THE ORIGIN OF DISPUTED ELECTIONS: CASE STUDIES OF EARLY AMERICAN CONTESTED CONGRESSIONAL ELECTIONS

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I. INTRODUCTION

Following the 2016 presidential election cycle, it is easy to imagine that a future vote-counting dispute in a presidential election could spill over and engulf the country in a new constitutional crisis. Only seventeen years ago, the Supreme Court's infamous decision in *Bush v. Gore*,[1] avoided a political and constitutional crisis over a long-running disputed presidential election.[2] Then, some commentators decried the decision as judicial partisanship, while others lauded the decision for its pragmatic approach.[3] Since *Bush v. Gore*, the academy has evaluated the meaning of electoral disputes and refocused on the importance of historical disputed elections and their continuing influence.[4] Recounts and disputed elections present particular challenges in the hyperpolarized atmosphere of contemporary politics. Many scholars have also looked to the infamous 1876 Hayes-Tilden disputed presidential election, which resolved a dispute about presidential electors through a first-of-its-

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[1] Bush v. Gore, 531 U.S. 98 (2000).

[2] *See* Elizabeth Garrett, *The Impact of* Bush v. Gore *on Future Democratic Politics*, *in* THE FUTURE OF AMERICAN DEMOCRATIC POLITICS: PRINCIPLES AND PRACTICES 141, 141 (Gerald M. Pomper & Marc Weiner eds., 2003).

[3] *See, e.g.*, Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore: *Judicial Partisanship on Election Cases*, 68 STAN. L. REV. 1411, 1426 (2016); H. Jefferson Powell, *Overcoming Democracy: Richard Posner and* Bush v. Gore, 17 J. OF L. & POL. 333, 341 (2001).

[4] *See, e.g.*, Edward B. Foley, *The Founders'* Bush v. Gore*: The 1792 Election Dispute and Its Continuing Relevance*, 44 IND. L. REV. 23, 27 (2010).

kind Electoral Commission, for guidance.[5] Their analysis reveals significant vulnerability in the administration of elections. In fact, there is growing concern that the next disputed presidential election could force the country over the brink, prompting civil disorder or democratic breakdown.[6]

While disputed presidential elections have garnered significant academic and public analysis,[7] contested elections in the U.S. House of Representatives have gone largely unexamined. Besides one study published in 2004, "no published studies focusing exclusively on contested [House] elections have appeared in the post-WW II era to update our collective knowledge."[8] Resolving contested elections in the U.S. House of Representatives is markedly different from addressing disputed presidential elections.[9] Those important disputes can be adjudicated under the Twelfth Amendment, which continues to remain a "ticking time bomb,"[10] as well as an act of Congress.[11] Contested congressional elections, however, *should* be resolved under Article I, Section 5 of the U.S. Constitution, which provides each chamber of Congress the authority to adjudicate contested elections.[12] Just as contested congressional elections remain unexamined, so too does the constitutional provision governing the resolution of such disputes. As one scholar recently described, "[r]arely does a constitutional provision escape notice [yet Article I, Section 5 of the U.S. Constitution] suffers from uncertainty

[5] *See, e.g.*, Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 FORD. L. REV. 1043, 1044 (2010).

[6] *See* Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 528–29 (2010).

[7] *See e.g.*, Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U.J. LEGIS. & PUB. POL'Y 471, 509 (2010).

[8] Jeffery A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789–2002*, 18 STUD. IN AM. POL. DEV. 112, 112 (2004); *see also* Henry L. Dawes, *The Mode of Procedure in Cases of Contested Elections*, 2 J. SOC. SCI., no. 27, 1869, at 1 (discussing historically disputed elections); *see* DE ALVA ALEXANDER, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 313–30 (1916); Vincent M. Barnett, Jr., *Contested Elections in Recent Years*, 54 POL. SCI. Q. 187, 188 (1939); C. H. Rammelkamp, *Contested Congressional Elections*, 20 POL. SCI. Q. 421, 422 (1905); *but see* Lisa Marshall Manheim, *Judging Congressional Elections*, 51 GA. L. REV. 359, 363–64 (2017) (arguing that Congress has the power over judicial involvement in elections).

[9] *See* JACK MASKELL & L. PAIGE WHITAKER, PROCEDURES FOR CONTESTED ELECTIONS IN THE HOUSE OF REPRESENTATIVES 1 (2010) (discussing procedures in disputed congressional elections); THOMAS H. NEALE, ELECTION FOR THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: CONTINGENT ELECTION (1999) (discussing procedures employed in a disputed presidential election).

[10] Colvin & Foley, *supra* note 6, at 529.

[11] *See* NEALE, *supra* note 9.

[12] *See* U.S. CONST. art. I, § 5.

and neglect."[13]

Electoral contests are not a new phenomenon. Between 1789 and 2002, there were "601 contested election cases in the House . . . or an average of just over 5.6 per Congress."[14] Recounts and election disputes have been a part of the American experience since the Colonial Era.[15] This raises an important, and unaddressed, question: How *did* the Founders conceptualize a method of addressing electoral disputes? This point has not been vigorously addressed, but the few scholars to opine on this important question have observed that "the Founders struggled with vote-counting disputes generally."[16] This puts it mildly. In the first elections after the ratification of the U.S. Constitution, there were major disputes in congressional, gubernatorial, and even presidential elections.[17] Yet, very little scholarly attention has been placed on the causes and continuing impact of these disputed elections.

Particularly in congressional elections, the difficulty relates back to the founding. Article I, Section 5 of the U.S. Constitution provides that each House of Congress "shall be the Judge of the Elections . . . of its own Members."[18] This largely unexamined and undebated provision vest both houses of Congress with the ability to judge the elections and returns of its members without providing clear rules and procedures for resolving disputes.[19] "Although Article I, Section 5 empowers each House of Congress, neither body has clarified the reach of this constitutional protection, [and t]he federal courts have likewise failed to fill the gap, [which means that] an ad hoc, state-based regime dictat[es] the adjudication of congressional election contests."[20] This inconsistent administration began during the early years of the republic.[21] At the same time, however, resolving contested elections was not just a problem of congressional elections, but rather, the Founders also struggled to address electoral disputes in major state-wide executive elections—such as the disputed 1792

[13] Manheim, *supra* note 8, at 361.

[14] Jenkins, *supra* note 8, at 115.

[15] *See, e.g.*, TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742–2004, at 8, 9 (2005).

[16] EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 25 (2016).

[17] *See id*.; John Ferling, *Thomas Jefferson, Aaron Burr and the Election of 1800*, SMITHSONIAN (Nov. 1, 2004), https://www.smithsonianmag.com/history/thomas-jefferson-aaron-burr-and-the-election-of-1800-131082359/.

[18] U.S. CONST. art. I, § 5.

[19] *See* Manheim, *supra* note 8, at 362.

[20] *Id*. at 426.

[21] *See* FOLEY, *supra* note 16, at 26.

New York gubernatorial election between George Clinton and John Jay.[22]

This fact, then, raises a simpler question—*did* the Founders fail to conceptualize a universal method for resolving electoral disputes? If they did, then that oversight helps explain the increasingly frequent disputes over the procedure and forums of high-profile election recounts in modern American politics and a reason Article I, Section 5 remains unexamined. To answer this question, Part II of this Article will review contemporary historians' perspectives on the theories of democracy espoused by the Founders and conclude that regardless of which theory is correct, each theory supports the need to have developed a framework for responding to electoral disputes. In turn, Part III tests how the Founders' theories responded to contested elections by reviewing three geographically diverse contested elections from the Second and Third Congresses, and the legal and political developments of the 1790s, to highlight the development of informal and irregular procedures for resolving such disputes, which was marked by *constant struggle* given the lack of constitutional guidance. Looking to contested House elections is a useful lens into the Founders' approach to electoral disputes because the U.S. House of Representatives was viewed as the "People's House" and the "more 'immediate representatives'" of the people in government.[23] The Founders would have been particularly concerned about the representational nature of the House, and ensuring appropriate and fair adjudication of contested House elections.[24] In addition, recent reform in the resolution of disputed parliamentary elections could have informed the Founders' approach.[25] Finally, this Article will conclude that the Founders' failure to clearly develop a universal framework for resolving disputed elections was a significant oversight. Not only did it promote lingering effects still felt today—leaving us ill equipped to address electoral disputes since the founding—but was also a failure in implementing the Founders' theories of democracy.

[22] *See id*. at 191.

[23] ROBERT V. REMINI, THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES 1 (2006); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 597 (1969).

[24] *See* WOOD, *supra* note 23, at 387–88.

[25] *See id.* at 26–27, 175–76.

II. THE FOUNDERS' THEORY OF DEMOCRACY: OMITTING ELECTORAL DISPUTES?

To understand early republican recounts and disputed elections, and particularly what they mean for our contemporary approach to recounts, we first must understand how the Founders would have perceived contested elections. By reviewing the Founders' theory of democracy, we can begin to establish how the Founders *would* have been concerned about disputed elections. After analyzing the ramifications of their understanding of democracy on recounts and disputed elections, it is essential to discern whether actual substantive mechanisms were put in place to address contested elections.

Contemporary historians have engaged in significant dialogue on the exact confines of the Founders' theory of democracy—rarely finding common ground—but each theory suggests the Founders would have been concerned with electoral disputes.[26] While this Article does not seek to comprehensively examine the large body of scholarship geared towards discerning the ideological makeup of the Founders—which was not monolithic—this approach does establish three main lenses upon which to examine competing perspectives on the republican form of government. First, the liberal tradition based upon the writings of John Locke and Montesquieu imbibed with a modern understanding of the market economy has historically been seen as a major motivating force in early republican thinking.[27] Second, Bernard Bailyn and Gordon Wood, in contrast, focus on the influence of the English opposition in the seventeenth and eighteenth century.[28] Finally, J.G.A. Pocock argued that the Founders' thinking is best understood "as the last great act of the Renaissance."[29]

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[26] *See, e.g.*, Stanley N. Katz, *The American Constitution: A Revolutionary Interpretation*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 26 (Richard Beeman et al. eds., 1987).

[27] *See* Joyce Appleby, *The Social Origins of American Revolutionary Ideology*, 64 J. AM. HIST. 935, 940, 947 (1978) [hereinafter *Social Origins*]; Joyce Appleby, *What Is Still American in the Political Philosophy of Thomas Jefferson?*, 39 WM. & MARY Q., 287, 290 (1982) [hereinafter *The Political Philosophy of Thomas Jefferson*].

[28] *See* WOOD, *supra* note 23, at 43–44; *The Political Philosophy of Thomas Jefferson*, *supra* note 27, at 301; BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION vii (1967).

[29] *See* J.G.A. Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 J. INTERDISC. HIST. 119, 120 (1972).

A. The Liberal Interpretation: Charles McIlwain, Steven Dworetz, and Joyce Appleby

Every high school-age history textbook describes the profound impact John Locke and Charles-Louis de Secondat, Baron de La Brède et de Montesquieu (Montesquieu) had upon the foundation of American democracy.[30] From Locke's argumentation for life, liberty, and property[31] to Montesquieu's celebrated small-republic theory,[32] the foundations of our democracy seemingly rest upon their insights.[33] Various figures have advocated for the liberal tradition.[34] In the early 1920s, Charles McIlwain extolled the virtues of natural rights philosophy[35] as embodied in our Constitution just as Historian Joyce Appleby ably stated the influence of the market system on the Founders.[36]

Most commonly, the Revolution has been viewed "as an expression of the natural rights philosophy."[37] The ideas of "the social contract, inalienable rights, natural law, and the contractual basis of government"[38] permeated the writings of the Founders.[39] As early as 1923, McIlwain began describing the development of revolutionary

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[30] *See, e.g.*, *Hobbes, Locke, Montesquieu, Rousseau on Government,* CONST. RTS. FOUND. 1, 3, 4 (2000), http://www.crf-usa.org/images/pdf/gates/HobbesLockeMontesquieuRousseau.pdf (providing materials for high school students on Hobbes, Locke, Montesquieu and Rousseau in order for students to conduct an analysis of each philosophers' political beliefs and how such beliefs impacted the democratic revolution in America); *see also* David Jenkins, *The Lockean Constitution: Separation of Powers and the Limits of Prerogative*, 56 MCGILL L.J. 543, 575 (2011) ("Although polemicists and statesman took inspiration from many intellectual sources, Locke, Montesquieu, and the English common law remained among the most influential.").

[31] *See Locke's Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (updated Jan. 11, 2016), http://plato.stanford.edu/entries/locke-political/ [hereinafter *Locke's Political Philosophy*].

[32] *See* Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 12–13 (1990).

[33] *See, e.g.*, Dep't of Transp. v. Armacost, 532 A.2d 1056, 1062 (Md. 1987); THE FEDERALIST NO. 85 (Alexander Hamilton); Bergman, *supra* note 32, at 31.

[34] *See* David DeGroot, Note, *The Liberal Tradition and the Constitution: Developing a Coherent Jurisprudence of Parental Rights*, 78 TEX. L. REV. 1287, 1296 (2000).

[35] *See* Katz, *supra* note 26, at 25.

[36] *See Social Origins*, *supra* note 27, at 958.

[37] *See* BAILYN, *supra* note 28, at vii.

[38] *Id.*

[39] *See, e.g.*, Jenkins, *supra* note 30, at 574–75 ("His theories of natural rights, the social contract, and constitutional checks and balances potently combined with radical Whig polemics to fortify the revolutionary rhetoric about fundamental liberties and the threat of tyranny."); *see also* THE FEDERALIST NO. 2 (John Jay) ("Nothing is more certain than the indispensable necessity of government; and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers.").

thought in line with adoption of natural rights.[40] In particular, he discerned three distinct developmental stages in colonial ideology.[41] First, the colonists relied on charter rights.[42] Next, the English constitution guaranteed to its subjects the rights of a free people.[43] And finally, the English constitution indicated that rights existed "as the rights of man in general."[44] A key feature of McIlwain's understanding of the Founders was a belief that "the fundamental law function of the Constitution [is] a limitation on the power of the sovereign over individuals."[45]

In addition to McIlwain's significant assertion of liberalism's impact upon democratic theory, other scholars have sought to reframe the founding period in terms of a Lockean tradition.[46] For example, Steven Dworetz has stated emphatically that, "the Revolutionists formulated and presented their arguments for resistance in the vocabulary, and often in the actual words, of the *Second Treatise* [*of Government*]."[47] For the Founders, Locke's writings created the foundation for "consent, lawful and limited government, toleration, and resistance to tyranny."[48]

Finally, for Joyce Appleby, the development of the free market idea along with the influence of an emulation of small government defines the democratic thinking of the Founders.[49] Much of the perceived influence of liberalism on democratic theory stems from the belief in the energizing capabilities of a liberated political economy.[50] Stated directly, "America's unique economic situation . . . helped explain the bold political experiments of the new nation; [and] made the United States a powerful symbol of reform."[51] To a large extent, the persuasive power of liberalism—for Appleby—stems from the advent of the market economy.[52] Liberalism in America offered "a modern utopia which could garner the loyalties of a broad range of Americans. . . . America was rich with new possibilities."[53]

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[40] *See* Katz, *supra* note 26, at 25.
[41] *See id.*
[42] *See id.*
[43] *See id.*
[44] *Id.*
[45] *Id.* at 26.
[46] *See* STEVEN M. DWORETZ, UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION 56 (1990).
[47] *Id.*
[48] *Id.* at 98.
[49] *The Political Philosophy of Thomas Jefferson, supra* note 27, at 287, 288, 291.
[50] *See id.* at 291.
[51] *Id.*
[52] *See Social Origins*, *supra* note 27, at 958.
[53] *Id.*

This modern utopia was based on the principles espoused by Locke and Montesquieu—in particular:

> The economic theory of England's first liberals offered a language for discussing [the foundation of democratic theory], and the American Revolution created the need for an ideology which could lead men with a good conscience from a defense of the rights of the English to an articulation of the rights of man.[54]

Frequently, Appleby would return to statements made by influential figures in the founding to evoke the draw of liberalism. Quoting John Stevens, she described the Founders' belief in man's ability to govern himself.[55] Importantly, "[t]he microcosm and macrocosm condensed in Stevens' statement is instructive, for the Americans' claim to self-government was both personal and political and rested on the faith that there existed a natural order which began inside the individual."[56] Significantly, self-government encourages the development of a smaller government.[57]

Taken together, the liberal view of democratic theory emphasizes the inherent rights protected by a limited government.[58] A discussion of electioneering and electoral disputes is absent from the writings of Appleby and Dworetz, however, we can glean from their scholarship a sense of how the Founders' would have responded to electoral disputes. By emphasizing self-government and small government, responding to disputed elections would be limited in nature.[59] At the same time, Locke's writings place consent in a central role.[60] But, by permitting "[t]acit consent" to authorize governmental action, Locke undermines the centrality of active consent in government.[61] Thus, Hanna Pitkin has argued, the form and power of government in a Lockean view is determined by natural law.[62] What is important, therefore, "is not previous acts of consent but the quality of the present government, whether it corresponds to what natural law

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[54] *Id.*

[55] *Id.* at 957.

[56] *Id.*

[57] *See id.* at 958.

[58] *See, e.g.*, *Social Origins*, *supra* note 27, at 958; *cf. The Political Philosophy of Thomas Jefferson*, *supra* note 27, at 297 (discussing the development of the protected rights as articulated by the Declaration of Independence).

[59] *See Social Origins*, *supra* note 27, at 957–58; *The Political Philosophy of Thomas Jefferson*, *supra* note 27, at 297.

[60] *See Locke's Political Philosophy*, *supra* note 31.

[61] *Id.*

[62] *See* Hanna Pitkin, *Obligation and Consent—I*, 59 AM. POL. SCI. REV. 990, 994 (1965); *Locke's Political Philosophy*, *supra* note 31.

requires."[63] Permitting fraud and deceit to go unchecked through elections is inconsistent with a properly functioning government—one that would not elicit the consent of the governed. It is unclear, however, whether one disputed congressional race is enough to transition the entirety of government from functional to maligned.

B. An Empire of Liberty

In contrast to the continued celebration of the liberal tradition, other historians have fundamentally challenged the influence of Lockean thinking on the Founders' theory of democracy. In contrast, new scholars emerged that anchored the burgeoning American democracy as sprouting from the rich English intellectual traditions of the Dissenters, radical Whigs, Classical Republicans, or more generally, the Opposition.[64] The two leading figures in movement are Bernard Bailyn and Gordon Wood. Their combined impact on our understanding of the historical ideology leading towards the Revolution and eventual ratification of a Constitution has been profound. Simply stated, "[t]aken together, Wood's and Bailyn's work, mutually reinforcing though not always in detailed agreement with each other, offered a compelling, encompassing interpretation of the nation's founding and the beginning of a distinctive national politics."[65]

1. Bernard Bailyn: Distrust of Centralized Authority

Bernard Bailyn shocked the academy with his "iconoclastic" approach to historical interpretation.[66] In *The Ideological Origins of the American Revolution*, Bailyn traced the ideology of the American resistance movement of the 1760s to the reasoning and rhetoric of the English Opposition.[67] For Bailyn, "the Revolution was a transforming event that triggered a 'critical probing of traditional concepts.'"[68] Through studying pamphlets written during the American Revolution, Bailyn began to view the American Revolution

[63] *Locke's Political Philosophy*, *supra* note 31.

[64] Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49, 51, 54, 64, 69 (1972).

[65] John Howe, *Gordon S. Wood and the Analysis of Political Culture in the American Revolutionary Era*, 44 WM. & MARY Q. 569, 570 (1987).

[66] Thomas A. Spragens, Jr., *Populist Perfectionism: The Other American Liberalism*, *reprinted in* LIBERALISM: OLD AND NEW 141 (Ellen Frankel Paul et. al. eds., 2007).

[67] *See The Political Philosophy of Thomas Jefferson*, *supra* note 27, at 301.

[68] *Id.*

as "above all else an ideological, constitutional, political struggle."[69] Even more so, he found that the intellectual developments in the decades before independence led to a radical idealization of the American experience and endowed the Revolution with intellectual vigor.[70] This made the Revolution a "profoundly . . . transforming event."[71] Bailyn found the reliance upon the liberal natural rights philosophy too limited in scope.[72] Instead, "the fear of a comprehensive conspiracy against liberty throughout the English-speaking world—a conspiracy believed to have been nourished by corruption, and of which, it was felt, oppression in America was only the most immediately visible part—lay at the heart of the Revolutionary movement."[73]

This belief that power is evil, albeit a necessary evil, and must be controlled, limited, and restricted, developed from this obsession of corruption.[74] A significant mistrust of power is an indelible part of the American political ethos. Bailyn believed that "[w]ritten constitutions; the separation of powers; bill of rights; limitations on executives, on legislatures, and courts; restrictions on the right to coerce and wage war—all express the profound distrust of power that lies at the ideological heart of the American Revolution and that has remained with us."[75]

From this concern of centralized power, the transition to a representative republic was clear. Bailyn articulated the reason behind our transformation of the English idea of representation, one based upon virtual representation on a national level, to one in which the people *were* the government.[76] The English model relied upon the notion that "every Member of Parliament sits in the House not as Representative of his own Constituents, but as one of that august Assembly by which all the Commons of *Great Britain* are represented."[77] The American Revolution rejected this. Now, the people were present through their representatives, and were themselves the government.[78]

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[69] BAILYN, *supra* note 28, at vi.

[70] *Id.* at vi–vii.

[71] *Id.* at vii.

[72] *See id.*

[73] *Id.* at ix.

[74] Bernard Bailyn, *The Central Themes of the American Revolution*, *in* ESSAYS ON THE AMERICAN REVOLUTION 26–27 (Stephen G. Kurtz & James H. Hutson eds., 1973).

[75] *Id.*

[76] BAILYN, *supra* note 28, at 173.

[77] PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764-1766, at 21 (Edmund S. Morgan ed., 1959).

[78] *See* BAILYN, *supra* note 28, at 173.

Connecting the rhetoric of the American Revolution to the Opposition in England, Bailyn established that:

> The leaders of the Revolutionary movement were radicals—but they were eighteenth-century radicals concerned, like the eightieth-century English radicals, not with the need to recast the social order nor with the problems of economic inequality and the injustices of stratified societies but with the need to purify a corrupt constitution and fight off the apparent growth of prerogative power.[79]

Disputed elections, in turn, would have been profoundly concerning. If the Founders worried about the growth of abusive power and the need for fairness over bribery, we would expect a comprehensive system to respond to disputed elections. Perhaps the answer lies implicitly in the revolutionary reformulation of representation and consent. If the people are in fact the *government*, "acting in the conduct of public affairs,"[80] then a contested election does not elicit the consent of the people until settled. Bribery and fraud would be equally inconsistent. The fear of corrupt government would never, knowingly, overlook conceptualizing how to address disputed elections.

2. Gordon Wood: The End of Classic Politics

An important elaboration of Bailyn's approach to the Founders' theories of democracy is seen through the writings of Gordon Wood. In *The Creation of the American Republic*, Wood advanced the notion that an American political system developed from the intellectual history of the English dissenters and emergence in a uniquely American form after the Revolution "when Americans abandoned their earlier 'devotion to the transcendent public good' and accepted Madison's brilliant solution to the problem of majority faction."[81] For Wood, the Revolution was also a triggering moment that brought about a fully formed American political identity.[82] That identity was based upon a new understanding of representation, constitutions, and lasting impact of the Anti-Federalists.[83]

For Wood, representation was the heart, sole, and single most

[79] *Id.* at 283.
[80] *Id.* at 173.
[81] *The Political Philosophy of Thomas Jefferson*, *supra* note 27, at 301.
[82] *See* WOOD, *supra* note 23, at 516.
[83] *See id.*

important development of the American Revolution.[84] The Revolutionaries developed a fundamentally new conception of representation. This radical change meant that "[o]nly by profoundly transforming the traditional [character of representation] could Americans explain the conception of federalism [and] the revolutionary idea that the people were equally represented in two or more parts or levels of government at the same time."[85] It is from these notable roots that the modern conception of democracy and politics sprang.[86] These new changes brought about, in Wood's words, "[t]he [e]nd of [c]lassical [p]olitics."[87] The American form of government was a unique creation, "a *representative democracy*."[88] The unique nature of representation defined American. As Madison said, "'the delegation of the government' . . . 'to a small number of citizens elected by the rest'" explained the uniqueness of the system.[89] Moreover, Madison believed that "representation was 'the pivot' on which the whole American system moved."[90] Because of this, every part of the elective government had become representative of the people.[91]

Next, the constitution enshrined the changes fashioned by the Revolution. For the Founders, the Constitution was a "'thing *antecedent* to a government, and a government is only the creature of a constitution.'"[92] Building upon the newly formed understanding of representation, the people were seen as able to craft the constitution.[93] In the people's "hands it is clay . . . they have the right to mould [sic], to preserve, to improve, to refine, and to furnish it as they please."[94] For the first time in history, "the rulers had become the ruled and the ruled the rulers."[95]

History has given a great deal of credit to the Federalists for establishing the modern American republic.[96] To a large extent, Gordon Wood debunked the Federalist myth.[97] First, "[t]he

[84] *See* GORDON S. WOOD, REPRESENTATION IN THE AMERICAN REVOLUTION 1 (1969).
[85] *Id.* at 2.
[86] *See id.*
[87] *Id.* at 69.
[88] *Id.* at 1–2, 70 (emphasis in original).
[89] *Id.* at 71.
[90] *Id.* at 72.
[91] *See id.* at 73.
[92] WOOD, *supra* note 23, at 600.
[93] *See id.* at 601.
[94] *Id.* at 600–01.
[95] *Id.* at 602.
[96] *See, e.g.*, *id.* at 615.
[97] *See id.*

Federalist image of a public good undefinable by factious majorities in small states but somehow capable of formulation by the best men of a large society may have been a chimera."[98] Second, the Federalists' reliance upon their virtue and disinterest in politics was a facade.[99] The Anti-Federalists saw the reliance upon disinterests as a means of foisting a gentry ruling class upon a republican governmental framework.[100] While the Anti-Federalists failed to defeat the ratification of the Constitution, through debate, the Anti-Federalists help transform the early republic.[101] Instead of a "classical republic led by a disinterested enlightened elite, Americans got a democratic marketplace of equally competing individuals with interests to promote."[102]

In this marketplace of democracy, it was clear that individuals with personal interests would seek to maximize their electoral chances. As such, it could come as no surprise the contested elections were likely. Indeed, following the contentious election of 1800, which was resolved by the House of Representatives on the thirty-sixth ballot, it is surprising no comprehensive response to disputed elections was developed.[103]

C. Civic Humanism: J.G.A. Pocock

On this, J.G.A. Pocock and Gordon Wood could agree—the liberal interpretation failed to appreciate the historical influence of republican thinking upon the Founders.[104] Each historian attributes significant influence to various republican figures in England, but strongly disagrees on the lineage of the American political system.[105] For Pocock, the question was whether the American Revolution ought

[98] *Id.* at 615.

[99] *See* Gordon S. Wood, *Interest and Disinterestedness in the Making of the Constitution*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 92–93 (Richard Beeman et al. eds., 1987).

[100] *See id.* at 93.

[101] *See id.* at 102–03.

[102] *Id.* at 103.

[103] *See* Colvin & Foley, *supra* note 6, at 477–78, 480 (noting that the twelfth amendment was created after the election of 1800 but is fatally flawed); *see also* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 284 (2009) ("Over the course of several days in mid-February 1801 the House voted thirty-five times with no majority.").

[104] *See* J.G.A. Pocock, *The Myth of John Locke and the Obsession with Liberalism*, *in* JOHN LOCKE: PAPERS READ AT A CLARK LIBRARY SEMINAR 21, 21 (J.G.A. Pocock & Richard Ashcraft eds., 1980).

[105] *See, e.g.*, *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 523–24 (1975) [hereinafter THE MACHIAVELLIAN MOMENT]; *see also* J.G.A. Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 J. INTERDISC. HIST. 119, 124 (1972) [hereinafter *Virtue and Commerce*].

to be considered as "the last great act of the Renaissance [rather than] the first political act of revolutionary enlightenment."[106] Thus, for Pocock, a consensus developed that neoclassical republican ideology, traceable through Machiavelli to the eighteenth-century English Opposition, underlays the foundation of democracy in America.[107] This fundamentally altered

> [o]ur knowledge of the significance of the Renaissance revival of classical political thought . . . Pocock . . . traced the tangled threads of civic humanism from sixteenth-century Florence through the political clash between the Court and Country parties in eighteenth-century England to what he considers the replay of that conflict in America in the 1790s.[108]

Importantly, Pocock's work fits into the iconoclastic reinterpretation of the Founding Fathers started by Bailyn.[109] In fact, both believed that "[f]rom the English Opposition literature, the colonial gentry had absorbed the classical republican fears about the encroachments of power and were compelled to respond violently to the British tax acts because, in their minds, these acts were portents of tyranny."[110] The learned fear of political corruption forms the basis of both views of democracy.[111]

In this regard, Wood and Pocock agreed that the English opposition played a significant role in advancing the Founders' political philosophy.[112] However, "Pocock has suggested that insufficient attention has been given to the fact that the language and concepts taken from the English Opposition were clearly premodern."[113] Wood believed the American Revolution and ratification of the Constitution was the "'end of classical politics.'"[114] Pocock emphatically disagreed.[115] His interpretation of the historical record, particularly relying upon rhetorical tendencies of the Founders, showed the significant influence classical political thinking had upon the Founders.[116] He disagreed that Wood was able to make his case.[117] Speaking in almost feigned polite terms, Pocock charged that "even

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[106] *Virtue and Commerce*, *supra* note 105, at 120.
[107] *See id.* at 124.
[108] *The Political Philosophy of Thomas Jefferson*, *supra* note 27, at 288–89.
[109] *See Social Origins*, *supra* note 27, at 935.
[110] *Id.* at 936.
[111] *See id.* at 937.
[112] *See id.* at 939, 957.
[113] *Id.* at 952.
[114] *See* THE MACHIAVELLIAN MOMENT, *supra* note 105, at 523–24.
[115] *See id.* at 524.
[116] *See* THE MACHIAVELLIAN MOMENT, *supra* note 105, at 526–27.
[117] *See id.* at 526.

after the wealth of detail with which Wood's, Pole's, and other analyses have explored the thesis of an implicit abandonment of virtue in Federalist theory, we are not faced with a generation who unanimously made this abandonment explicit."[118]

The Founders' premodern influences were clear for Pocock.[119] It was that "the American Revolution and Constitution in some sense form the last act of the civic Renaissance, and . . . the ideas of the civic humanist tradition."[120] The Machiavellian moment in America was a conflict between civic virtue and corruption.[121] The civic humanist tradition of *virtù*, public spirit, was an underpinning of all eighteenth century republican ideology.[122] From Machiavelli's *Discourses*, we learn that individuals displaying *virtù* through devotion to the public interest are the most revered.[123] In describing the greatness of Florence, Soderini is said to have praised "the quality of *virtù* on the part of her leading citizens [which] has served more than anything else to maintain the freedom of the Republic."[124] Echoing Bailyn, it was the rise of corruption that triggered a collective American reaction to cure corruption through *virtù*.[125] In their defense of virtue against corruption, the Americans rejected a parliamentary monarchy in favor of a confederation of republics—"their revolution was a *rinnovazione* [renewal] in exactly the sense intelligible to Savonarola or Machiavelli."[126]

Ultimately for Pocock, the impetus for Revolution and the ratification of the Constitution was the historical conflict between virtue and corruption.[127] Unlike Wood, who viewed the development of American representation as a wholly new creation,[128] Pocock views it as the logical outgrowth of an intellectual community imbued with civic humanistic thought but unable to eradicate corruption from the parliamentary monarchy model.[129] Thus, the representative democracy became a means of adding on additional interests without

[118] *Id.*
[119] *See id.* at 462.
[120] *Id.*
[121] *See id.* at 486.
[122] *See id.* at 462; QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 176 (1978).
[123] *See* SKINNER, *supra* note 122, at 176.
[124] *Id.* at 177.
[125] *See* THE MACHIAVELLIAN MOMENT, *supra* note 105, at 507 ("[O]nce Americans began to talk of corruption, the situation rapidly passed out of intellectual control.").
[126] *Id.* at 516.
[127] *See id.* at 462.
[128] *See* WOOD, *supra* note 85, at 1–2.
[129] *See* THE MACHIAVELLIAN MOMENT, *supra* note 105, at 516.

ever becoming corrupted.[130] This represents not the end of classical politics, but the last great act of Renaissance thinking.

Collectively, Pocock's writings do not directly address disputed elections.[131] As with the other theories of democracy, Pocock's celebration of *virtù* in a representative democracy, and the everlasting conflict with corruption, however, would be expected to guard against election fraud.[132] In fact, Pocock would likely argue that Americans remained attuned to concerns of corruption within government—in many respects this is why Alexander Hamilton's decisions to establish a National Bank and freestanding army were seen with suspicion.[133] Still, the nebulous concern of corruption and the belief that the American system was immune from its malaise provides very little *actual* protection against election fraud. As we will see, corruption retained its place in the American electoral system.

D. The Impact on Disputed Elections

The Founders had a blind spot in implementing their theory of democracy: election administration. It was not just the advent of the political party that was unanticipated by the Founders,[134] but the way in which the political parties would transform the process of electing candidates for office.[135] Ned Foley has written that, "[s]ome, but certainly not all, of that struggle can be attributed to the fact that the Founders were inventing a new kind of federal system, one characterized by the split sovereignty between the states and the national government."[136] This development forced the Founders to wrestle with "federalism issues that simply had not existed before."[137]

In implementing a method of election administration, the Founders built upon a rich tradition from England.[138] Voting in the early republic has been characterized as "'deferential' . . .

[130] *Id.* at 530.

[131] *See* generally Kenneth Sheppard, *J.G.A. Pocock as an Intellectual Historian*, *in* A COMPANION TO INTELLECTUAL HISTORY 114 (Richard Whatmore & Brian Young eds., 2016) (discussing Pocock's seminal works; none of which directly address disputed elections).

[132] *See* THE MACHIAVELLIAN MOMENT, *supra* note 105, at 507.

[133] *See id.* at 528–29.

[134] *See* Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM L. REV. 215, 219 (2000).

[135] *See id.*

[136] FOLEY, *supra* note 16, at 25.

[137] *Id.*

[138] *See* Andrew W. Robertson, *Voting "Rites": The Implication of Deference in Virginia Electioneering Ritual, 1780–1820*, *in* ARTICULATING AMERICA: FASHIONING A NATIONAL POLITICAL CULTURE IN EARLY AMERICA 131, 131 (Rebecca Starr ed., 2000).

electioneering."[139] This process had two key elements: "[c]andidates 'spouted,' or made literate and decorous speeches designed to impress the lower order with their knowledge . . . [and 2] candidates 'courted' voters, wooing them with elaborate flattery delivered either in person or in letters published in newspapers."[140] While listening to the spouting, voters paid overt deference to their social superiors. In return, the candidate would "'cajole, fawn, wheedle'" the audience without promising any specific policy changes.[141]

The electioneering process also made broad allowances for unruly behavior.[142] Close contests might generate insults, intimidation, and brawling—frequently riots would occur when a candidate's supporters would verbally or physically assault their opponent's supporters.[143] The likelihood of resorting to violence was frequently lubricated by copious amounts of liquor.[144] In the congressional contest between John Marshall and John Clopton in 1799, "[l]iquor [was] in abundance . . . . A barrel of whiskey for all, with the head knocked in, and the majority took it straight. Independent of the political excitement, the liquor added fuel to the flame."[145] Out of the haze and excitement of voting, the polling ritual was designed to exert local consensus.[146] The acts of "'[s]pouting' and 'courting' made freeholders feel that they were a valued part of the community."[147]

The historical voting rites and rituals seemed to evoke the need to select the *best* of the community. As such, "[t]hese electioneering rituals thus set out to confer upon a favored candidate the imprimatur of the community."[148] Yet, election administration would change dramatically in the first few decades following ratification of the U.S. Constitution.[149] The historical approach to electioneering was ill-equipped for the advent of political parties in the early republic. For example, from 1795–1799, Virginia—once thought of as a docile one-party state—was "a hotbed of partisan competition in

[139] *See* Andrew W. Robertson, *Voting Rites and Voting Acts: Electioneering Ritual, 1790–1820*, *in* BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC 57–58 (Jeffrey L. Pasley et al. eds., 2004).

[140] *Id.* at 60.

[141] *See id.* at 61.

[142] *See id.*

[143] *See id.*

[144] *See* Robertson, *supra* note 138, at 145.

[145] *Id.*

[146] *See id.* at 146; Robertson, *supra* note 139, at 63

[147] Robertson, *supra* note 139, at 63

[148] *Id.*

[149] *See id.* at 64.

congressional races."[150] This period was marked by the transformation of deferential voting practices towards democratic politics.[151] Indeed, "competitive, partisan, mass-based politics both exploited the old rituals and created new ones to form a more durable sense of party in the electorate."[152] The Founders could not have anticipated such large scale changing in the act of voting. From this omission, it is not unreasonable that in implementing their theory of democracy, the Founders failed to recognize the need to address electoral contests. While voting in the early republic was replete with rioting, drinking, and general disagreement, the community *consistently* came together to grant approval of their designated representative.[153] Party politics would challenge such consensus.[154]

The historical record is clear; the Founders did not seriously consider how elections—particularly for the House of Representatives—would be conducted and resolved.[155] While unanimously agreeing during the Constitutional Convention that Congress would be "the Judge of the Elections, Returns and Qualifications of its own Members,"[156] currently enshrined in Article I, Section 5 of the U.S. Constitution,[157] this provision failed to include specific rules and principles for Congress to apply when judging elections and returns.[158] This provision was barely discussed during the Constitutional Convention.[159] This left each chamber responsible for devising these crucial rules without much guidance. Ned Foley has observed, "[a]lmost immediately, the task proved more of a challenge than had been anticipated."[160]

In particular, by agreeing to vest Congress with the power to determine the member qualifications and the manner of electioneering, the Founders delegated a significant degree of authority not only to Congress, but also the states.[161] There was significant concern that the state legislatures would manipulate the

[150] *See id.* at 66.
[151] *See id.* at 64.
[152] *Id.*
[153] *See* Robertson, *supra* note 138, at 145–46.
[154] *See* Robertson, *supra* note 139, at 66.
[155] Jack N. Rakove, *The Structure of Politics at the Accession of George Washington*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 269 (Richard Beeman et al. eds., 1987) ("Nor can it be said that the framers seriously considered just how elections for the House of Representatives were to be conducted.").
[156] U.S. CONST. art. I, § 5, cl.1.
[157] *Id.*
[158] *See id.*
[159] *See* FOLEY, *supra* note 16, at 33.
[160] *Id.*
[161] *See* Rakove, *supra* note 155, at 269.

electoral process.[162] Even with this fear, the states were given significant latitude in administering elections.[163] As Madison himself opined:

> Whether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district; these and many other points would depend on the Legislatures, and might materially affect the appointments.[164]

This was a surprising federal abdication. Madison believed the manner in which congressmen were to be elected was a critical element in a fully functioning democracy—he once described ballot voting as "'the only radical cure for those arts of Electioneering which poison the very fountain of Liberty.'"[165] When, in 1788, states began adopting a variety of procedures for electing representatives—which included not only district and statewide selection but also hybrid elections where electors voted statewide for particular districts—Madison admitted that he believed state experimentation was beneficial.[166] This diversity of electoral methods, however, may have represented "nascent partisanship rather than neutral principles of good government."[167]

State constitutions also served as a backdrop to the Federal Constitution, and these varied significantly.[168] For example, the qualifications for voting differed in each state.[169] For example, "Massachusetts in 1780 was the one state to raise the level of its qualification for state elections—from £40 to £60 of personal property, while the freehold alternative increased from £2 to £3 annual value."[170] Suffrage was predominately limited to landowning,

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[162] *See id.*

[163] *See id.*

[164] *Id.*

[165] *Id.*

[166] *Id.* at 270 ("'It is perhaps to be desired that various modes should be tried, as by that means only the best mode can be ascertained.'").

[167] *See* FOLEY, *supra* note 16, at 34 (observing that Virginia's first congressional election involved Patrick Henry's manipulation of the legislative districts to pit James Madison against James Monroe; with the unsuccessful hope of seating Monroe over Madison); MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 557 (2016).

[168] *See* Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, J. EARLY REPUBLIC, Summer 2013, at 231.

[169] *See id.* at 223–28.

[170] *Id.* at 228.

white males.[171] And overall, the election landscape was mired in complexity built upon decades of independent development and varying divergence from different British models.[172]

Instead of focusing on developing clear standards for resolving disputes as authorized by Article I, Section 5, the most contentious debate over election administration during the Constitutional Convention and the ratification process was the provision—now Article I, Section 4— which provides Congress the authority to "make or alter" the "[t]ime[], [p]lace[] and [m]anner" of federal elections.[173]

For the Founders, particularly during the Federal Constitutional Convention, the primary concern was informing the discussions of federal elections in Article I was the risk of uncooperative states.[174] For example, Alexander Hamilton noted that by providing states the authority to run congressional election, under Article I, Section 4, "risk[ed] 'leaving the existence of the Union entirely at their mercy.'"[175] Following the failings of the Articles of Confederation, the Founders looked for processes that would insulate Congress from recalcitrant states.[176] Indeed, "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation[,]" and that "the Clause 'was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.'"[177]

The primary concern, expressed by the Anti-Federalists during the ratifying conventions, was that Congress would aggrandize its power over the states.[178] For example, in a letter, John Quincy Adams feared that this "trivial [provision would became a] very dangerous instrument in the hands of such a powerful body of men."[179] The Federalists defended the provision as an important tool in preserving the federal government and to limit state legislatures from electoral

[171] *See, e.g.*, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 125 (2014) (discussing state variation in suffrage based on residency, sex, race, religion, and property interests); *cf.* HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, & THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 40, 41, 42, 43, 44 (2005) (discussing the requirements for voting in the seventeenth and eighteenth centuries in England and the American colonies through the revolution, which typically included a property requirement).

[172] *See* Ratcliffe, *supra* note 168, at 221, 222.

[173] U.S. CONST. art. I, § 4; *see* KLARMAN, *supra* note 167, at 340–41.

[174] *See* THE FEDERALIST NO. 59, at 330–31 (Alexander Hamilton).

[175] Manheim, *supra* note 8, at 368.

[176] *See id*.

[177] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2672 (2015) (citations omitted).

[178] *See* THE FEDERALIST NO. 60, at 334 (Alexander Hamilton).

[179] KLARMAN, *supra* note 167, at 341.

chicanery, such as malapportionment.[180] In part, these fears stemmed from the belief that Rhode Island, in 1787, had intentionally withheld its congressional delegation, which scuttled a sizeable sale of western land.[181]

The extensive debate over Congress' revisionary powers, under Article I, Section 4, starkly contrasts with the paucity of debate over its power to judge the elections, returns, and qualifications of its members.[182] Each of the theories of democracy attributed to the Founders by contemporary historians, however, *would* have been concerned with developing a method of peacefully resolving disputed elections. The liberal interpretation's reliance upon consent, Bailyn and Wood's attributed distrust of centralized authority, and Pocock's reliance upon *virtú* analytically echo similar concerns about the prevalence of electoral tampering, fraud, and the consequences of a prolonged vote counting dispute on the health of a representative democracy.

Just as contemporary historians have divergent views upon the theoretical underpinnings of the Revolutionary period; so too did the Founders. Specifically in the context of election administration, these disagreements fell along a familiar fault line: Hamilton and Madison.[183] Hamilton espoused a particularly pragmatic view of election administration: An electoral system is healthy when a candidate overwhelmingly chosen by the voters is elected, and failing when he is "counted out" through electoral trickery.[184] Conversely, Madison believed that the system should provide an accurate count.[185] These competing perspectives—implementing a system that produces the correct result in most cases compared to a fair count—may help to explain the Founders' failure to adequately implement a system to resolve disputed elections. Lacking a shared sense of what method to use to resolve vote-counting disputes represented a larger disagreement over how to approach these challenging issues and which was more consistent with republican ideals: the pragmatic or idealistic approach.

To test how the Founders responded to disputed elections, and the supposition that their implementation of their own theories of democracy omitted electoral disputes, the next section will review

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[180] *See id.* at 342.
[181] *See id.*
[182] *See* THE FEDERALIST NO. 60, 339 (Alexander Hamilton).
[183] *See* FOLEY, *supra* note 16, at 23.
[184] *Id.* at 22.
[185] *Id.* at 23, 24.

early contested elections for the United States House of Representatives immediately following ratification of the U.S. Constitution.

III. DISPUTED U.S. HOUSE OF REPRESENTATIVE ELECTIONS

Frequently, the founding period is discussed in bucolic terms—stating the omnipresence of the Founders and their unassailably perfect formation of the early republic's governing structure.[186] There exists a belief that the founding era was devoid of partisan political activities.[187] This is unsubstantiated by the historical record.[188] This glorified perception of the founding era bleeds over to the administration of elections as well. But, "[a]s the framers of the federal Constitution struggled over the complex details of creating a government, their concept of voting was rather limited."[189] This omission is typified by President George Washington's ardent belief that "[t]he exercise of this right of election seems to be so regulated as to afford less opportunity for corruption and influence; and more for stability and system than . . . has usually been incident of popular governments."[190]

A. Resolving Contested House Elections During the Founding

Initially, following the convention of the First Congress, the U.S. House of Representatives authorized one of the first standing committees—the Committee on Elections—to develop procedures for adjudicated contests as authorized under Article I, Section 5 of the U.S. Constitution.[191] Jenkins has described these early processes as providing the Committee on Elections a "strictly clerical role, wherein [the Committee] would collect all available [information] and report it back to the chamber, so that the membership might decide [the

[186] Christopher J. Parosa, Comment, *Federalism: Finding Meaning Through Historical Analysis*, 82 OR. L. REV. 119, 121 (2003).

[187] Jeffrey L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, *in* SEEKING JUSTICE AND INFLUENCING CONGRESS IN THE 1790S 57, 66 (Kenneth R. Bowling & Donald R. Kennon eds., 2002).

[188] In fact, both the advent of political parties and lobbying practices pre-date the ratification of the Constitution. *Id.* at 66, 99 ("We should not romanticize or whitewash the political culture of the Founding Era.").

[189] CAMPBELL, *supra* note 15, at 10.

[190] *Presidential Addresses (1789-1796)*, *in* GEORGE WASHINGTON: A COLLECTION 445, 448 (William B. Allen ed., 1988).

[191] Jenkins, *supra* note 8, at 112–13.

contest] on its merits."[192] This included reporting back both facts and evidence.[193] During the Second Congress, however, the House expanded the Committee's authority.[194] No longer would they serve a clerical role; instead, the Committee would—in addition to reporting back facts and evidence—provide a recommendation on the contested election.[195] This recommendation would state whether "the House should rule in favor of the contestant (the individual contesting, or disputing, the election), [or] the contestee (the individual holding the election certificate, who was typically seated), or neither (in which case the recommendation would be that the election, and the seat, [should] be vacated)."[196] Imbued with this new-found authority, the Committee attempted to develop and adopt informal procedures for developing facts and evidence, such as through the taking of testimony.[197]

The informal and irregular nature of the procedures developed by the Committee on Elections led to both conflict and a desire to refine the procedures.[198] While "[a]ttempts to establish legal precedents for the settlement of contested elections date from the recommendations of the Ames Committee in 1791,"[199] these attempts failed to reform the procedures in 1791, 1796, and 1797.[200] Finally, "[i]n 1798 a law was enacted proscribing a uniform mode of taking testimony and for compelling the attendance of witnesses."[201] The law, however, required each subsequent Congress to reauthorize the procedures.[202] Unfortunately, the law lapsed in 1804.[203] Similar bills were introduced in 1806, 1810, 1813, and 1830, but we not passed.[204] Finally, in 1851, more formal rules governing taking and gathering testimony was imposed, yet, "other aspects of contested elections" remained unresolved.[205] This meant that resolving contested elections was "a constant struggle," particularly because the first

[192] *Id.* at 113–14.
[193] *Id.* at 114
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 144, 163 (1968).
[200] *See* Jenkins, *supra* note 8, at 114.
[201] Polsby, *supra* note 199, at 163.
[202] *See id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*

compilation of contested elections "was not published until 1834."[206]

B. Methodology

It is this proposition—that the Founders' framework established by the Constitution, implementing their theory of democracy, rendered elections "less opportunity for corruption and influence,"[207] that can be tested. If the framework truly insulated elections against corruption and influence, then the process selected would adequately resolve contested elections. To discern how the founding era responded to contested elections, reviewing disputed congressional elections (for the United States House of Representatives) will illuminate the various processes in place for governing electioneering.

In turn, this will shed light on how the Founders implemented the system of government, an extension of their theories of democracy. The House of Representatives is a particularly apt sample because it is commonly known as the "'People's House.'"[208] Moreover, "the members of the houses of representatives were perhaps the more 'immediate representatives'" of the people.[209] Concerned with representation and consent, the Founders' theory of democracy plays out through the political body designated to legislate the will of the American people.[210]

The method of analyzing how the Founders' theory of democracy addressed contested elections will be to review three geographically diverse contested congressional elections—all within the first decade after the ratification of the Constitution—during the Second and Third Congresses. This decade was particularly active in addressing contested elections, with sixteen petitions filed in the House to contest an election.[211] The disputes ranged from challenges to the eligibility of members to fraud, bribery, and deceit.[212] Three of these disputes—all relating to challenges of bribery or electoral tampering—will be reviewed in chronological order to control for the

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[206] Jenkins, *supra* note 8, at 114, 114 n.17.

[207] *Presidential Addresses (1789-1796)*, *supra* note 190, at 448.

[208] REMINI, *supra* note 23, at 1 ("It has been said many times that the United States House of Representatives is the 'People's House,' and as such it has endured for more than two centuries.").

[209] WOOD, *supra* note 85, at 64.

[210] *See id*. at 16, 21, 62.

[211] *See* CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEARS 1789 TO 1834, INCLUSIVE 118, 119 (M. St. Clair Clarke & David A. Hall eds., 1834) [hereinafter CASES OF CONTESTED ELECTIONS].

[212] *See id*. at 23, 47, 118.

evolution in democratic thinking on electoral issues beginning with: (1) James Jackson v. Anthony Wayne of Georgia in 1791,[213] (2) Henry K. Van. Rensselaer v. John E. Van Allen of New York in 1793,[214] and (3) Abraham Trigg v. Francis Preston of Virginia in 1793.[215] In addition to applying the principles discerned from contemporary historians, these contested elections will be reviewed against a backdrop of elections within each state at or around the time of the contested election.

C. Contested Congressional Elections: 1790–1800

1. Jackson v. Wayne

The 1791 election for Georgia's lower district pitted two storied Revolutionary War generals in a hotly contested race.[216] The incumbent James Jackson had won handedly in 1789[217] and was able to rely upon his reputation for vicious combat in the South Theater during the Revolutionary War.[218] His opponent was equally renowned. *Mad* Anthony Wayne, the challenger, was renowned for his service in Washington's Army at the Battle of Monmouth and later fought in Georgia.[219] He received a significant a land tract from Georgia, where he moved and served as a delegate to the state's Constitutional ratification convention.[220] These men had once been friends, they were even seen touring the state with General Washington,[221] but Wayne's ambition caused him to seek the seat.[222] This was also one of the earlier contests between the emerging

[213] *See id.* at 47.

[214] *Id.* at 73.

[215] *Id.* at 78.

[216] FOLEY, *supra* note 16, at 40.

[217] *See* MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788–1997, at 1 (1998). Jackson won over fifty percent of the vote with his opponents eking out thirty-three percent and fourteen percent respectively. *Id.* The election was conducted at-large, meaning that Georgia's members had to reside in specific districts but each voter cast three votes—one for each district—the statewide totals determined who then was elected. *Id.* at 3.

[218] Rakove, *supra* note 155, at 277; *See also* FOLEY, *supra* note 16, at 40 (describing how Jackson helped recapture Augusta and Savannah during the War).

[219] *General Anthony Wayne*, USHISTORY.ORG, http://www.ushistory.org/paoli/history/wayne.htm (last visited Jan. 2, 2018).

[220] *Anthony Wayne Family Papers 1681-1913*, WILLIAM L. CLEMENTS LIBR., https://quod.lib.umich.edu/c/clementsmss/umich-wcl-M-398way?byte=6516185;focusrgn=bioghist;subview=standard;view=reslist (last visited Jan. 2, 2018).

[221] *General Washington Visits Savannah*, S.C. INDEP. GAZETTE AND GEO. CHRON., June 4, 1791, at 3.

[222] FOLEY, *supra* note 16, at 40–41.

political parties.[223] Jackson was seen as an enemy of the administration and a member of the proto-Democratic-Republican party.[224] General Wayne staked his allegiance with the proto-Federalists.[225]

The election was close, very close. The Georgia legislature certified Wayne's victory by only twenty-one votes.[226] The official collection of congressional returns, however, had Wayne winning by a mere *five* votes.[227] Immediately, Jackson began alleging corruption and fraud on the part of Wayne and his supporters.[228] Finally, Jackson petitioned the House of Representatives to review the election.[229] In his petition, General Jackson alleged that (1) there were nine more votes cast than eligible voters,[230] (2) that in Camden county, only twenty-five votes had actually been cast, but the return showed an additional sixty-four—all of which were cast for General Wayne,[231] (3) while the rest of the state suffered from low voter turnout, every elector voted in this county,[232] and (4) two of the three required magistrates presiding over the election were not actually magistrates.[233]

Appearing before the Committee on Elections, General Jackson represented himself.[234] He made an inspired plea to the Committee to not permit such fraud and abuse go unpunished.[235] Turning towards the heritage of the Revolution, he remarked that:

> [T]he right of representation was what America fought for, [for] seven long years, for which so many States were desolated, and for which so many heroes fell. Yet, strange as it might appear, scarce half a score of years had passed away ere this right had been violated and trampled on; trampled on

[223] *Id.* at 41.
[224] *See id.*
[225] *Id.*
[226] *Id.*
[227] DUBIN, *supra* note 217, at 4.
[228] *Jackson Alleges Bribery*, FED. GAZETTE & PHILA. DAILY ADVERTISER, Aug. 31, 1791, at 3 ("General Jackson is canvassing the election of General Wayne. Mr. Jackson has published a number of affidavits, to shew that bribery and false returns were among the expedients adopted to carry the election against him.").
[229] *The Petition of James Jackson*, FED. GAZETTE & PHILA. DAILY ADVERTISER, Nov. 11, 1791, at 3; CASES OF CONTESTED ELECTIONS, *supra* note 211, at 47.
[230] CASES OF CONTESTED ELECTIONS, *supra* note 211, at 47. The falsified returns showed eighty-nine votes case in the county when only eighty-one males were eligible to vote. FOLEY, *supra* note 16, at 41.
[231] CASES OF CONTESTED ELECTIONS, *supra* note 211, at 47; FOLEY, *supra* note 16, at 41.
[232] FOLEY, *supra* note 16, at 41.
[233] CASES OF CONTESTED ELECTIONS, *supra* note 211, at 47
[234] *Id.* at 50; FOLEY, *supra* note 16, at 41.
[235] FOLEY, *supra* note 16, at 41.

> ere the blood of our fellow-citizens, . . . whilst the vestiges of the revolutionary war were still exposed to every eye.[236]

In his conclusion, General Jackson built upon the legacy of the Revolution and spoke to the democratic character of the government forged through this conflict.[237] Particularly, General Jackson evoked the idea that the People are the government and that:

> [T]he only safety to the People, is in their free elections of members to represent them. If elections are pure and free, the People are free; but if the elections are corrupt—I beg pardon of the House—but this honourable House must be corrupt likewise.[238]

In the end, the House determined that General Wayne's actions were corrupt and he was stripped of his seat.[239] This result, however, did not entitle General Jackson to serve in Congress.[240] Instead, the House divided 29–29 on the question of whether to seat General Jackson.[241] Unsurprisingly, this cut along party lines. The twenty-nine favorable votes for Jackson were predominately proto-Democratic-Republican voters.[242] Twenty-seven of the twenty-nine votes against him were "proto-Federalist."[243] Ultimately, the Speaker of the House's tiebreaking vote against Jackson conformed to this party split—he was aligned with the proto-Federalists.[244]

There is reason to believe that the decision may have been based more upon principle. Some members argued that they were only enabled to seat members who the Governor certified received the most votes.[245] James Madison disagreed with this proposition and felt that the law entitled the winner of the most *legitimate* votes to the seat.[246] Regardless, the framework for determining the seating

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[236] CASES OF CONTESTED ELECTION, *supra* note 211, at 51.

[237] *Id*. at 51–52; 3 JAMES HERRING & JAMES B. LONGACRE, AM. ACAD. OF THE FINE ARTS, THE NATIONAL PORTRAIT GALLERY OF DISTINGUISHED AMERICANS 8 (1836) [hereinafter HERRING & LONGACRE].

[238] FOLEY, *supra* note 16, at 42.

[239] CASES OF CONTESTED ELECTIONS, *supra* note 211, at 49–50; FOLEY, *supra* note 16, at 42; *see also* HERRING & LONGACRE *supra* note 237, at 8.

[240] *See* FOLEY, *supra* note 16, at 42.

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *See id.* ("The business before the House was not to take cognizance of Mr. Jackson's right to [the] seat, it had been no more than to investigate the legality of Mr. Wayne's seat, which was now decided in the negative.").

[246] *Id.* at 43; *but see* David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U.L. REV. 606, 615 n.47 (1996) ("Since there was apparently no way of knowing which candidate would have won an untainted election, there is much to be said for

of members after a dispute had not been developed.[247] Thus, following the Committee's decision, a Special Election was held for the seat.[248] John Milledge would eventually be declared the winner and sat in the Second Congress.[249]

After the dispute, each of the two men went in different directions. General Jackson was elected to the United States Senate in 1793 and would go on to become the Governor of Georgia.[250] General Wayne did not suffer too long from his botched attempt to steal the election. Instead, President Washington appointed him commander of the Legion of the United States (U.S. Army) and he regained his fame by leading a crushing defeat of the various Indian forces at the Battle of Fallen Timbers.[251]

So, what does the Jackson v. Wayne dispute indicate about the Founders' understanding of disputed elections? To begin, the Framers did establish a mechanism to address contested elections—the Committee on Elections.[252] The Committee was established as the first standing Committee of the House of Representatives.[253] The first rules adopted by the Committee delineated its purpose and jurisdiction.[254] Specifically, the rules stated that the Committee will "consist of seven members," and that

> it shall be the duty of the said committee to examine and report upon the certificates of election, or other credentials of the members returned to serve in this House, and to take into their consideration all such matters as shall or may come in question, and be referred to them by the House, touching returns and elections, and to report their proceedings, with their opinion thereupon, to the House.[255]

This seems to suggest the Framers were concerned with the consequences of disputed elections.[256] As has been established above,

this outcome [of a new election, instead of allowing Jackson to take the seat].").

[247] Currie, *supra* note 246, at 615 n.47.

[248] *See id.*; *see also,* Dirk Langeveld, *Henry Osborne: Two Scandals, Twice Removed*, THE DOWNFALL DICTIONARY (Jan. 7, 2009), http://downfalldictionary.blogspot.com/2009/01/henry-osborne-two-scandals-twice.html.

[249] Langeveld, *supra* note 248.

[250] *Jackson, James, (1757-1806)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000017 (last visited Jan. 2, 2018).

[251] 1 JOSEPH R. CONLIN, THE AMERICAN PAST: A SURVEY OF AMERICAN HISTORY, 189, 191 (Ann West et al. eds., 9th ed. 2010).

[252] 1 ANNALS OF THE CONG., 127–28 (Joseph Gales ed., 1834).

[253] *See id.* at 127.

[254] *Id.*

[255] *Id.*

[256] *See id.*

however, the Founders did not take an active role in coordinating the procedure of voting among the several states. Rather, states such as Georgia could establish a hybrid at-large voting process.[257] In turn, this process permitted General Wayne the opportunity to stuff the ballot box.[258] Additionally, the members of the House were unsure about their authority to grant Jackson the seat stolen from him.[259] Ultimately, the entire process of adjudicating electoral disputes was mired in confusion.[260] And, General Wayne faced no consequences from his alleged fraud—instead he reestablished his heroic status (at least to some) during the Battle of Fallen Timbers.[261] Even with the election clearly stolen from him, General Jackson did not take the seat.[262] A special election was called and John Milledge represented the residents of the lower district of Georgia.[263] While both he and General Jackson aligned with the proto-Democratic-Republican party,[264] this special election was an unnecessary exercise.

What is even more interesting about the extended debate before the House was General Jackson's reliance upon themes from the Revolution—such as consent and corruption.[265] Under the theory of democracy espoused by Bailyn, the result of the dispute reinforces the American resentment of corrupting influence.[266] Yet, this undercuts the Madisonian idea that American democracy could continue to add additional interests without becoming corrupt.[267] Wood likely would have appreciated the appeal to the conceptualization of the entire House (and thus the People) as being corrupted if this fraud was condoned.[268] And Pocock would exclaim his correctness in assigning the on-going tension between virtue and corruption as an enduring trend in American democracy.[269]

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[257] *See* Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 B.Y.U. L. REV. 1523, 1565 (2012).

[258] *See* CASES OF CONTESTED ELECTIONS, *supra* note 211, at 47.

[259] *See* Currie, *supra* note 246, at 615 n.47.

[260] *See id.*

[261] *See* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 903, 906–07 (2017); *see also* CONLIN, *supra* note 251, at 189, 191.

[262] *See* CASES OF CONTESTED ELECTIONS, *supra* note 211, at 65, 68.

[263] *See* Barton Myers, *John Milledge (1757-1818)*, NEW GA. ENCYCLOPEDIA (Mar. 24, 2006), http://www.georgiaencyclopedia.org/articles/government-politics/john-milledge-1757-1818.

[264] *See id.*; *see also, James*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, ht tp://history.house.gov/People/Listing/J/JACKSON,-James-(J000017)/ (last visited Jan. 2, 2018).

[265] *See* CASES OF CONTESTED ELECTIONS, *supra* note 211, at 51, 55–56.

[266] *See* BAILYN, *supra* note 28, at 55, 56, 57–59.

[267] *See, e.g.*, THE FEDERALIST No. 10, at 49 (James Madison).

[268] *See* WOOD, *supra* note 85, at 113.

[269] *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 350–51 (2009).

Importantly, none of these responses articulates how to avoid the continuation of corruption in elections. Instead, each theory dissects the cause, bemoans the consequences, but never seeks the *cure* for contested elections.

This is incredibly important because Georgia's elections were relatively open. As of 1789, Georgia permitted all property paying white males the opportunity to vote.[270] While this conception of suffrage is restrictive in excluding African-Americans and women, it was at the time a progressive approach.[271] Moreover, actual voting indicates that approximately ninety percent of property-owning males in Georgia were eligible to vote.[272] The difference can be attributed to "light, compulsory poll taxes which transformed the taxpaying requirement into a broad adult white male suffrage."[273]

For example, a similar law in North Carolina, enfranchised all adult males via such a poll tax, with the exception of "sons living under the paternal roof, apprentices, slaves, and indentured servants.'"[274] Thus, in the midst of a state open to the conception of (limited) universal suffrage, the prospect of electoral fraud became a consuming concern.[275] In many ways, increased suffrage reduced the power of landed elites.[276] To win an election, a candidate now needed widespread support or *alternative* strategies to receive votes.[277] Ultimately, the outbreak of partisan electoral fraud and universal suffrage represented the worst and best republican outcomes from the Revolutionary Era.[278]

2. Van Rensselaer v. Van Alen

This 1793 contested election in New York was between the old and the new America: Henry K. Van Rensselaer was a Revolutionary War hero and scion of a powerful political family in New York[279] while

[270] *See* Ratcliffe, *supra* note 168, at 231–32 (2013).

[271] *See id.* at 231.

[272] *Id.* at 230 ("[Robert Dinkins'] tabulation places six states at around 90 percent (New Hampshire, New Jersey, Pennsylvania, North Carolina, and Georgia).").

[273] *Id.* at 227.

[274] *See id.*

[275] *See id.* at 233, 242.

[276] *Id.* at 254.

[277] *See id.* at 242.

[278] *See id.* at 243.

[279] *See* 1 CATHARINA V. R. BONNEY, A LEGACY OF HISTORICAL GLEANINGS 58–59, 61–65 (1875); *see Van Rensselaer Family Papers, ca.1686-1964*, N.Y. ST. LIBR., http://www.nysl.nysed.gov/msscfa/sc23282.htm (last visited Jan. 2, 2018). In fact, one of the counties in the contested district was named after his family. Tracking down the origin of Henry K. Van Rensselaer is not easy. While the Van Rensselaer family was a prominent family at the time,

John Van Alen was a surveyor and merchant.[280] At the time, Van Rensselaer had made a name for himself not only as a war hero, but also as a county judge.[281] The official return count placed Van Allen 295 votes ahead of Van Rensselaer (1,165 to 870).[282] Subsequently, Van Rensselaer alleged a number of electoral irregularities that called into question the legitimacy of the outcome.[283] In his petition, Van Rensselaer alleged that, (1) "[m]ore votes [were] actually given than were computed by the inspectors," (2) the "[b]allot box [was] not locked," (3) the "[b]allot box [was taken] in[to the] custody of a person not authorized by law to take charge of it."[284]

The discussion before the Committee on Elections turned on the requisite degree of voting irregularity necessary to void an election.[285] According to Representative Lea, "corruption in elections [is] the door at which corruption . . . creeps into the House."[286] Indeed, while there appeared to have been voting irregularities, the question truly became "not whether corruption generally should vitiate an election, but what quantum should be sufficient for that purpose."[287] This required a discussion of whether votes were lawfully rejected, but it was quickly curtailed due to the belief that such evidence would be outside the scope of the House.[288] In fact, during much of its analysis, the Committee felt it needed to review the legality of rejecting votes under New York law.[289] The Committee concluded that "the House of Representatives would never institute an inquiry into such a

the name Henry was popular in the family. Various reports put his name as Hendrick, Henry J. and Henry I. Van Rensselaer. *See* JOHN L. BROOKE, COLUMBIA RISING: CIVIL LIFE ON THE UPPER HUDSON FROM THE REVOLUTION TO THE AGE OF JACKSON 177, 189, 626 (2010); *see also Henry I. Van Rensselaer*, N.Y. ST. LIBR., http://www.nysl.nysed.gov/msscfa/sc5985.htm (last visited Jan. 2, 2018); *see also Van Rensselaer (Rensselaerwyck) Manor Records, 1630–1899*, N.Y. ST. LIBR., http://www.nysl.nysed.gov/msscfa/sc7079.htm (last visited Jan. 2, 2018). In fact, the year before, Henry's cousin Stephen Van Rensselaer played a prominent role in the disputed New York gubernatorial election. Stephen Van Rensselaer, who was John Jay's running mate for Lt. Governor, used his authority to retain a local sheriff—who handled and delivered the ballots to the secretary of state—because he was a Federalist and the next sheriff was not. Seizing on this, the canvassing committee decided to disqualify the entire county's votes; which would have thrown the election to Clinton. *See* FOLEY, *supra* note 16, at 55–56.

[280] Jim Greenfield, *Our Most Famous Citizen*, NORTH GREENBUSH NOTES, http://www.townofng.com/wp-content/uploads/2013/03/NGN_20061128_JohnEVanAlen.pdf (last visited Jan. 2, 2018).

[281] BROOKE, *supra* note 279, at 69.

[282] DUBIN, *supra* note 217, at 7.

[283] *See* CASES OF CONTESTED ELECTIONS, *supra* note 211, at 73.

[284] *Id.*

[285] *Id.* at 75.

[286] *Id.*

[287] *Id.*

[288] *See id.* at 76.

[289] *See id.*

species of evidence."[290] Moreover, some members of the Committee felt it needed to determine whether disputes in two out of the ten towns in the district was sufficient to void the election.[291] In the end, the Committee felt the allegations of fraud and tampering did not rise to the level of irregularity to void the election.[292] With so many conflict viewpoints on how to resolve the case, very little guidance for future disputes was developed.[293]

What is to be made of the decision that ballot tampering and voter suppression did not rise to the level of *irregularity* to vitiate the election? The statements made by Representative Lea, focusing on the role corruption plays in undermining the legitimacy of the House, evoke both Bailyn and Pocock's concerns.[294] To a greater degree, Wood's emphasis on the legitimacy of representation is significantly undercut by admitting a member without fully reviewing claims of serious vote tampering.[295] Significantly, if the American democratic system is built upon a foundation of representational democracy, it must envision an active role of the government or the people to ensure that electoral corruption is prevented. Under the system created, there was not even a significant post hoc review.[296]

Early republic New York was a dynamic arena for the development of partisan politics.[297] Candidates in New York "that were determined to win had little scruple in encouraging the unqualified to vote, . . . for example, by . . . encouraging aliens to vote."[298] New York then restricted voter eligibility,[299] but "even conservative Federalist landlords encouraged tenants to vote, paying their traveling expenses and offering financial inducements to vote appropriately."[300] This was a system built upon corrupting the electoral process.

Specifically, Columbia and Rensselaer Counties were seats of factionalism in the early republic.[301] In fact, "in the wake of the Revolutionary [W]ar, the civil geography of the upper Hudson Valley

[290] *Id.*
[291] *Id.*
[292] *Id.* at 77.
[293] *See id.* at 73–74.
[294] *See, e.g.*, Teachout, *supra* note 269, at 348.
[295] *Cf.* Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J. L. & POL. 189, 303 (2014) (discussing Wood's philosophy).
[296] *See* Manheim, *supra* note 8, at 361.
[297] *See* Ratcliffe, *supra* note 168, at 242.
[298] *Id.*
[299] *See id.*
[300] *Id.*
[301] *See* BROOKE, *supra* note 279, at 65, 108.

was the subject of a complex political game of chess."[302] The first congressional election brought about new procedures for selecting and nominating candidates, with publicized nominating meetings at prominent locations, elected chairs and secretaries of the county committees, and lists of committee members who would support candidates.[303] Still, "[o]ff-year elections . . . retained the limited and opaque form of the traditional nomination. . . . Behind the scenes the gentry struggled to shape the lists to suit their interests."[304] In this scene, the Van Rensselaer family remained important Federalist players.[305] During this period, however, the county began to transform from a Federalist bastion to an Anti-Federalist stronghold.[306] The turning point was the Clinton-Jay gubernatorial election.[307] Afterwards, coalitions of Anti-Federalists supporters continued to support candidate lists full of Republican members to keep the Van Rensselaer clan "at bay."[308]

According to lore, the Van Rensselaer family's thirst for power was nearly unquenchable.[309] While many of the rejected ballots seemed, *prima facie*, to have been legally rejected,[310] Henry K. Van Rensselaer nevertheless brought the dispute before the House of Representatives.[311] In fact, he submitted a piece to the *Albany Gazette* to defend his decision to do so.[312] His challenge was unsuccessful.[313] As is often said, "like father like son." This, too, was true for the Van Rensselaers. During an 1807 election campaign in Albany, New York, an Anti-Federalist meeting issued a resolution questioning the integrity of Solomon Van Rensselaer (Henry's son), a prominent Federalist.[314] It seems that *going negative* is not a recent phenomenon. In response, Van Rensselaer sought out the author, "beat him with a heavy cane, and then stomped on him with his

[302] *Id.* at 65.
[303] *See id.* at 108.
[304] *Id.*
[305] *See id.* at 203.
[306] *See id.* at 205–06.
[307] *See id.* at 205 ("Paradoxically, in a year when the state of New York stood on the verge of constitutional crisis, deeply divided on the issue of the Otsego ballots for governor, Columbia County crossed the boundary between the crisis politics of the revolutionary settlement and the routine politics of interest and development.").
[308] *Id.* at 203–04.
[309] *See* W.W. Spooner, *The Van Rensselaer Family*, AM. HIST. MAG., Jan. 1907, at 1–3.
[310] CASES OF CONTESTED ELECTIONS, *supra* note 211, at 76.
[311] *Id.* at 73.
[312] *To the Freeholders and Inhabitants of the Counties of Rensselaer and Clinton*, ALBANY GAZETTE, Jan. 9, 1794, at 2.
[313] CASES OF CONTESTED ELECTIONS, *supra* note 211, at 77.
[314] WOOD, *supra* note 103, at 334.

feet."[315] Partisans from each side joined the fray, turning Albany into "'a tumultuous *sea of heads*, over which clattered a forest of canes; the vast body, now surging this way, now that, as the tide of combat ebbed and flowed.'"[316] That was the Van Rensselaer way.

3. Trigg v. Preston

Unlike the last two disputed elections, this decision was not determined by voter irregularity or stuffing the ballot box. Instead, the question was simply, "whether the presence of a part of the military force of the United States, and what acts of theirs, will vitiate an election[?]"[317] The election was between Francis Preston and Abram Trigg, and the initial ballot count found a razor thin *ten* vote margin of victory for Preston.[318] Trigg challenged the result on the ground that Preston's brother, a captain in the military, marched troops to one of the polling places and circled the polling location with the express purpose of discouraging pro-Trigg voters from casting their vote.[319] In addition, the state had an odd rule that permitted the sheriff to close polling at any point during the day—so long as he made three proclamations that voting was ending without additional voters coming to vote.[320]

The Committee on Elections directed its focus to the allegations of the military's harmful role in discouraging voting.[321] The facts before the Committee showed at one point a large fight broke out because "many of the country people were dissatisfied with the conduct of the soldiers."[322] The Committee agreed with the facts as alleged by Trigg and found that the damage done to his campaign by the military stunt was enough to void the election.[323] In fact, the Committee found that it was highly likely that more voters were "prevented from voting" for Trigg which would have overcome Preston's slim lead.[324] The consequence was that "the election was unduly and unfairly [biased] by the turbulent and menacing conduct of the military."[325] When the vote was taken by the entire House on the resolution that

[315] *Id.*
[316] *Id.*
[317] CASES OF CONTESTED ELECTIONS, *supra* note 211, at 78.
[318] *Id.*; DUBIN, *supra* note 217, at 9.
[319] CASES OF CONTESTED ELECTIONS, *supra* note 211, at 79.
[320] *See id.* at 78.
[321] *See id.* at 79.
[322] *See id.*
[323] *See id.* at 79–80.
[324] *Id.*
[325] *Id.* at 79.

Francis Preston was not the duly elected member of the House, however, that resolution failed.[326] Some members of the House were not concerned with military presence at the polling location.[327] Preston was, therefore, confirmed to his seat.[328] In his next election, Preston would run unopposed.[329] It seemed he scared off any possible challenger.

This outcome fits the state of Virginia in the early republic. Virginia was one of the few states that clung to the traditional "'courting'" and "'spouting'" model of voting.[330] "Only in Virginia and Kentucky did the old-fashioned English mode of elections continue, lasting throughout the antebellum period." Oral voting, added to the persisting power of local sheriffs and county courts in parts of the Upper South, gave local elites some control over elections."[331] Voting continued to be conducted *viva voce* (with living voice), where "[t]he voters, one by one, had to swear that they were qualified and then publicly declare the names of those they were voting for."[332] This process was "*open to abuse*, especially where less wealthy men had to announce their vote in the presence of those to whom they were beholden—landlords, employers (possibly of family members), local officials with real authority."[333] This type of abuse was on display by Preston's display of military force.[334]

The tilting of power towards landed elites was also continued by the use of plural voting.[335] "In Virginia, South Carolina (till 1819), and some parts of Kentucky the principle of plural voting persisted, allowing wealthy men to vote in every county in which they owned sufficient property."[336] The election contest between Trigg and Preston appropriately demonstrates the types of fraud used in the system.[337] Candidates could intimidate voters from casting ballots, or as other cases have demonstrated, tamper with the ballot box.[338] Overall, it seems as the early republican period was marked by a

[326] *Id.* at 84.
[327] FOLEY, *supra* note 16, at 45.
[328] *See* CASES OF CONTESTED ELECTIONS, *supra* note 211, at 84.
[329] *See* DUBIN, *supra* note 217, at 11.
[330] *See* Robertson, *supra* note 138, at 139.
[331] Ratcliffe, *supra* note 168, at 235.
[332] *Id.* at 234.
[333] *Id.* (emphasis added).
[334] *See* Foley, *supra* note 16, at 44.
[335] *See* Ratcliffe, *supra* note 168, at 233.
[336] *Id.*
[337] *See* FOLEY, *supra* note 16, at 44.
[338] *Id.* at 44–45.

consistent desire to win elections—at all costs.[339] At the same time, the U.S. House of Representatives struggled to "get its bearings" in resolving disputed elections.[340]

D. Historical Oversight or Intentional Choice?

The three early congressional contested elections provide a unique perspective into how the Founders approached the issue of electoral disputes.[341] While not the only three disputes during the first decade following ratification of the U.S. Constitution, they represent geographically diverse states, factual similarities and differences, all of which render comparison beneficial.[342] What is clear from the resolution of the disputes, however, is that the Founders had difficulty resolving these electoral disputes. Results of congressional elections were overturned, yet, the aggrieved party was not seated in Congress.[343] Others used military might to intimidate opponents out of future electoral challenges.[344] And finally, the stain of electoral manipulation was easily washed away with future success.[345] The Founders' difficulty in implementing the basic principle of electoral integrity, therefore, reveals "a fundamental incompleteness in their own conception of elections as a means to achieve 'republican' government, as they called it.'"[346]

The Founders' attention was focused on other aspects of the newly establishing form of government.[347] This oversight is surprising, especially because election administration reform in England would have provided concrete and contemporary guidance to the Founders.[348] In 1770, British Prime Minister George Grenville authored an act to provide for an impartial tribunal of randomly selected members of the House of Commons to resolve disputed parliamentary elections.[349] This act was ignored in America.[350] J.M. Fewster has noted that before 1770, disputed elections in the House of Commons were "frequently determined . . . with little or no regard

339 *See id.* at 45.
340 *Id.* at 47.
341 *See id.* at 41–42, 44; *see* CASES OF CONTESTED ELECTIONS, *supra* note 211, at 47, 73, 78.
342 *See id.*
343 *See, e.g.*, FOLEY, *supra* note 16, at 42.
344 *Id.* at 44.
345 *Id.* at 247.
346 *Id.* at 25–26.
347 *See id.* at 35.
348 *See id.* at 4–5.
349 *Id.*
350 *Id.*

to the merits of the cases presented by the rival candidates."[351] Others have observed that "'controverted elections were tried and determined by the whole House of Commons, as mere party questions, upon which the strength of contending factions might be tested.'"[352] Prime Minister Grenville declared that it was "scandalously notorious, that we are as earnestly canvassed to attend in favour of the opposite sides, as if we were wholly self-elective, and not bound to act by the principles of justice, but the discretionary impulse of our own inclinations."[353]

Under the system established by the Grenville Act of 1770, "rivals for a seat would alternately strike members until they had established a committee of thirteen, to which each would then add a nominee, bringing the total to fifteen."[354] Importantly, this committee would resolve disputes without reporting to the full House.[355] The impetus for reform has been attributed to addressing a highly polarized process—as Prime Minister Grenville's comments make clear.[356] For example, in 1770, the House of Commons continuing to address conflict over seating MP John Wilkes, a renowned member of the Opposition, who was expelled from the House and subsequently reelected by his constituents.[357]

Notwithstanding the recent reform in England, the former colonies overwhelmingly rejected the reform.[358] As has been discussed, the U.S. Constitution provided for a provision that vested exclusive authority to judge the election of members with the Legislature.[359] This provision received little opposition, with "this aspect of legislative independence . . . so widely accepted at the time that no one appears to have opposed this clause at the Convention, and criticism in the state ratifying conventions was limited to its exclusion of state legislatures, not the judiciary, from the adjudicative process."[360] By 1792, most states had adopted similar

[351] J.M. Fewster, *Before and After the Grenville Act: The House of Commons and the Morpeth Elections of 1768 and 1774*, 35 PARLIAMENTARY HIST. 298, 298 (2016).

[352] Paul E. Salamanca & James E. Keller, *The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members*, 95 KY. L. J., 241, 277 (2006/2007).

[353] George Grenville, Debate in the Commons on Mr. Grenville's Bill for Regulating the Trials of Controverted Elections, Feb. 28, 1776, *in* 16 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 902–03 (1813).

[354] Salamanca & Keller, *supra* note 352, at 276.

[355] *Id.*

[356] *See* Grenville, *supra* note 353, at 903.

[357] Salamanca & Keller, *supra* note 352, at 276–77.

[358] *See id.* at 277–78.

[359] U.S. CONST. art. I, § 5, cl. 1.

[360] Salamanca & Keller, *supra* note 352, at 276; *see also* Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986) (citations omitted) ("There was no opposition to the Elections Clause

provisions in their own state constitutions.[361] Specifically, by that point, twelve states had adopted constitutions, and of the twelve, "all but Virginia had adopted a constitution explicitly recognizing the privilege."[362]

Some scholars have attributed this divergence from English precedent to "Parliament's near pre-eminence in the British political structure, such that delegation of particular responsibilities cannot materially threaten its autonomy," or simply as "a matter of political culture."[363] These explanations, while possible, gloss over the challenging federalism issues presented by vote-counting disputes in congressional elections; challenges that had not existed before.[364] Yet, the Founders very clearly turned to British precedent in other ways. In 1791, during the debate over the contested election between Jackson and Wayne, James Madison relied upon several British authorities, including William Blackstone's *Commentaries on the Law of England* to reach his position.[365] And, given the weight Bailyn and Wood placed on the reasoning and rhetoric of the English Opposition as inspiring the Founders,[366] it is surprising that reforms meant to reduce the partisanship of seating members of Parliament—including the leading figure of the Opposition, John Wilkes[367]—were not replicated. Unfortunately, in this period, "[i]t did not take long for a pattern of partisanship to prevail in the federal House of Representatives' adjudication of disputed elections."[368] Yet, the Grenville Act of 1770 sought to address this precise concern; this precedent was ignored.[369] Such oversight may have been unintentional, or not. The consequences, however, have had lasting impacts.

IV. CONCLUSION

"'Men entrusted with the formation of civil constitutions should

in the Federal Constitutional Convention . . . and the minor opposition in the ratification debates focused upon the clause's removal of final authority not from the *courts*, but from the state legislatures, where the Articles of Confederation had vested an analogous power.").

361 Salamanca & Keller, *supra* note 352, at 274.

362 *Id.* The provision was not added in Virginia's Constitution until 1830. *See* VA. CONST. of 1830, art. III, § 9.

363 Salamanca & Keller, *supra* note 352, at 277.

364 *See* FOLEY, *supra* note 16, at 25.

365 *Id.* at 43.

366 *See supra* Section II.B.

367 *See* Salamanca & Keller, *supra* note 352, at 331; *see also John Wilkes*, SPARTACUS EDUCATIONAL, http://spartacus-educational.com/PRwilkes.htm (last visited Jan. 2, 2018).

368 FOLEY, *supra* note 16, at 47.

369 *See* Salamanca & Keller, *supra* note 352, at 276–77.

remember [that] they are *painting for eternity*: that the smallest defect or redundancy in the system they frame may prove the destruction of millions.'"[370]

The Founders revolted against English tyranny based upon the belief that corruption in the English political system was systematic.[371] Figures such as James Madison expressed concern over the administration of elections. Yet, the system they created did not directly address how to resolve contested electoral disputes, specifically in congressional elections, but rather, delegated much of the task to Congress and largely to the states. The result: directly following the ratification of the Constitution, several congressional races were mired by allegations of bribery, fraud, and the use of military force to quell political opposition. Congress' resolution of those disputes was challenging and failed to develop clear guidelines for future disputes. Moreover, the Constitutional provision which provided both Houses of Congress with the authority to adjudicate contested elections, Article I, Section 5, was overlooked and under-utilized. The most ardent debate over election administration concerned the restrictions on *time, place, and manner* of federal elections. The oversight has led Lisa Marshall Manheim to lament that the current state of jurisprudence around resolving contested congressional elections as "[i]nconsistency is the constant."[372]

These disputes fit within the context of the early republic's struggle to develop its own civic identity. In this time of development, powerful political figures asserted their vision onto the electoral landscape. This was sometimes accomplished by limiting voting eligibility, or selecting candidates; it could also be done through election fraud and voter intimidation. These activities were strikingly un-democratic. Yet, these issues were not systemically addressed and curtailed by the Founders.

Unsurprisingly, the issue of how to resolve recounts and disputes elections has not abated; instead, we have struggled significantly to effectively resolve these disputes. Some disputes have brought our country to the brink. And these disputes do not only impact our national offices: In 2016 a recount was nearly instituted in the North Carolina gubernatorial election; a contentious recount decided the 2004 Washington gubernatorial election; in 2013 the Virginia

[370] BAILYN, *supra* note 28, at 184.

[371] *See* John Joseph Wallis, *The Concept of Systematic Corruption in American History*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 23, 36 (Edward L. Glaeser & Claudia Goldin, eds., 2006).

[372] Manheim, *supra* note 8, at 364.

Attorney General election was subject to a short recount; and even local races have antagonistic recounts, including a 2010 juvenile judge election in Ohio. The Founders' failure to establish clear guidelines and practices for resolving electoral disputes, typified by the early congressional disputed elections, is one of their "original [electoral] sin[s]."[373] Sadly, as a country, we are still striving for the clarity they could have provided.[374]

[373] FOLEY, *supra* note 16, at 33.
[374] *See* Manheim, *supra* note 8, at 407–08.