electoral Commission bill, then candidate Rutherford B. Hayes reflected that the occasion presented such an opportunity to revisit the subject of presidential elections.

Before another Presidential Election this whole subject of the Presidential Election ought to be thoroughly considered, and a radical change made. It is probable that no wise measure can be devised which does not require an amendment of the Constitution. Let proposed Amendments be maturely considered. Something ought to be done immediately.<sup>1</sup>

Instead of wholesale reform and constitutional amendment, Congress spent the next eleven years focusing its energy on a joint rule and then a statutory fix to the problem. The resulting statute, the Electoral Count Act,<sup>2</sup> is confusing, unwieldy and fails to account for all the problems the Constitution creates for disputed presidential elections. It also represents a complete rejection of the Electoral Commission model. In this paper, we piece together all congressional action on this matter in the aftermath of the Hayes-Tilden 1876 election leading up to the passage of the Electoral Count Act in an effort to explain why Congress missed this opportunity and turned away from the Electoral Commission model.

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1. RUTHERFORD BIRCHARD HAYES, DIARY & LETTERS OF RUTHERFORD BIRCHARD HAYES: NINETEENTH PRESIDENT OF THE UNITED STATES 70–71 (D. MCKAY CO. 1964).

2. Pub. L. No. 98-456, 98 Stat. 1748 (codified at 3 U.S.C. § 15 (2006)).

## I. THE TWELFTH AMENDMENT PROBLEM

In another article we have detailed the problems and gaps that the Twelfth Amendment to the Constitution has created for our system of electing the President.<sup>3</sup> Briefly, the Twelfth Amendment provides the joint session of Congress with instructions for conducting the electoral vote.<sup>4</sup> The Amendment is wordy, but the language that causes the most problems is relatively short: “The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”<sup>5</sup> This is all the direction the Constitution provides to the joint session, and one can quickly see the problems it creates if there is a dispute. For instance, what does the language say about who is to count or determine the validity of electoral votes? One can make the argument, as some have, that this authority is vested exclusively in the President of the Senate, with the two Houses being merely onlookers. Alternatively, as others have claimed, one can contend that Congress has authority under the Necessary and Proper Clause<sup>6</sup> to fill the gap that exists in the constitutional text. The key point, however, is that because the constitutional ambiguity remains unless and until there is a constitutional amendment to fix it, different arguments can be made to support one or the other of these interpretations depending on the politically strategic reasons for doing so.<sup>7</sup>

Even if it were settled *who* has the final constitutional authority to decide which Electoral College votes from a state are entitled to be counted, subsidiary questions arise over how to exercise this authority if there is a dispute over electoral votes. For example, can the vote counter reject votes? How should the vote counter choose among competing votes? These are just a few of the questions posed by the text of the Twelfth Amendment,<sup>8</sup> and as we detailed in our article, many of the issues have arisen in our history. The most glaring example was the Hayes-Tilden Election Dispute.

A. *The Hayes-Tilden Election Dispute and the Electoral Commission*

The question of what to do when faced with competing electoral returns from a single state reared its head in the Hayes-Tilden dispute. In the aftermath of the 1876 presidential election, Congress was faced with thirty-five disputed electoral votes from five states, enough to swing the election either way.<sup>9</sup> In three southern states, Florida, Louisiana, and South

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3. Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475 (2010).

4. U.S. CONST. amend. XII.

5. *Id.*

6. U.S. CONST. art I § 8, cl. 18.

7. See generally Colvin & Foley, *supra* note 3, at 480–523.

8. For a list of others, see *id.* at 482–83.

9. CHARLES FAIRMAN, *Five Justices and the Electoral Commission of 1877*, in *THE OLIVER WENDELL HOLMES DEVISE: THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 40–41 (Paul A. Freund & Stanley N. Katz, eds., Supp. 1988). For another good source on the Hayes-Tilden dispute generally, see PAUL LELAND HAWORTH, *THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876* (1966).

Carolina, multiple electoral certificates were returned, along with allegations of fraud, violence, voter intimidation, and corruption.<sup>10</sup> In Oregon, one elector was possibly ineligible which led to the submission of two slates, one including the elector and another with a replacement from the other political party.<sup>11</sup> If Hayes received all of the disputed electoral votes, he would prevail by a margin of one; therefore each dispute was critical to the overall outcome.<sup>12</sup>

The Constitution was silent as to how to proceed and there was no legislation governing the electoral count. Perhaps worse still, control of Congress was split between the Democrats and Republicans, creating a loggerhead.<sup>13</sup> This was a true crisis in presidential succession. Without some sort of compromise, there was concern that the Republicans, and the President of the Senate specifically, would assert that he had the power to declare Hayes President.<sup>14</sup> Conversely, the Democrats might insist that, with no agreement on what to do about the disputed Electoral College votes, neither candidate had an outright majority and therefore it fell to the House of Representatives to decide the winner.<sup>15</sup> If neither side budged, there would be a genuine stalemate resolvable only through the force of arms. However, the two parties reached a compromise, agreeing to create a bi-partisan Electoral Commission, comprised of five members from each house (five Democrats and five Republicans) and four U.S. Supreme Court Justices (thought to be two Democrats and two Republicans) who would choose a fifth to join them.<sup>16</sup> Initially, it was thought that the fifth justice would be Justice David Davis, who was considered to be the most independent member of the Court. However, in the midst of all this, Davis was selected by the Illinois state legislature to the United States Senate.<sup>17</sup> His replacement on the Commission, Justice Joseph P. Bradley, was thought to be a Republican.<sup>18</sup> These changes in the presumed composition of the Commission made it, at least on its face, appear less evenly bi-

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10. Colvin & Foley, *supra* note 3, at 502–04. Florida and Louisiana returned three certificates while South Carolina returned two. *Id.*

11. *Id.* at 504–05.

12. *Id.* at 502–03.

13. *Id.* at 505–06.

14. George F. Edmunds, *Presidential Elections*, 12 AM. L. REV. 1, 3–4 (1877). The Republicans in the House were strong proponents of this view. Representative James A. Garfield was indignant about the Senate's decision to back the Commission, writing to Rutherford B. Hayes that the Senate simply needed to "support its presiding officer in following the early precedents, which were made under the fresh impulses of the constitution." 1 THEODORE CLARKE SMITH, *THE LIFE AND LETTERS OF JAMES ABRAM GARFIELD* 629 (1925). Garfield took this position to the House floor for over an hour and he ultimately received 79 of 83 votes to serve on the Commission from the party caucus. *Id.* at 630–31. As will be seen in this paper, many Democrats remained angry over this possibility through the rest of the decade.

15. Samuel J. Tilden himself, and his most fervent followers, continued to assert this position up until almost the very end, Inauguration Day, and there were fears that they were lining up military officers to support this stance, with the consequence that another civil war might erupt. Edmunds, *supra* note 14, at 3–4.

16. FAIRMAN, *supra* note 9, at 48–49.

17. *Id.* at 54.

18. *Id.*

partisan.<sup>19</sup> Congress was effectively bound to the Commission's findings unless both Houses rejected the findings, unlikely given the partisan split of Congress.<sup>20</sup>

The key question for the Commission, from a legal standpoint, ultimately turned on whether a state was entitled to alter the official determination of which presidential electors won the state's popular vote *after* the congressionally specified date on which the electors were to cast their votes for President. In Florida, the State's canvassing board had declared the Hayes electors to have won the popular vote, despite protests from Samuel J. Tilden supporters. On the specified day in December, the Hayes electors cast their votes for their candidates, and their votes were certified by the State's Governor. The Tilden electors met the same day, and got the State's Attorney General (a Democrat) to certify their vote. More significantly, in January, the State had a new Governor—and a new legislature—and pursuant to a new statute, the new Governor (also a Democrat) certified that the Tilden electors had been the true popularly elected ones. The Electoral Commission, on a straight party-line vote, split in ruling that the certification of the Hayes electors was the only one in compliance with the U.S. Constitution. In his decisive opinion, Justice Bradley explained his view that the Constitution's requirement that presidential electors in all states cast their votes for President on the same day implicitly precluded a state, like Florida, from subsequently determining that the wrong electors had been certified winners of the popular vote.<sup>21</sup>

### *B. Congress's Missed Opportunity*

In the aftermath of this experience, it was clear that Congress needed to do something to fix the problem posed by the Twelfth Amendment. However, it was not as if Congress was operating on a blank slate. Indeed, since the first electoral count, Congress employed or proposed numerous methods or bodies for resolving electoral count disputes, including joint rules, legislation, constitutional amendments, committees, the Supreme Court, and an Electoral Commission.<sup>22</sup>

During the eleven years of debate leading up to the Electoral Count Act, many of these methods were debated. Congress could have reexamined and modified the Electoral Commission model. While there was some wide dissatisfaction with the way the Commission worked, it was not as if it was

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19. Indeed, Hayes noted in his diary, upon the selection of Justice Joseph P. Bradley, the odds of him prevailing in Washington D.C. had increased to five to one in his favor. HAYES, *supra* note 1, at 71.

20. See FAIRMAN, *supra* note 9, at 49. It was conceivable that one side or the other might claim unilateral authority to declare the winner even after the Commission's ruling, notwithstanding the statutory directive that both Houses needed to overturn a Commission decision. But, as a practical matter, once the Commission ruled, public opinion would not tolerate either side attempting to negate its decision unilaterally.

21. Colvin & Foley, *supra* note 3, at 507–16. Hayes himself described the votes as a strictly “party” vote and noted that they demonstrated the “strength of party ties.” HAYES, *supra* note 1, at 73.

22. See generally Colvin & Foley, *supra* note 3.

a total failure.<sup>23</sup> It would have been possible to adopt the general concept while making modifications to reduce the partisanship and perception that the outcome would be *fait accompli*. For instance, the number of commissioners could have been reduced, members could have been selected from outside Congress, and Congress could have determined a better way to select a neutral tiebreaker by not limiting the pool to sitting Supreme Court justices. However, Congress did not seriously consider employing the Commission model. Instead, it adopted legislation that went back to the old model of relying on Congress to resolve these disputes.

Moreover, the need to fix the problem with the Twelfth Amendment that provoked the crisis of 1876 gave the nation and its leading statesmen the opportunity to confront the role of political parties in democratic elections in a way that the Framers of the Constitution (and even the Twelfth Amendment) had not done. The problem that proved visible in 1876 was one rooted in two-party conflict: neither side could rise above its partisan desire to win the Presidency in order to resolve the vote-counting dispute impartially, and therefore any institution charged with resolving this dispute inevitably would act based on partisan motives if that institution was dominated by one party or the other. This partisan dynamic was one that had not been anticipated by the Framers, because they had hoped that they had designed the Electoral College in a way to avoid the effects of partisanship in presidential elections.<sup>24</sup> Obviously, the Framers were sorely mistaken in this respect, as became obvious by the election of 1800.<sup>25</sup> But even as the Founding Generation adopted the Twelfth

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23. The Commission model represented a bi-partisan compromise that averted a potential crisis in presidential succession. Because both sides considered acting unilaterally—the Republicans through the President of the Senate, the Democrats through the House—there were serious rumblings about the use of arms, and President Ulysses S. Grant in fact deployed troops over concerns of civil unrest. The dispute never turned into open warfare, and the Electoral Commission compromise led to a relatively peaceful presidential succession. Norman J. Ornstein, *Three Disputed Elections: 1800, 1824, 1876, in AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE* 29, 35 (John C. Fortier ed., 3d ed. 2004) (noting President Grant's deployment of troops). Senator George F. Edmunds defended the use of the Electoral Commission, later stating that he was certain that the Senate would have declared Hayes as the winner and the House would have declared Tilden as the winner with the resolution coming by a resulting armed conflict. Edmunds, *supra* note 14, at 3–4.

24. One of us has written on how this misunderstanding about the Electoral College was part of a broader misunderstanding by the Founders on how partisanship would affect disputed elections for the chief executive, whether governor or president. See Edward B. Foley, *The Founders' Bush v. Gore*, 44 *IND. L. REV.* (forthcoming).

25. The most significant problem was that originally members of the Electoral College could only vote for President. The Vice President would then be the candidate with the second most votes. The Framers did not seem to anticipate that this might mean the President and Vice President would be political enemies. To prevent this result, the members of the Electoral College had to be especially strategic in casting their votes. In 1800, the Democratic-Republicans failed at this task and cast the same number of votes for the Presidential candidates (Thomas Jefferson) and his "running mate" Aaron Burr, tossing the election to the House of Representatives. See generally SUSAN DUNN, *JEFFERSON'S SECOND REVOLUTION: THE ELECTION CRISIS OF 1800 AND THE TRIUMPH OF REPUBLICANISM* (2004); JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* (2004); EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800*,

Amendment to fix the defect in the Electoral College that had surfaced in 1800, the Founders did not have the foresight to use the Twelfth Amendment as a vehicle to handle the problem of partisanship in a dispute over counting ballots cast for a state's presidential electors. The authors of the Twelfth Amendment, had they been clairvoyant, could have designed a neutral institution—better than the ad hoc Electoral Commission of 1877—to handle this kind of dispute. But they did not. More significantly, in the aftermath of the Electoral Commission's work in 1877, the statesmen of that time (if they had been acting in the public-minded spirit of the Founders), now that they had experienced the consequences of partisan motivations in the context of this type of dispute, could have created the kind of balanced bipartisan institution that eluded the Founders. The fact that the generation of leaders who lived through 1876–1877 did not create a new institution to overcome the effects of partisanship in a disputed presidential election is the most significant negative legacy of their experience.

The 2000 presidential election brought Congress's inadequate response to the Hayes-Tilden dispute to the forefront. Again, Supreme Court justices would play a pivotal role in resolving the dispute, this time sitting as a court and deciding *Bush v. Gore*.<sup>26</sup> The Electoral Count Act failed to resolve all the problems and questions created by the Constitution. Had the Supreme Court declined to intervene, it is quite possible, perhaps even likely, that two slates of electors, one favoring Al Gore and one favoring George W. Bush, would have been sent to Congress.<sup>27</sup> In 2000 the Congress was divided: the House was Republican and the Senate was tied, with Al Gore having the authority to cast the tiebreaking vote. Predicting how that Congress would have reacted to such a scenario is an impossible task.<sup>28</sup> This scenario, and the crisis it would have created, provide the best justification for the Supreme Court's intervention in the 2000 election.<sup>29</sup> Like 1876, the 2000 election dispute represents another presidential succession crises averted, less than a year before the September 11th attacks.<sup>30</sup>

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AMERICA'S FIRST PRESIDENTIAL CAMPAIGN (2007); BERNARD A. WEISBERGER, *AMERICA AFIRE: JEFFERSON, ADAMS, AND THE REVOLUTIONARY ELECTION OF 1800* (2000).

26. 531 U.S. 98 (2000), *cert granted*, 531 U.S. 1046 (2000). Perhaps it was appropriate that again it appeared U.S. Supreme Court Justice Kennedy, like Justice Joseph P. Bradley in 1876, held the fate of the election in his hands as the "swing vote."

27. Indeed, the Florida legislature was prepared to appoint a George W. Bush slate of electors in the event the Supreme Court did not intervene. Colvin & Foley, *supra* note 3, at 529 n.282.

28. For some speculation on various scenarios, see Colvin & Foley, *supra* note 3, at 522–23, 528–31.

29. *Bush*, 531 U.S. at 1046, 1047 (Scalia, J., concurring) (arguing that grant of certiorari was necessary to prevent "casting a cloud" upon the legitimacy of the election); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 327–31 (2003) (summarizing possible scenarios, problems with the Electoral Count Act (ECA) and the crises that the Court's intervention averted).

30. POSNER *supra* note 29, at 331 ("Had the worst-case scenario that the decision averted come to pass, the forty-third President would have taken office after long delay, with no transition, with greatly impaired authority, perhaps amid unprecedented partisan bickering



Thus, the primary lesson of 1876 and 2000 is that our constitutional system for resolving presidential election disputes is flawed. The Congress of 1887 thought it was addressing this problem, but even they knew that their legislation was a less-than-ideal substitute for a much-needed constitutional amendment, and the lesson of 2000 is that the Electoral Count Act is woefully inadequate. Together, the two disputes demonstrate the need for a neutral institution to resolve election disputes, something in the likeness of the flawed but successful Electoral Commission. This paper will explain why the Electoral Count Act prevailed where other ideas, such as a neutral body, joint rules, or constitutional amendments, failed. Additionally, the paper should shed light as to why it took Congress eleven years to reach a resolution in the aftermath of Hayes-Tilden and why the resulting legislation was so confusing.<sup>31</sup> Our hope is that this historical inquiry will also create a foundation for considering how politicians and scholars might fix the problem and fill this gap in the law of presidential succession.<sup>32</sup>

## II. CONGRESS'S RESPONSE TO THE HAYES-TILDEN DISPUTE

Because of the length of this article and complexity of the legislative history, we decided that it would be easier on the reader to explain some conclusions at the outset. First, a primary driver for the difficulty of fixing the electoral count was the diversity of opinions on the subject in Congress. The only point of agreement was that there was a problem that required resolution, and we did not come across a statement from a member of Congress suggesting that they should do nothing. But beyond that, opinions were divided, often in many directions, on nearly every single aspect of resolving the problem.

In this respect, the debate, particularly early on, differs from how we understand the way legislation is often crafted. Here, perhaps surprisingly,

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and bitterness, leaving a trail of poisonous suspicion of covert deals and corrupt maneuvers, and after an interregnum unsettling to the global and the U.S. domestic economy and possibly threatening world peace.”).

31. One scholar, shortly after the passage of the Electoral Count Act, described it as “[t]he most complicated bit of governmental machinery which the modern world has to exhibit.” John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633 (1888). For a thorough discussion of the resulting legislation, see Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004). See also Eric Schickler, Terri Bimes & Robert W. Mickey, *Safe at Any Speed: Legislative Intent, the Electoral Count Act of 1887, and Bush v. Gore*, 16 J.L. & POL. 717 (2000). The possible unconstitutionality of the Electoral Count Act has also been addressed. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653 (2002).

32. Our work on this topic has included an exercise using a model election court based on a McCain v. Obama hypothetical case. The project was co-sponsored by Election Law @ Moritz, the AEI-Brookings Election Reform Project, and the Supreme Court Institute. In an effort to create a neutral body, the model court was composed of two judges from different backgrounds who came together to select a third member of the panel. For more information on the project, see Election Law @ Moritz, Election Court, <http://moritzlaw.osu.edu/electionlaw/index.php>. See also Edward B. Foley, *The McCain v. Obama Simulation: A Hypothetical Variation on Bush v. Gore* (forthcoming, draft on file with author).

partisan legislative politics did not organize views into two competing teams. Instead, members from both parties offered a wide variety of proposals. Two-party conflict may have been a factor in preventing any legislative solution until 1887, but two-party conflict cannot be the sole explanation for the cacophony of congressional voices on this topic.

For instance, members of Congress could not agree on the appropriate method to resolve the problem: constitutional amendment, legislation, or joint rule. They disagreed about who possessed the power to conduct the count: the President of the Senate, the Houses acting together, the two Houses acting separately, or the two Houses acting together and voting as state delegations. They disagreed as to whether a legislative act would bind a future Congress on the matter. On what would prove to be one of the more important sources of disagreement, they disagreed about whether they might come up with a new system, perhaps vesting the power to count in the Supreme Court or Chief Justice. Members of Congress disagreed about the extent of the power to conduct the electoral count, about how much deference to give the states, or whether Congress could even reject returns.

Problematic in all of these opinions was that they often did not avail to compromise. For instance, an adamant believer that a constitutional amendment is necessary could not possibly compromise with someone who believed that Congress could legislate on the matter. As will be seen, some of these arguments were likely grounded in partisan or institutional concerns, but there are several cases of individuals taking stances to their own party's or institution's detriment.

Second, it does not appear that Congress seriously considered adopting the model of the Electoral Commission or some alternative. This was true despite the fact that a framer of the Electoral Commission,<sup>33</sup> Senator George F. Edmunds, was also the primary author of the Electoral Count Act. Professor Stephen A. Siegel, in his own review of the Electoral Count Act's (ECA's) legislative history for a different purpose than ours,<sup>34</sup> was uncertain whether this was because Congress believed that the job belonged to them, as a matter of policy, or because Congress believed a constitutional amendment was necessary to create a different arbiter.<sup>35</sup> Additionally, the legislative history reveals two more explanations. First, there was overall dissatisfaction with the Electoral Commission, particularly from the Democrats who found themselves in control of Congress soon after the Hayes election. Second, at the start of the debates the Democrats in Congress were in complete control for the first time in a long time and

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33. Obituary, *George F. Edmunds*, N.Y. TIMES, Mar. 1, 1919, at 11.

34. Siegel sought to discern the true meaning of the ECA and to advise modern-day members of Congress on how to enforce the statute's directives. Our goal is to understand why Congress missed the opportunity that it had in the aftermath of 1877 to fix the problem inherent in the Twelfth Amendment.

35. Siegel, *supra* note 31, at 555 (“[I]t is unclear whether the failure to legislate some tribunal other than Congress as the ultimate arbiter of the electoral count was because Congress believed, as a matter of policy, it should not move it elsewhere, or because Congress believed that in the absence of a constitutional amendment, it could not move the responsibility elsewhere.”).

viewed the Electoral Commission as one event in a line of Republican abuses going back to the Twenty-Second Joint Rule.<sup>36</sup>

This point leads to the third conclusion, which is that early failures to compromise by Congress were a result of this partisanship. Some Democrats wished to operate under their own version of the Twenty-Second Joint Rule, which would make rejecting electoral votes easy. Knowing the Republican President would never sign that type of bill, the Democrats sought to create a joint rule. Later, only when congressional control was split between the parties did the congressional actors move beyond the idea of using a joint rule and insisting on legislation. It seems it was necessary for congressional control to be split between the political parties in order to cool partisan temptations. The debate becomes much more civil and serious when this happens and eventually leads to a resolution.

The fourth conclusion is that once congressional control split between the parties, the substance of the debate was also altered. The concern during the debate was less about which party will receive an advantage, but rather whether the proposal would give more power to one of the two Houses of Congress. This led to further delay in a resolution.

Moreover, there were several close presidential elections during the period of Congress's attempts to fix the system. The final conclusion is that the close presidential elections did not appear to play a central role in the debates or passage of the legislation. Members of Congress were certainly aware of the close calls, but they do not feature prominently in the debates and members rarely mentioned them. At the same time, it is difficult to imagine particularly close elections not impacting the mindset of Congress. Thus, this conclusion is tentative and may need revision upon further research into historical archives.<sup>37</sup>

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36. For the full text of the Twenty-Second Joint Rule, see H. Subcomm. On Compilation of Precedents, Counting Electoral Votes, H.R. Misc. Doc. No. 44-13, at 256 (2d Sess. 1877). The Twenty-Second Joint Rule was the strongest display of Congress's counting power. If a member of Congress objected to a state's votes, both Houses would have to agree to count the votes or they would be rejected. Under this rule Congress rejected the votes of several southern states in three elections, the only time it ever did this. Colvin & Foley, *supra* note 3, at 497-99.

37. One possible explanation is that Congress faced too many significant issues during this period. Civil service reform, civil rights and voting reform, presidential succession, tariffs, maintenance of the gold standard, immigration, and race relations in the aftermath of Reconstruction were all issues on the national agenda during the period. Still, it would seem possible for Congress to have carved out time for a constitutional amendment had there been the political will. Congress, after all, was able to adopt the Twentieth Amendment in 1933, which also concerns presidential elections, during the Great Depression.

A. *Forty-Fifth Congress 1877: Republicans Control the Senate and the Democrats Control the House of Representatives*

1. The House of Representatives Considers a Constitutional Amendment

The 45th Congress did not feature much serious movement toward solving the problems posed by the Twelfth Amendment, except for some constitutional amendment proposals. In the earliest action following the Hayes-Tilden dispute, Representative Milton I. Southard (D, OH) introduced a resolution to form a committee consisting of eleven members for “consideration of the state of law respecting the ascertainment and declaration of the result of the election of President.”<sup>38</sup> The resolution was a response to a committee already formed by the Senate that was authorized to work with any committee from the House.<sup>39</sup>

This committee, officially entitled the Committee on the State of the Law Respecting the Ascertainment and Declaration of Result of Election of President and Vice-President, produced a report and suggested amendment to the Constitution in May 1878.<sup>40</sup> The majority of the Committee, unsurprisingly, found that the electoral system was a failure:

Every reason originally alleged for it has been refuted by experience; its operation is inequitable and cannot be otherwise; it is aristocratic in its nature; it was founded in distrust of the people and intended as a check upon popular will; it is peculiarly open to treachery and fraud, and it has brought the country to the verge of revolution and anarchy repeatedly.<sup>41</sup>

This language, particularly the concern about fraud and anarchy, certainly harkened back to the nation’s collective experience in the previous presidential election. The fundamental change proposed to the electoral system was to change the allocation of electoral votes in each state while preserving the Electoral College. Rather than a candidate winning all of a state’s electoral votes, the proposal divided each state’s electoral votes proportionally among the candidates according to the number of votes they received in each state.<sup>42</sup>

The upshot of this plan was primarily two fold. First, and likely most important, the majority felt that it was a more accurate expression of the entire country’s preference for a particular candidate. This would be accomplished by reducing the likelihood of an election going to the House and doing away with the notion that a one-vote victory by a candidate in a

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38. 6 CONG. REC. 132 (1877).

39. *Id.*

40. H.R. REP. NO. 819 (1878).

41. *Id.* at 1–2.

42. *Id.* at 13. Specifically, the math in the amendment required multiplying the total votes that the candidate received in a state by the whole number of that state’s electoral votes and then dividing that number by the total number of votes cast in that state. That number would be kept to the third decimal and would be the number of electoral votes the candidate received for that state. *Id.* For example, in the election of 1876 New York had thirty-five electoral votes. Under this system, Hayes would have received 16.9 of New York’s votes to Tilden’s 18.031. *Id.* at 12.

particular state would net the entirety of that state's electoral votes.<sup>43</sup> Second, the majority argued that this plan tended to prevent or reduce the impact of election fraud. Noting that under the current plan a local fraud in New York, Philadelphia, or Cincinnati had the potential to swing an election in New York, Pennsylvania, or Ohio—and then perhaps the nation—the majority argued that under this plan such a fraud would have a much smaller impact, to the point that parties might not be willing to engage in such activities.<sup>44</sup>

Indeed the same point is stronger when one considers the fact that it would have changed the nature of not only fraud but also all election disputes or snafus in presidential elections. Taking Florida in 2000 as an example, some believe the butterfly ballot in Palm Beach County might have been sufficient to cost Florida's electoral votes for Al Gore. Under this proposal, the impact of the ballot problem would have paled in comparison. In fact, it is difficult to imagine that the problem would have resulted in any dispute at all.

The majority's proposed amendment also included a provision for the counting of electoral votes in Congress. The language would have replaced the dreaded passive language in the Twelfth Amendment that left open the question of who counts the votes. In the proposed amendment, the President of the Senate would open the votes, but "the electoral votes [would] then be counted by the two houses, as certified, unless rejected by both houses."<sup>45</sup> In the event of an election dispute in a state, the highest judicial tribunal to pass on the dispute was to transmit the decision to the President of the Senate and the Houses were bound to follow that decision unless both disagreed with it.<sup>46</sup> If there were a dispute but no certificate of decision, the votes would only be counted if both Houses agreed.<sup>47</sup> Furthermore,

[i]f there be more than one certificate of electoral votes from any State, and no such judicial decision as aforesaid, or if there be more than one such decision from any State, in either case that certificate of electoral votes which shall be held by both houses to be made by the rightful authority, and that judicial decision which shall be held in like manner to be made by the rightful tribunal, shall be conclusive, and the votes be counted accordingly, unless rejected by both houses.<sup>48</sup>

Finally, rather than requiring a candidate to receive a majority of the votes, the proposed amendment required only a plurality. In the event of a tie, which was highly unlikely under the amendment due to the use of fractions, the vote would immediately go to the House of Representatives as under the original plan.<sup>49</sup>

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43. *See id.* at 10.

44. *Id.*

45. *Id.* at 14.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

The minority report<sup>50</sup> of the Committee took issue with the majority's assertion that the early plan was aristocratic in nature and did not always reflect the will of the entire people.<sup>51</sup> They insisted that this was not a flaw of the system, but the point: the election of the president was to be "the will of the States, expressed in such manner as through their several legislatures they might direct . . . [not] as a means of arriving at the aggregate voice of all the people of the United States."<sup>52</sup> In effect, the minority argued, the proposed amendment would violate principles of federalism and states' rights, which were fundamental compromises of the Constitution.<sup>53</sup> The minority also disagreed with the majority's contention that the proposed amendment would lessen corruption and fervor.<sup>54</sup> They argued, instead, that this would increase passions in states where elections were once considered to be foregone conclusions.<sup>55</sup> As to whether this plan would reduce contested elections, the minority insisted that instead it would nationalize and increase contests as parties hoped to gain fractions all across the country in hopes of offsetting fractions they lose in other states.<sup>56</sup>

Whatever the merits of the debate between the majority and dissenting members of the committee, the majority's proposal suffered two defects that would plague future efforts at reforming the Twelfth Amendment. First, not content with only fixing the procedures for resolving disputes over ballots cast for presidential electors, the proposal attempted to tackle the far more controversial issue of how to distribute Electoral College votes. The proposal's plan for proportional distribution might be better than the largely prevailing system of winner-take-all (today, only Maine and Nebraska use a type of proportional system), but getting this idea to secure enough support for a constitutional amendment has proven impossible throughout U.S. history. Therefore, any reform of dispute resolution procedures that is attached to broader Electoral College reform, like the proportionality proposal, has little chance of adoption. Second, even insofar as this proposal focused on dispute resolution, it felt compelled

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50. The majority members of the Committee were not listed in the report. The minority members were H.A. Herbert (D, AL), John F. House (D, TN), and Eppa Hunton (D, VA), all Democrats. *See id.* at 23. Assuming the remaining members of the Committee were in the majority, those members would have included, Milton Southard (R, OH), Clarkson N. Potter (D, NY), George Bicknell (D, IN), John G. Carlisle (D, KY), Benjamin Butler (R, MA), Curtis H. Brogden (R, NC) and Ezekiel S. Sampson (R, IA). Standing and Select Committees of the House of Representatives, 45th Cong., 3d Sess., H Misc. Doc. No. 2, at 11.

51. *Id.* at 15.

52. *Id.* at 16.

53. *Id.* at 18–19. The minority also noted that nothing was stopping the states from adopting a plan similar to this. *Id.* at 20.

54. *Id.* at 20.

55. *Id.* ("The plan of the committee, giving importance to the ballot of every voter in the Union, making every one of eight millions and a half of voters feel that the result might depend upon him, would set fire to every State in the Union at once . . . The same reasoning shows that frauds would be perpetrated in States where it is now useless to attempt them.")

56. *Id.* at 21. Going further, the minority insisted that this would result in further federal encroachment on power in the southern states because of the constant concern of intimidation. *Id.*

to give both Houses of Congress, as distinct institutions, a role in the dispute-resolution process.

To be sure, the proposal stated the concurrence of both Houses would be necessary in certain circumstances: for example, both Houses would need to agree to count Electoral College votes that lacked state certification, while both Houses would need to agree to reject Electoral College votes with state certification. The problem with this sort of procedure is that there might be a dispute about whether or not the state certification existed (or, similarly, whether an authoritative state judicial decision existed). If the two Houses disagreed on the existence of the condition precedent, then the same sort of recipe for a disastrous stalemate existed. After 1877, members of Congress should have recognized the need for a single federal institution to be the ultimate authority concerning disputed presidential elections, but the jealousy of each House to maintain a distinct institutional role in the process was too great to permit learning this obvious lesson.

## 2. Senator Edmunds Responds to the Proposed Amendment and Lays the Foundation for the Electoral Count Act

Senator George F. Edmunds was perhaps the most important actor in the attempts to reform the election system. A Republican from Vermont, he was an architect of the Electoral Commission and also served as a member of the Commission. In the Senate, Edmunds was a leader of the Republican Party and President Pro Tempore of the Senate during much of this era.<sup>57</sup> The Edmunds Bill, as it was often called, would eventually become the Electoral Count Act. Thus, his early impressions on the subject are especially relevant. Edmunds published a law review article on the subject in October of 1877.<sup>58</sup> In the article, *Presidential Elections*, Edmunds gave his opinion on the Electoral Commission, the proposed Amendment, and alternatives to the Amendment.<sup>59</sup>

Regarding the Electoral Commission, Edmunds viewed the gravity of the situation as one that “led men of all parties and all views in Congress to unite, as one of the simplest and plainest duties of patriotism, in a measure of legislation that should peacefully solve the difficulty.”<sup>60</sup> Edmunds wrote that three characteristics of the Commission were notable in its defense. First, the Commission acted uniformly, like a court, allowing the entire body to answer questions conclusively.<sup>61</sup> Second, the Commission included five Supreme Court justices “taken from a body of men learned in

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57. Edmunds served as President Pro Tempore from 1883–1885 and Chairman of the Republican Conference from 1885–1891. *Biography of George Franklin Edmunds*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=E000056> (last visited Nov. 11, 2010).

58. Edmunds, *supra* note 14. Furthermore, the solution “was not, perhaps the best theoretically possible, but it was the best practically possible on that occasion.” *Id.* at 6.

59. *See generally id.*

60. *Id.* at 4.

61. *Id.* This was, of course, in comparison to the idea of the two Houses attempting to answer the same questions, which was highly unlikely. *See id.*

the law, withdrawn from active politics, and dependent neither upon the favor of the people, of Congress, or the Executive for the permanence of their official positions.”<sup>62</sup> Third, the Commission was to rule on the issues before it “*according to the law as it stood before the passage of the act*” to ensure that the “lawful President was to be ascertained by the same law in every respect that existed on the day of the election.”<sup>63</sup> It is striking how little Edmunds’ own proposal incorporated the strengths of the Commission as he viewed it.

Edmunds wanted reform. It was the details of the reform that proved troublesome. In responding to the committee’s work, Edmunds started with common ground: the passing of the 1877 crisis did not abrogate Congress’s “imperative duty of providing in advance, so far as clear provisions of the Constitution or a statute can do, for the disposition of similar dangers and disputes in the future.”<sup>64</sup> However, the proposed amendment, according to Edmunds, was the wrong approach to this problem. Here, Edmunds largely agreed with the minority report that the Amendment would in effect nationalize the presidential election, cause more problems with disputes, and lead to a more autocratic Presidency.<sup>65</sup>

Instead, Edmunds outlined his vision for a solution. Any law, Edmunds posited, must first address “[h]ow far can Congress, under the Constitution, authorize any federal tribunal, be it the Houses of Congress, a board, or a court, to go in determining the validity of an Electoral vote.”<sup>66</sup> On this point, Edmunds viewed the “*act of the counting commanded by the Constitution only as an administrative, not as a judicial, ceremony.*”<sup>67</sup> Instead, it would be ideal if “the disputes touching the constitution of the Electoral Colleges in the States could be disposed of in advance [of the counting of the votes]” and “it would be safer for the peace order and justice of the Republic in the long run, to have such disputes settled by honest judicial means in the States in which they may occur.”<sup>68</sup> Thus, Edmunds hoped that an amendment to the Constitution could be avoided if states would be willing to resolve the disputes in advance of the voting of the Electors and Congress would bind itself to such a decision.<sup>69</sup> As will be seen, the spirit of Edmunds’ hopes would be later captured in the Electoral Count Act.

It is remarkable that Edmunds, so involved with this issue, did not see the overriding need for a new constitutional amendment to fix the defects of the Twelfth Amendment. Equally outstanding, after 1877, is his thought that a

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62. *Id.* at 6–7. Edmunds acknowledged that perhaps bias exists in each person, but maintained that at least the federal judiciary was the most insulated from the temptations and fears that reign over politicians. *Id.* at 7.

63. *Id.* at 7.

64. *Id.* at 9.

65. *See id.* at 9–15.

66. *Id.* at 16.

67. *Id.* at 17.

68. *Id.* at 18. Edmunds did not argue that these tribunals would be flawless, just better more often than not than the exercise of some centralized power, like Congress. *Id.*

69. *Id.* at 18–19.



dispute over a state's presidential ballots could be conclusively resolved in the state itself, rather than in a national institution. To be sure, consistent with the values of federalism, one might hope—and even instruct—the authoritative national institution to bind itself to the decision of a state's tribunal. But one still needed to identify the single federal national institution that would declare a President duly elected. As long as there was the possibility that someone would argue the need to ignore the state's tribunal's decision—and after 1877 it was inevitable that this sort of argument could not be foreclosed—then to avoid anarchy there needed to be a national institution authorized to reject that claim and pronounce that the ruling of the state tribunal would be followed. Edmunds' failure to recognize this basic point is baffling and would prove to be the Achilles Heel of the statute he authored.

Senator Edmunds seemed to believe that federal courts could, or perhaps should, be able to review the actions of state courts, to determine “whether the State law had been followed, just as in many cases of federal judicial jurisdiction they so act, and yet take as the best proof of the State law the judgment of the highest State courts.”<sup>70</sup> If this exercise of power was appropriate, Edmunds suggested that legislation “be made for a prompt review of the decisions of the State courts by the Supreme Court of the United States, so that before the counting of the Electoral votes every dispute concerning title to the office of Elector would be lawfully disposed of.”<sup>71</sup>

In order to ensure enough time, Edmunds suggested holding the elections on the first of September and requiring the Electors to cast their votes on the first of January.<sup>72</sup> Edmunds' contemplation of a role for the U.S. Supreme Court does suggest some recognition on his part for a national institution to have the ultimate authority. But insofar as he wanted to add the Supreme Court's jurisdiction *legislatively* to the existing framework of the Twelfth Amendment rather than modify the Twelfth Amendment itself, Edmunds remained confused about who exercised final authority. What if either the House or the Senate disagreed with the Supreme Court's ruling? Or either the House or the Senate believed that the Supreme Court went beyond the scope of its statutory jurisdiction, or that this statutory jurisdiction was unconstitutional? One could not give the Supreme Court final authority without also explicitly revoking that authority from the two Houses of Congress.

Thus, it seems Edmunds believed in three distinct roles for three different types of bodies to determine the valid electoral vote. First, the vote canvassing belonged to the state's administrative mechanisms. Second, the dispute resolution belonged to the designated state tribunals and possibly the federal judiciary for an abuse of discretion type review. Third, the vote counting, after these disputes were resolved, was to be done by Congress,

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70. *Id.* at 18.

71. *Id.* at 19.

72. *Id.* at 18.

but should be a rather mechanical exercise. But 1877 showed the inability to keep this last stage merely mechanical.

For the third function, Edmunds admitted that if one party controlled Congress, the decisions of the states and/or judiciary might be ignored.<sup>73</sup> Though less than ideal, he thought it was a danger in only the most extreme circumstances and his model would have reduced it. However, in the ideal, Edmunds thought:

If it were possible to find or to constitute one single tribunal, having final power to count the votes and declare the result after the States had, through their tribunals, disposed of disputes, being the farthest possible removed from the heat of political prejudice, and possessing from its character and constitution the general confidence of the country, the best method of ascertaining who had been elected President would be reached.<sup>74</sup>

Here, “judicial tribunals are best calculated to hear and decide disputed questions of law and fact, although they may involve inquiries extending into the domain of politics and the decision of the fact of an election.”<sup>75</sup> On this, however, Edmunds noted that a movement to give such a duty to the Supreme Court was defeated.<sup>76</sup> Such proposals were made during and after 1877, but they never seemed to garner much support. Edmunds concluded, for unknown reasons, that there was not support in Congress for such a change, but predicted that at some time in the future, the function would be removed from the political branch and assigned to some sort of judicial tribunal.<sup>77</sup> While Congress would adopt much of Edmunds’ vision, these latter two sentiments would fail to become part of the debate. In other words, Edmunds’ best insights went unfulfilled. He saw the need for a national adjudicatory tribunal but failed to press for it. Nor does it appear that he pushed for replacing Congress as the vote counter, perhaps because this would have required constitutional amendment, something Edmunds sought to avoid.

Whether Edmunds should be charged with a failure of vision or a failure of leadership, the bottom line is that he did not push for the kind of reforms that were necessary after 1877. It is possible that Edmunds simply determined that systemic reform was impossible—still he recognized that it was needed and certainly could have made an effort.

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73. *Id.* at 19 (“It may be thought that, in high party excitements, both when the two Houses of Congress are impressed with the same bias, and when they are in opposition, preliminary decisions will be disregarded . . . and thus there will still be danger.”).

74. *Id.*

75. *Id.* at 19–20.

76. *Id.* at 20.

77. *Id.* Legislators, he maintained, were ill-suited for such questions, “as they affect the right of the people at large, as well as private rights, and depend exclusively upon pre-existing laws and events, and require for their solution only a discovery and declaration of them.” *Id.*

### 3. Other Early Proposals

The amendment to apportion the electoral votes into districts appears to have been the most serious proposal immediately following the 1876 dispute because it came from the Committee. However, the House did not vote on it, for reasons still undiscovered.<sup>78</sup> In 1877, Senator William W. Eaton (D, CT) proposed an amendment that would have required the states to create election dispute tribunals.<sup>79</sup> The governor in each state would appoint at least five people, with the advice of the state senate, to the tribunal at least one year before the presidential election.<sup>80</sup>

The evenhandedness of this amendment would have seemed to depend entirely on the state governor's party and state senate's majority party. The legislature would then direct the tribunal to hear cases of contested elections and the tribunal would determine and certify the case thirty days before the electors voted.<sup>81</sup> Oddly, the amendment would not have bound Congress to the state's decision. Later proposed amendments simply empowered the joint convention of both Houses of Congress acting as one body to judge the electoral returns, or alternatively referred disputes to the Supreme Court, the highest state court, or Congress as a whole.<sup>82</sup> As will be seen, parts of these proposed amendments would find their way, in part, into the ECA. No proposals for constitutional amendment were brought *to a vote* in the decade after 1876.<sup>83</sup> Indeed,

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78. HERMAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 98 (1897).

79. *Id.* at 121.

A tribunal for the decision of all contested issues arising in the choice of the electors of President and Vice-President shall be appointed in each State, in the manner following, to wit: Not less than twelve months prior to the time fixed by law for the choice of electors, the governor of each State shall, by and with the advice and consent of the senate of the State, appoint not less than five persons learned in the law and otherwise duly qualified, to whom shall be referred, in such manner as the Legislature of the State shall direct, all cases of contested election arising in reference to electors of President and Vice-President. And it shall be the duty of the tribunal so constituted to hear and determine every such contest, and to certify, thirty days at least before the day upon which the electors shall be called upon to give their votes, their decision therein to the proper returning officer or officers of the State, and to transmit an authenticated copy thereof, under the seal of the State, to the seat of Government of the United States, directed to the President of the Senate.

No person shall be eligible to the office of judge of elections who shall not have the qualifications required by law for judicial office in the State of which he is a citizen. The term of office of the said judges of election shall expire upon the day fixed by law for the oath of office to be taken by the President and Vice-President elect of the United States, for the term ensuing after their appointment, and before entering upon the discharge of their duties they shall be sworn to a faithful performance of the same.

6 CONG. REC. 415 (1877).

80. AMES, *supra* note 78, at 121.

81. *Id.*

82. *Id.*

83. *Id.* at 115-16.

[t]he fact that it was impossible to secure the indorsement [sic] of any one of the plans proposed in the years succeeding the contested election of 1876 by even one branch of Congress indicates that the adoption of a new system of electing the Chief Magistrate is improbable before the present method of amending the Constitution is itself changed.<sup>84</sup>

This point, that amending the Constitution is incredibly difficult, plays a significant role in framing the entire approach to reform. Senator Edmunds recognized this difficulty in his law review article, as he advocated legislating within the confines of the Constitution's text, rather than changing the text. With members of Congress resigned to the idea that a constitutional amendment was an impossible task, creative proposals to the problem were limited to any legislative solution that was consistent with the Twelfth Amendment.

Arguably, however, these members of Congress were too quick to abandon the idea of a constitutional amendment, even recognizing its great difficulty. After all, there have been other constitutional amendments concerning presidential elections and transitions: the Twelfth itself, the Twentieth, and the Twenty-Fifth. Moreover, in 1934 Senator George Norris came two votes shy in the Senate of sending an additional amendment to the states.<sup>85</sup> Therefore, had there been a concerted effort to adopt a well-tailored amendment dealing with the problem of disputed presidential ballots, it could have mustered enough support at some point during the decade between 1877 and 1887.

#### *B. Forty-Sixth Congress 1880: The Democrats Control Both Houses*

For the first time in decades, Democrats controlled both Houses of Congress in 1880. It seems clear from the debates that the Democrats harbored resentment over the Hayes-Tilden dispute and perceived Republican abuse under the Twenty-Second Joint Rule in the 1860s. This resentment played a significant role in the debate as the Democrats went back to investigate the 1876 election, and their main proposal was another joint rule. Even though the Democrats chafed under the Republican use of the earlier joint rule, the Democrats sought payback rather than fair-minded reform. Despite the Democratic control of both Houses, however, the 46th Congress was unable to enact a rule or piece of legislation, which demonstrates the diversity of opinions on this subject.

##### 1. The Senate Considers a Joint Rule or Bill for the Electoral Count

On May 6, 1880, Senator John Tyler Morgan (D, AL) introduced a joint rule, Senate Res. 1712, for the counting of electoral votes.<sup>86</sup> The proposal required at least two Senators and three House members to sign any

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84. *Id.* at 113.

85. Caitlyn Nestleroth, Senator George W. Norris's 1934 Constitutional Amendment Relating to Disputed Presidential Elections (May 14, 2010) (paper on file with author); *see also* 78 Cong. Rec. 9245 (1934).

86. 10 CONG. REC. 3547 (1880).

objection to votes.<sup>87</sup> If there was a valid objection to a state's vote the two Houses were to split and consider the objection separately, until both Houses resolved the objections, at which time they were to meet again.<sup>88</sup> If only one list of votes was received from a state, the rule required both Houses to concur in order to reject the votes.<sup>89</sup> However,

[i]f more than one list of votes of electors from any State, or paper purporting to be such list, has been submitted to each House for its decision upon objections made thereto, and it shall appear that the Houses have not concurred in receiving either of said lists, they shall each be declared by the President of the Senate, in the presence of the Senate and House of Representatives, as being rejected; and no list of votes of electors so rejected shall be afterward read in the presence of the two Houses except for information.<sup>90</sup>

Thus, in the event of multiple returns, both Houses would have to concur to accept the returns. The proposal also provided for a separate opportunity to challenge electors or their individual votes. In the event of this challenge, the Houses would again separate to consider the objections, but no vote would be rejected unless both Houses concurred.<sup>91</sup> The Bill was referred to the Special Committee on the Elections of President and Vice-President, which Senator Morgan chaired.<sup>92</sup>

On May 20, 1880, Senator Morgan reported back to say that the Bill was postponed indefinitely.<sup>93</sup> On May 21, Senator Morgan moved to have the joint rule considered by the Senate and the motion was agreed to.<sup>94</sup> The next day, the proposed rule was read again and the only significant change to the initial proposal was to remove the separate procedure for considering objections to the electors.<sup>95</sup>

Senator Morgan went on to explain the rationale behind the proposed rule, starting with the legislative power to create such a rule. He explained that the statutes already passed by Congress likely exhausted the extent to

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87. *Id.* at 3654.

88. *Id.*

89. *Id.* Senator John Tyler Morgan made clear that his intent was to move away from the previous Twenty-Second Joint Rule that allowed either of the two Houses to reject the votes of a state far too easily in a way that violated the Constitution. *Id.* at 3655.

90. *Id.* at 3052. It appears that Senator Morgan thought that there was no alternative to rejecting all slates if both Houses disagreed. He believed the idea that Congress could compel a state to follow a certain procedure and then give presumptive approval to the certificate that resulted from that procedure to be an affront to the power of the states. The possibility of total disenfranchisement was as far as Senator Morgan would go to incentivize the states to resolve their disputes. *Id.* at 3656.

91. *Id.* at 3052.

92. *Id.*; see also JOINT RULE FOR COUNTING THE VOTES OF ELECTORS OF PRESIDENT AND VICE-PRESIDENT, SENATE MISC. DOC. NO. 90 (1880).

93. 10 CONG. REC. at 3547.

94. *Id.* at 3608. The following day, Senator Morgan noted that this was a strict party line vote. *Id.* at 3653. Removing the provision on challenging electors was likely because another bill, S. 1687, was introduced to deal with this directly. *Id.* at 3656. This bill would have made it a crime for anyone ineligible to be an elector, or improperly assuming the role of an elector, to cast a vote. *Id.*

95. *Id.* at 3652–53.

which Congress was authorized to legislate in regard to the presidential election.<sup>96</sup> Once the electoral certificates reached the two Houses of Congress, this legislative power ended and “the jurisdiction of the Senate and House of Representatives to count the votes and ascertain the persons elected takes full effect.”<sup>97</sup> Senator Morgan suggested that many believed Congress could go no further in controlling the count “without invading the constitutional jurisdiction of this great tribunal.”<sup>98</sup> Furthermore, Senator Morgan noted that other than the Electoral Commission Act and perhaps the Twenty-Second Joint Rule, Congress had been unwilling to use legislation to control its discretionary exercise of the right to count votes.<sup>99</sup>

Senator Morgan also noted that Abraham Lincoln signed the joint resolution but included a statement maintaining he had no right to interfere in the counting of electoral votes under the Twelfth Amendment and that he had no room to veto the resolution even if he so desired.<sup>100</sup> This rejection of the power of Congress to regulate the counting of the vote by legislation meant that they could only do so by “concurrent agreement” or by constitutional amendment.<sup>101</sup> Until such an amendment was adopted, Senator Morgan maintained that Congress must use the joint rules, even though those rules might only be “binding as a matter of comity between the two Houses.”<sup>102</sup> It was, therefore, Congress’s duty, “in advance of another election, to adopt some rules that will be just to all parties at all times and under all circumstances, as far as this may be attainable.”<sup>103</sup>

But why did Senator Morgan not entertain the possibility of a constitutional amendment for the sake of posterity, and not just a joint rule for the next election? His failure to do so showed a lack of statesmanship.

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96. *Id.* at 3653. Of course, the fact that a Republican—“His Fraudulency Hayes” no less—was in the White House at the time would have created a strong incentive for the Democrats in Congress to use the joint rule, rather than legislation, approach to adopt their preferred procedures for counting Electoral College votes.

97. *Id.*

98. *Id.*

99. *Id.* In regard to that joint resolution, Senator Morgan noted that the prevailing opinion was that the motivation to disenfranchise and punish certain southern states caused Congress to abuse its power. *Id.* For an explanation of the Twenty-second joint rule, *see supra* n. 37. Furthermore, Senator Morgan noted that Congress had adopted twenty-two such joint rules but never submitted one to the President. 10 CONG. REC. at 3663. Indeed, he noted, the question of presentment to the President was expressly raised and decided in the negative when the first joint rule was adopted. *Id.*

100. *Id.* at 3654. Indeed, Lincoln actually held on to the resolution until the votes had been counted in favor of his election and then signed it. *Id.* Senator Morgan’s concern makes sense; as he later noted, there should be “great deal of hesitancy, and I confess in some instances with alarm, upon intrusting [sic] to the President of the United States the power to participate in legislation which might affect the result of the count in which he was personally interested.” *Id.* at 3659. Likewise, if Congress desired to change the law, the president could veto the measure if he decided it was not in his interest or simply disagreed with it. *Id.*

101. *Id.* at 3654.

102. *Id.* Senator Roscoe Conkling (R, NY) argued that the rule should have a provision requiring that it could not be withdrawn except by concurrent vetoes of both houses, otherwise it would have no permanence in the event of political shifts in Congress. *Id.* at 3661.

103. *Id.* at 3654.

Like the Democrats in 1804, who asserted their unilateral power to adopt the Twelfth Amendment over the objections of the Federalist Party,<sup>104</sup> the Democrats of 1880 could have pushed forward their vision of how to resolve a disputed presidential election, or sought some form of accommodation with Republicans in order to assure necessary ratification of an amendment.

Senator Morgan argued that the joint session certainly had the power to determine whether the “power of appointment has been constitutionally and lawfully exercised,” but in the event that a state only returned one certificate, the requirement that both Houses concur in order to reject the certificate embraced the idea that they should presume that the certificate received was legitimate.<sup>105</sup> The same presumption did not apply when a state submitted multiple certificates.<sup>106</sup>

Senator Morgan’s critiques of using a traditional piece of legislation to regulate the electoral count and compelling the states to create procedures that would give their returns a presumption of validity were leveled directly at Senate Bill 1485, introduced by Senator Edmunds.<sup>107</sup> This Bill was in fact the precursor to the Electoral Count Act. For instance, it gave presumptive approval to any determination of an election controversy made pursuant to the preexisting laws of a state.<sup>108</sup> Senator Edmunds’ Bill required only one Senator and House member to sign each objection to an electoral vote.<sup>109</sup> Upon receiving the objections for a specific state, each House was to withdraw and consider the objections.<sup>110</sup>

The proposed Bill also had particular rules that restricted the discretion of the two Houses to reject votes. For instance, if only one set of returns was received from a state, rejection of those returns required the affirmative votes of both Houses.<sup>111</sup> In the case of two or more sets of votes, only those votes found to be “regularly given by the electors” determined by the appropriate tribunal under preexisting state law could be counted.<sup>112</sup> In the

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104. *See infra* note 121.

105. 10 Cong. Rec. at 3655 (“The theory of the rule now presented is that the States first pass judgment upon the fact of the appointment of electors and upon the validity of the votes cast by them so far, at least, as the question of their validity depends upon the laws of the States; and unless the Houses shall concur in overruling that decision, it shall stand.”).

106. *Id.*

107. For the full text of the bill, see *id.* at 3656-57.

108. *Id.* at 3656.

That each State may, pursuant to its laws existing on the day fixed for the appointment of the electors, try and determine before the time fixed for the meeting of the electors any controversy concerning their appointment, or the appointment of any of them. Every such determination made pursuant to such law so existing on said day, and made prior to the said time of meeting of the electors, shall be conclusive evidence of the lawful title of the electors who shall have been so determined to have been appointed, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated.

*Id.*

109. *Id.*

110. *Id.*

111. *Id.* This is the same as Senator Morgan’s joint rule.

112. *Id.*

case of a dispute of more than one state tribunal, the two Houses would have to concur as to which electors and tribunal were “authorized by [the state’s] laws.”<sup>113</sup> If no state tribunal was to pass judgment on multiple slates of electors then the two Houses would have to concurrently decide “the lawful votes of the legally appointed electors of such State.”<sup>114</sup> Ultimately, Senator Edmunds maintained that his Bill restricted the ability of the joint session to pass judgment upon a state’s selection of electors in a way that was most faithful to the Constitution.<sup>115</sup>

Senator Morgan was quick to note that the two proposals contained many similarities. In addition to objecting to the use of a bill, his primary critique was leveled at giving presumptive validity to a decision by a state’s highest tribunal. Senator Morgan argued that this provision impermissibly restricted the constitutional power of the two Houses to judge the votes of a state.<sup>116</sup> As Senator Morgan noted, the joint session, which he called the election tribunal, was a peculiar body in the Constitution:

It is not a congress met together; it is not a joint assemblage of the two Houses in which there is any general power to be exercised by them in the presence of each other, but it is the meeting of two distinct constitutional bodies entrusted with a distinct constitutional jurisdiction. The very essence of the jurisdiction that they can exercise implies necessarily that they must have the full and unlimited power of deciding according to their own enlightened discretion and judgment as to what is proper to be done under the Constitution and laws of the United States . . . .<sup>117</sup>

Furthermore, he argued, if Senator Edmunds was correct and the two Houses could be required to accept the final judgment of a state on this matter, it is because the Constitution must entrust that power to the states.<sup>118</sup> Instead, Senator Edmunds’ proposal would allow the power to be impermissibly shared between the states and the two Houses of Congress.<sup>119</sup>

Senator Edmunds responded to Senator Morgan’s assertion that the use of traditional legislation was inappropriate by noting that as early as 1800, when Congress considered creating a Grand Committee<sup>120</sup> for counting electoral votes, both Houses passed legislation in support of the proposal.<sup>121</sup>

113. *Id.*

114. *Id.*

115. *Id.* at 3697 (“I have always maintained since I have maintained anything about it, that the Congress of the United States has not a right in any form to draw into question the action of a State, and that when the counting power, be it large or little, or wherever it may be . . . has ascertained that those are the official papers of the State, comes to act it has no mission of decision or discretion or consideration at all; that its duty is absolutely ministerial.”).

116. *Id.* at 3658–59.

117. *Id.* at 3659.

118. *Id.*

119. *Id.*

120. The Grand Committee proposal of 1800 would have appointed six members of each House of Congress and the Chief Justice to resolve election disputes. *See generally*, Colvin & Foley, *supra* note 3, at 486–88.

121. 10 CONG. REC. at 3662 (also noting an attempt to do the same in 1824).



The source of power to legislate in the area, according to Senator Edmunds, came from the Necessary and Proper Clause.<sup>122</sup> Furthermore, a traditional piece of legislation was desirable because it was permanent in nature and less vulnerable to abuse in the event of one-party control of Congress.<sup>123</sup> Senator Morgan responded by noting that neither Bill in 1800 was adopted by both Houses. He also criticized the specificity that Senator Edmunds' Bill included, which, he argued, would tend to cause Congress to legislate with more and more detail on the subject.<sup>124</sup> Of course in the background of this debate must have been the fact that the President was a Republican. The Democrats could pass a joint rule without Republican support or the President's signature. A piece of legislation would require some level of compromise in order to gain President Hayes' signature.

The Senate again took up debate of Senator Morgan's concurrent resolution ten days later on May 24, 1880.<sup>125</sup> Senator Henry M. Teller (R, CO), who was also on the Committee, started the debate by voicing his objections to the plan.<sup>126</sup> Senator Teller began by acknowledging that the Senate might be "acting under a pressing necessity, [and] under a demand made by the people for some provision for counting the electoral vote" but this Bill was a purely temporary measure, likely to survive only one electoral count.<sup>127</sup>

Worse still, Senator Teller saw no reason either House could abandon the rule either before or during the electoral count.<sup>128</sup> Senator Teller also objected that the resolution gave Congress too much power, authorizing the two Houses "to inquire whether the electors had been or had not been elected in the manner provided by the various State Legislatures."<sup>129</sup> But

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122. *Id.* at 3694.

123. *Id.* at 3695. By contrast, a joint rule, "instead of providing . . . for a rule of law which certainly exercises some constraint upon Senators and members of Congress as well as other people, [Senator Morgan] propose[s] to decline to have a law at all, but propose[s] to leave it to the entirely unregulated, unbridled, and undirected will of what may happen to be the majority on that occasion, and in the case of a double return to say that you will take neither unless both Houses can agree to take one or the other. That would have the effect to throw out the vote of the particular State on this division." *Id.*

124. *Id.* at 3662 ("Once that you get this subject open to legislative action and put it under the control of the legislative power of Congress you open a wide gap . . .").

125. *Id.* at 3682.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 3683. Senator Henry M. Teller was an absolutist on this question. ("The Constitution . . . submitted this whole question to the State, having reserved nothing to Congress except the power to appoint the time at which these men should be appointed and the time at which they should cast their votes, the authority, it seems to me, to examine and determine whether the State has elected them in the manner that we think they ought to have been elected cannot be found anywhere in the Constitution."). *Id.* Senator Teller went so far as to insist that Congress could not even pass judgment on whether an elector was constitutionally ineligible. *Id.* Despite this, Senator Teller did seem to leave open the idea that Congress could pass judgment on the actions of state officials if they acted outside "the ordinary forms of law." *Id.* Furthermore, seemingly contradicting himself, Senator Teller thought it possible that Congress could pass a law to this effect. *Id.* It is difficult to understand how this might solve the constitutional problems posed by passing judgment on

what if a state submits multiple returns? In that case Senator Teller's absolutist position unraveled, and he acknowledged that the two Houses could determine the "one true return."<sup>130</sup> Senator Teller did not explain how the two Houses would venture to determine the honest return.

Senator John J. Ingalls (R, KS) rose to explain the sorts of "emergencies" that could arise during the electoral count: (1) a certificate might be withheld or defective, (2) one or more electors might be constitutionally ineligible, (3) the electors might cast their votes for ineligible candidates, (4) a state might not be eligible to cast votes, (5) there might be multiple returns from a single state, and (6) no person might receive a majority of the votes.<sup>131</sup> Despite all of these problems, Senator Ingalls noted that the Constitution only provided a solution for the sixth issue, no candidate receiving a majority of the votes.<sup>132</sup> In this case, of course, the vote would be shifted to the House of Representatives, where the representation from each state would have a single vote.<sup>133</sup> Senator Ingalls maintained that by analogy, this method was the only method the Constitution provided to resolve these sorts of emergencies and should be employed in the five other emergencies.<sup>134</sup> Senator Ingalls offered an amendment to the joint rule to this effect.<sup>135</sup>

Senators Edmunds and Morgan again debated the virtues of enacting a statute or joint rule.<sup>136</sup> Senator Morgan suggested the statute would be no more compulsory than a rule and that there would be no way to force

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the electoral votes, unless perhaps he thought it would be authorized by the Necessary and Proper Clause.

130. *Id.* Ultimately, Senator Teller's absolutist stance only applied if there was a single return. *Id.* Senator Teller's argument would have been stronger if he explained why Congress could pick between two returns but not disqualify a constitutionally ineligible elector.

131. *Id.* at 3685.

132. *Id.*

133. U.S. CONST. amend. XII.

134. 10 CONG. REC. at 3685–86. Thus, if a state returned two rival certificates, the question would be turned over to the House voting by state representation. Senator John J. Ingalls maintained that this was most faithful to the Constitution in two ways. First, the Framers envisioned the method to resolve one of the types of emergencies. *Id.* Second, this method looked the most like the Electoral College itself, so it would remain faithful to that institution and the rights of the states. *Id.* The Senate, he argued, would play no role in the matter. *Id.* at 3686.

135. *Id.* at 3686. Senator Ingalls also stressed that he voted against the electoral commission bill in 1877 and was of the opinion that constitutional amendment was the only appropriate method for changing the operation of electoral count. *Id.* at 3685 ("It appears inappropriate that a President should have any connection whatever with legislation bearing upon a subject so vital and important to himself. It should be, in my judgment, by an amendment to the Constitution."). However, if a statute should be passed, Senator Ingalls argued that they should act quickly before the politics of the next election affected their ability to do so in a nonpartisan fashion. *Id.* Senator Ingalls' argument was opposed most strongly by Senator Conkling, despite the fact that he did not plan to vote for the rule. *Id.* at 3686–87. Senator Conkling's opposition was grounded in his belief that partisan bias would govern results in a close election with one-party control of Congress. *Id.* at 3689. Finding no support, Senator Ingalls withdrew the amendment. *Id.* at 3694.

136. *Id.* at 3699–700.

Congress to abide by it if Congress chose to ignore it.<sup>137</sup> Senator Edmunds replied that he felt the political ramifications of ignoring the statute were too great, for instance, if the statute plainly required the joint session to accept any decision made by a state tribunal about the correct electors, the joint session would feel compelled to do so.<sup>138</sup>

Ultimately, Senator Edmunds offered an amendment substituting Senator Morgan's resolution with his proposal.<sup>139</sup> The amendment was rejected thirteen to twenty-seven.<sup>140</sup> Senator Edmunds then offered an amendment to Senator Morgan's resolution that gave conclusive status to any determination about an election dispute made by a state tribunal pursuant to laws existing prior to the meeting of the electors.<sup>141</sup> This amendment was rejected fourteen to twenty-five.<sup>142</sup> The Senate considered Senator Morgan's resolution without any amendments and the resolution passed twenty-five to fourteen.<sup>143</sup>

## 2. The House Considers the Joint Rule

The House took up consideration of the resolution on June 10, 1880.<sup>144</sup> The Chairman of the Committee on the Electoral Count, Representative George A. Bicknell (D, IN) introduced the Bill, noting that the whole committee had considered and agreed upon the resolution.<sup>145</sup> Representative Bicknell started by stating that the Necessary and Proper Clause empowered Congress to "provide legislation necessary and proper to carry into effect the powers of the two Houses for ascertaining and declaring the result of the election."<sup>146</sup> Representative Bicknell did acknowledge what he considered to be the weakness of the resolution, its form as a joint rule rather than legislation.<sup>147</sup> In his mind, the Constitution demanded legislation to carry into execution constitutional provisions and thus, a joint rule is nothing more than "mere make-shift, a temporary expedient" because "it binds nobody."<sup>148</sup> Bicknell was unclear about the reason the Senate insisted on a joint rule, but he had several ideas. First, he suggested that it might be revenge for the Republican use of the Twenty-

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137. *Id.* at 3699.

138. *Id.* at 3700.

139. *Id.* at 3701.

140. *Id.* at 3703. Thirty-six senators were absent. *Id.*

141. *Id.*

142. *Id.* at 3704.

143. *Id.*

144. *Id.* at 4386.

145. *Id.* There was no formal written report and motions to refer the bill back to the committee to produce a report were rejected. *Id.* at 4387.

146. *Id.* at 4387. Additionally, he noted, the current state of the law was inadequate. *Id.* ("[The statutes] fail to declare who shall count the electoral vote, they fail to declare who shall determine what are votes proper to be counted, and they make no provision whatever for the determination of contested elections.")

147. *Id.* at 4388.

148. *Id.* ("Either House adopting it to-day may abandon it to-morrow. It carries no moral force with it.")

Second Joint Rule.<sup>149</sup> Representative Bicknell responded to this suggestion, “I submit that it is not our part to follow republican examples; we never gained anything by it. Our business is to do right and satisfy our constituents.”<sup>150</sup> Representative John Van Voorhis (R, NY) was even sharper in his attribution of partisanship, describing the joint rule as “a convenient and easy method to enable the Democratic Party to obtain the Presidency, whether its candidate is elected or not.”<sup>151</sup>

The other possible reason why the Democrats in the Senate insisted on a joint rule was simply that passing a traditional bill was impossible. But Representative Bicknell argued that this should not be a deterrent either.<sup>152</sup> Despite his concerns, Representative Bicknell gave his support to the joint rule because it addressed the “emergency”<sup>153</sup> and might give momentum to an eventual piece of legislation.<sup>154</sup>

The objections to the rule were generally similar to those in the Senate. For instance, Representative Thomas Updegraff (R, IA) voiced several objections. First, he believed that the power to count rested with the President of the Senate and could only be altered by constitutional amendment.<sup>155</sup> Second, the joint rule violated Article 2, Section 1 of the Constitution, giving state legislatures the power to appoint the electors.<sup>156</sup> And third, the passage of the rule would only make matters and confusion

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149. *Id.* Indeed, Representative Eppa Hunton (D, VA) argued that the Republicans were hypocritical for opposing this rule on the grounds that they approved of the Twenty-Second Joint Rule. *Id.* at 4494 (“Now, what do my friends on the other side think of this rule in regard to violating State rights if their party approved the late twenty-second joint rule?”). Representative Harry White (R, PA) responded by simply saying it “was a bad rule.” *Id.*

150. *Id.* at 4388.

151. *Id.* at 4487.

152. *Id.* at 4388 (“The answer to this is that, if we are right, the possibility of defeat ought not deter us, the difficulties in the way ought not to frighten us. If it be suggested that some constitutional scruples may defeat the proposed law, I submit that a joint rule contravening the Constitution is no better, nay, it is worse than a doubtful law; it is accomplishing by indirection what you dare not openly undertake. If it be suggested that there is danger of a veto from the President, the answer is, we are bound to perform our duty without reference to a possible failure of duty elsewhere.”).

153. *Id.* Representative George A. Bicknell also referred to the defects of the Twelfth Amendment. See *id.* for his take on the various opinions of the Twelfth Amendment.

154. *Id.*

155. *Id.* at 4389; see also *id.* at 4501–02 (argument by Representative Lucien B. Caswell (R, WI) that this rule and the electoral commission bill were unconstitutional). Other Republicans stuck with the argument that legislation was necessary. For example, Representative White maintained that there was no doubt that Congress could legislate on the matter, pointing to the Electoral Commission and participation by five Supreme Court justices as the highest precedent in this regard. *Id.* at 4500.

156. *Id.* at 4389. Additionally, Representative Thomas Updegraff maintained that the constitutional text and structure gave no suggestion that Congress should have any power to legislate in the area of the electoral count; rather, all such power was granted to the states. *Id.* at 4390. The fact that under the proposed joint rule a single House could stifle the voice of a state caused issue as well. *Id.* at 4391. Representative John Van Voorhis (R, NY) was generally of the same opinion. He believed that all disputes and questions could only be answered and settled at the state level. If two certificates were received, then it was up to the President of the Senate, and only the President of the Senate, to look to see which certificate was made in the mode prescribed by the state legislature. *Id.* at 4488.

worse.<sup>157</sup> Additionally, Representative Updegraff argued that the power created by the resolution was “unmistakably judicial and not legislative” and it was wrong to assign such power to a legislative body.<sup>158</sup> Another objection, from Representative Van Voorhis, was that allowing Congress to play an active role in the electoral count would violate separation of powers because it would take power from the President of the Senate (the Vice President) and give Congress too much power in determining who will be the next President.<sup>159</sup>

Representative William Lounsbery (D, NY) made appeals to the urgency of the matter. It was only the following winter of 1881 during which the joint session would count the electoral votes. If they did not pass a resolution, there would be no rule by which to guide the count and the country might fall again to political division.<sup>160</sup> Representative Harry White (R, PA) doubted the sincerity of the Democrats’ sense of urgency. He argued that it was not without reason that they only pursued this joint rule at the very end of the session, suggesting that the Democrats sought to sneak one by the other party or the American people.<sup>161</sup> Indeed, he pointed out, there had been ample opportunity for the House to deal with the issue since 1876 but there seemed to be no sense of urgency then.<sup>162</sup>

Representative Eppa Hunton (VA, D) took issue with the idea that this rule was an invasion upon the power of the states to appoint the electors. Representative Hunton argued that first, the right to select electors is not an original power, but rather one conferred upon the states by the Constitution.<sup>163</sup> This right, however, was not absolute, because it was not an interest in each state individually, but all the states together.<sup>164</sup> In other

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157. *Id.* at 4389.

158. *Id.* at 4393.

159. *Id.* at 4490–91.

160. *Id.* at 4401 (“[T]he two Houses of Congress will come together next winter, as the Constitution says they shall come, without any light or guide except their conscience and their purpose at the time when they have to act[.] Do they not know that when great interests are at stake, when two, three, or perhaps more parties in this country shall have been in a struggle hot and exciting, the blood not yet cooled, the results not yet determined, the dispute still active in the public minds in all the States—do not gentlemen know the great danger which will hang over us if we now refuse to act?”). Similar appeals were made by Representative Hunton. *Id.* at 4492 (“The question presented to this House is one of the deepest importance, because in my opinion if ever this country is disrupted and the Government broken up it will be on the occasion of a contested presidential election.”); *id.* at 4494 (“[T]he closing hours of this session are approaching, and we thought something must be done to avert the disaster, possibly war, next year, in the count of the votes for President . . .”).

161. *Id.* at 4491 (“The American people are now within five months of another presidential election, with the possibilities of all the angry excitements of the past upon them, and yet no deliberate enactments have been considered by this House nor by this Congress providing suitable remedies against the dangerous perils from the uncertainties and disputes about electoral counts. Now, here in the closing hours of the session a remedy, a weak, unsatisfactory, unconstitutional remedy, is proposed in the form of a mere legislative rule.”).

162. *Id.*

163. *Id.* at 4492.

164. *Id.*

words, in 1876, “[n]ot only was Louisiana interested to have her true vote counted and to have her legally appointed electors certify their votes here and their votes counted, but every one of the thirty-eight States . . . had the same interest in the question.”<sup>165</sup> Debate over the resolution continued until June 14, at which point the Democrats were unable to form a quorum in order to vote to pass the resolution.<sup>166</sup> Having reached the end of the session, Representative Bicknell relented and made a motion that the resolution be postponed until December.<sup>167</sup>

### 3. The Senate Revisits the Question in December 1880 and Amends the Plan

The presidential election in November 1880, between Republican James Garfield and Democrat Winfield S. Hancock, was remarkably close, with the closest popular vote margin ever, less than 10,000 votes, or less than 0.1 percent of the total.<sup>168</sup> The electoral vote margin was 214–155, but Garfield won the 35 electoral votes in New York by a relatively close margin, 20,000 votes out of 1.1 million votes cast, enough to swing the entire election.<sup>169</sup> Had Hancock won New York, he would have had an Electoral College majority of 190–179.

The Democrats alleged fraud in the state, with suggestions that Republicans had brought in voters from neighboring states and that 5,000 Democratic ballots were dumped into the Hudson River.<sup>170</sup> Some Democratic leaders argued that Hancock should contest the election; he waited six days to concede, deciding it was not worth the possible unrest.<sup>171</sup> Republicans had allegations of their own, including fraud in California and “fraud, violence and intimidation” in parts of the South in states that went for Hancock.<sup>172</sup> Despite the closeness of the election, however, it does not appear from the debates that it played much of a role in cajoling Congress to act.

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165. *Id.*

166. *Id.* at 4540. House Republicans were refusing to vote. *Id.*

167. *Id.* The motion passed ninety to seventy-five. *Id.* at 4541. In the Senate, Senator Morgan offered a resolution to note that “the President of the Senate is not invested by the Constitution of the United States with the right to count the votes of electors” in response to the House’s inability to consider the joint rule. *Id.* at 4558. The resolution could not be considered without unanimous consent and Senator Ingalls. *Id.*

168. KENNETH D. ACKERMAN, *DARK HORSE: THE SURPRISE ELECTION AND POLITICAL MURDER OF PRESIDENT JAMES A. GARFIELD* 220 (2003).

169. *Id.* at 221.

170. HERBERT J. CLANCY, *THE PRESIDENTIAL ELECTION OF 1880*, at 243–44 (1958).

171. EDWARD B. FOLEY, *BOOK ON DISPUTED ELECTIONS* (forthcoming, draft on file).

172. ACKERMAN, *supra* note 168, at 221. Garfield lost California by less than 150 votes out of more than 160,000 cast. His loss was blamed on the publishing of a fake letter, attributed to him, which suggested supported continued Chinese immigration, which was detrimental to California workers. *Id.* at 218, 221. If New York had flipped to Winfield S. Hancock, Garfield would have only needed to flip a state with six electoral votes to regain the lead, the number that California had that year. In fact, California was so close that year that one of Garfield’s electors actually polled higher than one of Hancock’s, causing California to split its Electoral College vote 5–1. See JEROME D. LEVIN, *PRESIDENTIAL ELECTIONS, 1789–2000*, at 158 (2002).

On December 22, Senator Morgan reintroduced the resolution to have the Senate vote on it or to have it referred back to the committee.<sup>173</sup> Senators Morgan and Edmunds proceeded to rehash much of their debate from the past summer.<sup>174</sup> The only portion perhaps worth mentioning is that Senator Edmunds insisted that at this point there was no real urgency on the matter because it was his belief that James Garfield was duly elected President and there would be no issues during the electoral count.<sup>175</sup> Senator Morgan responded that a regulation for the conduct of the count was still needed and that there might be some question about the vote of Georgia.<sup>176</sup> Georgia's electors cast their votes on the incorrect day. Regardless, Senator Edmunds moved that the Senate proceed to the consideration of other business and the Senate agreed to the motion.<sup>177</sup>

On January 29, 1881, Senator Ingalls introduced a resolution requesting the presences of both Houses for the purpose of counting the electoral vote. The resolution was similar in form to the typical electoral count resolution, providing for a date and time and purpose for the meeting, with little guidance as far as procedure.<sup>178</sup> Senator Thomas F. Bayard (D, DE) made a motion to refer the resolution to the Select Committee on the Electoral Count.<sup>179</sup> The Republicans argued that this was unnecessary since the resolution was the same in form to most prior resolutions and there were only eight legislative days until the joint session, so it was unlikely anything more specific could be agreed on.<sup>180</sup> Senator Morgan argued that he did not desire to have the joint session and to see a dispute arise without a rule established in advance of the dispute, again referring to a possible issue with the state of Georgia.<sup>181</sup> Once again, even over this relatively simple issue, the debate broke along partisan lines and the resolution was referred to the committee twenty-nine to eighteen.<sup>182</sup>

Senator Morgan reported back to the full Senate with the resolution and an amendment on February 1.<sup>183</sup> The amendment added a section to deal with any potential votes of electors that "have been given on a day other than that fixed for casting such votes by act of Congress."<sup>184</sup> This took the form of a few prior joint rules in the event that the vote count would be stated in two hypothetical totals: if the votes had counted, or if they had

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173. 11 CONG. REC. 312 (1880).

174. *Id.* at 312–17.

175. *Id.* at 317.

176. *Id.* If Hancock had won New York, and Georgia's votes had been thrown out, there would have been a question whether Hancock had won "a majority of the whole number of electors appointed," as required by the Twelfth Amendment.

177. *Id.*

178. *Id.* at 1020–21.

179. *Id.* at 1021.

180. *Id.*

181. *Id.* at 1022 ("It is therefore proper, it seems to me, that this committee should take into consideration at least . . . [the] questions that may arise in reference to the counting of the votes of the different States.").

182. *Id.* at 1023.

183. *Id.* at 1090.

184. *Id.*

not.<sup>185</sup> Senator Morgan admitted that James Garfield had won the Presidency and expressed his confidence that the electoral count would be orderly and peaceful.<sup>186</sup> As such, he felt it was necessary to adopt this solution in order to avoid any issue about Georgia's vote.<sup>187</sup>

Senator Edmunds, Senator Morgan's antagonist much of the previous session, agreed with the approach.<sup>188</sup> Despite that, there was still some opposition. Senator George F. Hoar (R, MA)<sup>189</sup>, recognizing that Congress had adopted this approach in the past, expressed his concern that this was the equivalent to failing in their constitutional duty, that there would in fact be no single electoral count.<sup>190</sup> Senator Benjamin Harvey Hill, from Georgia attributed his state's failure to cast the votes on the correct day to a mere accident, a misunderstanding as to which day would be the first Wednesday in December.<sup>191</sup> Despite this, and the fact that he was certain that the votes still reflected the election in Georgia, Senator Hill argued that the votes should be excluded on the grounds that this was what the Constitution and statute required and to send a message to states so they know the rule will be enforced.<sup>192</sup>

The House considered the Senate's joint resolution on February 5 and the debate included basically the same points as those made in the Senate. Despite these strong opinions, the resolution passed the House, 160–77.<sup>193</sup>

185. *Id.*

Were the votes of electors cast on the \_\_\_ day of \_\_\_, 1880, to be counted, the result would be *A B* for President of the United States \_\_\_ votes, and for *C D* for President of the United States \_\_\_ votes; if not counted the result would be for *A B* for President of the United States \_\_\_ votes, and for *C D* for President of the United States \_\_\_ votes, but in either event \_\_\_ is elected President of the United States.

186. *Id.* at 1130.

187. *Id.*

188. *Id.* ("I have no disposition to discuss or criticise the second part of the amendment recommended by the committee, in respect of, as it is understood, the State of Georgia."). Likewise, Senator Ingalls, who opposed Senator Morgan's efforts to create a joint rule, agreed with the approach. *Id.* at 1133.

189. As will be seen, along with Senator Edmunds, Senator George F. Hoar, Republican from Massachusetts, was one of the main advocates of the ECA in the Senate. He was Chairman of the Committee on Privileges and Elections for more than ten years during this period. 2 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 100 (1903). Remarkably, neither his autobiography nor biography contains a single mention of the bill. *Id.*; see also FREDERICK H. GILLETT, GEORGE FRISBIE HOAR (1934).

190. 11 CONG. REC. at 1131:

I deemed it my duty to put on record my protest and my conviction that the Congress of the United States has got over the temporary danger and temporary difficulty, not in a constitutional way, by providing by law as it ought to have done at the time of the last election, a method of performing this constitutional function of counting the vote, but by refusing to perform the one clearest and most imperative duty which rests upon somebody, under the Constitution, to count the vote.

191. *Id.* at 1133.

192. *Id.* at 1133–34 ("[T]he States ought all to be notified that if they fail to cast their vote in the manner, and especially at the time, prescribed by the law of Congress, the vote will not be counted . . .").

193. *Id.* at 1262. Democrats voted in favor of the resolution, 115-6. Thirty-five Republicans voted for it while sixty-seven voted against it.



The electoral vote count was performed according to the resolution on February 9, declaring the results in two alternatives, with and without Georgia's electoral votes.<sup>194</sup>

Thus, the country and Congress barely dodged another bullet in 1880. Even so, this fact coupled with the still-recent experience of the election of 1876 was insufficient to prompt Congress into statesman-like behavior in preparation for the next presidential election.

*C. Forty-Seventh Congress 1881–1883: A Virtual Tie in the Senate and Republican Majority in the House of Representatives*

In the 47th Congress, the Senate again considered the Edmunds Bill. The debate was short and the Bill passed without issue. The story was different in the House of Representatives where the bill failed by a vote of 93 for and 100 against.<sup>195</sup> The later debates had more depth so they are examined in more detail; it is noteworthy, however, that the Republican House rejected a plan that had been chiefly designed by Republicans in the Senate.<sup>196</sup>

*D. Forty-Eighth Congress 1883–1885: The Democrats Control the House of Representatives and the Republicans Control the Senate*

The 48th Congress marked a shift in control, with Democrats clearly controlling the House of Representatives and Republicans controlling the Senate. This appears to have shifted the debate over the electoral count as well, as the Senate actively proposed legislation, instead of joint rule, over the course of the next few years. The debate also shifted to protecting the institutional prerogatives of the two Houses, rather than the political power of the two parties. Once again, another exceedingly close presidential election was on the horizon in 1884, but that did not motivate the two parties to adopt a bipartisan compromise that would handle a potential dispute impartially.

1. Congress Considers the Edmunds Bill

Senator Hoar re-introduced the Edmunds Bill, Senate Bill 25, on December 4, 1883.<sup>197</sup> The Senate began consideration on January 16, 1884 and Senator Hoar noted that the bill had the unanimous support of the Committee on Privileges and Elections and was the same as the bill that passed the Senate two winters before.<sup>198</sup> The Bill, which had breezed through the tied Senate in the previous session, did the same in the Republican-controlled Senate without amendment or debate on January 16, 1884.<sup>199</sup>

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194. *Id.* at 1372.

195. 13 CONG. REC. 5149 (1882).

196. The House Democrats voted eighty-three for and zero against the bill. The House Republicans voted five for and ninety-seven against the measure.

197. 15 CONG. REC. 12 (1883).

198. *Id.* at 430.

199. *Id.*

The Bill was referred to the Select Committee on the Law Respecting Election of President and Vice-President in the House on January 24.<sup>200</sup> The Committee came back with a report on April 10 and the Bill was placed on the House Calendar for debate.<sup>201</sup> The House Committee amended the Senate Bill and Representative William W. Eaton (D, CT) presented the changes.<sup>202</sup> The proposed changes were significant. First, they eliminated the conclusive status given to electoral certificates produced as a result of a state's election dispute mechanisms.<sup>203</sup> Second, the amendment eliminated any attempts to bind the joint session into a particular decision governed by the circumstances and to prevent the joint session from rejecting votes.<sup>204</sup> Instead, the amendment only sought to outline the procedures for dealing with the objections to a state's electoral votes or double returns. In the case of either, the resolution was submitted to the entire joint session.<sup>205</sup> The joint session would engage in three hours of debate and then proceed to vote per capita by state to determine the resolution of the matter.<sup>206</sup>

The House debated the new Bill over four days. The arguments for and against the Senate Bill were not unlike the arguments advanced in prior sessions.<sup>207</sup> For instance, Representative Alphonso Hart (R, OH) argued against the House amendment because it did not bind the joint session to particular outcomes; the outcome of any dispute would likely be determined by which party comprised the majority in the per capita voting.<sup>208</sup> Representative Abraham X. Parker (R, NY) noted that the House Democrats were knowingly awarding themselves an advantage with this plan because they would have a strong overall majority in a joint session, suggesting partisan motivations were still at play despite the split congressional power.<sup>209</sup>

Likewise, arguments were made in favor of the amendment. For instance, Representative Luke Pryor (D, AL), a member of the committee, argued that the House amendment was based on a faithful interpretation of the Constitution, which empowered the joint session, as a unique body, to resolve questions about the electoral vote.<sup>210</sup> Still, House members

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200. *Id.* at 638.

201. *Id.* at 2843.

202. *Id.* at 5076.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 5076–80, 5096–105, 5453–68, 5545–51.

208. *Id.* at 5454. Representative Alphonso Hart also noted the criticism that the Electoral Commission received, even though, he argued, it was made up of some of the most distinguished jurists of the day. If they were viewed in such a light, a partisan vote from the entire Congress would be worse. *Id.*

209. *Id.* at 5460 (noting the Democrats had a seventy-seven vote majority there).

210. *Id.* at 5096–105

Having reached the conclusion that this board have been assembled under the provisions of the Constitution for a purpose that involves and implies action . . . I repeat and now insist that in this word vote is included the ascertainment and determination of all defects, irregularities, illegalities, non-qualifications of

recognized the urgency and timeliness of resolving the issue at that time. For instance, Republican Representative Hilary A. Herbert (D, AL) noted that it was time for Congress to pass a law given the impending presidential campaign and the fact that the Congress was split between the two parties.<sup>211</sup>

Just before voting on the committee's amendment, the House considered an amendment in the event the underlying amendment failed. That amendment would have eliminated the word "conclusive" regarding a determination of an election dispute by the state, instead allowing it to be overruled by concurrent action of both Houses acting separately.<sup>212</sup> The House voted on the amendment on June 24 and there were 127 yeas and eighty-two neas, with 114 not voting, so the amendment passed.<sup>213</sup> With so many members not voting, it is difficult to determine whether it was a strict partisan vote, although all 116 Republicans voting in unison would not have defeated the yeas. Senate Bill 25 was sent back to the Senate in its amended form and referred back to the Committee on Privileges and Elections.<sup>214</sup> Senator Hoar had the Bill discharged from the committee and was granted unanimous consent for the Senate to non-concur to the changes and seek a conference.<sup>215</sup> On June 28, the House agreed to a conference.<sup>216</sup> However, Senator Hoar reported back to the Senate that the conference was unable to agree on the question on February 13, 1885.<sup>217</sup>

## 2. The 1884 Presidential Election

None of the sources reveal why the two parties were unable to agree. One thing did happen in the interim: the 1884 presidential election. A possibility is that the uncertainty of the outcome of the election, rather than galvanizing the conference to agree, made one party or the other wait to see if it might gain the Presidency and an upper hand on the issue later. The situation was similar to that in 1876 insofar as Republicans controlled both the White House and the Senate going into the election. They might have

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electors or persons voted for, frauds . . . or coercions, from the suffragan through its transit to this Federal board of inspectors, revisers, and determinants of last resort at the seat of the Government of the United States.

211. *Id.* at 5546 ("We are entering on what is likely to be a very exciting Presidential campaign. The House is Democratic and the Senate is Republican, and if we adjourn this session without having agreed upon any rule or any law which shall regulate the count of the electoral vote we may have a deadlock again next winter . . . I believe that a bad law would be better than no law at all.").

212. *Id.* at 5550. Two other amendments were considered. One was notable because it submitted disputes to the Supreme Court, rather than Congress. That amendment was not approved. *Id.*

213. *Id.* at 5551. The Democrats voted 122-17 for the amendment. One Republican joined them, with sixty-three voting against it.

214. *Id.* at 5579.

215. *Id.* at 5689. The Senators appointed to the conference were Senators Hoar, John Sherman (R, OH) and James L. Pugh (AL). *Id.*

216. 15 CONG. REC. at 5762. The House appointed Representatives William W. Eaton, Risdin T. Bennett (D, NC), and Hart to the conference.

217. 16 CONG. REC. 1618 (1884).

thought that by controlling the Presiding Officer in the Senate as well as the military, they would have the upper hand if the situation of 1876 repeated itself. Conversely, the Democrats might have thought they could use their control of the House to prevail this time, even if they had not done so in 1877.

As in 1880, New York would be the “swing state” of the election. An assassin’s bullet struck down President Garfield in September 1881, allowing his running mate Chester A. Arthur, a New Yorker, to assume the Presidency. In 1882, President Arthur inserted himself in his home state’s politics by ensuring that his Secretary of the Treasury, Charles J. Folger, replaced the incumbent Governor as the Republican nominee for that office.<sup>218</sup> The resulting bitterness helped the Democrat’s nominee, Stephen Grover Cleveland, to victory as Governor of New York.<sup>219</sup> Just two years later, with the support of the Tilden political machine, Cleveland emerged as the Democrats’ nominee for the Presidency of the United States.<sup>220</sup> This marked the third New Yorker to capture the nomination in the last four elections.<sup>221</sup>

With the sitting governor of the likely swing-state taking the nomination, it is difficult to say how this might have played into the considerations of Democrats and Republicans in Congress. The Democrats were likely more confident of their success and Cleveland’s ability to secure New York. Likewise, the Republicans, aware of the possibility of fraud with the 1880 elections in mind, might have been more interested in having the ability to challenge New York’s returns, which would have been limited by the legislation under consideration. President Arthur did not pursue the Republican nomination aggressively, perhaps due to contracting Bright’s disease,<sup>222</sup> and the nomination went to former Maine Congressman and Secretary of State James G. Blaine.<sup>223</sup>

The national election was quite close, with a slim popular vote margin, 48.5% to 48.2% and 219 electoral votes to 182, both in favor of Cleveland.<sup>224</sup> New York, the swing state, was even closer in 1884 than 1880: just less than 1100 votes, instead of 20,000, meaning a swing of just 550 could have shifted the presidency to Blaine.<sup>225</sup> With such a close margin, it took two weeks to resolve the outcome in New York and both parties enlisted the assistance of lawyers to review the official canvassing of

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218. RICHARD E. WELCH, JR., *THE PRESIDENCIES OF GROVER CLEVELAND* 25 (1988).

219. *Id.* at 26. Grover Cleveland was a relative political novice at the time; he had served as Sheriff of Erie County from 1871–1873 and was Mayor of Buffalo for only a few months before receiving the nomination for Governor. *Id.* at 24–25.

220. *Id.* at 28–29. The support of Tilden came after there was some movement for a Tilden nomination in order to “revenge the ‘Steal of ‘76.’” *Id.*

221. *Id.* at 29.

222. THOMAS C. REEVES, *GENTLEMAN BOSS: THE LIFE OF CHESTER ALAN ARTHUR* 317 (1975). Indeed, Chester A. Arthur died shortly after leaving office. *Id.* at 418.

223. Harper’s Weekly, *The Presidential Elections: 1860–1912*, available at <http://elections.harperweek.com/1884/Overview-1884-4.htm> (last visited Nov. 11, 2010).

224. *Id.*

225. REEVES, *supra* note 222, at 40–41.

votes in New York.<sup>226</sup> New York's canvassing process, structured to include bipartisan observers, found Cleveland to be the winner and resulted in a relatively peaceful resolution.<sup>227</sup>

Again, the irresponsibility of going into the 1884 presidential election without a procedure is remarkable. What would have happened if New York had devolved into an 1876-like dispute? Like in 1876, there were no procedures for dealing with this scenario and Congress was split between the two parties. Incredibly this close-call did not seem to raise serious concern among the various actors in Congress.

Another factor might be crucial, however. Senator Hoar's Bill passed through the Senate with little objection from Senate Democrats. It could be that the members of the two Houses thought each respective Bill went the furthest to protect their interests. With such a wide difference between the House stance and the Senate stance, compromise would have been quite difficult. Still, it is the obligation of statesmen to overcome such concerns in light of the overriding national interest, and this they failed to do.

*E. Forty-Ninth Congress 1885–1887: The Republicans Control the Senate and the Democrats Control the House of Representatives*

In 1887, Congress finally passed the Edmunds Bill. For some reason, both Houses debated the issue from closer starting points. Interestingly, both supported the Bill and opposition to it was quite bipartisan in this session. Perhaps the closeness of the 1884 presidential election and the split control of Congress finally triumphed, bringing both Houses together.

1. Senate Considers the Edmunds Bill Again

The next winter, the Senate reconsidered regulating the electoral count when Senator Edmunds introduced Senate Bill 9 in December 1885.<sup>228</sup> Senator Hoar reported back from the Committee on Privileges and Elections to place the Bill on the calendar without amendment.<sup>229</sup> Debate on the Bill began formally on January 21, 1886, beginning with a speech from Senator John Sherman (R, OH).<sup>230</sup> Senator Sherman was the Edmunds Bill's chief antagonist during this debate, which is notable because Edmunds, Hoar, and Sherman were all prominent Republicans.<sup>231</sup>

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226. FOLEY, *supra* note 171.

227. *Id.* Indeed, James G. Blaine did not wish to challenge the canvassing process in court, finding it to be fair. DAVID SAVILLE MUZZEY, JAMES G. BLAINE: A POLITICAL IDOL OF OTHER DAYS 324 (1934).

228. 17 CONG. REC.122 (1885).

229. *Id.* at 242.

230. *Id.* at 815.

231. Sherman was Republican Conference Chairman from 1884–1885 and President Pro Tempore of the Senate from 1885–1887. He also served as Secretary of the Treasury for President Hayes and Secretary of State for President William McKinley. *Biography of John Sherman*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000346> (last visited Nov. 11, 2010). The Sherman Antitrust Act is, of course, named after him. WINFIELD SCOTT KERR, I JOHN SHERMAN: HIS LIFE AND PUBLIC SERVICES, at Introduction (1908).

Senator Sherman noted that the timing again was good for passing a bill when Congress was free from “political bias”:

[T]he bill that has twice passed the Senate and been sent to the House, rather with a view to gain a conference than otherwise, is now before us again. A conference was defeated by the unwillingness of either House to abate its ideas on this question, and it now comes before us again at the beginning of an administration, when no party advantage can be derived from our decision, when the Senate is clearly on one side in party politics and the House clearly is on the other; and now, if ever, this matter ought to be settled upon some basis of principle.<sup>232</sup>

However, Senator Sherman did not think the Bill was without flaw. He particularly disagreed with section four, in the case of a state submitting a single set of returns, binding the joint session to accept those returns unless both Houses agreed to reject them.<sup>233</sup> Senator Sherman argued that this gave weight to the opinion of one House in a disagreement over what might be an important matter.<sup>234</sup> The greater flaw, according to Senator Sherman, was in the case of two returns and no determination of any dispute by the state. There, the fourth section provided that only the returns that “the two Houses, acting separately, shall concurrently decide to be the lawful votes of the legally appointed electors of such State” would be counted.<sup>235</sup>

Senator Sherman considered this section in the context of the previous election, when the vote margin in the state of New York was only a few thousand votes and could have flipped the electoral vote count.<sup>236</sup> If there was a dispute over that margin, Senator Sherman argued that this provision would have encouraged both parties in New York to submit electoral certificates and given the partisan split in Congress, it was likely that New York’s vote would have been excluded altogether, by whichever House would gain a political advantage through rejecting the votes.<sup>237</sup> Senator Sherman agreed that there should be “some tribunal provided to whom all questions should be referred.”<sup>238</sup> The President of the Senate was undesirable as this ultimate tribunal because no individual should have such power,<sup>239</sup> and the Supreme Court was undesirable because they should not

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Senator Sherman voted against the Electoral Commission in 1877, but considered it to be a wise measure due to the potential for civil war. 17 CONG. REC. at 815.

232. 17 CONG. REC. at 815.

233. *Id.*

234. *Id.* at 816.

235. *Id.*

236. *Id.* Senator Sherman did not explain how the two groups of electors might have submitted votes, but he suggested that if there was a genuine issue or question about the validity of the results, both groups of electors would find a way to meet and cast ballots. *See id.*

237. *Id.* Furthermore, Senator Sherman argued that allowing one House to exclude the returns of a state was not on firm constitutional ground. *Id.* His point was not that Congress did not have power to regulate the electoral count but that under the Twelfth Amendment, the “vote[s] shall be counted” requires Congress to count some votes and not to reject votes. *See id.* at 817.

238. *Id.*

239. *Id.* Although Senator Sherman thought that in the absence of legislation he might have some power. *Id.*

have to decide political questions.<sup>240</sup> Therefore, Senator Sherman argued that the Congress, voting as one body, was capable of making this determination, in the event of double returns or a question about a single return when the two Houses could not agree separately.<sup>241</sup>

The Senator submitted amendments to that effect that did not pass.<sup>242</sup> Sherman was clear as to why he advocated this “tribunal,” over other possible arbiters, like the President of the Senate or Supreme Court. What is not clear is why he did not propose a bipartisan commission. While he voted against the Electoral Commission, the vote was on constitutional grounds; otherwise, he thought it was successful. Perhaps the key here was that he thought his amendment was possible through legislation, whereas another proposal could only be achieved through constitutional amendment. It does not appear that Sherman ever proposed a constitutional amendment on the subject.

Senator Hoar took to the Senate floor in opposition to Senator Sherman’s plan. In some ways, Senator Hoar was sympathetic to the idea of a single common arbiter for these sorts of disputes; he just fundamentally differed in thinking the role was judicial.<sup>243</sup> Indeed, he thought that the Chief Justice of the Supreme Court would ably serve in the role of common arbiter.<sup>244</sup> But as a long supporter of the Edmunds Bill, Hoar had abandoned the hope that Congress might divest itself of this role. His support of the Bill was based on the failed attempts of past members of Congress and the “present state of political and public sentiment in this country.”<sup>245</sup> This admission,

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240. *Id.* at 817–18 (“It would tend to bring that court into public odium or one or the other of the two great parties.”).

241. *Id.* at 818. In doing so, Senator Sherman noted that the legislatures of Mexico and France were capable of operating in such a matter and acknowledged that it was unlikely his proposal would be well regarded in the Senate since the House outnumbered them. *Id.* Senator Edmunds responded by stating that they might as well amend the bill to give the House alone the judgment. *Id.* at 819. Senator William M. Evarts (R, NY) argued the same against the amendments:

I submit that the only debate here, and that is the way it has only been urged, is that the vote of the Senate and its protective power in the election is lost by the count in the general ballot of the two Houses connected. I cannot but perceive that the methods proposed by the Senator from Ohio give one opportunity to the Senate to overcome the majority in the House by the count of the united votes of the two bodies.

*Id.* at 820.

242. *Id.*

243. 17 CONG. REC. at 1020 (“A perfect bill, as I believe, would provide for a common arbiter between these two bodies, which the Constitution has left to the lawmaking power, and that has been the attempt of the statesmanship that has dealt with this subject from the beginning of the century to the present day; but every such attempt has failed.”). This was because the function was not legislative or political, but judicial in nature. *Id.* (“[J]udicial in regard to the nature and character of the act to be performed; that is, you are to have a tribunal which is to determine the existing fact and the existing law, in contradistinction from determining the law or creating the facts according to his own desire . . . . It is a function into which the wish or the desire of the person exercising it can not properly enter.”).

244. *Id.*

245. *Id.*

by one of the chief supporters of the Edmunds Bill and leaders in the Senate, suggests that at this point all hope of systemic reform was lost.

Senator Morgan, now in the minority, articulated the same views as he did in earlier debates and also argued that the Constitution was actually sufficient in its terms.<sup>246</sup> Senator Hoar made an amendment that required a state's governor to certify returns.<sup>247</sup> After extensive debate, the Bill was recommitted to the Committee on Privileges and Elections.<sup>248</sup> The Bill emerged from committee with a few amendments that went to the points brought up by Senator William M. Evarts and passed the Senate by voice vote.

## 2. The House Considers the Edmunds Bill

On March 19th, the House of Representatives received the Bill from the Senate and referred it to the Select Committee on the Election of President and Vice-President.<sup>249</sup> On April 15, the Committee returned with a report on the Senate version of the Bill. Because the Democrats had the overall majority in the House, Democrats comprised the majority of the Committee. Because the minority report was comprised entirely of Democrats, the majority must have been bipartisan.<sup>250</sup> The majority report included two substantive amendments. The first amendment prohibited the joint session from rejecting the votes of a state that had "one lawful return."<sup>251</sup> Under the Senate version, the two Houses could reject a state that had a single return; the majority argued that they should not have this power, which differed from the early position taken by the Democrats when they controlled both Houses.<sup>252</sup> This Amendment also inserted the word "lawful" before return, apparently leaving open the question about whether the two Houses could determine the single return was unlawful.<sup>253</sup>

The second amendment altered the rules for when the two Houses were faced with multiple returns but not a determination from a state's dispute resolution system. In that case, the House amended the Senate Bill to give

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246. *Id.* at 863–68.

247. *Id.* at 966.

248. *Id.* at 1064.

249. *Id.* at 2535.

250. H.R. COMM. ON THE ELECTION OF PRESIDENT AND VICE-PRESIDENT, H.R. REP. NO. 1638, pt. 2, at 1–3 (1886). The minority was comprised of Representatives Daniel Ermentrout (D, PA), Lewis Beach (D, NY), John T. Heard (D, MO), Thomas D. Johnston (D, NC) and Samuel Dibble (D, SC). *Id.* pt. 2, at 3. Representative Andrew D. Caldwell (D, TN) was Chair of the Committee and in the majority. *Id.* pt. 2, at 1. The report does not list the majority members of the committee. Assuming the remaining members were in the majority, they would have also included John R. Eden (D, ILL), Lewis Beach (D, NY), Charles H. Gibson (D, MD), James Laird (R, NE), Charles S. Baker (R, NY), John Hiestand (R, PA), William C. Cooper (R, OH) and Seth C. Moffatt (R, MI). DAVID T. CANON, GARRISON NELSON, & CHARLES STEWART III, 4 COMMITTEES IN THE U.S. CONGRESS 1789-1946, at 308 (2002).

251. *Id.* pt. 1, at 1.

252. *Id.* pt. 1.

253. *Id.* pt. 1, at 2. Later, the majority report noted that the two Houses are authorized by the Constitution to determine "from the best evidence to be had, what are legal votes" because they can only count legal votes. *Id.*



the return certified by the state's governor presumptive validity unless the two Houses voted to reject it.<sup>254</sup> The majority did not like that the Senate version required both Houses to concur on the correct set of returns and gave no set of returns presumptive validity, presumably because this would give a single House the ability to entirely disenfranchise a state.<sup>255</sup> Despite these amendments, the majority otherwise agreed in large part with the Senate Bill, for the first time in the course of the bipartisan Congress's work on the subject. Perhaps this was because, as expressed in the House Report, both political parties finally realized that "[t]he interests involved are too precious and the dangers too great to be left longer without adequate provisions against trouble and discord."<sup>256</sup>

The minority agreed with the first part of the first amendment, that the two Houses should not have the power to reject the returns of a state that submits only one return.<sup>257</sup> However, the minority disagreed with inserting the word "lawful" into that provision because it would give Congress the prerogative to reject returns.<sup>258</sup> The minority disagreed with the second amendment on the grounds that it allowed both Houses to reject a vote that had the governor's certification, which would disenfranchise a state.<sup>259</sup> The minority also disagreed with requiring a state to resolve a dispute six days before the meeting of the electors and to resolve the dispute using laws enacted prior to election day, believing both actions went beyond the Constitution in controlling the mechanisms of the state's election and dispute resolution.<sup>260</sup> The Report was submitted to the House on April 30.<sup>261</sup>

Debate on the Bill, with amendments, did not begin until December 7.<sup>262</sup> Representative Andrew J. Caldwell (D, TN), Chair of the Committee, was the only member to speak that day. First, Representative Caldwell noted that the Bill would be an authoritative expression that the power of the electoral count was vested in Congress, not the President of the Senate.<sup>263</sup> Next, he noted that Congress has the ability to create a law or joint rule providing for the manner of counting the vote, and defended the power of Congress to judge the legality of the votes.<sup>264</sup> Caldwell noted that the

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254. *See id.* pt. 1, at 1.

255. *Id.* pt. 1, at 2.

256. *Id.*

257. *Id.* pt. 2, at 3.

258. *Id.*

259. *Id.*

260. *Id.* pt. 2, at 2.

261. 17 CONG. REC. 4045 (1886).

262. 18 CONG. REC. 29 (1886).

263. *Id.* at 30 (noting the attempt of the President of the Senate to assume that power in 1857 and the allegations of a similar possibility in 1876).

264. *Id.* ("The power to judge of the legality of the votes is a necessary consequent of the power to count. The existence of this power is of absolute necessity to the preservation of the Government. The interests of all the States in their relations to each other in the Federal Union demand that the ultimate tribunal to decide upon the election of the President should be a constituent body, in which the States in their federal relationships and the people in their sovereign capacity should be represented.")

intention of the amendments was to protect the states from any suggestion that the legislation might be used to improperly disenfranchise them; however, Caldwell emphasized that it was important not to go so far as to inhibit the ability of Congress to reject unlawful votes.<sup>265</sup>

Representative Samuel Dibble (D, SC), a member of the minority report of the Committee, continued the debate on December 8. His primary contention was that the electoral returns of a state that are certified under its laws should have prima facie validity when they arrive before Congress and neither House or both Houses should be able to set aside this return “when it is certified and presented in regular form and manner.”<sup>266</sup> Additionally, Representative Dibble took issue with the safe harbor date and insisted that the states should have the full time until the electors cast their votes to resolve any controversies. To do otherwise would impermissibly interfere with the state’s power to determine the electors.<sup>267</sup> Dibble agreed that Congress was competent to legislate as to who had the counting power, but took issue with the idea that the count itself could be a judicial act, rather than a ministerial act of simply counting.<sup>268</sup>

Dibble did acknowledge that the act generally sought to constrain Congress’s ability to judge the returns, but thought it still left Congress with too much ability to insert its will into a dispute.<sup>269</sup> Despite the issues the minority of the Committee had with the Bill, Representative Dibble, in a signal that the Bill stood a good chance of passing, noted that for the most part, the Bill had the unanimous approval of the Committee and there were no dissents to the main features of the Bill.<sup>270</sup> Representative William C. Cooper (R, OH), a member of the majority report of the Committee, defended the Bill’s intrusions upon the state as limited, only arising if the state has put itself into the position of submitting multiple returns.<sup>271</sup> Representative John R. Eden (D, IL) maintained that the Bill, with amendments, would effectively determine all questions and scenarios

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265. *Id.* at 31. Here Representative Caldwell made an interesting point: Congress must have this power in order to enforce the Fourteenth Amendment. In the event that the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2. Likewise, Caldwell noted that Congress needed to enforce other provisions in the Constitution, such as the guarantee of a republican form of government, in this regard. 18 CONG. REC. at 31 (arguing that Congress would be required to reject the votes of a state that did not have a republican form of government).

266. 18 CONG. REC. at 46 (noting that the Constitution did not give Congress the same power to judge the electoral returns as it did to judge the returns of their own elections).

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 47.

271. *Id.* at 49.

relative to the electoral account while leaving the states to determine the disputes.<sup>272</sup> Further, the necessity of the legislation was “manifest,” despite the fact that previous disputes were resolved peaceably; the law was still unsettled and invited future contests.<sup>273</sup>

Representative George E. Adams (R, IL) maintained that he believed the Bill would not bind the two Houses of Congress when they actually count the electoral vote.<sup>274</sup> Additionally, Representative Adams noted that the legislation included language that would still permit Congress to make judgments. For instance, in the event of two sets of the returns, the Bill gave presumptive validity to those votes “regularly given.”<sup>275</sup> This term, he argued, was entirely subjective and ambiguous.<sup>276</sup> Debate wrapped up on December 9, and Representative Charles S. Baker (R, NY) rose to argue that the Bill was unconstitutional, on the grounds that it strips power from the President of the Senate and gives too much power to Congress.<sup>277</sup> Any remedy, in Representative Baker’s mind, would have to take the form of a constitutional amendment, and he argued that this should have been the focus all along.<sup>278</sup>

Wrapping up debate, Representative Herbert (D, AL), summarized the case for a law and the history of the progress in Congress since the Hayes-Tilden disputed election:

Mr. Speaker, this bill has come over to us as I understand by a practically unanimous vote on the part of the Senate, Democrats and Republicans. That body has four times passed and sent to this House this bill, or one very similar to it. I hope the time has come when the House is at last ready to pass the bill in some shape or other.

No question has been more thoroughly and ably discussed in the last ten years than that involved in this bill—the counting the electoral vote. Eleven years ago the country was on the eve of civil war because we had a disputed Presidential election and no law provided under which the count could be made. The Electoral Commission was resorted to. The country submitted to the result, but was never satisfied with it. It was the natural and perhaps the inevitable, result. The country never will be satisfied in any political case with a temporary expedient or device under a law passed at the moment, after parties had taken sides on the question. The party losing under such circumstances will naturally believe it has been cheated. The people of this country are law-loving and law-abiding, but they want laws passed before cases arise, and not with reference to any special case that may have arisen. When a party loses a suit under a law passed beforehand, without reference to his particular case, even though he may believe injustice has been done him, has no feeling of personal wrong or personal indignation against the law-making power,

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272. *Id.* at 50.

273. *Id.*

274. *Id.* at 51.

275. *Id.* at 52.

276. *Id.*

277. *Id.* at 74.

278. *Id.* at 75.

because he knows that human laws must be imperfect. . . . And therefore it is that an unjust law, an imperfect law, is better than no law at all. Let the people know beforehand what the law is and what they are to expect.<sup>279</sup>

The House took up the majority of the Committee's amendments. The Committee abandoned the insertion of the word "lawful" without a vote but the other amendments were agreed to.<sup>280</sup> The amendments offered by the Committee minority were rejected.<sup>281</sup> The Committee's amendments passed by a vote of 141–109 with seventy-two members not voting.<sup>282</sup> An additional amendment, making a slight change to the committee majority's first substantive amendment, by Representative Eden was accepted and changed the rules to ensure the Houses could not reject the votes when a state submits a single return that has been "regularly given" and certified by the state executive.<sup>283</sup>

Senator Hoar requested that the Senate non-concur in the House amendments and he, Senator Edmunds (R) and Senator James L. Pugh (D) were appointed to the conference committee.<sup>284</sup> The House appointed their conference, Representatives Caldwell (D), Eden (D) and Cooper (R) on December 14.<sup>285</sup> The House conferees reported back on January 20, 1887.<sup>286</sup>

As to the substantive amendments, the Senate conferees agreed in large part with the House, with a few changes. The first substantive change dealt with the House amendment on a state that submitted a single return that was certified by the state executive: though no electoral votes may be rejected, *the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.*<sup>287</sup>

The House Conference Report noted that this change would leave no doubt that Congress could still reject a single return that was certified by a state's governor if it agreed that the return was not regularly given.<sup>288</sup> The Senate accepted the second substantive House amendment and the only change the conference made was to the language of the second substantive House amendment.<sup>289</sup> The report from the House conferees noted that the changes would ensure that a path for Congress was created for almost every circumstance of disputed returns and, in the event that it fails, the two Houses' power would be circumscribed to a minimum to prevent the

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279. *Id.* at 75.

280. *Id.* at 76.

281. *Id.*

282. *Id.* at 77. 130 Democrats voted in favor of the amendment, with ten voting against. Ninety-nine Republicans voted against it, with eight voting in favor.

283. *Id.*

284. *Id.* at 133.

285. *Id.* at 187.

286. *Id.* at 826.

287. *Id.* at 668.

288. *Id.*

289. *Id.*

disenfranchisement of a state.<sup>290</sup> The Senate agreed to the conference report with little discussion on January 20.<sup>291</sup> The President signed the Electoral Count Act on February 4, 1887.

#### CONCLUSION

The long meandering path to the Electoral Count Act, starting just after the Hayes-Tilden election dispute in 1876, was eleven years in all. Congress considered constitutional amendments, joint rule, and eventually settled on legislation. It is clear that the nature of the early debate was framed by partisanship on the part of the Democrats, stemming from anger at the Hayes-Tilden disputes and what they considered to be abuse at the hands of Republicans during the Civil War and Reconstruction Eras. The debate evolved as this partisanship tempered and control of Congress was split between the two parties. Still, the biggest hurdle seems to have been the diversity of opinions various members of Congress had, a fact that perhaps accounts for why the Bill had to be bi-partisan. In the end, the Bill marked two aims. First, it attempted to resolve the question as to where the power to count electoral votes resides by asserting this authority to be in the joint session of Congress.

But, of course, the legislation by itself cannot conclusively defeat the claim, based on the text of the Twelfth Amendment, that this authority lies with the President of the Senate—or alternatively, the argument that it lies exclusively with the House of Representatives in the event that there is a debate whether any candidate has obtained a majority of Electoral College votes. Second, it sought to protect the state's prerogative to cast electoral votes by allowing the states to give their votes presumptive validity through election dispute laws and resolution and restricting the discretion of Congress.

So why was Congress finally able to enact a statute in 1887, before the 1888 presidential election, rather than earlier, perhaps before the 1884 presidential election? The Edmunds Bill was essentially the same in both years, and the partisan makeup of Congress was the same in both years, with Republicans controlling the Senate and Democrats controlling the House of Representatives. It is unclear why the conference on the Bill was unable to come to an agreement in 1884–1885 but was successful in this respect in 1887. One difference was a Republican President before the 1884 election and a Democratic President, Grover Cleveland, before the 1888 election, although it does not seem that this would have made a practical difference in the particular circumstances: Cleveland's Vice-President, Thomas Hendricks, died in office, and thus the Republican President pro tem of the Senate (John Ingalls) would supervise the counting of Electoral votes under the Twelfth Amendment. The election of 1880 was close, but not in the same way the 1884 election was, with a deciding margin of less than 1100 votes in New York. Two close successive

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290. *Id.*

291. *Id.* at 828.

elections must have had an impact on Congress, particularly since both focused on the battleground state of New York, where allegations of fraud and corruption were frequent on both sides. The especially narrow results in 1884 must have amplified concerns. Congress must have also known that the 1888 election would likely come down to another close battle in New York, so they would have been wise to take these narrow scrapes with disaster to heart. The 1888 election was indeed quite close, this time with Benjamin Harrison narrowly defeating Grover Cleveland by 14,000 votes in New York to secure the Presidency.<sup>292</sup>

The ultimate compromise was not necessarily hailed as a panacea. John W. Burgess, a father of the field of political science,<sup>293</sup> published a scathing criticism of the Electoral Count Act in 1888.<sup>294</sup> He regarded the Act as a failure in several ways. First, it was incredibly complex, but despite the complexity (or perhaps because of it) it was often ambiguous or even failed to account for various scenarios.<sup>295</sup> Much of the law required Congress to accept votes that are “regularly given,” but Burgess noted that this language is entirely ambiguous and without a single interpretation could lead the law to operate in several different ways.<sup>296</sup> Burgess was also especially critical of what he saw was an abdication of Congress’s constitutional duty to police the returns from the states and to reject improper electoral votes by such measures as requiring both Houses to concur in order to reject a state’s single return.<sup>297</sup> Burgess hoped that this “makeshift . . . compromise” would be temporary and Congress might eventually come to an agreement to establish a “common arbiter between the two Houses.”<sup>298</sup>

There is no doubt criticisms leveled by Burgess were warranted. Indeed, the first time the law was set to be tested, in 2000, confusion about the statute reigned as “politicians, lawyers, commentators, and Supreme Court justices seemed prone to misstate or misinterpret the provisions of the law, even those provisions which were clear to the generation that wrote them.”<sup>299</sup> Perhaps then it is not surprising that some members of the Supreme Court seemed to think intervention was necessary. However,

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292. Again, there were allegations of vote-buying, fraud and corruption on both sides. FOLEY, *supra* note 171.

293. John W. Burgess founded the Political Science Quarterly and was on the faculty at Columbia University. Columbia University, C250 Celebrates Columbians Ahead of Their Time: John William Burgess, *available at* [http://c250.columbia.edu/c250\\_celebrates/remarkable\\_columbians/john\\_burgess.html](http://c250.columbia.edu/c250_celebrates/remarkable_columbians/john_burgess.html).

294. John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633 (1888).

295. *Id.* at 652–53 (“There is no doubt that the law disposes, in a complex and clumsy way indeed, of some of the difficulties in the counting of the electoral votes . . . [B]ut it cannot be regarded as a solution in principle of this great question.”); *see, e.g., id.* at 651 (noting the failure to deal with the case of two state executives claiming the governorship or whether a rejected state’s votes should be deducted from the number needed to gain a majority of the votes).

296. *Id.* at 643–45.

297. *Id.* at 637–39.

298. *Id.* at 653. He hoped that this change would come before more controversy. *Id.* (“The truth is, we want a new baptism of nationalism all around. Let us hope that it will not again be one of fire.”).

299. Siegel, *supra* note 31, at 542.

Court intervention was not something the framers of the ECA would have envisioned, particularly since Congress consistently rejected the Court as an arbiter of these disputes during this period.

So in this regard, Burgess' criticisms were quite accurate: the ECA was a failure and the drafters of the ECA would have been surprised by the Court's decision. Criticism of the ECA and Congress is warranted from an objective standpoint as Congress certainly missed the opportunity to enact a serious reform of the system. At the same time, perhaps we should be grateful that any legislation was enacted at all, given the partisan strife and inability to reach a compromise in the ten years following the Hayes-Tilden dispute. The ECA compromise relied on effectively stripping Congress's power to reject votes or exercise discretion as much as possible. Perhaps this was the correct lesson for Congress to learn from the Civil War and Reconstruction Era; the Framers of the Constitution were mistaken to give this power to Congress. And perhaps too it was impossible to expect Congress to deposit that power in any other body, especially if such a solution required constitutional amendment, since such a compromise would have required even more support.

Still, the problems with the Twelfth Amendment and Electoral Count Act remain. If intervention by the Supreme Court is not a desirable solution, then Congress must act again to fix this gap in presidential succession. There is no reason that Congress could not consider solutions now, but one lesson from the Electoral Count Act is that the measure must and should be bipartisan; thus it might be best for any serious debate to take place during a period of some level of shared power between Republicans and Democrats. Additionally, *Bush v. Gore* certainly stirred partisan sentiments in the country, but not to the same degree that Hayes-Tilden did because of the historical context of that dispute. As the ten year anniversary of the *Bush v. Gore* decision approaches, the relative recentness of the events should be used as an opportunity to revisit the narrowly avoided constitutional crisis and think about how we might avoid the next one.

To that end, now is the perfect time for all interested parties to make proposals. Senator Edmunds hoped the Electoral Commission might serve the role of neutral arbiter of the Hayes-Tilden dispute, and Senator Hoar thought some body other than Congress was the best arbiter of future disputes. Even with the attempts to tie the hands of Congress with the Electoral Count Act, it looked as if Congress might face deadlock and partisanship under the ECA in 2000. These ideals of Senators Edmunds and Hoar should not be lost on us today, and the goal should be to make some other neutral or bipartisan body the arbiter of these disputes.

The point is not to let the aftermath of *Bush v. Gore* and the continuing interest in electoral reform during this past decade become another lost opportunity, in the way that the decade after the Hayes-Tilden dispute regrettably was. Recognizing the difficulties of overcoming the partisan and institutional obstacles to reform, one should also understand the paramount national need to surmount these difficulties. The next time there is a disputed presidential election and there is a partisan deadlock in

Congress, as there was in 1876 and 2000, let us hope that there has been sufficient leadership to give the nation an authoritative and evenhanded tribunal that can fairly adjudicate the dispute.