

Virtue over Party: Samuel Randall’s Electoral Heroism and Its Continuing Importance

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Introduction	476
I. The Limits of Institutionalism.....	477
A. The Need for Virtuous Officeholders	477
B. The Problem of Partisan Legislatures.....	480
II. Samuel Randall on March 1, 1877: A Profile in Electoral Courage	481
A. Some Background for Understanding March 1, 1877	486
B. The Decisive Day and the House’s “Stormiest Session”	493
C. An Assessment of Randall’s Conduct	498
III. The Lessons of Randall’s Electoral Heroism	505
Conclusion.....	509

* © Edward B. Foley. Director, *Election Law @ Moritz*, and Chief Justice Thomas J. Moyer Professor for the Administration of Justice and the Rule of Law, Moritz College of Law at The Ohio State University. This Essay is an edited version of the keynote address delivered on September 14, 2012, for the symposium, “Foxes, Henhouses, and Commissions: Assessing the Nonpartisan Model in Election Administration, Redistricting, and Campaign Finance,” at the University of California, Irvine School of Law. In preparing it for publication, I have endeavored to keep it true to its delivery as an address, while providing in the footnotes citations and supplementary information that will permit it to advance scholarly inquiry on the topics it touches. Its discussion of Samuel Randall’s role in resolving the disputed Hayes-Tilden election, far from intending to be the last word on this much-neglected aspect of our nation’s most momentous electoral crisis, instead will serve a useful purpose if it prompts renewed consideration of Randall’s significance as Speaker of the House at the point the dispute reached its most critical juncture. The middle portion of this keynote, which is the part that focuses on Randall, draws from an earlier talk given at Ohio State on January 24, 2012, entitled *March 1, 1877: The Stormiest Session of Congress—and Its Relevance Today*. In preparing that talk, as well as this keynote, I want to thank Les Benedict, John Fortier, Daphne Meimaridis, David Stebenne, Charles Stewart, and especially Steve Huefner. Heather Gerken, as the respondent to this address, as well as other symposium participants, provided very valuable feedback that I have endeavored to incorporate in this edited version. Librarians Matt Cooper, Kathy Hall, and Matt Steinke were invaluable in finding original documents. Research assistants Kyle Kopko, Mandy Mallott, and Owen Wolfe contributed immensely to this project. I also thank the editors and staff of the *UC Irvine Law Review*, who, in addition to providing excellent and precise editing of the text and footnotes of this piece, took on all the tasks associated with reproducing the pictures that accompanied the address and appear here.

INTRODUCTION

You can count me among those who strongly believe that the United States needs more nonpartisan institutions for the governance of the electoral process. My recent scholarship has focused on the design of nonpartisan tribunals to adjudicate vote-counting disputes.¹ More broadly, in a new paper entitled *The Separation of Electoral Powers*,² which is a companion to this address, I employ the familiar three-part distinction between legislative, executive, and judicial functions to sketch out three distinct institutions to tackle the problem of partisanship in election administration. I consider the possibility that a nonpartisan body might supersede the traditional power of the regular partisan legislature to enact the laws that govern the voting process. Most relevant to my points here, I specifically advocate for the adoption of a nonpartisan election director, instead of a partisan secretary of state, to administer all the rules and procedures for the casting of ballots, including early voting.

My home state of Ohio continues to be Exhibit A of what happens when those rules are in the hands of partisans. In each of the last three presidential elections, Ohio's secretaries of state have been accused of making administrative decisions with the goal of favoring the presidential candidate from the same party as the secretary of state. In 2004, the Ohio secretary of state was Republican Ken Blackwell.³ In 2008, Democrat Jennifer Brunner was tagged with the same kind of criticism, even though she came into office thinking she could be above the kind of reproach that Blackwell received.⁴ In 2012, Republican Jon Husted began the year thinking that he could escape the fate that Blackwell and Brunner both suffered, but instead by September he had become embroiled in a nationally prominent controversy over cutbacks in Ohio's early voting opportunities, to the point where his critics called him "secretary of suppression."⁵ Justified or not, these criticisms could not exist if Ohio's voting rules were enforced, not by a partisan secretary of state, but instead by a nonpartisan election director.⁶

1. 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 (2010) (examining the idea of impartial tribunals through a simulation that used retired judges to stand in for the Supreme Court in a hypothetical case with facts similar to *Bush v. Gore*, 531 U.S. 98, 100–04 (2000)).

2. Edward B. Foley, *The Separation of Electoral Powers*, 74 MONT. L. REV. 139 (2013).

3. STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY WITH NATHAN A. CEMENSKA, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 27–28 (2007).

4. See RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 19, 24–25 (2012).

5. E.g., Ari Berman, *Eleventh-Hour GOP Voter Suppression Could Swing Ohio*, NATION (Nov. 4, 2012, 9:35 AM), <http://www.thenation.com/blog/171011/eleventh-hour-gop-voter-suppression-could-swing-ohio>.

6. My own assessment of Secretary Husted's performance is that much of the criticism leveled against him was unwarranted and that he arguably did a better job than either of his two immediate predecessors in making administrative decisions based on a nonpartisan conception of the public

Based on my observations of the electoral process in Ohio, as well as many other states, if there were a National Association for the Advancement of Nonpartisan Electoral Institutions, I would proudly be a card-carrying member.

I. THE LIMITS OF INSTITUTIONALISM

Still, what I want to say here is that nonpartisan institutions are not enough. We also need individual officeholders in those institutions who have sufficient virtue that they do not make their decisions based on favoritism for a particular party or candidate.

A. The Need for Virtuous Officeholders

Let me illustrate this point with a hypothetical. Suppose we become lucky enough to have a federal director of elections, appointed by the most nonpartisan method we can devise. I have in mind something like Rick Hasen's proposal that a presidential appointment require confirmation by three-quarters of the Senate.⁷ It still would be necessary that the individual who holds this office actually act in a nonpartisan manner.

To invoke an analogy: Just as it would be wrong for the chairman of the Federal Reserve to make decisions about monetary policy based on a desire to help a particular presidential candidate win in November,⁸ so too it would be wrong for a federal director of elections to make decisions about the availability of early voting based on favoritism for a particular presidential candidate. We hope

interest. For example, his decision not to appeal the federal court ruling that required the counting of so-called "right church, wrong pew" ballots was consistent with a desire to run a fair election rather than seek maximum partisan advantage—and in making this decision, Husted parted company with his fellow partisan, Attorney General Mike DeWine, who insisted on pursuing the appeal. Even so, Husted's record was far from perfect. As I wrote at the time, his decision not to permit *any* weekend early voting in October was one that only a partisan Republican would reach; it would not have been adopted by a nonpartisan election director. See Edward B. Foley, *Analyzing a Voting War Trifecta*, FREE & FAIR (Aug. 16, 2012), <http://moritzlaw.osu.edu/electionlaw/freefair/index.php?ID=9579>. Moreover, if a nonpartisan election director had made the decision to eliminate the last weekend of early voting (on the ground that local election officials needed that time to prepare for Election Day), that decision would not have been susceptible to the same kind of intense criticism as was the substantively identical move that was actually made in Ohio. The reason is that Ohio's actual decision was made by a partisan institution that reasonably could be accused of acting out of partisan motives, whereas a nonpartisan institution would be immune from the same kind of attack.

7. Hasen applies this confirmation requirement to a three-member commission, but it is equally nonpartisan if applied to a single director of elections. See Richard L. Hasen, *End the Voting Wars*, SLATE (June 13, 2012, 6:09 PM), <http://hive.slate.com/hive/how-can-we-fix-constitution/article/end-the-voting-wars>.

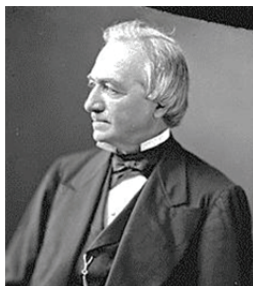
8. Coincidentally, on the eve of this keynote address, Republicans accused Federal Reserve Chairman Ben Bernanke of making decisions with a view to aid Obama's reelection efforts. See Peter Schroeder & Erik Wasson, *Republicans Question Whether Fed Carrying Water for Obama*, HILL (Sept. 13, 2012, 5:00 AM), <http://thehill.com/business-a-lobbying/249185-republicans-question-whether-fed-carrying-water-for-obama>.

that the structural design of the Federal Reserve,⁹ and specifically the method by which the Fed chair is appointed,¹⁰ reduces the risk that the chair is actually motivated by partisanship. But we cannot guarantee that we have eliminated this risk completely. Likewise, requiring three-fourths of the Senate to confirm a federal director of elections would considerably reduce the risk that this director would actually be motivated by partisan bias. But even with this optimal appointment method, we have not eliminated the risk entirely.

Let me give you a real-world reminder that sometimes officials who are specifically chosen to be nonpartisan when making important electoral decisions actually end up acting as if they were affected by partisanship. Consider, in this regard, the role of the five Supreme Court justices on the Electoral Commission that Congress created to help resolve the disputed Hayes-Tilden presidential election of 1876.¹¹

Figure 1: Five Justices on the Electoral Commission of 1877

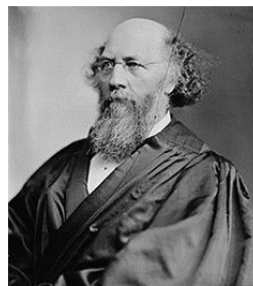
Joseph Bradley (R)



Nathan Clifford (D)



Stephen Field (D)



9. The structure of the Federal Reserve system is complex. The Federal Open Markets Committee is the institution that sets interest rates; its members are the Federal Reserve Board of Governors as well as the presidents of the regional Federal Reserve banks. The bank presidents are selected through a process that gives power to private-sector financial institutions, while the president and Congress appoint the board members to fourteen-year terms. By tradition, as well as design, the Fed is expected to be insulated from political pressure when determining monetary policy. *See generally* WILLIAM GREIDER, *SECRETS OF THE TEMPLE* (1987).

10. The chairmanship is a four-year term but eligibility is limited to members of the Board of Governors who, with their fourteen-year terms, are supposed to be independent of politics. *See Board Members*, BOARD GOVERNORS FED. RES. SYS., <http://www.federalreserve.gov/aboutthefed/bios/board/default.htm> (last visited Mar. 11, 2013).

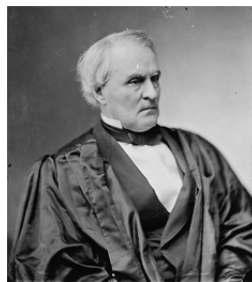
11. In my judgment, the best single volume on the disputed Hayes-Tilden election remains PAUL LELAND HAWORTH, *THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876* (Russell & Russell 1966) (1906), largely because of its thoroughness, but also due to its commendably nonpartisan assessment of various actors involved. In reading Haworth today, one cannot avoid wincing at its antiquated language, especially in regards to matters of race. The book is a product of the same era as *Plessy v. Ferguson*, 163 U.S. 537 (1896), and even if Haworth is as enlightened as Justice Harlan's dissent on issues of race, that standard still falls far short of contemporary norms. For an excellent recent account of the Hayes-Tilden dispute, but one that is less comprehensive than Haworth's, see MICHAEL F. HOLT, *BY ONE VOTE: THE DISPUTED PRESIDENTIAL ELECTION OF 1876* (2008).

Figure 1 (continued)

Samuel Miller (R)



William Strong (R)



Congress included five justices on the Commission, in addition to five senators and five representatives, in the hope and expectation that they as jurists would be more impartial than the ten members of Congress on the panel. All five of these justices ended up embracing the legal position that benefited the candidate of the party with which they were associated; the three Republican justices supported the Hayes position, and the two Democratic justices sided with Tilden. Most significantly, Justice Joseph Bradley's alignment with the other Republicans on the Commission proved dispositive. Bradley was added to the Commission as the fifth justice at the last minute when Justice David Davis, who was viewed as an independent, declined to serve. Thus, Bradley was chosen specifically to be nonpartisan, and yet he acted in a way that appeared (at least to Democrats at the time) to be motivated by party loyalty. There are many lessons to draw from Bradley's appointment to and performance on the Commission, and I have written about some of them previously.¹² But the one that is most relevant here is this: it is not enough to appoint someone to be a nonpartisan tiebreaker, whose role is to be the single impartial vote if all the other members split along party lines. It is necessary, too, that this designated neutral member of the body actually possess the psychological disposition to be neutral and then act according to this virtuous disposition rather than from a motive, conscious or not, to favor one side or the other.¹³

12. See Edward B. Foley, *Recounts: Elections in Overtime*, in ELECTION LAW AND POLITICS: THE RULES OF THE GAME 149, 158–60 (Matthew J. Streb ed., Routledge 2013) (2004); Foley, *supra* note 1, at 507; see also Nathan L. Colvin & Edward B. Foley, *Last Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 *FORDHAM L. REV.* 1043, 1045–50 (2010); Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 *U. MIAMI L. REV.* 475, 502–16 (2010) [hereinafter Colvin & Foley, *The Twelfth Amendment*].

13. I do not mean to suggest that Justice Bradley in fact was motivated by partisanship rather than a sincere belief that ruling in favor of Hayes was the correct constitutional position. My own assessment of the key legal question before the Commission—whether the Constitution's requirement that the presidential electors in all states cast their Electoral College votes on the same date, see U.S. CONST. art. II, § 1, cl. 4, means that any recount completed after that date of ballots cast by citizens for the office of presidential electors must be null and void—is that this question was

Put more succinctly, in order to have genuine electoral nonpartisanship in practice, it is necessary to have virtuous officeholders in addition to well-designed institutions.

B. *The Problem of Partisan Legislatures*

There is more to this necessity of virtue. We must consider, too, the role of the legislature in the governance of the electoral process. The legislature enacts the voting laws. If these voting laws are partisan in their motivation, the inherent bias of these laws is not negated just because they are administered by a nonpartisan director of elections instead of a partisan secretary of state. We all know about the recent enactment of restrictive voting laws by Republican-dominated state legislatures. Many observers suspect that these laws were motivated by a desire to secure a partisan advantage, rather than a sincere policy preference.¹⁴ This suspicion, of course, was validated, at least in Pennsylvania, when the Republican leader of the state's house of representatives, Mike Turzai, gloated to fellow partisans that passage of that state's new voter ID law would secure Mitt Romney's victory in the state.¹⁵ This example vividly shows that, to remove inappropriate partisanship from the governance of the voting process, it is hardly enough to put in place a nonpartisan official to administer the voting laws that the legislature enacts.

Yet the legislature is going to remain a thoroughly partisan institution. It is not going to be reformed to become some sort of nonpartisan body. Nor is the authority to enact laws for the governance of the voting process likely to be completely removed from the purview of partisan legislatures. To be sure, we may be able to remove redistricting from the legislature's authority, as California did.¹⁶ If we are especially fortunate, we might be able to assign the authority to promulgate many election administration rules—including voter ID rules—to some form of independent nonpartisan body.¹⁷ And we may be able to use

reasonably open to opposite answers, but that Bradley's was the better view. Nonetheless, Bradley siding with his fellow Republicans, in opposition to all the Democrats on the Commission, left the impression (also reasonable) that he acted as a partisan. We can never be sure of Bradley's actual motives, and they may have been complicated enough that he did not completely know his own mind. It would have been better to have a genuine neutral in the tiebreaking role, and for that neutral to act genuinely based on an impartial frame of mind.

14. See, e.g., Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865 (2013).

15. Here's the direct quote: "Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, done." Michael Cooper, *Pennsylvania's Voter ID Law Spurs Debate*, N.Y. TIMES, June 26, 2012, at A11 (quoting Turzai).

16. See Bruce Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012); Justin Levitt, *Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513 (2011); Karin Mac Donald, *Adventures in Redistricting: A Look at the California Redistricting Commission*, 11 ELECTION L.J. 472 (2012).

17. Wisconsin is the leading example in this country of a state with a nonpartisan commission for the administration of voting rules. Daniel P. Tokaji, *America's Top Model: The Wisconsin Government*

constitutional law to protect against the most egregious instances of partisan favoritism in the enactment of voting laws by a legislature (although in the Pennsylvania voter ID lawsuit the trial court refused to invalidate the law on that basis¹⁸). In any event, we are unlikely to entirely eliminate the authority of partisan legislatures to enact laws for the governance of the electoral process.

Therefore, if the electoral process is to be protected from legislation motivated by partisan favoritism, this protection will need to come in part from the willingness of legislative leaders to be virtuous and to set aside such partisan motives.

Let you think it inconceivable that a legislative leader is capable of putting aside partisanship when a major election is at stake, I want to give you an actual example. In fact, I want to share with you what may well be the most significant act of nonpartisan virtue on the part of an elected politician in U.S. history, involving perhaps the most explosive session ever in the U.S. House of Representatives. Yet I suspect many of you, as well as most Americans alive today, have never heard of this individual or his particular act of nonpartisan virtue.

II. SAMUEL RANDALL ON MARCH 1, 1877: A PROFILE IN ELECTORAL COURAGE

The politician is Samuel Randall, a Democrat from Pennsylvania, who was Speaker of the U.S. House of Representatives at the time of the disputed Hayes-Tilden election.¹⁹ The episode in question occurred on March 1, 1877, three days

Accountability Board, 3 U.C. IRVINE L. REV. 575 (2013). But, as Dan Tokaji shows, even Wisconsin is a cautionary tale in this regard, as its Government Accountability Board (GAB) is subservient to the state's legislature, which on partisan grounds has overridden the GAB's nonpartisan judgment on the topic of voter ID. In my essay on *The Separation of Electoral Powers*, I explore the theoretical limits to the idea that partisan legislation in the field of election law might be replaced by a nonpartisan assembly with exclusive authority to enact a state's election laws. See Foley, *supra* note 2.

18. The Pennsylvania trial court, on remand from the state's supreme court, temporarily enjoined enforcement of the voter ID law for the 2012 election, relying on the grounds that it would cause the disenfranchisement of some eligible voters. See *Applewhite v. Pennsylvania*, No. 330 M.D. 2012 (Pa. Commw. Ct. Oct. 2, 2012) (supplemental determination on application of preliminary injunction), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/Opinion_004.pdf. But the court intimated that the law would be permitted to take effect for future elections and did not suggest that it would be invalidated solely because of its apparent partisan motivation. Similarly, although the federal judiciary in 2012 blocked enforcement of newly enacted state laws that presented a serious risk of disenfranchising valid voters, see Hasen, *supra* note 14, at 1871–72, these judicial decrees did not entirely eliminate partisan electoral legislation. Virginia's new voter ID law, less stringent than others but nonetheless adopted by a Republican-dominated legislature over the objections of Democrats, was permitted to take effect. See Laura Vozzella, *Justice Department Upholds Va. Voter ID Law, Governor Says*, WASH. POST (Aug. 20, 2012, 10:30 PM), http://www.washingtonpost.com/blogs/virginia-politics/post/justice-department-upholds-virginia-voter-id-law/2012/08/20/76d609f6-eb2a-11e1-a80b-9f898562d010_blog.html.

19. Randall deserves a modern biography. In the meantime, the best available source is Sidney I. Pomerantz, *Samuel Jackson Randall: Protectionist-Democrat, 1863–1890* (1932) (unpublished Master's degree thesis, Columbia University) (on file with Columbia University). Pomerantz, it appears, went on to become a history professor at the City College of New York, and his master's thesis was a worthy start to his career. But it is clearly the work of a budding scholar, and Randall's

before the scheduled inauguration of the next president, when the outcome of the dispute was still very much in doubt and indeed had reached its final, critical juncture.²⁰ It is not too much to say that on that day the nation was at the edge of a constitutional precipice, and Randall's nonpartisan conduct as Speaker of the House pulled the nation back from the abyss.²¹ For the remainder of the nineteenth century, Randall's role in protecting our nation from the possibility of cataclysmic disaster was well recognized among those who recounted the drama of the Hayes-Tilden dispute.²² Yet, sadly, nowadays almost no one knows of Randall's heroism at this peak moment of electoral crisis, which has been eclipsed instead by the Electoral Commission (which I mentioned earlier) in recent retellings of the Hayes-Tilden affair.²³ Therefore, let me tell you Randall's story, and we then can assess its significance for us today.

role in history would benefit from someone with a more seasoned perspective. *See also* Albert Virgil House, Jr., *The Political Career of Samuel Jackson Randall* (Aug. 13, 1934) (unpublished Ph.D. thesis, University of Wisconsin) (on file with University of Wisconsin), available at <http://minds.wisconsin.edu/handle/1793/406>.

20. *See* HAWORTH, *supra* note 11, at 274 (“[T]he proceedings entered upon a new and dangerous phase.”).

21. One study of Randall's role in the “electoral deadlock following the presidential election of 1876” concluded that, if it had not been for Randall, “that deadlock would not have been peaceably resolved.” FRANK B. EVANS, *PENNSYLVANIA POLITICS, 1872-1877: A STUDY IN POLITICAL LEADERSHIP* 309 (1966). That study sees Randall's motives as complex, but acknowledges those who viewed Randall's conduct as setting aside partisanship. For example, that study quotes a letter sent to Randall praising him for his uniquely nonpartisan virtue at the crucial moment: “You stand alone among all our statesmen, and even with judges, as the only one who can in the discharge of his duties rise above party.” *Id.* at 305 (quoting J.B. Brawley to Randall, March 9, 1877).

22. Writing in 1906, in volume seven of his monumental *History of the United States*, James Rhodes declared that for his “skilful and resolute guidance” of the House's proceedings on March 1, Randall deserved “the respect and admiration of the country and of the world.” 7 JAMES FORD RHODES, *HISTORY OF THE UNITED STATES: FROM THE COMPROMISE OF 1850 TO THE FINAL RESTORATION OF HOME RULE AT THE SOUTH IN 1877*, at 278, 285 (1906); *see also* HAWORTH, *supra* note 11, at 276–77 (expressing a similar sentiment).

23. The Electoral Commission has been emphasized since 2000 because of the comparison between its role in the Hayes-Tilden dispute and the Supreme Court's role in *Bush v. Gore*. *See* WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS* 5–6 (2005).

Figure 2: Samuel Randall**Figure 3:** President Hayes or Tilden on March 4?

Rutherford B. Hayes of Ohio

Samuel J. Tilden of New York



Now, in telling this story, I wish to warn you at the outset that Randall was no saint. He was a ward politician from Philadelphia, a product of machine politics, who at points in his career was associated with some ugly electoral tactics.²⁴ Even by the standards of his time, he was a racist, with backward views regarding the status of blacks in America. Before the Civil War, he was against the abolition of slavery, and although he fought for the Union, he consistently promoted pro-Southern positions during the war and Reconstruction.²⁵ In 1864, when Lincoln worked so tenaciously for the adoption of the Thirteenth Amendment, Randall gave his first major speech as a junior representative in

24. Pomerantz does not hide Randall's blemishes. For example, Pomerantz describes Randall's campaign for reelection to the House in 1868 as "a characteristic machine politics affair." Pomerantz, *supra* note 19, at 27. Another member of Congress characterized Randall's victory that year as tainted by the corruption of electoral fraud that included "persons voted in the name of dead men, absent men, and men in the penitentiary" and was sufficiently widespread to require the invalidation of one ward's entire return. *Id.* at 28; *see also* House, *supra* note 19, at 10–11 ("Randall knew the tricks of ward politics and could play the game with the best of them.")

25. *See* Pomerantz, *supra* note 19, at 11–13.

opposition to this transformative measure.²⁶ He likewise opposed the Fourteenth Amendment and the major pieces of civil rights legislation that Reconstructionist Republicans passed in Congress.²⁷ Randall had even opposed permitting African Americans to serve in the Union Army.²⁸

Moreover, for much of his career, Randall was a loyal partisan. He rose to leadership among the Democrats in Congress, while that party was the minority, by becoming an especially skilled parliamentarian and consistently using every available tactic to thwart Republican measures.²⁹ Accordingly, in 1877 he could have been expected to act as a particularly partisan Democrat, employing his expertise in parliamentary procedure in the effort to get Tilden, as his party's candidate, inaugurated as president. Indeed, Randall was chosen Speaker by his fellow partisans in December of 1876, as the dispute over the presidential election was heating up, precisely to play this role.³⁰ Randall was Tilden's preference among the alternative Democratic candidates for Speaker, a fact that was instrumental to his winning the position.³¹ Thus, there was every expectation among Democrats that Randall would do all in his power as Speaker to deliver the presidency to Tilden.³²

Yet on March 1, at the crucial moment, Randall did not do everything in his power as Speaker to contribute to the partisan effort to put Tilden in the White House. Instead, acting contrary to intense pressure from fellow Democrats in the House, who wanted to pursue every available means that might lead to Tilden's inauguration, Randall made a decisive procedural ruling that had the effect of assuring that Hayes would be the one inaugurated on March 4. He made this procedural ruling based on his sense of duty to the nation as a whole. He told his fellow Democrats, whom he so severely disappointed, that he was acting "according to his conscience,"³³ not as someone beholden to his caucus.

In acting this way on March 1, Randall put country before party, as the old saying goes, and thus was motivated by the kind of nonpartisan virtue I am intending to illustrate. In depicting Randall's conduct, I wish to portray what we might call a "profile in electoral courage," drawing upon the title of then-Senator

26. *Id.* at 12. For anyone who has seen Spielberg's film *Lincoln*, the fact that Randall was on the wrong side of this great struggle is especially poignant.

27. *Id.* at 19.

28. *Id.* at 13 n.3.

29. *Id.* at 34, 51.

30. *Id.* at 63; see also JEFFREY A. JENKINS & CHARLES STEWART III, FIGHTING FOR THE SPEAKERSHIP: THE HOUSE AND THE RISE OF PARTY GOVERNMENT 255 (2013).

31. EVANS, *supra* note 21, at 289 (stating that Randall "was Tilden's personal choice for the speakership").

32. The historian Michael Holt paraphrases Randall as telling Tilden that "[h]e had been picked . . . primarily to make sure that Tilden was counted in as president, and he promised to heed any instructions Tilden cared to send him to achieve that goal." HOLT, *supra* note 11, at 204.

33. 5 CONG. REC. 2033 (1877).

John Kennedy's famous book about senators who in other circumstances put country before party.³⁴

By calling Randall's conduct on March 1 virtuous and courageous, I do not mean to suggest that Randall was entirely pure of heart. Again, he was no saint, neither that day, nor any other. But one need not be a saint to be a hero, and one need not always be a hero to act heroically on a particular occasion. Human beings are complicated creatures, usually acting with multiple motives, some even hidden from themselves.³⁵ Heroism in the moment does not require unalloyed purity even in that instant. It simply requires that the balance of considerations tends toward virtue, seeking achievement of the wider public interest, rather than the pursuit of narrower, more self-interested aims.

My claim then is that on March 1 virtue won out in the competition for Randall's allegiance. He acted that day in accordance with the better angel of his nature (despite, ironically, being such a foe of Lincoln in his earlier years). And whatever his tendency towards partisanship at other times in his career, even at other times during the whole Hayes-Tilden dispute, his decision to put country before party on March 1 could not have come at a more important—and, as we shall see, more trying—moment, when it would have been easy to succumb to the intense pressure of partisanship that he faced (and when others in his position likely would have done so). It was not at all easy for Randall to act as he did on

34. JOHN F. KENNEDY, *PROFILES IN COURAGE* (1955). Because Randall was not a senator, he was not a candidate for inclusion in the Kennedy book. (In discussing Senator Lucius Lamar, the book praised him for supporting the Electoral Commission of 1877, even though its decision went against his party's interests. *See id.* at 183–85. But Lamar's role in procuring a peaceful resolution of the disputed Hayes-Tilden election was far less significant than Randall's, especially after the Commission began its deliberations—since the House, and not the Senate, was the locus of potentially pivotal conflict as events moved ever closer to the scheduled presidential inauguration on March 4. Lamar is thus included in the Kennedy book primarily for reasons other than his role in the Hayes-Tilden dispute. Still, it is significant that *Profiles in Courage* recognized that acting contrary to party interest in the context of that momentous dispute was worthy of special commendation.)

35. Henry Watterson, the powerful Louisville journalist (and one-term congressman during the 1877 battle for the presidency), commented on the inevitable ambiguity of motives underlying the decisions that ultimately gave Hayes the White House:

The contrary promptings, not always crooked; the double constructions possible to men's actions; the intermingling of ambition and patriotism beneath the lash of party spirit; often wrong unconscious of itself; sometimes equivocation deceiving itself; in short, the tangled web of good and ill inseparable from great affairs of loss and gain, made debatable ground for every step of the Hayes-Tilden proceeding.

Henry Watterson, *The Hayes-Tilden Contest for the Presidency*, 86 *CENTURY* 3, 4 (1913). EVANS, *supra* note 21, at 306, invokes this passage, finding it “particularly applicable” to Randall. I concur, except that I depict Randall's decisive conduct on March 1 more charitably than Evans does. His portrait of Randall is affected by Randall's behavior during the entire month of February. I do not dispute that Randall sometimes acted out of partisan or self-interested motives during that period. But for me the key point is the specific decision Randall made on March 1 to deny partisan Democrats a crucial vote that they wanted the House to take (as I describe subsequently). The explanation for that specific decision, and not the entirety of Randall's conduct during the Hayes-Tilden dispute, is what I am after, to the extent that it can be retrieved from this historical vantage point.

March 1. On the contrary, it was exceedingly challenging, as many recognized at the time.³⁶ Thus, his conduct is worthy of being called heroic, and perhaps our generation can take some comfort in knowing that ordinary politicians, who are no superheroes and act as conventional politicians in their narrow-minded partisan pursuits throughout most of their careers, are nonetheless capable of specific acts of heroism when the occasion calls for it.

A. Some Background for Understanding March 1, 1877

To understand the significance of what Randall did on March 1, we need to set the stage. The relevant law is complicated, so bear with me. The same statute that created the Electoral Commission also set up a procedure for handling the electoral votes from each of the states.³⁷ Congress, in a special joint session, would consider each state in alphabetical order. The two houses, however, would separate to consider any objection to the counting of a state's electoral votes that was voiced in the joint session. If there was only one certificate of electoral votes from the state, then it would take both Houses of Congress (acting separately) to reject that state's electoral votes. However, if there was more than one certificate of electoral votes from the state, then those multiple certificates would first be sent to the Electoral Commission, and whatever the Commission decided with respect to that state would prevail unless both Houses of Congress (again, acting separately) subsequently rejected the Commission's decision. Thus, because both Houses of Congress were required to reject the Commission's decision, an affirmation by one House would be enough to sustain the Commission's decision.

The overlooked but decisive moment in the whole dispute arose as Congress

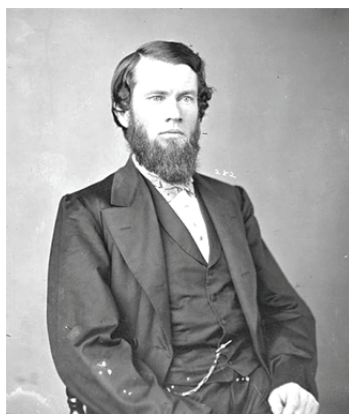
36. Pomerantz, *supra* note 19, at 73–74 (quoting the *New York World* as opining that Randall “had endeavored to be fair to both sides and had pleased neither”). Afterwards, “even the most partisan Democrats,” who had bitterly opposed him, acknowledged that he ““did what was right.”” EVANS, *supra* note 21, at 305 (quoting Letter from C.B. Hurst to Randall (Mar. 8, 1877)).

37. The statute is the Electoral Count Act of 1877, ch. 37, 19 Stat. 227 (1877), enacted on January 29 as a compromise measure designed to avert the situation in which the Republican-controlled Senate insisted that Hayes be inaugurated, while the Democrat-controlled House remained equally insistent that Tilden become president—a deadlock that would have triggered a constitutional crisis. See WILLIAM MCKENDREE SPRINGER, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 13, at 477–78 (1877). A verbatim copy of the entire statute is reprinted on pages four and five of ELECTORAL COUNT OF 1877 (Washington, Gov't Printing Office 1877). Randall voted for the compromise statute and helped shape its provisions. See Pomerantz, *supra* note 19, at 66 n.10. He disapproved of an earlier version, which would have picked the justices to serve on the Electoral Commission by lottery. See HOLT, *supra* note 11, at 213–14. What was adopted instead was the plan, as mentioned earlier, of having the fifth justice chosen by the other four (two Democrats and two Republicans) with the specific purpose of serving as a neutrally impartial tiebreaker if and when necessary. *Id.* at 214–15. When they crafted this plan, Randall and other Democrats thought it would lead to Tilden's eventual victory, as they envisioned Justice Davis occupying the tiebreaking seat and they did not think he would rule against Tilden on all of the issues likely to come before the Commission. See HAWORTH, *supra* note 11, at 209. For Tilden to become president, he needed to prevail on just one of the four states in dispute at the time (Florida, Louisiana, Oregon, and South Carolina), whereas Hayes needed to win all four.

came close to the end of the alphabet, when it was time to take up Vermont. With respect to four states, most recently South Carolina, the Commission already had issued its eight-to-seven rulings to award those states' electoral votes to Hayes. The Republican-controlled Senate had sustained those rulings. Thus, under the terms of the statute, the electoral votes of those four states were added to Hayes's column.

The special joint session of Congress was chaired by the president of the Senate, as required by both the statute and the Twelfth Amendment to the Constitution.³⁸ The president of the Senate at the time was actually the president pro tem, Republican Thomas Ferry of Michigan, because the vice president of the United States (who is normally the president of the Senate) had died and had not been replaced.³⁹ The joint session got to Vermont on the last day in February, having started at the beginning of the alphabet with Alabama on the first day of that month.⁴⁰

Figure 4: Senator Thomas Ferry



38. The Twelfth Amendment states: "The President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and the votes shall then be counted." U.S. CONST. amend. XII. The statute specifically provided that, when the Senate and House convene in joint session to count the electoral votes, "the President of the Senate shall be their presiding officer." § 1, 19 Stat. at 227.

39. HOLT, *supra* note 11, at 206.

40. A transcript of the proceedings of the Joint Session as it took up Vermont can be found in ELECTORAL COUNT OF 1877, *supra* note 37, at 711–17.

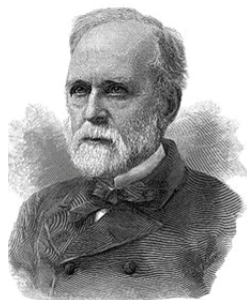
Figure 5: Senator Ferry Presiding over Joint Session⁴¹



In the joint session, Senator Ferry announced that he had received a single certificate of electoral votes from Vermont and asked if there were any objections to it. There were indeed objections, from Democrats. Much more important, however, was a surprise development. Representative Abram Hewitt of New York—who was chair of the national Democratic Party and the principal manager of Tilden’s presidential campaign—announced that he was in possession of a second certificate of electoral votes from Vermont. Hewitt wanted to give that second certificate to Ferry so that Vermont would need to go to the Commission under the terms of the statute.⁴²

41. *Counting the Electoral Vote—David Dudley Field Objects to the Vote of Florida*, HARPER’S WEEKLY, Feb. 17, 1877, at 191.

42. Hewitt’s second certificate was premised on a claim that one of Vermont’s Republican electors had been ineligible on the ground that he served as a federal postmaster at the time and therefore violated the constitutional requirement that presidential electors not hold any other federal office. See HOLT, *supra* note 11, at 201. The claim was substantively dubious at best, but that was not the point as it was procedurally invalid at the time Hewitt advanced it. ALLAN NEVINS, ABRAM S. HEWITT 383 (1967). Still, it served as a vehicle for stalling the entire process so close to Inauguration Day, and that basic fact is what mattered at the moment.

Figure 6: Representative Abram Hewitt

Hewitt's purpose in wanting Vermont sent to the Commission was not based on a belief that the Commission would rule in favor of the second certificate. Given the Commission's four prior rulings, Hewitt knew that the Commission would rule in favor of the first certificate, the one that Ferry already had, which awarded the state's electoral votes to Hayes. Hewitt knew, too, that the Republican-controlled Senate surely would sustain the Commission's ruling and thus Vermont would still go for Hayes under the terms of the statute. But Hewitt's purpose was simply to delay the count.⁴³ Hardline Democrats hoped that sending Vermont to the Electoral Commission might cause the clock to run out—that March 4 would arrive without the complete count of all states having been finished.⁴⁴ In that situation, the Democratic-controlled House of Representatives plausibly could assert that under the Constitution it was entitled unilaterally to

43. NEVINS, *supra* note 42, at 383 (explaining how Hewitt hatched the plan of using the purported second certificate of Vermont as “means by which he effectuated the delay”).

44. Hewitt's biographer argues that, in seeking delay, Hewitt was not attempting to derail the count completely in order to enable Democrats to claim that Tilden was constitutionally entitled to the presidency. NEVINS, *supra* note 42, at 379–81. Instead, the biographer asserts that Hewitt wanted delay solely to give the Democrats, especially those from the South, more leverage in negotiating concessions from Hayes in exchange for their acquiescence in Hayes's inauguration. *See id.* at 381–84. Haworth, by contrast, doubts that Hewitt's aims in seeking delay were limited only to securing a better bargain. *See* HAWORTH, *supra* note 11, at 279 n.1 (characterizing this account of Hewitt's behavior as a post hoc rationalization for his “failure to secure the seating of Tilden”). But even if bargaining leverage was Hewitt's only motive, he was playing with fire. The only way that his tactic could be effective in inducing greater concessions from Hayes was by appearing entirely serious in threatening to block completion of the count before March 4—and thus appearing entirely willing to send the nation off the constitutional precipice. Moreover, as Hewitt well knew, there were many hardliners in his party who adamantly and ferociously wanted to do just that and who were in no way interested in delaying the count merely as a bargaining ploy. *See* NEVINS, *supra* note 42, at 379–80. Thus, once Hewitt publicly proclaimed the existence of the second Vermont certificate and set the process of delay in motion, it was entirely conceivable the move (whatever Hewitt's actual motive) could play into the hands of the hardliners and actually achieve complete derailment of the count. When Hewitt made his move in the joint session, in other words, there was no guarantee he could keep his delay-seeking effort limited in scope and under control. As even his biographer acknowledges, Hewitt may “ha[ve] created a Frankenstein's monster that would overpower” the proceedings. *Id.* at 383.

elect Tilden as president, since neither candidate had received a majority of electoral votes by the prescribed deadline of March 4.⁴⁵

Figure 7: Will the House Provoke a Crisis?⁴⁶



If the House of Representatives took that unilateral step, and if Tilden attempted to assume the authority of commander in chief on that basis, it would have been a genuine constitutional crisis. The Republicans were prepared to resist, by military force if necessary, any claim by Tilden to the powers of commander in

45. The relevant provision of the Constitution at the time was the Twelfth Amendment. It has since been supplemented by the Twentieth Amendment, adopted in 1933, which contains a mechanism for determining what should happen if the time for inaugurating a new president comes and goes without the president having yet been chosen. See U.S. CONST. amend XX, § 3. But back in 1877, the only applicable constitutional text was the Twelfth Amendment and all it stated was that “if no person have [a] majority” of electoral votes, then the House by a special procedure “shall choose immediately, by ballot, the President.” U.S. CONST. amend. XII. The Twelfth Amendment did provide that if the House itself failed to choose a president by March 4 “whenever the right of choice shall devolve upon them,” then the new vice president (as chosen by the Senate) “shall act as President.” *Id.* But in 1877 there was no risk of the House failing to pick Tilden “immediately,” as the Twelfth Amendment requires, assuming the House had the authority to do so. Thus, the question was whether the House was entitled to do so in the circumstance where no person had yet been declared the official winner of a majority of electoral votes because a dispute over the counting of electoral votes had left the count incomplete by the time March 4 arrived. Although the text of the Constitution was frustratingly—and dangerously—ambiguous on this crucial point, in 1877 Democrats in the House (including Randall before the enactment of the compromise statute) took the position that they were authorized to unilaterally elect Tilden in this situation. See HAWORTH, *supra* note 11, at 177; HOLT, *supra* note 11, at 208. For a discussion of the problems caused by the Twelfth Amendment’s ambiguity, see Colvin & Foley, *The Twelfth Amendment*, *supra* note 12.

46. Thomas Nast, *A Truce—Not a Compromise*, LIBRARY OF CONG., <http://www.loc.gov/pictures/item/93510088> (last visited Aug. 30, 2013).

chief asserted on the basis of a unilateral declaration from the Democrats in the House.⁴⁷ The Republicans would have claimed that Ferry, as president of the Senate, had the constitutional authority under the Twelfth Amendment to complete the count in favor of Hayes by March 4, notwithstanding a formal declaration to the contrary from the House of Representatives.⁴⁸ It does not matter which side had the better of the argument in terms of constitutional interpretation. The point is that on February 28, just four days before the deadline, there were recalcitrant Democrats in the House who were prepared, even at this late date, to insist on their constitutional prerogative to elect Tilden in the event of an incomplete count of electoral votes. It was constitutional brinkmanship, and Hewitt's claim of a second certificate from Vermont seemed to all the world a signal that the leadership of the party and Tilden himself supported this confrontational stance.⁴⁹

47. According to one of Hayes's biographers, "there was much talk, some apparently of an informed nature, that Hayes would be inaugurated with the support of the army under Grant—in short by a kind of military dictatorship." HARRY BARNARD, *RUTHERFORD B. HAYES AND HIS AMERICA* 341 (Russell & Russell 1967) (1954). Another Hayes biographer likewise observes that "Republicans must have won" if the matter came to military conflict and thus some leaders of that party, including Hayes himself to a point, were not averse to resorting to force to settle the matter. H.J. ECKENRODE, *RUTHERFORD B. HAYES: STATESMAN OF REUNION* 205–06 (1930).

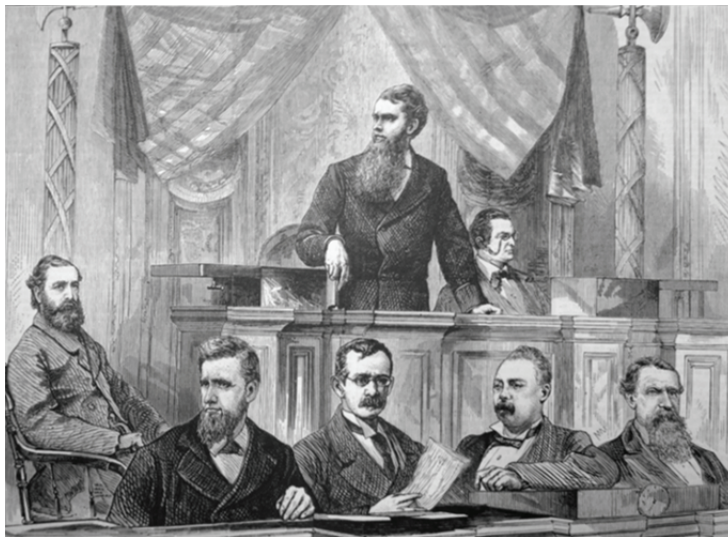
48. Haworth puts the point this way:

President Grant was . . . a Republican; and, although anxious for a peaceful settlement, he had given out that he intended to see his duly declared successor inaugurated. It was well known that in case the two houses were unable to come to an agreement Mr. Ferry would proceed to count the votes, and would declare Hayes the President-elect. Mr. Hayes would then be inaugurated under the protection of the United States army.

HAWORTH, *supra* note 11, at 208 (citation omitted); *see also* HOLT, *supra* note 11, at 207 (noting that Republicans claimed, if push came to shove, under the Twelfth Amendment "the president of the Senate had the exclusive power and authority to count the electoral votes and resolve disputes over contested returns from different states").

49. *See* HAWORTH, *supra* note 11, at 274–77; *see also* BARNARD, *supra* note 47, at 391–92 (describing Hewitt's conduct over Vermont as "giving appearance that he had joined the filibusterers").

Figure 8: “The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted”—U.S. Constitution, Twelfth Amendment⁵⁰



The gravest danger was the possibility that, when March 4 arrived, there would be two separate inaugurations and thus two competing claims to the office of the presidency and its powers of commander in chief. Just imagine Hayes asserting this authority by virtue of a pronouncement from Senator Ferry, with Tilden purporting to be president based on a vote to that effect from the House of Representatives. Had the conflict reached that point, in the view of many at the time (as well as since), it would have caused a second civil war.⁵¹ Some generals in the army were prepared to side with Tilden, and there were state militias that could be mobilized to support the Democrats.⁵² It is thus difficult to overstate the severity of the situation—and the potential threat to the nation—when Hewitt

50. *The Presidency—Mr. Ferry Announcing the Result of the Count*, HARPER'S WEEKLY, March 17, 1877, at 205.

51. Haworth titles a chapter of his book “Compromise or Civil War?” and opens the chapter with the observation that “at the time probably more people dreaded an armed conflict than had anticipated a like outcome to the secession movement of 1860–61.” HAWORTH, *supra* note 11, at 168. One Hayes biography describes the danger in even more apocalyptic terms:

If war had come it would not have been such a contest as the Secession War but a true civil war between parties instead of between sections. Almost every State would have been the scene of fighting, and . . . it is probable that freedom would have perished in a struggle between parties for the control of the government.

ECKENRODE, *supra* note 47, at 205–06.

52. HAWORTH, *supra* note 11, at 194 (“The enrolling of Democratic minute-men went forward until military organization to a certain degree had been effected in eleven states, and a commander-in-chief, namely General Corse, had been tentatively agreed upon.” (citations omitted)). Haworth adds that other generals were considered as well. *Id.* at 194 n.3; accord BARNARD, *supra* note 47, at 341–42.

made his surprise announcement in the joint session that he possessed a second certificate of electoral votes from Vermont.

Ferry refused to accept Hewitt's second certificate. Ferry said that, under the controlling congressional statute, any purported certificate needed to have arrived in his possession by February 1; this purported second certificate had not, and thus it was untimely and could not be considered.⁵³ Ferry then ruled from the Chair, over the protests of Democrats, that Vermont was a single-certificate state and thus the two Houses of Congress were supposed to separate and consider solely whether to accept or reject this single certificate.

Later that same day, the Senate voted quickly to accept the single certificate from Vermont. The House, however, recessed until the next day: Thursday, March 1.⁵⁴ Here is where the drama gets really interesting and becomes most intense.

*B. The Decisive Day and the House's "Stormiest Session"*⁵⁵

Under the terms of the statute, the debate over the single certificate from Vermont was limited to just two hours.⁵⁶ This time limit had been put in the statute precisely to avoid attempts to delay the completion of the count. When the House convened on March 1, hardline Democrats argued that this two-hour debate on the single certificate should not yet begin. The hardliners argued that the House, instead, should insist on sending Vermont back to Senator Ferry with the demand that the count not proceed unless and until Vermont was recognized as a two-certificate state and sent to the Commission on that basis.⁵⁷

53. The compromise statute was not entirely precise on this point, but it did speak of the certificates of electoral votes from the states being "opened by the President of the Senate" on February 1, once the joint session got underway, thereby implying that the certificates needed to have arrived in his possession by that time. Moreover, going all the way back to 1792, Congress by statute had specified a date by which certificates of Electoral Votes must have arrived from the states in order to be counted. See H.R. Misc. Doc. No. 13 § 2. Therefore, Ferry was on solid ground in asserting that Hewitt's second certificate from Vermont was procedurally barred because he had not received it by February 1.

54. 5 CONG. REC. 2028 (1877).

55. For the official account of what transpired in the House chamber that day, see 5 CONG. REC. 2031–35 (1877). But as one eyewitness later recalled: "To have an adequate conception of this scene of painful disorder, one must multiply this report [in the CONGRESSIONAL RECORD] by three or four. No system of reporting, no corps of reporters, was adequate to such an occasion." James Monroe, *The Hayes Tilden Electoral Commission*, 72 ATLANTIC MONTHLY 521, 536 (1893).

56. Section three of the statute provided:

That when the two houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or for the decision of any other question pertinent thereto, each Senator and Representative may speak to such objection or question ten minutes, and not oftener than once: *Provided*, That after such debate has lasted two hours, it shall be in the power of a majority of each house to direct that the main question shall be put without further debate.

H.R. MISC. DOC. NO. 13 § 3, at 459 (1877).

57. Here is how one of the hardliners framed their argument:

It is very evident that the proposition submitted by the gentleman from Illinois is one

Randall, as Speaker, presided over these deliberations in the House. He announced from the chair that, while he agreed with the view that Ferry should have treated Vermont as a two-certificate state and thus should have given it to the Commission, he believed that under the statute he was duty-bound to accept Ferry's ruling as final and thus start the clock on the two-hour debate, enabling the electoral count to continue.⁵⁸ The hardline Democrats insisted that Randall let the House vote as a body on their position—in other words, to vote on whether to send Vermont back to Senator Ferry and the joint session without undertaking any consideration of Vermont as a single-certificate state. Yet Randall refused to permit the vote that the hardliners so vociferously demanded.

Here are the key passages from the Congressional Record at the crucial juncture where Randall held firm to his position that the clock must start for the

which must be *preliminarily considered* before you proceed to the consideration of the other objections which are made. The gentleman from Illinois [Mr. SPRINGER] offered [in the joint session on the previous day] an objection to the closing of the objections to the vote from Vermont, unless the other return which had been made and of which the President of the Senate had been apprised [by Hewitt] should also be submitted by the President of the Senate in the presence of the two Houses. The failure on the part of the President of the Senate to do this, it is contended, makes the two Houses *powerless* to entertain any resolution upon that question. I think there is something more involved in this than a mere technical point, and that *you cannot proceed now to consider the objections to the electoral vote of the State of Vermont predicated upon the idea that there is but one single return from that State.* That is what the resolution of the gentleman from New York [Fernando Wood, a Democrat who was willing to let Hayes be inaugurated] proposes; and he reads the concluding clause of the first section of the law in order to demonstrate that in a case where there is but a single return it is the duty of the two Houses immediately to proceed and decide upon the objection by a vote. No one denies that.

But the question that lies back behind this is whether the certificates from the State of Vermont are single or dual in their character. If they are dual in their character [then] the clause of the law to which the gentleman from New York appeals does not apply. On the contrary, if this is a return which it is the duty of the President of the Senate to open and submit to the consideration of the two Houses, Vermont then becomes a State with dual electoral returns, which should be submitted under the law to the electoral commission.

5 CONG. REC. 2031 (1877) (emphasis added). By this argument, the hardliners made clear that in their view the House was not entitled to move forward under the statute in treating Vermont as a single-certificate state, but instead must go back to the joint session so that it could be properly treated as a dual-certificate state (according to their lights). On the basis of this argument, the hardliners attempted to maneuver the House into voting on their motion to go back to the joint session without considering Vermont as a single-certificate state.

58. Here are Randall's words on this point:

The SPEAKER. The Chair desires to say that, with great respect for all parties concerned, he considers that a grave mistake and wrong was committed yesterday in the joint meeting of the two Houses in this: that the Presiding Officer refused to receive even for opening and reading for information a package which had all the surroundings of an authentic and duly attested paper in relation to an electoral vote of the State of Vermont. The Chair, in one aspect of this case, thinks that he would be called upon to rule that the action of the Presiding Officer of the joint convention on yesterday was wrong. *He does not think that he possesses that power; neither in a technical sense, as he understands it, does he believe that the action of the joint convention can be reviewed in this House in the manner proposed.*

5 CONG. REC. 2032 (1877) (emphasis added). On this ground, Speaker Randall set himself against the hardliners in his own party who wanted to go back to the joint session without even considering the objections to the one certificate that Ferry had accepted from Vermont.

two-hour debate on Vermont, without first going back to the joint session to revisit the issue of the second certificate:

Mr. O'BRIEN. Do I understand the Chair to rule that the two hours' debate is now to commence?

The SPEAKER. The Chair so rules.

....

Mr. CAULFIELD. Well, sir, I appeal from that decision. I contend that there is no power in this House to proceed to the consideration of this question until we know what the question is. Under the present circumstances we do not know what the question is. . . . [U]ntil that [second] certificate is opened it is impossible for us to know what objections we are to consider.

....

Mr. O'BRIEN. Does not the Chair entertain the appeal from his decision?

Mr. CAULFIELD. I insist on my appeal from the decision of the Chair.

Mr. SPEAKER. *The Chair declines to entertain the appeal.*

Cries of "That is right," and applause.

Mr. SPRINGER. I hope the Chair will not insist upon that position. This is one of the most important questions that ever came before this House. [Cries of "Regular Order!"] *I insist that this appeal must be entertained and that we must know whether this is a case that has gone to the commission or whether it is now to be considered by the separate Houses.* This is not a dilatory motion, but one that arises upon a vital provision of the electoral law; and I ask the Chair to entertain the appeal.

The SPEAKER. The Chair considers that he is bound by the law—

Mr. SPRINGER. I want the law enforced. . . . *If this case under the law has gone to the commission, it is there now by the operation of the law and we have nothing before us.*

....

Mr. BEEBE (who addressed the Chair amid cries of "Order!" and great confusion) was understood to say: Mr. Speaker, I have stood with the majority of this House against every proposition to delay obedience to this law. I acknowledge my obligations under that law. I recognize the further fact that we are here not only under that, but in the exercise of every prerogative and privilege guaranteed by the Constitution to this House. [Cries of "Order!" mingled with applause.] Will the Chair entertain the motion—

The SPEAKER. The Chair will entertain no motion.

Mr. BEEBE. Then I charge the Speaker with doing what I have complained of the electoral commission for doing, violating the very law under which we are operating.

Mr. RICE. The Speaker is usurping power.

The SPEAKER. The Chair usurps no power.

Mr. BEEBE. Ninety members of this House demand that appeal from the decision of the Chair, and it cannot be had. . . . Will the Chair state the reason for his ruling?

The SPEAKER. The Chair decides according to his conscience and the law.⁵⁹

At this point, “[p]andemonium broke loose.”⁶⁰ Eyewitnesses described it as probably the “stormiest” session that had ever happened in the House.⁶¹ The *New York Times* reported: “This action of the Speaker seemed to set the [hardliners] wild with excitement. . . . Many ladies, fearing that a free fight was about to [break out], left the galleries.”⁶² *The Times* of London added these details: “Every member was on his feet; nearly all were screaming. . . . Some of the members grasped their revolvers, and there was imminent danger of personal collisions.”⁶³

The hardliners knew that their position was doomed if they could not prevail upon Randall to let the House vote on their proposal (which, again, was to stop the entire process unless and until Ferry acquiesced in sending Vermont to the Commission). If instead the House took back to Ferry its objection to the single certificate he recognized, then Ferry would simply count Vermont for Hayes under the terms of the statute, since the Senate already had voted to accept that certificate. Moreover, and this is a crucial point, Ferry would do the same even if the House tacked on an extra complaint about Ferry’s refusal to accept the second certificate at the same time that the House submitted its formal objection to the one certificate he accepted. Ferry could simply ignore that extra—indeed superfluous—complaint, as long as the House completed its duty under the statute to state its formal objection to the single certificate.⁶⁴

For this reason, it was absolutely crucial that the Democratic hardliners

59. 5 CONG. REC. 2033 (1877) (emphasis added).

60. Pomerantz, *supra* note 19, at 70.

61. Monroe, who witnessed the scene himself, later quoted the *New York Tribune* as fairly describing “such a scene of disorder as has probably never been witnessed in the stormiest scenes of Congress before.” Monroe, *supra* note 55, at 536. Haworth cited Monroe in his own description, which begins: “The session of [March 1] was probably the stormiest ever witnessed in any House of Representatives.” HAWORTH, *supra* note 11, at 276. Others have echoed the point even more forcefully: “The House session of March 1, 1877, was ‘probably the wildest that ever occurred in any American legislative body.’” EVANS, *supra* note 21, at 304 (quoting HERBERT BRUCE FULLER, *THE SPEAKERS OF THE HOUSE* 199 (1909)).

62. *The Last State Counted*, N.Y. TIMES, Mar. 2, 1877, at 1.

63. *Latest Intelligence: The Presidential Election*, TIMES (London), Mar. 2, 1877, at 5.

64. Randall was careful to make sure that the House did conduct this single-certificate vote before going back to the joint session. See 5 CONG. REC. 2053–54 (1877).

prevent the House from undertaking the two-hour debate under the statute on the single certificate from Vermont. As soon as that two-hour debate occurred, Hayes was all but inaugurated.⁶⁵ Conversely, however, if the hardliners could succeed in stopping that two-hour debate from happening, then they could see their way to Tilden's inauguration. If the House went back to Ferry without undertaking that two-hour debate, then the whole process halted unless Ferry was willing to reconsider his rejection of the second certificate. Yet it was most unlikely that Ferry would do that. Thus, with the entire electoral count stopped dead in its tracks, March 4 would arrive with the count incomplete, and the House could proceed to vote Tilden into the presidency under its interpretation of the Twelfth Amendment.

For these reasons, this climatic moment on March 1 was truly the “do or die” pivot point of the whole disputed Hayes-Tilden election. For precisely the same reasons, the hardline Democrats became apoplectically furious when Randall refused to let the House even vote on whether or not to adopt their position. When George Beebe, a Democrat from New York, asked Randall for the basis of his ruling and then heard Randall's reply—“The Chair decides according to his conscience and the law”—Beebe spun out of control.⁶⁶ As the *New York Times* described it: “Beebe mounted his desk, and running over the tops of four desks in front of him, denounced the rulings of the Speaker as unlawful and unjust. . . . The noise and confusion which was caused by Beebe's disgraceful performance exceeded anything ever known in Congress.”⁶⁷

Figure 9: Representative George Beebe of New York



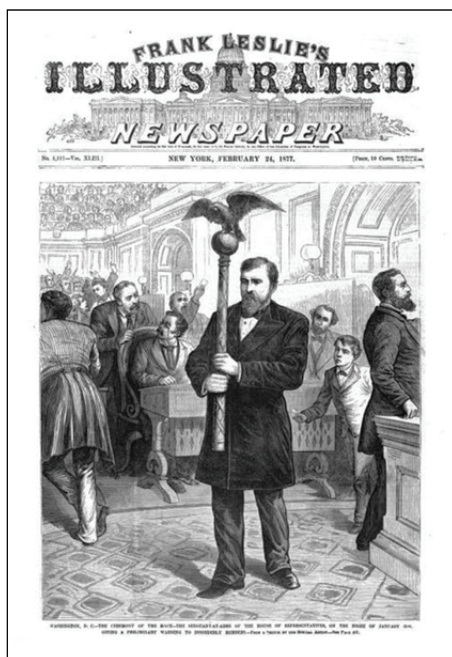
65. In this respect, my understanding of March 1 diverges from Haworth's. He suggests that the entire count still could have been derailed if at the end of the two-hour debate the House had sent a resolution back to Ferry demanding that Vermont go to the Commission. See HAWORTH, *supra* note 11, at 278. For reasons I explain, however, Ferry simply could have ignored that resolution, counted Vermont for Hayes, and moved on to the next state.

66. 5 CONG. REC. 2033 (1877).

67. *The Last State Counted*, *supra* note 62.

Randall had to call upon the Sergeant-at-Arms to restrain these recalcitrant members of his own party. Yet by invoking this show of force against his fellow Democrats, Randall prevailed. The two-hour debate on Vermont's single certificate indeed commenced and, once completed, the House returned to the joint session. Vermont's electoral votes were duly counted for Hayes under the statute. The joint session then moved on to the remaining states (Virginia, West Virginia, and Wisconsin), and the entire electoral count was finally complete at four o'clock the next morning, with Ferry declaring Hayes the official winner.

Figure 10: Sergeant-at-Arms and His Mace⁶⁸



C. An Assessment of Randall's Conduct

What should we make of Randall's adamant refusal to let the House even vote on the Democratic hardliners' proposal? It cannot be explained simply as a desire not to take the time to call the roll. Randall let the House vote on many other motions during the March 1 session, including on other dilatory moves made by the hardliners. But not this one.

68. FRANK LESLIE'S ILLUSTRATED NEWSPAPER (Feb. 24, 1877), available at <http://books.google.com/books?id=IkALAAAIAAJ&lpg=PR8&dq=FRANK%20LESLIE%E2%80%99S%20ILLUSTRATED%20NEWSPAPER%20Feb.%2024%2C%201877&pg=PA44#v=onepage&q=FRANK%20LESLIE%E2%80%99S%20ILLUSTRATED%20NEWSPAPER%20Feb.%2024,%201877&f=false>.

For Randall, it was a matter of principle. He saw it as his obligation to make sure, once Ferry made his ruling against the second certificate, that the House conduct the two-hour debate required by the statute on the single certificate from Vermont. He viewed this as an obligation of his Speakership even though, as a Democrat, he vehemently disagreed with Ferry's ruling. Furthermore, he viewed it as his obligation even though, from a small-"d" perspective, refusing to let the House—the people's chamber—take a vote could be seen as undemocratic. The hardliners certainly saw it that way, thinking that the body, rather than the chair, ought to have the last word on the matter. But, from Randall's perspective, the rule of law came first, above all else, and in this case the rule of law required that he prevent the body from taking a vote that potentially could defeat the operation of the statute enacted for the purpose of completing the count of electoral votes before March 4.

But why not just let the hardliners have their vote, as they were unlikely to obtain a majority of the whole House in support of their position? Randall could not risk the chance that the hardliners might win this vote. Even if the chance was fairly small, it was not negligible. There was still the possibility that the hardliners could prevail upon enough other Democrats to achieve approval of their motion. In particular, the status of Southern Democrats was still somewhat in flux. Southern Democrats had been bargaining with Republicans, offering to accept the inauguration of Hayes in exchange for promises that Hayes would remove federal troops from the South.⁶⁹ But the deal had not yet been definitively sealed at the crucial moment that the hardliners were pressing Randall to let the House vote on their proposal.⁷⁰ It was only after Randall had called upon the Sergeant-at-Arms to restore order—and towards the end of the two-hour debate on Vermont's single certificate—that a key Southern Democrat, Representative William Levy of Louisiana, announced his support for letting the count proceed so that Hayes could be inaugurated.⁷¹ Thus, at the moment Randall stood his ground in refusing the vote that the hardliners ferociously wanted, it remained uncertain what the vote would be.

Indeed, based on a vote that occurred at the end of the two-hour debate, Randall had good reason to believe that, if he had permitted a vote on the hardliner proposal, it could have come close to passing. Once the two-hour debate was over, Randall permitted a vote on a resolution demanding that Ferry accept the second certificate from Vermont and send the state to the Electoral

69. A key meeting between leading Southern Democrats and representatives for Hayes was held at the Wormley Hotel on the night of February 26. See HOLT, *supra* note 11, at 240.

70. On March 1, Southern Democrats were continuing to seek a commitment from outgoing President Grant that federal troops would not interfere with a Democratic takeover of Louisiana's government. Brooks D. Simpson, *Ulysses S. Grant and the Electoral Crisis of 1876–77*, 11 HAYES HIST. J. 5, 17–19 (1992); see also BARNARD, *supra* note 47, at 392–93 (describing the same March 1 meeting between Louisiana Democrats and Grant).

71. HAWORTH, *supra* note 11, at 277–79.

Commission. Randall permitted the motion at this time, but not earlier, precisely because now it could not prevent the timely conclusion of the electoral count (since, as already mentioned, Ferry could simply ignore this resolution in favor of declaring the debate on Vermont complete under the terms of the statute).

The House vote on this resolution, even after Levy had signaled the acceptance by Southern Democrats of Hayes's inauguration, was close. No Republican, of course, voted for this resolution; 104 Republicans voted against it. Of the Democrats in the House, 116 voted in favor of this resolution, and only 42 Democrats voted against it. Moreover, twenty Democrats—including Levy himself along with nine other Southerners—abstained from voting one way or the other. If instead these ten Southern Democrats along with the fifteen Southern Democrats who voted against the resolution had all supported it, the resolution would have passed 141 to 133. (The actual vote was 116 in favor and 148 against.)⁷² Therefore, prior to Levy's signal—*before* the beginning of the two-hour debate, when the hardliners wanted the vote on their proposal—*if* Randall had permitted that vote and *if* these twenty-five Southern Democrats had supported the hardliners at that crucial moment, the hardliners might have prevailed by a similar 141–133 margin.⁷³

The point then is that when Randall refused to let that vote occur, the uncertainty was too great—and the stakes were too high—for him to test the strength of the hardline position. By acting as he did, Randall prevented a genuine threat that the electoral count would not be complete by March 4. Thus, by resisting the demands of the hardliners within his own party, even by calling out the Sergeant-at-Arms against them when necessary, Randall was instrumental in thwarting the serious risk that the constitutional crisis of dueling claims to the

72. See 5 CONG. REC. 2048–49 (1877). Among the 148 nays, besides 104 Republicans and 42 Democrats, there were 2 independents.

73. For another account that highlights Levy's speech as the key turning point, see BARNARD, *supra* note 47, at 393–94:

Congressman Levy hurried from the Executive Mansion to the House to carry out an important assignment. This was to make a speech directed at those members who, sincerely or not, were justifying their delaying tactics by citing the continued presence of federal troops in Louisiana and South Carolina. . . . That speech was accepted as the signal for ending the stalemate on Vermont.

Accord FULLER, *supra* note 61, at 202:

The "irreconcilables" noticed that the conservative Democrats were voting with them on the Vermont case. Wild with delight they saw victory already won. Suddenly Levy appeared on the floor. Informing Randall of the successful termination of the Wormley conference, word was given to abandon the contest. Levy appealed to his fellow-members to refrain from preventing the completion of the count and thereby protect Louisiana and South Carolina. The radicals rallied from the shock and sought to muster their disorganized hosts. But the gloom of defeat had replaced the hope of victory.

See also C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 217–18 (1966) (describing how "the strength of the filibuster," which had been "[r]einforced with new recruits" on the morning of March 1, plummeted after Levy finished his speech).

presidency would occur on Inauguration Day. In this respect, Randall's decision to stand firm against the hardliners in his own party deserves to be called heroic.

Many who witnessed what happened in the House on March 1, 1877 felt this way.⁷⁴ Consider, for example, the view of one House member at the time—who later was a professor of political science at Oberlin College and who happened to share the name of the nation's fifth president—James Monroe. Writing in 1893 about the Hayes-Tilden dispute, this Oberlin professor emphasized the risk to the nation presented by the hardliner efforts to derail the count: "This opposition" once the count reached Vermont, "assumed such proportions as to fill patriotic minds with alarm lest the declaration of the final result should not be reached."⁷⁵ Monroe squarely gives Randall full credit for preventing this potential disaster: "This calamity to the country might not have been averted, had not the man of the occasion been found in Samuel J. Randall, the Democratic Speaker of the House."⁷⁶ Monroe recognized that Randall was a "warm partisan" but immediately commended him for having both the "firmness and conscience" to overcome his partisanship on this occasion and, instead, obey "his obligations to the Constitution and the laws."⁷⁷ Monroe continued: "He had a clear conviction that it was his duty not to permit the object of the electoral law to be defeated by any fractious policy of obstruction."⁷⁸ Moreover, fortunately for the nation, Randall

74. Pomerantz, *supra* note 19, at 73 (collecting the newspaper editorials that praised Randall in the aftermath of his conduct on March 1); *see also* EVANS, *supra* note 21, at 305 ("Randall was deluged with congratulations and condolences."). Hewitt himself later credited Randall with averting a national calamity:

There was much excitement and doubtless scenes of violence would have been witnessed but for the firmness of Speaker Randall, to whose patriotic action the country owes a debt of gratitude for the peaceful issue of this long, exciting, and humiliating controversy, upon which the attention of the country had been concentrated for many months with painful anxiety.

ABRAM S. HEWITT, *Secret History of the Disputed Election, 1876–77*, in *SELECTED WRITINGS OF ABRAM S. HEWITT* 155, 177 (Allan Nevins ed., Kennikat Press 1965) (1937). Hewitt also claimed that Randall was in cahoots with him over the introduction of the second certificate from Vermont. *Id.* ("In this transaction I had the full approval and co-operation of Speaker Randall . . ."). But this claim is unsubstantiated and self-serving. Hewitt wanted someone else to share the blame for provoking the precipitous commotion caused by the second certificate. Haworth, for one, doubted Hewitt's veracity on his explanation for his conduct towards the end of the count. *See* HAWORTH, *supra* note 11, at 279 n.1. In any event, whatever Hewitt's actual state of mind on the morning of March 1, and whatever Randall's knowledge of Hewitt's plans and motives, there were still many other hardliners that morning who were eager to make the most of Hewitt's machinations. Randall saved the country from the continuing threat they posed, and for that Hewitt's praise of Randall is creditable—indeed all the more so because Randall was saving the country from the potential consequences of what Hewitt himself had unleashed.

75. Monroe, *supra* note 55, at 532.

76. *Id.*

77. *Id.*

78. *Id.* at 533.

had the courage to match his conviction: “He had a strength of will equal to the emergency, and he put it to good use.”⁷⁹

Figure 11: James Monroe, House Member and Oberlin Professor⁸⁰



Some may question whether Randall really put aside partisanship in refusing on March 1 to let the House vote on the hardliner proposal. It is undoubtedly true that Democrats were not monolithic in their views on whether to go all the way to the brink in an attempt to get Tilden elected. Even apart from the situation of the Southern Democrats, who were willing to accept Hayes if the bargain was good enough, there were also Northern Democrats who did not want to risk a second civil war by fighting too hard to win the office of the presidency. Tilden himself was enigmatic up to the end on just how hard—and how far—he wanted to press his claim to the office. Thus, one could argue that Randall was actually acting in his party’s best interest by resisting the hardline position and, instead, seeking to bring the electoral count to a timely completion under the terms of the statute, even though it meant acquiescing in Hayes’s victory.⁸¹

79. *Id.*

80. Figure from Oberlin College Archives (on file with the *UC Irvine Law Review*).

81. See EVANS, *supra* note 21, at 307 (“Certainly concern for his own political future and that of the Democratic party were important considerations in all of Randall’s activities.”); see also House, *supra* note 19, at 98 (suggesting that Randall may also have been motivated by personal considerations, although crediting that Randall’s “actions at the time of the final crisis were the largest factors in the successful completion of the count”).

But this alternative account of Randall's conduct on March 1 is ultimately unpersuasive. The best evidence indicates that if he had permitted the vote to take place, a majority of his party would have voted in favor of the hardline position (even if a majority of the whole House would have rejected it). Thus, it is fair to say that, in refusing to let the vote occur, Randall most likely was acting against the wishes of the majority of his own caucus.⁸² But even if this were not true—in other words, even if the hardliners most likely were a minority among Democrats at the crucial moment when they demanded a vote on their proposal—the most partisan thing to do would be simply to let them have their vote and see what the result was. Randall could have taken the position that, as Speaker, he would do whatever the majority of his own party wanted and the best way to find that out would be to hold the vote that the hardliners wanted. If they lost, so be it; but by letting the vote take place, he could not have been accused of thwarting the wishes of his own party. Yet thwarting those wishes was precisely what Randall was willing to do if and when it was necessary to act in accordance with what he perceived to be his duty under the electoral count statute.⁸³

Moreover, within the Democratic Party itself, Randall had been viewed as one of the hardliners. Well into the month of February, Randall himself was pronouncing his commitment “to fight on this Electoral Commission inch by inch, and defeat the count at all hazards.”⁸⁴ For this reason, it was a great shock to the hardliners that he would not even let the House vote on their position. They considered Randall's refusal a betrayal of what had been their common cause.⁸⁵

82. This point is true even if at other times during the whole Hayes-Tilden saga the hardline position reflected only a minority within the Democratic caucus. For a comprehensive analysis of the relative strength of the hardline position as events unfolded, based on the totality of roll call votes in the House, see MICHAEL LES BENEDICT, *Southern Democrats in the Crisis of 1876–77: A Reconsideration of Reunion and Reaction*, in PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA 186, 186–209 (2006).

83. Evans suggests that Randall was merely acting on “Tilden's wishes” once Tilden finally signaled, in a telegram to Randall, that he (the party's candidate) wanted the count complete. EVANS, *supra* note 21, at 307. But Randall did not receive Tilden's telegram until sometime after midnight, as March 1 turned into March 2. *Accord* NEVINS, *supra* note 42, at 385; House, *supra* note 19, at 102; see ECKENRODE, *supra* note 47, at 230. Thus, hours earlier, when Randall made his crucial decision to deny the hardliners the vote they demanded, Randall did not have the benefit of the ever-vacillating Tilden's final instructions—and hence Randall at that outcome-determinative moment was acting on his own, in accordance with the dictates of his own conscience.

84. Pomerantz, *supra* note 19, at 68 n.14 (quoting Randall's letter to another Democrat).

85. In general, Evans's depiction of Randall does not take account of the critical timing of specific events on March 1 and does not mention Randall's refusal to let the House vote on the key proposal of returning to the joint session without conducting the two-hour debate on Vermont. See EVANS, *supra* note 21, at 304. Thus, Evans offers no reasons to believe this specific decision by Randall was motivated by partisanship rather than a sense of obligation. House's unpublished Ph.D. thesis on Randall mentions a rumor that on March 1 Randall was willing to bargain with Senate Republicans about who they would choose as their leader if he agreed to complete the count. House, *supra* note 19, at 101. But apart from the single *New York Times* story, which itself labeled the account as “Rumor,” *The Electoral Count*, N.Y. TIMES, Jan. 28, 1878, House cites no other source to substantiate the allegation, and I have found no other work that mentions this innuendo. Evans also

Thus, no matter how one assesses the numerical strength of the hardliners on March 1, it is accurate to say that Randall resisted his own partisan impulses and instead was guided by what he believed “conscience and the law” required. In this respect, Randall acted virtuously, and he deserves to be praised for doing so.⁸⁶ A biographer of another Speaker of the House, Thomas Brackett Reed—undoubtedly one of the most significant figures to hold that office—was especially effusive in his praise for Randall’s resistance of partisanship in order to avert the constitutional crisis that would have occurred if the election had not been settled by March 4:

Randall . . . possibly saved [the nation] from anarchy and civil war. . . . If Grant’s term had come to its constitutional end and his successor had not been determined upon, chaos itself would have intervened. The extent of the damage would have been incalculable with a weak or small man in the Speaker’s chair, and Randall reached a sublime height on that day when he put before himself the good of the country and, partisan as he usually was, and in defiance of many in his own party and of the precedents which he himself had helped to establish, he cleared the way for the completion of the count.⁸⁷

The bottom line is that Randall saw the hardliners of his own party as being willing to take the nation all the way to the edge of the constitutional cliff, and he took it upon himself as Speaker to keep the nation from reaching that edge.

quotes a letter that Randall wrote some months later, in which he said he would have been “ruined and disgraced” and the Democratic party would have “disintegrat[ed]” if he had not insisted upon completing the count. EVANS, *supra* note 21, at 306 (quoting letter). But the letter also says the crisis that would have ensued would have caused “an end of liberty in the Country & a succession of military elections.” *Id.* Thus, Randall felt an overriding need to avoid this national calamity, of which his own downfall and that of his party would have been incidental byproducts. Consequently, Randall’s larger purpose as expressed in this letter is consistent with a sense of duty to nation above all else. In any event, in preparing this keynote address, I have not yet had an opportunity to examine Randall’s collected papers in Philadelphia, and thus a more definitive assessment of his conduct on March 1 must await that research.

86. A history of House speakers, written at the end of the nineteenth century, observed that it would have been easy for Randall to let “the obstructionists” have their way and thus “to secure Hayes’s defeat,” but instead “Randall considered it his duty to obey the Electoral Commission act . . . and to stop obstruction on the Presidential election. He conscientiously performed this duty, therefore, in spite of his individual preferences and the fierce assault of his political friends.” M. P. FOLLETT, *THE SPEAKER OF THE HOUSE OF REPRESENTATIVES* 111 (Longmans, Green & Co. 1896); *see also* ECKENRODE, *supra* note 47, at 228–29 (“If the Democratic Speaker Randall had sided with the protesting faction, the count of the Vermont vote might have been held up indefinitely, precipitating the interregnum. Randall, however . . . resolutely faced the mob of protesting, reproachful fellow-Democrats and finally put down the revolt.”).

87. SAMUEL WALKER MCCALL, *THE LIFE OF THOMAS BRACKETT REED* 119 (1914) (echoing Reed’s own praise of Randall’s iron will and unfaltering courage); *see also* DE ALVA STANDWOOD ALEXANDER, *HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES* 44 (1916) (stating that “by firm fairness” Randall “rose to exalted heights” in 1877); GEORGE ROTHWELL BROWN, *THE LEADERSHIP OF CONGRESS* 78–79 (1922) (expressing that Randall’s “bold use of the enormous powers of the speakership . . . saved the situation”).

Moreover, it is undeniable that Randall acted courageously when the full force of the hardliners' fury was leveled against him and he was threatened with physical attack—at least from Beebe, who was bounding towards him.

Given these facts, I hope you can see why I consider Randall's conduct on March 1 to be worthy of being called a "profile in electoral courage."

III. THE LESSONS OF RANDALL'S ELECTORAL HEROISM

What use can we, in the second decade of the twenty-first century, make of Samuel Randall's heroic moment of civic virtue and courage, which occurred more than six score years ago? I think there are at least three valuable lessons for us to draw.

The first is actually a point about institutional reform. As heroic as Randall was in pulling the nation back from the constitutional precipice, the United States should not have to depend on such heroism in this kind of situation—especially not from a politician holding such an intrinsically partisan office as Speaker of the House. Instead, the issue of whether the federal government has received one or more timely certificates of electoral votes from a state, along with the ultimate question of whether or not a presidential candidate has won a majority of electoral votes, should be placed in the hands of a well-designed nonpartisan tribunal.⁸⁸

Second, we can only hope that the current Speaker of the House would exercise the same civic virtue if he happens to find himself in a similar situation. Suppose that in January of 2017—when Congress convenes to count the electoral votes from the 2016 presidential election—there develops a dispute over whether Wisconsin is a one- or two-certificate state.⁸⁹ Imagine, for example, that there is a last-minute decision from the Wisconsin Supreme Court invalidating some ballots as improper under state law, and this ruling—which would be the basis for the purported second certificate—gives the state to the Republican candidate, whereas the Democrat wins the state in the absence of this last-minute ruling (and thus the first certificate awards the state to the Democrat). Under the Electoral Count Act of 1887, passed in the wake of the Hayes-Tilden dispute, and which remains in

88. I have attempted to sketch the outlines of such an institution. *See* Foley, *supra* note 1, at 508–09.

89. The hypothetical scenario described in this paragraph of the keynote's text, when delivered at the symposium on September 14, 2012, was drafted in terms of the then-upcoming 2012 election. It has since been revised to refer to the 2016 presidential election, as the same point remains. Indeed, as long as the procedure for counting electoral votes is governed by the same rules as were in place in 2012, including the problematic Twelfth Amendment itself, there remains the risk that the outcome of the election depends on how the Speaker of the House decides to act. (To make the hypothetical work for the 2016 election, it is necessary to assume that in January 2017 Democrats control the Senate, Republicans control the House, and Wisconsin's governor is a Republican—all of which were true for the 2012 election. If it helps to visualize the hypothetical scenario in one's mind, then picture Hillary Clinton as the Democratic candidate and Marco Rubio as the Republican; but the hypothetical works just as well whoever ends up the two nominees.)

force, it still matters whether a state sends one or more certificates, and the president of the Senate still has the authority to make this ruling in the joint session.⁹⁰ Therefore, imagine Vice President Joe Biden (who still will be president of the Senate of January 6, 2017, when Congress convenes under the Electoral Count Act) ruling that Wisconsin is a one-certificate state, which would assure the Democrat's election,⁹¹ while hardline Republicans in the House insist that Wisconsin is a two-certificate state, which under the convoluted terms of the Electoral Count Act would lead to the Republican's victory.⁹² Suppose Biden refuses to accept the second certificate as timely, while the hardline Republicans in the House insist that Biden must, or else the count remains incomplete, and thus the House will assert its constitutional prerogative under the Twelfth Amendment to elect the Republican directly in the absence of an electoral vote majority for either candidate.

In other words, suppose the House Republicans in 2017 make the same constitutional argument that the House Democrats did in 1877, prepared to go all the way to constitutional brink to prevail. Would Speaker John Boehner (assuming he still is Speaker in 2017) resist the hardliners in his party in the same way that Speaker Randall did? In other words, would the current Speaker accept the authority of the president of the Senate to decide definitively whether there are one or more timely certificates from a state, and thus refuse to permit the House as a chamber to derail the completion of the count? We can certainly imagine hardliners within the current Republican Party—the so-called “Tea Party” types—being as intransigent as the hardline Democrats were on March 1, 1877. Thus, it is conceivable that resisting the hardline wing of his own party would

90. See 3 U.S.C. § 15 (2012). This section, notoriously convoluted and difficult to comprehend, repeats the language of the 1877 statute that “all the certificates, and papers purporting to be certificates, of electoral votes” “shall be handed, as they are opened by the President of the Senate” to the tellers appointed by the House and Senate for this purpose. *Id.* This language does not definitively determine when a certificate is too late in arrival to be opened by the president of the Senate.

91. This hypothetical scenario assumes that whichever presidential candidate wins Wisconsin will reach the 270 electoral votes necessary for being elected president without the involvement of the special procedure of the House of Representatives under the Twelfth Amendment.

92. If Wisconsin is deemed a two-certificate state, then under 3 U.S.C. § 15, if the Senate and House disagree on which certificate to count—which presumably would be the case, with the Senate supporting the pro-Democrat certificate (assuming the Democrats still control the Senate in 2017) and the House favoring the pro-Republican certificate—then the certificate endorsed by Wisconsin's governor is supposedly the tiebreaker, and presumably Wisconsin's Republican governor would favor the late-arriving certificate that purports to give the state's electoral votes to the Republican presidential candidate. Of course, given the extraordinary difficulty of interpreting 3 U.S.C. § 15, and its inherent ambiguities, Democrats in the Senate would argue that the Democratic presidential candidate should win even if Wisconsin is a two-certificate state. But who would adjudicate that dispute if Republicans in the House insist that their interpretation of 3 U.S.C. § 15 is the correct one? The point then is that as long as it is possible to assert that Wisconsin is a two-certificate state, and it is also possible to claim that the Republican candidate wins if Wisconsin is a two-certificate state, then the threat of a constitutional crisis exists where both sides claim entitlement to the presidency on Inauguration Day.

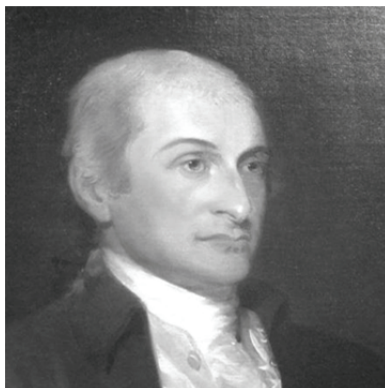
require Speaker Boehner to summon the same degree of fortitude and virtue that Randall was able to muster back then. Would the current Speaker match Randall in this respect? I leave that question for you to ponder, recognizing of course that in all likelihood it must remain in the realm of speculation.

The third and final point I want to make is that the story of Randall's heroism should be much better known than it is. It should feature prominently in high school history or civics classes, along with other "profiles in electoral courage"—like John Jay's refusal as New York's governor in 1800 to go along with Alexander Hamilton's partisan plan to amend New York's laws, in an effort to prevent Jefferson from becoming president.⁹³ Moreover, these and other "profiles in electoral courage" should be emphasized not only in high school but also in the various educational sessions that we as academics hold for professional politicians. When we are invited to speak to the National Association of Secretaries of State, for example, or the National Conference of State Legislatures, we should consider whether it would be appropriate to remind our audiences of the historical examples in which our public officials put aside partisanship when making a major decision about the operation of the electoral process.⁹⁴ In addition, if one or more of our current politicians resists partisan pressure in administering the electoral process, as Ohio Secretary of State Jon Husted arguably has on occasion, we should praise that kind of electoral virtue.⁹⁵

93. For an account of Jay's nonpartisan virtue in this electoral context, see Edward B. Foley, *The Founders' Bush v. Gore: The 1792 Election Dispute and Its Continuing Relevance*, 44 IND. L. REV. 23, 77 (2010).

94. In addition to Randall and Jay, other examples at the state level would include Edward Everett's decision in 1839 as the incumbent governor of Massachusetts not to contest his defeat, by a single vote, in his reelection bid; and Joshua Chamberlain's role in mediating the intensely disputed gubernatorial election of 1879 in Maine. There is, too, the performance of the intentionally neutral three-judge panel chosen to adjudicate Minnesota's disputed gubernatorial election of 1962, as well as the somewhat similar judicial panel selected to adjudicate Minnesota's 2008 senatorial election. Also worthy of mention is John Quincy Adams' essential role in ending the otherwise seemingly intractable dispute over the Speakership of the U.S. House of Representatives in 1839, which was tied up in a fight over ballots for representatives from New Jersey. All of these examples I discuss in a book I am writing, EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* (forthcoming). Incidentally, for an entirely different episode in his long political career, John Quincy Adams is the first example of senatorial virtue in Kennedy's *Profiles in Courage*. See KENNEDY, *supra* note 34, at 29–50.

95. See Foley, *supra* note 6 (mentioning Husted's refusal to appeal the "right church, wrong pew" ruling against him and, in doing so, resisting the more partisan position of his fellow Republican, Ohio Attorney General Mike DeWine). Husted also fought his fellow Republicans in Ohio over the issue of voter identification, rejecting their calls for a stricter law as unnecessary and contrary to the interest of the public as a whole. And on the issue of redistricting, Husted previously was out front on the need for a bipartisan compromise to avoid the egregious gerrymanders that plague Ohio politics.

Figure 12: John Jay

We should teach these “profiles in electoral courage” so that they become admired and, hopefully, emulated. I am not so naïve to think that proselytizing about electoral virtue in this way will automatically cause our politicians to suddenly become electoral heroes, resisting partisan pressures in the mold of Samuel Randall. But what we teach about U.S. history, both in high school and to professional politicians, does have the capacity to affect our political culture, at least over time and to some extent. Because we inevitably must rely to some degree on our politicians to be virtuous if the governance of the electoral process is to be free from partisan favoritism, we must hope that we can begin to cultivate at least modest improvements in the propensity of politicians to act with electoral virtue.⁹⁶

Moreover, if we do it right, teaching a set of “profiles in electoral courage” has the capacity to yield vivid lifelong memories of the standard to which we should hold our politicians when they make major decisions about the operation of the electoral process. These “profiles in electoral courage” are suitable for role-playing exercises, with participants asking themselves what they would have done if they had been in the same situation as Samuel Randall, or John Jay, or another

96. Justin Levitt has written a timely, important, and sophisticated paper on the use of situational norms to constrain the temptations of officeholders to act based on partisan impulses. *See* Justin Levitt, *The Partisanship Spectrum*, WILLIAM & MARY L. REV. (forthcoming). As Levitt cogently argues, the cultivation of these norms is, along with institutional design and sound substantive electoral rules, a necessary tool in an inevitably multipronged approach to increasing the possibility of impartiality in the governance of the electoral process. *Id.* As made clear in the introduction to this address, I share Levitt’s view that the adoption of nonpartisan institutions is also an essential ingredient to electoral reform (and I, too, believe that well-formulated substantive rules are a necessary, although not by themselves sufficient, component of improving the electoral process). Thus, in the same spirit as Levitt’s new paper, I hope that my highlighting of Randall’s role in the resolution of the disputed Hayes-Tilden election—as well as my broader call for a renewal of civics education that heralds other “profiles in electoral courage”—can help to inculcate among professional election officials the kind of role morality that Levitt analyzes and extols.

example of an electoral hero (like Charles Evans Hughes for his role in New York City's disputed mayoral election of 1905).⁹⁷ Having experienced vicariously in this way what it is like to stand in the shoes of a politician faced with this kind of decision and having the ability to refer to examples in the past where politicians acted virtuously in the moment of truth, the recipients of this form of education can demand that future politicians also do the right thing when they face their own moments of truth.

In any event, what and how we teach is something we who are academics can control. We certainly have more control over our teaching than we do over the structure of the institutions that govern the electoral process. It is not as if our scholarly proposals for institutional reform have all been adopted just because we have advocated these reforms. Thus, without abandoning these efforts at institutional reform, we should also devote some serious and sustained scholarly attention to the cultivation of electoral virtue. We can do this directly, by considering the content of what we teach and how we teach it, both to our regular students in the classroom as well as to our wider audiences.

CONCLUSION

In recent decades, scholars have largely neglected the cultivation of civic virtue as a pedagogical goal. It is considered an old-fashioned, even quaint, ideal. But it is one to which we should return. If we do, over time we might discover that we actually can help make a difference in the quality of our civic culture and thus, in turn, also make a difference in the quality of our democratic government and the electoral process that enables it to operate.

To that end, I have offered the story of Speaker Samuel Randall and his example of civic virtue, in the face of intense partisan pressure to do otherwise, at an acutely critical juncture in our nation's history, on March 1, 1877.

97. This example, too, will be discussed in the *Ballot Battles* book. See FOLEY, *supra* note 93.