

Submitted by the Council to the Members of
The American Law Institute
for Discussion at the Eighty-Ninth Annual Meeting on May 21, 22, and 23, 2012



PRINCIPLES OF ELECTION LAW: RESOLUTION OF ELECTION DISPUTES

Report to ALI
(April 16, 2012)

SUBJECTS COVERED

Model Calendar for the Resolution of Disputed Elections (8/9-week version)
Reporter's Notes on Model Calendar for the Resolution of Disputed Elections
(8/9-week version)
Model Calendar for the Resolution of Disputed Presidential Elections (5-week version)
Reporter's Notes on Model Calendar for the Resolution of Disputed
Presidential Elections (5-week version)
Expedited Procedures for an Unresolved Presidential Election
The Resolution of Ballot-Counting Disputes
How Fair Can Be Faster: The Lessons of Coleman v. Franken (page proofs)
Non-Precinct Voting
Appendix: *Lessons from Minnesota 2008 and Beyond: Reforming the Absentee Voting Process*

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**Principles of Election Law:
Resolution of Election Disputes
Report to ALI**

Comments and Suggestions Invited

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**Principles of Election Law:
Resolution of Election Disputes**

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The Council approved the initiation of this project in October 2010. Reporter Edward B. Foley presented a preview of this project at the 2011 Annual Meeting.

This is the first draft of the Model Calendar for the Resolution of Disputed Elections (8/9-week version) and the Reporter’s Notes on the Model Calendar. Identical versions of the Model Calendar for the Resolution of Disputed Presidential Elections (5-week version), the Reporter’s Notes on the Model Calendar, and Expedited Procedures for an Unresolved Presidential Election are contained in the Materials for Report to Council (2012). Identical versions of *The Resolution of Ballot-Counting Disputes, How Fair Can Be Faster: The Lessons of Coleman v. Franken* (page proofs), Non-Precinct Voting, and Appendix: *Lessons from Minnesota 2008 and Beyond: Reforming the Absentee Voting Process* are contained in the Reporters’ Memoranda (2011).

The project’s Reporters may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects; and copies of Reporters’ written disclosures are available from the Institute upon request; however, only disclosures provided after July 1, 2010, will be made available and, for confidentiality reasons, parts of the disclosures may be redacted or withheld.

Foreword

The ALI has begun work on the subject of Election Law. Two Ohio State University professors, Edward Foley and Steven Huefner, are the Reporters. Election Law is a large, complicated subject of tremendous importance to the process of democracy. We have not yet decided which particular subjects within the realm of election law to take up, but it is likely our effort will consider the transition to new methods of voting, a change from more than a century of citizens going to a polling station on a specified day and either writing on a ballot or pulling a lever. Now, many states have moved to a longer period of voting, usually prior to what was always called Election Day, and to electronic submission of votes. The new procedures require different legal rules, and no national legal organization has yet analyzed the issues associated with new voting methods.

Meanwhile, the prospect of a close Presidential election this year has led the Reporters to undertake an effort to address, in a timely and useful way, various state and local methods of certifying vote results and the procedures state and federal courts may impose when the results are disputed and time is limited. It would certainly be helpful for state and local officials, as well as courts, to have a common framework for resolution of the many questions that arise during and after voting. Our Reporters have brought together the top lawyers for the Presidential candidates and the major parties, state and local election officials, state and federal judges, and professors of election law to discuss potential legal issues and consider solutions or guidelines.

The result of these meetings and of the Reporters' analysis is one of the attached documents, Expedited Procedures for an Unresolved Presidential Election. This is an effort to achieve agreement on a model calendar for the five-week period between the first Tuesday in November and the Safe-Harbor deadline, specified by federal statute as six days prior to the first Monday after the second Wednesday in December, when states must hold the official meeting and vote of their Presidential electors. At the moment, this is an intellectual document based on discussions with engaged election-law experts. The Reporters call it "code-like," while recognizing that it would need to be revised significantly to become proposed statutory language. The work may have practical value in this Presidential election year. More likely, it will encourage discussion that might lead to statutory changes in the years ahead, and it might contribute to improved state statutes for resolving election disputes at every level of public office.

Another attached document is a nine-week calendar for resolution of non-presidential election disputes, thus permitting a November vote to produce a winner in early January. Also included is preliminary work by the Reporters on other interesting election law topics that this project is likely to address in the future.

None of this material has benefited from the full ALI process of debate and criticism. It has not been approved by the Council and will not be up for a vote at the Annual Meeting. The work is sent for your consideration and your comments. The Reporters will speak about their proposals and seek your questions and discussion at the Meeting.

We are happy to attempt in this way to contribute to a stronger democracy. We thank Professors Foley and Huefner and all who have helped their work get to this stage.

LANCE LIEBMAN
Director
The American Law Institute

April 5, 2012

PRINCIPLES OF ELECTION LAW: RESOLUTION OF ELECTION DISPUTES

REPORT TO ALI

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REPORTERS' MEMORANDUM

TO: ALI Membership

FROM: Edward B. Foley and Steven F. Huefner

DATE: April 2012

RE: Principles of Election Law: Resolution of Election Disputes

After initially laying out some general parameters of the project at the October Adviser/MCG meetings, and based on feedback from those meetings, the Reporters decided that the highest immediate priority was to develop a workable calendar for a disputed presidential election. This task was pursued in the accompanying 5-week calendar. After it was vetted among election attorneys and officials familiar with what might occur in the 2012 presidential election, a bipartisan consensus was reached that as much progress on the details of this calendar had been achieved to be useful practically in the event of a disputed presidential election this year. No legislation on this topic will be adopted by a state legislature before the November 2012 election, and the draft as it stands is ready to serve as a model for any Secretary of State unfortunate enough to be faced with this kind of dispute without adequate legislative guidance in the relevant state's own statutes. Consequently, the Reporters have moved on to the next stage of the project, which is a workable calendar for a much broader range of disputed elections, including the kinds of gubernatorial and senatorial elections that were disputed in 2004 (in Washington) and 2008 (in Minnesota), but which were unable to achieve a resolution prior to June of the following year—an unacceptably long period of time for resolving this kind of dispute. After developing the requisite level of consensus on this 8/9-week calendar, the Reporters will move on to other aspects of the project.

Model Calendar for the Resolution of Disputed Elections (8/9-week version)

Edward B. Foley, Reporter—ALI Election Law Project

Week	Monday	Tuesday	Wednesday	Thursday	Friday	Sa	Su
1		Election Day citizens cast ballots; preliminary count is conducted & reported			Local Election Boards preliminary review of provisional ballots to check for clerical errors		
2		Local Election Boards provisional voters must supply missing info or correct errors			State Canvassing Board deadline for receipt of all UOCAVA & other absentee ballots		
3	Local Election Boards complete canvass; report results to SoS	Secretary of State certification of canvass	State Recount Board recount petition due; state pays if margin is less than 0.25%	[Thanksgiving Day 2012, 2016, 2018, 2022, 2028, 2034, 2040]			
4	Election Court deadline for petitions to review eligibility of <i>uncounted</i> ballots		Election Court deadline for claims of fraud or illegality in <i>counted</i> ballots	[Thanksgiving Day 2014, 2020, 2024, 2026, 2030, 2032, 2036, 2038]	Election Court pre-trial motions & briefs due on eligibility of <i>uncounted</i> ballots		
5	Election Court oral argument on legal issues re eligibility of <i>uncounted</i> ballots	Election Court evidentiary trial begins on <i>uncounted</i> ballots	State Recount Board local phase complete	Election Court deadline for amended claims of fraud (w/cause for why not filed before)	Election Court pre-trial motions & briefs due on <i>counted</i> ballots, fraud/illegality claims		
6	Election Court oral argument on legal issues re <i>counted</i> ballots	Election Court Evidentiary trial begins on <i>counted</i> ballots	State Recount Board all challenges decided; full recount complete		Election Court motions & briefs due on legal issues re recount		
7	Election Court Oral argument on legal issues about recount			Election Court final orders on all pending issues/claims	State Supreme Court deadline to appeal Election Court orders		
8	[Christmas Day 2028, 2034] [December 26, 2016, 2022]	[Christmas Day 2012, 2018, 2040]	Christmas Day 2024, 2030	[Christmas Day 2014, 2036]	[Christmas Day 2020, 2026] [Christmas Eve 2032, 2038]		
9	[New Year’s Day 2029, 2035] [January 2, 2017, 2023]	[New Year’s Day 2013 2019, 2041]	New Year’s Day 2025, 2031	[New Year’s Day 2015, 2037]	[New Year’s Day 2021, 2027] [New Year’s Eve 2032, 2038]		

Reporter's Notes on Model Calendar for the Resolution of Disputed Elections (8/9-week version)

Edward B. Foley—Reporter, ALI Election Law Project

1. This calendar is designed to enable a state to complete all procedures related to resolving a disputed election, including a recount and judicial litigation, by December 31 of the same year in which the November election took place. Doing so would enable the winner of the election to take office, with all issues of state law resolved, as soon as January 1.
2. This calendar, therefore, could be used for any gubernatorial election or other election to an office under state law. It could also be used for congressional (U.S. Senate and U.S. House) elections—at least insofar as delivering to the winning candidate a final certificate of election under state law, to be presented in Congress and subject to further congressional proceedings. Likewise, it could also be used for a presidential election, if Congress were to move the meeting of the Electoral College to early January (and either move or eliminate the so-called Safe Harbor Deadline under 3 U.S.C. § 5). Appropriately adjusted, a similar 8/9-week calendar could be developed for primary elections, as well as referenda or initiative elections regardless of when they are held during the year.
3. The basic structure of this calendar is to allot the first two weeks after Election Day to the canvass, then five weeks after completion of the canvass to various potential legal proceedings including a recount, and finally the remainder of the time up to December 31 for an appeal to the state's supreme court of all issues resolved during the prior weeks.
4. In some years, this calendar would afford two weeks to the appellate proceedings in the state supreme court. In other years, the time available for these appellate proceedings would be as short as just one week. Moreover, the deadlines for filing appellate briefs (and the date for holding an oral argument in the state's supreme court) would need to take account of upon which date Christmas Day fell in any given year. Also, to resolve all legal issues by December 31, it would be necessary to leave open the possibility of additional proceedings in the trial-level Election Court, or before the State Recount Board, upon remand from a decision by the state's supreme court.
5. Clearly, then, under this calendar, there is little time for the appeal and potential post-appellate proceedings, and in some years they would be especially rushed. This time pressure could be alleviated by pushing into January the date by which all of the state's

legal proceedings regarding a disputed election must conclusively be resolved. Making the deadline January 7, for example, would add an extra week. While that might be desirable in some circumstances, in other situations the date on which the winning candidate is supposed to take office might already have passed. For example, members of Congress take office on January 3, and some states use that date for the inauguration of their governors.

6. This calendar contemplates three distinct types of legal issues that might be litigated in a state court concerning the counting of ballots: (a) claims about the eligibility of ballots that local officials during the canvass determined were *not* entitled to be counted; (b) claims about the eligibility of ballots already counted—and commingled with other counted ballots—or other claims attacking the validity of the result as determined by the count as certified after the canvass; (c) claims about determinations of voter intent made during a recount of the originally counted ballots.
7. These three distinct types of issues call for somewhat different judicial procedures, with different standards of proof. For example, for category (a), there should be a ballot-specific burden of proof regardless of which candidate has more votes after certification of the canvass: any candidate who wishes the judiciary to count a ballot that local officials determined is not entitled to be counted should bear the burden of showing that the local determination was, more likely than not, erroneous. By contrast, for category (b), a candidate who seeks to overturn the certification of the canvass on the ground that ballots already counted and commingled were not eligible to be counted, or on the ground that the certification rests on a systemic defect of the electoral process that prevents the certified count from being an accurate determination of the electorate's will, should bear a more difficult burden of showing by clear and convincing evidence the fundamental flaws that undermine the validity of the count. Furthermore, for category (c), judicial review of the recount should be confined to legal issues concerning the rules and procedures governing the recount and should not involve any ballot-specific factual issues of whether the recount accurately determined a voter's intent on a particular ballot.
8. The calendar attempts to sequence these three separate categories of issues efficiently, so that they all can be resolved in the state's trial-level court by the end of the seventh week, in time for a single consolidated appellate proceeding in the state's supreme court.
9. Under this calendar, there is no separate judicial "contest" of the election after final administrative certification of the result. Instead, using the three distinct judicial procedures, a candidate can challenge different aspects of the counting process, and when all of those procedures are complete, there is a final certification that is not subject to any further challenge.
10. An advantage of this approach is that the judiciary need not wait for the completion of the recount to begin litigation of issues in categories (a) and (b). By frontloading any

judicial trial of these issues, the calendar makes it possible to complete all necessary proceedings by the end of December.

11. To make this approach work, it is imperative that no court extend the deadline for completion of the canvass. Instead, the litigation of any issue concerning the conduct of the canvass, particularly those concerning the eligibility of ballots reviewed during the canvass, should be postponed until after the completion of the canvass according to this schedule.
12. To make acceptable the postponing of litigation concerning the conduct of the canvass until after its completion, it is necessary that ballots not originally counted during the canvass remain separated from previously counted and commingled ballots until after all judicial proceedings regarding their eligibility are finally and conclusively resolved. In other words, even after the trial-level court determines that some more ballots are eligible to be counted, or if local officials change their minds about a particular ballot's eligibility during the canvass, these ballots should remain in a separate "to be counted" category until after the state's supreme court has had the opportunity to rule on their eligibility.
13. The same principle should apply to all ballots not counted on Election Day itself. Any counting of these ballots will occur after an initial report of vote totals for each candidate will have been released. Thus, in a close election, the debate over which of these uncounted ballots are entitled to be counted will be conducted with an eye to "moving the needle" in one direction or another. Thus, after Election Day, no such determination with respect to the counting of a ballot should be made in a way that is irreversible until after all potential legal proceedings concerning the counting of these ballots have been completed.
14. For this reason, the certification of the canvass is not the certification of an electoral victory, which does not occur until after completion of all the different types of potential judicial proceedings.
15. With respect to the deadline for allegations of fraud that would undermine the validity of the certified canvass, the calendar attempts to balance two conflicting goals: first, the desire for a result that is honest and accurate; and second, the need for a final result before the day on which the winning candidate is supposed to take office. The calendar strikes this balance by requiring claims of fraud to be raised within three weeks after Election Day, with another eight days available for claims of fraud that reasonably could not have been discovered during those first three weeks. But once 30 days after Election Day have passed, any claim of newly discovered election fraud would need to be raised in a separate procedure to *remove* the winning candidate from office, like impeachment for a President, rather than in a procedure attempting to change the count of the ballots as determined by the certification of the canvass.

16. The selection of the members who will serve on the trial-level Election Court is an issue of particular importance.

- a. Experience shows that it is preferable to have a three-judge panel for this court, rather than a single judge; the reason is that the final outcome of the election should not appear to be the decision of a single individual. Although a 2-1 split that appears partisan would not be desirable, at least exposing a 2-1 split is preferable to not knowing whether the decision of a single judge would command the assent of other judges who presided over the same proceedings.
- b. The method for selecting the three members to this panel should be designed to maximize the likelihood that the public will perceive the panel to be fair, impartial, and evenhandedly balanced towards the competing claims of the two disputing candidates.
- c. One possible method for assuring this maximal perception of legitimacy is to have all members of the state's supreme court unanimously choose the panel's three members, assuming that the state's supreme court is not perceived to be dominated by a particular political party. Otherwise, it may be necessary to set up a more complicated selection mechanism.

17. The same need for maximal perception of legitimacy applies to members of the State Recount Board.

- a. If the Election Court is well chosen according to this criterion, it may be possible to permit the Election Court itself to select the members of the State Recount Board.
- b. A Secretary of State who is elected to office as a partisan candidate should not be a voting member of a State Recount Board unless the Secretary of State's presence as a voting member is visibly balanced by a high-ranking public official from a competing political party, so that the public perceives the overall composition of the State Recount Board as fair and evenhanded.

Model Calendar for the Resolution of Disputed Presidential Elections

Edward B. Foley, Reporter—ALI Election Law Project

Week	Monday	Tuesday	Wednesday	Thursday	Friday	Sa	Su
1		Election Day citizens cast ballots; preliminary count is conducted & reported	Secretary of State triggers this calendar if there is close election		Local Election Boards preliminary review of provisional ballots to check for clerical errors		
2		Local Election Boards provisional voters must supply missing info or correct errors			State Canvassing Board deadline for receipt of all UOCAVA & other absentee ballots		
3	Local Election Boards complete canvass; report results to SoS	Secretary of State certification of canvass	State Recount Board recount petition due	[Thanksgiving Day in some years]	Election Court deadline for petitions to review eligibility of <i>uncounted</i> ballots		
4	Election Court pre-trial motions & briefs due on eligibility of uncounted ballots		Election Court deadline for claims of fraud or illegality in <i>counted</i> ballots		pre-trial motions/briefs due on counted-ballots fraud/illegality claims		
5	Election Court final orders on all pending issues/claims	State Supreme Court deadline to appeal Election Court orders	State Recount Board recount complete	[Thanksgiving Day in some years]	Election Court Motions & briefs due on legal issues re recount		
6	State Supreme Court final order on all issues	Safe-Harbor Deadline State Recount Board counts all eligible uncounted ballots & adjusts final count as judicially required	State Supreme Court appellant's brief due		State Supreme Court oral argument		
7	Electors Vote for President						

Reporter's Notes on Model Calendar for the Resolution of Disputed Presidential Elections

Edward B. Foley—Reporter, ALI Election Law Project

1. The calendar accepts as given the congressionally specified dates concerning presidential elections. Thus, the calendar begins on a Tuesday, as Congress has specified “the Tuesday next after the first Monday in November” as the date on which the voters in each state cast their ballots for presidential electors.¹ 3 U.S.C. § 1. The calendar continues until “the first Monday after the second Wednesday in December next,” which is the date that Congress has set for the official meeting and vote of the presidential electors in each state. *Id.* § 7. Article Two of the U.S. Constitution requires that this date “shall be the same throughout the United States,” and in his decisive opinion resolving the disputed 1876 presidential election, Justice Joseph Bradley interpreted this constitutional requirement as precluding any state proceedings (judicial or otherwise) that would undo the state’s appointment of the presidential electors who cast their votes on the constitutionally uniform date.²

¹ Of course, state legislatures need not let their citizens vote for the office of presidential elector. Instead, under Article II of the U.S. Constitution, state legislatures may choose to appoint their states’ presidential electors directly, as occurred in some states early in U.S. history. An assumption underlying this calendar is that all states will continue their longstanding practice of permitting their voters to cast ballots for presidential electors, with the expectation that the electors will perfunctorily vote for the presidential candidate to whom they have pledged themselves. Because of its triggering mechanism, as explained in ¶ 3, this model calendar applies only to the states that make all of their presidential electors “winner take all” statewide offices (as currently all states but Maine and Nebraska do). A separate triggering mechanism would need to be developed for a system (as Pennsylvania and Wisconsin were at one point considering for 2012) whereby each congressional district in the state is allocated one presidential elector with the remaining two “at large” offices corresponding to the state’s two U.S. Senators. Likewise, a separate triggering mechanism would need to be developed were a state to adopt some sort of proportional system, pursuant to which a presidential candidate winning a proportion of the statewide popular vote would cause the candidate to receive a corresponding proportion of the state’s presidential electors.

² Justice Bradley issued his opinion not as a member of the Supreme Court but instead as the swing vote on the 15-member Electoral Commission that Congress created to resolve the disputed Hayes-Tilden election of 1876. Thus, although Bradley’s vote caused the Commission to split 8-7 in favor of Hayes, and although Bradley delivered an opinion explaining his interpretation of the Constitution as the basis for his decision, it is uncertain what precedential status Bradley’s view of Article Two’s uniform date requirement has for future disputed presidential elections. Moreover, when Congress met to count the votes in the 1960 presidential election, Vice-President Nixon (sitting in his capacity as President of the Senate under the Twelfth Amendment) accepted the Electoral votes from Hawaii that had been cast on behalf of then-Senator John Kennedy, even though the presidential electors pledged to Kennedy had not been officially confirmed to their office under Hawaii law until after the constitutionally uniform date for the meeting and vote of the electors in each state. On that date in 1960, duly appointed presidential electors pledged to Nixon’s

2. **Safe-Harbor Deadline.** The Electoral Count Act of 1887, passed to avoid the kind of congressional deadlock that threatened to leave the disputed 1876 presidential election unresolved on Inauguration Day, provides that Congress will treat as “conclusive” any resolution of a dispute over ballots cast for presidential electors if that resolution occurs “at least six days before the time fixed for the meeting of the electors” (provided also that the resolution is made pursuant to a state statute enacted before the date on which citizens cast their ballots for presidential electors). This provision is known as “the Safe-Harbor Deadline,” and given the congressionally specified dates mentioned in ¶1 (above), the six days before the meeting of the presidential electors is always a Tuesday exactly five weeks after the citizens of each state have cast their ballots for presidential electors. This model calendar assumes that states will wish to take advantage of the Safe-Harbor Deadline and thus develops a schedule that can resolve a dispute over ballots cast for presidential electors within this five-week period.
3. The current draft of the calendar incorporates the concept of a “triggering mechanism,” to put into effect the expedited procedures that make meeting the Safe-Harbor Deadline possible. The assumption is that these expedited procedures would not apply to non-presidential elections or even to presidential elections where the undisputed winner is known the day after the ballots for presidential electors are cast in November (as has occurred most of the time), and in those circumstances the canvassing of returns can take place at a more leisurely pace if a state wishes.
4. The current draft of the calendar is accompanied by a set of proposed model rules for a state legislature to enact in order to put this “triggering mechanism,” as well as the procedures and deadlines that it triggers, into law.
5. The expedited procedures in the current draft of the calendar allow two weeks for the completion of the canvass. This is a change from the previous draft, which allowed only one week. Feedback from several election administrators on that earlier draft prompted this change.

candidacy had cast their votes for him, but a later recount in the state had shown that the slate of presidential electors pledged to Kennedy had received more ballots cast by citizens on Election Day. As President of the Senate in early January 1961, Nixon had before him from Hawaii alternative certificates, one showing that he had received the state’s Electoral votes, the other showing that Kennedy had. Hawaii’s Electoral votes, however, were inconsequential in determining that Kennedy had received the constitutionally required majority necessary to be declared president without sending the election to the U.S. House of Representatives. Therefore, as a gesture of magnanimity, but explicitly declaring that he wished to set no precedent, Nixon announced that he was accepting Hawaii’s Electoral votes cast for Kennedy rather than the ones cast for him. In this respect, Nixon’s ruling was the opposite of Justice Bradley’s, as under Bradley’s interpreting of Article Two only the Electoral votes from Hawaii cast for Nixon would have been constitutionally permissible. In any event, the model calendar assumes that Justice Bradley is correct and that all disputes concerning which slate of presidential electors is entitled to hold that office must be resolved by the constitutionally uniform date for the meeting and vote of the presidential electors in each state.

6. The current draft incorporates an innovation developed in response to feedback on the previous draft: no ballots that were not counted on Election Day but which are deemed eligible to be counted during the canvass (such as provisional ballots or absentee ballots that are timely if they arrive during the canvass) are to be opened and counted (and thus commingled with previously counted ballots) until after completion of judicial review proceedings on the validity of ballot-eligibility determinations made during the canvass. Instead, these ballots (still in their secrecy envelope) are put in a pile “to be counted” at the end of the canvass, and are actually opened and counted if they are still deemed eligible to be counted at the end of the expedited judicial review process. (Ballots deemed ineligible to be counted during the canvass can also be counted at the end of the judicial review process, if the final judicial determination is that they are eligible.) Benefits of this approach include:
 - a. maintaining secrecy of the voter’s choice throughout the duration of the dispute,
 - b. the ability to “retrieve” ballots if the judiciary reverses a determination that a particular ballot is eligible during the canvass,
 - c. the development of judicial procedures, including ballot-specific burdens of proof, that are distinctly appropriate for ballot-eligibility determinations, but which may not be as well-suited for judicial review of a recount, or judicial review of issues relating to already counted ballots; and
 - d. maintaining a thicker “veil of ignorance” over the ultimate outcome of the election, during the duration of the dispute, thereby minimizing the pressures for candidates and their attorneys to engage in litigation tactics designed to either maintain or overcome a lead.

Because of this innovation, the certification of the canvass is *not* a certification that a particular candidate (or, technically, that candidate’s slate of presidential electors) “won” the election in that state—at least as long as the number of uncounted ballots at the end of the canvass (as will almost always be true if these expedited procedures have been triggered) is greater than the margin by which the leading candidate is ahead.

7. The current draft of the calendar schedules the recount of the previously counted ballots at the same time as the judicial review of the canvass. In theory, the recount of previously counted ballots could begin even earlier, on the day after Election Day, as soon as the expedited procedures are triggered. But local election officials will be busy with the canvass, which needs to be their highest priority during the first two weeks. Consequently, the model rules simply call for the State Recount Board to make good use of the two-week period of the canvass in preparing for the start of the recount that immediately follows the canvass (assuming that the triggering conditions, as specified by the model rules, require the recount to go forward).
8. The current draft contemplates a separate, very curtailed judicial proceeding in the event that legal issues arise relating to the conduct of the recount of previously counted ballots. The recount, it should be noted, is limited solely to the question of whether the

initial count of the ballot was accurate in recording the voter's intent; it does not involve questions of the ballot's eligibility to be counted (or the voter's eligibility to cast the ballot). Therefore, the judicial review of the recount is much narrower in scope than judicial review of the canvass.

9. The current draft also contemplates a third form of judicial proceedings, involving potential issues going to the eligibility of the counted ballots or otherwise questioning the validity of the count as a representation of the electorate's will. (Such issues would include fraud or a systemic breakdown of the voting process on Election Day.) The procedures and burden of proof appropriate for these issues (often associated with a traditional post-certification judicial "contest" of an election's final result) are different than those associated with judicial review of eligibility determinations made with respect to previously uncounted ballots during the canvass. The model rules tailor these procedures accordingly.
10. All three forms of judicial proceedings occur in the first instance in a special three-judge Election Court specifically designed to implement this expedited calendar. The deadlines and procedures associated with each of the three types of proceedings are coordinated to maximize efficiency in this Election Court, which should have discretion to further tailor its proceedings to meet the deadlines specified in the model rules.
11. The current draft provides for an appeal to the state supreme court from the rulings of the Election Court with respect to each of the three different types of judicial review proceedings. This feature of the current draft differs from the previous draft, which left virtually no time for any meaningful role by the state supreme court. This draft, by contrast, devotes a whole week to the possibility of appellate review in the state supreme court. Various comments on the previous draft considered this revision necessary to assure the legitimacy and efficacy of the entire five-week calendar. (The schedule is structured so that appellate review with respect to all three different forms of judicial proceedings in the Election Court can occur at the same time, in a single consolidated appellate proceeding.)
12. The current draft of the five-week calendar, however, still leaves no extra time for separate appellate proceedings in the U.S. Supreme Court, or separate trial-like proceedings in federal district court. The hope and expectation is that if a state follows this model calendar, including the role provided for the state supreme court, there will be no need for U.S. Supreme Court review or other federal court intervention. Alternatively, if necessary, the U.S. Supreme Court can
 - a. Either "borrow" some or all of the time set aside for the state supreme court (preempting the state supreme court, if the U.S. Supreme Court sees an issue of federal law emerging from the Election Court that requires its attention)
 - b. Or use the six days between the Safe-Harbor Deadline and the meeting of the Electoral College to address any pressing federal issues.

Expedited Procedures for an Unresolved Presidential Election

Edward B. Foley—Reporter, ALI Election Law Project

Please note: This first draft of “code-like” provisions for implementing the proposed model calendar for resolving a disputed presidential election is intended for discussion purposes only. Were it to be developed into the format of a “model code” or other form of model statutory rules, it would need to be revised significantly to conform to standard practices of statutory drafting. At this early stage of the process, however, the focus should be on the substance of the choices made for how to structure the five-week period between Election Day and the Safe-Harbor Deadline, as reflected in the content of this draft. For more explanation of these substantive choices, please see the “Reporter’s Notes on the Model Calendar for the Resolution of a Disputed Presidential Election,” which accompany this document and the proposed model calendar.

1. **Definitions** *[a more complete set of statutory definitions would be necessary as part of converting this draft into a fully developed set of model statutory rules]*
 - a. **Expedited Procedures for an Unresolved Presidential Election, or Expedited Procedures, or EPUPE, or this chapter:** these terms refer to the content of these statutory provisions.
 - b. **clerical mistake:** an inadvertent mistake made in the completion of a form, whether made by a voter, a poll worker, or other individual.
 - c. **Election Court:** the court appointed under § 13 of this chapter.
 - d. **Local board of elections:** the local agency of state government responsible for the conduct of the canvass within a locality.
 - e. **outstanding absentee ballots:** those absentee ballots that have been given or sent to voters but have not been returned by voters, during a period of time in which absentee ballots are still eligible to be counted if delivered to an appropriate government agency.
 - f. **presidential election:** an election in which citizens vote for a state’s presidential electors.
 - g. **Secretary of State:** the chief elections officer of a state.
 - h. **triggering margin:** the numerical difference between
 - i. the total number of votes statewide counted for the presidential candidate receiving the highest number of such votes, and
 - ii. the total number of votes statewide counted for another presidential candidate.
 - i. **UOCAVA ballots:** those military and overseas ballots that are subject to the provisions of the federal Uniformed and Overseas Citizens Absentee Voting Act, as amended by the federal Military and Overseas Voter Empowerment Act.

2. The Processing of Absentee Ballots before the Polls Close on Election Day

- a.** Voters shall be instructed to submit their absentee ballots, either by person or in mail, to their local board of elections.
- b.** For any absentee ballot received by a local board of elections on or before Election Day, at any time before the polls close on Election Day the local board of election may review the ballot to determine its eligibility to be counted, and may prepare an eligible ballot to be counted by feeding it through a tabulating machine, but the board may not produce from the machine a reportable count of the ballot until after the polls close.
- c.** If on or before Election Day a local board of elections determines that an absentee ballot is ineligible to be counted, the ballot shall be classified as a “rejected absentee ballot” and set aside, together with all other such ballots.
- d.** Immediately after the polls close on Election Day, each local board of elections shall determine the number of eligible absentee ballots cast for each presidential candidate and shall report those figures to the Secretary of State.
- e.** If at the time the polls close on Election Day, there are absentee ballots that voters have submitted to their local election boards within the time specified under state law, but the eligibility of the particular ballot has not yet been determined (and thus this ballot is not included within the count determined immediately after the polls close), this ballot shall be classified as an “unprocessed absentee ballot” and set aside, together with all other such ballots.

3. The Processing of Ballots Cast in “Early Voting” Locations Prior to Election Day.

- a.** Consistent with the procedures for absentee ballots in § 2.b above, in any local jurisdiction that administers early voting at designated polling sites, local officials may tabulate the ballots cast as part of early voting that are eligible to be counted but may not produce a reportable count of these ballots until after the polls close on Election Day.
 - i.** If during early voting, the method of casting a ballot is a paper optical scan ballot comparable to the ballots used for absentee voting, then the method of tabulating early voting ballots prior to the close of the polls on Election Day shall be the same as the method set forth in § 2.b.
 - ii.** If during early voting the method of casting a ballot is a Direct-Recording Electronic (touchscreen) voting machine, then the method of tabulating early voting ballots prior to the close of the polls on Election Day shall be to permit the machines to take all steps necessary to count the ballots short of producing a reportable count of the ballots.
- b.** After the polls close on Election Day, local boards of elections shall report to the Secretary of State the number of ballots cast and counted for each presidential candidate as part of early voting within their jurisdictions, along with their reports of ballots cast and counted in precincts on Election Day (as specified in § 4.d.i, below).
- c.** Local boards of election shall also calculate the total number of provisional ballots cast as part of early voting within their jurisdictions and shall report this number to the Secretary of State at the same time as reporting the number of provisional ballots cast in precincts on Election Day (as specified in § 4.e.1).

4. Preliminary Count of Ballots

- a. Immediately after the polls close, election officials at each precinct shall determine the number of ballots, other than provisional ballots, cast for each presidential candidate at that precinct and shall report those numbers to the local board of elections.
- b. The election officials at each precinct shall also report to the local boards of elections the number of provisional ballots cast at each precinct.
- c. The local board of elections shall tally the numbers received from all precincts.
- d. Upon completion of this tally, each local board of election shall report to the Secretary of State the following figures for each presidential candidate:
 - i. The number of ballots cast and counted for that candidate in all precincts on Election Day, as well as at early voting sites, within the local jurisdiction;
 - ii. The number of absentee ballots received and determined to be eligible that, having been counted on Election Day, were cast for that candidate (as specified in § 2.d, above).
- e. Together with the vote totals for each presidential candidate, each local board of election shall also report to the Secretary of State the number of “uncounted ballots” within the local board’s jurisdiction, by summing into a single figure:
 - i. The total number of provisional ballots cast within the local board’s jurisdiction;
 - ii. The total number of rejected absentee ballots within the local board’s jurisdiction as of the time that the polls closed;
 - iii. The total number of unprocessed absentee ballots within the local board’s jurisdiction as of the time that the polls closed.
- f. At the same time as each local board of election reports to the Secretary of State the number of uncounted ballots within its jurisdiction, the board shall also report the number of outstanding absentee ballots within its jurisdiction, which if received within a specified deadline during the canvass and determined to be eligible will be subsequently added to the count.
- g. Upon receiving these reports from the local boards of election, the Secretary of State immediately shall calculate the following figures:
 - i. a preliminary count of the total number of ballots statewide cast for each presidential candidate;
 - ii. the margin between the two presidential candidates receiving the highest numbers of statewide votes, with this margin also expressed as a percentage of the total number of statewide votes counted for all presidential candidates combined;
 - iii. the total number of uncounted ballots statewide;
 - iv. the total number of outstanding absentee ballots statewide.

5. Triggering the Expedited Procedures

- a. **Mandatory trigger.** Within 24 hours after the polls close in a presidential election, the Secretary of State shall declare publicly that the Expedited Procedures of this chapter are in effect when
 - i. any of the following numerical conditions obtain:

1. The preliminary count of ballots in the state shows the “triggering margin” to be between one-quarter of one percent of all ballots counted, **or**
 2. The number of uncounted ballots in the state is at least twice the triggering margin, **or**
 3. The number of outstanding absentee ballots in the state is at least quadruple the triggering margin, **or**
 4. The combined number of uncounted ballots and outstanding absentee ballots is at least triple the triggering margin,
 - ii. **and** there has been no public concession of defeat by a candidate within the triggering margin.
 - b. **Discretionary trigger.** Within 24 hours after the polls close in a presidential election, the Secretary of State may declare publicly that these expedited procedures are in effect if, in the Secretary’s judgment, the circumstances warrant such expedition.
- 6. The preservation of all ballots not counted on Election Day.**
- a. All ballots that are not counted on Election Day (and therefore which is not included within the preliminary count that the Secretary of State reports for the purpose of determining whether to trigger these expedited procedures) must remain uncounted for the duration of these expedited proceedings, unless and until otherwise provided, as specified in this section.
 - b. No such ballot shall be removed from its secrecy envelope until the completion of all proceedings, including all judicial review, that may affect the final determination of whether the ballot is eligible to be counted.
 - c. This section applies to all uncounted ballots included within the Secretary of State’s report for the purpose of determining whether to trigger these expedited procedures, as well as outstanding absentee ballots at the time of the Secretary of State’s report that may arrive subsequently and upon review may be eligible to be counted.
 - d. This section carries no presumption that an uncounted ballot is ineligible to be counted, but is only a procedural device to assure that the identity of candidates for whom an uncounted ballot is cast remains secret during the entirety of the time the eligibility of the uncounted ballot remains unsettled.
 - e. For any provisional or other uncounted ballot that is determined during the canvass to be eligible to be counted, the local board of elections shall classify that ballot as “eligible to be counted” for the purpose of reporting the results of the canvass.
- 7. Deadline for Completion of the Canvass**
- a. Each local board of elections shall complete the canvass and report its results to the Secretary of State by no later than the 13th day after Election Day.
 - b. Completion of the canvass shall include:
 - i. The evaluation of the eligibility of all provisional ballots within the local board’s jurisdiction;
 - ii. A review of rejected absentee ballots to determine whether they were correctly rejected;

- iii. The evaluation of previously unprocessed absentee ballots to determine if they are eligible to be counted.
 - iv. The processing of all previously outstanding absentee ballots, including UOCAVA ballots, that have arrived within the deadline necessary to be considered for counting and, as part of this processing for these deadline-compliant ballots, a determination of whether they are otherwise eligible to be counted.
 - v. A review of all tallies and computations necessary to determine the preliminary count of ballots, as reported to the Secretary of State after the close of the polls.
- c. On the 14th day after Election Day, the Secretary of State publicly shall certify the results of the canvass, which shall include an announcement of:
- i. The total number statewide of ballots counted on Election Day for each presidential candidate (this number differing from the preliminary count as a result of errors in tallying or computation having been corrected during the canvass);
 - ii. The total number statewide of provisional ballots determined to be eligible to be counted;
 - iii. The total number statewide of provisional ballots statewide determined to be ineligible to be counted;
 - iv. The total number statewide of previously uncounted absentee ballots, as well as previously outstanding absentee ballots, now determined to be eligible to be counted;
 - v. The total number statewide of previously uncounted absentee ballots, as well as previously outstanding absentee ballots, now determined to be ineligible to be counted.

8. The Conduct of the Canvass. In order to meet the deadlines specified in § 7, above, local boards of elections shall conduct the canvass as follows:

- a. All outstanding absentee ballots, other than UOCAVA ballots, must be received by local boards of elections no later than seven days after Election Day.
- b. All UOCAVA ballots must be received by local boards of elections no later than 10 days after Election Day.
- c. If any absentee voter whose ballot is rejected upon the local board's initial determination of its eligibility is given additional time to correct whatever defects caused its rejection, the resubmission of this ballot (or the voter's supplementary submission to correct these defects) must occur no later than 10 days after Election Day.
- d. Any provisional voter who in an effort to qualify the provisional ballot as eligible to be counted is permitted to submit additional information, or to make any correction regarding the casting of this provisional ballot, must make that submission or correction no later than seven days after Election Day.
- e. Local boards of elections shall conduct a preliminary review of all provisional ballots within three days after Election Day for the purpose of determining whether there has been a clerical mistake in filling out the form contained on the envelope in which the provisional ballot is cast.

- i. If the local board finds a clerical mistake that would prevent an otherwise eligible provisional ballot from being counted, the local board immediately shall so notify the voter by telephone or email.
- ii. The voter shall have the opportunity to correct the clerical mistake until no later than seven days after Election Day and to provide any additional information the voter wishes to supply in an effort to qualify the provisional ballot as eligible to be counted.
- iii. If the voter corrects the clerical mistake within the time specified for doing so, and the provisional ballot is otherwise eligible to be counted, the provisional ballot shall not be disqualified from being counted solely because of this clerical mistake at the time it was cast.

9. No judicial alteration of the deadlines for completion or conduct of the canvass. As long as local boards of election preserve uncounted ballots according to the requirements of § 6, above, neither the Election Court nor any other court in the state, including the state’s supreme court, has any jurisdiction to review or otherwise interfere with the conduct of the canvass until after it has been completed and certified by the Secretary of State.

- a. Upon presentation of clear and convincing evidence that a local board of elections is likely to commit an imminent violation of § 6, above, the Election Court has jurisdiction to order the board to comply with § 6 and may hold the board in contempt of court if the board contravenes this judicial order;
- b. But, in exercising the limited jurisdiction of § 9.a, above, neither the Election Court nor any other court may alter the deadlines for completion or conduct of the canvass that are part of the Expedited Procedures under this chapter.

10. Post-canvass recalculation of the triggering margin.

- a. As part of certifying the results of the canvass, the Secretary of State shall recalculate the numerical difference (defined as the “triggering margin” in § 1, above) between the total votes statewide counted for the leading presidential candidate and the total votes statewide counted for each of the other presidential candidates.
- b. Based on this recalculation, the Secretary of State shall designate as a “recount-entitled candidate” any candidate if:
 - i. the recalculated triggering margin for that candidate is less than one-quarter of one percent of all ballots counted, **or**
 - ii. the number of uncounted ballots statewide, as certified in the canvass, is more than twice the recalculated triggering margin for that candidate.

11. Judicial review of the canvass. Within 72 hours after the Secretary of State’s certification of the canvass (as specified in § 7.c, above), either the leading candidate or a recount-entitled candidate may petition the Election Court to review any determination made during the canvass by a local board of elections with respect to a ballot’s eligibility to be counted.

- a. A candidate’s petition may request the Election Court to classify as eligible to be counted a ballot that the local board classified as ineligible to be counted, or a candidate’s petition may request that the Election Court may classify as ineligible to be counted a ballot that the local board classified as eligible to be counted, and a candidate may include both types of requests within the same petition.

- b. A candidate's petition shall specify each ballot the candidate wishes the Election Court to review and the reasons why, contrary to the local board's determination, the candidate believes the ballot to be eligible or ineligible (as the case may be with respect to the specific ballot).
- c. Any candidate eligible to file a petition of this kind shall be designated as a respondent in any petition of this kind that is filed by another other candidate in the Election Court.
- d. Any local board of election whose ruling with respect to the eligibility of a ballot is under review pursuant to a petition of this kind shall also be designated as a respondent to the petition.
- e. The Secretary of State shall be designated as a respondent to all such petitions.
- f. There shall be no other parties to these judicial proceedings other than the respondents so designated according to subsections c-e, above, and the petitioners.
- g. The Election Court, in its sole discretion, shall be entitled to decide whether to permit or forbid receipt of briefs *amicus curiae* in these judicial proceedings, in accordance with the Court's need to complete these proceedings within the specified deadlines as well as the public's interest that the Court's deliberations be conducted and its rulings rendered solely in accordance with the applicable law and evidence.
- h. All petitions may be filed in the Election Court, and served upon all respondents, by email or other electronic method established by the Election Court, as may be any subsequent documents in these judicial proceedings whether filed by petitioners or respondents.
- i. [omitted]
- j. The Election Court shall maintain a website where, immediately upon receipt of any filing from a petitioner or respondent, a publicly accessible electronic copy of the filed document is posted.
 - i. Only documents designed as "**BY NECESSITY OF BALLOT SECRECY: FOR EXAMINATION ONLY BY THE ELECTION COURT**" are exempt from this requirement.
 - ii. No document filed with designation specified in § 11.j.1 shall be posted to the Election Court's publicly accessible website, or otherwise circulated to anyone other than petitioners or respondents to these proceedings, unless and until redacted or otherwise approved for posting by order of the Election Court.
- k. Before the Election Court conducts any evidentiary hearing with respect to the eligibility of ballots subject to a petition under this section, the Election Court shall entertain the submission of any motions or briefs addressing legal issues that would help the Election Court to narrow or frame the matters on which the taking of evidence might be necessary.
 - i. All such motions or briefs, whether submitted by petitioners or respondents, shall be filed within 72 hours after the filing of the petition to which they pertain.
 - ii. Prior to the start of any evidentiary hearings, the Election Court, in its sole discretion, may choose to hold an oral argument on any legal issues if, in the Court's judgment, doing so will help to expedite these judicial proceedings.

understanding of its rulings, including the grouping together of particular ballots that are subject to the same grounds of decision.

o. Direct appeal to the state's supreme court.

- i. A petitioner or respondent may appeal to the state's supreme court a ruling of the Election Court that a particular ballot is eligible or ineligible to be counted.
- ii. The grounds for such an appeal shall be limited to showing that the Election Court's ruling was
 - 1. clear error according to applicable legal standards, **or**
 - 2. entirely unsupported by the factual record developed in the Election Court.
- iii. Any such appeal shall proceed according to the provisions of § 16, below.

12. Judicial review of counted ballots.

- a. Within 15 days after Election Day, a presidential candidate (whether or not entitled to a recount upon these expedited procedures) may file with the Election Court a verified complaint seeking to alter or nullify the count of ballots, as certified by the Secretary of State after completion of the canvass, on the ground that
 - i. **either**, because of fraud, illegality, or error, the count includes ballots that were not entitled to be counted,
 - ii. **or**, because of a systemic breakdown in the voting process, the count of ballots is incapable of reflecting the electoral choices of the eligible voters who participated in the casting of ballots.
- b. A candidate's verified complaint shall state with specificity the factual basis of the claims upon which it seeks relief.
- c. The verified complaint shall name as a respondent:
 - i. The Secretary of State,
 - ii. Any other presidential candidate who is either the leading candidate or a recount-entitled candidate, **and**
 - iii. Any person or entity (whether an individual, a corporate or governmental body, or otherwise) whose actions the petition claims contributed to the factual circumstances upon which the petition seeks relief.
- d. The provisions of §§ 11.f-11.j, above (which apply to the judicial review of the canvass), apply equally to the Election Court's consideration of any complaint filed under this section.
- e. Within 48 hours after the filing of a verified complaint under this section, the complainant and respondents shall file any pre-trial motions or briefs, including any motions to dismiss the complaint in whole or in part for lack of adequate verification or specificity in its allegations.
- f. Before holding any trial on any claims raised by a complaint under this section, the Election Court shall determine whether the complaint states its claims with sufficient verification and specificity to warrant a trial.
- g. **Burden of proof.** If the Election Court determines that a trial is warranted, the complainant shall bear the burden of proving, by clear and convincing evidence, all facts necessary to sustain the claims that entitle the complainant to relief under this section.

- h.** In the trial of the claims presented in the complaint, the Election Court shall take into evidence only that testimony and only those documents tending either to sustain or refute the complainant's claims.
- i.** [omitted]
- j.** After the completion of the trial, if the Election Court finds that the complainant has established by clear and convincing evidence that, because of fraud, illegality, or error, the count of ballots includes ballots that should not have been counted, then:

 - i.** in the case of fraud, where it also can be established by clear and convincing evidence the number of ballots wrongfully counted because of the fraud, then the Election Court shall order the same number to be deducted from the total number of ballots counted for the candidate on whose behalf the fraud was committed;
 - ii.** in any circumstance in which clear and convincing evidence also establishes which presidential candidate received the vote of a ballot not entitled to be counted, the Election Court shall deduct that vote from the total counted for that candidate;
 - iii.** in the case of illegality or error, or in the case of fraud where it cannot be established by clear and convincing evidence the number of ballots wrongfully counted because of the fraud, and where because of ballot secrecy it cannot be determined for whom the wrongfully counted ballots were cast, then the Election Court shall determine whether the complainant has established by clear and convincing evidence that the fraud, illegality, or error is sufficiently pervasive to warrant nullification of the count on the ground that the electoral choices of the eligible voters cannot be ascertained.
- k.** If the Election Court determines, either pursuant to § 12.j.iii or because of clear and convincing evidence of a systemic breakdown in the voting process, that the count of ballots is incapable of reflecting the electoral choice of the eligible voters who participated in the casting of ballots, then the Electoral Court shall nullify the certification of the canvass and shall immediately report this nullification to the Secretary of State and to the state's legislature.
- l.** Within 12 days after the filing of a complaint under this section, the Election Court shall issue its final order either dismissing the complaint or granting relief.
- m. Direct appeal to the state supreme court.**

 - i.** A complainant or respondent may appeal the Election Court's final order dismissing the complaint or granting relief.
 - ii.** Upon consideration of the appeal, the state supreme court shall affirm the Election Court's final order unless an appellant establishes that the order

 - 1.** is contrary to law, **or**
 - 2.** rests on a factual finding that, in light of the complainant's burden of proof, is clearly erroneous.
 - iii.** Any appeal under this section shall proceed according to the provisions of § 16, below.

13. The appointment of the Election Court.

- a. Prior to Election Day, the state's Chief Justice, with the unanimous consent of all members of the state supreme court, shall select from among all of the state's judges, whether in active service or retired, three to serve as members of the Election Court.
- b. In the same manner, for each seat on the Election Court, the Chief Justice shall designate a first, second, and third alternate, in the event that a vacancy arises in any of these seats.
- c. If after Election Day, it becomes necessary to select one or more additional alternates to fill a vacancy on the Election Court, the Chief Justice shall do so by selecting randomly among all the judges in the state.
- d. If the Election Court is convened pursuant to these expedited procedures, the members of the Election Court (or their alternates, as necessary) shall serve for as long as these expedited procedures remain in effect.
- e. The three members of the Election Court shall choose one among themselves to preside as Chief Judge of the Election Court, or they may rotate as Chief Judge if they prefer.

14. Recount of ballots counted on Election Day.

- a. The Election Court shall choose, from among the members of all local boards of elections in the state, three to serve as the State Recount Board and shall designate one of the three as chair.
- b. No later than 24 hours after certification of the canvass, a recount-entitled candidate may petition the State Recount Board for a statewide recount of all ballots counted in the state on Election Day.
- c. With the assistance of local boards of election and the Secretary of State, prior to the completion of the canvass, the State Recount Board shall establish procedures for the conduct of a statewide recount in the event that a petition for one is received.
- d. The State Recount Board shall use the period of the canvass to make whatever preparations would expedite the completion of a recount in the event that, after completion of the canvass, one occurs.
- e. For any recount that involves ballots cast on Direct-Recording Electronic (DRE) voting machines that contain Voter Verified Paper Audit Trails (VVPATs), the method of recount shall be to count by hand the votes as recorded on the VVPATs, but if for any vote the VVPAT record is unavailable or illegible, then the vote shall be counted and verified as recorded electronically.
- f. For any recount that involves ballots cast on Direct-Recording Electronic (DRE) voting machines that do not contain Voter Verified Paper Audit Trails (VVPATs), the method of recount shall be to verify the accuracy of the electronic record of each vote.
- g. For any recount that involves optical-scan ballots, the method of recount shall be to count by hand all these ballots.
- h. Any recount-entitled candidate and the leading candidate shall be permitted to designate representatives to witness the recounting of ballots.
- i. A candidate's designated representative may object to any decision during the recount that, if sustained, would alter the number of ballots counted for any candidate.

- j. All such objections, unless and until waived, shall be presented to the State Recount Board for its review and final determination.
- k. The State Recount Board shall reject any such objection unless, by majority vote, the Board determines that, based on applicable law and available evidence, the objection more likely than not is correct (and thus the original recount decision more likely than not was incorrect).
- l. Within seven days after the filing of a recount petition, the State Recount Board shall complete the recount of all ballots originally counted on Election Day, including the completion of all rulings on objections presented to the Board.

15. Judicial review of a recount.

- a. Within 24 hours after completion of the recount, the leading candidate or a recount-entitled candidate may petition the Election Court to review the State Recount Board's ruling on any objection made during the recount.
- b. The only ground that may be raised in a recount-review petition under this section is that the Board's ruling on an objection was in violation of the legal standards that govern the operation of the recount.
- c. A recount-review petition under this section shall not be entitled to raise any claim that the State Recount Board was erroneous in its application of the correct legal standards to the specific ballots or issues raised in the recount.
- d. The petition shall include all legal arguments made in support of the claims and grounds asserted therein.
- e. The petition shall name as respondents the State Recount Board and any other candidate who would have been entitled to file a recount-review petition.
- f. Within 24 hours after the filing of a recount-review petition, a respondent to the petition may file a motion to dismiss the petition, or other responsive filing or brief, raising any legal issues the respondent wishes to present to the Election Court regarding the petition.
- g. Within 72 hours after the filing of all responses by respondents, the Election Court shall issue its final rulings on the claims and grounds raised by the recount-review petition.
- h. The provisions of § 11.f-11.j, above, apply equally to the Election Court's consideration of any petition filed under this section.
- i. [omitted]
- j. **Direct appeal to the state supreme court.**
 - i. A petitioner or respondent may appeal the Election Court's final rulings on a petition filed under this section.
 - ii. The only basis for such an appeal is that the Election Court manifestly failed to abide by the procedures and standards for a recount-review petition, as set forth in this section.
 - iii. Such an appeal shall proceed in accordance with the provisions of § 16, below.

16. Appeal of the Election Court's final orders.

- a. Any appeal of an Election Court's final orders under §§ 11, 12, or 15, above, shall be governed by the provisions of this section.

- b. Any such appeal must be filed directly in the state's supreme court, which shall have exclusive jurisdiction within the judiciary of this state over such an appeal, and must be filed within 24 hours after the order being appealed.
- c. A notice of such an appeal must be filed in the Election Court, also within 24 hours of the order being appealed from.
- d. The appellant must serve a copy of the appeal, and the notice of the appeal, upon any party to the proceedings in the Election Court from which the appeal is taken.
- e. Within 24 hours after filing the appeal, the appellant must file a brief containing the appellant's legal arguments in support of the appeal.
- f. Within 24 hours after the filing of appellant's brief, any other party to the appeal (designated as an appellee for the purpose of the appeal) may file a brief in response.
- g. The supreme court of the state shall hold oral argument on the appeal within 48 hours after the filing of appellant's brief.
- h. Within 72 hours after oral argument, and in any event at least one day before the Safe-Harbor Deadline under 3 U.S.C. § 5, the state's supreme court shall issue its final order with respect to any such appeal.

17. Post-judicial count and certification.

- a. Upon completion of the canvass and any judicial proceedings under §§ 11, 12, and 15, including any appeal taken from any of those proceedings under § 16, or after the expiration of time permitted for the filing of such an appeal, and in any event no later than one day before the Safe Harbor Deadline under 3 U.S.C. § 5, the State Recount Board shall convene to conduct a final count and certification of the results of the presidential election in the state.
- b. The State Recount Board shall count any previously uncounted ballot that has been judicially determined to be entitled to be counted (or was determined to be eligible to be counted during the canvass, after which no timely petition for judicial review was filed under § 11).
 - i. The State Recount Board shall count these ballots by hand unless it determines that the number of previously uncounted ballots requires it to count them by machine in order to finish the count by the end of the Safe-Harbor Deadline.
 - ii. When counting these ballots by hand, the State Recount Board shall proceed as follows:
 1. The leading candidate and any recount-entitled candidate shall be permitted to designate a representative to witness the Board's counting of these ballots.
 2. A candidate's representative shall be entitled to voice immediately an objection to the Board's determination of whether a newly counted ballot contains a vote for a presidential candidate and, if so, which one;
 3. Immediately upon the voicing of any such objection, the Board shall reconsider the determination objected to, and after making a final determination with respect to the particular ballot shall move on to the next one, without further objections.

- c.** The State Recount Board shall make any adjustment in the count as judicially required pursuant to § 12, above, including any appeal therefrom.
- d.** The State Recount Board shall make any adjustment in the count, pursuant the final results of a recount conducted under § 14, including any judicial review of the recount under § 15.
- e.** The State Recount Board shall make any other judicially required adjustments in the count.
- f.** The State Recount Board shall complete all of the proceedings pursuant to this section, and certify the final result of the presidential election in the state, before 11:59 p.m. at the end of the day on which the Safe-Harbor Deadline falls.
- g.** There shall be no judicial review (either in the Election Court, or the state's supreme court, or otherwise) of any decision made by the State Recount Board pursuant to this section.

September 16, 2011

To: ALI Election Law Project

From: Edward B. Foley, Reporter

Re: Materials and Plan for Discussion at First Meeting

This memorandum concerns the portion of the meeting that will discuss the development of model principles (and potentially also some model rules) for the resolution of ballot-counting disputes. Steve Huefner, our Associate Reporter, will circulate separately a memorandum concerning the other portion of the meeting, which will address our project's sub-component devoted to nontraditional methods of casting ballots (early voting, "no excuse" voting by mail, and the like).

Overall Agenda for Initial (October 2011) Meeting

For this particular meeting we are planning to spend roughly two-thirds of the time on the first topic, and one-third of the time on the second. (We anticipate that other meetings will have different allocations of time between the two.) Here's how we plan to divide the discussion during the day:

8:45 Coffee, juice, bagels, etc. available during the morning

9:00 Greetings & Introductions of Attendees

9:15 Resolution of Ballot-Counting Disputes:
Begin discussion of specific "black letter" principles derivable from
How Fair Can Be Faster law journal article.

10:45 short break

11:00 Resolution of Ballot-Counting Disputes: resume discussion

12:45 lunch

1:45 Nontraditional Methods of Casting Ballots

3:30 short break

3:45 Open Discussion: Taking Stock, Priorities, and Next Steps

5:00 Adjourn

The Resolution of Ballot-Counting Disputes: Background Information for Focusing the Meeting’s Discussion

The format of this first meeting is intended to be something of an “ice breaker” and different from what we anticipate for future meetings. For our next and subsequent meetings, the plan will be for the Reporter to submit drafts of specific operative language that, as revised based on discussion at meetings, will be eventually submitted for official ALI approval. This proposed operative language will be accompanied by Comments and Reporter’s Notes.

For this first meeting, however, I would like us to discuss a set of “black letter” principles derived from a law journal article that I’ve written and is about to be published: *How Fair Can Be Faster: The Lessons of Coleman v. Franken*, 10 ELECTION LAW JOURNAL ____ (forthcoming 2011). My goal is to have a full and candid discussion of the extent to which there is—among all of us involved in this ALI project—agreement, disagreement, confusion, uncertainty, agnosticism, etc., about these “black letter” principles. Insofar as there is agreement among us concerning these “black letter” principles, they become plausible candidates for being transformed by me as Reporter into potentially operative language for ALI’s official adoption, to be discussed and revised as such in our future meetings. Conversely, however, insofar as there is disagreement, uncertainty, etc., among us collectively about these proposed “black letter” principles, it obviously would be more problematic for me to attempt to convert them into potentially operative language for ALI’s official adoption.

I want to make abundantly clear at the outset that, as Reporter for this ALI project, I am entirely open to the rejection, revision, replacement, etc., of the “black letter” principles derived from *How Fair Can Be Faster*. My role as Reporter is related to, but distinct from, my individual scholarly role as a professor who produced this article. I hope and expect to be an “honest broker” for the ALI process that can produce for official ALI adoption a set of operative principles that may differ from what I recommend solely in my individual scholarly capacity.

Thus, I strongly encourage all participants in our ALI Election Law Project to be thoroughly frank and forthcoming in expressing disagreement, doubt, reservations, etc., with the “black letter” principles derived from *How Fair Can Be Faster* (or with content of the article itself). Or to express agreement, to the extent that is the case. Either way, it will be useful to me, as Reporter, to use these “black letter” principles as a starting point for our collective ALI discussion. It makes no sense for me to hide from you the relevant ideas and proposals I’ve recently developed in my own scholarship. I want you to know my specific thinking coming into this project as it gets underway, and we can use it as a baseline and focal point from which we can move according to our collective deliberations.

Consequently, to prepare for our initial meeting I ask that you read two documents in conjunction with each other: (1) the following list of “black letter” principles derived from *How Fair Can Be Faster*; and (2) *How Fair Can Be Faster* itself,

to give you the context and justification for these “black letter” principles. My recommendation is that you read the two interactively. There will be portions of *How Fair Can Be Faster* that you can skim or read more quickly (for example, the proposed changes to the congressional timetable for presidential elections, or my exact recommendations for the procedures of a model State Election Review Tribunal), as the details in those portions of the piece seem to me to be somewhat tangential to our ALI project. Still, the thesis of *How Fair Can Be Faster* is that the component parts of a state’s ballot-counting procedures—the canvass, the recount, the contest, etc.—must be considered as a totality in order for the system to work. Therefore, it will be helpful for you to have a sense of where I’m coming from with respect to the optimal design of a state’s ballot-counting system as a whole, in order to evaluate and discuss the specific “black letter” recommendations that can be derived from the article for possible ALI consideration. If you start with an initial cursory glance at the following “black letter” principles, as I recommend that you do, you are likely to find that they will be fully comprehensible (if at all) only after you have had a chance to review *How Fair Can Be Faster*. Hence my request that you read the two interactively: assuming that you start with the following “black letter” principles, please re-read them at least once after you have had a chance to peruse *How Fair Can Be Faster*.

A few more additional observations before getting underway:

First, I don’t anticipate that we will be able to have a thorough discussion of all of the following “black letter” principles in our October meeting (during the periods before lunch, according to the Agenda). Instead, one objective of this initial meeting will be to get a sense of whether there should be some order of priority in terms of taking up specific issues for the purpose of beginning to draft operative ALI language for our consideration. You will see that I have divided the “black letter” principles into several categories: Timing, Institutions, Procedures, Substantive Ballot-Counting Rules. There are also specific “black letter” principles concerning (a) the counting of ballots cast by mail and (b) provisional ballots. If there develops a consensus among us on which of these topics should be tackled first, in terms of beginning to hammer out actual operative ALI language, I’d love to know it. Otherwise, you should presume that I have presented the “black letter” principles in roughly the order in which I think it would be fruitful for us to consider them.

(Also, there is an obvious intersection between the “black letter” principles that I articulate concerning the counting of ballots cast by mail and the work that Steve is doing for the separate sub-component of our project, on nontraditional methods of casting ballots. One goal for the last session of our initial meeting is to see whether the day’s discussion develops useful synergies between the two sub-components and how we might best capitalize on them as we move forward.)

Second, the “black letter” principles identified here are not intended to exhaust the scope of what our ALI project will cover in terms of how best to resolve ballot-counting disputes. Rather, they are only those principles derivable from the *How Fair Can Be Faster* article, (again) as a starting point for our deliberations. I have attempted to

draft these “black letter” principles in such a way that they are not preclusive or preemptive of other potential principles that would be consistent with them (but just not yet addressed). Please keep this in mind as you read them, and of course I thoroughly welcome (either before, during, or after the meeting) suggestions as to additional issues or points that should be addressed in our ALI project that are not covered in these “black letter” principles.

Please remember, though, that the ALI has made an initial decision to limit the scope of this Election Law Project to our two sub-components: one, the resolution of ballot-counting disputes; and two, nontraditional methods of casting ballots. Therefore, suggestions of additional issues and points to address should be made within these parameters. A suggestion, for example, that the ALI should take a position on whether voting at traditional precincts should use touchscreen or optical scan ballots would be outside the scope of our project, as currently defined.

Third, and related to this last point, this memorandum assumes familiarity with the basic explanation of the project’s purpose and scope, as described at the ALI Annual Meeting in San Francisco in May (and previously approved by the ALI Council). If any reader of this memorandum would like additional information concerning what was said about this project at the Annual Meeting, a transcript is available on request. Likewise, please feel free to contact me, or Stephanie Middleton, if you wish to discuss further the foundational premises that are guiding work on this project (including the all-important premise of evenhanded impartiality, or nonpartisanship, as described at the Annual Meeting).

Fourth, although *How Fair Can Be Faster* was prompted by a close analysis of the ballot-counting dispute in Minnesota’s 2008 U.S. Senate election, and thus contains ample discussion of that particular dispute, the purpose of the ALI project is to be forward-looking, not backward-looking. Therefore, just as the article itself relies on this particular dispute for insights on how to improve the process nationally in the future, so too would it be appropriate for our discussion in October to invoke this particular dispute as an illustration of what works and what doesn’t. But I’m assuming that we all agree that our time at the meeting is best spent if we avoid “re-litigating” the merits of previously settled disputes, whether it be this one or *Bush v. Gore* or any other. Consequently, if we find ourselves referring to past examples during our meeting, I encourage all of us (myself included) to remain cognizant of whether we are most effectively using those examples to make points about principles that ALI should adopt for the resolution of future disputes.

Please keep this point in mind also as you read *How Fair Can Be Faster* in conjunction with the following “black letter” principles. It was not written specifically for the ALI project and thus parts of it may seem more backward-looking than the kind of discussion I am describing for our initial meeting. Nonetheless, I trust that with this memorandum to guide us, we can all use *How Fair Can Be Faster* as a tool for our forward-looking ALI purposes, rather than simply reading the article for its own sake (or some other purpose).

Fifth, the draft of *How Fair Can Be Faster* that I am sharing with you for purposes of our October meeting is a set of page proofs. Please note: because the ELECTION LAW JOURNAL holds the copyright on this piece, I ask that you not circulate these page proofs further, as they are intended for distribution only in connection with facilitation of our October meeting.

Sixth, there are several other important pieces of new scholarship besides *How Fair Can Be Faster* that have influenced my thinking in how best to articulate the following “black letter” principles. I considered circulating these other pieces to all of you in advance of our October meeting. But I have decided against that, as I think that just these two documents (the “black letter” principles and *How Fair Can Be Faster*) are plenty enough reading for one meeting and are most conducive to keeping us focused and moving forward towards potential operative ALI language to consider at future readings. Nonetheless, I want to identify these valuable scholarly works, and I’m happy to facilitate your access to them if you would like to see them as part of your preparation for our meeting:

1. Richard L. Hasen, *The Democracy Canon*, 62 STANFORD LAW REVIEW 69 (2009). Rick, who is a member of our ALI team, also has an important and timely new book coming out: *THE VOTING WARS*, to be published by Yale University Press in 2012. I’ve very much benefited from reading the book in draft.
2. Justin Levitt, *When Mistakes Matter: Election Error and the Dynamic Assessment of Materiality* (8/21/11 draft of work in progress).
3. Joshua A. Douglas, *Procedural Fairness in Election Contests* (9/12/11 draft of work in progress), including an appendix on current procedures that states use for disputes involving different types of elective office: governor, state legislature, state judge, congressional, and presidential electors.

I should note that the formulation of the “black letter” principles concerning Substantive Rules for Ballot-Counting Disputes, the last section below, is much closer in approach to what Rick Hasen advocates in his *Democracy Canon* piece than what one might think from reading *How Fair Can Be Faster* alone. My movement in this direction has been influenced not just by Rick’s own work, but also Justin Levitt’s articulation of the “materiality” concept in his very impressive work-in-progress. While the formulation of the proposed “black letter” principles below is not exactly the same as either Rick’s “Democracy Canon” or Justin’s “materiality” principle, I have attempted to capture the valuable insights that each of them have brought to the topic of how courts should handle ballot-counting disputes in the context of statutory ambiguity. No doubt that the formulation below will benefit from our deliberations and further revisions.

**The Resolution of Ballot-Counting Disputes:
“Black-Letter” Principles Derived from *How Fair Can Be Faster***

Timing

1. When a ballot-counting dispute concerns a presidential, gubernatorial, or mayoral election, or an election to another form of chief executive office, all administrative or judicial proceedings used to resolve the dispute should be complete by the date on which the newly elected chief executive is scheduled to take office, or in the case of a presidential election by the date that Congress has specified for the state’s resolution of the dispute to be binding on Congress in its own proceedings regarding the counting of electoral votes for the presidency.
 - a. In order to meet this ultimate deadline, in no event should a court delay the preliminary deadline for completing the canvass of returns.
 - b. Any legal issues that emerge during the canvass concerning the counting of ballots should be fully and fairly adjudicated in subsequent proceedings, without changing the schedule for completion of the initial canvass.
 - c. If necessary, in order to preserve the ability to litigate ballot-eligibility issues after completion of the canvass, a court may order that any counting of previously uncounted and still-disputed ballots be done in such a way that they do not become commingled with other counted ballots and thus may be removed from the final count if they are ultimately adjudicated to be ineligible for counting.
 - d. To facilitate the expedition of litigation over the counting of ballots, and to decrease the incentive of a candidate to resist a certification of the initial canvass that shows an opponent ahead, the burden of proof in any such litigation should be specific to each ballot (rather than a general burden of overturning the preliminary certification).
 - e. A candidate who challenges an administrative decision to count a ballot during the canvass bears the burden of proving, by a preponderance of evidence, that the particular ballot is not entitled to be counted.
 - f. Conversely, a candidate who challenges an administrative decision during the canvass that a particular ballot is not entitled to be counted bears the burden of proving, by a preponderance of the evidence, that the particular ballot is entitled to be counted.
2. [Disputes over ballot-counting in the context of state legislative and congressional elections raise different considerations than chief executive elections, and may be treated separately in subsequent meetings. For historical and separation-of-powers

reasons, there are special sensitivities with judicial involvement in these particular ballot-counting disputes. One unusual, but particularly difficult, category of disputes over legislative elections involves the situation where the determination of which political party controls the organization of a legislative chamber—including the appointment of Speaker of the House, or Majority Leader, as well as committee chairs and membership—depends on the outcome of a ballot-counting dispute involving one or more seats. The issue of timing in this context more closely resembles a ballot-counting dispute in a chief executive election than it does a more run-of-the-mill dispute over a single legislative seat that does not affect which party controls the organization of the legislative chamber. It is open for consideration whether our ALI project will wish to address this infrequent but troublesome situation specifically.]

3. [Likewise, there are special exigencies—including potential recusal and conflict-of-interest issues—when ballot-counting disputes concern elections for a seat on a state’s supreme court. It is debatable, of course, whether seats on a state’s supreme court should be an elective rather than appointive office, but it is evident that many states will continue to use popular elections as a means for selecting members of their state’s highest court. Consequently, our ALI project will need to consider whether we wish to formulate principles specifically for ballot-counting disputes in this particular context.]

Institutions

4. Because both the reality and the perception of evenhanded impartiality are important: for any tribunal that is authorized under state law to adjudicate any aspect of a ballot-counting dispute, this tribunal should be constructed so that it is—and both candidates involved in the dispute (presumably the one in the lead and the closest runner-up, wherever there are more than two candidates), their supporters, and members of the public generally perceive it to be—impartial and evenly balanced towards both sides of the dispute. [The formulation of this principle is designed to take account of the fact, as in the dispute over Alaska’s 2010 U.S. Senate election, that a dispute may involve a write-in, independent, or third-party candidate, rather than candidates from the traditionally two most powerful parties. I anticipate that we will need to have some discussion, whether at this initial meeting or later, on how best to formulate any official ALI language to handle this point.]
 - a. There are different specific mechanisms that a state can use to construct a tribunal that is, and is perceived to be, impartial and evenly balanced in this way. One method is for a three-member tribunal to have two members each of whom is seen as having a similar political affiliation as each of the two candidates involved in the dispute [who, again, may or may not be representatives of the two major parties], while the third member of the tribunal is a genuine neutral between the two disputing candidates. [This method may be easier to implement, as a practical matter, when the dispute involves candidates from the two major parties, but with appropriate advanced

planning it still may be possible to implement when the dispute involves a write-in, independent, or third-party candidate.] In any event, ALI at this time takes no position on the best mechanism for constructing a tribunal to achieve the goal of evenly balanced impartiality, and states may wish to exercise their function as laboratories of democracy to explore alternative mechanisms, as long as they adopt some mechanism to achieve this goal.

- b. Whenever the adjudication of a ballot-counting dispute has been conducted by a tribunal that was constructed to be impartial and evenly balanced, that adjudication should be deemed valid and final by any other tribunal to which the same dispute may be taken; this principle applies to state supreme courts as well as the federal judiciary, since no court is in a position to improve upon an adjudication of a ballot-counting dispute achieved by a tribunal that was constructed to be impartial and evenly balanced towards both sides of the dispute.

Procedures

5. In a statewide election, manual recounts for the purpose of verifying a voter's intent as marked on the voter's ballot should be conducted under the auspices of a single state-level institution with the authority to resolve any disputes about the voter's intent on particular ballots in accordance with a single uniform state standard. Although this single state institution may rely on local recount teams to perform a preliminary determination of the voter's intent on each ballot, any challenges made to these local determinations by either candidate should be resolved by the single state-level institution.
 - a. The ALI, at least at this time, takes no position on whether manual recounts should be required to verify voter intent or, if so, in what circumstances (including how close the gap between the two leading candidates must be in order to necessitate a manual recount).
 - b. Nor does the ALI at this time take a position on what type of voting technologies are preferable for the purposes of casting and counting ballots.
 - c. The principle here is simply that if a statewide manual recount does occur, then it should be subject to the uniformity of ultimate review by a single state-level institution.
6. A state should not wait for the completion of litigation over the eligibility of disputed ballots in order to begin a mandatory manual recount of ballots previously counted (for which voter intent, and not eligibility, is the only remaining issue).
 - a. Instead, states should determine immediately upon completion of the initial canvass whether a mandatory manual recount is required under state law and, if so, should begin the recount without delay. Ballots previously not counted

but subsequently determined to be eligible can be added to the recount later, before final resolution of all ballot-counting issues.

- b. If the initial canvass shows an election to be close to the point of triggering a mandatory manual recount, and there are potentially enough previously uncounted ballots that if subsequently determined eligible for counting would put the election within the margin that necessitates a manual recount, the relevant state officials should take all appropriate measures to prepare for the possibility of a recount and to make sure it can be completed on time.
7. With respect to ballots cast by mail, candidates (through their designated representatives) should have the opportunity to examine the envelope in which each ballot has been mailed in order to determine whether it has been properly cast by an eligible voter.
- a. As part of this opportunity, a candidate should be able to object to the counting of a ballot that the candidate believes is not entitled to be counted under state law.
 - b. The responsible election officials should decide whether to accept or reject the candidate's objection before they remove the absentee ballot from its envelope.
 - c. If the responsible election officials decide to accept the objection (and thus set aside the ballot as not countable), then both the voter and any opposing candidate should have an opportunity to protest this official decision and to demonstrate that the ballot is entitled to be counted.
 - d. The proceedings for adjudicating any such dispute over the eligibility of ballots cast by mail should permit opposing sides to introduce relevant evidence, and to offer arguments on the merits, consistent with the need to adjudicate this dispute expeditiously.
 - e. If the responsible election officials decide to reject the objection, based on their belief that the ballot is entitled to be counted, then they should count the ballot in such a way that (while maintaining the secrecy of the ballot) it does not become commingled with other counted ballots and thus may be retrieved and subtracted from the final count in the event that an authoritative tribunal rules that the election officials were mistaken.
 - f. If a candidate is given this opportunity to object in advance to the counting of a ballot cast by mail, but the candidate fails to state an objection or the basis for it, then in any subsequent adjudication the candidate should be deemed to have waived the objection and thus should be precluded from raising any further challenge to the counting of the ballot based on the same objection.

- g. Any ballot cast by mail that is not subject to an objection, if found to be eligible for counting by the appropriate election officials, may be counted and commingled with all other counted ballots.
 - h. If, even in the absence of a candidate's objection, appropriate election officials determine that a ballot cast by mail is not eligible to be counted, the voter and any other candidate should have an opportunity to protest this determination, just as they should have if the officials had accepted a candidate's objection to the ballot.
 - i. To facilitate this opportunity to protest the rejection of a ballot, election officials should make available to voters and candidates upon request a list of rejected ballots and the reason for their rejection.
 - j. If at any point, election officials reconsider a decision to reject a ballot and subsequently decide to count it, a candidate may protest the reconsideration as long as the candidate objected to the counting of it initially (and thus did not waive the objection); in this circumstance, as with an initial rejection of a candidate's objection, the election officials should count the ballot in a way that it does not become commingled with other counted ballots.
- 8. For ballots cast by mail that arrive at the appropriate office on or before Election Day, if the election officials find that the voter committed an error in filling out the envelope in which the ballot was mailed, and if this error would prevent the ballot from being counted under state law, then the local officials should be required to contact the voter by phone or email to permit the voter to correct the error.
 - a. Voters who are given this error-correcting opportunity should have only such time to do so as will not delay the completion of the initial canvass.
 - b. [We may wish to discuss how this proposed principle relates to current and proposed practices concerning military and overseas ballots. Steve has more to say about this, given his background and expertise on this particular topic.]
- 9. Voters who are required to cast provisional ballots on Election Day should be given a similar error-correction opportunity if, upon review of the provisional ballot envelope, election officials determine that it contains a clerical error that would prevent the ballot from being counted under state law, or if the voter would be able to supply a missing piece of identification that required the voter to cast a provisional ballot.
 - a. The amount of time that provisional voters are given for this error-correcting opportunity may be shorter than what should be provided to voters who cast their ballots by mail, perhaps as short as 48 hours, in order not to delay completion of the initial canvass.

- b. [One goal with respect to providing error-correcting opportunities with respect to both provisional ballots and ballots cast by mail is that the rules and deadlines be simple and straightforward enough so that, as a practical matter, a reasonable or average voter would be able to take advantage of these opportunities and not be overwhelmed or confused by them.]
10. With respect to provisional ballots cast in a statewide election, the decision of local election officials during the canvass on whether or not to count them should be reviewable, at the request of any candidate, by a single state-level tribunal applying a uniform standard.
- a. A candidate objecting to the counting of a provisional ballot should be required to state this objection to the appropriate local election officials before raising the issue with the ultimately authoritative state-level tribunal; otherwise, the objection should be barred as waived. (In this respect, provisional ballots should be treated similarly to ballots cast by mail.)
 - b. A candidate protesting the rejection of a provisional ballot, as well as the voter who cast the provisional ballot, should have the opportunity to present evidence and make arguments on why the ballot is eligible to be counted. If this evidence or argument is not first presented to the appropriate local officials, then it also is deemed waived and cannot be presented to the state-level tribunal.
 - c. To enable a candidate to have an opportunity to protest the rejection of a provisional ballot, election officials should provide upon request to any candidate a list of all voters whose provisional ballots were rejected and the reasons for their rejection. (As long as election officials never disclose which candidates the provisional ballots were voted for, giving this information should not be understood to violate the privacy clause of the Help America Vote Act. Again, the availability of this information is the same as for rejected ballots cast by mail.)
 - d. If a voter is mistakenly required to cast a provisional ballot and should have been permitted to cast a regular ballot [meaning that, contrary to state law, an administrative error was committed that caused election officials to believe erroneously that a particular voter must cast a provisional rather than regular ballot], then the provisional ballot should count even if the envelope in which it is cast contains a clerical error relevant solely to its status as a provisional ballot that would prevent it from being counted as a provisional ballot. [In other words, in this specific circumstance, the ballot should be counted as if it were a regular ballot, which it should have been, making the clerical error relevant solely to its status as a provisional ballot inapplicable given the initial administrative error.]

- e. With respect to polling locations that serve multiple precincts, if a voter goes to the correct polling location for the voter's precinct but is required to cast a provisional ballot there, and if the sole reason that the voter must cast a provisional rather than regular ballot is some apparent confusion on the part of the voter or poll workers concerning which of the multiple precincts sharing the same polling location is the correct precinct for the particular voter, then the provisional ballot should count with respect to all offices and issues on the ballot for which the voter was entitled to cast a ballot [in other words, all offices and issues that appear on the ballot for the voter's correct precinct].
 - f. If it is established by a preponderance of evidence that the error of a poll worker or other election official is responsible for the defect that would require a provisional ballot to be rejected, then the provisional ballot should be counted as if it were a regular ballot as long as it is also established by a preponderance of evidence that the voter is qualified to cast a vote in this election with respect to the particular office or issue.
11. No waiver doctrine should apply to issues that arise during the litigation of a ballot-counting dispute that affect the determination of which candidate legitimately won the election if those issues could not have reasonably been discovered during the initial canvass.
- a. It should be permissible to raise, for example, newly emerging evidence of fraud, for example involving the payment of money in exchange for ballots cast by mail, if this new evidence is discovered after the close of the initial canvass.
 - b. But even this evidence could not be raised after the final deadline for the resolution of all ballot-counting disputes in an election (which for chief executive elections would be the date for taking office).
 - c. After that deadline, the only recourse is constitutionally or statutorily prescribed mechanisms for removing the officeholder from office.

Substantive Rules for Ballot-Counting Disputes

12. State statutes should specify explicitly the requirements that if breached will disqualify a ballot from being counted.
- a. It is not sufficient that a state statute identify requirements that a voter must undertake as prerequisites to casting a ballot.
 - b. For each of those requirements, state law should unambiguously answer a "second-order, remedial" question: whether or not a consequence of failing to comply with that particular requirement is the disqualification of the ballot from being counted.

- c. If a state's statutory law fails to address this second-order, remedial question with respect to any particular requirement that a voter must undertake as a prerequisite to casting the ballot, then an adjudicatory tribunal should construe that omission as meaning that the failure to comply with that particular requirement does not disqualify the ballot from being counted.
13. With respect to those requirements the noncompliance of which disqualifies a ballot from being counted (according to an express provision of a state's statutory law), if the cause of the noncompliance is an error committed by a government official involved in the administration of a state's electoral process, then the ballot should count despite its noncompliance with the particular requirement unless:
- a. a state statute unambiguously provides with further specificity that the ballot may not count even where such government error is the cause of the noncompliance (and judicial enforcement of this statutory rule would not violate any constitutional command); or
 - b. the ballot was not cast before the polls closed or within the specified time period by which all ballots must be cast; or
 - c. the government error caused the voter to cast a vote with respect to an office or issue for which the voter was not a member of the electorate entitled to vote for that issue or office (for example, an official mistakenly gives a voter a ballot for one legislative district when the voter resides in another legislative district); or
 - d. the purpose of the particular requirement is to protect the integrity of the electoral process from fraud with respect to the casting or counting of ballots, and there exists substantial evidence that the particular ballot in dispute is tainted by such fraud.
 - e. For the purpose of this principle, in cases of mixed causation where both governmental and voter error are partially responsible for the noncompliance with the particular requirement, the voter's partial responsibility for the noncompliance should not be sufficient reason to disqualify the ballot from counting if the available evidence reasonably establishes that the voter likely would have complied with the requirement but for the government's contributing mistake.

How Fair Can Be Faster: The Lessons of *Coleman v. Franken*

Edward B. Foley

ABSTRACT

The largely successful resolution of Minnesota’s disputed 2008 U.S. Senate election offers a model from which other states can benefit in the event they confront a similar dispute. In particular, Minnesota employed impartial and balanced institutions, its State Canvassing Board and three-judge trial court, to conduct the recount and subsequent litigation of this Senate election. The lack of partisan bias in the composition and deliberation of these institutions was, by far, the overriding factor in making the eventual outcome of the election legitimate in the eyes of the losing side as well as the winners.

But the legitimacy of *Coleman v. Franken* came at an unacceptably high price in terms of the excessively long time that it took—eight months—to achieve this outcome. Had the dispute involved a presidential election, Minnesota’s experience would have been an utter failure, rather than a qualified success.

The primary purpose of this article is to develop a set of procedures that can achieve the same impartial fairness of *Coleman v. Franken* but within the strict time constraints essential for presidential elections (and also suitable for senatorial, gubernatorial and other statewide elections). In doing so, the article also draws other lessons from *Coleman v. Franken*, including the observation that a well-designed set of state procedures capable of being both fair and fast should be free from the interference of federal institutions that might undermine either objective.

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INTRODUCTION

ON JUNE 30, 2009, when ex-Senator Norm Coleman finally conceded that he had lost his reelection bid against challenger Al Franken—the same day as the Minnesota Supreme Court unanimously affirmed the trial court’s ruling that Franken had won more votes than Coleman—there was a widely shared belief among Minnesotans that the protracted dispute over their 2008 U.S. Senate election had ended fairly. The two major newspapers in the Twin Cities, the *Minneapolis Star Tribune* and the *St. Paul Pioneer Press*, both of which had endorsed Coleman’s bid for reelection, each editorialized that the result deserved respect precisely because of the process that generated it. Explicitly pronouncing the outcome “legitimate,” the *Star Tribune* observed that the “unanimity” of the Minnesota Supreme Court, being “dominated by Republican appointees,” demonstrates that “Franken’s 312-vote victory was determined according to impartial law, not partisan favor.”¹ Stating that the “system worked,” the *Pioneer Press* credited the “impartial, competent, independent judiciary” that adjudicated the ballot-counting dispute.²

To be sure, there were naysayers who questioned the legitimacy of the result despite the apparent fairness of the process that reached it. Most prominently, the *Wall Street Journal* irresponsibly declared that “Franken now goes to the Senate having effectively stolen an election,”³ thereby implying that Franken achieved his victory by means comparable to what vaulted Lyndon Johnson to the Senate in 1948.⁴ But nothing could have been further from the truth. Whereas Johnson’s supporters committed outright fraud by fabricating 200 extra votes on the tally sheets for the infamous Ballot Box 13,⁵ Franken and his

attorneys did nothing but argue that ballots actually cast by indisputably eligible voters should be counted in accordance with Minnesota’s previously enacted statutory rules for administering elections. Coleman, of course, made equivalent arguments in his effort to prevail, as do all candidates in major elections that end in a proverbial photo finish. Most significantly, as the Minnesota-based editorials pointed out, Republicans were well-represented on all three tribunals that determined the outcome of this Senate election—the State Canvassing Board, the three-judge trial court, and the Minnesota Supreme Court—and all three tribunals were essentially unanimous in all of their vote-counting decisions.

Thus, it was impossible to claim logically that Franken, the Democratic candidate, had “stolen” the election simply by making persuasive arguments to these tribunals, which lacked a pro-Democrat bias. But just as “birthers” have claimed that President Obama was born on foreign soil despite all evidence to the contrary, so too, in the context of a major disputed election like *Coleman v. Franken*, there inevitably will be some rabid partisans who refuse to accept the legitimacy of the outcome even though the process was equally fair to both sides. For this reason, the standard of legitimacy that any major disputed election can be expected to meet must be

¹Editorial, *A gracious finish to an epic drama; Unanimous Supreme Court decision legitimizes Franken win*, STAR TRIBUNE, July 1, 2009, at 14A.

²Editorial, *A Senator at long last*, PIONEER PRESS (St. Paul), June 30, 2009, at B8.

³Editorial, *The ‘Absentee’ Senator*, WALL STREET JOURNAL, July 2, 2009, at A11.

⁴See Robert Caro, THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT (1990).

⁵*Id.* at 388-389.

defined in terms of what a reasonable person, guided by logic and evidence, would accept as legitimate. By this standard, the outcome of *Coleman v. Franken* most definitely passes the test of legitimacy, as is confirmed by the editorials of the state's two leading newspapers despite their previous endorsements of Coleman's candidacy for reelection.

But even if one accepts the outcome of *Coleman v. Franken* as legitimate, and does so on the ground that the process yielding this result was fair, one still can criticize this process for taking far too long to reach its result. For this reason, I call the vote-counting dispute between Coleman and Franken "the Lake Wobegone Recount."⁶ Its fairness made it at least "pretty good" or "above average"—the terms that Garrison Keillor uses to describe residents of his fictional Minnesota town.⁷ But the resolution of this disputed Senate election cannot be characterized as an unblemished success, and its major defect was the inordinate amount of time it took.

June 30, 2009, the date the dispute ended, was almost a full eight months after Election Day (November 4, 2008). More importantly, it was six-and-one-half months after the date on which the presidential electors of each state met to cast their votes for president (December 15, 2008). Therefore, if the dispute over vote-counting in Minnesota's 2008 general election had affected the presidential election, and not just a U.S. Senate seat, the "system" would not have "worked"; Minnesota would have been unable to identify which presidential candidate won the popular vote in its state by the constitutionally required deadline.⁸

On December 15, 2008, the State Canvassing Board had not yet begun to review ballots challenged during the local phase of the recount in the U.S. Senate election. Thus, if the process had come to a halt on that day, the state either would have had to declare the election "undecided" or else would have had to announce Coleman as the winner based on his 215-vote lead on November 18 at the close of the canvass. Either way, such a short-circuited process hardly could have been considered a fair resolution of the election. A recount that was about to show the canvass incorrect would have been rendered null and void because it took too long. And there would have been no extra time for the judiciary to consider any of the issues relating to the rejection of absentee ballots, including the different standards used by local election boards for reviewing these ballots.

Consequently, if Minnesota—or any other state—wants a fair process for resolving a disputed presidential election, it will need to figure out a way to compress its recount and all related adjudicatory procedures into the time between the close of the canvass and the date the presidential electors meet. Congress could help the states by postponing this date: for example, by choosing January 5, the date that the Minnesota Canvassing Board officially certified the result of the recount (which showed Franken ahead by 225 votes). Even so, the lawsuit that Coleman filed to contest this certification did not begin until the next day. Thus, Minnesota and other states need to develop fair procedures for resolving disputed presidential elections that either eliminate the possibility of bringing this kind of lawsuit or else manage to schedule judicial consideration of the kinds of issues raised in *Coleman v. Franken* so that they are settled along with the recount by this new January 5 deadline.

The primary purpose of this Article is to propose a model calendar for resolving vote-counting disputes that is able to meet this objective and thus, by doing so, satisfy a reasonable standard of fairness for these disputes. Moreover, if this calendar works for presidential elections, it is also suitable for other major statewide elections. After all, it would have been better if the second Senator from Minnesota had been able to assume office in early January of 2009, as Congress and the nation faced monumental economic emergencies. Likewise, it is desirable that a newly elected governor take office in January without the cloud of an unresolved dispute over the governor's electoral victory.⁹ Therefore, the model calendar I propose, while tailored especially

⁶See Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 1 (2011).

⁷One perhaps could even add that the pace of the Lake Wobegone Recount matched the rather leisurely tempo of Keillor's popular Minnesota-based radio show, "A Prairie Home Companion" (including Keillor's signature "News from Lake Wobegone" monologue).

⁸Article Two of the U.S. Constitution requires that the presidential electors of each state cast their votes on the same day throughout the entire nation. U.S. CONST. art. II § 1. Therefore, Minnesota could not have delayed past December 15, 2008 to declare which presidential candidate won its popular vote.

⁹Washington suffered this unfortunate circumstance after its 2004 gubernatorial election. Although Christine Gregoire took office in January of 2005, a judicial challenge to the certification of her victory continued until June of that year. See Trova Heffernan, AN ELECTION FOR THE AGES: ROSSI VS. GREGOIRE, 2004 (2010).

to the unique exigencies of a presidential election, is designed to apply equally to senatorial, gubernatorial, and other major statewide elections.

This model calendar will assume both that Election Day remains in early November and that the initial canvass takes two weeks, thereby leaving roughly seven weeks until January 5. The model calendar will show how it is possible to schedule within these seven weeks both a *recount*, which is designed to address whether vote-counting machines accurately determined the voter's intent on each ballot, and a *recanvass*, which is designed to determine whether particular ballots are eligible to be counted. In making both the recount and the recanvass fit within this seven-week period, and doing so in a way that the losing side should accept as a fair process, this model calendar necessarily builds upon an efficient and appropriate use of the two-week canvass itself. Thus, as part of explaining the model calendar, this Article will also discuss the optimal use of the canvass.

In addition to developing the model calendar, this Article identifies other lessons from *Coleman v. Franken* concerning the fair resolution of disputed elections. One of these lessons concerns the importance of impartial institutions in adjudicating vote-counting disputes. While this point might seem obvious, it is often overlooked in the search for well-written rules that can settle a disputed election fairly regardless of the institution that will enforce those rules. But *Coleman v. Franken* illustrates that, as valuable as it is to have optimal vote-counting rules, even more important is an impartial tribunal that will enforce whatever vote-counting rules exist.

Another lesson of *Coleman v. Franken* concerns the federal supervision of a state's vote-counting procedures, and it follows from the previous point. If a state has an impartial tribunal for resolving its vote-counting disputes, then the resolution that this tribunal achieves should be immune from federal interference. This immunity could come in either substantive or procedural form. Fourteenth Amendment doctrine could explicitly adopt the principle that there is no Equal Protection or Due Process violation where a state employs the right kind of impartial tribunal for its vote-counting disputes. Alternatively, even where federal courts have the statutory jurisdiction to overturn the result of a state's vote-counting proceedings, the federal judiciary could invoke a new version of the political question (or abstention) doctrine to refrain from

doing so where the state has employed the right kind of impartial tribunal.

In developing these lessons, I draw upon the narrative of the entire dispute in *The Lake Wobegone Recount*.¹⁰ While I have endeavored to make this follow-up analysis readable on its own, many readers may wish to become more familiar with the details of what happened in Minnesota, on which I base these lessons. Ultimately, however, this Article is more about the future than the past. The objective is to replicate the valuable features of Minnesota's experience while avoiding the ways in which *Coleman v. Franken* fell short of the ideal.

I. A MODEL CALENDAR FOR PRESIDENTIAL AND OTHER STATEWIDE RECOUNTS

There are those who think that it is impossible to devise a fair recount process for presidential elections and that it is a fool's errand even to attempt to try to devise one.¹¹ These skeptics see one lesson of *Bush v. Gore*¹² to be that, no matter what, there is not enough time between Election Day (the date that citizens vote for presidential electors) and the Electoral College deadline (the constitutionally mandated uniform date on which the presidential electors in all states officially vote for president) to complete a fair recount of presidential ballots (the ballots that citizens cast for presidential electors on Election Day). The U.S. Supreme Court, of course, famously stopped the recounting of Florida's presidential ballots in 2000, six days short of the Electoral College deadline, because of the so-called "safe-harbor" provision (which gives states a benefit if they resolve all disputes concerning presidential ballots by this earlier "safe-harbor" date¹³).

But the skeptics think that the extra six days would have made no difference. Nor do they think it would have mattered if Florida had put in place a better recount regime before Election Day in 2000, one that did not involve a confusingly ambiguous

¹⁰See Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 1 (2011).

¹¹This point was pressed hard by several readers of the initial manuscript from which this Article was derived, including participants of the symposium honoring Dan Lowenstein (where it was first presented).

¹²531 U.S. 98 (2000).

¹³3 U.S.C. § 5 (2010).

relationship between the so-called “protest” and “contest” phases of Florida’s recount process (as well as other ambiguities that caused excessive delay as lawyers for candidates Bush and Gore litigated over how to resolve these procedural uncertainties).¹⁴ Instead, these skeptics focus on the fact that, once it became clear that Florida was “too close to call” the morning after Election Day and also that Florida would determine the winner of the Electoral College, it became inevitable that attorneys for the candidates would discover election irregularities worth litigating. According to the skeptics, a fair process for adjudicating these vote-counting disputes would require more than the six weeks between Election Day and the Electoral College deadline and, indeed, perhaps even more than the eleven weeks between Election Day and Inauguration Day (on January 20).

One might think that *Coleman v. Franken* confirms this suspicion of the skeptics. June 30, after all, was long after January 20. Indeed, the trial of *Coleman v. Franken* did not begin until January 26, almost a full week after the inauguration of President Obama.

One might be even more dubious of the prospects for completing a fair presidential recount in time for Inauguration Day if one considers as well Washington’s gubernatorial election of 2004. That disputed election was not resolved until June 6, 2005,¹⁵ which is also long after January 20. Although Washington might seem slightly speedier than Minnesota in resolving a vote-counting dispute in a high-stakes statewide election, one must remember that the Washington dispute did not involve an appeal of the trial court’s decision on which candidate was the lawful winner of the election. There, the candidate who had lost according to the trial court conceded defeat on the date of the trial court’s decision and declined to file an appeal. If that candidate had made the contrary decision on June 6, and if an appeal in Washington had taken as long as the appeal of *Coleman v. Franken*, then the Washington dispute would not have ended until mid-August.

Yet despite these discouraging dates, if one digs deeper into the proceedings that actually occurred in Minnesota to resolve the disputed U.S. Senate election of 2008, there is reason to believe that—contrary to the skeptics—it would be possible to structure a fair process for resolving disputes over presidential ballots in time to inaugurate the election’s rightful winner on January 20. To do this would necessitate four reforms of existing proce-

dures. First, it would require some adjustment of the calendar that Congress has set for the official casting and counting of votes by the presidential electors themselves. Second, it would require structuring both the *recount* and *re canvass* of presidential ballots so that they occur within the same seven-week period after an initial two-week canvassing of the election returns. Third, it would require that the two-week deadline for the canvass itself remain firm, so that disputes over ballots that arise during the canvass are deferred to the *re canvass* if they cannot be resolved definitively within this initial two-week period after Election Day. Finally, it would require the elimination of a right to seek any further appeal of the result at the end of this seven-week period, in recognition that a well-designed process for the recounting and *re canvassing* of presidential ballots in this seven-week period would provide enough procedural fairness to the competing presidential candidates and their supporters. Any extra procedural benefit from providing a further appeal would be outweighed by the need to bring the presidential election to a timely conclusion in advance of Inauguration Day. All four of these reforms are both feasible and desirable.

A. *Adjustment of the congressionally specified dates*¹⁶

Currently, federal statutes specify the following dates between Election Day in early November and Inauguration Day on January 20:

¹⁴A brief discussion of the distinction between the “protest” and “contest” phases is contained in *Bush v. Gore* itself. 531 U.S. at 101. For a more complete narrative of the events surrounding the Florida dispute, one can read Jeffrey Toobin, *TOO CLOSE TO CALL: THE THIRTY-SIX DAY BATTLE TO DECIDE THE 2000 ELECTION* (2001), or one can watch the HBO documentary, *RECOUNT*—recognizing that while both the book and the video are riveting accounts of the narrative, each arguably favors Gore’s side of the story.

¹⁵Documents in the Washington dispute, including the trial court’s oral decision of June 6, 2005, are collected on the *Election Law @ Moritz* website: <http://moritzlaw.osu.edu/electionlaw/litigation/washington.php>.

¹⁶My thinking on how best to adjust these congressional dates has benefited greatly from previous work on this topic by my Moritz colleagues. See Daniel P. Tokaji, Commentary, *An Unsafe Harbor: Recounts, Contests, and the Electoral College*, 106 MICH. L. REV. FIRST IMPRESSIONS 84 (2008), <http://www.michiganlawreview.org/firstimpressions/vol106/tokaji.pdf>; Steven F. Huefner, *Reforming the Timetable for the Electoral College Process*, ELECTION LAW @ MORITZ (Nov. 30, 2004), <http://moritzlaw.osu.edu/electionlaw/comments/2004/041130.php>.

- “Safe Harbor” Day¹⁷ (exactly 5 weeks after Election Day)
- Meeting & Vote of Presidential Electors¹⁸ (6 days after “Safe Harbor” Day)
- Congressional Count of Electoral Votes¹⁹ (January 6)

These dates are antiquated and could be revised to give states a couple of extra weeks to fairly resolve disputes over the counting of presidential ballots, without detriment to the goal of resolving these disputes in time to inaugurate the rightful winner of the election. There are three components to making this revision.

1. Eliminate the separate “safe harbor” deadline. There is no need for a separate, earlier “Safe Harbor” Day. The concept of a “safe harbor” is that, when Congress meets for the counting of the Electoral College votes from each state, Congress will presume that a state’s Electoral College votes are valid if they have been cast by presidential electors whose own authority to perform this role has been conclusively settled under state law by a specified date. But this same presumption of validity could apply so long as any dispute concerning the counting of ballots cast on Election Day by citizens for presidential electors is conclusively settled by the date on which presidential electors meet to cast their own votes for president.

The meeting of the presidential electors has become just a formality. It is unnecessary to leave time for deliberation at this meeting before the presidential electors cast their official votes for president. Thus, in this era of instantaneous communication via the internet, this meeting can occur on the same day that a dispute over the counting of ballots for presidential electors is resolved.

For example, the dispute might be conclusively resolved as late as 5 p.m. on that date, but there still would be ample time for the duly authorized presidential electors to cast their official votes for president by midnight. In this situation, both slates of presidential electors would need to convene, waiting for word of the dispute’s resolution—waiting, in other words, for the conclusive determination of which slate was entitled to cast the state’s Electoral College votes. But it hardly would be a hardship for both slates of presidential electors to conditionally convene in this way. After all, in each of the three southern states where the counting of ballots cast for presidential electors was disputed

in 1876, both the Hayes and Tilden slates of electors met on the decisive day. The same was true for Hawaii in 1960, since it remained unclear whether Kennedy or Nixon had carried that state on the day for the presidential electors to cast their votes.

Thus, the first step to reforming the congressionally specified calendar for counting the Electoral College votes from the states would be to eliminate the separate “Safe Harbor” date and, instead, apply the same “Safe Harbor” concept to the date on which the presidential electors meet to cast their official votes for president.

2. Move the meeting of presidential electors to early January. The date for the meeting and vote of presidential electors can be moved from mid-December, when it currently occurs according to the congressionally specified calendar, to early January—say, January 5 for sake of specificity. The main argument against such a move is that it would delay the resolution of a disputed presidential election, thus leaving even less time available for the transition from one administration to the next, which constitutionally must occur at noon on January 20.²⁰ But, on balance, this argument lacks sufficient force to be persuasive and thus should not dissuade Congress from making this move.

Most significantly, this argument is irrelevant in any presidential election that lacks a significant vote-counting dispute, which of course is virtually all of them. Routinely, the nation knows the winner of the presidential election on Election Night itself, or at least within the next day or two. Therefore, in these routine situations it does not matter whether the presidential electors meet in mid-December or early January to cast their official votes for president. If there is not enough time for smooth transitions from one administration to the next even in these routine situations, that problem lies in the two bookend dates of the presidential election calendar: Election Day in early November and Inauguration Day on January 20. It is most certainly not a problem caused by the intermediate date on which the presidential electors meet.

Moreover, this Article assumes that there will be no moving of the bookend dates. While one might

¹⁷3 USCA § 5 (2010).

¹⁸3 USCA § 7 (2010).

¹⁹3 USCA § 15 (2010).

²⁰U.S. Const., amend. XX.

be tempted to lengthen the time between Election Day and Inauguration Day in order to improve the quality of presidential transitions, one must remember that the Twentieth Amendment *shortened* this time period in order to avoid the previous problem of an excessively long lame-duck session between Election Day and Inauguration Day. Indeed, in 2008, the period between McCain's defeat (and thus the repudiation of the incumbent Bush's economic policies) and Obama's inauguration was arguably too long as it was, in the midst of a severe economic crisis. In any event, this Article will accept these bookend dates as fixed, and thus the issue of facilitating better presidential traditions applies only to the choice between mid-December and early January as the date for the meeting and vote of presidential electors. Furthermore, because this choice matters only when there is a serious dispute over the counting of ballots cast by citizens for a state's presidential electors, the interest in improving presidential transitions must be weighed against the countervailing interest in having a fair process for identifying the rightful winner of the presidential election.

If a dispute over ballots cast for presidential electors is serious enough to last until mid-December, as it was in 2000, then obviously there will be some inevitable disruption to the ordinary process of transitioning from one administration to the next. Both candidates, as claimants to the White House, will have to undertake some steps in November and December preparing for a presidential transition in the event that either one might be declared the conclusive winner, with little time left until January 20. But these steps necessarily will be tentative, less robust than they would be if a single candidate was already decisively recognized as the new President-elect. Even so, the relevant policy question is whether the *incremental* disruption to the presidential transition process outweighs the *incremental* benefit from giving states two more weeks, until early January, to resolve the dispute over the counting of ballots for presidential electors.

The states need that extra time. Both the Minnesota recount of 2008 and the Washington recount of 2004 demonstrate this. Minnesota did not certify the result of the Coleman-Franken recount until January 5,²¹ and Washington did not certify the result of its 2004 gubernatorial election until December 30.²² Moreover, had either recount ended on the date when the presidential electors met that year, each

state would have been unable to identify the correct winner of the recount. In both states, the candidate ultimately certified the winner was the one perceived to be behind in unofficial tallies on the day that the presidential electors met. Thus, giving the states an extra couple of weeks beyond mid-December to complete their recounts is crucial to the ability of these states to conduct their recounts accurately and fairly.

Perhaps with the pressure of a recount in a presidential election, Minnesota in 2008 and Washington in 2004 could have adjusted their schedules to finish their recounts a couple of weeks earlier (although Florida in 2000 was unable to meet a mid-December deadline). But one must remember that, for both Minnesota in 2008 and Washington in 2004, it was only the administrative recount that was complete by early January. In both states, there still remained the judicial litigation over the results of the recount, and in each case this litigation concerned the eligibility of particular ballots to be counted or what were essentially *recounting* issues. Therefore, even if it would have been possible to compress the *recounting* of ballots into fewer weeks if the Minnesota or Washington disputes had involved a presidential election, it still would have been necessary to resolve all issues concerning the *recounting* of ballots cast for presidential electors before the date on which those presidential electors met.

Consequently, the lesson of the Minnesota and Washington disputes is that states should be given until early January to resolve these disputes, but with the expectation that they conclusively settle all *recounting* as well as *recounting* matters within this same timeframe. In a presidential election, giving the states a couple of extra weeks so that they can accurately and fairly wrap up all disputes concerning both the *recount* and the *recounting* does mean that, in a situation where a dispute remains unresolved until the very end of the process, both candidates will need to undertake their tentative transition steps for a couple of extra weeks. Even as they are picking cabinet secretaries, they may not be able to finalize or announce these (and other) appointments until after the dispute is

²¹See Foley, *supra* note 6, at 3.

²²See *Timeline of events in the governor's race*, THE SEATTLE TIMES, Dec. 30, 2004.

finally resolved in early January. But although this additional time in the tentativeness of the transition is unfortunate, it is a price worth paying in order to enable the states to complete a fair and accurate process for determining the rightful winner of the presidential election.

The candidate declared the winner of the presidency will assume all the awesome powers of that office, including the ability to launch nuclear missiles. If taking an extra two weeks makes a difference in the ability of a state to identify which candidate rightfully won the election (as the experience of both Minnesota and Washington indicates that it does), then the cost of impeding the presidential transition process slightly is worth bearing. After all, it does no good to hurry up the transition if the new occupant of the Oval Office is the wrong individual, the one who actually did not win the most Electoral College votes—and thus the one not chosen by the American people through the constitutionally designated mechanism for making this choice.

Thus, notwithstanding the incremental cost to the presidential transition process in the rare circumstances of a disputed presidential election, Congress should move the date for the meeting and vote of the presidential electors to early January in order to give states the time they need to fairly and accurately resolve precisely this kind of dispute.

3. Move the congressional count of electoral votes to January 10. There remains to consider the date on which Congress meets to count the Electoral College votes cast by the authoritative presidential electors in each state. That date is now January 6.²³ It is worth noting that, if this date is unchanged, then giving the states until January 5 to resolve all disputes concerning ballots cast for presidential electors does not necessarily add any delay to the process of presidential transition. After all, it is possible for a dispute over the winner of a presidential election to extend beyond the date on which the presidential electors met in each state and to continue on to the date that Congress meets to count the Electoral College votes from each state. That situation is precisely what happened with respect to the disputed Hayes-Tilden election of 1876, and also with respect to Hawaii's Electoral College votes in 1960. Therefore, in the circumstance in which a dispute over the winner of a presidential election would extend all the way to

January 6 anyway, giving the states until January 5 to resolve these disputes according to their own electoral procedures would not cause any additional uncertainty over the presidential transition process.

This point, however, inevitably raises the question of how much time there should be between the date on which the states complete their own procedures for resolving disputes over the casting of ballots for presidential electors and the date on which Congress meets to review the results of these state procedures. A single day, between January 5 and 6, might not seem sufficient. But recall that one lesson from the Hayes-Tilden dispute is that, in counting the votes of the presidential electors, Congress is not supposed to “go behind the returns”²⁴—meaning that if an authoritative procedure under state law has determined which slate of presidential electors prevailed among the ballots cast by citizens (and the authoritative procedure has done so by the time that presidential electors must meet to cast their own official votes for president), then Congress should accept this authoritative determination from the state in question.²⁵

Therefore, as long as a state conclusively resolves all disputes concerning the counting of ballots cast for presidential electors by January 5, and does so pursuant to an appropriately fair procedure (of the kind this Article describes in Section B, below), then there would be nothing left for Congress to do except the simple formality of counting this state's Electoral College votes. This formality easily could occur in a single day, especially given the ability of internet-based communication. On January 5, the state officially could email to Congress an authenticated certificate of which presidential electors had been authoritatively chosen by the citizens of the state, along with the official Electoral College votes for president cast by these authoritative presidential electors. The next day, on January 6, Congress would simply recognize the authoritative status of the state's submission from the previous day and, as part of counting all the Electoral College votes from every state, would formally declare which presidential candidate had received this particular state's Electoral College votes.

²³USCA § 15 (2010).

²⁴Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475 (2010), at 508.

²⁵*Id.*

Still, the possibility exists that, even if a state has adopted the model recounting and recanvassing procedures, something might go awry and, as a result, there remains a dispute within Congress about how to count the Electoral College votes from this state. Given this possibility, I would give Congress a few extra days, until January 10, to review the submissions from a state where a dispute over the counting of ballots for presidential electors has occurred. These extra days would not, and should not, be enough time for Congress to re-litigate the entire dispute that has occurred within the state since Election Day. The principle of federalism built into the basic structure of the Electoral College, which gives state legislatures and not Congress the primary power of deciding how a state's share of the Electoral College votes for a president shall be determined, calls for congressional deference to the method that a state has chosen for resolving any disputes that may arise over the counting of ballots cast by its citizens for its share of presidential electors. Only if a state cannot authoritatively resolve such a dispute in time for its presidential electors to meet and vote on the day that the Constitution requires to be uniform throughout the nation, or if the state's procedures for resolving such a dispute deviate so drastically from basic standards of fairness as to be beyond the pale, would Congress be justified in rejecting the state's chosen method for resolving the dispute.

Moreover, Congress can monitor events in the state while the dispute is pending (or, more likely, raging) there. Thus, as January 5 approaches, Congress can watch closely to see how the state resolves the dispute by that firm deadline and, at the same time, can prepare for the unlikely contingency that the state fails to comply with that deadline. One way that Congress could best prepare for this contingency would be to empanel an impartial tribunal (of the kind I have described elsewhere²⁶) that would advise Congress what to do if the state has failed to meet its constitutional responsibility of authoritatively identifying its presidential electors by the necessary deadline. This tribunal, having monitored the proceedings in the state as they were occurring, could review those proceedings between January 5 and 10, as well as hear some additional arguments on behalf of both candidates insofar as the dispute remained unsettled after that deadline. In this way, this tribunal would provide a form of a narrowly limited appeal from the state's

proceedings, not unlike the limited form of judicial review that exists with respect to some administrative proceedings. Congress, by statute, could further provide that the judgment of this tribunal—on which presidential candidate had won the state's Electoral Votes, or even on whether the state had failed to authoritatively appoint its presidential electors by the constitutionally required deadline—would stand unless overruled by both Houses of Congress, meeting separately, on January 10.²⁷ Given the exigencies of the circumstances, as well as the basic principle of federalism that it is better to resolve disputes over presidential elections in the states rather than in Congress, I would allow no more than the five days between January 5 and 10 for this advisory tribunal to take steps to aid Congress in making the ultimately authoritative determination of which candidate becomes president.

To be sure, moving the date of this final congressional determination from January 6 to January 10 puts it four days closer to the presidential inauguration. Therefore, in a year in which a dispute over which candidate won the presidency goes all the way to Congress (and thus is unable to be resolved in the states), moving this date means that the presidential transition must remain tentative until January 10, rather than January 6. Obviously neither date is desirable. It seems to me that it does not make a significant difference, when a monumental dispute over a presidential election has occurred, whether that dispute is finally settled ten days, rather than two weeks, before Inauguration Day. More important is whether that dispute is settled peaceably, rather than violently, as well as the related consideration of whether the losing side believes that the outcome (while inevitably disappointing after such a long and hard-fought dispute) is legitimate because it results from a process that was fundamentally fair to both sides. If a brief review of the state's proceedings by an impartial advisory tribunal empaneled by Congress would help achieve a peaceable acceptance of the result as legitimate,

²⁶Edward 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).

²⁷This new statute would be, in essence, a replacement for the convoluted and outdated procedures set forth in the Electoral Count Act of 1887. In the event of a deadlock between the two Houses of Congress, that archaic law gives the tiebreaking role to the Governor of the relevant state. It would be much better if the tiebreaker were a balanced and impartial tribunal.

then the four extra days for this review to occur would be worth the delay in knowing which candidate would ultimately prevail in the specific circumstances of this extreme dispute.

4. Summary of adjustments to congressionally specified dates. Based on the foregoing analysis, the new congressionally specified schedule—in between the fixed bookend dates of Election Day and Inauguration Day—would be:

- “Safe Harbor” Day (January 5)
- Meeting & Vote of Presidential Electors (January 5—same as “safe harbor”)
- Congressional Count of Electoral Votes (January 10)

But the exact dates in this proposed schedule are not crucial. Congress could keep January 6 as the date for its counting of Electoral College votes and still make January 5 the new date for the meeting and vote of the presidential electors. (Doing so, of course, would eliminate the additional time for review by an impartial advisory tribunal to assist Congress, but reasonable minds might prefer this trade-off in order to keep a full two weeks between the date for the official congressional counting and Inauguration Day.) Moreover, one could make a minor adjustment to the date for the meeting and vote of the presidential electors, while maintaining the basic overall purpose and structure of the proposed schedule. For example, one could choose January 2, rather than January 5, as the date for this constitutionally definitive Electoral College event. (Doing so, while keeping January 6 as the date for the congressional count of the Electoral College votes, would still permit a four-day window for review by an impartial advisory tribunal empaneled by Congress, assuming that additional process was thought desirable for the reasons considered above.)

The important point is to move the date by which states must resolve disputes over the counting of ballots for presidential electors from mid-December to early January. The proposed schedule does that whether this date is specified as January 5 or January 2. I would choose January 5, rather than January 2, to give the states just a little more time to complete all proceedings with respect to both the *recount* and *re canvass* of disputed ballots. For the reasons that follow, based on the experience of proceedings in both Minnesota and Wisconsin (as well

as litigation over provisional ballots that has occurred in Ohio), it will be difficult for states to meet the deadline even if it is set more generously at January 5. The time will be tight, especially when one contemplates all the possibilities of litigation over the eligibility of disputed absentee or provisional ballots. Still, if states are forced to finish their dispute-resolution proceedings by January 2, there is probably a way to squeeze in all of those proceedings by this stricter deadline while still making those proceedings sufficiently fair and accurate, so that the outcome is worthy of acceptance as legitimate in the context of a presidential election. What remains readily apparent, however, is that states cannot be expected to complete these proceedings by mid-December. Thus, the crucial move in the calendar must be to give the states until early-January to complete these proceedings.

B. A single 7-week period for both recount and recanvass

As the dispute between Coleman and Franken demonstrated, a recount does not necessarily include a recanvassing of ballots. Minnesota’s *administrative recount* of its 2008 U.S. Senate election was limited to a review, by human hands and eyes, of those ballots that had already been scanned by electronic machines. The purpose of this administrative recount was solely to discern the voter’s intent on each recounted ballot.

The scope of the administrative recount proceedings did not encompass issues concerning whether particular ballots were eligible for counting in the first place. It did not address whether ballots that had been rejected during the initial canvass, and thus never were counted in the first place, were wrongly rejected and thus should have been counted instead. Conversely, it did not address whether some ballots that had been accepted and counted during the initial canvass should, instead, have been rejected.

According to Minnesota law, these issues of ballot eligibility were recanvassing, not recounting, issues and thus were required to be addressed separately in a subsequent judicial proceeding after completion of the administrative recount.²⁸ Minnesota law called this judicial proceeding a “contest”

²⁸Coleman v. Ritchie, 758 N.W.2d 306 (Minn. Jan. 5, 2009). See also generally Foley, *supra* note 6.

because it was a lawsuit filed in court to contest the results of the administrative recount.²⁹ The only partial exception to the requirement that recanvassing issues concerning ballot eligibility be deferred to a separate judicial contest, rather than folded into the administrative recount, occurred when the Minnesota Supreme Court ruled (in its controversial 3-2 decision of December 18) that the administrative recount could include any previously rejected ballots that both candidates, as well as the relevant local election officials, all agreed had been mistakenly rejected in the initial canvass.³⁰ But this partial exception was, in a significant sense, not an exception at all because the institution responsible for the recount (the State Canvassing Board) still had no authority under Minnesota law to make its own ballot-eligibility determinations. This institution, in other words, could not add ballots to the recount on the ground that it found, based on evidence presented to it, that some ballots rejected in the initial canvass should have been accepted and counted in the first place. Nor could this institution rule that some of the ballots initially accepted and counted should instead have been rejected. Thus, the essential point remains that the Coleman-Franken recount was confined to the ascertainment of *voter intent*, with issues concerning *ballot eligibility* to be determined by separate recanvassing proceedings—either the ad hoc administrative recanvassing ordered by the Minnesota Supreme Court, which required the consent of both candidates for a ballot to be counted, or subsequent recanvassing by a court in a judicial contest to the result of the recount.

The upshot of Minnesota law in this respect, however, is that the state was unable to complete all of its separate recanvassing proceedings by the same date that it certified the result of its recount, on January 5.³¹ It took the separate, and subsequent, judicial contest to determine that 351 additional ballots had been wrongly rejected in the initial canvass and thus were still entitled to be counted.³² It likewise was necessary for the same judicial contest to consider, and ultimately dismiss, Coleman's claim that there were thousands of ballots that had been counted initially but which should have been rejected as ineligible. The trial court in the judicial contest did not make the first of these two ballot-eligibility determinations (finding the need to count additional votes) until March 31,³³ and it did not make the second (dismissing the claim of ineligible ballots tainting the recount) until April 13.³⁴ The

Minnesota Supreme Court affirmed both of these ballot-eligibility determinations on June 30, bringing the disputed election to a close.³⁵

The main lesson of Minnesota's experience with the Coleman-Franken dispute, as well as Washington's similar dispute over its 2004 gubernatorial election, is that states must develop a set of procedures that enable them to resolve all recanvassing issues concerning ballot eligibility, as well as complete all recounting of ballots aimed at discerning voter intent, by early January. It is not enough that states complete their administrative recounts within this timeframe, leaving unsettled ballot-eligibility issues to drag on for months in additional judicial proceedings.

This point is certainly true with respect to presidential elections, for the reasons already discussed above. But it also applies to the U.S. Senate and gubernatorial elections that were the subjects of the disputes in Minnesota and Washington. Indeed, it applies to any election in which the winner is expected to take office in January. A state's procedures for resolving disputed elections should enable the winner of a U.S. Senate election to be seated in January, along with the other Senators, and not months later. Likewise, it would be far preferable if a governor, inaugurated in January, did not have the cloud of additional judicial proceedings that might remove her from office some months down the road. Therefore, if it is possible to design a fair process for resolving a disputed presidential

²⁹Minn. Stat. § 209.021 (2010).

³⁰*Coleman v. Ritchie*, 758 N.W.2d 306 (Minn. 2008).

³¹Minnesota is hardly alone in having this problem. As Washington's experience with its 2004 gubernatorial election shows, other states permit a separate lawsuit over ballot eligibility issues even after completion of a manual administrative recount of all ballots cast and counted in a statewide election. Wisconsin came close to experiencing the same situation in its recent special election of a seat on the state supreme court, although the losing candidate there declined to pursue a post-recount lawsuit. Arguably, any state that permits both administrative recounts and judicial contests (as many do) is in this situation, although there are technical differences between states where judicial contests involve only the relitigation of issues already adjudicated in administrative proceedings—as compared to states, like Minnesota, where certain ballot eligibility issues can only be raised for the first time judicial litigation that occurs after the completion of the administrative recount.

³²See *Foley*, *supra* note 6, at 26.

³³*Id.* at 27–29.

³⁴*Id.* at 3.

³⁵*Coleman v. Franken*, 767 N.W.2d 453 (Minn. 2009).

election by January 5, as this article will show that it is, then this same fair process would also be appropriate for resolving disputes over elections for U.S. Senator, governor, or other statewide offices.

To understand how it is possible for a state to complete both a recount and a canvass within the same seven-week period, one begins with this recognition about the procedures Minnesota used for the Coleman-Franken dispute: both the administrative recount and the trial of the judicial contest occurred within seven weeks. They just did not occur at the same time. The administrative recount occurred between the close of the initial two-week canvass, on November 18, and certification of the recount's result, on January 5 (a period one day shy of a full seven weeks). The trial of the judicial contest started on Monday, January 23 and ended, after seven weeks of testimony and argument, on Friday, March 13.³⁶ Thus, if there were a way to move the trial of the judicial contest so that it occurred at the same time as the administrative recount, it becomes realistic to think that it would be feasible to finish the canvassing of ballot eligibility issues by the same January 5 deadline for certifying the recount of all previously counted ballots.

To be sure, there was more to the judicial contest than just the seven-week trial, even putting aside the appeal of the trial court's rulings. Before the trial started, there were three weeks from the filing of the complaint on January 6, during which the parties conducted discovery and filed pre-trial motions. Moreover, after the trial ended on March 13, it took the three-judge trial court exactly a month, until April 13, to release its final decision.

Even so, it is not difficult to see how the time for canvassing ballot eligibility issues could be curtailed to fit within seven weeks. At the front end of the canvassing process, it is important to remember that, by definition, it is a review of the initial canvass itself. Therefore, the two weeks of the initial canvass is an appropriate period for the candidates to discover issues that they might wish to raise in the canvassing process. When the morning after Election Day reveals the two leading candidates in a major statewide election to be separated by no more than a few hundred votes, the attorneys for each candidate immediately will begin their investigation of potential ballot-eligibility issues that they might wish to raise in any available canvassing proceeding. The Coleman-Franken story certainly shows this. While well-designed

re-canvassing procedures might permit the candidates to conduct some additional evidentiary "discovery" with respect to ballot-eligibility issues after the completion of the initial canvass, during the early phase of the canvassing process, the "discovery" of these issues will already be well underway since the morning after Election Day. It would not be unfair to the candidates to expect them to limit their additional evidentiary "discovery" during the canvassing period, confining themselves largely to ballot-eligibility issues that emerged during the two-week canvass itself. After all, as a review of the initial canvass, the canvass does not concern new issues, but instead only those already addressed in some way in the initial canvass.

At the back end of the canvassing process, it is not unreasonable to expect the tribunal that adjudicates these ballot-eligibility issues to render its final judgment more expeditiously than did the three-judge panel in *Coleman v. Franken*. Particularly in the context of a disputed presidential election, when it would be absolutely imperative for this tribunal to conclude its proceedings in time for the meeting of the presidential electors on January 5 (according to the congressionally specified calendar proposed in section A, above), the tribunal should be able to issue its final judgment within no more than a few days after the close of whatever trial-type evidentiary sessions it conducts on the ballot-eligibility issues. Courts have repeatedly shown themselves capable of issuing decisions quickly in election cases when exigencies require them to do so. *Bush v. Gore* is the most obvious example, whatever one thinks of the merits of that decision. Indeed, even the three-judge panel in *Coleman v. Franken* could act quickly when necessary: it issued its decisive standard-setting opinion of February 13 only one day after holding an oral argument on what standard it should set.³⁷

Thus, with relatively modest adjustments to the timetable for the judicial contest that occurred in *Coleman v. Franken*, it would be possible to compress the entire litigation of the ballot-eligibility issues into the seven-week time span that the actual trial of that judicial contest consumed. Doing so would require using a few days at the front end for additional "discovery," as well as shaving a

³⁶See Foley, *supra* note 6, at 36.

³⁷*Id.*

few days from the back end to leave time for the tribunal to release a final opinion. But in the course of a seven-week proceeding, modest adjustments of this nature are hardly infeasible.

Still, it remains necessary to consider exactly how a seven-week proceeding for recanvassing ballot eligibility issues could occur at the same time as the seven-week proceeding devoted to recounting ballots in order to verify voter intent. Would the two proceedings take place on entirely separate but parallel tracks, only to converge at the very end, just in time to comply with the January 5 deadline for the meeting of the presidential electors? Or would the recanvassing and recounting be integrated somehow into some overall unified proceeding?

These questions, in turn, raise another: why have two separate institutions conduct the recanvass and the recount? Would it not be more efficient, especially in the inevitably short amount of time available to meet the deadline for presidential elections, to have a single institution conduct both the recanvass and the recount? But if there is to be only one institution for both proceedings, should an administrative body (like the State Canvassing Board in Minnesota) be authorized to conduct the recanvass as well as the recount? Or, instead, should a judicial tribunal (like the three-judge panel in *Coleman v. Franken*) be authorized to conduct the recount as well as the recanvass?

To analyze the various factors relevant to designing an optimal seven-week process for completing both the recanvass and the recount, it is easier to start with the institutional questions: one institution or two; administrative or judicial tribunal? After considering these questions, one can then explore whether the recount and the recanvass should overlap entirely for the full seven-week period or, instead, whether there should be some effort to at least partially sequence the two inquiries (so that both do not begin and end at exactly the same time within this seven-week period).

1. One impartial tribunal for both recount and recanvass. Although administrative agencies generally function quite differently from courts, the most striking fact about the administrative agency that conducted the 2008 recount in Minnesota was that, as required by state law, it was populated by four judges as well as the Secretary of State. This judicial presence on the State Canvassing Board was, as I explained in *The Lake Wobegone*

Recount,³⁸ a major asset. It caused the board's review of each challenged ballot to be more judicial in character, meaning that it was based on the relevant law and evidence without regard to extraneous political considerations. The judicial character of the board's deliberations, combined with the fact that the board's membership was balanced in terms of different partisan backgrounds, gave the public confidence that the board was conducting the recount fairly and impartially in accordance with law.

The same key attribute of judicial impartiality also marked the conduct of the three-judge trial court that was empaneled to adjudicate the ballot-eligibility issues raised in the *Coleman v. Franken* lawsuit, which amounted to a judicial recanvassing procedure. The similarity of these two institutions with respect to this essential feature of judicial impartiality indicates that it would be possible to design a single institution capable of impartially adjudicating both the voter-intent issues that arise in a recount and the ballot-eligibility issues that constitute a recanvass. Indeed, the three-judge panel that handled the *Coleman v. Franken* lawsuit easily could have also adjudicated the voter-intent issues that came before the State Canvassing Board, as long as the Secretary of State's office supported the work of this three-judge panel by organizing the local phase of the recount and presenting the challenged ballots to the panel for its review. Alternatively, the judges on the State Canvassing Board easily could have adjudicated the same ballot-eligibility issues that the three-judge panel decided, as long as the Board had been given statutory authority to hold evidentiary proceedings on these recanvassing issues.

Thus, I suggest the creation of a single State Election Review Tribunal (SERT) to perform the functions conducted by both the State Canvassing Board and the three-judge trial court in *Coleman v. Franken*. This body would be a hybrid, quasi-administrative and quasi-judicial, tribunal. It would combine features from both the State Canvassing Board and the three-judge panel to make this single institution most effective in adjudicating both voter-intent and ballot-eligibility.

In my judgment, the voting members of this single SERT should be three judges, appointed in a way that

³⁸*Id.* at 8.

guarantees partisan balance among the three, in much the same way as was achieved for the three-judge trial court in *Coleman v. Franken*. But I would also make the Secretary of State a non-voting (*ex officio*) member of the SERT, so that the Secretary of State's office can organize the administrative operations of the recount, including its local phase, much as it did for the State Canvassing Board in 2008. I would give the SERT the explicit statutory authority to order the Secretary of State to assist in its proceedings in whatever way it deems necessary to complete a fair recount and recanvass within the specified seven-week deadline.

There are different ways of selecting the three judges to serve on the SERT so as to guarantee partisan balance among them. This article is not the place to delve into the details of these selection mechanisms.³⁹ It is enough to say here that one way would be to require, by statute, that the appointment of these three judges be unanimously confirmed by all members of the state's supreme court.⁴⁰ Moreover, if it were thought desirable that the members of the supreme court themselves not be recused from serving on the SERT (because they may have exceptional judicial talents and reputations not shared to the same extent by other members of the state's judiciary), the statute could make clear that it would be permissible to fill any of the three slots on the SERT with existing supreme court justices *as long as all* members of the supreme court unanimously consent to which among themselves are selected.

It should not be thought demeaning or otherwise problematic to make the Secretary of State a non-voting member of the SERT. In 2008, to his great credit, Secretary of State Mark Ritchie largely functioned this way in order to avoid an appearance of partisanship. When each challenged ballot came before the State Canvassing Board for its review, Ritchie's initial motion would be to sustain whatever decision the local recount officials had made. Thus, it is evident from 2008 that future recounts could be conducted by a SERT with three judges as its voting members, assisted by a non-voting Secretary of State who presents the challenged ballots from the local recount to the three SERT judges for their authoritative determination.

Nor is it necessary that the SERT's evidentiary proceedings to adjudicate ballot-eligibility issues conform exactly to the procedures used for a judicial trial, as in *Coleman v. Franken*. Rather, they

could resemble trial-type administrative adjudications. As long as the SERT can conduct hearings in which the competing candidates can present and cross-examine witnesses, and dispute the probative value of each other's documentary evidence, these recanvassing proceedings can be streamlined so that they more easily fit within the seven weeks allotted. The SERT should have the statutory flexibility to borrow from both judicial and administrative models in order to fashion a hybrid procedure that is both fair and expeditious in resolving disputes over ballot-eligibility issues.

Moreover, making the Secretary of State a non-voting member of the SERT should facilitate its ability to resolve ballot-eligibility disputes expeditiously. Many of these disputes, insofar as they concern voter registration information, can be dispatched quickly through a straightforward accessing of the state's voter registration database. Yet the trial in *Coleman v. Franken* became bogged down in technical issues of judicial procedure concerning how to access information in the state's voter registration database when the Secretary of State was not formally a party to that "judicial contest" lawsuit. These unnecessary procedural complications can be easily avoided if the Secretary of State is a non-voting officer of the SERT. The SERT then can simply order the Secretary of State to provide whatever information in the voter registration database would be useful in resolving the ballot-eligibility dispute. In doing so, of course, the SERT would give adequate notice to the competing candidates,

³⁹I have begun to explore them in *McCain v. Obama Simulation*. See *supra* note 26.

⁴⁰Something like this apparently occurred, although informally, for the appointment of the three-judge panel in *Coleman v. Franken*. Because of the Chief Justice's recusal, the authority to appoint this panel devolved to Justice Alan Page, the most senior member of the Minnesota Supreme Court. In exercising this authority, however, he reportedly consulted with all other members of the court. See JAY WEINER, THIS IS NOT FLORIDA: HOW AL FRANKEN WON THE MINNESOTA SENATE RECOUNT 143 (2010). In a state where all members of its supreme court come from the same partisan background, there would need to be additional statutory mechanisms to assure partisan balance on that state's SERT. One such statutory mechanism would be to require confirmation of SERT members by a two-thirds vote in the state's legislature. Cf. Richard Hasen, *Election Administration Reform and the New Institutionalism*, 98 CALIF. L. REV. 1075, 1099 (2010) (proposing that a state's chief elections administrator, usually its Secretary of State, be appointed by the state's governor with a requirement of confirmation by three-fourths of the state's legislature).

so that they have an opportunity to examine the voter registration information and raise any questions they might have about its accuracy or probative value concerning the particular dispute. Functioning more like an administrative adjudication in this way, the SERT's form of evidentiary proceedings is better suited to balance the goals of fairness and expeditiousness than the excessively litigious procedures used in *Coleman v. Franken*.

Even so, overall, the hybrid SERT should look more like a judicial court than an administrative agency. Its most important feature, after all, is the perception that it is able to convey to the public that the three judges, who are its voting members, adjudicate all disputes before them impartially and in accordance with law. To facilitate that perception, as well as to remind the three judges of the judicial character that is expected of them when they serve on this tribunal, these judges should wear their judicial robes and act as if they are in court. Indeed, in my judgment, as a predicate for serving on the SERT, its members should take a special judicial oath that they will "render all decisions in all matters that come before this body fairly and impartially, according to the applicable law and evidence, without regard to any considerations of political partisanship whatsoever."

Furthermore, it may be beneficial to consider the SERT officially as a special-purpose court within the state's judiciary. Its decrees would have the character and force of judicial judgments. Its rulings would serve as precedents, a form of law itself in the common-law tradition that our states have inherited. Indeed, if it would help, the name of this tribunal could be something like State Election Review Court instead of State Election Review Tribunal.

But in thinking of this hybrid institution as a special-purpose court, one should not lose sight of the advantages that flow from its quasi-administrative attributes. It needs to function in close coordination with the Secretary of State's office in order to operate the recount, as well as to facilitate expeditious adjudication of ballot-eligibility disputes. Crafted in the way described, it can have the essential benefits of both a judicial court and an administrative agency.

Thus, with modest adjustments to both the State Canvassing Board and the three-judge panel in *Coleman v. Franken*, a single institution could have performed the functions of both just as well as each of them actually did. Surely, it would

have been more efficient—without losing an iota of fairness—to have put all the voter-intent and ballot-eligibility issues before this single hybrid institution. Looking ahead to the possibility of the next disputed presidential election, it would undoubtedly be better if a state were prepared with a single tribunal of this kind to resolve all recounting and canvassing disputes by early January.

2. Integrating the recount and canvass schedules. When the canvass closes, the result either will or will not be within the margin specified for an automatic statewide recount. There has been some debate, in Minnesota and elsewhere, on whether this margin should be lower (say, 0.25%) rather than higher (say, 0.5%). I take no position in this Article on that margin-setting debate. Instead, I assume that a state would want to conduct a full-scale manual recount in any presidential, gubernatorial or other major statewide election where the margin of victory at the close of the canvass was within 1,000 votes (which would be under 0.1% for any election with a total vote count of over 1 million).⁴¹

I also assume that a state would want to conduct that full-scale automatic recount with the attributes that made Minnesota's recount of 2008 a success. In addition to the transparency and impartiality of the 2008 recount in Minnesota, a key feature was that the final determination of voter intent for all challenged ballots was made at the state, rather than the local, level. This feature eliminated the possibility of disparate standards for determining voter intent of recounted ballots, a problem that plagued the 2000 recount in Florida (and was also present to a lesser degree in Washington's 2004 gubernatorial recount). Assuming the desirability of this kind of automatic statewide recount in an exceptionally close presidential election—in other words, one

⁴¹This assumption is consistent with the findings and recommendations of a new study on recounts conducted by FairVote. See Rob Richie & Emily Hellman, *A Survey and Analysis of Statewide Election Recounts, 2000-2009* (April 2011), <http://www.fairvote.org/assets/Uploads/Recounts2011Final.pdf>.

That study found that a recount is extremely unlikely to reverse the outcome of a statewide election unless the initial margin of victory was under 1000 votes and, indeed, much closer to 100 votes. *Id.* at 6-7. Consequently, the study recommends that most states lower the threshold for automatic recounts to 0.1%, with that threshold "perhaps rising to 0.2% for the smallest population states." *Id.* at 10. Still, the study emphasizes that "recounts should be done in exceptionally close races even if costly to taxpayers" because "[r]ecounts uphold the value of every vote when an outcome is in doubt." *Id.* at 9, 10.

with less than a 1,000-vote margin at the end of the canvass—the task here is to explain how this kind of recount can be completed in the same seven-week period during which final resolution of all ballot-eligibility issues also occurs.

Even when the authority to resolve all voter-intent and ballot-eligibility disputes is placed in a single SERT, the coordination of the recounting and recanvassing proceedings necessary to adjudicate all these disputes is a challenge. There are reasons that one might be tempted to delay the start of the recount until the completion of the recanvass. After all, all ballots not counted during the initial canvass, but which the recanvass determines are eligible for counting, will need to go through the same voter-intent evaluation applicable in the recount. Why not just wait until the eligibility of all ballots for counting is finally determined before recounting any of them?

Moreover, it is also possible that the recanvass will affect whether the margin is close enough to trigger an automatic recount. For example, suppose that the certified margin after the canvass is 1,025, a little above the 1,000-vote threshold for an automatic recount in a particular state. Suppose further, however, that the recanvass will identify an additional 500 eligible ballots and that counting them drops the margin to 975. In this situation, the automatic recount cannot begin until after the recanvass has occurred.

Conversely, it is also possible that a recanvass will push a race out of the automatic recount zone. Suppose an election after the initial canvass shows a margin of 975, but after a recanvass (which identifies 500 more eligible ballots), this lead extends to 1025. This scenario is the mirror image of the one above. Here a state clearly would want to wait until after completion of the recanvass in order to avoid the time and expense of a full-scale statewide manual recount.

My view, however, is that a state would be wise to resist this temptation. A state with an election inside the automatic recount zone at the end of the initial canvass will have no way of knowing whether or not the recanvass will push the election outside this zone. Even if there is a large number of ballots rejected during the initial canvass that may or may not be accepted in the recanvass, it will be uncertain what percentage of these ballots will ultimately be accepted—and, perhaps more importantly, it will be uncertain whether the newly counted ballots

will break favorably enough for one candidate or the other. Most important of all is the fact that the recanvass may take longer than expected. If a state waits too long to start a recount, because it is hoping that the recanvass will obviate the need for one, the state may eventually learn that it still must conduct a full statewide manual recount, but by this point the state may have run out of time for completing one before the unalterable Electoral College deadline at the end of seven weeks.

Thus, my strong recommendation is that, whenever a state finds itself with a statewide election inside the automatic recount zone at the end of the initial recount, the state's recount tribunal—its single-institution SERT, according to my previous recommendation—immediately put in motion the process for conducting this automatic recount, including the necessary steps that must occur at the local level. The SERT should start this recounting process, no matter the potential scope of its simultaneous recanvassing process involving ballot-eligibility issues. At the end of the canvass, each locality will have two groups of ballots: (1) those previously counted, and (2) those previously rejected. With respect to the first group, these localities can start the manual recounting process under the SERT's supervision and direction. Meanwhile, with respect to the second group, which presumably is far smaller than the first (it would be troublesome if rejected ballots amounted to more than 5% of all ballots cast), the localities can forward these directly to the SERT for the candidates' attorneys to examine to see whether they present ballot-eligibility issues worth raising with the SERT. In this way, while local election officials are largely preoccupied with their manual review of previously counted ballots, and while the SERT itself is waiting for this local phase of the recount to finish, the SERT can begin working with the attorneys for both sides to set up a feasible schedule for evidentiary proceedings that may be necessary with respect to previously rejected ballots. If it turns out that some of the evidence that is necessary for the SERT to rule on the eligibility of these previously rejected ballots is testimony or other information from local election officials, they can be asked to testify or produce this information after they have completed the local phase of the recount.

Of course, if it would be more efficient for the SERT to schedule various elements of its recounting and recanvassing proceedings somewhat differently

in the context of a particular election, the SERT should have the flexibility to do that. Working with the Secretary of State, who in turn works with the local election officials, the SERT can adjust its overall schedule based on feedback from these election administrators. As a single institution, the SERT certainly can more easily manage the overall process to meet the Electoral College deadline at the end of seven weeks than if ultimate responsibility for the recounting and recanvassing tasks were divided between two separate institutions.

Following this recommendation, the SERT may find that it sometimes completes the recounting of previously counted ballots before it completes its recanvassing of previously rejected ones. In this circumstance, with respect to any ballots the SERT ultimately determines are eligible for counting despite being previously rejected, the SERT could send them back to local election officials to be counted. More likely, however, it would be easier if the SERT simply counts these extra ballots itself, using the same voter intent standard it employs for ballots challenged in the local phase of the recount. The SERT should have the statutory authority to choose either method for counting previously rejected ballots found eligible in the recanvass.

If it should happen that the recanvass shows that a full statewide automatic recount was unnecessary, the state should still be satisfied that it was time and money well spent. This holds true especially for a presidential election. Imagine at the end of the initial canvass, a margin of only 975 votes in a “swing state,” which will determine which presidential candidate wins the necessary majority of Electoral College votes. Imagine that seven weeks later, in time to meet the Electoral College deadline, this state (through its SERT) completes both a recount and recanvass, with a result that extends the ultimate margin of victory to 1,025 votes. No one would, or should, complain that the recount portion of the state’s proceedings had been a waste. On the contrary, all in the state—and in the nation as well—would be gratified to know that overall the SERT proceedings, including the recount component, had confirmed the accuracy and legitimacy of the presidential election.

The scheduling is inevitably trickier in the reverse situation. If the initial canvass puts a presidential election in the “swing state” just outside the automatic recount zone, the SERT has no choice

but to begin the recanvass without simultaneously starting the recount. Even so, as a single institution, the SERT is in a better position than two separate institutions to expedite the recanvassing proceedings because of the possible need for a recount in short order. Likewise, working with the Secretary of State and local election officials, the SERT can prepare the expedited timetable for the recount in the event that the need for it arises.

Perhaps, too, the SERT could bifurcate the recanvassing process in order to make a preliminary assessment of whether a full statewide manual recount will be necessary, with the remainder of the recanvassing process to be conducted if and when the recount is underway. For example, the SERT might set aside the first three weeks of its seven-week period for this kind of preliminary assessment of ballot eligibility issues. If this preliminary assessment produces enough additionally counted ballots to move the election to within the automatic recount zone, the SERT then could trigger the local phase of the recount (for which it would have already prepared), necessarily limited in this circumstance to only two or three weeks, so that SERT itself has one or two weeks for its own phase of the recount, as well as for any unexpected issues that develop during the entire process.⁴² In the meantime, as the local phase of the recount gets underway according to this expedited schedule, the SERT can resume work on all remaining ballot-eligibility issues, so that its recanvassing proceedings are also fully complete by the end of seven weeks.

Although this particular version of the seven-week timetable is especially tight, it shows that even in the most difficult of circumstances, a single SERT should be able to resolve all voter-intent and ballot-eligibility issues before an unalterable Electoral College deadline of early January. Because of its balanced and impartial panel of three judges, the SERT and its coordinated proceedings meet any standard of fairness that reasonably could be expected of recount and recanvassing procedures in the context of a presidential election. Indeed,

⁴²The actual dates of Minnesota’s 2008 recount confirm that this expedited schedule would be feasible. The local phase of the recount in 2008 took just two days over two weeks, from Wednesday, November 19 to Friday, December 5. *See* Foley, *supra* note 6, at 36. In 2008, the State Canvassing Board was able to complete within a single week its determination of voter intent with respect to challenged ballots in the recount.

the balance of fairness and expeditiousness of the SERT proceedings would make them appropriate for any other statewide election, which like presidential elections ought to be resolved by early January.

C. An unmovable 2-week deadline to complete the initial canvass

The ability to complete both a recount and recanvass of ballots cast for presidential electors, in order to meet an unalterable early-January deadline for these electors to cast their Electoral College votes, requires in turn that the initial canvass be complete by two weeks after Election Day. In an exceptionally close presidential election, where on the morning after Election Day a single “swing state” will determine the Electoral College winner and the margin in that state is under 1,000 (or perhaps even 10,000) votes, there will be incredible pressure to extend the deadline for certifying the result of the initial canvass. The candidate who is just a bit behind in the unofficial tallies reported in the press on the morning after Election Day, and throughout the initial canvass as late or amended returns trickle in, will attempt to pursue every legal avenue potentially available to delay the certification of the initial canvass, so that the opposing candidate does not get the benefit of being the presumptive winner from this first official certification of the election’s results.

We know this truth from the 2000 presidential election in Florida, where Gore successfully convinced the Florida Supreme Court to alter the certification deadline under that state’s laws. We know it also from the 2008 U.S. Senate election in Minnesota, where Franken—because he was behind at the time—argued that the initial canvass was incomplete without resolving whether absentee ballots had been wrongly rejected.⁴³ The State Canvassing Board, however, properly refused to delay the start of the automatic recount, ruling instead that the initial canvass was timely finished within its two-week deadline and its totals showed a result within the specified margin for triggering an automatic recount.⁴⁴

Moreover, for the many states which now rely heavily on provisional ballots, the challenge of completing the initial canvass within two weeks after Election Day is especially daunting in a close election that triggers an immediate fight over the counting of those provisional ballots. In

2008, for example, completing the initial canvass of a congressional election in Ohio was delayed until December 5 because of litigation over the counting of provisional ballots.⁴⁵ Under Ohio law, an automatic recount of that congressional election could not begin until the initial canvass, including the counting of all eligible provisional ballots, was complete.⁴⁶ As it turned out, when the dispute over the provisional ballots was finally resolved on December 5, the result put the race barely outside the margin for an automatic recount. But if Ohio had been required to start an automatic recount of this race on December 6, the state would have been well behind in the process and unlikely to be able to conclusively resolve the election by early January.

For comparison, Minnesota had finished the local phase of its Coleman-Franken recount on December 5, the same day that Ohio was just learning whether it would need a recount in its congressional election. Minnesota had started its Coleman-Franken recount on November 19, the day after ending its initial canvass. Thus, Minnesota was over two weeks ahead of Ohio in its schedule for being able to complete an automatic recount. In a presidential election, the inability of Ohio to *start* an automatic recount until December 5, because of litigation over provisional ballots that delayed completion of the initial canvass, would prove devastating to the state’s ability to complete the recount in time to meet its Electoral College deadlines.

Nor was the litigation in Ohio over provisional ballots in 2008 an isolated event, unlikely to be repeated. On the contrary, in 2010, Ohio again faced litigation over provisional ballots that seriously delayed the resolution of local elections.⁴⁷ Indeed, one of these races, for a seat on a juvenile court, still remains unresolved as of August 2011, because the litigation over provisional ballots that

⁴³Memorandum of the Al Franken for Senate Committee and Al Franken Regarding Improperly Rejected Absentee Ballots, *In Re: 2008 United States Senate Election*, Nov. 17, 2008, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MNSenate-Memo-11-17-08.pdf>.

⁴⁴See Foley, *supra* note 6, at 6.

⁴⁵Ohio ex rel. Skaggs v. Brunner, 900 N.E.2d 982 (Ohio 2008).

⁴⁶R.C. § 3515.03 (2010); see also *2010-50 Recount Procedures*, Secretary of State Website, May 14, 2010, available at <http://www.sos.state.oh.us/SOS/elections/Directives/2010Directives/2010-50.aspx>.

⁴⁷Hunter v. Hamilton Bd. of Elections, 635 F.3d 219 (6th Cir. 2011).

are potentially outcome-determinative in that race is still pending in court.⁴⁸

Thus, it is imperative, especially for states with provisional ballots, to develop procedures whereby they can successfully bring their initial canvass to a close within two weeks after Election Day. This deadline must remain firm, even with respect to disputes over provisional ballots, notwithstanding the inevitable pressures that will arise to extend this deadline. But for a state to succeed in making this deadline unmovable, the state's laws must establish a well-working relationship between the initial canvass and the subsequent recanvass. Tribunals will tolerate adhering to a rigid deadline for the initial canvass only if they readily understand how pressing issues over ballot eligibility that arise during the initial canvass can be properly handled in the subsequent recanvass without prejudice to either side in the dispute. Therefore, it is necessary to explore the appropriate relationship between the canvass and the recanvass. Doing so first requires a discussion of the tasks that must be undertaken in the initial canvass. Then, one can analyze how the proper handling of these tasks in the initial canvass can set the stage for an appropriate transfer of unresolved issues to the recanvass, while still insisting that the initial canvass close at the end of its allotted two-week period.

1. The tasks of the initial canvass. On the morning after Election Day, there will be two categories of ballots: (1) all those that already have been counted and thus form the basis for the unofficial margin by which one candidate is ahead; and (2) all those that, for whatever reason, have not been counted and thus serve as an attractive basis for the other side to attempt to overtake that lead.

During the two weeks of the initial canvass, there will be tasks to perform with respect to the ballots already counted. For example, local election officials will have to conduct the process of "reconciliation," by which they compare the number of ballots cast with the number of voters who cast ballots. (In most instances, this comparison is made by checking the number of voters who signed poll books before casting their ballots, or alternatively the number of voters who received "authorized to vote" tickets after signing the poll books.) In some states, including Minnesota, this reconciliation process requires local officials to perform a procedure called "random withdrawal" if the num-

ber of ballots cast exceeds the number of voters who cast ballots.⁴⁹ An old-fashioned procedure, random withdrawal requires local election officials to literally reach into the ballot box and, without looking, randomly withdraw a number of ballots equal to the excess over the number of voters.

Obviously, disputes can arise over the canvassing procedures, like reconciliation and random withdrawal, related to ballots already counted. (Indeed, in 2010, Minnesota faced such a dispute, which turned out to be inconsequential, in the context of its gubernatorial election.⁵⁰) It is more likely, however, that a dispute will arise over uncounted ballots, as they present such an obvious target for the candidate who needs to overcome an opponent's lead. Therefore, if a state wishes to reduce the likelihood that it will face a major dispute in a presidential or other important statewide election, the state should take steps, first, to lower the number of uncounted ballots it is likely to have after Election Day and, second, to develop strong procedures for handling however many uncounted ballots the state ends up having.

There are three main sub-categories of uncounted ballots that a state may experience in its initial canvass: (a) unprocessed absentee ballots, (b) rejected absentee ballots, and (c) provisional ballots.

Unprocessed absentee ballots. We must first consider those ballots that arrive too late to be counted on Election Night but are still potentially eligible to be counted under state law. Some states, for example, permit overseas and military ballots to arrive up to ten days after Election Day as long as they are postmarked by Election Day. These ballots will need to be evaluated during the initial canvass to determine whether they satisfy all other requirements of eligibility (just like the absentee ballots that arrived and were evaluated before Election

⁴⁸See *Hunter v. Hamilton County Bd. of Education* litigation documents, available at the Election Law @ Moritz website: <http://moritzlaw.osu.edu/electionlaw/litigation/Hunter.php>. As of this writing, according to the official docket in the case, an evidentiary trial was held in July and the parties are in the midst of post-trial submissions.

⁴⁹See Edward B. Foley, *A Note on Reconciliation in Minnesota*, ELECTION LAW @ MORITZ, Dec. 3, 2010, available at <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=7977>. See also Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 366-67 (2007).

⁵⁰In re 2010 Gubernatorial Election, 793 N.W.2d 256 (Minn. 2010).

Day): whether they were cast by registered voters, whether the absentee ballot envelopes contain all necessary information, and so forth.

In any major statewide election for which these ballots may determine which candidate is the winner, they inevitably will come under intense scrutiny during the initial canvass. Candidates will attempt to challenge the eligibility of ballots they think will more likely be advantageous to the other side. Although Gore suffered a public relations backlash when he attempted to question the validity of some late-arriving absentee ballots in Florida, and he ultimately backed down after his running mate announced on *Meet the Press* that their campaign would not question any military ballots,⁵¹ neither Coleman nor Franken by contrast showed any hesitation in challenging the eligibility of absentee ballots when doing so suited their strategy. Therefore, in future elections, states must be prepared for the possibility of fierce fights over the eligibility of any absentee ballot that was not evaluated before Election Day.

Of paramount importance is the impartiality of the local election boards that make these eligibility determinations during the initial canvass. If these boards are perceived to be biased in favor of one party or the other, the whole process of bringing closure to the election will get off on the wrong foot, and it will be difficult for the process to regain a sense of legitimacy. Thus, it would be far better if these boards are evenly balanced in their representation of the two major political parties, with the tie-breaking member of the board chosen by a method that guarantees his or her neutrality and independence.

Even if local elections boards are well-structured to be impartial in this way, it makes sense to have a rule that preserves the possibility of undoing any decision to count a ballot made by a local board during the initial canvass. Before Election Day, even with respect to absentee ballots, once the local board determines that a particular ballot is eligible, it is then counted in such a way that it is commingled with all other counted ballots. It cannot be extracted—“uncounted”—if it is later determined that, contrary to the board’s decision, it was in fact ineligible for counting. That practice is appropriate for absentee ballots evaluated before Election Day (subject, perhaps, to the qualification that if a candidate appropriately challenges the eligibility of a particular absentee ballot before Election Day, then that ballot converts to a new tentative status whereby the local board can count

it, overriding the challenge, but only if it is later possible during the recanvass for that candidate to reassert the challenge and thus for the SERT to remove that ballot from the count in the event that the challenge proves to be correct). But with respect to absentee ballots that are counted for the first time after Election Day, the inevitable suspicions raised about every move made during the initial canvass mean that it is prudent to provide that any new counting done during the canvass can be undone, if necessary, during the recanvass. A provision of this sort means there will be less incentive to delay the initial canvass, because its decisions will not be so consequential.

Likewise, if a local election board during the initial canvass rejects an absentee ballot as ineligible, that decision also is not irreversible. On the contrary, this rejected absentee ballot simply gets added to the pile of absentee ballots that were rejected as ineligible prior to Election Day.

Rejected absentee ballots. On the morning after Election Day, a state inevitably will have a pile of absentee ballots that were deemed ineligible during the ongoing evaluation of absentee ballots that arrived before Election Day. This pile can be made much smaller if a state adopts the sound practice of notifying voters of problems with their absentee ballots that can be corrected. Nonetheless, there must be some deadline beyond which voters are no longer able to correct these mistakes. For example, absentee ballots that arrive before Election Day may be correctable during the first week of the initial canvass after Election Day, but any ballot that arrives after Election Day is not correctable. Thus, even if a state adopts a generous policy of this type, at some point during the initial canvass the state will face a pile of rejected absentee ballots with defects that voters were unable or unwilling to correct.

The question then arises whether, during the two weeks of the initial canvass, local election officials should review these rejected absentee ballots to see if they made any mistakes in rejecting some of them. In 2008, Minnesota statutes did not address this point with sufficient clarity. This ambiguity led to the unfortunate “candidate veto” decision, in which the Minnesota Supreme Court by a 3-2 vote concocted

⁵¹Richard L. Berke, *EXAMINING THE VOTE; Lieberman Put Democrats In Retreat On Military Vote*, N.Y. TIMES, July 14, 2001.

a new procedure whereby local elections officials were instructed to count previously rejected absentee ballots if, upon review of them, they determined that they had been rejected in error—as long as attorneys for both Coleman and Franken concurred in this new determination of eligibility.⁵²

A better procedure would be one, specified unambiguously in advance of Election Day (so that there is no room for litigation over its details), that requires local election officials to complete their own review of rejected absentee ballots before the close of the two-week canvass. During this review, representatives of each candidate should be entitled to be present, where they may raise objections to whatever decision the local election officials make regarding each ballot. These objections should be recorded so that they can be taken up, and conclusively resolved by the SERT, during the subsequent recanvass. Thus, rejected ballots that the local election officials review during the initial canvass and determine to be eligible, contrary to their earlier determination, should be counted in such a way that this counting can be undone in the subsequent recanvass. In this respect, these ballots are the same as the previously unprocessed absentee ballots that are counted after they have been evaluated for the first time in the initial canvass.

The ability of the SERT to “uncount” a ballot during the recanvass is not exactly the same as giving a candidate a veto over the counting of it during the initial canvass. A ballot that local election officials believe is eligible, upon their review of it during the initial canvass, should count for the purpose of determining the certified margin at the end of the canvass—and thus whether the election falls within the zone for an automatic recount. But if a candidate objects to the counting of particular absentee ballots, believing that they were correctly rejected in the first place, the candidate should still be able to present that objection to the SERT in the recanvass. By preserving the ability of the SERT to “uncount” any such ballot, the candidate who objects to its counting is not prejudiced. There is no need to give that candidate a veto over its counting in the initial canvass.

Most importantly, there is no need for potential delays that are likely to arise if candidates possess such a veto, and there are disputes about whether this veto power is being exercised in good or bad faith. Instead, candidates can quickly state and record their objections to the counting, or continued rejection, of previously rejected ballots. These objections

can be collected and presented to the SERT for its final determination. If candidates are overzealous in making objections during this process, it is likely they will voluntarily withdraw meritless objections as the proceedings move from the initial canvass to the recanvass. (A similar sort of voluntary withdrawal occurred during both the 2008 and 2010 Minnesota statewide recounts.) The way the recanvass gets scheduled during its seven-week period is likely to give candidates some extra time to reflect on the merits of their objections, and even this little bit of extra time will enable a whittling down of objections to go more smoothly, thus making it easier for the SERT to complete its recanvass by the mandatory early-January deadline, than if there are protracted fights early in the process over the exercise of a candidate’s veto power.

The paramount objective is to complete the initial canvass at the local level within its two-week deadline, without any basis for delay, so that the proceedings can quickly move on to the state level for a recount and recanvass, as necessary, by early January. A procedure for reviewing rejected absentee ballots that involves a candidate’s veto power is more likely to delay the completion of the initial canvass within its two-week deadline than a procedure that simply permits candidates to record their objections to whatever the local election officials decide. For this reason, above all, the concept of a candidate’s veto during the initial canvass should be rejected.

One might wonder: “Why bother to review rejected absentee ballots during the initial canvass? Just leave them all rejected unless and until the SERT decides, during the recanvass, that they are eligible.” But the Coleman-Franken dispute shows this position to be untenable. In an exceedingly close election where immediately after Election Day it appears that a review of rejected absentee ballots will determine which candidate wins, there will be overwhelming public pressure for local election officials to review these rejected ballots to see if they made any mistakes. There will also be a powerful sentiment to avoid the disenfranchisement of any voter whose ballots should have been counted but were not because local elections officials inadvertently messed up.

Therefore, it is necessary in advance of Election Day to establish a clear procedure whereby during

⁵²See Foley, *supra* note 6, at 15.

the two weeks of the initial canvass local election officials review all absentee ballots they previously rejected. Moreover, during the recanvass, the SERT will want the benefit of this local review before the SERT makes the final judgment on the ballot's eligibility. Consequently, it is best to have a procedure in which local officials can conduct this review expeditiously during the initial canvass, rather than waiting to do it later as part of the recanvass. And the most expeditious way to conduct this review during the initial canvass is to have the local officials decide whether or not to count each reviewed ballot, subject to the ability of candidates to make their objections, and then quickly move on to the next ballot that needs a review.

Provisional ballots. For some states, the ability to complete an initial eligibility determination for all provisional ballots by the end of the first two weeks after Election Day will be the most daunting challenge of the initial canvass. Ohio, for example, has a relatively large percentage of provisional ballots, in part because of laws and administrative practices designed to keep ballots from being irretrievably counted on Election Day if there are any suspicions about its eligibility. Moreover, precisely because provisional ballots by definition are questionable ballots, it will be difficult for local election officials to work through a large pile of provisional ballots, making all the necessary eligibility determinations, within a two-week period. Candidates, too, will be prone to dispute whatever the local officials decide, depending on whether they see a strategic advantage in counting or rejecting particular provisional ballots.

As with rejected absentee ballots, the process can be made somewhat easier by giving voters an opportunity to rectify whatever problems cause their ballots to be provisional. For example, voters who must cast a provisional ballot because they go to the polls without the form of identification that their state's law requires can be given several days, perhaps even up to the first full week after Election Day, to submit the necessary identification to their local board of elections. Similarly, for voters who are in danger of having their provisional ballots disqualified solely because they inadvertently omit some necessary information when filling out their provisional ballot envelope, the local board of elections can be required to notify the voters of these defects within the first week of the canvass and to provide

these voters with a small window of opportunity, perhaps 72 hours, in which the voters can correct these omissions. Washington adopted this type of procedure in the aftermath of its 2004 gubernatorial election, but it would have been far better to have had in place before Election Day.⁵³

Even if some voters are able to take steps in the early days of the canvass to make sure that their provisional ballots are indisputably eligible, there still will be provisional ballots for the local election officials to evaluate as the close of the canvass approaches. One side intensely will want these ballots counted, while the other side just as intensely will want them rejected. In order to prevent the battle over these provisional ballots from derailing the entire vote-counting process, with the consequence that there is no identifiable winner of the election by early January, it is important to remember that the determination of a provisional ballot's eligibility by local election officials during the initial canvass is, most emphatically, *not* a final determination of its eligibility. On the contrary, it is but a *preliminary* determination, made without any prejudice to the SERT's ability to make the final determination of eligibility during the subsequent recanvass.

Recognizing this point should help everyone involved in the vote-counting process understand the need to complete this preliminary determination on schedule and thus to move on to the main event so that it also can be completed on time. Moreover, when the authoritative ruling on all disputed provisional ballots is made at the state level by the SERT, rather than at the local level, the primary basis for delay-causing litigation over the eligibility of provisional ballots disappears. Based on *Bush v. Gore*, the main argument over provisional ballots has been that local boards of elections use different standards when reviewing the eligibility of similar ballots. This argument is eliminated when the SERT, a single statewide tribunal, ultimately is responsible for determining the eligibility of disputed provisional ballots.

Another potentially delay-causing issue arises when it appears that a significant number of voters were mistakenly required to vote a provisional ballot when they should have been permitted to vote a regular ballot in the first place. For example, suppose that a local board of elections mistakenly

⁵³Trova Heffernan, AN ELECTION FOR THE AGES: ROSSI VS. GREGOIRE, 2004 26–28 (2010).

instructs its poll workers to require voters to cast a provisional ballot if their driver's license contains the wrong address, when actually under state law this driver's license qualifies as a valid form of voter identification. States should have a rule in place that unambiguously requires local boards of election, if this kind of error comes to light during the initial canvass, to count any such ballots if they meet all the prerequisites necessary to qualify as a *regular* ballot even if they may fall short of additional prerequisites for provisional ballots. (After all, these ballots should have been cast as regular, not provisional, in the first place.)

Even so, the counting of these ballots, like any other ballot counted for the first time during the initial canvass, should be conditioned on the ability to "uncount" it during the recanvass. In this specific respect, these ballots should remain distinct from regular ballots cast and counted on Election Day, which are all commingled and cannot be individually retrieved to undo the counting of them. If a dispute remains about the status of these ballots at the end of the initial canvass, the SERT must be able to resolve that dispute either way. Therefore, if the SERT decides that some or all of these disputed ballots are actually ineligible (perhaps because the local officials turn out to be incorrect in thinking that they should have been cast as regular rather than provisional ballots), the SERT must be able to remove these ineligible ballots from the final count of the election in early January. But as long as the SERT's ability to "uncount" these ballots is preserved in this way, then there should be no danger of delaying the conclusion of the initial canvass for fear that the local board's ruling on the eligibility of these disputed ballots would be irreversible.

2. The relationship of the canvass and recanvass. It is not that the preliminary determinations of the initial canvass amount to nothing. On the contrary, at the very least, as a practical matter they establish a burden that a candidate must overcome to persuade the SERT that the local election officials were incorrect in these initial determinations. As long as the local boards of elections are themselves structured to be impartial, and the SERT is as well, then the SERT inevitably will give the local determination the benefit of the doubt.

The burden of persuasion. In fact, it would be advantageous to codify this burden of persuasion in the state's statutes, assuming that the statutes

also codify the structural impartiality of both the local boards of election and the SERT. Codifying this burden of persuasion will clarify unambiguously that, in the recanvass, a candidate who wishes the SERT to count a ballot that the local board rejected must demonstrate that, more likely than not, the local board was incorrect. Conversely, a candidate who wishes the SERT to reject a ballot that the local board counted during the initial canvass must also show that, more likely than not, the local board was incorrect.

It is important that this burden not be set too high. Otherwise, a candidate will attempt to delay certification of the initial canvass, thereby potentially derailing the entire post-voting dispute resolution process. For this reason, I have characterized the burden of persuasion as "more likely than not" rather than the higher threshold of the "clear and convincing" standard.

Moreover, it is also important to understand this burden of persuasion for the recanvass that the SERT conducts, as I have described it, differs significantly from the traditional burden that a candidate bears in a "judicial contest" of a certified election result. As the plaintiff in a lawsuit, the candidate who is the "contestant" in the judicial litigation traditionally bears the burden of proof on all factual issues relating to the counting of ballots. In a judicial contest, there is often a heavy presumption that the overall result in favor of the winning candidate is correct, and judges are loath to overturn the certification of this electoral victory.

By contrast, the burden of persuasion in the recanvass that I have described is a ballot-specific burden. The candidate who wants to overturn the local election board's determination of eligibility with respect to a specific ballot bears the burden of persuasion for this specific ballot. But if the opposing candidate wants to overturn the local election board's determination of eligibility with respect to a different ballot, then this opposing candidate bears the burden of persuasion for that other ballot. There is no overall burden of proof that either candidate must overcome.

Structuring the relationship between the initial canvass and the recanvass in this way makes it easier to move expeditiously from the one to the other. There will be no need for a candidate to vigorously resist the certification of the initial canvass, because there will be no heavy presumption that the candidate will need to overcome. Instead, the candidates

will understand the initial canvass for what it is: a preliminary phase, conducted at the local level, for ascertaining the winner of an election, who has yet to be conclusively identified because doing so requires completion of the recanvass conducted at the state level.

Waiver. Moreover, insofar as the role of the initial canvass is for local officials to make a preliminary determination of the eligibility of all questionable or disputed ballots, thereby setting the stage for the final determination at the state level by the SERT, it would be appropriate to establish in advance a clear waiver rule that precludes raising before the SERT in the recanvass any issue that could have been raised during the initial canvass but was not. This waiver rule should apply both to specific ballots as well as to specific issues applicable to multiple ballots. In other words, if during the initial canvass a candidate fails to challenge the eligibility of a particular provisional ballot, that candidate should be barred from challenging the eligibility of that ballot in the recanvass.

Likewise, suppose that many provisional ballots are rejected in the initial canvass for missing the voter's Social Security Number (SSN) on the provisional ballot envelope. Suppose during the recanvass a candidate wishes to argue that these ballots should be counted because the missing SSN is attributable to poll worker, rather than voter, error. The candidate should be required to raise this argument in the initial canvass in order to be able to assert it in the recanvass (unless, for some good reason that is not readily apparent, the candidate could not have uncovered the basis for making this argument during the initial canvass). Even if the candidate makes other arguments with respect to some or all of the same rejected ballots, this particular issue should be off-limits in the recanvass if it was not raised during the initial canvass.

The reason for this waiver rule is that the SERT should have the benefit of the local election board's position on each issue with respect to each disputed ballot. The local board's ruling not only carries a presumption of correctness, but it also serves to make sure that all relevant factual issues are addressed at the local level, where the evidence most likely resides, thereby creating a record of the relevant available evidence before the dispute over a particular ballot moves to the state level. While it is theoretically possible that during the recanvass, the SERT

could "remand" a particular ballot or particular issue concerning one or more ballots to the local board for further consideration, we have seen that time is of the essence during the recanvass. Therefore, the SERT should not be remanding matters to the local boards during the recanvass that could have been addressed by the local boards in the first instance during the initial canvass. Although it is appropriate to give the SERT fact-finding authority, including the power to hold its own evidentiary proceedings as part of its own ability to expedite the recanvass in order to meet its early-January deadline, the SERT should not be required to use its recanvass procedures to gather evidence and obtain the local board's position on matters that could have been addressed during the initial canvass.

There is also the question whether this waiver rule should extend to matters that could have been raised on or before Election Day. For example, the initial review of most absentee ballots to determine their eligibility occurs, as the local boards receive them, before Election Day. If the ballot is deemed eligible, it is counted and commingled with all other counted ballots on Election Day. In *Bell v. Gannaway*, the Minnesota Supreme Court ruled that if a candidate had the opportunity to challenge the eligibility of an absentee ballot before it was counted and commingled with other counted ballots, then the candidate was precluded from raising this challenge to its eligibility afterwards.⁵⁴

In *Coleman v. Franken*, the Minnesota Supreme Court invoked its *Bell v. Gannaway* precedent to bar Coleman from challenging the eligibility of previously counted absentee ballots, even when the trial court had ruled that identical ballots (which had been rejected elsewhere in the state) were in fact ineligible.⁵⁵ The procedural waiver rule of *Bell*, in other words, trumped the substantive merits of the ballot's ineligibility. Indeed, the Minnesota Supreme Court went so far as to suggest that its *Bell* waiver ruled applied even when a candidate had *no* opportunity to challenge the eligibility of a particular absentee ballot before it became commingled with the rest of the counted ballots.⁵⁶ While that version of the waiver rule seems extreme—indeed, it no longer makes sense to call

⁵⁴227 N.W.2d 797 (Minn. 1975).

⁵⁵*Coleman v. Franken*, 767 N.W.2d 453 (Minn. 2009).

⁵⁶*Id.* at n.19.

it a “waiver” rule if the candidate never had the opportunity to raise the issue in the first place—a more moderate version of the *Bell* waiver rule would seem appropriate in future elections (as long as it is clearly spelled out in state law before the election gets under way).

Appropriately applied, the *Bell* waiver rule would require a procedure that gives candidates the chance to challenge the eligibility of all absentee ballots, not just those that arrive after Election Day, before they are counted. This procedure could take place at the headquarters of each local election board, where representatives of candidates can review the local officials as they make their ballot eligibility determinations. If a candidate objects to the counting of a particular ballot, then this ballot in effect would be treated as a provisional ballot: the board could count it, as long as it does so in a way that preserves the ability of the SERT to “uncount” it during the recanvass if the SERT sustains the objection. (Indeed, if time permits during the initial canvass, the local board could review its eligibility determinations on these challenged ballots, just as it reviews all the uncounted absentee ballots that it had determined ineligible before Election Day.) But if a candidate, having had this opportunity, lets an absentee ballot get counted and commingled without raising an objection to its eligibility, then the candidate should be barred from disputing the ballot’s eligibility during the recanvass.

Newly discovered problems. Undoubtedly, there will be some issues that a candidate could not be expected to raise during the initial canvass, much less before Election Day, and therefore it would be inappropriate to apply a waiver rule to these. For example, suppose that three weeks after Election Day—and thus one week after initial canvass has closed and the period for the recanvass has started—a candidate discovers that a vote-buying scheme potentially taints several thousand of absentee ballots in an election where the certified margin at the end of the initial canvass was under 1,000 votes. The candidate should be entitled to present evidence of this vote-buying scheme to the SERT, which should be empowered to adjust the vote totals, or perhaps even void the election, if it finds after an evidentiary hearing that more ballots were bought than the previously certified margin. In a judicial contest of an election, a court would have this power.⁵⁷ Because the recanvass before the SERT, occurring in the same expedited seven-week period as the recount, substitutes for a

separate judicial contest afterwards, candidates should be able to raise in the recanvass the same allegations of wrongdoing that they would have been able to raise in a subsequent judicial contest.

Still, there is an inevitable outer time limit for even the most egregious evidence of wrongdoing. Consider again, the specific context of a presidential election. The immutable deadline for the close of the recanvass (and recount) is January 5, because the presidential electors must meet that day to perform their constitutionally specified duty of voting for president. If the next day there surfaces evidence of fraud affecting more votes than the margin of victory in the single state that swings the entire Electoral College, it is nonetheless too late to undo the final certification of the appointment of these presidential electors.

Should one find this conclusion troublesome, suppose instead that the evidence of fraud surfaces on January 21, one day after the inauguration of the new president. It would be constitutionally impossible for a court, in the context of a judicial contest to the validity of the presidential election, to remove the newly inaugurated president from office on the ground that the electoral victory had been fraudulently procured. The only constitutionally available recourse would for the House of Representatives to impeach, and the Senate to remove, the president on the ground that the fraud qualified as a “high crime or misdemeanor” under Article II.⁵⁸

The same point applies as much to the SERT’s authority during the recanvass as it would to a court’s authority in a judicial contest. Once the recanvass ends, and the victorious presidential electors cast their own official votes for president, the SERT’s jurisdiction ceases. There can be no further claim that the SERT certified as ultimately victorious the wrong slate of presidential electors.

Although the same constitutional imperative of electoral finality that governs presidential elections does not apply to U.S. Senate, gubernatorial, or other major statewide elections, there is no good policy reason why the same electoral deadline should not apply. If the process of canvassing and recanvassing the ballots for presidential electors is well-designed in the way I have described, then that

⁵⁷Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007).

⁵⁸U.S. Const. art. II, § 2, cl. 1.

same process can serve equally well for other statewide elections. To be sure, evidence of fraud in a U.S. Senate election may surface after the new Senator is seated in early January, but that evidence should be taken up in the Senate itself, not in a state-court proceeding that purports to have the authority to undo the election based on this evidence. Likewise, if a governor has just been inaugurated in early January, newly discovered evidence that the governor's election was fraudulently procured should be pursued in a special procedure, specified under the state's constitution, for removing the governor from office. It should not be pursued in a judicial contest of the electoral result. Rather, in a well-designed process of the kind I have described, all proceedings for challenging the counting of ballots in a gubernatorial election should be finished before the day on which the new governor is inaugurated.

D. No appeal after a fair recount and canvass process

The nine-week schedule that I have described—two weeks for the initial canvass, followed by seven weeks for the SERT's unified recount and canvass—leaves no time for any appeal of the SERT's final determination of the vote totals in a disputed statewide election. As we have seen, in a presidential election, the last day for the SERT to certify which slate of presidential electors won more ballots cast by citizens on Election Day is the very same day that these presidential electors themselves must meet to cast their official votes for president, which is the constitutionally mandated deadline for any proceedings under state law concerning a dispute over the ballots cast for presidential elections. Therefore, under this schedule, there is no room whatsoever for any appellate or other form of judicial review of the SERT's certification.

This feature of the schedule, however, should be no cause for concern as long as the SERT is structured to be balanced and impartial towards both candidates, in the way that I have described. A crucial lesson of *Coleman v. Franken* is that it is unnecessary to have appellate review when the primary tribunal's proceedings satisfy the standard of fairness that is appropriate for adjudicating disputes over counting ballots. The appeal to the Minnesota Supreme Court in *Coleman v. Franken* itself did not add to the essential fairness of the proceedings in that litigation, given the inherent balance and impartiality in

the composition of the three-judge trial court. On the contrary, what the appeal added was two-and-one-half months of delay. This extra expenditure of time was not only wasteful. It was inappropriate for an electoral dispute that must be settled as quickly as fairness permits. Thus, because by statute the SERT should be guaranteed to be as inherently balanced and impartial in its composition as was the three-judge trial court in *Coleman v. Franken*, there should be no right to appeal the SERT's rulings.

To fully appreciate this point, consider the possible outcomes in an appeal from an electoral tribunal that, by design, is structured so that its composition is as fair to both sides of the electoral dispute as is humanly feasible. One possibility, which is what occurred in *Coleman v. Franken*, is that the appellate tribunal will simply affirm the result already reached by the maximally fair first tribunal. This redundancy is a luxury that the process for resolving a disputed statewide election, especially a presidential election, simply cannot afford.⁵⁹

The second possibility is that the appellate tribunal will reach the opposite result of the maximally fair first tribunal, precisely because the appellate tribunal is less fair in its composition, and thus the appellate result—unlike the original result—reflects a bias or tilt towards one side of the dispute. (If the SERT is structured as described, one can easily imagine that many existing state supreme courts, given the partisan methods by which their members obtain their seats, with no guarantee of overall partisan balance in their composition, would be less well-suited to resolve an electoral dispute than the appropriately designed SERT.) This appellate divergence from the maximally fair tribunal's original decision is obviously not desirable, at least not from the perspective of fairness.

The third possibility is that both the original and appellate tribunals are equally well-designed to be balanced and impartial towards both sides in the electoral dispute, and yet despite this equivalence

⁵⁹Also, based on Minnesota's experience, there is reason to think that the judiciary itself is unwilling in the context of a disputed election to view an appeal as a full review of the merits of the legal issues in the case (in the same way that an appellate court ordinarily would do in an appeal). By the time *Coleman v. Franken* got to the Minnesota Supreme Court, there was a sense among observers that a kind of "judicial fatigue" had set in: the entire state was ready for the case to be over, and thus the supreme court was hardly inclined to second-guess the trial court's unanimous rulings.

they reach opposite results. One tribunal, in adjudicating the vote-counting dispute, rules in favor of one candidate. The other tribunal, adjudicating the very same vote-counting dispute on appeal, rules in favor of the other candidate. From the perspective of fairness, there is no way to prefer one result over the other. Indeed, more profoundly, in this circumstance there is no way for anyone to declare that one result was correct and the other one not. Obviously, this dispute was of a nature that equally fair tribunals could disagree about the correctness of the outcome. Everyone else may have an opinion about which outcome was correct, but no individual is in a position to claim that his or her vantage point is superior to the position of the maximally fair tribunal that reached the opposite conclusion. The most that anyone could say in this circumstance was that his or her own opinion agreed with one of the two tribunals but not the other.

In a dispute over the counting of ballots in a statewide election—especially a presidential election, where time is of the utmost essence—there is absolutely no advantage to having two divergent conclusions from two equally fair tribunals. To be sure, one side always would have preferred the opposite outcome if there is no appeal from the decision of a maximally fair tribunal. But in an election one side always must lose. By definition, there can be no fairer outcome than one reached by a maximally fair tribunal. Therefore, from the perspective of fairness, there is no point trying to seek a different outcome in an appeal from a determination of electoral victory reached in the first instance by a maximally fair tribunal.

Accordingly, there should be no right to appeal the decision of an appropriately designed SERT. For the same reason, there should be no ability of a candidate to move the vote-counting dispute to a separate state-court proceeding, whether denominated a “judicial contest” of the election or otherwise. In short, a state’s statutes, or constitution, should provide explicitly that the SERT’s jurisdiction over the vote-counting dispute is exclusive. During the seven weeks in which it conducts the recount and recanvass, the SERT should have full authority under state law to adjudicate any factual or legal issue relevant to the counting of ballots in the disputed statewide election. Thus, there is no reason for any other body to have authority under state law to assert any jurisdiction over the vote-counting dispute while it is pending before the SERT, and once the seven weeks of the SERT’s

jurisdiction has passed, there is no more time for any judicial body to undertake any additional adjudication of this same vote-counting dispute.

To some readers, it may seem anomalous to deprive a state’s conventional supreme court of any authority to review a legal ruling rendered by the SERT. One must remember, however, that historically the judiciary (including the state’s supreme court) had no role to play in the adjudication of vote-counting disputes in elections for state offices. Instead, the power to adjudicate such disputes resided in the legislature.⁶⁰ This was true even for gubernatorial, and not just legislative, elections, as the dispute over New York’s 1792 gubernatorial election clearly demonstrates.⁶¹

It is true, moreover, even though it was well understood historically that the resolution of such vote-counting disputes would require the adjudication of legal questions of the type that normally would be decided by a court of law. The lawyers for both sides in the 1792 dispute, for example, submitted briefs to the legislative canvassing committee, making the kinds of arguments on propositions of law that they would have submitted to a court of law if jurisdiction over the dispute lay with the judiciary rather than the legislature. In this respect, the litigation of electoral disputes was historically equivalent to the impeachment and removal of officers. The Founders of our Republic well understood that impeachment and removal of officers would involve the adjudication of legal questions having the character that ordinarily would be decided by courts of law. Nonetheless, their adjudication would occur in special proceedings within the legislature, over which the state supreme court would have no power of review.

In essence, then, my recommendation of a SERT with exclusive jurisdiction over vote-counting disputes, with no power of review in the state’s conventional supreme court, is something of a return to the

⁶⁰See Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. LEG. 265, 270 (2007) (without explicit statutory authorization, vote-counting disputes “otherwise traditionally would have been deemed nonjusticiable political questions”) (footnote omitted); see generally Josh Chafetz, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* (2007) (detailing the historical origins of legislative exclusivity over the adjudication of disputed elections).

⁶¹Edward B. Foley, *The Founders’ Bush v. Gore: The 1792 Election Dispute and Its Continuing Relevance*, 44 INDIANA L. REV. 23 (2010).

original historical understanding on this issue. It is not a complete return, however, insofar as it recognizes that legislative bodies have tended to be biased by partisanship in their adjudication of vote-counting disputes. (This bias was evident, for example, in the 1792 dispute.) The move to increased judicial involvement in vote-counting disputes, throughout the nineteenth and twentieth centuries, was with the hope that judicial adjudication of these disputes would be more impartial—unbiased by partisanship—than the legislative adjudication of these disputes.

But, alas, the legacy of the presidential election of 2000, as well as other less well-known examples, is that giving conventional courts the authority to adjudicate vote-counting disputes is no way to guarantee impartiality or the appearance of unbiased nonpartisanship.⁶² Instead, a primary lesson of the Lake Wobegone Recount, where both the State Canvassing Board and the three-judge trial court operated impartially, is that what matters is not whether the body is officially judicial, but instead how it is structured and who sits on it. Thus, the SERT should be specifically designed so that its rulings are inherently untainted by partisan bias, and once designed in this way its rulings should be unreviewable by a conventional court. So constituted, the SERT combines the best features of both historical and contemporary wisdom.

Nonetheless, it may help modern readers to be more comfortable in giving the SERT this exclusive jurisdiction if the SERT is officially designed as a judicial court under state law. That way the SERT is not unlike a special tax court, or court of claims, or other special-purpose court that decides a category of cases that state law has determined are best handled by a specialized institution rather than courts of general jurisdiction. I have no objection to this approach, as long as the SERT's proceedings have the character and adhere to the timetable that I have described. As I have already indicated, it would be fine to call this maximally fair electoral tribunal the SERC, the State Elections Review Court, rather than the SERT. The point is not its name, but what it does, the schedule it keeps and, most especially, the balance and impartiality that are inherently built into its composition.

There is, of course, no way for state law to deprive *federal* courts of jurisdiction over issues of federal law, including federal constitutional law, that might arise in the context of a dispute over the counting of ballots in a statewide election.

Nevertheless, one can hope that, if a state has a SERT that is maximally fair in its inherent composition, then a federal court will abstain from interfering with the SERT's proceedings on the ground that it is in no position to render a decision that would be fairer than the SERT's. Even on disputed issues of federal law relevant to the counting of ballots in the statewide election, the federal courts should trust the SERT to adjudicate these federal issues as fairly as they themselves would.⁶³

But what if the SERT commits an obvious error on a question of federal law, one might ask? Should the federal court sit by and let that error stand uncorrected? These questions, although rhetorically powerful, seem relatively inconsequential as a practical matter. It is unlikely that a well-designed SERT will

⁶²In addition to the partisan 4-3 split of the Florida Supreme Court in 2000, as well as the arguably partisan 5-4 split in the U.S. Supreme Court in *Bush v. Gore*, there is the ugly partisan ruling of the Alabama Supreme Court in the state's Chief Justice election of 1994, which led to the Eleventh Circuit's intervention on Due Process grounds in *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995). I have elsewhere discussed other examples from the gubernatorial elections of 1984 in Illinois and 1962 in Minnesota. See Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL. REV. 350, 377 (2007).

⁶³My proposal here draws inspiration from Dan Tokaji's previous work, although it differs in some details. Dan has suggested that federal courts should "accord less judicial deference to decisions made by partisan election officials than to those made by independent election management bodies." Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL. REV. 125, 150-151 (2009). My thought, essentially, is to turn Dan's formulation around and ratchet it up: federal courts should accord considerably greater deference to the adjudication of a vote-counting dispute by a state tribunal when that tribunal is structured to be free from partisan bias. Indeed, I would make that deference complete if the state's tribunal and its proceedings conform to the ideal type I have described, and in doing so my proposal goes further than Dan's. In this respect, my proposal is more willing than Dan's to draw upon the tradition of the political question doctrine, which was far more robust over a whole category of electoral disputes prior to *Baker v. Carr*, 369 U.S. 1 (1962). I would not reinstate the pre-*Baker* political question doctrine completely. Instead, I would simply invoke the doctrine to keep the federal judiciary's hands off cases in which a state has shown itself able to resolve an electoral dispute with a structurally evenhanded and unbiased institution. *Baker* itself recognized that reliance on the political question doctrine was appropriate where there was "an unusual need for unquestioning adherence to a political decision already made." *Id.* at 217. For the reasons stated in text, I would argue that such an "unusual need" exists if a state has managed to guarantee that an electoral dispute will be resolved by a maximally fair tribunal, one which will do even better than a federal court at minimizing the risk of a partisan taint in the resolution of the dispute.

commit what all would agree is a clear mistake of federal law.

On the contrary, if the answer to an applicable question of federal law is patently obvious, then presumably a maximally fair SERT will discern this obvious answer and thus there would be no need for federal court intervention. Conversely, if the answers to the federal questions are not so obvious, then there is no reason to think that the way a federal court would answer them is superior to the answers that would be reached by the maximally fair SERT. Federal courts are not structured to be necessarily balanced and impartial in cases involving the counting of ballots in major statewide elections, including presidential elections, and thus federal courts cannot presume that their decisions in these cases would avoid a bias or tilt to one side of the dispute. In a situation where the SERT is inherently structured to avoid this kind of bias or tilt, it is preferable from a perspective of fairness to leave to the SERT—without any further judicial review—ambiguous issues of federal as well as state law.⁶⁴

Indeed, with respect to the applicability of Equal Protection and Due Process to vote-counting cases, it should be possible to build into Fourteenth Amendment doctrine the principle that federal courts should defer to vote-counting decisions reached by state tribunals that are designed to be as balanced and impartial as possible. In other words, it should ordinarily suffice to defeat an Equal Protection or Due Process claim that challenges a state tribunal's vote-counting decision if it can be shown that the state tribunal was designed to be fair in the same way as I have described the SERT. Because most of the federal issues raised in vote-counting cases concern Equal Protection or Due Process, a doctrine of this sort would go far to eliminating the ability of the federal judiciary to interfere with the functioning of an appropriately designed SERT.

As part of this Fourteenth Amendment point, it is worth remembering that prior to the jurisprudential revolution of *Baker v. Carr*⁶⁵ and *Reynolds v. Sims*⁶⁶ it would have been impossible to prevail on a claim that the miscounting of ballots violated Equal Protection or Due Process. Indeed, even in cases involving clear evidence of egregious and intentional fraud in the selective counting of ballots, or the stuffing of ballot boxes, the prevailing doctrine before the Warren Court revolution demanded that there be no federal court interference with a state's vote-counting procedures. The leading case

is *Taylor v. Beckham*,⁶⁷ involving Kentucky's disputed gubernatorial election of 1899—a low moment in U.S. history as one of the two candidates was assassinated as part of the dispute.⁶⁸ The dispute reached the U.S. Supreme Court on the claim that fraudulent vote-counting in Kentucky's legislature violated Due Process or Equal Protection. The Court held that it must “decline to take jurisdiction”⁶⁹ over this Fourteenth Amendment claim because of the political question doctrine as previously articulated in *Luther v. Borden*,⁷⁰ which involved a dispute over Rhode Island's electoral process. Although *Luther* was a precedent from before the Civil War and thus before the ratification of the Fourteenth Amendment, the Court in *Taylor v. Beckham* determined that the Fourteenth Amendment did not supersede the basic principle of judicial noninvolvement in electoral disputes.

The same principle prevailed in Lyndon Johnson's infamous victory over Coke Stevenson in the primary election for the U.S. Senate seat from Texas in 1948.⁷¹ Stevenson went to federal court, alleging Fourteenth Amendment violations from

⁶⁴In making this proposal, I am not inclined to recommend that Congress enact a statute that would deprive the federal judiciary of jurisdiction over questions of federal law arising in the context of ballot-counting disputes. Far preferable would be for the federal judiciary itself to develop its own new abstention doctrine (or political question doctrine, see n. 63 supra) to achieve the same procedural effect. One clear advantage of a judge-made abstention doctrine is that the federal courts can tailor it to the circumstances for which it is appropriate. Obviously, this new abstention doctrine would not apply in those circumstances where a state has used a body afflicted with partisan bias to adjudicate a ballot-counting dispute. The key point here concerns the mindset of federal judges: when a ballot-counting dispute arrives in their courthouse, the first question they should ask themselves is whether the state's tribunal for resolving the dispute was maximally fair in the way I have described; if the answer is yes, then they should invoke this new abstention doctrine; if the answer is no, then they can proceed as they ordinarily would in the aftermath of *Baker v. Carr* and *Bush v. Gore*. (I leave for further scholarship the exact contours of this new form of an abstention or political question doctrine.)

⁶⁵369 U.S. 186 (1962).

⁶⁶377 U.S. 533 (1964).

⁶⁷178 U.S. 548 (1900).

⁶⁸For a description of the events surrounding this dispute, see Tracy Campbell, *DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION, 1742-2004* (2006), at 106-110.

⁶⁹178 U.S. at 580.

⁷⁰48 U.S. 1 (1849).

⁷¹See Robert Caro, *THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT* 379-380 (1990).

the fabrication of two hundred extra votes for Johnson in the tallies for Ballot Box 13. Although the federal district court was prepared to consider this claim, Johnson's attorneys (including Abe Fortas) sought and secured an order from Justice Hugo Black that enjoined the federal district court from interfering with the state's vote-counting procedures. The basis for Justice Black's order was the same philosophy that governed in *Taylor v. Beckham*: the federal judiciary has no business supervising a state's vote-counting procedures no matter how egregious the evidence of improper counting may be.⁷²

Bush v. Gore, of course, is directly at odds with the philosophy of *Taylor v. Beckham* and Justice Black's 1948 order. But the dissenters in *Bush v. Gore* invoked something of the spirit of *Taylor v. Beckham* when they asserted that the U.S. Supreme Court should not have intervened in 2000 to adjudicate Bush's claims of Equal Protection and Due Process violations arising from Florida's vote-counting procedures.⁷³ There is no need here to engage in an all-or-nothing debate about which of the competing philosophies of *Taylor v. Beckham* or *Bush v. Gore* is the better jurisprudential approach.⁷⁴ Instead, a middle-ground position is merely that the principle of noninvolvement in electoral disputes on the part of the federal judiciary is appropriate in the specific circumstance where a state has established a maximally fair tribunal for the adjudication of ballot-counting disputes.

One can consider this middle-ground position a "merits" point, rather than a "jurisdictional" one, if doing so is more palatable. Simply put, a claim of Due Process or Equal Protection violation lacks merit when the authoritative state body to ultimately decide all vote-counting issues is structured to be as fair to both sides of the dispute as it is possible to be. In this Article, I am less concerned with deciding definitively whether a "merits" or "jurisdictional" approach should be adopted. More important is to convince the federal judiciary, by whatever means feasible, that a mid-course correction is necessary to get the law on a sensible path somewhere between the extremes of *Taylor v. Beckham* and *Bush v. Gore*. Otherwise, there is the risk that the ruling of a well-designed SERT would be upended by a federal court that appears tainted, wittingly or not, by its own partisan bias. (Imagine a federal judge, motivated by partisan bias, undoing all the good work of the State Canvassing Board and Minnesota's judiciary in *Coleman v. Franken*.)

In sum, if a state gives its SERT exclusive jurisdiction over vote-counting disputes in statewide elections (as it should), and if federal courts refrain from interfering with an appropriately designed SERT (as they should), then the SERT should be able to meet its seven-week deadline for resolving vote-counting disputes. We must certainly hope that it can, because an appropriately designed SERT that complies with this schedule is our best—indeed only—chance of being able to resolve a disputed presidential election both fairly and expeditiously.

II. THE RELATIVE IMPORTANCE OF A FAIR INSTITUTION COMPARED TO IDEAL RULES

What we have discussed about the schedule for the fair resolution of a disputed statewide election leads directly to the next major lesson of *Coleman v. Franken*. It is not just that there is no time to appeal the decision of a fair tribunal. It is also more important that this single tribunal be structured to be fair, meaning balanced and impartial towards both sides in the disputed election, than it is for the vote-counting rules that this tribunal applies to be ideal.

We can recognize this crucial point when we remember that the vote-counting rule that the fair three-judge trial court applied was, in fact, not the same one articulated by the Minnesota Supreme Court on appeal. Yet this difference does not negate the essential fairness of the three-judge trial court's ruling.

A. *The doctrinal choice among strict, constructive, and substantial compliance*

In *Coleman v. Franken*, the three-judge trial court was unwilling to protect absentee voters

⁷²*Id.* at 380 (quoting Black, J.) ("It would be a drastic break with the past, which I can't believe that Congress ever intended to permit, for a federal judge to go into the business of conducting...a contest of an election in the state.")

⁷³"What it does today, the Court should have left undone." *Bush v. Gore*, 531 U.S. at 558 (Breyer, J., dissenting).

⁷⁴I have previously, albeit briefly, addressed the relationship of *Bush v. Gore* to both *Taylor v. Beckham* and Justice Black's 1948 order in the dispute between Johnson and Stevenson. See Edward B. Foley, *Bush v. Gore in Historical Perspective*, FREE & FAIR COMMENTARY, ELECTION LAW @ MORITZ WEBSITE, Dec. 9, 2010, <http://moritzlaw.osu.edu/electionlaw/free-fair/index.php?ID=7991>.

from official error that caused the failure of these voters to return proper registration forms.⁷⁵ The Minnesota Supreme Court, by contrast, made clear on appeal that it would be inclined to take the exact opposite view, as long as a candidate laid the necessary evidentiary foundation that official error of this sort affected the outcome of the election.⁷⁶ Indeed, the supreme court went out of its way to emphasize that “[t]he distinction between errors by voters and errors by election officials is an important one”⁷⁷ and, therefore, a vote “should not be rejected because of...[a] mistake...on the part of the election officers.”⁷⁸ (The disagreement between the two courts on this substantive point of law, however, made no difference in the outcome of the case, because at trial Coleman had failed to offer evidence that could have taken advantage of this doctrinal distinction.⁷⁹)

Purely from the perspective of which substantive rule for counting ballots is preferable, it would be hard to argue that the trial court’s position was better than the supreme court’s position. On the contrary, the supreme court’s view seems intuitively superior: why should voters have their ballots discarded when they did nothing wrong, and official error frustrated their ability to fully comply with the registration requirement? Moreover, the Minnesota Supreme Court’s position on this point is supported by a long line of judicial authority nationwide, as reflected in George McCrary’s well-respected *A Treatise on the American Law of Elections*.⁸⁰ Reviewing the relevant case law at the end of the nineteenth century, the fourth edition of this treatise concluded that collectively these precedents

disclose a well-defined disposition on the part of the courts to distinguish between acts to be performed by the voters, and those devolving upon the public officials charged with the conduct of the election. The weight of authority is clearly in favor of holding the voter, on the one hand, to a strict performance of those things which the law requires of him, and on the other of relieving him from the consequence of a failure on the part of election officers to perform their duties according to the letter of the statute where such failure has not prevented a fair election.⁸¹

Like the Minnesota Supreme Court in *Coleman v. Franken*, which echoed McCrary’s summation in

virtually identical language over one hundred years later, the prevailing view among the nineteenth-century precedents viewed it objectionable “to dis[en]franchise the voter because of the mistakes or omissions of election officers.”⁸²

This view, adopted by both McCrary and the Minnesota Supreme Court, is what I have termed the doctrine of *constructive* compliance, a middle-ground position that is different from *strict* compliance on the one hand and *substantial* compliance on the other.⁸³ Strict compliance would invalidate a ballot even when official error is entirely responsible for the ballot’s deviation from state law. This arguably harsh position is the one adopted by the three-judge trial court in *Coleman v. Franken*. Substantial compliance would count a ballot even when the voter’s error is entirely responsible for the ballot’s deviation from state law. This position is the one that both Franken and Coleman advocated at

⁷⁵The details on this point are in Foley, *The Lake Wobegone Recount*, *supra* note 6, as well as in its electronic Appendix, available at <http://moritzlaw.osu.edu/electionlaw/docs/foley-eljapp.pdf>.

⁷⁶*Coleman v. Franken*, 767 N.W.2d 452 (Minn. 2008).

⁷⁷*Id.* at 462.

⁷⁸*Id.*

⁷⁹*See* Foley, *supra* note 6, at 30–31.

⁸⁰GEORGE MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS (4th ed. 1897).

⁸¹*Id.* at 522–23.

⁸²*Id.* at 523. There are modern cases, besides *Coleman v. Franken*, that accept the McCrary distinction between official and voter error in the context of absentee voting. For example, *Connolly v. Secretary of State*, 536 N.E.2d 1058 (1989), bears remarkable similarity to one aspect of *Coleman v. Franken*: officials mistakenly sent some voters the wrong absentee ballot forms to return. In this case, voters who were obligated to have their absentee ballot envelope witnessed, because they were neither overseas nor permanently disabled, erroneously received the special absentee ballot forms, which do not require a witness for voters in either of these two categories. Consequently, voters who should have had their ballots witnessed did not. The Massachusetts Supreme Judicial Court expressly held that these voters should be protected from this official error and thus their ballot should count. Relying upon earlier Massachusetts precedents to the same effect, the court confirmed “that a good faith voter should not be disenfranchised because of an error by election officials.” *Id.* at 1063. In the same case, however, the same court disqualified other absentee ballots, because with respect to these, the voters themselves had failed to supply required information (like their address or their signature). *See id.* at 1064.

⁸³A more detailed discussion of constructive compliance, and its distinction from the alternative doctrines of strict and substantial compliance, is contained in *The Lake Wobegone Recount* and especially its web-based Appendix (<http://moritzlaw.osu.edu/electionlaw/docs/foley-eljapp.pdf>).

various times during their eight-month-long dispute, when each was attempting to harvest more previously rejected absentee ballots. But this position was rejected by both the three-judge trial court and the Minnesota Supreme Court.

Constructive compliance carves out a space between the doctrines of strict and substantial compliance on the ground that voters *constructively* comply with state law when they take every step they can to cast their ballot properly but election officials have made a mistake that prevents them from doing so. In this circumstance, the doctrine of constructive compliance mandates the counting of this ballot. But when voters make the mistake that causes their ballots to be noncompliant, they have not constructively complied, and thus the doctrine of constructive compliance joins with strict compliance to reject the ballot in this circumstance.

B. The necessity of an impartial institution to choose & apply doctrine

We may assume that the Minnesota Supreme Court had the better view, by embracing the doctrine of constructive compliance, than the three-judge trial court. Even so, it does not follow that the trial court was unfair or unreasonable in its insistence on strict compliance.

At the time of the *Coleman v. Franken* trial, Minnesota law was far from crystal clear on whether the supreme court's position was open to the trial court. On the contrary, there was good reason for the trial court to believe that it was obligated to insist on strict compliance. Reaching back into history, one could find Minnesota precedent supporting the trial court's adherence to strict compliance, especially in the specific context of absentee ballots, and thus most directly applicable to the *Coleman v. Franken* dispute.⁸⁴ Moreover, from a national perspective, there was longstanding precedent to support either strict or constructive compliance, as McCrary's treatise itself acknowledged. Putting the point euphemistically, McCrary characterized the decisions on point as "not entirely harmonious."⁸⁵

More significantly still, as McCrary also acknowledged, there necessarily were situations in which the doctrine of constructive compliance must give way to strict compliance. In other words, even under the more voter-friendly view, there were circumstances in which official error could not be excused, despite the fact that voter disenfranchisement would be the

consequence. For example, if an official error caused a voter to cast a ballot after the statutory time for closing the polls, that official error still might be irremediable under state law.⁸⁶ In this situation, the priority of enforcing the mandatory poll-closing deadline would trump the goal of avoiding voter disenfranchisement induced by official error. (The same point might apply to the deadline by which absentee ballots must be received from the post office in order to count. It might be the post office's fault that these ballots arrive late, but state law still might require their rejection.)

Perhaps, then, the trial court in *Coleman v. Franken* rightly, or at least reasonably, thought that the voter's failure to register fell into this irremediable category. On this view, being registered was an absolutely essential prerequisite to being entitled to vote. Even if official error caused the particular voter's failure to register, there could be no avoiding the consequence of the voter's disenfranchisement: the ballot of an unregistered voter simply cannot count.

In cases where reasonable jurists can adopt opposite positions on such a basic point, it is of overriding importance that the tribunal that adjudicates the disputed election—especially one with the high stakes of *Coleman v. Franken*, or a presidential election—be constructed to be strictly impartial and unbiased. As long as the tribunal satisfies this institutional requirement, whatever substantive position it adopts concerning the applicable ballot-counting rule will qualify as meeting the essential standard of electoral fairness and legitimacy. After all, if it is debatable among reasonable observers as to what is the correct ballot-counting rule to apply, no individual observer holds some kind of higher ground

⁸⁴Bell v. Gannaway, 227 N.W.2d 797, 802–03 (1975); see also Wichelmann v. City of Glencoe, 273 N.W. 638, 640 (1937), and other cases cited therein.

⁸⁵See McGary, *supra* note 80, at 522. There are also modern precedents in states other than Minnesota that insist on strict compliance in the context of absentee voting, even in circumstances where official error caused the noncompliance. See, e.g., Mansfield v. McShurley, 911 N.E.2d 581 (Ind. Ct. App. 2009) (disqualifying absentee ballots not initialed by officials, as required, even though innocent voters would be disenfranchised); Horseman v. Keller, 841 N.E.2d 164 (Ind. 2006) (clerical error by officials can invalidate absentee ballot, even though it would not invalidate regular "polling place" ballot); Miller v. Picacho School Dist., 877 P.2d 277 (Ariz. 1994) (absentee ballots invalid if hand-delivered rather than mailed to voters by officials); see also Thompson v. Jones, 17 So.3d 524 (Miss. 2008) (absentee ballots without official witness signature must be discarded).

⁸⁶See McGary *supra* note 80, at 125–28.

from which they can claim greater objectivity. In the midst of any dispute over the counting of ballots in a high-stakes election, the perspective of any individual observer may be affected (however unwittingly) by a personal preference about which candidate prevails. This risk, of course, is especially great in a presidential election, when virtually every conscientious U.S. citizen feels a stake in the outcome of the dispute and has an opinion about it.

Thus, in the midst of a vote-counting dispute in a high-stakes election, it is futile to think it will be possible to discern the objectively correct vote-counting rule whenever the existing statutory law leaves room for reasonable debate on this point. Instead, the best that the legal system can do is to construct a fair tribunal that is balanced and impartial to both sides of the dispute in its membership. Then, whatever that fair tribunal decides on the relevant question of law should be accepted as correct for the purpose of resolving the particular case.

To be sure, it would be better if in advance of Election Day a state's statutory law was so abundantly clear that no reasonable person could debate what vote-counting rules require with respect to any factual issue that might arise concerning any ballot cast in a high-stakes election. But as *Coleman v. Franken* abundantly demonstrates, the expectation that a state could meet this standard would itself be unreasonable. Even Minnesota, which in comparison to other states had a relatively clear elections code and a relatively well-run system of election administration, could not avoid all ambiguities regarding the applicable vote-counting rules in *Coleman v. Franken*. In particular, it was unable to avoid ambiguity on the basic question of whether strict or constructive compliance was the governing standard for disputes over particular ballots.

Indeed, given the state of relevant Minnesota precedents at the time *Coleman v. Franken* commenced, it would not have been unreasonable for the three-judge trial court to adopt even the substantial compliance standard, rather than either strict or constructive compliance. Moreover, reliance on McCrary's treatise would have provided some support for that position. Although McCrary preferred constructive compliance, his treatise's survey of nineteenth-century precedents revealed considerable, if not majority, support for the more lenient doctrine of substantial compliance. That support had been growing steadily in the twentieth century, including in Minnesota.⁸⁷ Therefore, by the time

of *Coleman v. Franken*, a reasonable case could be made—as it was by both Franken and Coleman at various times—that the right position even for absentee ballots under Minnesota law was the voter-friendly doctrine of substantial compliance.

Thus, the judiciary in *Coleman v. Franken* faced a genuinely open choice among the three basic positions of strict, constructive, and substantial compliance. Any of these choices would have been reasonable under Minnesota law at the time. In this circumstance, then, what mattered was that the tribunal that made this choice was balanced and fair to both sides—not that its choice could somehow be proven objectively correct.

Moreover, the fact that the Minnesota Supreme Court made a different choice from the three-judge trial court does not justify the time-consuming appeal in *Coleman v. Franken*. Rather, it falls in the category of two equally fair tribunals reaching opposite conclusions on a point of law over which they could reasonably differ, although in this case their divergence did not matter to the bottom-line outcome of which candidate won the election. Even if one might find the Minnesota Supreme Court's opinion a preferable treatment of the same issue, the three-judge trial court's handling of the case was sufficiently fair to resolve the disputed election.

C. Implications for Hasen's "Democracy Canon" thesis

The foregoing analysis concerning the relationship of strict, constructive, and substantial compliance—and the priority of securing a fair tribunal over the choosing of the ideal vote-counting rule—requires some rethinking of the so-called "Democracy Canon" recently advocated by Professor Richard Hasen.⁸⁸ This canon of statutory construction, which calls upon judges to interpret election laws with the goal of enfranchising voters, embraces the doctrine of substantial compliance.⁸⁹

⁸⁷Other state supreme courts have ordered the counting of absentee ballots with comparable deficiencies under state law, although not in the context of a high-stakes election like one for U.S. Senator. See, e.g., *Colten v. City of Haverhill*, 564 N.E.2d 987, 988 (1991) (city council election in town of about 50,000 in population).

⁸⁸See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

⁸⁹As Hasen himself put it, judges should engage in "statutory analysis with a thumb on the scale in favor of voter enfranchisement." *Id.* at 71 (emphasis in the original).

Hasen argues that this canon has a longstanding historical pedigree going “back to at least 1885.”⁹⁰ But the debate in Minnesota among which of the three alternative positions to adopt, as well as a strong historical pedigree supporting all three positions, means that Hasen’s Democracy Canon cannot claim normative or historical supremacy without at least considerable further analysis.

First of all, at a minimum, the McCrary position, as echoed by the Minnesota Supreme Court, shows that the Democracy Canon needs a more nuanced elaboration. It is not entirely accurate in terms of nineteenth-century precedents to say that they collectively support the “substantial compliance” position, which is how Professor Hasen essentially describes it. Instead, if the McCrary treatise is accurate, and there is no reason to think that it is not, the constructive compliance view—which excuses official but not voter error—was the historically predominant one.⁹¹

Additionally, there have been forceful arguments *against* adoption of the Democracy Canon going all the way back to 1792. As I have detailed elsewhere,⁹² that year involved the disputed gubernatorial election in New York, with John Jay challenging the incumbent George Clinton. The dispute concerned the transmission of one local county’s ballots to the Secretary of State in violation of statutory rules that required delivery by the local sheriff rather than other local officials. Supporters of Jay, who would have won if these ballots had been counted, advocated for an early version of the so-called Democracy Canon. Claiming that the statutory violation was a mere technicality, the enforcement of which would wrongly disenfranchise innocent voters, Jay’s friends urged for construing the law liberally to protect the constitutional right to vote. But on the other side were Clinton’s advocates, including Aaron Burr and the then-current U.S. Attorney General Edmund Randolph, who argued strenuously for a strict construction of the ballot delivery statute on the ground that it was designed to protect against ballot-tampering and electoral fraud. The authoritative body in the state, the legislative Canvassing Committee, expressly adopted the strict construction argument, rejecting the Democracy Canon position embraced by the dissenting Canvassers.⁹³

Whichever side was right or wrong in this early New York dispute, the key point here is that there will always be arguments on both sides of the “Democracy Canon” versus “strict construction” debate.⁹⁴ In *Coleman v. Franken*, Coleman hap-

pened to take the Democracy Canon position, with Franken echoing Aaron Burr in favor of strict construction. Unless it is open-and-shut in the particular

⁹⁰*Id.*

⁹¹As a technical proposition, it would be useful to distinguish analytically between the Democracy Canon as a principle for the *interpretation* of electoral statutes and the “substantial compliance” doctrine as a second-order rule concerning the *enforcement* of primary rules governing the voting process. Confined as solely an interpretative principle, the Democracy Canon would entail simply that, when an electoral statute is susceptible to multiple interpretations, courts should favor the interpretation that promotes rather than restricts voting rights. Insofar as an electoral statute was unambiguous, however, the Democracy Canon would not apply, even if the consequence of the unambiguous statute were to restrict voting rights. Understood this way, the Democracy Canon question—whether or not the statutory law is ambiguous—would need to be asked both with respect to the relevant primary rule and the possible second-rules for enforcing it. A state’s election code, for example, may be unambiguous in requiring an absentee voter to be registered yet not entirely clear with respect to the second-order enforcement issue of whether an absentee ballot must be invalidated if the reason for the voter’s non-registration is official obstruction. This analytical clarity would permit the Democracy Canon, as a purely interpretative principle, to coexist with the McCrary “constructive compliance” doctrine as the default judicial rule in the event of statutory ambiguity concerning what second-order enforcement rule to apply. Regrettably, however, Hasen’s own account of the Democracy Canon does not contain this distinction, as he repeatedly characterizes the “substantial compliance” doctrine (which excuses voter as well as official error) as an element of the Democracy Canon. *See, e.g., id.* at 76 n. 24 (“These [interpretative principles associated with the Democracy Canon] are sometimes stated in terms of accepting ‘substantial compliance’ with election laws rather than strict compliance, or that election laws are ‘directory’ (or advisory) only rather than mandatory.”); *see also id.* at 120–21 (characterizing the Alabama judiciary’s adoption of the “substantial compliance” doctrine as part of the Democracy Canon).

Furthermore, if the McCrary “constructive compliance” doctrine is understood, not as a canon of *interpretation*, but instead as a second-order *enforcement* rule having at least quasi-constitutional status (because it protects the right to vote from official disenfranchisement), then this understanding of the doctrine would explain—much better than Hasen’s canon-based account—precedents that invoke the “constructive compliance” principle to defeat even unambiguous statutes that conflict with this principle. *See, e.g., id.* at 88 (discussing Missouri case that reached this result).

⁹²Edward B. Foley, *The Founders’ Bush v. Gore: The 1792 Election Dispute and Its Continuing Relevance*, 44 *INDIANA L. REV.* 23 (2010).

⁹³*Id.*

⁹⁴Other recent precedents (besides those in note 85, *supra*), demanding strict compliance in the context of absentee voting include *Willis v. Crumbly*, 268 S.W.3d 288 (2007); *In re Canvass of Absentee Ballots*, 577 Pa. 231 (2004); *see also Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251 (2004) (absentee ballots void when sent to voters who did not request them); *Womack v. Foster*, 8 S.W.3d 854 (Ark. 2000) (absentee ballots void if no stated reason for voting absentee).

state regarding which side has already won this debate—and it almost never is—the adjudicatory tribunal necessarily will be favoring one candidate (and one political party) by adopting either the Democracy Canon or strict construction.⁹⁵ Both sides will be able to muster historical precedents to support their position, and indeed *Coleman v. Franken* will now be invoked as an important authority in support of the strict construction side of this debate.⁹⁶

Thus, contrary to Hasen’s suggestion, history does not point entirely in one direction. For this reason, the McCrary constructive compliance position can be viewed as an attractive middle ground, which may help explain why it has a leading claim to historical superiority. The future may be served best if *Coleman v. Franken* is viewed as a support for this middle ground, rather than favoring the strict construction side of a rigid dichotomy. But still, given the plausibility of contending alternatives, any future interpretation of where *Coleman v. Franken* stands within

this historical debate should be rendered by a tribunal that is as transparently impartial as was the three-judge trial court that decided *Coleman v. Franken*.

Moreover, and perhaps more important, the cliché about the devil being in the details is apt here. It matters much less which general position a court takes—substantial, constructive, or strict compliance—and much more how the court views the particular statutory rules and the relevant facts in front of it. A court invoking strict compliance might nonetheless excuse some missing details of an address on an absentee ballot envelope, accepting “175 Elm” for “175 Elm Street” perhaps, whereas a court invoking substantial compliance might not excuse an address that lacks both a city and a zip code.⁹⁷

Additionally, it is not always clear how to apply the McCrary middle ground: how would it apply, for example, to New York’s ballot transmission law of 1792? It was official, not voter, error that caused the ballots to be delivered in violation of the statutory

⁹⁵In this respect, my argument here echoes one point made by Chris Elmendorf in his critique of Hasen’s Democracy Canon. See Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051 (2010). For Hasen’s reply to Elmendorf, see Richard L. Hasen, *The Benefits of the Democracy Canon and the Virtues of Simplicity: A Reply to Professor Elmendorf*, 95 CORNELL L. REV. 1173 (2010). (I should note that on other issues in dispute between Hasen and Elmendorf, I take no position here—except that I am skeptical of Elmendorf’s more complicated “Effective Accountability Canon” for reasons that Hasen himself elaborates.)

⁹⁶A recent Ohio Supreme Court decision concerning provisional ballots adopted a strict compliance position, rejecting the “substantial compliance” argument favored by Secretary of State Brunner and the Democratic Party there. *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 900 N.E.2d 982 (2008). Although Hasen cites two other recent Ohio Supreme Court decisions as supporting the Democracy Canon, this decision rejected its applicability to the interpretation of Ohio’s statute involving provisional voting (despite that statute’s mind-numbing and nonsensical complexity, as the court itself acknowledged). The *Skaggs* ruling is also inconsistent with a 1991 decision from the same court, which permitted the counting of absentee ballots despite lacking a required signature on the ballot application. Still, *Skaggs* is defensible in rejecting the “substantial compliance” argument in that case. As Hasen himself acknowledges, there is reason to be concerned about the applicability of the Democracy Canon where its use would seem to distort a statutory scheme for how to decide which questionable ballots to count. In this context, adherence to settled expectations (whatever they might be) is a higher interpretive priority than voter enfranchisement. Nonetheless, it is significant to note that the Ohio Supreme Court’s insistence

on strict compliance in *Skaggs* reached the opposite result on the identical issue in the same case initially rendered by a federal district judge, before the federal appeals court ordered the case removed to state court. *State ex rel. Skaggs v. Brunner*, 588 F.Supp.2d 828 (S.D. Ohio 2008). The federal district judge was a Democrat, whereas the Ohio Supreme Court was all-Republican. The federal district judge’s ruling favored the Democratic candidate for Congress, whereas the Ohio Supreme Court’s ruling favored the Republican candidate. While it is possible that partisanship affected neither court’s rulings, the apparent coincidence is unsettling. Either judicial ruling would have been more palatable if rendered by a demonstrably nonpartisan tribunal.

⁹⁷A recent article on how the issues in *Coleman v. Franken* might apply in Missouri makes this same point. See Matthew W. Potter, *Confusion in the Minnesota Senate Election: Could It Happen in Missouri?*, 65 J. OF THE MO. B. 269 (2009). The author observes that Missouri case law is entirely unclear on when it will insist on strict compliance with the state’s absentee voting rules, compared to when it will accept substantial compliance. (Missouri law, like many other states, uses the terms “mandatory” and “directory” to make this distinction.) The Missouri judiciary itself has acknowledged this uncertainty: “[W]hether a statute is mandatory or merely directory is not always clear.... Thus no hard and fast test can be applied by which the question may be resolved.” *Elliot v. Hogan*, 315 S.W.2d 840, 846 (Mo. App. E.D. 1958). Consequently, unless Missouri takes steps to resolve this problem, in a high-stakes election with a razor-thin outcome that depends on the eligibility of disputed absentee ballots, the state’s judiciary will be susceptible to the charge that it decides whether to enforce or excuse compliance with an absentee voting requirement depending on the partisan basis of which candidate its ruling will help.

requirement that the county's sheriff be the one to take this responsibility. Obviously, it is undesirable if voters suffer—their ballots are discarded—because of this official mistake. On the other hand, however, if the delivery rule really does protect against the risk of ballot-tampering, to ignore a breach of the rule would be to invite the evil of stolen elections. How to weigh the one against the other, particularly in the context of a specific dispute over which candidate won the governorship?

Ultimately, whether the tribunal's ruling will be perceived as fair and legitimate will depend on the bottom-line result in the case, not on what generic doctrine the tribunal uses to reach it. One candidate will win and the other will lose, and because of that inevitability, it matters most that the tribunal be genuinely neutral between the two—and perceived as such by the public. If that reality and perception of impartiality is secured, which generic doctrine the tribunal employs (substantial, constructive, or strict compliance) is secondary to the result's ultimate fairness, legitimacy, and acceptability.

III. FEDERAL SUPERVISION OF STATE VOTE-COUNTING

Thus far, for the most part, we have addressed matters of state law: a state's institutions, procedures, and substantive rules for counting ballots and resolving disputes over this vote-counting. The primary lessons of *Coleman v. Franken* concern these state law topics. Moreover, the dispute over Minnesota's 2008 U.S. Senate election managed to avoid the federal institutions that might have become involved: either the federal judiciary or the U.S. Senate.

Still, *Coleman v. Franken* teaches us something about the role that federal law plays in the operation of a state's vote-counting processes. For one thing, federal Equal Protection law figured prominently in litigation of *Coleman v. Franken*, even though both the three-judge trial court and the Minnesota Supreme Court determined that no Equal Protection violation had occurred. In addition, a major reason why Minnesota was able to avoid the involvement of federal courts or the U.S. Senate was the perceived fairness with which Minnesota's own institutions were handling the situation. That fact is itself a significant lesson of "The Lake Wobegone Recount,"

with its overall "pretty good" or "above average" performance.⁹⁸

A. The future of *Bush v. Gore* after *Coleman v. Franken*

Coleman v. Franken, once ended, immediately became the most significant decision since *Bush v. Gore* on the applicability of federal Equal Protection to vote-counting disputes. *Bush v. Gore* was itself notoriously vague on this point, and thus the hope was that *Coleman v. Franken* would clarify this area of law.⁹⁹ Indeed, the conventional wisdom was that *Coleman v. Franken* showed that it would be impossible to win an Equal Protection claim on the ground that some ballots were counted in violation of state law and therefore other similarly invalid ballots, which had been properly rejected, should now be counted as well.

This conventional wisdom, however, has been upended by an important new Sixth Circuit precedent, *Hunter v. Hamilton County Board of Elections*,¹⁰⁰ which now competes with *Coleman v. Franken* for the status of being the most significant implementation of the Equal Protection ruling in *Bush v. Gore*. This Article is not the place to detail the facts and reasoning of *Hunter*.¹⁰¹ It is enough to say that *Hunter*, like *Coleman*, involved a situation in which some ballots had been counted in violation of state law, but other comparable ballots had not been counted.¹⁰² Yet, unlike in *Coleman*, the court in *Hunter* ruled that this differential treatment of

⁹⁸See Foley, *supra* note 4, at 1.

⁹⁹Before *Coleman v. Franken*, I analyzed at length how best to understand the Equal Protection ruling in *Bush v. Gore*. See Edward B. Foley, *The Future of Bush v. Gore*, 68 OHIO ST. L.J. 925 (2007); Edward B. Foley, *Refining the Bush v. Gore Taxonomy*, 68 OHIO ST. L.J. 1035 (2007); see also Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007 (2007).

¹⁰⁰635 F.3d 219 (6th Cir. 2011).

¹⁰¹For a thorough discussion of *Hunter* and its relationship to *Coleman v. Franken*, see Owen Wolfe, *Is Intent to Discriminate Required in Bush v. Gore Cases?*, available at http://moritzlaw.osu.edu/electionlaw/docs/110413_wolfe.pdf.

¹⁰²*Hunter* involved provisional rather than absentee ballots. Specifically, it involved the circumstance in which ballots were cast in the wrong precinct because of poll worker error. State law explicitly prohibited the counting of any ballots cast in the wrong precinct, but local election officials decided to count some "wrong precinct" ballots cast at the election board's headquarters because the board's own workers were responsible for these mistakes. For further details in this technically complex case, see Wolfe, *supra* n. 101.

similarly invalid ballots violated federal Equal Protection because it was “arbitrary,” without any justification or explanation.¹⁰³

There is obvious tension between the Equal Protection reasoning of *Coleman* and *Hunter*, which only the U.S. Supreme Court can resolve. In the meantime, lawyers are likely to focus on the “arbitrariness” standard articulated in *Hunter*. When a dispute arises over the outcome of an election, and it turns out that some similar ballots have been counted whereas others have not, one side will argue that this differential treatment of similar ballots is “arbitrary,” while the other side will attempt to defend it as not “arbitrary.” *Coleman v. Franken* will come to be cited as an example of a case where the differential treatment of similar ballots satisfied a non-arbitrariness standard. But, as long as *Hunter* remains good law, *Coleman* will not be a sufficient basis for deflecting an arbitrariness inquiry altogether (on the ground that the clarity of the relevant state statute, without more, is enough to defeat an Equal Protection claim arising from the violation of that state statute).¹⁰⁴

The prospects for this kind of case-by-case litigation on the “arbitrariness” issue—that is, in the context of the particular facts of each disputed election, whether the differential treatment of similar ballots is “arbitrary” or not—is inauspicious. The reason for this pessimism is that this “arbitrariness” standard is inherently vague. A finding of arbitrariness, or not, on the facts of each case is likely to be affected by an individual’s political perspective. Indeed, in *Hunter* itself, there was a partisan tinge to the Sixth Circuit’s ruling, which was a 2-1 split on the arbitrariness issue. The two judges in the majority were both Democratic appointees, and their finding of arbitrariness on the facts of that case was a judicial victory for the Democratic candidate involved in that particular ballot-counting dispute. Conversely, the one Republican appointee on the Sixth Circuit panel did not find the differential treatment of ballots to be arbitrary—a view which supported the position of the Republican candidate in that case.¹⁰⁵

Since arbitrariness is inevitably in the eye of the beholder, it is all the more imperative that the tribunal with the ultimate authority to adjudicate the arbitrariness issue is structured to be evenly balanced and impartial to both sides of the ballot-counting dispute. For this reason, in future cases it should be built into the Equal Protection analysis

expressly that, as long as the tribunal that resolves the dispute under state law is balanced and impartial in this way (as I have described the model SERT to be), then no federal court should second-guess the state tribunal’s decision on grounds of arbitrariness. There is no reason a single federal judge, or a three-judge federal appellate panel, or even the U.S. Supreme Court itself, should think that it is in a better position to address the arbitrariness issue than a state tribunal that (like the model SERT) is structured so that it is maximally fair to both sides.

The state proceedings in *Hunter* lacked any such fair tribunal, and therefore it was not inappropriate for the Sixth Circuit to adjudicate the arbitrariness issue in that context. But the three-judge trial court in *Coleman v. Franken* was structured to be balanced and impartial towards both sides and thus was maximally fair in the requisite way. The Minnesota Supreme Court’s unanimous affirmance of the trial court’s own unanimous rejection of *Coleman*’s Equal Protection claim hardly undercut the inherent fairness of this decision. Thus, insofar as Minnesota’s judiciary in *Coleman v. Franken* implicitly found that the local election officials had not been arbitrary in their differential treatment of absentee ballots, it would have been inappropriate for the federal

¹⁰³635 F.3d at 234 (viewing “arbitrary” differentiation among equivalent ballots as the essence of the Equal Protection holding of *Bush v. Gore*); *id.* at 242 (“The Board arbitrarily treated one set of provisional ballots differently from others, and that unequal treatment violates the Equal Protection Clause.”).

¹⁰⁴The Minnesota Supreme Court did hint that something like the Sixth Circuit’s arbitrariness inquiry was affecting its own analysis in *Coleman v. Franken*, but the Minnesota Supreme Court never explicitly developed this point in the way that the Sixth Circuit did. The Minnesota Supreme Court observed that “differences in available resources, personnel, procedures, and technology necessarily affected the procedures used by local election officials in reviewing absentee ballots,” leaving implicit the notion that these differences were justified and thus non-arbitrary. *Coleman v. Franken*, 767 N.W.2d 452, 466 (2009). After the Sixth Circuit’s decision in *Hunter*, one would expect much more explicit attention to the question of arbitrariness than was devoted by the lawyers and judges in *Coleman v. Franken*.

¹⁰⁵See 635 F.3d at 248. The partisan divide among the three Sixth Circuit judges in *Hunter*, moreover, tracked a similar divide among other officials involved in the case. For example, the outgoing Secretary of State, a Democrat, ruled in favor of the Democratic candidate, whereas the incoming Secretary of State, a Republican, immediately reversed that decision, siding instead with the Republican candidate. See Sharon Coolidge, *New secretary of state: Don’t count provisional ballots in contested vote*, CINCINNATI ENQUIRER (Jan. 11, 2011) (available on Lexis).

judiciary to second-guess this determination of non-arbitrariness. The inherent fairness of the state's proceedings should have insulated it from any further federal judicial review.

B. The absence of federal interference when the state is fair

At the time of *Coleman v. Franken*, neither substantive Fourteenth Amendment law nor the political question doctrine (or other procedural rule) foreclosed the possibility that a federal court might review the merits of the state-court rulings on whether or not to count particular ballots in that case.¹⁰⁶ And, of course, the U.S. Senate had the constitutional authority to overturn the state judiciary's certification of electoral victory. But neither form of federal review was invoked.

Although there was no formal barrier to federal intervention, none occurred in large part because the state's institutions were perceived to be fair in their treatment of both sides. To be sure, the fact that the Democrats controlled the U.S. Senate in 2009 would have made it difficult for Coleman to go there to overturn the state's final certification of Franken's victory even if it were perceived that the state had been biased in favor of Franken. But consider what would have happened if a fair tribunal in the state had awarded the election to Coleman, and the Democrats in the Senate had been tempted to overturn that fair result from purely partisan motives. Or, conversely, imagine that the Senate had been controlled by Republicans at the time and had attempted, for purely partisan reasons, to overturn the fair victory that Franken actually received from the state's proceedings.

My conjecture is that, in either of these imaginary scenarios, the very fairness of the state's proceedings would have restrained these partisan temptations. U.S. history is littered with examples in which partisanship at the federal level acts to undo partisanship for the other side at the state level. Most famously, the 8-7 partisan vote of the federal Electoral Commission that awarded the 1876 presidential election to Hayes counteracted anti-Reconstruction efforts among Democrats in the South to give the election to Tilden.¹⁰⁷ Similarly, the 5-4 decision of the U.S. Supreme Court in *Bush v. Gore*, which was perceived by many as partisan, was surely motivated by a desire to undo the 4-3 ruling in the same case by the Florida

Supreme Court, which just as equally was susceptible to the perception of partisanship.

To take an example from a U.S. Senate election, the stalemate over the outcome of New Hampshire's senatorial vote in 1974 fits this pattern. A state tribunal controlled by Republicans, after a series of controversial rulings on specific disputed ballots, declared the Republican candidate the winner by just two votes. The Democrats held the majority in the U.S. Senate at the time, and they used this power to insist on a new election.¹⁰⁸

The upshot of all these examples, as well as others that could have been added, seems to be that federal institutions will feel unconstrained to act in a partisan manner in response to partisanship that taints how state institutions perform their own role in the resolution of ballot-counting disputes. "Fight fire with fire" seems to be the mantra of the party that dominates the federal forum at the time. But what if the state institutions do not play with fire in the first place? What if the state actually adjudicates the vote-counting dispute with a procedure that is transparently fair to both sides and equally so? In this situation, would the party that controls the ultimately authoritative federal institution still feel free to decide the outcome of the election based on partisan considerations?

Coleman v. Franken may be the first major disputed election to raise these sorts of questions. It is the first either presidential or U.S. Senate election involving a major dispute over the counting of

¹⁰⁶Had Coleman attempted to take these issues to federal district court in an entirely new lawsuit, after his loss in the Minnesota Supreme Court, it is possible that he would have faced procedural obstacles based on the timing of his lawsuit, or on grounds of *res judicata* (the doctrine that courts will not relitigate disputes already adjudicated between the same parties). But these tentative and conditional rules of procedure are not as robust in their preclusive effect as the political question doctrine. For example, Republican supporters of Coleman might have been able to file a parallel Fourteenth Amendment lawsuit in federal district court simply by making the plaintiffs of the new lawsuit, not Coleman himself, but individual voters specifically aggrieved by the alleged Equal Protection violation. In any event, complete federal court review was not foreclosed in *Coleman v. Franken* for the simple reason that Coleman had a right to take his Equal Protection claim directly to the U.S. Supreme Court (in a conventional petition for writ of certiorari to review the Minnesota Supreme Court's decision), however unlikely it was that the Court would consider that claim after its unanimous rejection by eight Minnesota judges.

¹⁰⁷See Colvin & Foley, *supra* note 24, at 511-12.

¹⁰⁸See DONALD TIBBETTS, *THE CLOSEST U.S. SENATE RACE IN HISTORY*, *Durkin v. Wyman* (1976).

ballots where the state has empowered inherently balanced and impartial tribunals to resolve the dispute. The fact that there was no serious effort to find a federal institution to overturn the state's fair proceedings, based on partisanship, is at least suggestive. The embarrassment of a transparently partisan repudiation at the federal level of a transparently nonpartisan adjudication at the state level may be too much even for the most rabid of partisans. Admittedly, however, a sample size of one does not inspire much confidence in this conjecture.

But there is a way to turn this point around. If one thinks that a federal institution controlled by partisanship likely would indeed overturn a state's adjudication of a vote-counting dispute even when the state has been as nonpartisan and evenhanded as possible in its own proceedings, then one should be very troubled by the existing nature of our federal institutions. It would not be a pretty sight to see a partisan U.S. Senate overturn a state's proceedings as fair as those used by Minnesota for its 2008 election. Even worse would be if Congress, out of partisanship, overturned a presidential election that had been resolved fairly in the "swing state" where a significant dispute over the counting of ballots for presidential electors had occurred.

To avoid any possibility of such ugliness, it would be desirable if new federal institutions could be created to guarantee nonpartisanship and evenhandedness at the federal level, to be ready whenever the next major dispute over a U.S. Senate or presidential election arises. But, in the absence of a constitutional amendment, such institutions must be merely advisory to the powers that currently exist in the U.S. Senate (for an election of a Senator) or in Congress more generally (for a presidential election). At most, with respect to a disputed presidential election, a new federal institution structured to be maximally fair to both sides, could play the role of a statutory tiebreaker in the event that the two Houses of Congress were split on the outcome (presumably based on their opposite partisan motivations, as in 1877).

In any event, given the relatively remote possibility that new nonpartisan and evenhanded federal institutions will be in place when the next disputed U.S. Senate or presidential election occurs, I would prefer to hope that my conjecture is correct. In other words, the hope is that, at least if a state adopts a maximally fair process for resolving this kind of dispute, the existing federal institutions will not

act based on partisanship to overturn the result of that maximally fair process. Insofar as Minnesota's experience in resolving its disputed 2008 U.S. Senate election gives us any basis for this hope, this additional lesson from *Coleman v. Franken* is a somewhat comforting one.

CONCLUSION

Al Gore and Norm Coleman were both widely perceived as gracious when they each eventually gave their respective concession speeches. Both concession speeches, moreover, helped bring closure to these two ballot-counting battles, which had provoked such passion among partisans on each side. It is often observed that the United States is fortunate that we can settle these ballot-counting disputes peaceably, under the rule of law, rather than with the force of arms. The gracious acceptance by the losing candidate of the ultimate official result helps achieve this peaceable outcome.

Nonetheless, there is a difference between Gore's concession and Coleman's. Gore and his supporters did not accept the fairness of *Bush v. Gore*, just its legality. Coleman and his team, by contrast, while they did not like the outcome and even may have sincerely thought that their side should have prevailed on the merits of their case, recognized the essential nonpartisan fairness of the proceedings that yielded the opposite conclusion. As one of Coleman's attorneys stated publicly: "The bottom line is, as much as it pains me to say it, [Minnesota] probably did this as well as it could be done."¹⁰⁹

This difference is hugely significant. Because only one candidate can win the election, only one side can be happy at the end of a fiercely fought dispute over the counting of ballots in a major statewide race where the outcome will be decided by less than 1,000 votes. But *Coleman v. Franken* proves that the losing side, even while understandably unhappy, can accept the full legitimacy of the outcome, and not just its legality, because of the equally balanced and impartial procedures that produced the result.

¹⁰⁹Jim Ragsdale, *Overtime: Chapter 4: In Minnesota's Coleman vs. Franken U.S. Senate race, the system worked. But here's how to make it better*. Pioneer Press, September 24, 2009.

No higher standard can be expected of the way in which a major disputed election is ultimately resolved. Minnesota's "Lake Wobegone Recount" was able to meet this standard. The presidential election of 2000 was not.

The goal of this article has been to show how in the future other major disputed elections, especially another disputed presidential election, could be able to satisfy this same highest standard of legitimacy. The next time, whenever it may occur, the context of the ultimate concession speech in a disputed presidential election should look more like Coleman's than like Gore's. But for that to happen, it is not enough simply to replicate the success of the Lake Wobegone Recount. Coleman's concession came six months too late for that.

Consequently, this Article has developed a method so that the right kind of concession can occur in the right kind of timeframe. This method has several crucial components. Above all, it requires that the state in which the dispute occurs place the authority for resolving this dispute in a structurally fair tribunal that is evenly balanced and impartial to both sides. It also requires a carefully constructed schedule whereby this tribunal

can complete its work by early January, which in turn requires coordination of recounting and canvassing procedures in the way I have described. Finally, if a state puts in place this kind of tribunal, with this kind of schedule, then no federal institution should interfere with the fair and timely outcome the state is able to achieve.

If all of these conditions are met, then the next disputed presidential election would be as successful in its resolution as the Lake Wobegone Recount. That circumstance would be the best that the nation could hope for, given the existence of the dispute in the first place. The sense of full legitimacy that this method of resolution entails would certainly be preferable to the way 2000 ended.

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To: *ALI Election Law Project*
From: Steven Huefner, Associate Reporter
Date: Sept. 19, 2011
Re: Additional Materials for First Meeting (October 2011)

Non-Precinct Voting

The second component of the ALI Election Law project involves “non-precinct voting.” The scope of this component of the project potentially includes several categories of election reforms, all intended by their proponents to at least make ballot casting more convenient, and perhaps to also increase voter turnout. (ALI anticipates remaining agnostic with respect to the basic legislative policy decisions about whether a state should adopt non-precinct voting options, and instead to limit itself to proposing principles for the optimal means of implementing these options in states that have chosen to do so.) These non-precinct voting options include: (1) open (or no-excuse) absentee voting; (2) early voting; (3) Election Day voting supercenters; and (4) voting entirely by mail. (Internet voting, another potential type of non-precinct voting, is not within the anticipated scope of the present project.)

Open absentee voting allows any registered voter to use an absentee ballot without providing a reason (in contrast to traditional absentee voting, which has been available only to voters who asserted that they could not get to their polling place on Election Day). Early voting allows voters to visit designated polling locations in the days (or weeks) before Election Day to cast their vote in person under the supervision of election officials. Voting supercenters permit some voters, especially in large metropolitan areas, to cast a ballot on Election Day in alternative locations, typically convenient to their workplace, without having to return to their home precinct. Voting entirely by mail involves sending a paper ballot to all voters, who in lieu of voting at a polling place then return their voted ballots by mail (like an absentee ballot).

Only two states, Washington and Oregon, currently conduct voting entirely by mail. Voting supercenters similarly have so far been deployed in only a handful of locations. However, both open absentee voting and early voting already have been adopted in more than half the states, with a substantial majority of these adoptions occurring in just the past decade. These two predominant and increasingly widespread types of convenience voting will be the initial focus of this component of the Principles of Election Law project.

Although the rise of these alternatives to traditional voting certainly promises additional convenience to voters, it also raises a variety of issues that should be considered in promoting fair, reliable, and efficient elections. The outline below introduces some of these issues and invites discussion about how states might best implement open absentee voting, early voting, or both options together. Indeed, it is worth noting that, of the twenty-seven states with open absentee voting today, all but one (New Jersey) also have some version of early voting (while an additional six states have only early voting without open absentee voting). But although some overlap may exist in the considerations relevant to both of these forms of convenience voting, the outline below approaches these two alternatives independently.

The outline is intended as an overview of the topic and a starting point for discussion, rather than an effort to develop specific and comprehensive statements of principle at this stage. Many discussion items are presented for consideration as normative statements, but some merely describe an issue for the Project to consider. Because it likely will be difficult to discuss all of the outlined considerations at the first meeting, the hope is to use the time available primarily to raise issues and identify priorities. To help facilitate this first discussion, the outline is accompanied by a separate appendix that describes absentee voting issues at stake in the 2008 Minnesota Senate election contest. The appendix explores in greater detail how deficiencies in the absentee voting process can affect election integrity, and what lessons should be learned from the Minnesota contest and other recent experiences.

I. Open Absentee Voting

A. Registration/Eligibility.

1. Although “open” or no-excuse absentee voting, by definition, permits all eligible voters at a particular election to use a jurisdiction’s absentee voting process, certain additional prerequisites may still exist in the form of registration and identification requirements. These should be no more burdensome than necessary to ensure the efficient processing of absentee ballots and reasonably minimize the risk of voting fraud.
2. States should carefully consider whether on balance it is worth allowing simultaneous voter registration and absentee voting, or whether absentee voting should be limited to voters already registered. States that choose to allow simultaneous voter registration and absentee voting should adopt safeguards to ensure that absentee voters become properly registered.

B. Obtaining Absentee Ballots.

1. A state choosing to adopt open absentee balloting still needs to decide how easy to make the process of applying for an absentee ballot. One key question is whether to provide an application to all registered voters automatically, or instead to require an individual voter to make a personal request.
2. Another question is whether to permit third parties to prepare and distribute their own versions of absentee ballot applications, or to require voters to use only official forms.
3. States also must decide which third parties (if any) – e.g., relatives, friends, voter assistance groups – may collect and return absentee ballot applications.

4. A voter should be able to apply for an absentee ballot either in person, by mail, or electronically, as the voter chooses.
5. A voter should be able to request an absentee ballot as early as [twelve?] months before a regularly scheduled general election, as early as [six?] months before a regularly scheduled primary election, and as late as [the day before the election itself?].
6. A request for an absentee ballot for a primary election should also be treated as a request for an absentee ballot for the associated general election to follow.
7. A request for an absentee ballot for an election should also be treated as a request for an absentee ballot for any runoff election necessary to conclude the election.
8. A voter should be able to make a standing request for absentee ballots for all future elections (“permanent absentee voter” status).
9. Boards of Elections must be able to provide an absentee ballot and accompanying voting materials (including transmission envelopes) to voters electronically, either by email or secure Internet site. Absentee voters should be allowed to choose whether to receive their ballots electronically or by regular mail.
10. For a regularly scheduled election, absentee ballots should be available for distribution 45 days before Election Day. For a special election, absentee ballots should be available for distribution as soon as practicable after the matters to be contested are fixed.

C. Voting and Returning Absentee Ballots.

1. Absentee ballots should be returnable either by mail or in person, as chosen by the voter.
2. In lieu of notarization or witness requirements, absentee ballots should be accompanied by the voter’s sworn declaration.
3. Identification and authentication requirements should be sufficient to verify the eligibility of the voter, but should not impose unnecessary burdens. For first-time voters, the identification requirements of HAVA section 303(b) should presumptively be sufficient.
4. The Project may wish to consider how to invite or permit the integration of new technologies, for instance digital photographs, particularly into the identification and authentication process.

5. To be valid, an absentee ballot either must be received by the appropriate elections official by the close of the polls on Election Day; or must bear a postmark or its equivalent showing its mailing by 12:01 a.m. (measured by local time at the place where the voter completes it) on Election Day and be delivered to the designated elections office by the close of business on the [3rd?] business day after the election. (Note that overseas and military voters are subject to more lenient standards under provisions of federal law and under UMOVA, the uniform state law adopted by the Uniform Law Commission in 2010.)
6. Election officials should develop electronic voter information guides to assist absentee voters in casting their ballots.

D. Counting Absentee Ballots.

1. States should consider centralizing the process of collecting and counting absentee ballots. The value of increased standardization that this would produce likely outweighs any additional costs of removing this duty from local poll workers. Absentee ballot counting boards might still be staffed with volunteer poll workers, who should receive special training in processing absentee ballots.
2. Chain of custody rules for processing, counting, and preserving absentee ballots should be clear and easy to administer.
3. As a method of authenticating absentee voters, states should consider alternatives to the highly subject process of signature matching. For instance, alternatives could include a state assigned voter ID code, or the use of voters' digital photos.
4. The process of verifying the eligibility of absentee ballots can occur on a rolling basis before Election Day, but the absentee ballots themselves should not be counted before Election Day.
5. States should make a deliberate and explicit decision which absentee voting requirements absentee voters must strictly follow, the violation of which will render a ballot invalid unless corrected.
6. States should provide absentee voters whose ballot transmission envelope does not comply with a mandatory requirement an error correction opportunity, akin to the process available for voters casting a provisional ballot to verify their eligibility. As discussed in more detail in section C.4 of the accompanying appendix, this process should take advantage of the canvass period to permit absentee voters to perfect an otherwise invalid ballot.

7. Any error correction process should include reasonable notice to the voter of the deficiency, and a firm deadline for correcting the error. Absentee voters should not be permitted to correct rejected ballots if they ignored a previously available opportunity to do so.
8. States should determine how to allow public observation of the absentee ballot verification process and how to permit challenges to official eligibility determinations.

E. Coordination with UOCAVA—MOVE—UMOVA Processes.

Absentee voting processes should be designed to operate smoothly in conjunction with additional accommodations provided to military and overseas voters under existing federal and state laws, including the federal Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), its 2009 amendment in the Military and Overseas Voter Empowerment Act (“MOVE”), and state adoptions of the 2010 uniform state law in the area promulgated by the Uniform Law Commission, the Uniform Military and Overseas Voters Act (“UMOVA”).

II. Early Voting

- A. No excuse should be required for a voter to use early in-person voting.
- B. The time period for early voting should be structured to maximize opportunities for participation within reasonable budgetary and logistical constraints on election officials, and in light of the value of a system in which all voters cast ballots in light of essentially the same information. An extended period of early voting would be antithetical to this last value, might not generate significant increases in participation over a more modest period of early voting, and would likely impose excessive election administration costs. As a starting point for discussion, the Project might consider the proposition that early voting should be available for at least [7?] days before Election Day, including one full weekend, but should not begin sooner than [14?] days before Election Day.
- C. Early voting should continue at least through the day two days prior to Election Day, if not through the day immediately prior to Election Day. Some election officials argue that they need the day prior to Election Day to update pollbooks and attend to other final preparations for Election Day. It might be preferable to seek to ease these burdens in other ways, perhaps even by further limiting the starting day of early voting, in order to permit early voting to continue through the day before the election. If early voting is not available the day before Election Day, voter information efforts should clearly communicate this.
- D. Early voting locations should be open on a rotating or extended day schedule designed to accommodate as many voters as possible, based on population density, work patterns, and the location of early vote centers.
- E. No additional voter identification requirements should be imposed on early voters.
- F. Early voters should vote in a manner similar to the way voting occurs on Election Day.
- G. Early voting ballots and voting equipment must be secured against tampering, loss, and damage throughout the early voting period.
- H. No tallying of early voting should occur until the close of polls on Election Day.
- I. States that permit simultaneous voter registration and early voting will want to consider a process that allows subsequent verification of a voter's eligibility before the voter's ballot is tallied, in a way that permits disqualification of the ballot if the voter is found ineligible.

APPENDIX

Lessons from Minnesota 2008 and Beyond: Reforming the Absentee Voting Process

Ned Foley and Steve Huefner

The November 2008 Senate election in Minnesota offers a recent example of the significant impact that absentee voting can have on an election. The legal contest that delayed the eventual winner, Al Franken, from taking office until July 7, 2009, focused largely on problems with absentee ballots. Franken's main opponent, Norm Coleman, had been declared the winner after the initial vote count on election night. However, because Coleman's margin of victory was less than one-half of one percent, Minnesota law automatically required a recount. During the recount, Franken asked for a review of absentee ballots that had been rejected during the initial count. This led to over 900 wrongly rejected ballots being added to the election totals, giving Franken the victory. Coleman brought suit challenging irregularities in the ballot counting process, but after losing his appeal to the state supreme court he conceded the election on June 30, 2009.

Because absentee ballot counting problems loomed so large in the 2008 Minnesota Senate election, the state adopted several reforms of the absentee ballot casting-and-counting process. But before considering what lessons others can learn from the Minnesota experience, it is worth remembering that Minnesota is not the only state whose absentee voting problems have prompted thoughts of reform. Other recent statewide election disputes in which absentee ballots have figured prominently include Florida's presidential election of 2000, and Washington's gubernatorial election of 2004. Lessons for reforming absentee voting should also take into account these experiences.

A. Absentee Ballots in Florida's 2000 Presidential Election

With all the focus on dimpled and hanging chads, which were the subject of the U.S. Supreme Court's attention in *Bush v. Gore*,¹ many people forget that absentee ballots played a prominent role in the resolution of the disputed 2000 presidential election in Florida. Unlike in the recent disputed elections in Minnesota and Washington, in Florida the absentee ballots at issue were late-arriving overseas ballots, rather than domestic absentee ballots counted on Election Day. According to a *New York Times* report in July 2001, a simple analysis of Bush's final certified victory of 537 votes reveals that Gore would have won Florida by 202 votes if the certification had excluded the 2,490 late-arriving overseas ballots that were counted. Bush received 1,575 of these votes, Gore only 836, with 79 scattered among other candidates.²

Florida law at the time was not entirely clear on the rules applicable to counting these late-arriving ballots. Eventually, state courts determined that late-arriving ballots were eligible for counting if: (1) they bore *either* a postmark *or* a dated signature indicating that they had been cast on or before Election Day, and, (2) they arrived at local

¹ 531 U.S. 98 (2000).

² David Barstow & Don Van Natta, Jr., *EXAMINING THE VOTE; How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, Jul. 15, 2001.

boards of election within ten days after Election Day.³ But there was much debate during this period, based on construing a Florida statute (and ancillary state administrative regulations) in light of a federal consent decree, over whether or not a dated signature without a postmark was sufficient.⁴ There was also considerable confusion among local election boards about whether ancillary rules regarding absentee ballots—such as the requirement of a witness—were applicable to these overseas ballots.⁵

The Gore campaign, after an initial attempt to urge localities to follow a strict interpretation of the relevant laws, backed down and acquiesced in local decisions to adopt lenient interpretations.⁶ Some of those who followed the events in Florida may remember Vice-Presidential candidate Joe Lieberman’s appearance on “Meet the Press,” where he undercut the Gore campaign’s local efforts to disqualify overseas ballots that violated state law.⁷ At the time, Lieberman and some of Gore’s other top-level advisers thought that attempting to invalidate overseas ballots, a portion of which were coming from military personnel, would be a strategic mistake and a public relations disaster. But in light of Al Franken’s successful effort eight years later to convince the Minnesota judiciary to adhere to a strict interpretation of absentee voting rules during the 2008 senate election, without suffering any significant public relations repercussions, election litigators and observers may second guess the Gore campaign’s decision.

To be sure, factual differences exist between Florida 2000 and Minnesota 2008 regarding absentee voting. The role of military ballots loomed larger in Florida 2000, and in 2008 Minnesota did not permit any late-arriving ballots. Still, one cannot help but wonder what would have happened if Gore, like Franken, had adopted a position on absentee ballots of counting every valid vote but only valid votes. Ron Klain, one of Gore’s chief strategists, later stated that he wished the campaign had settled on the position the judiciary eventually arrived at: any ballot must have either a postmark or a dated signature. Insisting on compliance with this standard would have precluded localities from being even more lenient. At the same time, anticipating Franken’s strategy eight years later, Gore might have looked among the rejected domestic absentee ballots for ones that had been wrongly rejected. In 2008, Florida rejected 18,456 absentee ballots—roughly twice as many as Minnesota, but a smaller percentage⁸—including 4,768 for non-matching signatures.⁹ These numbers suggest that Gore might have fruitfully urged the Florida judiciary to examine, as the *Coleman v. Franken* court later would do, whether specific ballots were appropriately rejected.

³ *Bush v. Hillsborough County Canvassing Bd.*, 123 F.Supp.2d 1305 (N.D. Fla. 2000).

⁴ See Richard Perez-Pena, *COUNTING THE VOTE: THE ABSENTEE BALLOTS*; *Review Military Votes, Florida Attorney General Says*, N.Y. TIMES, Nov. 21, 2000; *Overseas Ballots Sans Postmark ‘Should’ Count*, ABC NEWS, Nov. 21, 2000, <http://abcnews.go.com/Politics/story?id=122443&page=1>.

⁵ Robert Pear, *COUNTING THE VOTE: THE PROCESS*; *Those Serving In the Military Run Obstacles To Balloting*, N.Y. TIMES, Nov. 20, 2000.

⁶ Alicia Montgomery, *Gore Troops Surrender on Military Ballots*, SALON.COM, Nov. 21, 2000, http://dir.salon.com/story/politics/trail/2000/11/21/trail_mix.

⁷ Richard L. Berke, *EXAMINING THE VOTE*; *Lieberman Put Democrats in Retreat On Military Vote*, N.Y. TIMES, July 14, 2001.

⁸ U.S. Election Assistance Commission, *The 2008 Election Administration and Voting Survey*, <http://www.eac.gov/assets/1/Documents/2008%20Election%20Administration%20and%20Voting%20Survey%20EAVS%20Report.pdf>, at 37.

⁹ *Id.* at 40.

We can never know what would have happened if Gore had adopted Franken's strategy, but we can assume that in the next major disputed election, lawyers will put absentee ballots front-and-center. Attempting to learn from Gore's failure and Franken's success, they will look for a way to craft a multi-pronged argument regarding absentee ballots that is sensitive to potential distinctions between domestic and overseas ballots, favorable and unfavorable ones. They will not be as quick to abandon these issues as Gore was in 2000. Thus, it may be beneficial for legislatures to limit these potential issues by providing clearer rules for casting and counting absentee ballots.

B. *Absentee Ballots in Washington's 2004 Gubernatorial Election*

Disputes over absentee ballots also played a large role in the dispute over who won the 2004 gubernatorial election in Washington State. Indeed, there are significant parallels between what happened in Washington and what happened in Minnesota four years later. Some of those parallels may have been particularly close because of the fact that the same Seattle-based law firm, Perkins Coie, represented the Democratic candidates in both disputes (although some version of the parallels likely would have existed even without this commonality of counsel). Yet as similar as the two scenarios were, they also had important differences.

In Washington, as in Minnesota, the Republican candidate led in the initial returns. Accordingly, the Democratic candidate pushed hard to count absentee ballots that had either been rejected or not yet reviewed. This effort was especially vigorous in King County, the most Democratic of all the state's counties in its political leanings, and home to almost one-third of the state's voters.

Absentee voting in Washington was more straightforward than in Minnesota: for example, Washington had no witness requirement, as Minnesota does (see section C), nor did Washington allow voters to register at the same time they voted their absentee ballots, with the attendant possibilities for multiple errors concerning submission by mail of the extra registration form (see section C.2).¹⁰ Consequently, the reasons for rejecting an absentee ballot in Washington were only a partial subset of the reasons in Minnesota: primarily, lack of a signature on the absentee ballot envelope, or an apparent mismatch between this signature and the signature on file in the county's voter records (see section C.3).¹¹ Washington law also required counties to notify absentee voters of a missing signature, and to provide those voters the opportunity to correct the omission before completion of the county canvass fifteen days after Election Day. In light of this requirement, many counties—including King County—also notified absentee voters if they believed there was a signature mismatch, and thus gave these voters the same opportunity to provide a better signature or otherwise prove the validity of their identity by the close of the county canvass. Given these opportunities, a flurry of effort occurred during the first two weeks after Election Day to get affected voters to rectify missing or inadequate signatures, so that their absentee ballots could be counted. The Democrats led this effort because they knew they were playing catch-up, but the Republicans quickly joined, lest their miniscule lead be overtaken by the Democrats' work.

¹⁰ WASH. REV. CODE ANN. § 29A.40, *et seq.*

¹¹ David Postman, *Suit Launches Battle over Ballots*, SEATTLE TIMES, Dec. 4, 2004.

Even with all this effort, after the canvass there were still 15,000 rejected ballots statewide; of these, 2,478 were King County ballots that had been rejected because of missing or non-matching signatures.¹² (These numbers included provisional ballots—ballots pending verification of a voter's registration—as well as absentee ballots, which raised equivalent signature issues.) At this point, the Democratic candidate was still behind, heading into a statewide manual recount. The Democrats thus made a legal maneuver comparable to one that Franken made in Minnesota four years later: they argued that the manual recount should include a recanvassing of all rejected absentee ballots. The Republicans in Washington strenuously opposed this argument, as Coleman did in Minnesota, and the issue went to the state supreme court.¹³ Unlike the Minnesota Supreme Court, however, Washington's high court was unanimous and did not attempt a compromise outcome akin to the ill-fated “candidate veto” ruling in Minnesota. Instead, the Washington Supreme Court squarely rejected the Democrats' claim that the manual recount should include a review of all rejected absentee ballots to make sure the rejection was correct.¹⁴

But the Washington Supreme Court left the door slightly open. If the rejection of specifically identified absentee ballots was demonstrably incorrect, then a county canvassing board on its own initiative could recanvass those specific ballots before the certification of the manual recount's results.¹⁵ This crack proved wide enough for the Democrats. On Monday, December 13, 2004—the same day that the Electoral College met that year to vote officially for President of the United States (an indication of how long these matters take)—King County discovered that 573 absentee ballots had been wrongly rejected because workers had failed to complete the process of checking their signatures against the county's election records.¹⁶ The workers had only looked up these voters in the county's *computerized* voter file and, not finding them there, failed to check the voter's original *paper* registration form (or other available documents), as required by state law.¹⁷

Over the objections of Republicans, the Washington Supreme Court unanimously permitted King County to recanvass these wrongly rejected ballots on the ground that the official error was readily apparent: in effect, plain error, in the form of election workers failing to comply with the statutes.¹⁸ Meanwhile, further investigation caused King County to find an additional 162 absentee ballots fitting the same description: workers had rejected them based on the same incomplete search of computer records only, without checking original paper forms.¹⁹ Thus, there were a total of 735 absentee ballots to recanvass, which proved to be extremely important. Without them, the Democratic candidate would have been ahead at the end of the manual recount by only ten votes. The recanvassing of these rejected absentee ballots on the last day of the manual recount

¹² Keith Ervin, *How Councilman's Finding Led to Detection of Goofs*, SEATTLE TIMES, Dec. 14, 2004.

¹³ McDonald v. Sec'y of State, 103 P.3d 722 (Wash. 2004).

¹⁴ David Postman, *Democrats' Lawsuit Unanimously Rejected by the State Supreme Court*, SEATTLE TIMES, Dec. 14, 2004.

¹⁵ *Id.*

¹⁶ *Ballot Mistake Could Add 573 Votes To Gov's Race*, KOMO NEWS, Dec. 13, 2004, <http://www.komonews.com/news/archive/4140081.html>.

¹⁷ *Id.*; see also WASH. STAT. ANN. § 29A.40.110 (2004).

¹⁸ Wash. State Republican Party v. King County Div. of Records, 103 P.3d 725 (Wash. 2004).

¹⁹ Keith Ervin, *Up to 162 Ballots Missing*, SEATTLE TIMES, Dec. 17, 2004.

extended the Democratic candidate's lead to 130 (later reduced to 129 because of a disqualification of one ballot elsewhere in the state)—still tiny, given the approximately 2.9 million ballots cast, but an order of magnitude larger than ten.²⁰

The Republicans immediately tried to get counted about 500 rejected ballots from around the state. They claimed that the rejection of these ballots also was demonstrably wrong according to the Washington Supreme Court's standard.²¹ But the Secretary of State, who was a Republican, advised the counties that this claim came too late for purposes of canvassing, since all the other counties besides King had already completed their manual recounts and submitted a final certification of the election's results.²² (In King County itself, the canvassing board refused to take up 91 previously rejected ballots that the Republicans wanted reconsidered. The board distinguished these from the 735 that they were willing to review on the ground that the Republicans' 91 ballots had problems identified during the initial canvass yet the voters failed to take that opportunity to correct those problems, whereas the Democrats' 735 ballots were initially rejected solely because of the county's mistake.)²³

The only recourse for the Republicans at this point was a judicial contest of the election, which they pursued. Among the claims that they included in their contest was an allegation that many ballots had been rejected that, under state law, should have been counted. As in Minnesota, the contest further alleged an Equal Protection violation stemming from the rejection of some ballots equivalent to others that were counted. Unlike in Minnesota, however, early in pre-trial proceedings the trial court dismissed the Equal Protection claim concerning previously rejected ballots. The trial court in essence ruled that it lacked jurisdiction to consider whether some ballots were mistreated in relationship to others; it only had jurisdiction to decide whether ballots, on their own terms and not in relation to others, were treated properly under state law. This ruling left open the possibility that, at trial, Republicans would continue to claim that some absentee ballots that were entitled to be counted on their own terms under state law were instead improperly rejected. But the Republicans abandoned this claim, instead focusing at trial on what they then perceived to be the larger problem of ballots that had been counted but under state law should *not* have been.

During the trial, the Republicans identified major problems concerning the handling of absentee ballots, especially in King County. Hundreds more absentee ballots surfaced that never had been reviewed during the canvassing process, but pursuant to the court's earlier order, it was now too late to consider them. Even worse, in King County alone, the court credited evidence showing that 875 more absentee votes were counted than absentee ballots were cast.²⁴ But at the end of the trial (on June 6, 2005), the trial court ruled that state law did not provide any available remedy for this problem.²⁵ The

²⁰ Election Assistance Commission, *2004 Election administration & survey report*, http://www.eac.gov/research/election_administration_and_voting_survey.aspx.

²¹ Ralph Thomas, *Gregoire Catches Rossi, Democrats Say*, SEATTLE TIMES, Dec. 22, 2004.

²² Elizabeth M. Gillespie, *Both Parties Respond to the Latest Chapter in Recount Saga*, SEATTLE TIMES, Dec. 22, 2004.

²³ David Postman, Ralph Thomas & Keith Ervin, *It's Gregoire by 130; Is It Over? Rossi Says This Wasn't a Clean Election*, SEATTLE TIMES, Dec. 24, 2004.

²⁴ David Postman, *Judge Rules with Eye to Present and Future*, SEATTLE TIMES, May 25, 2005.

²⁵ Court's Oral Decision, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 6, 2005).

upshot was that if a candidate could not stop the wrongful counting of absentee ballots before they were commingled with the rest of the state's tally, a judicial contest of the election would be unable to undo the mistake.

While the experience in Washington illustrates many areas where absentee voting could be reformed, the recent Senate dispute in Minnesota, including the subsequent changes in state election law, better demonstrates the possibilities for reform.

C. Improving Absentee Voting After Minnesota's 2008 Election.

As seen above, policy issues beyond just how best to handle a post-voting dispute are at stake in the design of an absentee voting system. With respect to how to conduct absentee voting, while the national trend is in favor of “no excuse” absentee voting as a convenient means of facilitating voter participation, ongoing concerns about the susceptibility of absentee voting to fraud and abuse mean that some states may resist this national trend. Minnesota continues to limit absentee voting to specific justifying circumstances, and also continues to require that regular absentee voters include the signature of an eligible witness to help verify the legitimacy of the ballot.²⁶ These witness rules, which thwarted many Minnesota voters in 2008, were rooted in an earlier era's policy of curtailing absentee voting to narrow circumstances and imposing anti-fraud measures designed to assure the integrity of absentee votes. Whether Minnesota and other states with witness requirements will choose to retain them as convenience voting spreads remains to be seen. But a variety of other forms of state laws, for example, rules that regulate who besides a voter can handle or deliver the voter's absentee ballot, also may complicate absentee voting. To the extent that such laws exist and are enforced, the number of absentee ballots that will ultimately be rejected will be larger.

As important as are the rules for casting absentee ballots, even more important are the rules for counting them. Who counts them? When, where, and how are they counted? May the candidates challenge absentee ballots before they are counted? May the authoritative officials count absentee ballots even if they do not comply with the rules for casting them? If so, in what circumstances?

Several lessons relevant to these questions emerge from Minnesota's experience. These experiences, especially when considered in light of what happened in Washington four years earlier and in conjunction with the changes that Minnesota made to its election law after 2008, provide an example of how absentee voting laws can be reformed to assure that each ballot is more effectively issued, verified, and counted.

1. Validation of the eligibility of absentee voters

The major disputes in both Washington and Minnesota derived from the rules for validating the eligibility of absentee voters. Some of the validation issues concerned whether absentee voters were properly registered, (the requirements of which may differ by state). In both states, the litigation brought to light significant problems in the accuracy of the states' voter registration databases and, in particular, the states' accounting of absentee voters. One must hope that all the nationwide emphasis on

²⁶ MINN. R. 8210.0500 (2011).

improving the quality and accuracy of voter registration databases will reduce some of the potential legal problems, as a result of improved administrative procedures and practices concerning data management. These improvements may include centralizing the acceptance process for absentee ballots and mandating strict standards for determining which ballots are to be accepted or rejected.

Certainly, one administrative move that would help would be to conduct the validation process at the level of the local elections board, rather than at the precinct level. Minnesota invited considerable trouble in 2008 because it permitted its local elections boards to send absentee ballots to each precinct for validation on Election Night. As the last task on Election Night at the end of a long and strenuous day for the essentially volunteer army of poll workers, this administrative process was a recipe for the inaccuracies and inconsistencies that occurred. It would be much better to centralize—and professionalize—the validation process by putting it in the hands of the local elections board and its regular administrative staff. In most places, this elections board is at the county level, but in some places, it will be at the municipal level (as in Minneapolis, rather than Hennepin County). One could argue that it would be preferable to consolidate this validation function at the county level throughout the entire state. Doing so, for example, might reduce errors associated with individuals' moving from one municipality to another within the same county. But the ideal should not be the enemy of the preferable, and removing this function from the precinct level—the critical step—would be a vast improvement.

Minnesota responded to the problems of 2008 by enacting strict standards for accepting absentee ballots. In 2008, many local officials used discretion to allow voters to fix mistakes.²⁷ Post-2008, the responsibility of reviewing absentee ballots now lies with county absentee ballot boards, not with precinct poll workers. These ballot boards are teams of specially trained election judges that review the absentee ballot envelopes to determine if they meet the requirements for acceptance.²⁸ The post-2008 law requires strict compliance with the instructions for completing the absentee ballot certificate found on the absentee ballot envelope, and failure to provide any required information will result in the ballot being rejected.²⁹ While this may lead to a higher number of initially rejected ballots, the law also allows voters to correct rejected ballots, as discussed in section C.4. Overall, the process is fairer and easier to manage.³⁰ As Washington demonstrated in 2004, it may be preferable to wrongfully reject ballots initially, while offering the possibility for correction later, than to wrongfully accept ballots that should have been rejected, a problem that may not even be correctable through judicial intervention.

2. *The problem of simultaneous registering & voting by mail*

Minnesota complicates the administrative process by permitting absentee voters to register at the same time as they cast their absentee ballots. Minnesota has a tradition

²⁷ Mark Ritchie, *Absentee Balloting in the 2010 General Election 1*, available at <http://www.sos.state.mn.us/index.aspx?page=1570>.

²⁸ MINN. STAT. ANN. § 203B.121 (2011).

²⁹ *Id.*

³⁰ Ritchie, *supra* note 27, at 1.

of Election Day Registration (EDR), which makes voting easier by allowing voters to register at the same time as they vote, and thereby also eliminating the need for provisional ballots. However, when applied to absentee voting, this policy, while generous, invites administrative error that may have the effect of disenfranchising innocent voters—exactly the opposite of the policy goal underlying the state’s generosity. In effect, local election officials are required to operate two absentee voting systems simultaneously, one for those already registered and one for those needing to be registered, in the heat of all their preparations leading up to Election Day. Moreover, for each person requesting an absentee ballot the officials must make a judgment whether that person belongs in System 1 or System 2. No matter how well-intended the local election officials are, their human imperfection inevitably will cause some unregistered voters to suffer through no fault of their own, as they could be sent absentee ballots intended for those already registered, without instructions for also completing their own voter registration.

Minnesota has employed several methods for smoothing out the "absentee EDR" process. One method is use of the Statewide Voter Registration System, which can track whether a voter is registered, has applied for an absentee ballot, has received an absentee ballot, and has had that ballot accepted or rejected. With the increased ability to securely store such information online, any election official could access such information, and thus would be able to determine whether a voter was registered upon receiving an application for an absentee ballot. However, as Washington demonstrated in 2004, reliance solely on computer records may be ineffective if such records are improperly maintained. Thus there may still be a need to consult the original registration filed by the voter until such electronic systems can be made more reliable. Minnesota also allows voters to correct potential registration problems, either through the mail 20 days prior to the election, or in person on Election Day.³¹ However, some voters still may not be able to correct such mistakes, even if adequately notified.

The question necessarily arises whether the benefits of providing “absentee EDR” are worth the disenfranchising errors that will result. Even for a state strongly committed to in-person EDR, perhaps it is appropriate to require pre-registration before a voter can take advantage of voting by mail. Especially if the state expands the opportunity for early in-person voting, then requiring pre-registration to vote by mail could be seen as an appropriate policy trade-off. Under this system a person would have the choice of either pre-registering and then submitting an absentee ballot, or going in-person to both register and vote at the same time. This would increase the convenience and accessibility of voting while not sacrificing its security and reliability.

The extra security precautions appropriately associated with mailed-in ballots, in contrast to in-person ballots, also complicate the decision to permit simultaneous registration and voting by mail. Minnesota understandably asks its newly registering absentee voters to provide extra information beyond what already registered absentee voters must submit, and these additional hurdles also cause an increase in the rejection of absentee ballots (sometimes as a result of official, rather than voter, error concerning these additional steps). It might be better to settle a voter’s status as legitimately registered *before* the voter casts a ballot by mail, and if the voter is unable to do that, then ask this voter to simultaneously register and vote *in person* sometime before the close of

³¹ MINN. STAT. ANN. § 201.061 (2011).

balloting on Election Day. While this approach will likely prevent some people from voting, the small number that as a result may not be able to vote may be worth the increased assurances of validity.

Otherwise, it would seem necessary for the state to permit newly registering absentee voters to correct any mistakes in the mailing of their simultaneous registration-and-voting materials. At the very least, mistakes caused by official errors in sending these voters the wrong materials should be open for correction during the canvassing period, once they have been caught. These voters could receive notice of the problem, and be given the opportunity to complete the missing registration form that they did not receive—similar to the way in which Washington gives its absentee voters the opportunity to supply missing signatures. In any event, what seems clear is that Minnesota’s existing system, which has a built-in catch-22 for voters who take advantage of the state’s “absentee EDR” policy but whose ballots are rejected because they were sent the wrong form, is self-contradictory in terms of its own policy of enabling more people to have their vote counted, and thus should be fixed one way or the other.

3. An alternative to signature-matching

In both Minnesota and Washington, the biggest problem in validating the eligibility of absentee voters was the inconsistent treatment of signature mismatches by local officials. In each state, an election official or worker had to determine that the signature on the absentee ballot matched the signature on the application before the ballot would be counted. Signature matching is enormously subjective, and the degree to which local officials bothered to scrutinize signatures varied widely among localities in both states. Moreover, even if the process relied on a single, precise, and uniform standard, the utility of the enterprise would be dubious: for many individuals, their signatures legitimately vary over time. If they registered to vote long ago, their registration signatures may be quite different from what they now put on their absentee ballot envelopes. To reject a ballot in this circumstance, even if the signatures are objectively and demonstrably different, would be to wrongly disenfranchise an eligible voter.

Accordingly, in the aftermath of the 2008 election in Minnesota, one prominent local election official (Joe Mansky of Ramsey County, where St. Paul is located) proposed replacing signature verification with verification using a voter identification number (VIN).³² Minnesota has since responded by replacing the problematic signature matching with identification number matching. Minnesota now allows voters applying for an absentee ballot to provide a Minnesota driver's license number, state-issued identification card number, the last four digits of the voter's social security number, or a statement saying that the voter does not have any of these numbers.³³ The number provided on the application must then match the number given on the returned absentee ballot. If the numbers do not match, then the absentee ballot board members will see if the signatures match. If neither the numbers provided nor the signatures match, the ballot will be rejected.

Alternatively, a state could assign the voter a unique VIN at the time of registration or, perhaps, when applying for an absentee ballot. The voter would then

³² Joe Mansky, *Lessons from the Coleman/Franken Recount*, PIONEER PRESS (St. Paul), Aug. 1, 2009.

³³ MINN. STAT. ANN. § 203B.04 (2011).

write that number on the absentee ballot envelope. Sufficient security would be needed to safeguard against the temptation to apply for someone else's absentee ballot, get that person's VIN, and then put that VIN on the envelope. Linking the same VIN on the envelope to the original application would not suffice to detect wrongful ballot applications. But if voters needed to authenticate their identity when applying for the absentee ballot, this requirement would safeguard against VINs being given to imposters. Obviously, concerns would arise if the identification requirement for obtaining an absentee ballot were unduly onerous, but the policy debates over voter identification have recognized that the need for security is greater in the context of absentee voting than for in-person voting.

Another concern is that individuals would misplace or forget their VINs before completing their absentee ballots. Perhaps there could be some method by which individuals could obtain a new VIN, analogous to resetting one's password for many password-protected websites. As they do with banks, for example, individuals could establish a special security question—what is your mother's maiden name?, in what city were you born?, etc.—that would enable them to get a new VIN from their local board of elections. However, these additional steps create more possibilities for fraud or for people to obtain someone else's VIN, so perhaps Minnesota's model that utilizes numbers which voters are unlikely to lose is preferable.

But requiring local boards of election to collect either an identifying number or a password or security question from voters raises additional questions. Would such information be secure against efforts of political partisans to hack into the board's database in order to obtain all of the voters' self-authenticating information? Would the representatives of parties or candidates who observe the process of accepting or rejecting absentee ballots—as part of the transparency necessary to maintain public confidence in the legitimacy of the election—get access to this private information and be able to put it to inappropriate uses? Can we trust the local election officials themselves not to leak this information to one side or the other? While states such as Minnesota have laws providing that removing registration records or applications for purposes other than those required by statute is a felony, the risk of such tampering may still be present.

These sorts of questions cause one to wonder whether new technologies would enable the creation of innovative ways for individuals to authenticate their identities on absentee ballot envelopes without private numbers or passwords, but in ways that would be more reliable than a signature. Suppose when voters apply for an absentee ballot they submit a digital photo of themselves over the internet. Most current computers have this capacity, and individuals without a computer of their own could go to a public library or other public agency for this purpose. At the same time that they submit this digital photo to the local board of elections, the voters could print a copy of the photo with a printer attached to the computer (boards of elections can reimburse public libraries for this expense). The voters could then attach the printed photo to the outside of the absentee ballot envelope, thereby still preserving the secrecy of the votes cast on the ballot itself, but inside the outer envelope—so that the photo is submitted along with absentee voter's name and address. The matching exercise that the local board then performs is not between two signatures, but between two copies of the same photo. If the voter loses the printed copy of the photo obtained at the time of applying for the absentee ballot, the voter can always submit a new photo (at the voter's own expense). The match then

would be between two recent photos of the same individual, a much easier and more objective task than matching two signatures.

Another advantage of matching two photos of the same voter, rather than requiring the voter to submit a VIN or a special password, is that a voter's visage is already public information and not easily replicable by imposters. It is highly unlikely that unscrupulous partisans will attempt to commit voter fraud by disguising their facial features to look like another registered voter. If there is concern that there may be attempts to apply for someone else's absentee ballot (as long as the board only matches the ballot application's photo with the submitted ballot's photo), then the system could add the additional precaution that the photo at the time of absentee ballot application must match a photo submitted by the same voter at time of registration. To be clear, these two photos need not be identical; the match simply would require that the two photos show the individual to be the same citizen.

No state currently has in place a system of collecting digital photos of individuals at time of registering to vote and/or applying for an absentee ballot. But in an era in which every cell phone includes a digital camera, it would not be inordinately difficult to put this kind of system in place. The hardest part is printing the copy of the photo that the absentee voter must attach to the absentee ballot envelope itself. But if individuals can get passport photos at post offices, as commonly occurs today, it would seem possible to equip post offices—as well as public libraries, motor vehicle bureaus, nursing homes, and other social service agencies—with the capacity to print a photo to attach to an absentee ballot envelope. However, while a photo matching system would provide greater accuracy in verifying voters, it is also not without drawbacks. Some voters may not want to spend the time, effort, or expense to take and print out photos, and thus may decide not to vote at all. Additionally, the costs to the state for reimbursing for photos may be too high to justify the increased benefits over a number matching system.

Whether a system using existing identification numbers, one providing new identification numbers, or one deploying a new technology, such as photo matching, is most effective remains to be seen. Although each method has drawbacks, these new methods might offer improvements over signature matching. Each of these methods reduces the subjectivity that is inherently part of signature matching, and thus each greatly decreases the probability of ballots being wrongly rejected and increases the validity of elections.

4. Opportunity to correct errors during canvassing period

The most voter-friendly step that a state can take to reduce the number of ultimately uncounted absentee ballots is to notify voters if there is a problem that would prevent their mailed-in ballot from being counted and permit them to correct that defect before the close of the canvass. In 2008, Minnesota had a notice requirement of this sort for absentee ballots arriving at least five days *before* Election Day,³⁴ but this did not help deficient absentee ballots that were timely submitted in the last days up to Election Day itself. And unlike Washington, Minnesota also did not provide voters an opportunity to correct deficient but timely mailed-in ballots during the first week or so after Election

³⁴ MINN. STAT. ANN. § 203B.13 (2008) (repealed in 2010 and replaced by Minn. Stat. Ann. § 203B.121 (2011)).

Day. Of course, prohibiting corrections after Election Day may eliminate one potential category of post-Election Day wrangling and uncertainty, but this strict approach also will result in fewer ballots being counted. A slight accommodation during the canvass period could be accepted in order to better promote the validity of the election and re-enfranchise voters whose ballots would otherwise not be counted.

For instance, in 2010, the strict compliance standard that Minnesota followed may have resulted in the initial rejection of more ballots, but the potential disenfranchisement arising from these rejections was mitigated by a revised error correction process. Under the new process, absentee ballots now must be delivered to a ballot board for review within five days of receipt.³⁵ As was the case in 2008, if ballots are rejected more than five days before Election Day, the local election official is required to send the voter a replacement ballot along with an explanation of why the initial ballot was rejected, thus providing the voter another chance to vote successfully. But in a new step adopted in response to the large number of rejected ballots in 2008, Minnesota law now also provides that if an absentee ballot is rejected within five days of Election Day, the election official is required to attempt to notify the voter by either phone or email.³⁶ Although new absentee ballots are not sent to these voters during this time period, the notification allows these voters the opportunity to cast a ballot in person. In addition, Minnesota's statewide voter registration system now also provides an online resource for voters to look up the status of both their absentee applications and submitted ballots.³⁷

Minnesota's election system could be further improved by allowing absentee voters to download a replacement ballot directly from the voter registration system if it indicates that their initial ballot was rejected. More generally, a workable error correction process for absentee ballots could require election officials to notify an absentee voter by email or telephone (according to whichever preference the voter listed on the ballot envelope), within 72 hours after the polls close, if the official review of the ballot identified a problem that would prevent the ballot from being counted. The absentee voter then could be given up to a week to fix the problem. Many problems could be fixed without requiring the voter to appear in person or to resubmit missing information on paper by conventional mail. Instead, because the paper ballot itself already is in the possession of the election officials, the voter could supplement the original submission by email or, if necessary, facsimile. For example, the voter could fax a missing signature (or email a PDF copy, if that is easier). But there might be some unusual circumstances in which a voter needed to do more to clear up confusion concerning the voter's registration status—for example, a case in which one voter's record was mistaken for another's with a similar name and address—and, for that, the voter might need more time in order to appear in person or submit additional material. Even so, local election officials should be able to complete the canvass within two weeks of Election Day. If voters are required to correct any defects concerning their mailed-in ballots within ten days of Election Day, for example, it would still give officials four days to process a voter's supplementary submission in order to complete the canvass within two weeks.

³⁵ MINN. STAT. ANN. § 203B.08 (2011).

³⁶ MINN. STAT. ANN. § 203B.121 (2011).

³⁷ Ritchie, *supra* note 27, at 3-4.

The voters' deadline for fixing these problems should be firm. If a voter receives the required notice, or fails to provide a method of notification (by email or phone), and the voter misses the specified deadline, then the voter's absentee ballot should be irreversibly disqualified. Even if the problem is a correctable one under the relevant state law—a missing signature, for example, as in Washington—there comes a time when the problem no longer can be corrected for the purpose of counting ballots in this particular election. Ten days after Election Day is an amply generous deadline in this regard. If a voter cannot manage to correct a problem by then, the ballot should no longer have the capacity of affecting the outcome of the election.

Moreover, a state law reasonably can specify that some kinds of problems cannot be fixed during this ten-day grace period. For example, if the absentee voter never attempted to register before casting the ballot, and registration is a prerequisite to voting in the state, then the absentee voter cannot attempt to register for the first time during the ten days after Election Day. The purpose of the grace period is not to extend into the canvass period the time for registering.

Instead, the grace period for fixing mistakes concerning the submission of absentee ballots can be seen as analogous to the period that is available to provisional voters to clear up the problems that caused them to vote provisionally. For example, if voters must cast a provisional ballot because they failed to show a required form of identification, they usually have the opportunity under state law to supply the missing ID within a few days after Election Day. Likewise, if a voter is required to cast a provisional ballot because the pollbook does not list the voter as registered in that precinct, the voter is permitted to supply additional information to show that the pollbook was mistaken and that the voter is indeed registered. But if the provisional voter in fact had never attempted to register (and thus the pollbook was correct), the provisional voter would not be permitted to validate the provisional ballot (so that it would be counted) by demonstrating that the voter's identity and residence would have made the voter eligible to register had the attempt been made.³⁸ Likewise absentee voters should not be permitted to correct rejected ballots if they ignored a previously available opportunity to do so.

It is extremely important, therefore, that state law be unambiguously clear in distinguishing the categories of errors that can be fixed during this kind of grace period from those that cannot. In a high-stakes statewide election like the ones that occurred in Washington and Minnesota, it would be extremely undesirable to have litigation over the ground rules for taking advantage of the grace period. As the experience in Washington showed, both campaigns will press hard during the grace period to correct every initially rejected absentee ballot that they think was cast for their candidate. Consequently, both sides—and the public generally—ought to know that these rejected ballots can be rescued when they suffer from certain kinds of defects, but not others, and there ought to be no uncertainty about which is which. Missing signature, yes; lack of any registration, no; and so forth.

These clear rules should apply exactly the same throughout a state in any statewide election. In other words, there should be no discretion on the part of local officials to be more gracious during the grace period than local officials elsewhere in the

³⁸ See Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193 (2005).

state. Discretion of this sort invites the appearance, if not the reality, of partisan manipulation. For example, if in a particular state an absentee ballot still requires a witness, and if the absence of any witness irreversibly prevents the ballot from being counted, then this rule ought to be enforced statewide, with no exceptions in any localities. Localities should not be permitted to be more lenient in letting only *their* voters take remedial steps to validate their ballots in the event of this particular kind of problem. Since many localities tilt one way or the other in terms of the political or ideological composition of their local electorate, the exercise of local discretion in the administration of this grace period could be perceived to skew the outcome in a close race.

Moreover, states should have clear rules about how the campaigns may interact with absentee voters during the grace period. As in Washington, campaigns should be permitted to know whose ballots have been rejected and to contact these voters to assist them in determining if their problem is correctable under state law. Even if the voters themselves properly receive notice of the problem from the state, and even if in theory the voters could figure out by themselves how to correct fixable problems within the deadline of the grace period, voters often are confused about the voting process and could benefit from legitimate assistance from the campaigns.

In this respect, assistance from the campaigns during the grace period is little different from—and thus no more pernicious than—“get out the vote” (GOTV) efforts before or on Election Day. Still, GOTV activities during the canvass do raise special dangers. Both campaigns know the reported gap between the two candidates in the initial unofficial returns, and thus the incentive to “harvest” (or block) the counting of additional ballots is unusually acute. Therefore, safeguards need to be deployed to ward off the temptation within campaigns to bend, stretch, or even break the rules regarding the correction of previously rejected ballots during the grace period. One safeguard is to require the voter to submit the correction individually, rather than to permit the campaign to submit corrections in batches. This safeguard means that the campaign can give the voter advice about how to submit a correction, but the voter must be the one to actually do so, whether by email, facsimile, conventional mail, or in person. Preventing campaigns from supplying missing signatures in bulk, for example, will reduce the likelihood that the campaigns will attempt to submit those missing signatures fraudulently. Each voter, when submitting a personal correction to a deficient absentee ballot, can also be required to sign an oath, swearing to the authenticity of the information submitted and accepting personal responsibility for the individual submission of this information.

As long as safeguards of this type are in place, the grace period can be a democracy-promoting means of enabling voters to avoid unnecessary disenfranchisement through the disqualification of their absentee ballots for failure to comply with the technical requirements of absentee voting.

5. Special requirements for military and overseas voting

As Florida demonstrated in 2000, military and overseas absentee voting may cause problems unique from domestic absentee voting. Congress has worked to address these issues in part by passing the Uniformed and Overseas Citizens Absentee Voting Act

(“UOCAVA”), and its recent amendment, the Military and Overseas Voter Empowerment (“MOVE”) Act of 2009. States also have a variety of laws addressing these voters, and the Uniform Law Commission is now urging states to enact the Uniform Military and Overseas Voters Act (“UMOVA”).

The biggest issue facing military and overseas voters is the increased likelihood that their voted absentee ballots will arrive after Election Day. Some states, such as Florida in 2000, counted these late arriving ballots provided certain criteria were met. Other states, such as Minnesota, do not count any ballots received after Election Day. Providing a clear standard of which ballots will be counted is important to preventing post-election disputes that ultimately have to be decided by the judiciary.

In any event, taking additional steps to diminish the number of late-arriving ballots would be beneficial. The most critical step to increasing the number of ballots received on-time is to extend the period for absentee voting. The MOVE Act now requires that states provide absentee ballots to military and overseas voters at least 45 days before Election Day. Minnesota’s success in 2010 is evidence that this 45-day requirement is at least a good start.

In addition to extending the voting window, others steps can be taken to make sure the voter receives an absentee ballot in a timely manner. One such reform also required by the MOVE Act is to allow overseas voters to receive their unvoted ballots electronically. Allowing voters to download their ballot online and print it out, rather than waiting to receive it in the mail, is a substantial improvement for many, particularly those who may be constantly moving and thus have difficulty receiving traditional mail. Today these electronic ballots typically still must be returned by mail rather than electronically, but in the future election officials may develop means for voters to securely submit voted ballots online without undue risks of fraud or tampering.

A well-constructed open absentee voting system should take advantage of improvements and accommodations specifically designed for UOCAVA voters, wherever appropriate, while also permitting the smooth integration of those special accommodations that remain limited only to military and overseas voters.

6. Success of Minnesota’s new process during 2010 gubernatorial election

The benefits of Minnesota’s post-2008 changes to its election law, and to its absentee voting process in particular, were apparent in the next major general election. Although the 2010 gubernatorial election in Minnesota also had a recount, the process was much smoother than in 2008, in part because of the absentee balloting changes. The number of rejected absentee ballots was under 3,000 in 2010, down from nearly 12,000 in 2008. This translated to a 97% acceptance rate for absentee ballots. Minnesota’s Secretary of State attributed the high rate of success to the new notification requirements, as 3,960 voters whose absentee ballots were initially rejected were ultimately able to submit a valid absentee ballot.³⁹ Additionally, 378 voters who received notice of the rejection of their absentee ballots less than five days before the election were able to cast ballots in person.⁴⁰ Although Minnesota still allows voters to register to vote at the same

³⁹ Ritchie, *supra* note 27, at 1.

⁴⁰ *Id.* at 2.

time as submitting an absentee ballot, this did not appear to create major problems in 2010.

The recent experiences in Florida, Washington, and Minnesota have suggested several reforms of the absentee voting process in those states and elsewhere. The changes Minnesota made between 2008 and 2010 demonstrate that absentee voting can be improved by limiting those responsible for handling absentee ballots, providing strict standards for ballot acceptance, and providing voters with an opportunity to correct rejected ballots. While providing a good example of an effective non-precinct voting alternative, Minnesota's absentee voting system still retains some features, such as limiting absentee voting only to those with an excuse, and allowing registration at the time of voting, that may not be ideal for other states.