ELECTION LAW JOURNAL
Volume 10, Number 2, 2011

DOI: 10.1089/elj.2010.0090

The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election

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ABSTRACT

One of the most daunting circumstances that confronts a robust democracy is a major election where the initial returns show an extraordinarily narrow margin of victory. The intensely competitive political forces that produce the proverbially "razor-thin" result inevitably carry over into the canvassing and recounting of votes. The existence of errors in the casting and counting of ballots will give the competing candidates a set of specific grounds over which to battle. If disputed ballots are either removed or added to the official count, the result may be the declaration of a different winner. Therefore, the laws and institutions charged with resolving post-voting disputes over particular ballots when the stakes are this high will be challenged in meeting a key test of democratic legitimacy: will the electorate, including supporters of the candidate that eventually loses this protracted fight, believe that the ultimate resolution was unbiased towards either side?

Minnesota's election for U.S. Senate in 2008 is the nation's most recent major election in which an extraordinarily close initial margin of victory triggered a protracted fight over particular ballots. Coming in the wake of the disputed presidential election of 2000, as well as Washington's disputed gubernatorial election of 2004, the fight between incumbent Norm Coleman and challenger Al Franken over Minnesota's U.S. Senate seat merits close attention for the lessons it can teach on how better to prepare for similar disputes that will arise in the future. This article describes the details of the Minnesota dispute, to serve as a platform for analyzing those valuable lessons in future scholarship. Moreover, because the Minnesota dispute primarily concerned absentee ballots, an understanding of this episode is necessary for a thorough evaluation of the relative risks and benefits as the nation moves increasingly to vote-by-mail. Insofar as Minnesota's experience with its 2008 election shows potential pitfalls in the administration of absentee voting, the nation is in a position to learn from Minnesota's mistakes.

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This article is the first part of a two-part manuscript that was originally prepared for the festschrift honoring Dan Lowenstein in January 2010, and I join others in acknowledging Dan's leadership role in the field. The article benefitted from feedback from the symposium participants, especially Sam Issacharoff. Since then, I have also received helpful comments from Richard Briffault, Bruce Cain, Guy Charles, Heather Gerken, Rick Hasen, and Michael Kang, among others. I also thank my colleagues at the Moritz College of Law, particularly librarians Kathy Hall, Matt Steinke, and Thomas Sneed, as well as Sarah Cherry, Nathan Cemenska, and Kyle Kopko, for their research and analysis. I am grateful for the exceptionally thoughtful and careful editing of Sophia Chang, whose intelligence, dedication, and good cheer made the revision process most pleasant. In addition to the sources cited, I relied on personal conversations with participants in the recount, and remain extremely grateful for the time, information, and insights they provided. Any errors in interpretation or judgment remain with the author. Documents from the lawsuit discussed in this article are collected at the Election Law @ Moritz Web site: <http://moritzlaw.osu.edu/electionlaw/states/index.php?stateID=45>.

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INTRODUCTION

"WHERE…ALL THE CHILDREN are above-average" is what Garrison Keillor says about his fictional Minnesota town of Lake Wobegone, whose residents shop at Ralph's Pretty Good Grocery. "Above-average" and "pretty good" are appropriate labels for the way in which Minnesota resolved its disputed 2008 U.S. Senate election. These labels might seem faint praise. Yet when compared with most other major disputed elections throughout U.S. history, this one was handled much better than most.

To be sure, it took far too long to resolve: eight months from Election Day (November 4, 2008) to Norm Coleman's concession speech on June 30, 2009, after losing his appeal in the Minnesota Supreme Court. Even worse, had it been a presidential election, Minnesota would not have been in a position to identify the winning candidate by the

date that Congress had designated for the Electoral College to meet in 2008: December 15.[1] On that date, Minnesota's State Canvassing Board still had not yet begun to review ballots challenged by both candidates during the local phase of its statewide recount.

Indeed, December 15 was the very day that Coleman first went to court over the issue that would come to dominate the dispute for the rest of its duration: whether absentee ballots that had been rejected should be counted.[2] When the State Canvassing Board certified the results of the administrative recount on January 5, 2009, this issue still remained largely unaddressed because the Minnesota Supreme Court had ruled that previously rejected absentee ballots could not be considered in the administrative recount unless *both* candidates, as well as local officials, agreed that they had been improperly rejected.[3] Consequently, after certification of the recount on January 5 showed Franken as prevailing, Coleman pressed forward with his effort to get more absentee ballots counted.[4] He did so using the procedure that the Minnesota Supreme Court stated was the appropriate one for that effort: a judicial contest of the certified result.[5] Although Coleman filed his judicial contest immediately after the certification of the recount, it took the trial court until April 13 to resolve his claims concerning the rejected absentee ballots.[6] His appeal of the trial court's rulings took another two and a half months.

Notwithstanding the excessive delay in ending this dispute, Minnesota's procedures were admirably fair. The State Canvassing Board conducted the recount impartially. More significantly, the three-judge court that adjudicated Coleman's contest of Franken's certification was "tripartisan" in its membership—each judge having been appointed by a governor from a different political party (one Democrat, one Republican, and one Independent)—and all of its rulings were unanimous.[7] It was impossible for Coleman to reasonably claim that this court's rulings were influenced by a partisan bias against him. Thus, when these rulings were all affirmed on appeal in another unanimous decision (by a court that included two appointees of the then-incumbent Republican governor, Tim Pawlenty), Coleman had no plausible choice but to acknowledge he could not have asked for a fairer process to consider his claims. In this respect, the resolution of *Coleman v. Franken*[8] stands in sharp contrast to *Bush v. Gore*, or any number of other major disputed elections in U.S. history where the outcome appeared tainted by partisanship.[9]

Of course, the protracted dispute over absentee ballots in *Coleman v. Franken* would not have occurred in the first place if there had not been significant problems with the administration of Minnesota's absentee voting laws in the 2008 general election. Some of these problems concerned the content of the relevant Minnesota statutes. Written in an age when absentee voting was disfavored, they imposed antiquated requirements, including

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[1] 3 U.S.C. § 7 (2010).

[2] Amended Petition for an order to show cause pursuant to Minn. Stat. 204B.44, Coleman v. Ritchie, 758 N.W.2d 306 (Minn. Dec. 15, 2008).

[3] Order, Coleman v. Ritchie, 758 N.W.2d 306 (Minn. Dec. 18, 2008).

[4] Order, Coleman v. Ritchie, 758 N.W.2d 306 (Minn. Jan. 5, 2009).

[5] *Id.*

[6] Findings of Fact, Conclusions of Law & Order for Judgment, Coleman v. Franken, 767 N.W.2d 453 (Minn. 2009).

[7] Rachel E. Stassen-Berger, *U.S. Senate Race Tripartisan Trio to Rule on Election Contest: Pawlenty, Ritchie Reject Franken's Certification Bid*, Pioneer Press (St. Paul) Jan. 13, 2009, at A1.

[8] I call this case *Coleman v. Franken*, which is more reader-friendly than its technical name: *In the matter of the Contest of General Election held on November 4, 2008, for the purposes of electing a United States Senator from the State of Minnesota*. 767 N.W.2d 453 (Minn. 2009). *Coleman v. Franken* also permits more accessible analogies to *Bush v. Gore*. It is also accurate that Coleman was the primary contestant in this lawsuit, although he joined with a single voter as a named contestant in his complaint. Franken was the named contestee. After he filed his contest, individual voters sued separately, and their claims were considered alongside the candidates'. The most significant group of these voters were named in the media the "the Nauen voters," after the attorney who represented them. Jay Weiner, *Senate recount trial: Coleman side opposes two voters in the 'Nauen 61' group*, MinnPost, Mar. 19, 2009, <http://www.minnpost.com/politicalagenda/2009/03/19/7507/senate_recount_trial_coleman_side_opposes_two_voters_in_the_%E2%80%98nauen_61%E2%80%99_group>.

[9] For an early example of this kind, see Edward B. Foley, *The Founders'* Bush v. Gore*: The 1792 Election Dispute and Its Continuing Relevance*, 44 Indiana L. Rev. 23 (2010). The most significant disputed election in U.S. history that was resolved by a tribunal that appears tainted with partisanship is the 1876 presidential election. For a discussion of why the nation was unable to reform its institutions for resolving disputed presidential elections in order to avoid the same type of taint in 2000, see Colvin & Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 Fordham L. Rev. 1043 (2010). An experiment to test a type of tribunal that might be able to avoid this kind of problem in the future is discussed in 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).

that the completion of the absentee ballot envelope be witnessed.[10] This old-fashioned approach to absentee voting was entirely out of sync with the message that the public was receiving, both nationally and in Minnesota specifically, in 2008: absentee voting exists to be a convenient alternative to in-precinct voting, and indeed it is preferable that many voters utilize the availability of absentee voting in order to avoid long lines (and other associated problems) at polling places on Election Day. Not surprisingly, then, when 2008 turned out to be one of the most high-interest elections in decades—because of the historically dramatic presidential election on the ballot—the number of absentee ballots cast in Minnesota jumped.[11] Inevitably, there was also a correspondingly high number of absentee ballots rejected because of problems voters had in complying with the state's arcane and outdated rules for absentee voting.[12] It took an exceedingly close statewide election to expose the flaws in the state's absentee voting system.

Minnesota's 2008 U.S. Senate election will serve for a long time as a useful case study on the possible pitfalls—and potential solutions—when the outcome of an important election turns on the administration of rules for the casting and counting of absentee ballots. Minnesota itself has already learned from its own mistakes, enacting a new statute designed to fix the defects in the state's absentee voting statutes that surfaced in 2008.[13] One relatively straightforward reform, for example, which would have avoided much of the problem of rejected absentee ballots, is a requirement that local officials give absentee voters an opportunity to correct mistakes made in the completion of their absentee ballot envelopes.[14]

There are many other perspectives, however, by which one can view Minnesota's disputed 2008 U.S. Senate election. Instead of focusing on the substance of the absentee voting problems, one can concentrate on the procedures the state used to resolve the substance of the dispute. Minnesota would have faced difficulties resolving the dispute in a timely manner even if the dispute had involved issues other than absentee voting. Indeed, there *were* some secondary issues in *Coleman v. Franken*,[15] and had these particular problems been more severe, they could have caused the same kind of inordinate delays in reaching a resolution even in the absence of any fight over absentee ballots. Nonetheless, the same fair and impartial institutions existed to handle these other issues along with the ones concerning absentee ballots.

There is also the perspective of Equal Protection and, more generally, the applicability of federal constitutional law to ballot-counting disputes. *Coleman v. Franken* involved Fourteenth Amendment claims concerning the way in which Minnesota counted absentee ballots, just as *Bush v. Gore*[16] involved Fourteenth Amendment claims concerning the way Florida counted hanging and dimpled chads. Future disputed elections will raise more such claims, even if they concern write-in votes or provisional ballots, rather than chads or absentee ballots. Thus, *Coleman v. Franken* stands alongside *Bush v. Gore* as an important precedent on how the Fourteenth Amendment applies to vote-counting disputes. Indeed, *Coleman v. Franken* is the first major case to explain—and thus refine—how *Bush v. Gore* itself should be understood with respect to these disputes.

What follows is a detailed narrative account of the disputed 2008 U.S. Senate election in Minnesota. This account is designed to serve as a platform upon which to analyze this dispute from any of these multiple perspectives. Indeed, in future work, I intend to draw lessons from this episode on how the resolution of future disputed elections might be improved: to make them faster, yet still fair.

The Lake Wobegone Recount should be applauded for what it was. But this recognition does not mean that any state, or the nation as a whole, should settle for the Lake Wobegone Recount as the highest possible standard that the resolution of a disputed election could achieve.

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[10] MINN. STAT. ANN. § 203B.07 (2008).

[11] 292,546 absentee votes were cast in Minnesota in 2008 compared to 231,711 absentee ballots in 2004. Election Assistance Commission, *Election Administration and Voting Survey*, < http://www.eac.gov/research/election_administration_and_voting_survey.aspx > .

[12] According to the EAC, 9,368 absentee ballots were rejected in 2008. *Id.*

[13] *See* MINN. STAT. ANN. § 203B.121 (2010). The 2010 election in Minnesota demonstrated the success of this statutory reform. The number of rejected absentee ballots in 2010 was significantly reduced, with only 3,000 ballots rejected. Brian Bakst, *This time, only 3,000 rejected absentee ballots*, STAR TRIBUNE, Nov. 4, 2010. Moreover, the problems that emerged during the recount of the 2010 gubernatorial election in Minnesota concerned issues other than absentee voting.

[14] MINN. STAT. ANN. § 204B.45 (2010).

[15] See the discussion of "Missing Ballots" and "Alleged Double-Counting of Duplicated Ballots" in Parts II.B.1 & II.B.2, below.

[16] 531 U.S. 98 (2000).

Still, in order to build upon the foundation of this "above average" or "pretty good" achievement—learning from its virtues as well as its deficiencies—it is necessary to delve into the details of what actually transpired.[17]

I. THE CANVASS: NOV. 5 TO NOV. 18

On the morning after Election Day, with 100% of precincts reporting, the incumbent U.S. Senator, Republican Norm Coleman, had 725 more votes than his Democratic challenger, Al Franken, out of almost three million ballots cast. The Associated Press had called the race for Coleman before 7 a.m., but retracted two hours later.[18] Over the next few days, as local election officials checked their figures, Coleman's narrow lead kept dwindling. By Wednesday night, it was down to 477. At one point on Thursday, it bounced back up to 590, but by the end of that night it had fallen—like a stock market index on a volatile day—all the way to 236. Friday's close was 221, and then Monday's was 206.[19]

Coleman supporters saw evil lurking behind this downward movement of their candidate's lead. His side filed litigation to control the chain-of-custody of ballots and to disclose the records that would explain the shift in numbers.[20] Even after the entire saga was over, the editorial page of the *Wall Street Journal* complained that suspicious changes in precinct totals during the canvass cast doubt over the integrity of the final result.[21]

By all reasonable accounts, however, such lingering suspicions remain unfounded. To be sure, at the time, the changing numbers might have seemed questionable in some instances, although local officials offered plausible explanations for their error corrections. But the beauty of the recount, in this regard, was that it "pushed the reset button" and thus started the entire count of all 2.9 million ballots all over again from zero.[22] Mistakes during the initial canvass that all seemed to go in Franken's favor were irrelevant once the automatic recount began—unless there were allegations that actual Coleman-voted ballots were deliberately destroyed during the canvass, or extra Franken-voted ballots were deliberately added that had not actually (or properly) been cast and counted on Election Day.[23]

But the Coleman campaign did not allege this kind of impropriety. They understandably were concerned about an initial report that ballots had been traveling in a single election official's car. They dropped the matter, however, once they were satisfied that the initial concern was unfounded.[24] The blogosphere was not as quick to let go of this incorrect report. This kind of dispersal of untruths at lightning speed raises questions about the ability

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[17]This article was written before the publication of Jay Weiner's book THIS IS NOT FLORIDA: HOW AL FRANKEN WON THE MINNESOTA SENATE RECOUNT (2010). Thus, the account here inevitably, and appropriately, differs from that book in its details and emphasis. Having had the benefit of Jay's superb reporting while this disputed election was in progress, and also Jay's assistance in obtaining some documents for the preparation of this article, I look forward to the opportunity in future scholarship to reflect critically on the insights in his book and how they can help improve our understanding of how to handle future disputed elections.

[18]Kevin Duchschere, Curt Brown & Pam Louwagie, *Recount: The Coleman-Franken brawl drags on*, STAR TRIBUNE, Nov. 6, 2008, at 1A.

[19]Kevin Duchschere & Patricia Lopez, *One step closer to Senate recount*, STAR TRIBUNE, Nov. 11, 2008, at 1A.

[20]Coleman sued election officials in Stearns County to obtain what he believed were more secure chain-of-custody rules, and the state trial court granted his emergency motion. Order, *In the Matter of the Stearns County Auditor's Petition for Ex Parte Order Securing Ballots*, 73-CV-08-14472 (Minn. Dist. Ct. Nov. 7, 2008). Other counties soon followed the new judicial rules from Stearns County, and the Franken campaign (after initial concerns) did not oppose them. The new rules may have been better, and chain-of-custody is important. Thus, one does not wish to rule out the possibility of litigation over chain-of-custody in the first few hours, or days, after Election Day. Still, it is unsettling to have litigation—and the adoption of new rules—over something as basic as chain-of-custody, as the candidates fight ferociously to gain the upper-hand when Election Night tallies show a minuscule vote margin between the two candidates. It would be far preferable, and thus should be a high priority, to settle upon sound chain-of-custody rules well in advance of Election Day, so that there is no room for destabilizing litigation over these rules after the ballots have been cast.

[21]Editorial, *The ''Absentee'' Senator: Franken wins by changing the rules*, WALL ST. J., Jul. 2, 2009, at A11. At the time, I responded to what I considered were glaring and irresponsible inaccuracies in the *Wall Street Journal*'s portrayal. *See* Edward B. Foley, *The Rhetoric of a ''Stolen'' Election*, FREE & FAIR (July 1, 2009), <http://moritzlaw.osu.edu/electionlaw/freefair/articles.php?ID=6547>.

[22]The "reset button" point is noted in 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 (St. Paul), Sept. 24, 2009.

[23]*Id.*

[24]One of Coleman's lead attorneys stated: "we've heard enough from the city attorney to let go of this. It does not appear that there was any ballot-tampering, and that was our concern." Patricia Lopez & Kevin Duchschere, *Coleman leads Franken by 206 votes*, STAR TRIBUNE, Nov. 11, 2008. *See also* Mark Brunswick, *Public servants adjusting reluctantly to the public eye*, STAR TRIBUNE, Nov. 21, 2008, at 16A.

of the electoral process to avoid public distrust based on misinformation. Nonetheless, in this instance, however hurtful persistent repetition of falsehoods might be to the particular person wrongly accused of misconduct, the issue lost its salience among most sectors of the general public once Franken was seated in the Senate.[25]

To be sure, later during the recount, there emerged an issue over an envelope of ballots that went missing—an issue that remained in dispute all the way to the very end of the appeal. But there never was any allegation that this loss of ballots was anything other than an innocent mistake on the part of election officials.[26] Indeed, during the trial of the judicial contest, Coleman's attorneys emphatically denied any claim that fraud or any other deliberate misdeed tainted the counting and recounting of ballots in this election.[27] Likewise, had Franken come out behind at the end of the recount, he might have raised issues about breaches in the proper chain-of-custody in some localities, but there is no indication that he would have claimed any fraudulent or manipulative intent on the part of the local officials involved.[28]

Thus, when the State Canvassing Board met on Tuesday, November 18 (two weeks after Election Day) to declare the result of the statewide canvass, the effect was merely to announce that the state needed a more precise instrument to measure the outcome of an election this close.[29] Indeed, the result of a random audit of sample precincts—as required in all elections under Minnesota law[30]—added nine votes to Coleman's lead, from where it had stood when the initial local canvasses were reported (on Monday, Nov. 10).[31] A 215-vote margin, or less than one-hundredth of one percent of the 2.9 million votes, triggered an automatic hand recount of all these ballots in this statewide race.[32]

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[25]The year 2010, however, forced Minnesota to conduct another statewide recount, this time over the outcome of its gubernatorial election. While the result was not nearly as close as the U.S. Senate race—a final certified margin of victory of 8,770—it raises issues that had not been the focus of attention in the dispute over the 2008 U.S. Senate race. For example, one issue that attained prominence in 2010 was an alleged lack of reconciliation between the number of voters who signed the poll books in a precinct and the number of ballots cast in that precinct. There was some Internet chatter that this phenomenon might have had an effect on the outcome of the much-closer U.S. Senate race in 2008, but that speculation is improbable as even a 312-vote margin is extremely difficult to overcome through a large number of random errors. More importantly, however, Coleman never pressed this issue during either the recount or the subsequent judicial contest of the 2008 U.S. Senate election. Coleman had a fair opportunity to raise a lack of reconciliation if he believed the evidence warranted it. Therefore, it would be inappropriate to claim now that Coleman was somehow wronged in 2008, based on an issue he never raised then.

[26]Months later, in a newspaper review of the disputed election, there was an intriguing suggestion—never proven—that a "Coleman operative" may have been responsible for the envelope's disappearance. Dave Orrick, *Overtime: The 2008 U.S. Senate Race, Chapter 3: How Franken's attorneys outmaneuvered Coleman's team to secure the Senate seat*, Pioneer Press (St. Paul), Sept. 18, 2009. What is important, as the newspaper notes, is that at trial Coleman's attorney "stipulated: 'We have no doubt that a number of ballots existed that were inside an envelope that has been lost.'" *Id.*

[27]Coleman v. Franken, 767 N.W.2d 453, 457 n.3 (Minn. 2009).

[28]Another chain-of-custody issue that emerged during the recount but was satisfactorily resolved by the start of the judicial trial concerned 171 ballots from a Franken-friendly precinct in Maplewood, a St. Paul suburb. This incident is the most disturbing to have emerged from the entire vote-counting process. The reason is that it involves the only known instance of official deceit, specifically fabrication of numbers on a canvassing report from a particular precinct. Poll workers at the precinct had missed a pile of absentee ballots, and then altered the report of the number of voters who had signed in at the precinct in order to conceal the discrepancy. *See Overtime: Chapter 2, Part 3: Ballots disappear—and so does Coleman's lead vs. Franken*, Pioneer Press (St. Paul), Sept. 9, 2009.As disturbing as this incident of poll worker misconduct may be, because it was caught during the recount it did not affect the accuracy of the ultimate vote totals for the two candidates. Before the start of the trial in *Coleman v. Franken*, Coleman's attorneys had been told by officials of the circumstances surrounding the discovery of the 171 Maplewood ballots. Their acknowledgement at trial that they had no problem with counting the ballots reflected their knowledge of what had actually occurred. (My understanding of these facts is based on interviews with some of the participants involved with this particular issue.)

[29]Official Minutes, Canvassing Board Meeting, Nov. 18, 2008, available at <http://www.sos.state.mn.us/index.aspx?page=1408>.

[30]Minn. Stat. Ann. § 206.89 (2008).

[31]Jay Weiner, *Latest Coleman-Franken recount numbers: Norm's lead grows to 215*, MinnPost, Nov. 17, 2008, <http://www.minnpost.com/politicalagenda/2008/11/17/4674/latest_coleman-franken_recount_numbers_norms_lead_grows_to_215>.

[32]Minn. Stat. Ann. § 204C.35 (2008). The statutory trigger for an automatic recount was much higher than the actual margin in 2008. In light of the automatic recount of the 2010 gubernatorial election, where the margin was relatively large (8,770 votes), the state is considering legislative changes that would reduce the automatic trigger even lower than the current one-half of one percent. Obviously, if the trigger in 2008 had been one-quarter of one percent, or even as low as one-tenth of one percent, the actual margin would still have been well below the trigger.

II. THE RECOUNT: NOV. 19 TO JAN. 5

The recount consisted of two phases. The first was conducted locally. Recount teams at 107 sites throughout the state,[33] under the watchful eyes of the public and representatives from each campaign, manually reviewed every ballot that had been initially counted by a machine. During this process, the two sides were entitled to challenge the decision that the recount team made with respect to a particular ballot. For example, the Coleman camp could challenge a ballot counted for Franken, claiming that the ballot should be considered a "no vote" on the ground that the oval for Franken was not marked sufficiently or properly. Conversely, the Franken side could challenge a ballot deemed a "no vote" by the recount team as being one that should be counted for him; he could assert that the mark on the ballot showed enough voter intent according to the rules that Minnesota law provides for recounts.[34]

All the ballots challenged during this local phase of the recount were submitted to the State Canvassing Board for its determination. This review by the five-member board was the second, centralized phase. It meant that any disputed ballot received a fresh and authoritative determination by a single statewide body, thus avoiding any issues of local disparities in recount standards such as those that plagued Florida in the 2000 presidential election. This centralized—and mandatory—nature of the Minnesota recount has not received as much attention as it deserves. Much of the litigation in Florida's disputed presidential election concerned whether there would be a manual recount of the ballots with so-called "hanging chads," what the scope of that recount would be, and who would conduct it.[35] All these issues were settled in Minnesota before Election Day, as they should have been in Florida, and Minnesota's provision for a mandatory centralized manual recount was the method most likely to induce public confidence in the eventual outcome.[36]

When the local phase finished on December 5, there were 6,655 challenged ballots, out of the almost 3 million recounted. That large pile of challenged ballots was whittled down, as each side began withdrawing its more aggressive challenges, to 1,337 eventually ruled on by the Board. Once the Board was finished with its rulings on December 19, Franken was in the lead for the first time—by a margin of about 250 votes.[37] Franken's lead dropped to 49, after the roughly 5,000 ballots for which challenges had been withdrawn were added back into the count.

A. The successful examination of ballots to discern voter intent

The Board's conduct in reviewing challenged ballots was widely seen as exemplary of a fair and impartial process. Three main factors contributed to this perception. First, the accessibility and transparency of the Board's deliberations made it feasible for members of the public to judge for themselves the quality of the Board's proceedings. It was possible to watch the Board's ballot-by-ballot deliberations live on the Internet (through a new "citizen journalism" project called www.theuptake.org), as well as to follow detailed accounts posted by journalists and bloggers in attendance. One web-only news service, MinnPost (whose reporters had been trained at now-downsized traditional newspapers), distinguished itself by the high quality of its coverage, both in terms of "play-by-play" descriptions of the proceedings (by Jay Weiner) and analytic commentary (by Eric Black). These "new media" endeavors supplemented, rather than supplanted, traditional newspaper coverage from the Minneapolis *Star Tribune* and the St. Paul *Pioneer Press* (among others).[38]

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[33]Patricia Lopez & Mike Kazsuba, *Ready, set . . . recount*, STAR TRIBUNE, Nov. 19, 2008, at A1.

[34]MINN. ADMIN. RULES § 8235.0800 (2008).

[35]The literature on all the lawsuits in Florida over the 2000 presidential election is voluminous. One especially readable account is JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION (2001). Toobin focuses in particular on Gore's strategic decision to seek a manual recount in only four counties rather than statewide, as well as on the tension between the so-called "protest" and "contest" phases of Florida's post-voting procedures. *See also* CHARLES L. ZELDEN, *BUSH V. GORE*: EXPOSING THE HIDDEN CRISIS IN AMERICAN DEMOCRACY (2010).

[36]MINN. STAT. ANN. § 204C.35, subd. 1(a)(2) (2008). Even if the state chooses to lower its trigger for a mandatory recount (*see supra* note 32), the desirability of doing so in no way detracts from the basic point that it is better to have some mandatory trigger than none at all.

[37]Kevin Duchschere & Mike Kaszuba, *Visions of Senate race lead dance in Franken's head,* STAR TRIBUNE, Dec. 20, 2008, at 1A. Rachel E. Stassen-Berger & Dave Orrick, *Franken in front . . . for now*, PIONEER PRESS (St. Paul) Dec. 19, 2008.

[38]*See* Jay Weiner, *Franken-Coleman Recount: One reporter's personal journey through the spin and Twitter of a post-modern, post-campaign campaign*, MINNPOST, Dec. 5, 2008; Eric Black, *Eric Black Ink Archive*, 99–141, MINNPOST, <http://www.minnpost.com/ericblack/archive>.

The Internet allowed the public to actively participate in the recount proceedings. Both Minnesota Public Radio and the *Star Tribune* posted on their websites photos of various challenged ballots and asked their audiences to submit their judgments on whether the ballots should be counted and for whom.[39] Some of the posted ballots immediately became the stuff of legend. The most notorious one seemed to vote for "Lizard People" as a write-in candidate.[40] Although people joked about the oddities of some ballots, by participating in the online examination of challenged ballots they developed a good understanding of the task confronting the Canvassing Board and thus were able to evaluate the reasonableness of the ballot-specific judgments that the Board would reach.

The second main factor that aided Minnesota in the conduct of the recount was the rules specified in advance about how questionable ballots should be judged to determine whether they should be counted for a candidate. Minnesota has a statute (204C.22) that is relatively specific in how to identify voter's intent from the marks on a ballot.[41] Although the statute does not (and could not) eliminate all discretion and judgment on the part of the officials conducting the ballot-by-ballot review, Minnesota's statutory standards are certainly more specific than the ones that Florida had in 2000 governing the dispute over hanging and dimpled chads.[42] In addition to the statute itself, Minnesota's Secretary of State had published a "Recount Guide" containing pictures of typical questionable ballots, indicating how they should be handled.[43] And again, unlike Florida, Minnesota lodged the authority to make the judgment calls over challenged ballots in the hands of a single five-member statewide body, rather than among a myriad of local officials and institutions.[44]

The third major factor contributing to the successful recounting of ballots was the membership of this five-member Canvassing Board. It was something of an accidental, or at least fortuitous, success. Minnesota law provides that the Secretary of State shall be a member of this Board and shall appoint four jurists to be co-panelists: two from the state's Supreme Court and two from a lower court.[45] The requirement of four judicial, rather than legislative or administrative, officers increased the likelihood that the Board's deliberations would be evidence-oriented and rule-guided, rather than merely partisan and outcome-driven in their calculations. Still, there was no guarantee that the four jurists or the Secretary of State would be genuinely impartial and scrupulously nonpartisan, nor any guarantee that they would be skilled in the exercise of their recount tasks. Indeed, before Secretary of State Mark Ritchie announced the names of the four jurists who would join him on the panel, there were suspicions that he might tilt the body in favor of Franken. Having a reputation as a liberal, with ties to voting rights activists, Ritchie was initially distrusted by Coleman's supporters.[46]

Yet Ritchie soon proved his ability to set aside partisan affiliation in his role as chair of the Canvassing Board. First, he essentially turned over his appointing authority to the judiciary itself: he asked Chief Justice Eric Magnuson to select the two members of the Supreme Court who would serve on the panel, and he likewise asked the Chief Judge Kathleen Gearin of the Ramsey County District Court to select the other two members. It turned out that both Chief Justice Magnuson and Chief Judge Gearin selected themselves, as well as one colleague each. But this rather haphazard method of appointment resulted in a balanced and highly competent body. The Chief Justice and Justice Barry Anderson were recognized Republicans: both had been appointed to the Supreme Court by Governor Tim Pawlenty, and they each had long-standing Republican affiliations on their resumes.

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[39]Bob Von Sternberg & Glenn Howatt, *Disputed Ballots: Judge for yourself; You can join in the puzzling over scribbles and ovals and arrows*, Star Tribune, Nov. 29, 2008, at 1A.

[40]David Brauer, *'Lizard People' rules the recount*, MinnPost, Nov. 20, 2008, <http://www.minnpost.com/braublog/2008/11/20/4740/lizard_people_rules_the _recount>.

[41]Minn. Stat. Ann. § 204C.22 (2008).

[42]Kyle C. Kopko, Sarah McKinnon Bryner, Jeffrey Budziak, Christopher J. Devine & Steven P. Nawara, *Count What You Want to Count: Motiviated Reasoning and Challenged Ballots*, 33 Pol. Behav. 271 (2011), available at <http://www.springerlink.com/content/6171311p17406695/>.

[43]Office of the Minnesota Secretary of State, *2008 Recount Guide*, available at <http://www.leg.state.mn.us/docs/2009/other/090983.pdf>.

[44]Minn. Stat. Ann. § 204C.31 (2008).

[45]*Id*.

[46]Before the Canvassing Board convened, I was one of those who voiced skepticism about its ability to appear genuinely impartial in its deliberations. Edward B. Foley, *In '62, Minnesota set the recount standard*, Star Tribune, Nov. 18, 2008, available at <http://startribune.com/opinion/commentary/34706104.html>.

Their membership on the Board immediately counteracted Ritchie's allegedly leftward leanings. Furthermore, Judge Edward Cleary had been appointed by Governor Jesse Ventura, an Independent.[47] As Minnesota has a stronger tradition of an Independence third party than other states—and since Independent candidate Dean Barkley had garnered 15% of the vote in his race against both Coleman and Franken[48]—it was valuable to have representation of the Independence Party perspective on the panel. Finally, it was difficult to discern the political leanings of Judge Gearin, who had been elected to the bench without any party affiliation.[49] With this varied group in place, it could not be said that the panel was decidedly biased in one direction or another.

But it was not just *who* the members were that generated a public impression of their fairness and impartiality. Rather, it was also very much *how* they conducted themselves in their transparently Internet-accessible deliberations on the ballots and the issues that arose. In his role as chair, Ritchie went out of his way to avoid an appearance of bias, adopting a posture of invariably moving to sustain the local recount team's ruling on a challenged ballot regardless of which candidate had made the challenge.[50] Together, Ritchie and Chief Justice Magnuson were the evident bipartisan leaders of the Canvassing Board, both exhibiting considerable leadership skills suited to their public roles. Moreover, all members of the panel appeared thoughtful, intelligent, judicious, and fair-minded in their consideration of marks on the ballots and how to treat them. The fact that the five-member panel was consistently unanimous in virtually all of its rulings (and all of its major ones), despite the diversity of its members' backgrounds, added significantly to the impression that they were making their judgments based on the evidence and the law, as best as they humanly could, rather than out of any desire to have a particular candidate prevail.[51]

In sum, it seems difficult to imagine a better method for the human evaluation of hand-marked ballots than the one Minnesota employed for the 2008 recount of its U.S. Senate race. To be sure, Minnesota might have adopted a statute that did more to increase the likelihood that the members of the Canvassing Board would be fair and skilled in the way they turned out to be. And perhaps the procedures for challenging ballots at the local level might have been streamlined in such a way as to avoid the need to reduce total statewide number of challenged ballots from 6,655 to the 1,337 that the Board eventually faced[52]—although one virtue of the process that Minnesota employed was that each side felt it had the right to challenge as many ballots as it thought necessary, thus preserving the fairness of the process that led to the eventual whittling-down of these challenges on

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[47] *Overtime: Chapter 2, Part 4: As Franken vs. Coleman ballot challenges grew, campaigns wanted to 'Punch them in the nose'*, Pioneer Press (St. Paul), Sept. 9, 2009.

[48] *Election Reporting*, Nov. 4, 2008, <http://electionresults.sos.state.mn.us/20081104/ decRslts.asp?M=S&R=allP=A&Races=>.

[49] *Id*. Judge Gearin has since embroiled herself in another political controversy, by invalidating Governor Tim Pawlenty's budget reconciliation measures. *See* Eric Black, *Final unallotment brief, by Pawlenty's side, says: Read the law; governor followed it*, MinnPost, Mar. 3, 2010, <http://www.minnpost.com/ericblack/2010/03/03/16370/final_unallotment_brief_by_pawlenty's_side_says_read_the_law_governor_followed_it>.

[50] Official Minutes, Canvassing Board Meetings, available at <http://www.sos.state.mn.us/ index.aspx?page=1408>. During the 2010 recount of Minnesota's gubernatorial election, it became clear that some strong partisans on the Republican side still harbored a belief that Ritchie and his office had been unfairly biased during the 2008 recount of the U.S. Senate race. *See* Michael Thielen, *Mr. Weiner's naivete and bias on the 2008 Minnesota recount*, The Hill's Congress Blog, Nov. 8, 2010, <http://thehill.com/blogs/congress-blog/politics/128173-mr-weiners-naivete-and-bias-on-the-2008-minesota-recount>; John Croman, *Security and emotion high on the road to recount*, Kare11.com, Nov. 7, 2010, <http://www.kare11.com/news/news_article.aspx?storyID=880659>. The nature of political passion being what it is, evidence-based analysis of the events—conducted in an effort to be scrupulously as nonpartisan as possible—is unlikely to persuade individuals who are fervently convinced that Ritchie "stole" the election for Franken. All one can do is to describe in detail why the evidence indicates otherwise, and to observe that this intractable opinion is an outlier. Even members of Coleman's legal team, who have as firm a grasp of the detailed facts as anyone, do not maintain that Ritchie robbed Coleman of a victory that was legitimately his.

[51] It perhaps could be observed that, based on occasional 4–1 splits over particular ballots, Judge Cleary turned out to be the most pro-Franken member of the Board, while Justice Anderson was the most pro-Coleman. But the fact that these splits were 4–1, rather than 3–2, and went in both directions, indicated that the Board as a whole was being balanced. For a detailed discussion of the Board's proceedings, see Eric Black, *The Canvassing Board takes the Ballot Challenge!*, MinnPost, Dec. 16, 2008, <http://www.minnpost.com/ericblack/2008/12/16/5330/the_canvassing_board_takes_the_ballot_challenge>. *See also* Editorial, *Act II, Scene II: Trying hard to get it right*, Pioneer Press (St. Paul), Dec. 17, 2008, at B10; Jay Weiner, *Recount week in review: Good day for Franken, good job by Ritchie and whole Canvassing Board*, MinnPost, Dec. 19, 2008, <http://www.minnpost.com/stories/2008/12/19/5440/recount_week_in_review_good_day_for_franken_good_job_by_ritchie_and_whole_canvassing_board>.

[52] Rachel Stassen-Berger & Dave Orrick, *supra* note 37.

sober reflection.[53] Many states would do well to use Minnesota's experience in this respect as a starting point for improving their own recount procedures.

B. Issues beyond the discernment of voter intent

For all the success of the process the state used to review the marks on each ballot, three problems emerged during the recount that could not be handled simply by this process.

1. Missing ballots. First, and least significant, was the fact that an envelope containing 133 ballots from a Minneapolis precinct was lost and never could be found, despite herculean efforts to locate it. The envelope had been marked "1 of 5" and its four sequentially-marked siblings had not gone astray. Moreover, the number of votes in the precinct counted on Election Night essentially matched the number of voters from the precinct who cast ballots to be counted.[54] It was not as if 133 more votes were counted on Election Night than cast. In other words, it was not that the 133 extra "phantom" votes did not really correspond to actual ballots and thus should be discarded in a recount. Consequently, the Canvassing Board unanimously chose to accept the vote tallies from Election Night on the machine-generated tape in lieu of the availability of actual ballots to recount.[55] This solution, although obviously not perfect (nothing perfect was possible given the unavailability of the lost actual ballots), seemed the most reasonable second-best remedy to avoid disenfranchisement of the 133 voters who evidently cast the missing ballots. Although the machine tally might be inaccurate—the manual recount was proving that the machines did not always accurately discern voter intent from the marks on the ballot—the machine tally was still better evidence of voter intent than nothing at all. Although Coleman challenged this ruling in the subsequent judicial contest (the results on the tape favored Franken by a net of forty-six votes[56]), all eight judges were unanimous, as the Canvassing Board members had been, in rejecting this challenge. Coleman's argument for ignoring the second-best evidence of voter intent in this circumstance never seemed a strong one.

The episode, however, did reinforce the necessity of maintaining strong chain-of-custody practices for the handling of ballots. Some degree of human error is inevitable in the counting and recounting of three million ballots, and even the best chain-of-custody procedures written into a state's election statutes cannot guarantee that no ballots will go astray during the counting-and-recounting process. Indeed, a detailed review of Minnesota's experience in the 2008 election will reveal numerous instances of ballots missing here and there, usually in very small numbers and usually found fairly quickly after a diligent search, with the consequence that neither side disputed the integrity of the ballots eventually found. The 133 missing ballots from Minneapolis were different because their number was an order of magnitude larger than most of the isolated problems, and because the ballots were never found.[57] It would be impossible to write rules to guarantee that a problem of this magnitude and significance will never occur again, but it does remind one of the need to recheck administrative procedures and practices to see if there are any ways of reducing the risk.

2. Alleged double-counting of du licated ballots. The second noteworthy problem that emerged during the recount was an allegation by Coleman that approximately 150 ballots had acci-

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[53]In the 2010 gubernatorial recount, there emerged again a debate about whether it is possible to constrain the use of challenges, but as in 2008, initially overzealous challenges at the local level were withdrawn before the State Canvassing Board had to rule. Although some have advocated for stricter rules to thwart such overzealousness, Minnesota's experience in both 2008 and 2010 suggests that there is a benefit to a process that permits candidates to vent some initial frustration through aggressive challenges only to let the inevitability of the result sink in over time.

[54]On Election Night, machines counted 2,028 ballots in the precinct, with rosters showing 2,029 voters. During the recount, only 1,896 ballots were recounted. Dave Orrick & Jason Hoppin, *On last day's eve, envelope with 133 votes is missing: Coleman workers cry foul as Ritchie grants Minneapolis time to find it*, Pioneer Press (St. Paul), Dec. 5, 2008, at A1.

[55]Official Minutes, Canvassing Board Meeting, Dec. 12, 2008, at 7, available at <http://www.sos.state.mn.us/index.aspx?page=1408>.

[56]Mark Brunswick & Bob von Sternberg, *Senate Recount: Minneapolis gives up on 133 ballots, but they still have pull; How they got away and deciding whether to count them are just some of the loose ends in the Franken-Coleman race*, Star Tribune, Dec. 8, 2008, at 1B.

[57]The 171 ballots from Maplewood found during the recount (*see supra* note 28) obviously equaled the missing Minneapolis ballots in order of magnitude. But, unlike their Minneapolis counterparts, the Maplewood ballots were found and thus could be recounted in the conventional way. This distinction made a difference from Coleman's perspective, with the missing Minneapolis ballots being the qualitatively more objectionable situation.

dently been counted twice by local recount teams. The allegation emerged from apparent discrepancies concerning practices for the treatment of damaged ballots on Election Night.[58] When a ballot (typically an absentee one damaged during its delivery through the mail) cannot be read by a machine, the practice is for local election officials—two from different parties—to fill out a duplicate ballot, marking the original and the duplicate with serial numbers so that they can be tracked: "Original 1" with "Duplicate 1," "Original 2" with "Duplicate 2," and so forth. During the recount, it became apparent that some ballots marked "Original" lacked a corresponding "Duplicate" ballot. It seemed as if, in the press of business on Election Night, some officials might have failed to mark the "Duplicate" as such. When the two campaigns prepared for the local phase of the recount in consultation with the Secretary of State's office, they agreed that "Original" ballots should be counted instead of "Duplicates"—on the theory that "Original" ballots were better evidence of voter intent, and the reason for the "Duplicates" (to feed them through the machine) was inapplicable during the manual recount.[59]

But with each "Original" counted during the recount, even if a corresponding "Duplicate" was missing, the possibility existed that unmarked duplicates also had been counted as part of the recount—thus giving these voters two counted ballots instead of just one. Or so Coleman argued. Franken countered that there were different possible explanations of what might have happened: for example, an "Original" might have been marked, but a "Duplicate" never made (or perhaps lost).[60]

In any event, the State Canvassing Board unanimously concluded that under Minnesota law it was not entitled to consider the issue of alleged double-counting because to do so would require the taking of testimony and the consideration of other extrinsic evidence, rather than just an examination of the ballots themselves.[61] Coleman went to the Minnesota Supreme Court, asking for an order that would require the Canvassing Board to address the issue. But the Supreme Court unanimously agreed with the Board that, as an administrative body supervising the recount, it lacked jurisdiction over the issue; the only way for Coleman to raise the issue was in a separate judicial contest of the election, where the full range of relevant evidence could be considered at trial.[62]

Coleman did eventually press the point in his judicial contest of the election, but he got nowhere with it. The trial court unanimously ruled that Coleman was barred from raising the issue because he had agreed in advance to the recount rules, which called for the counting of "Original" ballots even when a corresponding "Duplicate" could not be found.[63] The trial court also ruled that, in any event, Coleman failed to introduce sufficient evidence to prove that double counting had occurred.[64] Although double-counting was indeed a possibility where "Originals" lacked corresponding "Duplicates"—and, critically, the number of ballots counted in the precinct was greater than the number of voters listed in the rosters as having voted in that precinct—the court concluded that there was evidence in the record to provide other reasons for the discrepancy. For example, this kind of discrepancy "can be caused by voters failing to sign rosters before voting and election judges failing to mark the acceptance of absentee ballots on the rosters."[65] With insufficient evidence to show that double counting was "more likely than not" the reason for the discrepancy, the trial court rejected Coleman's contention.[66] This rejection was unanimously affirmed on appeal.[67]

3. Wrongly rejected absentee ballots. The third problem to emerge during the recount was by far the biggest of them all: the problem of wrongly rejected absentee ballots. These were ballots that local officials on Election Night had ruled invalid, but there had since emerged reasons to believe that their rejection had been erroneous under state law and that they therefore should have been counted. During the recount, it was unclear exactly how many such ballots there were, but it was clear enough that there were many in

[58]Official Minutes, Canvassing Board Meeting, Dec. 16–19, 2008, at 6–16, available at <http://www.sos.state.mn.us/index.aspx?page=1408>.
[59]*Id.* at 6.
[60]*Id.*
[61]*Id.* at 13.
[62]Coleman v. Minnesota State Canvassing Bd., 759 N.W.2d 44 (Minn. 2008).
[63]Findings of Fact, Conclusions of Law & Order for Judgment, *supra* note 6.
[64]*Id.*
[65]*Id.* at 31.
[66]*Id.* at 32.
[67]Coleman v. Franken, 767 N.W.2d 453, 470 (Minn. 2009).

relation to the tiny lead of 215 votes that Coleman held after the initial canvass. There were roughly 12,000 rejected absentee ballots statewide, and estimates that 1,600 or so might have been wrongly rejected.[68] Although the issue of rejected absentee ballots later would become the centerpiece of Coleman's judicial contest of the election, during the recount Franken was the one to press the question whether rejected absentee ballots could be reexamined—essentially recanvassed—by local election officials. Franken's goal at the time was that absentee ballots, if determined to be wrongly rejected, would be included within the recount process and thus part of the certified result upon completion of the recount.[69] Because the issue of rejected absentee ballots proved to be so overwhelmingly predominant during the entirety of the dispute over this election, it is worth discussing separately how this issue emerged and was handled during the recount.

III. THE FIGHT OVER REJECTED ABSENTEE BALLOTS IN THE CANVASS AND RECOUNT

The dispute over rejected absentee ballots actually emerged during the very first week after Election Day, while local election officials were still conducting the canvass. Franken then identified 461 rejected absentee ballots from Minneapolis alone that he asserted should be counted.[70] The Coleman campaign countered by saying that Franken was "'trying to stuff the ballot box.'"[71] But Franken's public relations efforts concerning rejected absentee ballots quickly gained traction, as it became apparent that a potentially significant number of absentee ballots had indeed been mistakenly rejected and should have been counted under Minnesota law.

A. The operative statute

The relevant Minnesota statute, 203B.12, specified four requirements an absentee ballot must meet in order to be counted, stating that noncompliance with any of these requirements obligates local officials to reject the ballot:

> (1) the voter's name and address on the return envelope are the same as the information provided on the absentee ballot application;
> (2) the voter's signature on the return envelope is the genuine signature of the individual who made the application…and the certificate has been completed as prescribed in the directions for casting an absentee ballot;
> (3) the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and
> (4) the voter has not already voted [in the same] election, either in person or by absentee ballot.[72]

The very next sentence of the statute explicitly stated: "There is no other reason for rejecting an absentee ballot."[73] Thus, if there were absentee ballots that did not fit within one of the four specified grounds for rejection, it seemed straightforward that these ballots had been improperly rejected and should have been counted.

The Franken campaign indeed was able to identify ballots the rejection of which had been obviously mistaken: for example, a voter whose ballot had been rejected on the ground that the voter was not registered when, in fact, the state's database showed the voter to be registered. The Franken campaign even made a video of several voters who claimed their ballots had improperly been rejected for this reason.[74] Moreover, some counties soon admitted that they had been mistaken in rejecting some ballots. Itasca County was the first to do so, saying that "we messed up" by accidently putting in the "reject pile" a ballot that had been accepted for counting.[75] In a state with a public culture com-

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[68]Kevin Duchschere & Mark Brunswick, *Senate recount: 133+5÷87=1 big muddle*, STAR TRIBUNE, Dec. 12, 2008.
[69]*See* Patricia Lopez & Bob von Sternberg, *Rejected absentee votes may decide it*, STAR TRIBUNE, Nov. 23, 2008.
[70]Jason Hoppin & Rachel E. Stassen-Berger, *Coleman's lead at 206—and now the recount: Hennepin County rejects Franken request to count 461 absentee ballots*, PIONEER PRESS (St. Paul), Nov. 11, 2008, at A1.
[71]*Id.*
[72]MINN. STAT. ANN. § 203B.12 (2008). The statute has since been amended. *See* 2010 Minn. Sess. Law Serv. Ch. 194 (H.F. 3111), available at <http://www.revisor.mn.gov/laws/?key=57853>.
[73]MINN. STAT. ANN. § 203B.12 (2008).
[74]FrankenForSenate, *My Vote*, YOUTUBE, Dec. 10, 2008, <http://www.youtube.com/ watch?v=YBOad11LueE>.
[75]Rachel E. Stassen-Berger & Dave Orrick, *Stage set for absentee ballot debate that could decide Coleman-Franken race*, PIONEER PRESS (St. Paul), Nov. 25, 2008.

mitted to counting every valid vote, and also committed to minimizing vote-counting errors and correcting them when they exist, there was evident public pressure to find a way to rectify these obvious mistakes and count the wrongly rejected absentee ballots.

B. The initial skirmish over information

Franken's initial strategy—not surprisingly, for a candidate who was narrowly behind at the time—was to try to determine how large the pool of wrongly rejected absentee ballots might be, who might have cast them, and whether they might be likely Franken voters. Accordingly, his team submitted requests for this information to local officials around the state, so that they could duplicate the kind of showing that they initially made for just Minneapolis. Fourteen of the state's 87 counties complied, but most of the others did not—including Ramsey County, which includes St. Paul, the capital.[76]

On Thursday, November 13, Franken sued Ramsey County to get this information.[77] Ramsey County resisted on the ground that it did not want its voters harassed by campaign officials. But Franken argued that the information was essential to determining the lawful winner of the election and that, in any event, it was a public record to which he was entitled; as long as the secrecy of the ballot itself was maintained (preserving the privacy of how a specific voter cast the ballot), the identity of individuals whose ballots were rejected must be publicly transparent, just as are the identities of the individuals in the poll roster whose ballots are cast and counted on Election Day. Otherwise, the public cannot know that the votes counted are the ones—only the ones, and all the ones—entitled to be counted in the election.[78]

The following Wednesday, November 19, the state trial court held a hearing on Franken's suit and immediately ruled in his favor. Ramsey County did not appeal.[79] Other counties that had been following Ramsey's lead in withholding this information from Franken soon complied, so as not to have to face their own lawsuit on this issue. Thus, one can look at this preliminary litigation over access to information about rejected absentee ballots as a relatively minor bump in the road on the way to bigger issues. Still, it is disconcerting that there would be a need for any litigation at all on this point. State law, and the underlying principle it protects, ought to be abundantly clear—all voters in an election are equally entitled to know which of their ballots were counted and which were not so that all voters are able to assess the legitimacy of the count—so that any resistance to the law embodying this principle would be demonstrably untenable and thus not worth the cost of fighting it. Minnesota's law on this point was not so clear as to prevent Ramsey County from forcing Franken to take the matter to court.[80]

Even with this preliminary legal victory, Franken's battles over rejected absentee ballots had hardly begun. He now had the information he sought, but the rejected ballots were still rejected, and many counties would not undertake a reexamination of them without a further legal fight.

C. The request to review rejected absentee ballots

Franken wanted the State Canvassing Board to order local officials to reexamine rejected absentee ballots, so that they could be included in the recount if they had been wrongly rejected. This the Board would not do, as it believed it had no authority to require such reexamination. But over the course of two meetings to prepare for its role in the recount, the first on November 26 and the second on December 12, the Board unanimously developed the position that it would encourage localities on their own initiative to engage in a reexamination of rejected absentee ballots.[81] (Its encouragement was more definite, and less tentative, at the second meeting than at the first.) The Board would then be in a

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[76]Jay Weiner, *The Great Minnesota Recount, Day 1: Franken forces win legal round*, MinnPost, Nov. 19, 2008, <http://www.minnpost.com/stories/2008/11/19/4714/the_great_minnesota_recount_day_1_franken_forces_win_legal_round>.

[77]Al Franken for Senate v. Ramsey County, 62-CV-08-11578 (Minn. Dist. Ct. 2008).

[78]Summons, Al Franken for Senate v. Ramsey County, 62-CV-08-11578 (Minn. Dist. Ct. Nov. 13, 2008).

[79]Order, Al Franken for Senate v. Ramsey County, 62-CV-08-11578 (Minn. Dist. Ct. Nov. 19, 2008).

[80]A similar point can be made with respect to the preliminary litigation that occurred over rules protecting the chain-of-custody of ballots during the initial canvass, in the immediate aftermath of Election Day. *See* supra note 20.

[81]Eric Black, *Franken wins key—but provisional—victories at Canvassing Board*, MinnPost, Dec. 12, 2008, <http://www.minnpost.com/ericblack/2008/12/12/5252/franken_wins_key_--_but_provisional_--_victories_at_canvassing_ board>; Dave Orrick & Jason Hoppin, *Franken loses a round over absentee votes: Canvassing Board won't add rejected ballots to recount*, Pioneer Press (St. Paul), Nov. 27, 2008.

position to consider whether it was entitled to include such locally reconsidered ballots as part of certifying the results of the recount.[82]

At the time the State Canvassing Board made this request of local officials, it was in Franken's interest to increase the number of previously rejected absentee ballots that upon review were now seen as eligible for counting. Consequently, in describing the standard he believed should be used to decide whether to count a previously rejected ballot, he took a position that he subsequently opposed during Coleman's judicial contest of the election. Before the Canvassing Board, Franken urged the adoption of the "substantial compliance" standard, rather than "strict compliance," to determine whether an absentee ballot should be counted—meaning that as long as the voter "substantially complies" with the relevant statutory requirements, the ballot should count, even if the voter fails to "strictly comply" with that requirement.[83] In the subsequent judicial contest, Franken vigorously opposed Coleman's invocation of this "substantial compliance" standard and, instead, argued strenuously that Minnesota law demands that voters adhere to "strict compliance" in the casting of absentee ballots. But during the recount, Franken was emphatic that the Board must adopt the "substantial compliance" standard.[84] A point heading, followed by several pages of argument, in one of Franken's briefs to the State Canvassing Board proclaimed:

> Minnesota Law Requires the State Canvassing Board to Take Action to Ensure that Ballots Cast in Substantial Compliance with the Law Are Counted.[85]

The "substantial compliance" standard would likely yield more countable ballots, which Franken needed at the time.

One cannot fault Franken for reversing his legal position on this issue between the recount and the judicial contest (or for Coleman doing the same, only in the opposite direction). Candidates want to win, and their lawyers will try to make whatever arguments might increase their chances of winning at each stage of the dispute. A candidate who is behind will attempt to harvest more ballots through invocation of the "substantial compliance" standard. Conversely, the candidate who is ahead will assert the "strict compliance" standard in the opposite effort to limit the counting of additional ballots. Consequently, when Franken was behind, he made one argument; once he pulled ahead, he switched to the opposite argument. Coleman did exactly the same. The important point is that the institutions that adjudicate these disputes should be structured in such a way to withstand the pressures that the candidates will exert in their efforts to win.

D. Coleman goes to court

During the recount, Coleman sought to limit the counting of previously rejected absentee ballots, since he was still ahead at that time. He initially took the position that counties like Itasca could correct blatant mistakes, like putting an "Accepted" ballot in a "Rejected" pile. But as mid-December approached, and the magnitude and complexity of the problem concerning wrongly rejected absentee ballots became increasingly apparent, Coleman hardened his position. He argued that a judicial contest of the election, after completion of the recount, was the only proper forum for counting previously rejected absentee ballots.[86] On Friday December 12, the day the State Canvassing Board reiterated more formally its request that local officials review their rejected absentee ballots, Coleman announced that he would go to the Minnesota Supreme Court for an order to block the inclusion of these ballots in the certified result of the recount.[87] (Coleman

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[82]A more detailed description of the Board's request to the local officials and the issues raised is contained in the Appendix to this article, available at <http://moritzlaw.osu.edu/electionlaw/docs/foley-eljapp.pdf>.

[83]Franken invoked the "substantial compliance" standard even during the preliminary canvassing proceedings, in urging the State Canvassing Board not to accept the returns of the local canvassing boards unless they reviewed the rejected absentee ballots and counted those that satisfied the substantial compliance standard. 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, at 7, 12–14.

[84]Franken continued to press the "substantial compliance" standard during the recount. Supplemental Memorandum of the Al Franken for Senate Committee and Al Franken Regarding Uncounted Absentee Ballots, *In Re*: 2008 United States Senate Election, Dec. 11, 2008, at 2–3, 9.

[85]Memorandum of the Al Franken for Senate Committee and Al Franken Regarding Improperly Rejected Absentee Ballots, *supra* note 83, at 12.

[86]Letter from Coleman Campaign to Minnesota Canvassing Board, *In Re*: 2008 United States Senate Election, Dec. 12, 2008.

[87]Amended Petition for an Order to Show Cause Pursuant to Minn. Stat. § 204B.44, *supra* note 2.

filed his suit the following Monday, December 15.) If the court would not grant this relief to keep these ballots out of the recount entirely, then as a back-up Coleman requested that the court set ground-rules to make sure that (a) the treatment of absentee ballots was consistent across the state's counties and (b) the handling of these ballots preserved the possibility of un-counting any that subsequently were determined to have been improperly counted.[88]

On December 18, by a sharply divided three-to-two vote (with Chief Justice Magnuson and Justice G. Barry Anderson recusing themselves because of their membership on the State Canvassing Board), the Minnesota Supreme Court granted a version of Coleman's back-up request.[89] The court's ruling was not exactly what Coleman had contemplated. Still, it evidently was designed to assure uniformity and to protect Coleman's interest that no ballot be counted that he believed had been properly rejected. The order stated that local election officials lacked statutory authority to amend their canvassed returns to reconsider initially rejected absentee ballots; in this respect, the majority of the court adopted Coleman's position.[90] In so ruling, the majority of the court rejected the applicability of section 204C.39, which provides that county canvassing boards may correct "an obvious error in counting or recording of the votes for an office."[91] As the court majority explained in a subsequent opinion, it did not believe that an error in determining an absentee ballot to be disqualified for one of the four reasons set forth in section 203B.12 to be an error in "counting or recording a vote" under 204C.39.[92]

Even so, in an apparent effort to adopt a compromise position, the court majority determined that it had authority to require the counting of ballots if the relevant local election officials, with the concurrence of both candidates, agreed that the ballots had been wrongly rejected and should be counted.[93] Accordingly, the court majority ordered the adoption of a procedure whereby the local election officials and the two candidates would review each of the still-uncounted absentee ballots:

> The local election officials shall identify for the candidates' review those previously rejected absentee ballot envelopes that were not rejected on any of the four bases stated in Minn. Stat. § 203B.12.…Any absentee ballot envelopes so identified that the local election officials and the candidates agree were rejected in error shall be opened, the ballot shall be counted, and its vote for United States Senator added to the total votes cast for that office in that precinct. A candidate shall be permitted to challenge the declaration of which candidate for United States Senate such a ballot is to be counted for, using the challenge standards utilized during the pending recount process. The respective county canvassing board shall file an amended report including the absentee ballot(s) so counted, and the State Canvassing Board shall accept the amended report and include its numbers in the pending recount.[94]

It was immediately evident that this procedure permitted each candidate to veto a ballot that the local election officials themselves now determined had been wrongly rejected on Election Day. Consequently, it was equally apparent that each candidate might attempt to exercise this veto power strategically, vetoing ballots cast in precincts favorable to the candidate's opponent. The court majority added an admonition to its order, reminding the candidates of their obligation to exercise this veto power only when they had a good-faith belief that the local officials were now incorrect that they had wrongly rejected a ballot (and thus the candidate in good faith believed that the original rejection had been proper under the law):

> In reviewing previously rejected absentee ballot envelopes for purposes of reaching agreement on whether the ballot envelope was rejected in error, the parties are reminded of their obligations under Minn. R. Civ. P. 11 that by presenting a pleading or other paper to the court, any attorney or unrepresented party is certifying to the court that such

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[88] *Id.*
[89] Coleman v. Ritchie, 758 N.W.2d 306 (Minn. 2008).
[90] *Id.* at 307.
[91] Minn. Stat. Ann. § 204C.39, subd. 1 (2008).
[92] Coleman v. Ritchie, 762 N.W.2d 218, 224 (Minn. 2009).
[93] The statutory basis for the court majority's assertion of this authority was murky. The majority cited Minn. Stat. § 204B.44, which permits anyone to petition the court to correct any type of election error. But that statute says nothing about a special procedure in which both candidates must concur with the determination of local election officials in order to correct an electoral error.
[94] Coleman v. Ritchie, 758 N.W.2d 306, 308 (Minn. 2008).

> pleading or other paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. In the event of a subsequent election contest under Minn. Stat. ch. 209 in which a party seeks a determination by a district court as to the propriety of the rejection of absentee ballots, parties and their counsel shall be subject to sanction for any previously rejected absentee ballot that was made available to the parties for review pursuant to…this order and as to which the court determines that the standards of Rule 11 were not met.[95]

The court majority evidently hoped that its order fairly accommodated the competing interests of (a) including within the recount total all previously rejected absentee ballots for which there could be no reasonable dispute as to their entitlement to be counted and (b) postponing for the eventual judicial contest of the election all previously rejected absentee ballots about which there might be a reasonable dispute.

The court majority's order, however, provoked strongly worded dissents from Justices Page and Paul Anderson. Page began his by quoting Stalin that it is "completely unimportant" who votes but "extraordinarily important" who counts the votes.[96] Paul Anderson was somewhat less provocative in quoting the playwright Tom Stoppard in the same vein: "It's not the voting that's democracy; it's the counting."[97] Both dissenters argued that the natural interpretation of section 204C.39, with its language permitting the correction of "obvious errors in counting or recording the votes," entitled local election officials to rectify what they themselves now believed to be "obvious errors" in rejecting absentee ballots—and to do so without each candidate having a veto power over these official error-correcting decisions.[98] Thus, both dissenters agreed with Franken's position that the local officials had authority to undertake this error-correction on their own initiative and that the State Canvassing Board was obligated to accept any such amended returns from the localities (unless the amended returns were challenged in court by a candidate under procedures set forth in section 204C.39).

The Minnesota Supreme Court's 3–2 ruling to adopt its "candidate veto" order, fabricated out of thin air, stands as the low point in the entire eight-month saga of the dispute over the vote count in this U.S. Senate election.[99] For one thing, it was the only significant non-unanimous ruling by an authoritative statewide body during this entire eight-month period. Second, the 3–2 split appeared to fall along ideological, if not exactly partisan lines, in a way that arguably appeared that each of the five Justices was adopting a position favorable to the candidate the Justice was most predisposed to support in this post-election dispute. The two dissenters were, in the eyes of many, the two most liberal of the five. Two members of the three-Justice majority were Pawlenty appointees with strong Republican ties (and the two most conservative of the five): Justices Gildea and Dietzen. Justice Helen Meyer, appointed by Jesse Ventura (the state's former Independence governor), was widely regarded as the pivotal member of this five-Justice panel and viewed as the one who developed the "candidate veto" compromise; it was she who signed the order on behalf of the court.[100] Even if attribution of political motives on the part of these five Justices was inaccurate, the fact remains that the appearances created by this 3–2 split made this attribution possible. In this respect, the 3–2 split brought back memories of the U.S. Supreme Court's 5–4 decision in *Bush v. Gore*—or the earlier 4–3 split of the Florida Supreme Court in that case.

But even apart from the unseemliness of the 3–2 split and whatever the underlying motives might have been, the substance of the "candidate veto" order came under immediate and sustained criticism. Echoing the dissents, newspaper columnists and other media commentators complained that it gave the candidates too much power over the counting of ballots.[101] It was not a procedure contemplated in the statutes themselves and thus had not been vetted through the legislative process. It might have been better if the court majority had ruled the previously rejected absentee ballots out-

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[95] *Id.* at 308–09.
[96] *Id.* at 309.
[97] *Id.* at 311.
[98] *Id.* at 309.
[99] Mike Kaszuba, *Campaigns' veto power in recount is decried*, Star Tribune, Jan. 9, 2009.
[100] Coleman v. Ritchie, 758 N.W.2d 306 (Minn. 2008).
[101] *See supra* note 99; *Overtime: Chapter 2, Part 5: Canvassing board member on Franken v. Coleman: "'This is going to be more intense than I thought,'"* Pioneer Press (St. Paul), Sept. 9, 2009.

side the scope of the recount altogether, leaving them entirely to the eventual judicial contest. Or else the court majority could have adopted the dissents' position. But the middle-ground compromise ended up pleasing virtually no one and laid the ground for some difficulties that emerged during the subsequent contest.

E. Implementing the court's 3–2 ''candidate veto'' order

The court's order came just as Franken was overtaking Coleman in the review of the challenged ballots from the recount, underway before the State Canvassing Board. Thus, while Franken previously needed rejected absentee ballots to be counted in order to have a chance of prevailing, his interest now shifted to limiting the addition of uncounted ballots in order to preserve his new-found lead among counted (and recounted) ballots. Still, since Franken had been the one pushing for the inclusion of wrongly rejected absentee ballots, he could not easily walk away from that position. (To do so would have presented a public relations problem.) In the aftermath of the court's order, his side announced that it would agree to accept the counting of all absentee ballots that the local officials themselves identified as wrongly rejected—as long as Coleman would do the same. In essence, Franken proposed that the two candidates waive the veto power that the court's order had given them. This proposal was substantively the same as the one that Franken had argued for in the court's proceedings (and the one that the two dissenting justices had embraced).[102] Coleman, however, rejected this proposal.

As might have been anticipated, the process of reviewing absentee ballots—with both sides entitled to exercise their veto power under the court's order—did not go smoothly. Behind by forty-nine votes at this point (after the recount of all initially counted ballots was complete), Coleman wanted the counting of 654 previously rejected absentee ballots *in addition to* the 1,346 that local officials had identified as wrongly rejected. The Secretary of State's office said that Coleman had missed an agreed-upon deadline for raising the issue of additional ballots that the local officials themselves had not identified.[103] Franken refused to consider any of the 654, considering them as being outside the process set up pursuant to the Minnesota Supreme Court's 3–2 order.[104] Franken himself had eighty-five additional ballots that he thought had been wrongly rejected despite the local officials' determination to the contrary, but his request to have the local officials reconsider these ballots (unlike Coleman's) was timely under the agreed-upon deadline.[105]

On New Year's Eve, Coleman went back to the Minnesota Supreme Court, seeking an order that would have required consideration of these 654 ballots.[106] On January 5, the court—this time with its five participating members unanimous (Chief Justice Magnuson and Justice Barry Anderson still recusing)—flatly rejected Coleman's request. The court succinctly explained that its previous order "implicitly recognized that any agreement among the parties was voluntary and, absent such an agreement, resolution of those disputed ballots would need to await an election contest."[107] Since Franken would not agree to the inclusion of the 654 disputed ballots, these ballots were "the proper subjects of an election contest."[108]

Meanwhile, while Coleman's motion was pending before the court, the two candidates managed to agree on the counting of 933 ballots among the 1,346 identified by local officials as wrongly rejected. These ballots were opened and counted on January 3. These ballots broke sharply in favor

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[102]But Franken did not announce this proposal until after both sides had been given the list of 1,350 absentee ballots that local officials identified as wrongly rejected. Thus, one could argue that Franken had a chance to analyze the precincts in which these 1,350 came from and make a judgment about whether counting all of them on balance would be disadvantageous to his pending lead. *See* Katie Humphrey, *Counties identify 1,350 ballots to be tallied*, STAR TRIBUNE, Dec. 28, 2008, at 1B.

[103]Mike Kaszuba & Pat Doyle, '*Stay civil', both campaigns are told: Bickering over absentee ballots worsens as local officials get ready to convene meetings to sort out the mess*, STAR TRIBUNE, Dec. 30, 2008, at 1A; Rachel E. Stassen-Berger, *Franken lead at 49: Absentees still to count; Race remains muddled as campaigns, counties wade into disputed ballots*, PIONEER PRESS (St. Paul) Dec. 31, 2008, at A1.

[104]One Franken lawyer was quoted as saying: "Let me cut to the chase. We're not going to agree to any of the 654. The 654 is from left field." Pat Doyle, Mike Kaszuba, Kevin Duchscere & Larry Oakes, *Campaign lawyers sparred across state on tallying rejected absentee ballots*, STAR TRIBUNE Dec. 31, 2008, at 1A.

[105]Mark Zdechlik, *Meetings planned statewide to decide fate of rejected ballots*, MPR NEWS, Dec. 29, 2008, <http://minnesota.publicradio.org/display/web/2008/12/29/ recount_update/>.

[106]Motion for Emergency Order, Coleman v. Ritchie, 759 N.W.2d 47 (Minn. 2008).

[107]Coleman v. Ritchie, 759 N.W.2d 47, 49 (Minn. 2009).

[108]*Id.*

of Franken, and extended his lead to 225 votes.[109] Two days later, the same day that the court rejected Coleman's request to order further consideration of additional ballots, the State Canvassing Board certified this 225-vote victory for Franken.[110]

IV. THE TRIAL OF THE JUDICIAL CONTEST

A. The panel

On January 6, the very next day after certification of Franken's victory by the State Canvassing Board, Coleman filed his judicial contest of the election. Under Minnesota law, this contest must be heard by a three-judge panel appointed by the state's Chief Justice.[111] Because Chief Justice Magnuson recused himself due to his participation on the Canvassing Board, the authority to appoint the panel fell to Justice Alan Page as the next most senior Justice on the Supreme Court. He picked Elizabeth Hayden, Denise Reilly, and Kurt Marben.[112]

Justice Page's selection of these three judges must be considered the most important—and most laudable—decision of the entire *Coleman v. Franken* saga. It was instantly visible to Minnesotans that this panel was "tripartisan" and thus evenly balanced with respect to Democrats, Republicans, and Independents.[113] Judge Hayden had been appointed by Governor Rudy Perpich, who was from Minnesota's version of the Democratic party (Democratic-Farmer-Labor or DFL). Judge Reilly had been appointed by Republican Governor Arne Carlson. Most interestingly, Judge Marben had been appointed by Governor Jesse Ventura, an Independent, and thus Judge Marben might have been perceived as the potential tiebreaking vote between his two co-panelists.[114]

No tie-breaker, however, proved necessary. The three-judge panel was unanimous throughout the entirety of its proceedings, speaking literally with one voice in all of its orders. Thus, having equal representation on the panel from all three political backgrounds—Democrat, Republican, and Independent—made all of its unanimous rulings inherently non-partisan (or at least evenly tri-partisan, which amounts to essentially the same thing). Although Justice Page has not spoken publicly about his selection of these three, one must surmise that he very much had in mind the visible political balance he was able to achieve.[115]

It is also noteworthy that the three judges came from three different parts of the state and had not served on the bench with each other.[116] Although one could not know exactly what personal chemistry would develop among this judicial triumvirate, one could hope that their relative unfamiliarity with each other would put them all on best behavior—and thus predispose them to seek consensus wherever possible. Appellate judges, especially supreme court judges, who sit together on politically charged cases become predisposed to disagree with each other; these cases almost always produce strongly worded dissents. But the fact that the three judges were brought together from different regional courts for the single purpose of deciding an important election case, and selected so that

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[109] Rachel E. Stassen-Berger, *Franken's lead grows to 225 in recount finale*, Pioneer Press (St. Paul), Jan. 3, 2009.

[110] Official Minutes, Canvassing Board Meeting, Jan. 5, 2009, at 2, < http://www.sos.state.mn.us/ index.aspx?page = 1408 > .

[111] Minn. Stat. Ann. § 209.045 (2008).

[112] Order, In re Appointment of Judges Under Minn. Stat. § 209.045 for Election Contest Titled: In re Sheehan v. Franken, 62-CV-09-956 (Minn. Dist. Ct. Jan. 12, 2009).

[113] Rachel E. Stassen-Berger, *U.S. Senate Race Tripartisan Trio to Rule on Election Contest: Pawlenty, Ritchie Reject Franken's Certification Bid*, Pioneer Press (St. Paul) Jan. 13, 2009, at A1.

[114] *Id.*

[115] Justice Page's appointment of this three-judge panel echoes the equally successful selection of an evenly balanced panel to adjudicate the dispute over Minnesota's 1962 gubernatorial election. I have written about the 1962 election elsewhere. *See* Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 Stanford L. & Pol. Rev. 350, 377–78 (2007); Edward B. Foley, *Let's Not Repeat 2000*, Legal Times, Apr. 21, 2008, < http://www.law.com/jsp/nlj/PubArticleNLJ. jsp?ID = 900005508716 > ; Edward B. Foley, *In '62, Minnesota set the recount standard*, Star Tribune, Nov. 18, 2008; *see also* Huefner, Tokaji, Foley & Cemenska, From Registration to Recounts 140–141 (2007).The method of selecting the three-judge panel for the 1962 election differed from the method Justice Page employed for *Coleman v. Franken*. The 1962 gubernatorial candidates mutually agreed upon the three judges, with the candidates themselves identifying one Democrat, one Republican, and one neutral judge. The two candidates then mutually proposed this three-judge panel to the Chief Justice at the time, who ratified the candidates' selection. *See* Ronald F. Stinnett & Charles H. Backstrom, Recount 95–96 (1964). By contrast, there is no indication that Coleman and Franken had any involvement in the selection of the three-judge panel for their dispute. Nonetheless, by choosing the three individuals he did (including one Independent as well as one Democrat and Republican), Justice Page made the three-judge panel as transparently non-partisan and evenhanded as possible without the participation of the candidates themselves in selecting the panel members.

[116] *See supra* note 113.

they would collectively make a balanced panel, might have made each judge be careful to avoid looking like the first to act "politically" rather than legally. Whether Justice Page intended it or not, the geographic as well as political diversity within this three-judge panel probably increased the likelihood that they would work hard to find common ground and thus avoid dissenting votes. In any event, that's how it turned out.

B. The judicial contest and the Senate

Coleman's initial Notice of Contest was essentially a placeholder, filed immediately after the Canvassing Board's certification of Franken's victory.[117] Franken, in turn, quickly filed a motion to dismiss the case, arguing that the court lacked jurisdiction because the U.S. Senate had the exclusive authority to decide challenges to the propriety of Franken's certified victory.[118] In its first ruling, which was unanimous (as all of its decisions would be), the three-judge panel quite properly rejected Franken's argument. The court observed that their proceedings would only be preliminary to the eventual power of the U.S. Senate to decide which candidate to seat and, under Minnesota law, the judicial contest was necessary to complete the state's determination of which candidate to submit to the Senate. Indeed, the panel particularly observed that the issue of absentee ballots had been left unresolved by the administrative recount and the litigation ancillary thereto. Thus, as the Minnesota Supreme Court had ruled in its January 5 order, the three-judge panel declared that the judicial contest would be the forum under Minnesota law for resolving the dispute over absentee ballots.[119]

In light of all the rulings that Coleman subsequently would lose, it is worth remembering that this very first order from the court made clear that these three judges would give him a fair chance to prove his case. The court indicated that it was sensitive to the concern that some of Coleman's allegations were more vague than desirable. Still, he had submitted enough allegations with sufficient specificity, particularly involving the issue of absentee ballots, to indicate that he was entitled to proceed with mustering evidence to support his claims. Moreover, the court recognized the public interest at stake in giving Coleman a fair shot to prove his case: "The Court strives as its ultimate goal to conduct the proceedings in such a way that the public will have faith in the electoral process and confidence in our judicial system."[120]

For Franken, the inability to dismiss the judicial contest before it even got underway meant that he would have to wait for its resolution in order to take his Senate seat. The Senate had made clear that it would not seat him, even temporarily, without the presentation of a certificate from Minnesota.[121] But Minnesota law provided that Franken could not receive this certificate as long as the judicial contest remained pending. Franken tried to convince the Minnesota Supreme Court to permit a temporary certificate, but the court unanimously said no.[122]

C. Preparing for trial

The trial was scheduled to start January 26. Prior to trial, Coleman and his team made several decisions that proved fateful for his prospects of winning his case. Perhaps nothing he could have done would have put him in a position to persuade the three-judge panel that the law called for the counting of many more absentee ballots than the court ultimately agreed to count; and it is even less likely that counting more ballots would have enabled him to overcome Franken's 215-vote margin at the start of trial. Still, the decisions Coleman made in advance of trial appear now—with the benefit of hindsight—to have reduced his odds of success. The first decision was the most consequential, because it affected the others. It was to put Joe Friedberg, who had not been involved in the recount, in charge of presenting Coleman's case to the three-judge court.[123] Friedberg was a prominent criminal defense attorney in Minnesota and a friend of Coleman's, although a Democrat who said he

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[117]Notice of Contest, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Jan. 6, 2009).
[118]Contestee Al Franken's Motion to Dismiss, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Jan. 12, 2009).
[119]Order on Contestee's Motion to Dismiss, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Jan. 22, 2009).
[120]*Id.* at 10.
[121]Eric Black, *Reid won't try to seat Franken until he has certificate*, MinnPost, Mar. 5, 2009, <http://www.minnpost.com/ericblackblog/2009/03/05/7178/reid_wont_try_to_seat_franken_until_he_has_a_certificate>.
[122]Franken v. Pawlenty, 762 N.W.2d 558 (Minn. 2009).
[123]Kevin Duchschere, *Senate recount: Coleman adds legal star power to team*, Star Tribune, Jan. 17, 2009, at 1A.

would "do anything for Norm, except vote for him."[124] But Friedberg was not experienced in litigating election contests, and it showed.

Coleman's effort to convince the court to count more absentee ballots would, broadly speaking, involve two sources of law: (1) the relevant provisions of Minnesota's statutes governing the absentee voting process; and (2) the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The statutory provisions are quite complicated, intricately intertwined with one another, and technical in their many details. Parsing the statutory provisions would require, for example, figuring out how "complete" a voter's or witness's address must be on the absentee ballot envelope in order to qualify the ballot to be counted. Would a missing zip code suffice to disqualify the ballot if the rest of the address was present? What if both the zip code and name of the city were missing, but local election officials could figure out the location from just the street address?

Moreover, the problem of partially complete addresses was just one category among a myriad of different interpretative issues that would arise under the relevant statutory provisions. Others concerned the voter's or witness's registration status, or the notarization of a voter's signature, or the circumstances in which the absentee ballot was delivered to (or returned by) the voter. Overlaying all of these fact-intensive interpretative questions concerning the application of the statute to various "events on the ground" was a basic issue of whether the statute required the absentee ballot envelope *objectively* to meet a certain standard of compliance in order to qualify for counting, or else whether the statute permitted local officials *subjectively* to exercise a certain degree of judgment or discretion in deciding whether a ballot qualified for counting.

The primary relevant statute, 203B.12, says that local officials must be "satisfied" that an absentee ballot meets the relevant requirements.[125] The word "satisfied" suggests that the local officials are entitled to exercise a certain degree of subjective judgment or discretion in applying the relevant criteria to determine whether an absentee ballot qualifies for counting. But in a separate sentence, the same statute says that local officials must reject a ballot if they "find" that its voter "failed" to meet one of the specified requirements.[126] In contrast to the word "satisfied," the word "find" suggests an objective standard that the ballot itself must meet to be counted.

The complexity and multiplicity of the statutory interpretation issues, combined with Friedberg's inexperience with election law, caused Friedberg to emphasize Equal Protection in his initial presentations of Coleman's case to the trial court.[127] Even with respect to the statutory issues that Friedberg could not avoid, he chose to paint with an extremely broad brush, invoking the idea of "substantial compliance" in an attempt to justify the counting of any absentee ballot that might be remotely acceptable. In doing so, Friedberg failed to offer some precise analytical distinctions under the statute that the trial court, in its desire to be careful, might have found persuasive. Moreover, Friedberg's impressionistic style extended beyond just his legal arguments, to the underlying evidence in the case. He seemed unconcerned with pinning down the eligibility of specific ballots, preferring rather to make a generic equitable point about treating similar ballots similarly. The overall impression Friedberg conveyed was one of analytical and evidentiary sloppiness, not cogency with respect to a combination of law and facts that would add up to a winning case.

D. Coleman's failure to satisfy the trial court's standards

Coleman's rather cavalier approach to proving the relevant facts for each rejected absentee ballot, as demonstrated in his Motion for Summary Judgment,[128] undermined his case throughout the trial and was evident from the very first day. Friedberg attempted to introduce into evidence photocopies of the ballot envelopes, rather than the envelopes themselves, and Franken's attorneys blocked that effort by showing the court that some of the photocopies omitted crucial information.[129]

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[124]Dave Orrick, *Coleman's attorney probably didn't vote for him*, Pioneer Press (St. Paul), Jan. 19, 2009, <http://blogs.twincities.com/politics/2009/01/colemans_attorney_probably_did.html>.

[125]Minn. Stat. Ann. § 203B.12, subd. 2 (2008).

[126]*Id.*

[127]A detailed analysis of Friedberg's strategic choices and their apparent consequences is contained in the Appendix to this article, available at <http://moritzlaw.osu.edu/ electionlaw/docs/foley-eljapp.pdf>.

[128]The Appendix discusses in depth the deficiencies of Coleman's Motion for Summary Judgment. *Id.*

[129]Elizabeth Baier, *Coleman's campaign calls first witnesses in recount trial*, MPR News, Jan. 26, 2009, <http://minnesota.publicradio.org/display/web/2009/01/26/ recount_trialblog/>.

Friedberg was also hoping that the court would rely on evidentiary presumptions to favor the counting, rather than the rejecting, of ballots in circumstances where it was factually unclear whether the ballots were valid under Minnesota law. For example, his legal team wanted the court to presume that a ballot was delivered on time, even if an official marked it late and there was no other evidence one way or other. Similarly, Coleman wanted the court to presume that voters and witnesses were registered, unless evidence showed the contrary, and that the voter had not cast another ballot. Coleman even wanted the court to presume, from the face of the ballot envelope itself, that its signature was valid—without any testimony from the voter or an election official corroborating its validity.[130]

The court would not accept that approach to the facts. On February 3, in a series of pronouncements that included a denial of Coleman's Motion for Summary Judgment, the court made clear that it would count all identified ballots that were proven to have been "legally cast and wrongly rejected,"[131] but individualized proof would need to be forthcoming and would not be presumed. In one of its rulings that day, the court limited Coleman's case to "those ballots that were specifically disclosed to [Franken] by name as of January 23," so that Franken would have an opportunity to prepare for trial on those ballots.[132] This ruling confined Coleman to presenting evidence on the roughly 5,000 ballots he presented as part of his Motion for Summary Judgment, thereby precluding his broader effort to count as many as 12,000 absentee ballots.

A week later, on February 10, the court elucidated what Coleman would need to do for each absentee ballot in order to get the court to count it. There would have to be testimony—from the voter or another competent witness, in the form of an affidavit or presented in open court—that the voter satisfied the various statutory requirements: (1) did not vote a separate ballot in the election, (2) signed both the ballot application and the ballot envelope, (3) was registered, and (4) secured a witness who was registered or authorized to administer oaths.[133] The court's elucidation of how Coleman could satisfy this evidentiary burden came in the form of an order granting in part, but also denying in part, a motion for summary judgment submitted by a group of 61 individual voters allied with the Franken campaign. The court granted the motion for 24 of these voters because their affidavits presented unrebutted testimony on all of these statutory requirements. But the court denied the motion with respect to the remaining voters because their affidavits failed to cover one or more of the necessary statutory elements. Despite the roadmap that the court provided the parties in this ruling, Coleman never put himself in a position to comply.[134]

Coleman's prospects for prevailing deteriorated even further on Friday, February 13, when the trial court issued an order specifying in great detail its view of the statutory law that governed whether or not to count previously rejected ballots. Having enumerated nineteen different kinds of factual situations involving rejected absentee ballots, the court explained why its view of the statutory law precluded it from counting the ballots in most of these situations. Since Friedberg had hoped that the "substantial compliance" doctrine would permit the counting of ballots in virtually all these situations—and because the trial court's February 13 order clearly rejected that argument—Friedberg needed to rethink this strategy if Coleman were to have any chance of winning.[135]

The court's February 13 order was widely regarded as pivotal when it was issued, and the Coleman team certainly treated it as such. They could have responded to it by hunkering down and trying to prove the validity of as many ballots as they could under the court's now-enunciated principle of hewing tightly to the statutory rules. After all, in their Motion for Summary Judgment, they had identified over 2,000 ballots that they could argue met the exact terms of the statute, without relying on the doctrine of substantial compliance.[136] They

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[130] *Id*.

[131] Rachel E. Stassen-Berger, *Judges want to count every legally cast ballot in Senate race*, PIONEER PRESS (St. Paul), Feb. 3, 2009.

[132] Order on Contestee's Motion in Limine to Limit Absentee-Ballot Evidence to Ballots Pleaded in the Notice of Contest, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Feb. 3, 2009), at 4–5.

[133] Order Granting in Part and Denying in Part Petitioners' Motion for Summary Judgment, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Mar. 11, 2009), at 10.

[134] *Id*.

[135] Order Following Hearing, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Feb. 13, 2009).

[136] Indeed, these 2,000 ballots would not require Coleman to invoke the idea of "constructive" compliance, which (as explained in the Appendix) by distinguishing between official and voter error is a considerably narrower alternative to "substantial" compliance. *See supra* note 82.

could now get to work to introduce the evidence necessary in the court's view to meet this legal standard.

Maybe, too, if they were careful about it, they could down the road ask the court to revisit only one or two targeted categories, by making it clear to the court that they were abandoning any attempt to prevail on expansive and indeterminate notions of "substantial compliance" and Equal Protection. A modest motion for partial reconsideration along these lines would have opened up the possibility of counting over 1,500 more ballots (according to the numbers provided in the Motion for Summary Judgment), without requiring the court to repudiate entirely its now-announced approach to the case.

The Coleman team responded differently. Castigating the "Friday the thirteenth" order, evoking images of a horror story, they immediately asked the court to reconsider it entirely—a request which, naturally, was immediately denied. They then went about trying to show that the legal standard in the court's February 13 order compounded the alleged Equal Protection violation of equivalent absentee ballots being treated differently.[137]

Their approach to Equal Protection was not a narrow one. They did not confine it to ballots for which official error was the responsible cause of noncompliance in the first place.[138] Instead, they continued to argue that, as long as some localities had wrongly used an unduly lenient standard on Election Night to count ballots for which voter error was the exclusive cause of the noncompliance, then Equal Protection now obligated the court to count all properly rejected ballots that fit within the inappropriately lenient standard of these lax localities.

That expansive approach to Equal Protection was doomed to failure. The three-judge panel had already indicated that it was skeptical of any Equal Protection argument. Back on February 3, in denying his Motion for Summary Judgment, the court had put Coleman on notice of this skepticism: "The Court questions the applicability of *Bush v. Gore* to the issues presented in [this case, because] …the objective standards imposed on absentee ballots by Minn. Stat. § 203B.12 distinguishes [sic] the election systems of Minnesota and Florida."[139] In light of this skepticism, Coleman would have had to explain that even though the Minnesota statute was clear in not excusing *voter* error, it was unclear on what to do about *official* error—because the statute did not contemplate that the *government* would make mistakes that prevented voter compliance. The statute simply did not address this problem, and in the wake of local divergence on what to do without this guidance, Equal Protection could step in to assure fair treatment of voters who fell within this small statutory gap. But Coleman never developed this line of thinking.

In pursuing Equal Protection even after February 13, Coleman focused on categories of rejected ballots for which voter error, rather than official error, was most obviously the responsible cause. In his quest for the Holy Grail, he held up ballots rejected for lack of a valid witness as a principal example. Some localities apparently were willing to count ballots even though they lacked a valid witness—in contravention of the statutory requirement—although other counties properly enforced this requirement by rejecting ballots without a valid witness. The voter, of course, was entirely responsible for failing to secure a valid witness. Yet Coleman wanted to show the extent of the local variation in accepting or rejecting ballots in this situation, and as part of his submission he wanted to introduce the testimony of a statistician to analyze this variation.[140]

On February 18, moving from skepticism to antipathy toward Coleman's Equal Protection argument, the court precluded Coleman from offering this statistical evidence: "It is irrelevant whether there were irregularities between the counties in applying Minnesota Statutes § 203B.12, subd. 2. prior to this election contest."[141] All that mattered, according to the court, was what the statute provided, and the court itself would enforce that statutory standard to all previously rejected ballots

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[137]Letter Requesting Permission to File Motion for Reconsideration, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Feb. 16, 2009).

[138]The narrow Equal Protection argument would have asserted that, as long as Minnesota law was *unclear* whether it accepted the idea of "constructive" compliance (as discussed in the Appendix), then federal Equal Protection required this small scope of statutory ambiguity to be resolved in favor of uniformity across local jurisdictions. *See supra* note 82.

[139]Order on Contestants' Motion for Summary Judgment, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Feb. 3, 2009), at 6–7.

[140]Eric Black, *Three Judges to Coleman: Your lack-of-uniformity argument is ''irrelevant,''* MinnPost, Feb. 19, 2009.

[141]Order on Contestee's Motion in Limine to Exclude Testimony of King Banaian, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Feb. 18, 2009), at 3.

brought before it.[142] In other words, if it was clear that localities should have rejected ballots for lack of a valid witness, then it would make no difference to the court's consideration that some counties on Election Night improperly had adopted a lenient standard for ballots in this situation. So much for Coleman's Equal Protection claim to the contrary.

E. Coleman's pivot: Unlawful ballots that were counted

Since Coleman could not convince the court to invoke Equal Protection to justify counting more ballots than the statute permitted, he began exploring the possibility of trying to convince the court that Equal Protection required voiding the outcome of the election altogether. The theory was that the court's February 13 order now established that many ballots had been counted on Election Night in violation of state law, a number far exceeding the 215-vote margin that the Canvassing Board had certified on January 5. It was not physically possible to "uncount" these invalid ballots. They had been detached from their envelopes on Election Night and irretrievably commingled with the valid ballots. Although there was no way to determine whether these invalid ballots had been cast for Coleman or for Franken (or for Barkley, the Independence Party candidate), their volume was allegedly large enough to inevitably taint the result. The only remedy, therefore, apart from some sort of an attempt at a statistical adjustment (for which Minnesota law did not seem to provide), would be to declare the election result null and void.[143]

The court itself could not order a new election. That decree would have been beyond the court's authority in a contest of a U.S. Senate election under the relevant provision of Minnesota's code.[144] But at least theoretically the court could declare itself incapable of adjudicating which candidate had received the highest number of valid votes—because of the irretrievable presence of so many invalid ballots—and thus rule that no candidate was entitled under Minnesota law to receive a certificate of election.[145] Equal Protection, moreover, could require that the court take that position as the only available way to undo the opposite treatment of identical ballots, especially since the court had emphatically determined that state law would not permit achieving equal treatment by now counting clearly invalid ballots.

The political consequences of a judicial nullification of the election on this ground would be unclear. Perhaps the state legislature would intervene to order a new election. Perhaps the U.S. Senate would take matters into its own hands. But those political considerations could not be the court's concern. As the court itself kept repeating, its jurisdiction was confined to identifying which candidate had received the highest number of lawful votes. The only question now was whether the court could perform this task, given the apparent fact of so many unlawful votes tainting the result certified on January 5.

Although this new void-the-election approach of Coleman's team might have had some promise in theory, it confronted two basic problems. One was factual. Were there really so many invalid ballots among those already counted? Maybe Coleman could show some counties that were improperly lenient with respect to ballots with invalid witnesses. But were there enough of these to cast doubt on Franken's 215-vote margin, or whatever the margin would end up being at the end of the trial? And as for Coleman's claim that some localities had been more lenient in matching voter signatures on envelopes and applications, would it turn out that any of the ballots *already counted* should have been rejected for a signature mismatch? The specter of a tainted election similar to Washington's gubernatorial election in 2004 (where over a thousand concededly invalid ballots dwarfed a roughly 100-vote margin of victory) was theoretically interesting, but it had yet to be proven.[146]

More fundamental, however, was a procedural roadblock under Minnesota law that prevented any

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[142] *Id.*

[143] My Moritz colleague Steve Huefner has written the definitive work on how states generally handle the problem when the number of invalid (but commingled) ballots exceeds the winning candidate's margin of victory. *See* Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007).

[144] MINN. STAT. ANN. § 209.12 (2008).

[145] MINN. STAT. ANN. § 204C.40, subd. 2 (2008).

[146] In a brief filed on February 20, Coleman said that he had identified ninety-seven ballots from just five localities that were counted on Election Night but invalid under the court's February 13 order. The brief said that Coleman expected to find many more similarly invalid ballots upon conducting a statewide review. Contestants' Memorandum of Law in Support of Motion for Ruling Applying February, 13, 2009 Order, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Feb. 20, 2009), at 4.

proof of this kind. In 1975, the Minnesota Supreme Court had decided a case, *Bell v. Gannaway*,[147] which seemed to say that a candidate could challenge the validity of an absentee ballot based on improper or missing information on its envelope *only* before the ballot was counted. Once the ballot was removed from its envelope and commingled with other counted ballots, any such challenge was procedurally too late.[148]

Coleman made several arguments in an effort to get out from under the precedent of *Bell v. Gannaway*. The relevant statute had been amended since that precedent, and arguably the language was different enough that the precedent was no longer applicable. As a practical matter, the opportunity to challenge absentee ballots before they were counted on Election Night no longer existed in 2008 in the way it had over a quarter-century earlier. Moreover, the scale and circumstances of *Bell v. Gannaway* were far different from *Coleman v. Franken*. *Bell* involved a single ballot in a single precinct in a small-town election. *Coleman v. Franken*, by contrast, involved a candidate's putative obligation to challenge in advance potentially thousands of ballots all around the state in order to preserve the integrity of the outcome in a U.S. Senate election, obviously one of the most consequential of those that the state administers.

None of these potential distinctions between *Bell* and the present case, however, would matter. *Bell* was straightforward in its language that a challenge not made in advance of counting was waived. Thus, reliance on *Bell* was an easy position for the three-judge panel to embrace, and doing so easily permitted the court to avoid the conundrum of going down an evidentiary road that might lead to an obligation to void the election—an obviously unpalatable result for a court to reach. Thus, it was not hard for Franken to convince the three-judge panel to follow the precedent of *Bell*. If that precedent were to be distinguished, with all the potentially unpalatable implications that might follow from doing so, it would have to be the Minnesota Supreme Court that would make that move.[149]

F. Coleman's insufficient evidence

In the end, Coleman's case simply fizzled out for lack of factual proof. He never submitted the kind of evidence that the court said was required to prove the validity of each previously rejected ballot. Before resting his case, Coleman finally got around to asking the court's permission for additional time in order to submit affidavits from voters attesting to the validity of their rejected ballots—precisely the kind of showing that would have satisfied the court's evidentiary standard. But on March 2, the day of Coleman's last witnesses in his attempt to prove he had won the election, the court denied his request as untimely.[150]

Consequently, when it came time to sum up his case, Coleman was left in the same position in which he had started before trial: with no choice but to argue that the court should rely on evidentiary presumptions to assume the validity of ballots that the local officials had rejected. In his final brief to the three-judge trial court, filed on March 17, Coleman asked the court to adopt seven specific presumptions:

1. A voter receiving a Registered Voter ballot is presumed registered.
2. A witness with a Minnesota address is presumed registered.
3. A ballot application is presumed to have been properly submitted, even if missing.
4. A signature is presumed valid.

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[147]227 N.W.2d 797 (Minn. 1975).

[148]*Id*. at 805.

[149]In a telephone interview conducted as part of research for this project, one of Coleman's attorneys—while quick to acknowledge that there was not a hint of partisan bias in the conduct or rulings of the three-judge panel—suggested that the panel's one flaw may have been a reluctance to undo the conduct of the state's local officials even where that conduct went awry under the law. If there is any context in which this suggestion has merit, it is in the context of the panel's unwillingness to distinguish *Bell v. Gannaway* and thereby confront what to do about the fact that significant numbers of absentee ballots were counted in apparent violation of statutory directives. But one must be cautious about being too critical of the panel in this regard. *Bell* was, in fact, a major precedent from the Minnesota Supreme Court standing as an obstacle, which would have needed to be pushed to one side in order for the panel to go down that path. If *Bell* had *supported* an inquiry into ballots already counted despite potentially being invalid, and if the panel had labored to set aside *Bell* under *that* circumstance, then one might properly accuse the panel of being too quick to avoid an inquiry into the misconduct of local officials. But with *Bell* on the side of avoiding this inquiry, it is hard to blame the panel for being too docile in its treatment of local election officials.

[150]Order on Contestants' Request to Submit Voter Affidavits, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Mar. 2, 2009).

5. If a locality does not reject a ballot for missing information, the information is presumed correct.
6. If a locality does not reject a ballot on the ground that the voter is not registered, proper registration is presumed.
7. A voter is presumed to have voted only once (absent evidence to the contrary).[151]

With the help of these presumptions, Coleman believed he could show that 1,360 ballots satisfied the court's February 13 order. But, of course, the court would not give him the benefit of all these presumptions.

1. The trial court's sur rising leniency. Ultimately, however, the court was more lenient in the counting of ballots than had been expected, given its February 13 order. The court, for example, counted any ballot even if an application could not be found by officials (and thus there was no signature to compare, as required by law), as long as the voter submitted an unrebutted affidavit saying that the voter had submitted an application.[152] This position was not exactly the same as the presumption that Coleman wanted (#3 above), which would have presumed that the voter had submitted a proper application even in the absence of an affidavit from the voter (or other competent witness) saying so. Thus, the court may not have been as generous as Coleman would have liked on this point. Still, the court's position protected any voter who had submitted an application that was lost by the government. Coleman simply did not come forward with voters to say that they were in this situation.

The court was similarly lenient regarding evidence that a voter did not cast multiple ballots. As long as Coleman submitted certifications from local officials that they had no evidence of multiple ballots from a voter, the court was satisfied.[153] But Coleman was late in submitting certifications from several localities, and thus he was unable to have counted additional ballots from those localities for which he might have been successful if he had been more diligent. Likewise, the court accepted any signature on the ballot envelope that appeared genuine, based on its own review. The court, in other words, did not reject any ballots just because local officials had rejected them on the basis of a signature mismatch. Whether the court's approach amounted to precisely the same as Coleman's request that a signature be presumed genuine (#4 above) is a quibble. Certainly, if any voter submitted an affidavit attesting to the signature's genuineness, that would be more than enough. Even without such testimony, as long as the signature did not look problematic to the court (and the ballot met all the other evidentiary requirements), the court would count it.[154]

As for partial addresses, the court in the end was also more charitable on this issue than some might have guessed based on the February 13 order. If the ballot envelope contained a street address (or post office box number), but neither city nor zip code, the court would still count the ballot as long as *either* the full address "was evident from the face of the ballot" (as in the case of a spouse serving as the witness) *or* the parties supplied the rest of the address from the state's voter registration database.[155] Thus, Coleman could have avoided the rejection of any ballot for missing a city name and/or zip code.

More surprisingly, the court ended up being somewhat lenient on whether a Minnesota witness was registered. If a locality had rejected a ballot on the ground that the witness was not registered, and if Coleman could not show that the witness had *ever* been registered, then the rejection would stand.[156] But the court would consider the witness valid no matter the date of registration: "a person may serve as a 'registered voter witness' under [the relevant statutes] if she or she has ever registered to vote in Minnesota."[157] The witness, in

[151]Contestants' Findings of Fact, Coleman v. Franken, 61-CV-09-56 (Minn. Dist. Ct. Mar. 17, 2009), at 58.
[152]Order Granting in Part and Denying in Part Petitioners' Renewed Motion for Summary Judgment, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Mar. 11, 2009), at 6. An example of the court's position on this issue is in its order of March 11 concerning the ballots of Franken-allied voters participating in the litigation. Brenda Rengo's application could not be found, but "she testified in her declaration under penalty of perjury that she fully completed her application pursuant to applicable law." *Id*. Accordingly, the court concluded: "In the absence of evidence to the contrary, the Court finds the unrebutted testimony of the witness sufficient." *Id*.
[153]Order for delivery of ballots to office of the Minnesota Secretary of State For Review By the Court, Coleman v. Franken, 61-CV-09-56 (Minn. Dist. Ct. Mar. 31, 2009), at 12.
[154]*Id*. at 15.
[155]*Id*. at 17.
[156]*Id*. at 9–12.
[157]Order Granting Petitioners' Second Renewed Motion for Summary Judgment, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Mar. 31, 2009), at 6.

other words, did not need to be registered at the time of witnessing; either before or after would suffice.

Moreover, and more surprising still, with respect to any ballot that had *not* been rejected by local officials on the ground that the witness was not registered, the court itself was willing to presume *from the face of the ballot alone* that a witness with a Minnesota address was in fact registered.[158] In essence, the court partially adopted Coleman's requested presumption on this point (#2 above). The court, in effect, was acting like those localities that did not check a witness's registration status in the state's registration database. The court's approach could not undo the rejection of ballots in localities that did check the database and correctly found that the witness had never registered. But for a ballot rejected for some other reason (for example, a signature mismatch, or missing application, or registration form inside the secrecy envelope), if the ballot could overcome this problem at trial, then the court itself would not investigate whether or not the Minnesota witness was actually ever registered, and thus the ballot would be counted based on a presumption of validity in this respect. The court's approach in this regard might raise questions relevant to Equal Protection—why was it acceptable for some localities to reject ballots for a unregistered witness if the court itself would not do so?—but it certainly meant that Coleman, if he had obeyed the court's evidentiary standard, could have availed himself of the opportunity to get the court to count more ballots.

Applying its moderately lenient standard, the court ultimately found only 351 additional ballots that were valid and entitled to be counted. These included, moreover, ballots submitted by Franken and his allied voters (and thus were not just ones that Coleman wanted counted). When they were opened, these ballots added 198 more votes for Franken, and only 111 more votes for Coleman, thereby extending Franken's margin of victory to 312.[159]

2. Could Coleman have met the court's standard? How many more ballots would the court have counted under its moderately lenient standard if Coleman had done the work to present the required relevant evidence? Based on the available record, we cannot know.[160] The court did say that its own review of all the submitted ballots, including examination of the state's registration database, showed that only about 650 were from registered voters.[161] Since the court ended up counting 350 of these, Coleman would have been limited to providing additional evidence with respect to the remaining 300 of these—not enough to overcome Franken's 312 margin. To have had any chance of prevailing in the trial court, Coleman would have had to *either* demonstrate valid registration for more voters beyond the 650 whom the court identified *or* convince the court to accept ballots from unregistered voters who had erroneously received Registered Voter ballots. In other words, assuming that the pool of properly registered voters beyond the 650 identified by the court was numerically limited,[162] it seems clear that Coleman would have needed to persuade the court to count the ballots of those voters whose lack of registration was induced by official error in mailing the wrong forms.[163]

In his Motion for Summary Judgment, Coleman identified 637 ballots cast by unregistered voters who had received Registered Voter ballots.[164] This number is essentially the same as the number of registered voters whose ballots the court ultimately considered. If Coleman had been able to convince

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[158] *See supra* note 153, at 17.

[159] Order for Opening and Counting of Ballots, Coleman v. Franken, 62-CV-09-56 (Minn. Dist. Ct. Apr. 7, 2009).

[160] A local television station in Minnesota sought a court order that would require public disclosure of rejected ballots, but its claim was rejected on appeal. KSTP-TV v. Ramsey County, 787 N.W.2d 198 (Minn. App. 2010). In theory, had it prevailed, this lawsuit would have permitted members of the public to make their own judgments for each rejected ballot as to whether it met the court's legal standards—and what difference it would have made to the ultimate vote totals if each ballot had been so ruled. Even so, there would have been no guarantee that anyone undertaking this inquiry would have the other pieces of evidence, besides the ballot itself, necessary to meet the court's standard. Nor would it have guaranteed that anyone undertaking this inquiry would view the relevant evidence exactly the same way that the three-judge panel would. Despite the tantalizing desire to figure out what the "correct" result of the election would have been if Coleman had given the court all the evidence that he might have, it remains true that there cannot be any objectively "correct" count of the ballots outside the context of the court's own adjudication of the actual case.

[161] *See supra* note 153, at 11–12.

[162] Based on Coleman's own numbers given to the media during trial, it would be unlikely that he could have shown more than 200 additional registered voters, and he could not guarantee that all these ballots had been voted for him.

[163] In other words, Coleman needed to convince the trial court to adopt the idea of "constructive" compliance, as explained in the Appendix. *See supra* note 82.

[164] *See supra* note 132.

the court to consider just this one additional category, he would have doubled the number of ballots in play. Of course, doing so would have been no guarantee of victory. These ballots, like the 350 that the court eventually counted, probably would have favored Franken. Indeed, Coleman's own assessment of them during trial was that this category would break Franken's way. Yet they would have had to break very favorably for Coleman, 475 to 162, to overcome Franken's 321-margin at the end of trial. It was a most unlikely prospect. Even so, by not pressing the court to protect voters from official error—and instead conceding that an absentee ballot must be rejected if the voter is unregistered, even when official error caused the voter to be unregistered—Coleman left himself in the zone of mathematical impossibility, not merely improbability.

G. The trial court's final order and legal reasoning

When the three-judge panel issued its final order on April 13, it was largely a *fait accompli*. The court confirmed the counting of additional ballots under its moderately lenient standard, as announced in its March 31 ruling. The court also confirmed, however, that its leniency would not extend to counting the ballot of an unregistered voter: "Even if a voter's failure to register is due to official errors or omissions, votes submitted by non-registered voters are not legally cast."[165]

The final ruling, not surprisingly, definitively rejected Coleman's effort to distinguish *Bell v. Gannaway* and set aside the election on the ground that the number of invalid ballots exceeded Franken's 312-vote margin of victory. The court's rejection of this line of argument could not have been more emphatic: "Minnesota law does not provide a remedy for Contestants' claim that absentee ballots were wrongfully accepted and counted."[166] The court added that Coleman had procedurally "waived" this argument "by failing to identify specific ballots" that he believed cumulatively caused Franken to be wrongly identified as the winner.[167] But it would seem that this procedural waiver was ultimately inconsequential, and even if Coleman had specified exactly which ballots he thought were invalid—and enough of them—the answer still would have been that "no remedy exists under Minnesota law," because of *Bell*, once the ballot has been opened and counted.[168]

The final ruling also definitively rejected Coleman's Equal Protection argument as a reason to count additional ballots, beyond those valid under Minnesota law. While this result was not at all surprising given the court's earlier pronouncements on Equal Protection, there did emerge a little-noticed inconsistency in the final ruling's Equal Protection analysis. On the one hand, the court's main reason for rejecting Coleman's Equal Protection argument remained its view that Minnesota law, unlike Florida's in *Bush v. Gore*, was unambiguous. On the other hand, the court observed that in some respects Minnesota law left it to local officials to decide whether or not to invalidate ballots on particular grounds.[169]

The issue of local discretion in evaluating absentee ballots had emerged most clearly during the trial in the context of verifying a witness's registration status. It turned out that some localities had the technological capacity to conduct this verification before counting an absentee ballot on Election Night, while other counties did not have this capacity.[170] Part of the explanation for this difference in technological capacity was that Minnesota statutes gave local counties the authority to establish county-wide absentee ballot boards, rather than determining the validity of absentee ballots at each precinct on Election Night.[171] The counties with absentee ballot boards generally were able to access the state voter registration database to determine whether a witness was registered, whereas officials at each precinct on Election Night generally were unable to do so.[172]

Because state law gave localities the choice on whether to establish an absentee ballot board, it also seemed as if state law implicitly gave localities the choice on whether or not to check a witness's registration status before deciding to accept or reject a ballot. In other words, it was acceptable for election officials to look at an absentee ballot envelope and, if the witness listed a Minnesota address that

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[165]Findings of Fact, Conclusions of Law & Order for Judgment, *supra* note 6, at 22 ¶ 135.
[166]*Id.* at 24 ¶ 142.
[167]*Id.* at ¶ 141.
[168]*Id.* at ¶ 143.
[169]*Id.* at 33–56.
[170]Findings of Fact, Conclusions of Law, and Order for Judgment, *supra* note 6, at ¶¶ 66–67.
[171]MINN. STAT. ANN. § 203B.121 (2008). One of the reforms adopted in the aftermath of *Coleman v. Franken* is that all counties are now required to have absentee ballot boards; they are no longer just optional. *See* MINN. STAT. ANN. § 203B.121 (2010).
[172]*See supra* note 170.

did not look irregular, simply assume that the witness was registered. This procedure is what the three-judge court itself had done as part of its March 31 order. But because this procedure was discretionary, it was equally okay under Minnesota law (according to the court) if localities took the opposite approach and, using available access to the state's registration database, checked a witness's registration status and then invalidated ballots if the witness was unregistered.

The existence of local discretion is not necessarily problematic under *Bush v. Gore.* The majority opinion there said as much, pointing out that different localities might use different technologies to administer elections. The potential problem under *Bush v. Gore*, however, was how clearly state law contemplated local variation in the counting of ballots in a statewide election due to local discretion. If the discretion was the byproduct of an ambiguous state statute, as the local variation in treatment of dimpled chads was in Florida, then the local discretion was potentially more troublesome under *Bush v. Gore*. Thus, for the trial court in *Coleman v. Franken*, the question was whether the discretion in verification of a witness's registration status was the product of a clear or an ambiguous state statute.

The trial court obviously wanted "clear" to be the answer, but it was tricky for the court to say so. Insofar as the Minnesota statute seemed to be clear on the issue of a witness's registration status, it seemed to be that the witness actually being registered was clearly required—not that it was clear that local officials had the discretion to waive this requirement when they lacked the technological capacity to check before deciding whether to count the ballot. But if the local officials really had this discretion under the statute, then it seemed as if the statute was at least a little bit murky on this discretion point.

The trial court's effort to have it both ways—both clarity and authorized local discretion to disregard a witness's registration status—was not entirely successful. Regarding the differential access to technology, the court asserted: "By all accounts, election officials performed their duties on Election Day to the best of their abilities, given the resources available to them."[173] In an effort to distinguish *Bush v. Gore* on this point, the court added: "In light of the state's goal of enfranchising voters whenever possible under the law, election officials must be vested with reasonable discretion to address election issues unique to their jurisdictions while still operating under the uniform standards of Minnesota law."[174]

But it is not obvious at all how this maximum-enfranchisement goal distinguishes *Bush v. Gore*. Florida also had a goal of maximizing voter enfranchisement; that was the policy underlying its general "intent of the voter" standard for evaluating dimpled and hanging chads.[175] Yet it is precisely this vague standard that got Florida in trouble with the majority of the U.S. Supreme Court.

Nor was it accurate for the trial court in *Coleman v. Franken* to suggest that localities without access to the state's voter registration database on Election Night faced an issue "unique" to them.[176] If anything, the baseline expectation in Minnesota was that the validity of absentee ballots would be determined at the precinct on Election Night and that these precincts lacked access to the state's registration database. Therefore, in many localities officials would simply be looking at the envelope to see if a witness's address had a superficial irregularity. If not, the ballot would be counted. In other words, the localities with the ability to check the registration database were arguably the exception, not the rule. This situation made it at least a little unclear under the statute, given Minnesota's professed desire of maximizing voter enfranchisement, whether localities with enhanced technological capabilities should be using them to invalidate ballots that routinely would be counted throughout the rest of the state. And if the statute was at least a little bit unclear on this point, then did *Bush v. Gore* kick in and require statewide uniform treatment of equivalent ballots in the absence of unambiguous authorization for the local variation?

The trial court never really confronted this basic question. It kept repeating: "The state-wide standards governing absentee voting in Minnesota are uniform and explicit and apply in every county and city in the state."[177] Yet elsewhere in its opinion it acknowledged that counties varied in whether they verified a witness's registration. The court's effort to reconcile the different parts of its analysis of the Equal Protection issue did not hang together convincingly.

Moreover, given the discretion of local officials to count a ballot without checking a witness's regis-

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[173]Findings of Fact, Conclusions of Law, and Order for Judgment, *supra* note 6, at 43.
[174]*Id.* at 44.
[175]Bush v. Gore, 531 U.S. 98 (2000).
[176]*See supra* note 171, at 41.
[177]*Id.* at 46.

tration, it could not be that a ballot was *invalid* just because the witness was unregistered. Rather, ballots with witnesses whose addresses appeared superficially regular were *countable*, even if the witness was not in fact registered. Being countable in this way distinguished these ballots from those cast by felons, which were inherently *uncountable* (in other words, intrinsically *invalid*) under Minnesota law. Therefore, if confined to those circumstances in which local officials exercised discretion as a result of an ambiguous state law, Coleman's Equal Protection argument would not require the court to count *invalid* ballots, like those cast by felons. Rather, so confined, the argument would only require the court to count ballots that the court itself had already determined to be *countable*—and some of which, pursuant to the March 31 order, the court had already counted. Yet, whether because of the way Coleman had presented his Equal Protection argument, or otherwise, the court was unable to see the distinction between the felon hypothetical and the real situation involving local variation on witness registration.

Still, it is unlikely that a more analytically coherent opinion from the three-judge panel on Equal Protection would have changed the court's bottom-line conclusion. Even accepting that the local discretion concerning the checking of witness registration was a by-product of statutory ambiguity, the court most probably would have concluded that the discretion was justifiable in light of different local resources and other different local circumstances. Statutory ambiguity as the cause for this local discretion might make this argument harder, but it does not make it impossible when the facts support the underlying reasonableness of the local variation. Based on the trial testimony, and its predisposition to support the professional judgment of the state's local election administrators, the three-judge panel would have found a way to reach the same conclusion even if forced to travel down a somewhat different analytical path to get there.

V. THE APPEAL

A. *The decision to appeal*

Coleman did not need to appeal the three-judge trial court's final ruling. Instead, he could have gracefully conceded the election at that point (as did Dino Rossi, Republican candidate for governor of Washington in 2004 when the trial court in that disputed election issued its final ruling against him).[178] Coleman had received a full and fair hearing before a transparently impartial panel of conscientious jurists. The only reason to appeal would be to get a different group of judges to reach a different result on the same issues. If Coleman were to prevail, would it be because the different judges were able to see the merits of the case more objectively than the three-judge panel, or rather because he was fortunate to find a set of judges more predisposed to rule in his favor?

Recall that the Minnesota Supreme Court had split 3–2 back in December in its ruling that adopted the "candidate veto" procedure. That ruling had been a partial victory for Coleman, who had sought the supreme court's intervention. The majority for that ruling was certainly more pro-Coleman than the two justices in dissent, who had embraced Franken's view of that issue. Thus, maybe Coleman could eke out another narrow 3–2 victory, if only to get a partial remand to the trial court that would require additional evidentiary proceedings with respect to some of the ballots in dispute. (Delay, after all, at least would keep Franken out of the Senate while the dispute dragged on, given the supreme court's earlier decision to refuse Franken a certificate until the case was over.) Such a 3–2 reversal of the unanimous trial court would not have been pretty—it would reek of partisanship—but the law unquestionably gave Coleman a right to appeal, and thus he made a stab at it. Of course, there was also the theoretical chance, however slim the odds, that the Minnesota Supreme Court might reverse the unanimous trial court decision by its own 5–0, or perhaps even 4–1, ruling.[179]

B. *The arguments on appeal*

As Coleman prepared his appeal, he had three basic lines of attack he could pursue: (1) *Bell v. Gannaway*, contrary to the trial court, was not an obstacle to ruling the election null and void on the ground that too many invalid ballots had already

[178]Gordy Holt & Chris McGann, *Rossi Ends the Fight: Judge upholds Gregoire's election victory*, SEATTLE POST-INTELLIGENCER, Jun. 7, 2005.

[179]Chief Justice Magnuson and Justice Barry Anderson continued to recuse themselves because of their prior service on the Canvassing Board.

been counted; (2) the trial court adopted too narrow an interpretation of Minnesota's statutory law in identifying ballots eligible to be counted; and (3) and the federal Constitution required the counting of ballots that state law called for rejecting. On appeal, Coleman also added (4) a Due Process argument that he had not pursued in the trial court until late in the proceedings there.

1. The Minnesota Supreme Court on *Bell v. Gannaway*. The first of these was a non-starter. None of the Justices had any interest in distinguishing *Bell*. Indeed, they buried in a footnote the trickiest part of explaining why *Bell* should govern in a statewide election. As Coleman argued in his briefs to the supreme court, the *Bell* waiver doctrine is predicated on a candidate having the opportunity to challenge a ballot before it is counted and commingled by local officials. Yet in a statewide election, candidates lack this opportunity in those localities that use an absentee ballot board to review the eligibility of absentee ballots (rather than sending them to precincts for review on Election Night). At the end of its lengthy footnote on this point, the Minnesota Supreme Court acknowledged that Coleman had no opportunity to challenge absentee ballots in those localities that used board-conducted, rather than precinct-conducted, review. Nonetheless, the court still said *Bell* applied and that the legislature meant for candidates to be precluded from challenging absentee ballots after they were counted and commingled even if candidates had no opportunity to challenge them beforehand.[180]

This ruling has the odd consequence of converting *Bell*, at least to this extent, from a procedural limitation to a substantive one: local decisions to count an absentee ballot must stand, without any possibility of a remedy whatsoever, no matter how flagrantly they disregard the plain commands of the relevant statutes. A statute, for example, explicitly commands that a ballot must not be counted if its envelope lacks the voter's signature. Suppose a local ballot board entirely ignores this command and counts it anyway, with the candidate having no opportunity to protest either beforehand or afterward. This invalid ballot, together with several others just like it, makes the difference in an election: there are more of these blatantly invalid ballots with signatures missing than the winning candidate's margin of victory, and there is good reason to think that the invalid ballots were cast for the winning candidate. The footnote in the Minnesota Supreme Court's opinion in *Coleman v. Franken* would seem to dictate the rather bizarre conclusion that this incorrect outcome must prevail, with the wrong candidate installed into office, and the local officials getting away with their blatant subversion of state law on the counting of ballots. But that implication is the logical consequence of the court's insistence on foreclosing Coleman's ability in the judicial contest to attack ballots as wrongly counted even when he had no prior opportunity to challenge the counting of them.[181]

2. Coleman's absent statutory argument for counting more ballots. Coleman never clearly and explicitly pressed on appeal a statutory argument for why more ballots should have been counted. Perhaps Coleman thought that he could not make enough headway by leading with the statutory argument. Recall his judgment in advance of trial that counting ballots for which the voter's noncompliance was attributable to official error would not have been enough to overturn Franken's lead. He needed to win more ballots either under a broader statutory argument premised on "substantial compliance," or a federal constitutional argument that encompassed ballots for which noncompliance was attributable to voter error.

From Coleman's perspective, it was too bad that the most attractive legal argument did not line up with the ballots most likely to shift the count in his favor. Even though Coleman himself did not argue the point, the Minnesota Supreme Court strongly suggested that it would accept the idea of constructive compliance, as distinguished from substantial compliance, to protect voters from *official* error.[182] "The distinction between errors by voters

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[180]"We must presume the legislature was aware," the footnote stated, that the consequence of having a ballot board meant no opportunity for candidates to challenge. Coleman v. Franken, 767 N.W.2d 453, 468 n.19 (Minn. 2009). But this presumption was by no means inevitable. Instead, the court could have insisted that challenges be available even before ballot boards (and not just in precincts) *or* that the *Bell* waiver rule does not apply wherever challenges are not available.

[181]This conversion of *Bell* from a procedural to a substantive doctrine also has implications for Equal Protection analysis, which I intend to explore in further scholarship on how disputes over questionable ballots might best be handled. Meanwhile, it is hard to fault the Minnesota Supreme Court for not wishing to go down this thorny path, and at least the Justices were unanimous in their refusal to do so.

[182]The idea of constructive compliance is explored in the Appendix. *See supra* note 82.

and errors by election officials is an important one," the state's high court observed.[183] In the specific context of absentee voting, the court agreed with Franken in emphatically rejecting the idea that "substantial compliance" would excuse voters from their own mistakes.[184] But if the voter follows all the rules, then the ballot "should not be rejected because of 'irregularities, ignorance, inadvertence, or mistake, or even intentional wrong on the part of election officers.'"[185] Although the court did not need to state definitively that it would count absentee ballots based on the idea of constructive compliance—because Coleman did not specifically ask the court to do so—the language of the court's opinion certainly invites this argument in a future case.

The Minnesota Supreme Court's position on the interpretation of the state's statutes was, quite clearly, very different from the trial court's. The trial court had squarely rejected the idea that a nonregistered voter who followed all the rules could be protected from official error that sent a Registered Voter's Ballot instead of the proper absentee voting materials for a nonregistered voter. The Minnesota Supreme Court did not embrace this harsh position, but rather went out of its way to suggest that it would accept the opposite view.

This difference in statutory interpretation is the only divergence between the two courts in their view of the law applicable to *Coleman v. Franken*. But it is a difference significant not only to future cases. If Coleman had argued constructive compliance and the supreme court had accepted it, then Coleman would have been in a position to make a much narrower Equal Protection argument than the one he presented—and lost.

3. The im lications for E ual Protection on a eal. The category of ballots that Coleman really wanted to win on Equal Protection grounds—his Holy Grail—was the one involving unregistered witnesses. These were the ballots that Coleman thought would favor him. Most of them had been rejected in rural counties that carefully checked a witness's registration status and did not cut the voter any slack. These localities tended to vote disproportionately for Coleman, so getting these ballots counted was a priority.

Moreover, making the Equal Protection argument with respect to this category was straightforward. Whereas some rural counties clearly followed their strict policy of checking witness registration, other localities just as clearly had a policy of not checking witness registration. Whether due to technological differences, or just differences in attitude, or both, it was undeniable that the local variation was not merely isolated, minor, and random. Rather, it was the product of conscious choices at the local level.[186]

Coleman could have crafted an argument that on this particular issue the state statutes were unclear, even if they were clear in other respects. The lack of clarity concerned whether or not localities had the discretion to adopt their own policies on whether to count ballots despite lack of witness registration. The upshot of this statutory ambiguity, or so the argument would go, was that this category of ballots fell within the holding of *Bush v. Gore*, even if other categories of ballots did not.

But Coleman did not argue Equal Protection this way on appeal. Instead, he continued to argue Equal Protection as if accepting that argument required the court to count ballots that were patently invalid under Minnesota's statutes. Because "the differences in application [of the statute on Election Night] were about *not complying* with…statutory requirements," as Coleman put it, he asked the supreme court to order the counting of all comparably invalid ballots.[187]

He made the broader—and ultimately unsuccessful—Equal Protection argument because he thought he needed to extend it to more categories of rejected absentee ballots than just the one involving unregistered witnesses. But he put himself in the position of needing Equal Protection for more categories because he had failed to make the constructive compliance argument on statutory grounds for other categories that were affected by official error. Thus, Coleman's statutory argument boxed him into a bad corner on Equal Protection.

Of course, even if Coleman had made the narrower Equal Protection argument, it is far from clear that the Minnesota Supreme Court would have accepted it. The unanimous opinion for five Justices offers multiple reasons for rejecting

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[183]Coleman v. Franken, 767 N.W.2d 453, 462 (Minn. 2009).
[184]*Id.*
[185]*Id.* at 462 (quoting *Fitzgerald v. Morlock*, 120 N.W.2d 339 (1963)).
[186]*See supra* note 6, at ¶¶ 66–68.
[187]Appellants' Brief, Coleman v. Franken, 767 N.W.2d 453 (Minn. 2009), at 42 (emphasis in the original).

Coleman's Equal Protection claim. The court first said that the government must intend to discriminate among voters in order for there to be an Equal Protection violation. But since that reason did not square with *Bush v. Gore*, the court explained why in its view *Bush v. Gore* did not apply here. The court provided the interesting observation that absentee ballots remain hidden in their envelopes and therefore officials can never be certain for whom the ballots are cast when they apply different rules for counting or rejecting them. By contrast, in Florida, the officials were looking directly at chads that were dimpled for Bush or Gore when deciding whether or not to count them.[188]

To be sure, the risk of partisan manipulation of vote-counting by local officials is greater when those officials are looking directly at votes for candidates marked on ballots and, at the same time, these officials are deciding on the spot the rules for when those ballots count. But it seems inconceivable that *Bush v. Gore* would not apply at all to absentee ballots inside secrecy envelopes. Assume that the relevant state law had merely—and vaguely—directed local officials to reject an absentee ballot when, in their judgment, it "lacked sufficient indicia of trustworthiness," but to count it otherwise. There is no way that the *Bush v. Gore* majority would have tolerated local variation in the treatment of objectively comparable absentee ballot envelopes (with similarly completed witness information, for example) based on that vague statutory standard.

Thus, the supreme court needed an additional reason for distinguishing *Bush v. Gore*. It relied on the one used by the trial court: that the relevant Minnesota statutes were clear in their rules for counting and rejecting absentee ballots, in contrast to Florida's law for evaluating hanging or dimpled chads. But this reason, as we have seen, works with only some of the categories of rejected ballots presented by Coleman and considered by the trial court. If Coleman had developed an argument based on the ambiguity of Minnesota law concerning the counting or rejecting of absentee ballots for lack of a registered witness, he would have made it much more difficult for the supreme court to distinguish *Bush v. Gore* based on the clarity of Minnesota law.

Even if Coleman had prevailed in the Minnesota Supreme Court on a more focused Equal Protection argument, there is no guarantee he could have translated that legal victory into more votes—much less enough to overturn Franken's margin of victory. As long as Coleman was required to meet the trial court's evidentiary standard, and as long as Coleman was unable to do so as a practical matter, then no amount of prevailing on legal theories would make any difference at all. Still, understanding that the narrow Equal Protection argument was never presented on appeal—and thus never squarely rejected by the Minnesota Supreme Court—illuminates what issues remain open for the future.[189]

4. The inclusion of Due Process in the a eal. The new twist that Coleman pursued on appeal concerned not Equal Protection, but instead Due Process. He claimed that there had been a change in the law from Election Night, when most localities adopted a lenient standard, to February 13, when the trial court adopted a strict standard. He argued that, according to the reasoning of several federal circuit-court precedents, this change in state law violated the federal constitutional requirement of Due Process.[190]

The problem with this argument was that the strict standard appeared to follow the text of the statute, so it was hard to view the trial court's embrace of the strict standard as a *change* in the law. Moreover, the lenient standard had not been applied uniformly by all localities on Election Night. Thus, it was difficult to claim that under Min-

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[188]Coleman v. Franken, 767 N.W.2d 453, 465–66 (Minn. 2009).

[189]New Equal Protection issues emerged in the counting of write-in ballots in the dispute over Alaska's 2010 U.S. Senate race. *See* Miller v. Treadwell, No. S-14121 (Alaska 2010) available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Miller-Opinion-12-22-10.pdf>. Other elections in 2010, including several local races in Ohio, also triggered new Equal Protection issues over the counting of provisional ballots. One of these reached the Sixth Circuit as of this writing. *See* Hunter v. Hamilton County Board of Elections, No. 11-3060 (6th Cir. 2011) available at <http://moritzlaw.osu.edu/electionlaw/litigation/ documents/Hunter-6thOpinion.pdf>. Each electoral cycle will continue to offer novel ways to argue Equal Protection violations in the counting of ballots, at least until the scope of *Bush v. Gore* is clarified to the point where litigation over these issues is no longer worthwhile. (The 2010 recount of the gubernatorial election in Minnesota did not provide an occasion for pursuing Equal Protection, because the dispute ended after the completion of the administrative recount. Unlike with respect to the 2008 U.S. Senate election in Minnesota, there was no judicial contest of the certified result of the state's 2010 gubernatorial election.)

[190]Appellants' Reply Brief, Coleman v. Franken, 767 N.W.2d 453 (Minn. 2009), at 14–15. Coleman raised Due Process at the end of the trial; it was not an avenue of attack that he had pursued earlier. *See* Pat Doyle, *The Coleman-Franken recount: Can it be over soon?*, Star Tribune, Mar. 23, 2009.

nesota law the "correct" position for localities to take was the lenient rather than strict one. The lenient localities had simply got it wrong on Election Night according to Minnesota law as it stood at the time. The fact that the trial court sided with the strict localities, rather than the lenient ones, was just a matter of the trial court's confirmation of which position had been the proper understanding of Minnesota law all along.

In rejecting Coleman's Due Process claim, the Minnesota Supreme Court emphatically adopted this view of state law: "strict compliance with the statutory requirements for absentee voting is, and has always been, required" under the relevant statutes.[191] By adopting this view, the supreme court undercut the predicate for Coleman's attempt to rely on the federal Due Process precedents. If there was no change in state law from Election Day to February 13, then there was no Due Process problem to consider.

This view of state law, moreover, permitted the supreme court to sidestep what might have been a thorny Due Process issue if the circumstances were different. Suppose the localities had been uniform in adopting the lenient position, based on a long-settled understanding in the state that they should ignore statutory violations that would disqualify a ballot. Despite the clarity of the statute on point, in this circumstance the "law" of the state on Election Day might be better reflected in the uniformly lenient policy of the localities—and thus a judicial "return" to strict compliance with the statutory standard might actually be a *change* in the law. This perspective on the situation would be more persuasive if the Secretary of State, as Minnesota's chief elections officer, had adopted an administrative rule reflecting the lenient rather than strict position. (There was, in fact, no such administrative rule in Minnesota.) For a court to subsequently repudiate settled expectations reflected in an authoritative statewide administrative rule, as well as longstanding local administrative practices, might implicate Due Process concerns.

Of course, it would be relevant whether the state's judiciary previously had spoken on the debate between the lenient and strict positions. If an administrative rule or practice flies in the face of *both* statutory text *and* judicial interpretations of that text, the situation is different than if there is an administrative rule or practice in the absence of any judicial pronouncements. Still, if the judicial precedents were old enough or not directly on point, and the contrary administrative rule had been understood by local officials as the operative "law of the state" for years, then a new judicial ruling might be a *change* in state law (and thus potentially a violation of Due Process) even if the new judicial ruling resuscitated the old judicial precedents.

The Minnesota Supreme Court, however, never had to confront that thorny scenario because it held that Coleman had failed to develop an evidentiary predicate for it: "Coleman does not cite, and after review of the record we have not found, any evidence in the record that election officials required only substantial compliance in any past election or any official pronouncements that only substantial compliance would be required in the November 4, 2008 election."[192] There was, in short, no clearly established administrative policy in place that the trial court's February 13 order upended. But just because *Coleman v. Franken* itself lacked the factual predicate for a difficult Due Process issue, it hardly follows that no future case will. Instead, *Coleman v. Franken* puts the world of election officials, candidates, and their attorneys on notice that Due Process claims will likely become as prominent as Equal Protection arguments in disputed elections.[193]

VI. THE CONCESSION

The Minnesota Supreme Court, like the trial court, was unanimous in rejecting every argument that Coleman raised on appeal.[194] If Coleman had hoped for another 3–2 ruling partially in his favor, as he had obtained in December, he must have been deeply disappointed. But it is likely that the widespread negative reaction to that earlier 3–2 ruling, combined with the equally widespread praise for the trial court's unblemished unanimity, caused the five sitting members of the Minnesota Supreme Court to suppress whatever inclinations they might have had to disagree on the merits of the appeal.

They must have known that it would look horrible if, by a 3–2 vote along party lines, they reversed

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[191]Coleman v. Franken, 767 N.W.2d 453, 462 (Minn. 2009).
[192]*Id.*
[193]Indeed, Due Process arguments have appeared in disputes arising from elections in 2010, including those in Alaska and Ohio. *See supra* note 190.
[194]Coleman v. Franken, 767 N.W.2d 453 (Minn. 2009).

the unanimous trial court on any issue. They may have felt boxed in by the fact that the three-judge panel had been carefully selected to be demonstrably "tripartisan"—and had gone on to perform so admirably in its transparent effort to abide impartially by the rule of law. So be it. If the members of the Minnesota Supreme Court felt constrained in this way, that judicial self-restraint was a benefit to the citizens of the state.

In any event, Coleman chose not to pursue his case any further. He might have tried to interest the U.S. Supreme Court in the Equal Protection or Due Process issues, but the likelihood that the federal Supreme Court would have agreed to hear the case was infinitesimal. He could have tried to start all over again in federal district court, but he would have faced huge procedural hurdles concerning the authority of the federal trial-level court to revisit what Minnesota's judiciary had decided. Finally, he could have knocked on the door of the U.S. Senate, which under the Constitution clearly had the power to nullify Franken's state-court victory.[195] But politically Coleman had no chance of success in a Senate with fifty-nine Democrats awaiting Franken's arrival. At best from his perspective, Republicans could have filibustered the seating of Franken even after he had his certificate in hand. But to be the cause of such purely political obstructionism was not a palatable prospect for one who wished to hold open the possibility of running again for high office in the future.

Consequently, on June 30, the same day that the Minnesota Supreme Court rejected his appeal, Coleman announced his concession.[196] It was widely praised as appropriately gracious.[197] Coleman recognized the legitimacy of the court's decision as the rule of law. He acknowledged that, while he had "wanted to win," it was time to end the litigation as contrary to the best interests of the state. He called for all citizens to come together in accepting the result as the product of democracy.[198] If a major statewide election must take eight months to resolve, Coleman's concession was the right note on which to end.

CONCLUSION

The Lake Wobegone Recount is a story with multiple dimensions. Most obviously, it is a story about problems caused by an antiquated absentee voting regime. Those problems were compounded by the divergent implementing decisions that local election officials made in an effort to administer this outdated regime in a contemporary presidential election involving a level of voter interest unseen in decades.

The Lake Wobegone Recount, however, is not just a story about absentee ballots—in the same way that *Bush v. Gore* is not just a story about hanging chads. Both of these disputed elections tell important tales about the procedures used to resolve such disputes. If *Bush v. Gore* involves a recount cut short by a tight deadline, *Coleman v. Franken* depicts a dispute that dragged on for far too long because it lacked any deadline at all.

Bush v. Gore is not a pretty tale, with its 4–3 split in the Florida Supreme Court, followed by the 5–4 divide in the U.S. Supreme Court. The Lake Wobegone Recount, by contrast, is a much happier story, with its mostly unblemished judicial unanimity (except for an awkward 3–2 order of the Minnesota Supreme Court early in the process). As one continues to study the rich details of the Lake Wobegone Recount, one cannot help but wonder whether there could be some way, for future recounts, to replicate the fairness and impartiality of its procedures without their excessively time-consuming attributes.

Still more dimensions of the Lake Wobegone Recount offer other lessons for the future. *Coleman v. Franken* tells a story about what substantive rules should govern a ballot-counting dispute, both the rules of state law concerning "strict" versus "substantial" compliance (including the possibility of an intermediate—"constructive" compliance—position) and the rules of federal Equal Protection and Due Process as they apply to the counting of ballots. Perhaps even more interesting is the interplay between these rules and the institutions that enforce them: would *Coleman v. Franken* be the same if the Minnesota judiciary had reached exactly the same substantive conclusions of law but in opinions issued by judges perceived as biased in favor of Franken?

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[195]Roudebush v. Hartke, 405 U.S. 15 (1972).

[196]Brian Montopoli, *Coleman Concedes: Franken Wins Senate Seat*, CBS NEWS, June 30, 2009, <http://cbsnews.com/8301-503549_162-5126051-503544.html>.

[197]*Id.*

[198]Norm Coleman's Concession Speech, available at <http://minnesota.publicradio.org/features/2009/06/30_coleman_concession>.

Finally, the Lake Wobegone Recount is a story about the relationship between law and politics. The fairness of a disputed election's resolution is measured not simply by either the outcome the law reached or the process the law used to get there. Instead, fairness in this context depends to a significant extent on the losing side's political response to the law's process and outcome. *Coleman v. Franken*, therefore, can be evaluated by Coleman's own embrace of the law—and the law's institutions—which handed him his defeat.

I have written this detailed account of the Lake Wobegone Recount so that scholars can explore all its richness in developing ideas about how best to resolve future disputed elections. I, too, will contribute to that effort in a companion piece to this one, to be published in the next issue of *Election Law Journal*. In the meantime, one can simply value the Lake Wobegone Recount for the good story that it is.

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(Postscript follows →)

POSTSCRIPT

Timeline of Key Dates in Minnesota's Election Dispute

The Canvass

Nov. 4	Election Day
Nov. 18	State Canvassing Board announces the canvass statewide; Coleman ahead by 215 votes

The Recount

Nov. 19	Local phase of the recount starts; court orders Ramsey County to divulge names and addresses of rejected absentee voters
Dec. 5	Local phase of the recount ends
Dec. 12	State Canvassing Board asks local officials to create "Pile 5" of absentee ballots wrongly rejected Nov. 4; Coleman says he will ask Minnesota Supreme Court to exclude these ballots from the recount
Dec. 16	State Canvassing Board begins review of ballots challenged in recount
Dec. 18	Minnesota Supreme Court requires State Canvassing Board to count, as part of the recount, absentee ballots—but only those ballots that local officials and *both* candidates agree were wrongly rejected; otherwise, previously rejected ballots must await a judicial contest
Dec. 19	State Canvassing Board completes review of ballots challenged in recount
Dec. 30	State Canvassing Board tabulates withdrawn challenges; all recounted ballots give Franken a 49-vote lead; pursuant to Minnesota Supreme Court's order, candidates begin review of 1,350 absentee ballots identified by local officials as wrongly rejected
Jan. 5	State Canvassing Board certifies the result of the recount; Franken ahead by 225 votes

The Trial

Jan. 6	Coleman files *Coleman v. Franken* contest
Jan. 23	Oral argument on motions for summary judgment
Jan. 26	Trial commences
Feb. 3	Stipulation that the count of 933 previously rejected absentee ballots, as part of the recount, was proper; court limits Coleman's case to 4,797 ballots he specified (not larger "universe" of rejected absentee ballots)
Feb. 10	Court orders candidates to brief 19 categories of rejected ballots; also orders the counting of some, but not all, Nauen-plaintiff ballots
Feb. 13	Court issues order on law governing the 19 categories
Feb. 26	Court orders search for registration forms inside secrecy envelopes; 90 such forms were found
Mar. 2	Coleman conditionally rests case
Mar. 5	Franken's motion to dismiss
Mar. 12	Franken rests his case
Mar. 13	Coleman concludes rebuttal; closing arguments
Mar. 31	Court orders opening of additional ballots; Franken's final margin of victory increases to 312
Apr. 13	Court's final order

The Appeal

Apr. 20	Coleman files notice of appeal
Apr. 24	Minnesota Supreme Court sets schedule
Apr. 30	Coleman files opening appellate brief
May 11	Franken files response brief
May 15	Coleman files reply brief
June 1	Oral argument
June 30	Appeal rejected; Coleman concedes
July 7	Franken sworn into office