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Articles

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

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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.

TABLE OF CONTENTS

Introduction 188
I. A Model Calendar for Presidential and Other Statewide Recounts 190
A. Adjustment of the Congressional Specified Dates 191
1. Eliminate the Separate "Safe Harbor" Deadline 192
2. Move the Meeting of Presidential Electors to Early January 192
3. Move the Congressional Count of Electoral Votes to January 10 194
4. Summary of Adjustments to Congressionally Specified Dates 196
B. A Single 7-Week Period for Both Recount and Recanvass 196
1. One Impartial Tribunal for Both Recount and Recanvass 199
2. Integrating the Recount and Recanvass Schedules 200

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This article is a substantially revised version of the second part of a manuscript that was originally prepared for the festschrift honoring Dan Lowenstein in January 2010. Part one was published as *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 1 (2011). The gratitude I expressed to everyone who helped in the preparation and revision of part one equally applies to this companion piece. Once again, Sophia Chang has done superlative work in assisting the preparation of the piece for publication, and this time she did so even after she had already started another full-time job. Her successor, Abby Kline, has also contributed excellent editorial assistance.

C. An Unmovable 2-Week Deadline to Complete the Initial Canvass 204
1. The Tasks of the Initial Canvass 205
2. The Relationship of the Canvass and Recanvass 209
D. No Appeal After a Fair Recount and Recanvass Process 212
II. The Relative Importance of a Fair Institution Compared to Ideal Rules 216
A. The Doctrinal Choice Among Strict, Constructive, and Substantial Compliance 216
B. The Necessity of an Impartial Institution to Choose & Apply Doctrine 218
C. Implications for Hasen's "Democracy Canon" Thesis 219
III. Federal Supervision of State Vote-Counting 222
A. The Future of *Bush v. Gore* after *Coleman v. Franken* 222
B. The Absence of Federal Interference When the State is Fair 224
Conclusion 225

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

[1] Editorial, *A gracious finish to an epic drama; Unanimous Supreme Court decision legitimizes Franken win*, Star Tribune, July 1, 2009, at 14A.
[2] Editorial, *A Senator at long last*, Pioneer Press (St. Paul), June 30, 2009, at B8.
[3] Editorial, *The 'Absentee' Senator*, Wall Street Journal, July 2, 2009, at A11.
[4] *See* 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

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

[7] One 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).

[8] Article 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.

[9] Washington 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" date[13]).

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

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[10] *See* Foley, *supra* note 6.

[11] This 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).

[12] 531 U.S. 98 (2000).

[13] 3 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 procedures. 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 *recanvass* 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 recanvass 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 recanvassing 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:

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[14]A 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.

[15]Documents 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.

[16]My 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" Day[17] (exactly 5 weeks after Election Day)
- Meeting & Vote of Presidential Electors[18] (6 days after "Safe Harbor" Day)
- Congressional Count of Electoral Votes[19] (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

[17] 3 USCA § 5 (2010).
[18] 3 USCA § 7 (2010).
[19] 3 USCA § 15 (2010).
[20] U.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 *recanvassing* 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 *recanvassing* 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 *recanvassing* 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 *recanvass* 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

[21] *See* Foley, *supra* note 6, at 3.

[22] *See 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.

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[23] 3 USCA § 15 (2010).

[24] Nathan 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 elsewhere[26]) 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,

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

[27]This 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 *recanvass* 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"

[28]Coleman 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

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[29]Minn. Stat. § 209.021 (2010).

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

[31]Minnesota 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.

[32]*See* 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 recanvass 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 recanvassing 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 recanvassing ballot-eligibility issues could be curtailed to fit within seven weeks. At the front end of the recanvassing 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 recanvassing 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 recanvassing proceeding. The Coleman-Franken story certainly shows this. While well-designed recanvassing 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 recanvassing 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 recanvassing 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 recanvass does not concern new issues, but instead only those already addressed in some way in the initial canvass.

At the back end of the recanvassing 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

[36] *See* 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,

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

[40] Something 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 recanvassing disputes by early January.

2. Integrating the recount and recanvass 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

[41]This 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,

[42]The 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 is 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

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[43]Memorandum 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.

[44]*See* Foley, *supra* note 6, at 6.

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

[46]R.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.

[47]Hunter 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 number 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

[48] *See* 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.

[49] *See* 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).

[50] In 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

[51]Richard 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 is 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

[52] *See* 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

[53]Trova 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

[54]227 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

[57]Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007).
[58]U.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 recanvass 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 recanvass—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

[59]Also, 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

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[60] *See* 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 PRIVILEDGED 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).

[61] Edward 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

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[62]In 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).

[63]My 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

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[64]In 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.)

[65]369 U.S. 186 (1962).

[66]377 U.S. 533 (1964).

[67]178 U.S. 548 (1900).

[68]For 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.

[69]178 U.S. at 580.

[70]48 U.S. 1 (1849).

[71]*See* 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

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[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).

[74] I 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. Gorein 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

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[75]The 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.

[80]George 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.

[83]A 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

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[84]Bell 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.

[85]*See McCrary, 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).

[86]*See McCrary, 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]

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[87]Other 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).

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

[89]As 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 happened 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

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[90] *Id.*

[91] As 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).

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

[93] *Id.*

[94] Other 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

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[95]In 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.)

[96]A 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.

[97]A 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

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[98] *See* Foley, *supra* note 4, at 1.

[99] Before *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).

[100] 635 F.3d 219 (6th Cir. 2011).

[101] For 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

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[103] 635 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.").

[104] The 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*.

[105] *See* 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 nonarbitrariness. 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

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[106]Had 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.

[107]*See* Colvin & Foley, *supra* note 24, at 511–12.

[108]*See* 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.

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[109]Jim 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. Minesota'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 recanvassing 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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