

Ballot Battles: The History of Disputed Elections in the United States

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Reviewer: Sean Ledwith

When the United States goes to the polls this November to elect a new President many will think back nervously to the corresponding event 16 years ago. Memories of hanging chads, disenfranchised African Americans, weeks of political stalemate and a controversial decision by the Supreme Court will be re-awakened. George Bush's accession to the Presidency at the expense of Al Gore was hugely contentious at the time, but of course, now seems even more so in light of the effect the Bush administration would subsequently have on global politics. The prospect of Donald Trump being handed the keys to 1600 Pennsylvania Avenue in similar circumstances probably strikes most observers around the world as an even more horrifying prospect! If anyone believes a repeat of the debacle of 2000 is unlikely, they will not be reassured by reading Edward Foley's informative and lively history of contested US elections, *Ballot Battles*.

The author comprehensively recounts how that notorious election was only the latest example of a constitutional fault-line that runs through the heart of the US electoral system; a subterranean flaw that is only waiting for a similar opportunity to erupt again. He compares the current dearth of serious discussion of a possible repeat of 2000 to the complacency of the designers of a certain transatlantic liner: 'While we can admire the desire to build a ship with minimal risk of sinking, it is still necessary to put enough lifeboats on board the Titanic in case the unthinkable actually occurs. The mechanisms for resolving vote counting disputes are the lifeboats of the electoral system' (p. 11). Foley has not only produced what must surely be the definitive study of this recurring problem in American politics but also provides a persuasive set of recommendations on how to avoid future collisions with this constitutional iceberg. The book is full of fascinating accounts of how some of the most iconic figures in United States history, including Lincoln, Kennedy and Nixon, responded to the challenge of this critical issue. Students of American history, politics or law will find it a richly rewarding read.

He argues the roots of the stand-off in 2000 can actually be traced right back to the formation of the United States in the late-18th century. Two of the Founding Fathers at the centre of the 1787 Constitutional Convention that systematised the US political system were at loggerheads over the appropriate response to a contested election along the lines of what a future generation would witness in the case of Bush and Gore.

Foley explains how James Madison, the future fourth President, took a purist view that each and every election count must be conducted according to the highest standards of probity and rigour, and that failure to do so should not be tolerated under any circumstances. In contrast, Alexander Hamilton, Secretary of State under George Washington, adopted a more pragmatic view that if there were anomalies apparent in one particular election, they would be ironed over the course of time and should not be allowed to impede the everyday running of the system. The author proceeds to describe how many of the most infamous electoral controversies in United States history can be interpreted through the prism of this perennial debate between two of the leading architects of the Constitution, and how the unresolved question could return to the national agenda later this year: 'Next time America has a disputed presidential election, whenever that occurs, would we expect a candidate to take the Hamiltonian view of acquiescing until the quadrennial cycle repeats itself or instead demand a Madisonian fair count in the immediate election?' (p. 24). It would seem unlikely that Donald Trump would be content with the former.

Foley provides a valuable chronological sequence of dramatic examples of how this latent problem has resurfaced in United States history on numerous occasions, sometimes accompanied by a shocking loss of life. The first significant case occurred just a few years after the Constitution had been signed-off by Hamilton, Madison and the rest of the Founding Fathers. John Jay was seeking to unseat George Clinton as Governor of New York in a 1792 gubernatorial election. Not the least curious aspect of this episode was that the former was willing to give up the position of Chief Justice of the Supreme Court in pursuit of what subsequent generations would regard as an inferior position. The validation dispute arose because an outgoing sheriff in one of the counties was not authorised to count the ballots as his official period of office had expired. Consequently, the disallowed votes cost Jay the election and handed it to Clinton. The contenders promptly summoned formidable legal teams to fight their respective cases, including two of America's most prominent public figures. Clinton could call on the advice of Edmund Randolph, one of the signers of the Constitution and the nation's first Attorney General, and future Vice President Aaron Burr. A bitter legal battle ensued, climaxing with Clinton's initial electoral victory being confirmed by a supposedly neutral canvassing committee. As Foley explains, however, this body was fatally characterised by partisanship. At the turn of the 19th century, American politics began to be plagued by internal ideological struggle on a scale not anticipated by the first generation of post-Independence leaders. The dispute between Jay and Clinton encapsulated a wider political contest emerging in the young republic between the promoters of big government, known as Federalists and personified by Jay, and the Democratic-Republicans, represented by Clinton, who were defending the Jeffersonian model of the minimal state. The canvassing committee that was putatively an independent third party was dominated by known supporters of the incumbent. This early case illustrated a serious under-estimate on the part of the architects of the Constitution in considering how rapidly party politics would develop in the United States. In Foley's words: 'The short-sightedness of the Founders with respect to the distinctive dangers of disputed gubernatorial elections stems largely from their naïve belief that the constitutional arrangements they were assembling would keep the formation of organised political parties in check' (p. 49). Fast forward to 2000 and roles taken by Burr and Randolph would be taken by equally prominent figures; interestingly two former Secretaries of State, James Baker and Warren Christopher. Of course, by that time, the partisanship that the first generation had barely glimpsed had brought the political system to virtual gridlock-where it remains today.

One of the heroes of Foley's history is the 19th-century jurist, James Kent, sometimes known as the 'American Blackstone'. The author hails Kent as being one of the first legal commentators to spot the lacuna at the heart of the system of electoral scrutiny. Foley describes how Kent was appalled at the blatant inadequacy of the New York canvassing committee, and how he suggested an alternative solution which the author suggests is still required in modern practice. Kent stated what modern observers might regard as an obvious point that any such neutral tribunal must be 'equally biased' in terms of political allegiance. Kent's concept, Foley adds, 'may be an odd way to phrase it, especially to modern ears, but it captures the essential requirement of impartiality that Kent considered necessary for the tribunal to perform its function' (p. 53). In contrast, the Supreme Court's crucial verdict in *Bush v Gore* was the upshot of deliberation by an institution

that was weighted 5-4 in favour of Republican-appointed justices opposed to Democrat ones.

The 2000 controversy obviously generated a huge amount of controversy at the time and continues to do so, but at least no lives were lost as a result. The same could not be said for some of the disputed elections of the 19th century recalled by Foley. American politics in that period was decisively affected by the shadow of slavery, both in the antebellum era and in the post-Civil War decades. One of the most formidable abolitionists of the century was Thaddeus Stevens who played a starring role in the so-called 'Buckshot War' of 1838 in Pennsylvania. In the year the intensifying mood of political rivalry in the country was centred on the predominantly northern party of the Whigs and the southern-based Democrats. The Whig Governor of the state, Joseph Ritter, had refused to concede defeat amid accusations on both sides of stuffed ballot boxes. Ritter went so far as to order the commander of the state militia to open fire on his opponents if they tried to physically remove him. Bloodshed was only averted as General Robert Patterson-another of Foley's heroic defenders of judicial fair play-faced down the Governor in a dramatic cabinet meeting, thereby forcing the latter to resign. Thaddeus Stevens and an associate, supporters of Ritter, had earlier 'made a narrow escape only by climbing through a window and outrunning their assailants' (p.82).

The most crucial disputed election of that century – or any other arguably – was the battle for the White House that took place in 1876. In that year, Foley recounts, 'the nation came closer to the ultimate constitutional crisis of two separate inauguration ceremonies, with two individuals purporting to assert the authority of commander in chief than most Americans now realise' (p. 117). For a decade or so after the conclusion of the Civil War, Northern troops had been dispatched by Republican Presidents to occupy the South and enforce with use of arms if necessary the 'Reconstruction' of a post-slavery economy. The resentment felt by many Southern voters concerning what some of them regarded as foreign occupation came to a head in the 1876 presidential election when their preferred candidate, Samuel Tilden, appeared to have collected sufficient votes overall to reclaim the White House from the Republicans. However, three southern states (including Florida which would also be at the centre of the crisis of 2000) were the scenes of wrangling between the two parties over the legitimacy of counting processes. Consequently, two sets of contradictory voting records were dispatched to Congress for the national count that November. Foley adds that ambiguity in the 12th Amendment means that in such a situation it is unclear whether the Senate or the House of Representatives should have the last word. As these two chambers at the time were controlled by Republicans and Democrats respectively, the scene was set for an explosive constitutional crisis. Once again, the protagonists on each side managed to agree on the creation of a third party body, known as the Electoral Commission, to hopefully break the deadlock. However, when it became apparent the body was going to rule against Tilden, his Democrat colleagues in the House threatened to stage a filibuster that would have prevented the inauguration of a new President in March 1877. At this point another one of Foley's constitutional heroes took matters in hand and imposed a time limit on the debate, thwarting the Democrat wrecking plan. Remarkably, this was a fellow Democrat, Samuel Randall, who evidently resolved that it was his responsibility as House Speaker to pull the country back from the political precipice. Foley argues the Speaker in this episode is one of America's forgotten benefactors from the annals of ballot battles: 'In a nation that needs reminders that sometimes politicians resist partisanship and instead, rising, to the occasion, act in the interests of the entire public, this collective historical amnesia about Randall is regrettable and worth rectifying (p. 148). Randall's intervention resolved the immediate crisis but was not enough to prevent the 1876 election going down in United States history as the backdrop to one of the country's most shameful deals. Tilden's party only abandoned their claim to the White House on condition the Republicans withdrew federal troops from the South; thereby condemning African Americans there to decades of racist discrimination and terror in the form of the Jim Crow laws.

Foley's examination of the most recent, and best known, ballot battle in 2000 bookends his study of the phenomena. With characteristic insight, he explains how the Supreme Court's verdict in *Bush v Gore* was not as calamitous as critics of the former candidate generally believe. The decision actually includes two components. The second part was, in effect, the order to the Florida authorities that the recounting process should halt, thereby handing the Presidency to Bush. The first part, however, was potentially more beneficial to the long-term interests of the US political system, implying that in similar cases the federal Court can

intervene and over-rule one of its subsidiaries if there is evidence of malpractice at the state level. Foley's view of the 2000 controversy may seem counter-intuitive to many, but his exhaustive scholarship and powerful argumentation mean that it is a view that should be taken seriously: 'Unless and until an even better institution is developed to handle these high-stakes cases, the federal judiciary is the best of the available institutions' (p. 21).

The author is happy to accept this review and sees no need to respond with a comment.

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