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Mediation and Post-Election Litigation: A Way Forward

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I. INTRODUCTION

Most who have looked at the use of alternative dispute resolution (ADR) in election disputes have concluded that ADR is not appropriate in the election context, particularly in post-election disputes. This article challenges that orthodoxy and suggests that ADR, specifically mediation, can play a useful role when elections go awry.

As someone who teaches both ADR and Election Law, I like to point out to my students the natural link between these two disciplines—elections, after all, are a form of dispute resolution. So it seems almost cannibalistic to ask the question of how ADR might inform election law. Not only that, but as discussed in different ways at the Symposium underlying this volume, election disputes do not fit well with many of the theories that animate ADR scholarship. Elections are inherently binary. Elections are the zero-sum game that any admirer of *Getting to Yes*¹ abhors. In an election, there is no way to split the pie any differently, no way to “create value.”² Democracy demands a winner and a loser. There is nothing in elections *Beyond Winning*.³

This article explores what the ADR field can contribute to resolving disputes in elections based on the premise that although elections themselves are binary, the many disputes that can arise during the election process reveal a more nuanced picture. Disaggregating election disputes reveals structures

* Professor of Practice, William & Mary Law School. Many thanks to the following individuals for their valuable insights and input: Minnesota Secretary of State Mark Ritchie, Minnesota Supreme Court Justice Paul Anderson, Jack Young, Marc Elias, Ben Ginsberg, Gary Poser, and Lynn Fraser. Thanks also to Carrie Menkel-Meadow and Howard Bellman for their suggestions and encouragement. And finally, thanks to John Mulligan, Shanna Reulbach, and Megan Mitchell for their very able research support.

¹ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce ed., 1991).

² Although some have suggested there are ways to split the pie even in elections. See Lawrence Susskind, *Could Florida Election Dispute Have Been Mediated?*, *DISP. RESOL. MAG.*, Winter 2002, at 8, 10 (including the bold idea that Gore and Bush, through a mediated agreement, might have (1) agreed to give the other input in Supreme Court appointments, cabinet posts, and (2) agreed to install bipartisan task forces to develop proposals on key policy issues).

³ ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

that ADR scholars and practitioners deal with every day: multiple parties of interest, strong fervor, high emotion, a focus on positions rather than interests, and a need to define a process that will produce a result that all sides will abide.

By disaggregating disputes that arise in elections, I hope to show that there is room for value creation in election dispute resolution and that mediation can help resolve election disputes more efficiently. Others have written about mediating disputes that arise before elections,⁴ but common wisdom has advised that “parties are unlikely to . . . resolve post-election disputes in mediation in light of the high stakes finger-pointing and the need to certify the election results in a timely manner.”⁵ This article takes issue with that assumption, arguing that mediation could prove a useful tool to address shortfalls inherent in post-election litigation.

This paper begins with a review of the current landscape with respect to non-judicial resolution of election disputes, underscoring general acceptance of the idea that court is not always the best place to resolve certain election disputes. The following sections review the drawbacks of both mediation and litigation in the post-election dispute context, concluding that both are in their own ways fraught. With these shortcomings in mind, the next section suggests that disaggregating post-election disputes into process disputes versus outcome-determinative disputes reveals a role for mediation. The final section tests this approach using the 2008 Minnesota senate recount as a case study. The Minnesota recount provides an opportunity to retroactively disaggregate post-election disputes, illustrating some of the greatest—and perhaps most unanticipated—challenges posed. Although mediation might not be right in all post-election disputes, the Minnesota example helps unpack instances in which mediation could usefully play a part.

II. EXTRA-JUDICIAL PROCESSES IN ELECTION DISPUTES

Before advancing the theory that ADR, particularly mediation, could improve dispute outcomes in the election context, this section reveals that many jurisdictions already employ extra-judicial forms of dispute resolution in U.S. elections. Out-of-court election dispute resolution mechanisms are in place at both the federal and state level. This section will discuss four distinct forms: statutory, administrative, legislative, and quasi-judicial.

⁴ See generally Erin Butcher-Lyden, Note, *The Need for Mandatory Mediation and Arbitration in Election Disputes*, 25 OHIO ST. J. ON DISP. RESOL. 531 (2010) (arguing for the adoption of a federal statute mandating mediation in pre-election disputes).

⁵ *Id.* at 544.

MEDIATION AND POST-ELECTION LITIGATION

ADR is featured explicitly in several state and federal statutes.⁶ One example is the Federal Election Commission (FEC) ADR Program.⁷ In 2000, the FEC established the program, which employs ADR techniques to resolve selected federal campaign finance disclosure disputes. While the FEC's ADR Program has never formally mediated a case, the program uses problem solving facilitative mediation techniques to settle select campaign finance complaints. According to program director Lynn Fraser, the use of interest-based negotiation has greatly enhanced the efficiency with which such referrals are processed.⁸

The Help America Vote Act (HAVA) provides another example of an explicit statutory ADR requirement in elections. To be eligible for funding under HAVA, section 15512 requires states to incorporate ADR procedures to help individuals resolve specified claims involving discrimination or lack of access to the polls should the administrative complaint process take too long.⁹ Following HAVA's mandate, states have begun to adopt ADR procedures. For example, New York's Election Law section 3-105 sets out an administrative complaint procedure that provides a process for recourse for an individual who believes that there has been a violation of Title III of HAVA.¹⁰ The New York statute provides that if a panel of the State Board of Elections fails to resolve a formal complaint within ninety days, the

⁶ For a review of some examples, see Butcher-Lyden, *supra* note 4, at 571–72.

⁷ See *ADR Program*, FEC, <http://www.fec.gov/em/adr.shtml> (revised Feb. 2010). This program tracks general federal support for the increased use of ADR, embodied in the enactment of the Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 574(a), (b) (LexisNexis 2011) (authorizing federal agencies to use ADR in disputes, exempting mediation from disclosure under the Freedom of Information Act, and requiring agencies to adopt ADR policies) and the ADR Act of 1998, 28 U.S.C. § 651 (requiring each federal district court to develop ADR procedures).

⁸ Telephone Interview with Lynn Fraser, Director, Federal Election Commission ADR Program (May 25, 2011). For a discussion of the politics surrounding the passage of the ADRA, see Lawrence E. Susskind et al., *When ADR Becomes the Law: A Review of Federal Practice*, 9 NEGOTIATION J. 59 (1993). Since its passage, federal agencies have increasingly incorporated ADR dispute resolution techniques to curtail litigation and other administrative inefficiencies. See David Seibel, *To Enhance the Operation of Government: Reauthorizing the Administrative Dispute Resolution Act*, 1 HARV. NEGOT. L. REV. 239 (1996).

⁹ See 42 U.S.C. §15512(a)(2)(I) (“If the State fails to meet the deadline applicable under subparagraph (H), the complaint shall be resolved within 60 days *under ADR procedures* established for purposes of this section. The record and other materials from any proceedings conducted under the complaint procedures established under this section shall be made available for use under the ADR procedures.” (emphasis added)).

¹⁰ N.Y. ELEC. LAW § 3–105(1) (Consol. 2011).

complaint can be moved to an outside ADR agency for resolution.¹¹ The agency then has an additional sixty days to resolve the dispute and make a final determination.¹² New York contracts with the New York State Dispute Resolution Association to resolve these complaints.¹³ While the system is in place, thus far no claim has been resolved through this mechanism.¹⁴ Although neither example reflects a robust incorporation of ADR into election processes, the FEC ADR Program and HAVA's ADR mandates mark federal recognition that ADR has a place in resolving election disputes.

Aside from explicit statutory mention of ADR in resolving election disputes, the most common form of non-judicial resolution of election disputes is administrative. Connecticut provides an example of a state that routes election disputes through an administrative commission before proceeding to court.¹⁵ Connecticut's State Elections Enforcement Commission is charged with policing "[any] alleged violation . . . of any provision of the general statutes relating to any election or referendum [or] primary . . ."¹⁶ In a nod to informal dispute resolution measures, Connecticut statute requires that the Commission "attempt to secure voluntary compliance, by informal methods of conference, conciliation and persuasion, with [the requirements of Connecticut election statutes]."¹⁷ Another example is North Carolina, where election statutes require that those who wish to file an "election protest" must file with the county board of elections for preliminary consideration, with an appeal to the state board of elections.¹⁸ Many other states require an administrative process before a party may

¹¹ N.Y. ELEC. LAW § 3-105(7) (Consol. 2011).

¹² *Id.*

¹³ According to Bill McCann, Deputy Enforcement Counsel for the New York State Board of Elections, very few HAVA complaints reach the state level each year. McCann stated that the majority of complaints are resolved on the local level.

¹⁴ Since the Election Law § 3-105 was enacted, the ADR provision has never been used. McCann says that the Legislature enacted the law to provide the Board of Elections with more control and flexibility to resolve disputes and address complaints (e.g., by providing more access to the polls), but the administrative process has not yet progressed to the point where the provision is necessary. McCann noted that this provision is not particularly useful in avoiding litigation because it addresses HAVA complaints specifically; HAVA provides no right to sue in itself. New York does not have an ADR provision for any other election law complaint process. N.Y. ELEC. LAW § 3-105 (Consol. 2011).

¹⁵ CONN. GEN. STAT. § 9-7a(g) (2011).

¹⁶ CONN. GEN. STAT. § 9-7b(a)(1) (2011).

¹⁷ CONN. GEN. STAT. § 9-7b(a)(6) (2011).

¹⁸ N.C. GEN. STAT. § 163-182.9-11 (2011).

MEDIATION AND POST-ELECTION LITIGATION

litigate a post-election dispute.¹⁹ Election law scholars analyzing the effectiveness of administrative remedies point to partisanship of election administration in most states negatively impacting the integrity of and public's confidence in elections as serious challenges these bodies face.²⁰

No doubt in homage to the idea that courts should steer clear of political disputes,²¹ some state statutes require state legislatures to settle certain post-election disputes. Legislative branch involvement is typically restricted to elections for specified offices of distinct importance, such as governor.²² Akin to the power conferred on Congress by Article 1, Section 5 of the U.S. Constitution, which grants to Congress the power to judge the elections and qualifications of its members, some states similarly grant power to state legislatures to resolve certain election disputes. Alabama statute, for example, mandates that its general assembly serves as a tribunal to resolve disputes in elections for a wide range of offices.²³ Likewise, Colorado state statutes charge its general assembly with resolving contests concerning elections of certain state officers.²⁴

Of states that rely on the judiciary to resolve election disputes, some have established alternative quasi-adjudicative procedures for certain election disputes. In Illinois, for example, all election disputes are fast-tracked

¹⁹ See, e.g., R.I. GEN. LAWS § 17-7-5(a)(11) (2011).

²⁰ Daniel P. Tokaji, *The Persistence of Partisan Election Administration*, ELECTION LAW @ MORITZ (Sept. 28, 2010), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=7645>.

²¹ See *infra* notes 65–69.

²² KY. REV. STAT. ANN. § 120.205 (LexisNexis 2011); 25 P.A. STAT. ANN. § 3312 (West 2011); S.C. CODE ANN. § 7-1-50 (2011); V.A. CODE ANN. § 24.03–804 (2011); W. VA. CODE § 3-7-2 (LexisNexis 2011).

²³ ALA. CODE § 17-16-65 (2011). “The two houses of the Legislature, in joint convention assembled, and presided over by the Speaker of the House of Representatives, shall constitute the tribunal for the trial of all contests for the office of Governor, Secretary of State, Auditor, Treasurer, Attorney General, Commissioner of Agriculture and Industries, justices of the Supreme Court, or judges of the courts of appeals . . .”

²⁴ COLO. REV. STAT. ANN. §§1-11-205, 207 (West 2011). Colorado's statutory scheme instructs that the senate president will preside over a meeting of the general assembly at which testimony from the contestor will be heard, along with the contestee. The parties' lawyers may then offer arguments, followed by debate among the general assembly concluding with a vote. Steven Huefner observes that “letting majoritarian institutions resolve questions about the majority's will in an election contest may be appropriate.” Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 321 (2007). For an argument advocating against state courts interfering with Congress' role in U.S. Congressional elections, see Kristen R. Lisk, *The Resolution of Contested Elections in the U.S. House of Representatives: Why State Courts Should Not Help with the House Work*, 83 N.Y.U. L. REV. 1213 (2008).

directly to the State Supreme Court.²⁵ In Nebraska, one district court is designated to hear all election disputes.²⁶ In Ohio, contests involving races for statewide office are heard by the Chief Justice of the State Supreme Court.²⁷ Some states make use of judicial panels, perhaps demonstrating a recognition that election disputes are both too important and too political to be entrusted to one judge. In Iowa, the Chief Justice of the Iowa State Supreme Court selects three district judges to make up a panel to hear disputes in statewide elections, and selects four district judges to sit with him or her to hear disputes regarding elections for national office, including presidential electors.²⁸ For ballot initiatives, Iowa's resolution-by-panel-system ventures even further from standard judicial resolution: the contesting party nominates one panelist, the county commissioner nominates an opposing panelist, and the two nominated panelists mutually agree on a third person, all three of whom sit together to adjudicate the dispute.²⁹

The range of alternatives to standard litigation indicates dissatisfaction among the states with traditional adjudication as the sole method of resolving election disputes. By allowing county and state administrative boards to resolve local election disputes, holding special legislative sessions, or convening special judicial panels, states routinely acknowledge that some election disputes are ill-suited, for a variety of reasons, to standard litigation. While litigation remains a default solution, states appear open to exploring alternative methods to reach more efficient and satisfying results.

Although there has been increasing interest in the use of ADR in election disputes, mediation has not been promoted in the post-election context. The next section examines likely reasons why.

III. THE DRAWBACKS OF MEDIATION IN THE POST-ELECTION CONTEXT

Good mediators work with parties to help them understand their interests and generate options to meet those interests. A skilled mediator can help parties identify their interests even if they came to the table armed only with

²⁵ 10 ILL. COMP. STAT. ANN. 5/23-1.1a (LexisNexis 2011) ("[t]he Supreme Court shall have jurisdiction over contests of the results of any election, including a primary, for an elected officer provided for in Article V of the Constitution, and shall retain jurisdiction throughout the course of such election contests.").

²⁶ NEB. REV. STAT. ANN. § 32-1102 (LexisNexis 2011).

²⁷ OHIO REV. CODE ANN. § 35.1508(B) (LexisNexis 2011).

²⁸ IOWA CODE § 61.1, 60.1 (LexisNexis 2011).

²⁹ IOWA CODE § 57.1 (LexisNexis 2011).

MEDIATION AND POST-ELECTION LITIGATION

intractable “positions.”³⁰ Once a full set of interests is on the table, the move to helping parties generate value-creating options is the mediator’s bread and butter. But, as noted at the outset, critics of mediation in election disputes point to the problem that elections are a zero-sum game. How can you create value when the whole point of an election is to pick a winner?

The drawbacks to using mediation in this context are not limited to this puzzle. Some of mediation’s biggest advantages in other contexts are problematic when applied to election disputes. The principle of confidentiality provides a perfect example. For those of us who have tried to explain the value of mediation to disputing parties, one of the biggest selling points is confidentiality.³¹ Virtually any litigant can see value in the prospect of avoiding airing dirty laundry in court by privately sitting down with a mediator to resolve the terms of the dispute. It is well recognized, however, that for certain kinds of disputes shutting out the public eye can be quite problematic.

For example, *Rojas v. Superior Court*³² involved a complaint that owners of an apartment building concealed the building’s toxic mold problem. The tenants sued to compel production of material from an earlier mediation between the owners and developers, who both saw it in their best interest to keep the existence of a toxic mold problem from the tenants. The lower court constructed an exception to mediation confidentiality to allow plaintiffs access to the mediation documents. The California Supreme Court reversed, finding confidentiality in mediation communications absolute as it applies to

³⁰ FISHER & URY, *supra* note 1, at 42. The authors lay out the difference between “positions” and “interests” by observing that “behind opposed positions lie shared and compatible interests . . .” *Id.* The work of the mediator is to identify those interests and to help the parties create options that satisfy those shared interests. Earlier, Mary Parker Follett described the difference usefully:

In the Harvard Library one day . . . someone wanted the window open, I wanted it shut. We opened the window in the next room, where no one was sitting. This was not a compromise because there was no curtailing of desire; we both got what we really wanted. For I did not want a closed room, I simply did not want the north wind to blow directly on me; likewise the other occupant did not want that particular window open, he merely wanted more air in the room.

Mary Parker Follett, *Constructive Conflict*, in *PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920S* 67, 69 (Pauline Graham ed., 1995).

³¹ See JOHN W. COOLEY, *THE MEDIATOR’S HANDBOOK* 6 (2d ed. 2006) (listing nonpublic nature as the first in a list of the benefits of mediation).

³² *Rojas v. Superior Court*, 93 P.3d 260 (Cal. 2004).

evidence prepared for the sole and limited purpose of mediation.³³ Confidentiality in election dispute mediation is similarly fraught. Should election dispute mediations be conducted behind closed doors? Unlike disputes between private parties, the public might demand to know—and indeed has the right to know—how election disputes are resolved for the very reason that it is the public which must sanction the outcome. Secrecy, even a hint of the proverbial smoke-filled room—can cast great doubt on the legitimacy of an electoral outcome.³⁴

Another reason parties are encouraged to try mediation is self-determination. Self-determination is often cited as the predominant benefit of and central value in mediation because it ensures that outcomes are responsive to the parties' interests.³⁵ There is no way to know how a judge will decide a case, but mediation affords parties the opportunity to control the outcome of their dispute.³⁶ This quality can be very attractive to parties,

³³ *Id.* at 271. See generally Sarah Williams, *Confidentiality in Mediation: Is It Encouraging Good Mediation or Bad Conduct?* *Rojas v. Superior Court of Los Angeles County*, 2005 J. DISP. RESOL. 209 (2005). For an interesting discussion of how the Uniform Mediation Act's confidentiality provisions managed the problem of public health and safety versus confidentiality, see Philip J. Harter, *The Uniform Mediation Act: An Essential Framework for Self-Determination*, 22 N. ILL. U. L. REV. 251, 258 (2002) ("[What if] the mediator . . . learn[s] that a barrel of a highly toxic chemical lies just beneath the local playground or that some product poses a very real danger to potential users[?] Or, it may be that one of the participants is so upset with what happened that s/he plans to seriously harm someone. In these instances the strong presumption of confidentiality—which is essential for mediation to work successfully—should be overridden and the facts revealed, but only to the extent necessary to address the concern. The question is: who decides and by what standards." (citation omitted)).

³⁴ One way around mediation confidentiality issues is to make election mediation sessions open to the public. See Uniform Mediation Act, 710 ILL. COMP. STAT. ANN. 35/1 § 6(a)(2) (LexisNexis 2011). Indeed, in some instances a state's open meetings laws might require access. But this option risks forfeiting the significant benefits confidentiality lends to mediation, including encouraging candor and uninhibited option generation.

³⁵ Kimberlee Kovach, "Mediation," *THE HANDBOOK OF DISPUTE RESOLUTION* 305 (Michael L. Moffitt & Robert C. Bordone, eds., 2005).

³⁶ See, e.g., Jacqueline Nolan-Haley, *Self-Determination in International Mediation: Some Preliminary Reflections*, 7 CARDOZO J. CONFLICT RESOL. 277, 277 (2006) (noting that "the right of self-determination allows parties to participate in decisionmaking and voluntarily determine the outcome of their disputes. This understanding of self-determination is rooted in the philosophical principle of personal autonomy and is expressed through the legal doctrine of informed consent. The simple version of the normative story states that those who are affected by a dispute should voluntarily consent to the outcome of that dispute. In short, "party" self-determination in mediation gives ownership of the conflict to the disputants.").

MEDIATION AND POST-ELECTION LITIGATION

particularly in cases in which it is difficult to predict the litigated outcome. But self-determination is a tricky concept in election disputes (and indeed in any mediated public dispute). Who is the “self” being determined in an election dispute? Is it the candidate? The party? The national party? The state party? The candidate’s supporters?³⁷ The whole project of democracy is a form of self-determination: the right of the electorate to determine their representatives. Self-determination is quite difficult in the election context.³⁸

An intimately related challenge to be explored in greater detail below involves the scope of parties’ authority to settle an election dispute. Suppose in a recount contest the two parties agree in mediation that a new election should be administered. Do the parties have the power to mandate this remedy through a mediated agreement? In certain instances when courts have ordered new elections they have undertaken to impose this remedy under dubious statutory authority.³⁹ What exactly is the scope of parties’ authority to settle post-election disputes? Mediated agreements have the force of a contract, but can a court enforce such an agreement?⁴⁰

An additional hurdle to using mediation in election disputes is the problem of choosing a mediator. Is it possible to find a truly “neutral” person in the heat of a political battle?⁴¹ Professor Edward Foley’s elaborate scheme

³⁷ For an interesting discussion of stakeholders in election disputes, see David Kovick & John Hardin Young, *ADR Mechanisms*, in GUIDELINES FOR UNDERSTANDING, ADJUDICATING, AND RESOLVING DISPUTES IN ELECTIONS 227, 245–246 (Chad Vickery ed., 2011), available at http://www.ifes.org/~media/Files/Publications/Books/2011/GUARDE_final_publication.pdf.

³⁸ Note that the problem of self-determination is inherent in many if not most public disputes because by definition, a public dispute has an impact on and involves a diverse array of parties in interest. See SUSAN L. CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE TO HANDLING CONFLICT AND REACHING AGREEMENTS* 5 (1988).

³⁹ Huefner, *supra* note 24, at n.112 (See, e.g., *Gunaji v. Macias*, 31 P.3d 1008, 1012, 1016–18 (N.M. 2001) (creating an equitable remedy of partial revote, in contrast to code requirement of disregarding the entire precinct); *State ex rel. Olson v. Bakken*, 329 N.W.2d 575, 579–82 (N.D. 1983) (approving the equitable remedy of partial special election for an identified set of voters whose votes were not counted)).

⁴⁰ Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) (discussing the need for “public adjudication” versus what the parties may themselves desire).

⁴¹ The mediator choice problem goes beyond the neutrality problem. In advocating for mediation, this article assumes that mediation will be done well, by a skilled mediator able to help the parties realize mediation’s many benefits. As longtime public dispute mediator Howard Bellman points out, however, “even with surgery, you cannot always assume it will be done well.” This mediator competency problem should be

for empaneling an election tribunal to resolve contested elections provides an example of just how difficult a task it is to find people who the public will accept as truly neutral in a contested election.⁴² Even if mediation did have some use in election disputes, would the idea be dead on arrival given the difficulty of identifying a true neutral?⁴³

The mediator choice problem leads to another of the biggest challenges mediating election disputes: finality. There is no guarantee in mediation that the parties will emerge with an agreement. When agreement is not reached, mediators take solace in the belief that mediation has at least facilitated communication and understanding between the parties.⁴⁴ From this perspective, failure to reach a settlement is not a failure on the part of the mediator if the parties walk away with a better understanding of the other side's interests and their own. But some disagreements simply require finality; election disputes fall in this category, particularly given the time-sensitivity inherent in all post-election disputes. Someone must take office.

This leads to a further difficulty. Mediation is often seen as the best alternative in disputes that involve ongoing relationships.⁴⁵ Elections,

acknowledged as a potential drawback of mediating election disputes. Telephone Interview with Howard Bellman, Mediator/Arbitrator, August 15, 2011.

⁴² Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 378-79 (2007) ("Consider a five-member court that convenes only when an election contest is filed. Its members consist of four judges who already sit on other general-jurisdiction state courts. These four members are selected, one each, by the majority and minority leaders of both houses of the state legislature. These selections occur at set intervals, so that these members of the court are known in advance of any election contest that may occur. The fifth member is an attorney, whether a currently sitting judge or not, chosen by the mutual agreement of the other four members. This fifth member also serves for a specified term, with a new fifth member chosen by the other four current members, when the previous fifth member's term has expired. In this way, also, the fifth member is always specified before an election contest arises.").

⁴³ Election Attorney Ben Ginsberg sees neutrality as the single biggest impediment to mediating election disputes. Telephone Interview with Ben Ginsberg, Partner, Patton Boggs LLP (June 2, 2011).

⁴⁴ Some mediators feel that their job is not even aimed at achieving a finalized agreement. "Transformative" mediators, for example, do not view "problem solving" as the goal. Instead, they see party empowerment, communication, and recognition as the object of the mediation exercise. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 108-12 (1994).

⁴⁵ Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*,

MEDIATION AND POST-ELECTION LITIGATION

however, are not about preserving relationships between the two sides. Enhancing “understanding” between the parties is not relevant or useful in the context of election disputes. Chances are good that candidates from opposing parties will not have an ongoing relationship post-election. Furthermore, political parties in this country have been trying to understand each other for generations, so far without much success.

Finally, smooth and efficient elections are a cornerstone of democratic transfer of power. Too much litigation threatens to derail the legitimacy of the electoral outcome. Scholars have pointed to the dramatic increase in litigation as a threat to the legitimacy of elections in this country.⁴⁶ One hope would be that mediation could stem this tide and help disputants avoid the damage protracted litigation does to public confidence. Others might argue that injecting “alternative” dispute resolution processes like mediation into an already fraught dispute environment is more than the public could take. Most people are not familiar with mediation or its core principles,⁴⁷ and may be more suspect of mediation than tried-and-true adversarial resolution in the courts.⁴⁸ Litigation is at least a process that the public (and election attorneys) understand.⁴⁹

As the above discussion makes clear, there are some very real reasons to pause when thinking through the value of mediation in post-election disputes.

11 HARV. NEGOT. L. REV. 1, 31 (2006) (“Facilitative processes, such as mediation, are less appropriate in cases where facts need to be determined.”).

⁴⁶ *Infra* note 62, at 29.

⁴⁷ Neither, for that matter, are lawyers, who are often skeptical of mediation (at best) and seek to game the mediation process (at worst). See John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247 (2010) (“Many believe that lawyers’ adversarial methods and mindsets are inherently inconsistent with mediation.”); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 57–59 (1982) (exploring how lawyers look at the world might contribute to lawyer distrust of mediation); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 252 (2002) (lawyers’ involvement in mediation might make ADR “more adversarial and legalistic”) as cited in Robert Robinson, *Mapping the World: Facts and Meaning in Adjudication and Mediation*, 63 ME. L. REV. 61, 87, n.163 (2010).

⁴⁸ Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of ADR and Public Civil Justice*, 47 UCLA L. REV. 949, 985 (2000) (“[w]hile training and professional culture may help explain lawyer skepticism about ADR, the lay public also has reasons to view ADR as less legitimate than trial.”).

⁴⁹ Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1087 (1984) (noting that certain cases present “a genuine social need for an authoritative interpretation of law”). See also David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2633–35 (1995).

Indeed, the range of reasons why mediation is ill-suited to election disputes is undoubtedly why no sustained effort has thus far been made to incorporate it. As the following section portrays, however, there are enough shortcomings to litigating post-election disputes that mediation deserves another look.

IV. THE SHORTCOMINGS OF POST-ELECTION LITIGATION

There is little question that post-election litigation is a necessary component of ensuring that our elections are fair. Voters, candidates, and parties have consistently turned to courts to resolve perplexing post-election disputes, sometimes asking courts to impose extraordinary remedies such as ordering a new election,⁵⁰ disqualifying a candidate,⁵¹ declaring a winner,⁵² and even resolving the question of who should take office when the winning candidate has died.⁵³ There is no scarcity of post-election litigation. In

⁵⁰ See, e.g., *Long v. Bryant*, 992 So. 2d 673, 680, 686 (Ala. 2008) (upholding the *Perry* Circuit Court's decision to order a runoff election after a recount revealed there was no winner of a mayoral race); *Gooch v. Hendrix*, 851 P.2d 1321, 1322, 1327, 1330–32 (Cal. 1993) (affirming the Superior Court of Fresno County's annulment of a school board election and order for a new election when there was substantial evidence that fraudulent votes affected the election's outcome); *Thompson v. Jones*, 17 So. 3d 524, 526, 529 (Miss. 2008) (ordering a special election for county sheriff after the circuit court released its conclusion that illegal absentee ballots had voided the Democratic primary after the general election had already occurred); *Reese v. Duncan*, 80 S.W.3d 650, 653, 656 (Tex. App. 2002) (upholding an order for a new election when the number of illegal votes counted could have materially affected the outcome of the election).

⁵¹ See, e.g., *Stephenson v. Woodward*, 182 S.W.3d 162, 164, 173 (Ky. 2005) (affirming the post-election disqualification of a winning state senatorial candidate who failed to meet the residency requirement); *Ellis v. Meeks*, 957 S.W.2d 213, 214, 217 (Ky. 1997) (disqualifying a winning ward alderman candidate for visiting polling places on election day); *Smith v. Brito*, 173 P.3d 351, 352, 356 (Wyo. 2007) (upholding the disqualification of a winning town council candidate who was not a registered voter at the time of filing).

⁵² See, e.g., *Waltman v. Rowell*, 913 So. 2d 1083, 1084–85, 1092 (Ala. 2005) (declaring the incumbent candidate for city council the winner after the circuit court had decided that his opponent had won after hearing an election contest); *McIntosh v. Sanders*, 831 So. 2d 1111, 1112, 1116 (Miss. 2002) (affirming the Kemper County Circuit Court's declaration of a winner of the county election commissioner race after one of the candidates was disqualified); Huefner, *supra* note 24, at 297 (describing a trial court's reversal of election results based on statistical findings concerning ballot layout (citing *Bradley v. Perrodin*, 131 Cal. Rptr. 2d 402, 405–06 (Cal. Ct. App. 2003))).

⁵³ See, e.g., *Tataii v. Yoshina*, No. 25599, 2003 Haw. LEXIS 237, at *2–7 (Haw. May 22, 2003) (confirming that the deceased winner of the general election for a seat in the U.S. Congress was the proper nominee and that a special election was the proper way

MEDIATION AND POST-ELECTION LITIGATION

exponentially increasing numbers, parties use courts to resolve election disputes of all kinds.⁵⁴ This article argues, however, that there are some very real drawbacks to litigating post-election disputes.

Post-election disputes arise most commonly when the vote tallies are close enough that the loser thinks he or she might win if the votes were recounted or otherwise challenged. When an election produces a clear winner, voters and candidates are often disinclined to mount a dispute.⁵⁵ Election irregularities and inconsistencies and gaps in state election statutes often go completely unnoticed for the simple reason that the tally did not approach the “margin of litigation.”⁵⁶

When elections are close, a rush to court is common—indeed, many state election statutes mandate that post-election disputes such as recounts be resolved in court.⁵⁷ Heading to court fulfills several needs. In the case of a candidate calling for a recount, litigation signals that the losing candidate will not give in; it provides publicity for a candidate who believes the election outcome is unjust; and finally it is a means of reaching out to a neutral party to declare judgment with (relative) finality. Although, as noted above, many states mandate administrative and/or quasi-judicial procedures

to fill the vacancy); *Lockard v. Miles*, 882 N.E.2d 288, 288–89 (Ind. 2008) (affirming that the winner of a party caucus held after the candidate who won the primary died should be on the general ballot instead of the runner-up in the primary); *Evans v. State Election Bd. of the State of Oklahoma*, 804 P.2d 1125, 1126–27, 1129, 1131 (Okla. 1990) (determining that the candidate for district judge who won the most votes, though deceased, was the victor and a special election should be held to fill the vacancy). See also *Faulder v. Mendocine County Bd. of Supervisors*, 144 Cal. App. 4th 1362, 1366–67 (Cal. Ct. App. 2006) (calling for the cancellation and sealing of election results and the scheduling of a special election when one of the two candidates for district attorney died prior to the election).

⁵⁴ Richard Hasen, *The Supreme Court's Shrinking Election Law Docket, 2001-2010: A Legacy of Bush v. Gore or Fear of the Roberts Court?*, UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER SERIES PAPER NO. 2011-11.

⁵⁵ Relying on close elections to tell us whether a state's election apparatus is functioning is less than optimal. Problems will only be revealed if and when a close election happens. Foley, *supra* note 42, at 375 (in this article, Professor Foley suggests ways that states might address election irregularities without waiting for outcome-affecting errors to come to light.).

⁵⁶ Richard Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 938 (2005).

⁵⁷ See *supra* Part II; see, e.g., WASH. REV. CODE § 29A.68.011 (2007) (judicial remedy when certain conditions are met, i.e., neglect of duty on part of an election official, any state voter can contest the result of an election in court); ARIZ. REV. STAT. ANN. § 16-672 (1980) (any elector can contest results); N.M. STAT. ANN. § 1-14-1 (2004) (New Mexico statute allows a candidate to contest the results of an election in court).

prior to litigation,⁵⁸ the march to court when elections are close has never been seriously questioned.⁵⁹ It is widely held to be the cleanest way to resolve post-election disputes.⁶⁰ Indeed, election litigation has skyrocketed since *Bush v. Gore* in 2000.⁶¹

However, there are real reasons to question the assumption that court is the best place for post-election dispute resolution. As seasoned election lawyers will tell you, post-election litigation is anything but straightforward. Post-election litigation can drag on for months and months and can cost candidates and taxpayers millions of dollars. Lawyers in the Franken-Coleman recount in Minnesota estimated a price tag of \$10 million in legal fees alone.⁶² On a cost basis, alternatives should certainly be explored.

⁵⁸ See *supra* Part II.

⁵⁹ Kovick and Young note that one factor opposing the use of ADR is in instances where countries have a "strong, credible and independent judici[al] . . . system . . . that can be relied upon to hear and resolve election complaints in a fair and timely manner." KOVICK & YOUNG, *supra* note 37, at 255. Because the U.S. judiciary is widely seen as credible, independent, and strong, the tendency is to assume that courts are the natural venue for election disputes.

⁶⁰ Foley, *supra* note 42, at 376 ("The prevailing public conception of courts, right or wrong, is that their job is to decide [election] cases according to the requirements laid down by the law...without regard to discretionary considerations of politics."). As noted above, some even advocate for *increased* judicial oversight of elections. See *Recent Case*, Sandusky County Democratic Party v. Blackwell, 387 F.3d 565 (2004), 118 HARV. L. REV. 2461, 2464 (2005) (advocating more judicial oversight of unilateral interpretations of federal election law made by partisan state election officials).

⁶¹ See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 28–29 (2007); Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009). Hasen's results show that election litigation more than doubled shortly after 2001 and has held steady at that amount for the decade since *Bush v. Gore*. Pre-2000, the country averaged 94 election cases (in both state and federal courts) annually. *Id.* at 90. The average number of election-related cases over the past ten years has been 239. Richard L. Hasen, *Election Law Litigation Remained at Double Its Pre-Bush v. Gore Rate*, ELECTION LAW BLOG (March 31, 2011), <http://electionlawblog.org/archives/019119.html>.

⁶² See JAY WEINER, *THIS IS NOT FLORIDA: HOW AL FRANKEN WON THE MINNESOTA SENATE RECOUNT*, 223–24 (2010) (during the 2008 Minnesota senate recount and related litigation, candidates Al Franken and Norm Coleman spent \$5.7 million and \$4.4 million on legal fees, respectively); John Gibeaut, *Electing to Litigate As Primaries Begin, Voters, State Officials and Lawyers Brace for More and More Lawsuits*, 94 A.B.A. J., 40, 46 (2008) (one election lawsuit cost the state of Ohio more than \$5 million.); Erin Butcher-Lyden, *supra* note 4, at 537 (just ten of the twenty-three lawsuits against the state of Ohio during the 2004 election cost the state a combined \$1 million.); CONNY MCCORMACK, *THE COST OF STATEWIDE RECOUNTS: A CASE STUDY OF MINNESOTA AND WASHINGTON*, THE PEW CENTER ON THE STATES 23, 35 (2010), *available at* http://www.pewcenteronthestates.org/uploadedFiles/MN_WA_recounts_report.pdf

MEDIATION AND POST-ELECTION LITIGATION

Aside from cost, protracted litigation risks alienating the electorate.⁶³ The public may be satisfied when election controversies are decided quickly and resolutely in court, but they become less enamored when litigation drags on for months and months, particularly if an elected seat remains vacant as a result. But more than practical concerns surface: when elections are decided in courts, voters come to believe that they lack voice. Given the dismal state of voter participation in elections in this country,⁶⁴ protracted and habitual litigation poses a real risk to the franchise.

A further reason litigation is problematic in post-election disputes is the issue of courts' relationships with the political process. Time and again, judges in election law cases note a profound hesitance to enter the "political thicket." As Justice Frankfurter wrote in *Colegrove v. Green* in 1946, "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people."⁶⁵ What is more, scholars have noted that judges may hesitate to impose remedies in the election context in which even minor corrections can have broad, systemic implications.⁶⁶

Courts are also awkward places to resolve post-election disputes in cases that lack statutory guidance. When state election statutes compel judicial review, those statutes are often silent when it comes to substantive guidelines on how courts should proceed.⁶⁷ As a result, courts often have to choose

(finding a manual recount in Minnesota cost counties a total of \$460,000 and a manual and machine recount combined cost the state of Washington \$1.16 million).

⁶³ Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 5–6 (2007) ("*Bush v. Gore*'s main legacy has been to increase the amount of election-related litigation. As election law has become a political strategy, it threatens to further undermine public confidence in the electoral process. No lemonade, only lemons.").

⁶⁴ A study of voter turnout since 1945 listed the United States at No. 138 (out of 169) in a ranking of countries votes to voting age population ratio. See *Voter Turnout Rates from a Comparative Perspective*, available at <http://www.idea.int/publications/vt/upload/Voter%20turnout.pdf>.

⁶⁵ *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946).

⁶⁶ See *Developments in the Law: Voting and Democracy*, VII. *Election Administration: Judicial Review and Remedial Deterrence*, 119 HARV. L. REV. 1188, 1191 (2006) ("[j]udges may be deterred from ordering a systemic remedy [in election cases] because it appears more difficult to implement than the remedy in a standard [non-election] case between individuals."). See also Richard L. Hasen, *Judges as Political Regulators: Evidence and Options for Institutional Change*, in RACE, REFORM, AND REGULATION OF THE POLITICAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY (Guy-Uriel Charles, Heather K. Gerken & Michael S. Kang eds., 2011).

⁶⁷ Huefner, *supra* note 24, at 277 (citing *Developments in the Law—Elections*, *supra* note 21, at 1311 (noting that election contest statutes provide "little guidance as to the grounds that are cognizable"))).

between available remedies (adjustment of vote totals, new elections, fines, penalties or injunctions, and so forth) with very little to go on aside from common law and principles of equity.⁶⁸

Another challenge in resolving disputed elections in courts is the related problem of perceived judicial neutrality. In the past, when state supreme courts have split on election cases along partisan lines, as was the case, for example, in the 1982 Illinois governor's race between Republican incumbent James Thomson and Democratic opponent Adlai Stevenson III, the credibility and neutrality of the judiciary is threatened. As Professor Foley observes of this phenomenon:

Whether these split decisions...precisely correspond to the partisan affiliation of the judges on those courts is beside the point. Nor does it matter whether any of these judges were actually motivated by political considerations, rather than their good faith perception of what the law required of them. Rather, the problem is that these teeter-totter rulings reveal that the applicable law is not so crystal clear that the judges have no choice but to follow its command, and therefore the judges are free to decide the case in accordance with their political preferences if they are so inclined.⁶⁹

The public's confidence in neutral, non-political adjudication of disputes is put at risk each time an election case, by nature fraught with partisan conflict, confronts the courts.

A final reason why courts are problematic forums for election disputes is that judges are often ill-equipped to handle election law matters.⁷⁰ Most of

⁶⁸ *Id.*; see also Daniel P. Tokaji, Commentary, *An Unsafe Harbor: Recounts, Contests, and the Electoral College*, 106 MICH. L. REV. FIRST IMPRESSIONS 84, 87 (2008) (noting the awkward problem of state election laws deferring to federal laws that do not exist, Tokaji provides the example of Section 3515.08 of the Ohio Revised Code under which contests of elections to federal office are to be "conducted in accordance with the applicable provisions of federal law." Tokaji goes on to note the trouble with this scheme: "The problem is that there are no federal laws allowing judicial contest proceedings over disputed federal elections. Nor is it clear that Congress would have the constitutional power to impose such a procedure for presidential elections, even if so desired. Instead, federal law refers back to the 'final determination' made under state law pursuant to 3 U.S.C. § 5. In other words, we have circular references The effect of Ohio's law thus appears to be the elimination of any judicial contest proceedings in *any* federal election taking place in that state.").

⁶⁹ Foley, *supra* note 42, at 377-78.

⁷⁰ Recognizing the lack of resources state judges face in election cases, the National Conference of Chief Justices of State Supreme Courts identified this as a problem of great significance and encouraged the National Center for State Courts, partnering with

MEDIATION AND POST-ELECTION LITIGATION

the approximately 25,000⁷¹ state and 600⁷² federal court judges in the United States lack specific expertise in election law. Many election law cases involve matters of first impression that must be resolved quickly in the context of intense partisan conflict—a pressure-filled circumstance judges rightly abhor.

For these reasons, resolving post-election disputes in court is not always optimal. Although litigation has its place, the next section explores ways in which mediation might, in certain instances, play an important role in alleviating pressure on courts to resolve post-election disputes.

V. THE PROMISE OF MEDIATION IN POST-ELECTION DISPUTES

As a general matter, mediators are trained to guide parties through disputes in ways that make the dispute resolution process more efficient and the outcome more solid. Mediators are trained to help open channels of communication, to facilitate the process of direct negotiation, to help parties understand and frame their dispute, and to act as an agent of reality in instances where parties may have an inflated sense of the strength of an argument.⁷³ Mediation is effective because mediators can assist parties in solving problems “more integratively, at less cost, with greater party participation, and with the possibility of preventing...some disputes.”⁷⁴ Whether these generally accepted benefits of mediation have application in the post-election context hinges on two central variables: first, the nature of the post-election dispute at issue; and second the style of mediation employed.

the William & Mary Law School, to form the Election Law Program to help address this problem by creating resources for judges on election law. See ELECTION LAW PROGRAM, <http://www.electionlawissues.org>.

⁷¹ Bureau of Justice Statistics, U.S. Department of Justice, State Court Organization (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf>.

⁷² U.S. Courts, Judicial Facts and Figures 2009 (2009), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/Table101.pdf>.

⁷³ JOHN W. COOLEY, *THE MEDIATOR'S HANDBOOK* 30–31 (2d ed. 2006).

⁷⁴ Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 802 (1999).

A. Which Post-Election Disputes are Appropriate for Mediation?

The International Foundation for Election Systems (IFES) recently examined the use of ADR in election conflicts.⁷⁵ The book is aimed at building election infrastructure in post-conflict and developing democracies. Its authors identify several types of election disputes ill-suited for ADR including: (1) disputes relating to fundamental rights, (2) cases in which binding precedent is desirable, and (3) cases in which the court system can provide a timely, credible decision.⁷⁶ These factors provide a useful starting point. There are certainly instances in which fundamental rights come into play in post-election disputes. Any time a ballot is invalidated, for example, a voter's fundamental right to exercise the franchise is jeopardized.⁷⁷ In addition, there is very often the need for precedent setting in post-election disputes, particularly in the recount context, as states build experience managing them.⁷⁸ Finally, thanks to the health of the U.S. judicial system, its courts are capable of delivering timely and credible decisions in the majority of instances.

Although these general exemptions provide a good rough guide, this article argues that there are a certain subset of post-election disputes which do not directly involve fundamental rights, for which administrative precedent setting is more important than judicial precedent setting, and which courts are ill-equipped to manage: post-election process disputes. Post-election process disputes are distinguished from outcome-determinative post-election disputes. For the purposes of this article, "outcome-determinative" refers to those disputes for which the resolution will directly impact a vote tally. An example of an outcome-determinative dispute would be whether or not the voter intended to vote for Candidate X or whether the factors required to prove fraud were sufficiently argued. These disputes require a third-party neutral such as a judge or election official to issue a ruling one way or another.

⁷⁵ GUIDELINES FOR UNDERSTANDING, ADJUDICATING, AND RESOLVING DISPUTES IN ELECTIONS (Chad Vickery ed., 2011), available at http://www.ifes.org/~media/Files/Publications/Books/2011/GUARDE_final_publication.pdf.

⁷⁶ *Id.* at 254–55.

⁷⁷ As one state supreme court justice noted, "the right to have one's vote counted is as important as the act itself." *Coleman v. Ritchie*, 758 N.W.2d 306, 311 (Minn. 2008).

⁷⁸ See, e.g., *Tamney v. Atkins*, 209 N.Y. 202, 205 (N.Y. 1913) (cited broadly for the proposition that the ability of courts to engage in judicial review of election disputes is bounded by state statute).

MEDIATION AND POST-ELECTION LITIGATION

Unlike outcome-determinative election disputes, process disputes are those encompassing mechanics and procedural rules for how, in the case of recounts, votes will be counted.⁷⁹ In the context of a recount, these kinds of process disputes can include the following kinds of issues:⁸⁰

- When can a candidate challenge ballots?
- When can a candidate examine election materials?
- What is the definition of a valid ballot?
- How will voter intent be determined?
- What are the standards for determining whether a ballot has met technical or procedural requirements (such as initials by poll clerks)? Should ballots be counted if the technical defect is not caused by the voter?
- Should absentee ballots be counted if postmarked prior to Election Day but received by the clerk after Election Day?

In the vast majority of jurisdictions, when a recount is triggered, either automatically or because the losing candidate has petitioned for a recount, it is far from clear what procedural rules will govern the recount. State statutes and regulations often leave unresolved a wide range of procedural questions from matters as seemingly insignificant, such as where tables will be set up, to significant questions of standards for determining valid ballots. Even when state statutes and regulations include specific procedural rules, wide gaps must be filled before the recount can proceed.⁸¹

Vagaries concerning the validity of absentee ballots illustrate the point. If absentee ballot envelopes must be signed by the voter, should a ballot count

⁷⁹ Note that the line between outcome-determinative versus post-election process disputes is not always clear. Process decisions can turn out to be outcome-determinative. For example, in one of the closest elections in U.S. history, the 2004 Washington state governor's race, candidates asked a judge, *inter alia*, to pick a method by which to eliminate illegal votes. The judge could order a new election, require direct evidence (i.e., ask voters to testify), or use a "proportional deduction" method by which the judge would estimate whom each illegal voter voted for based on the precinct in which the voter lived. The choice between these various processes could be outcome-determinative. One can imagine that a mediated resolution of this process question would have been an effective means of resolving the dispute, but might have indeed determined the outcome. See *Borders v. Kings County*, No. 05-2-00027-3, Slip Op. at 4 (Wash. Super. Ct. June 24, 2005) discussed in *Developments in the Law: Voting and Democracy, IV. Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1155–56 (2006).

⁸⁰ These examples are drawn from TIMOTHY DOWNS, ET. AL., *THE RECOUNT PRIMER* 19–20 (1994).

⁸¹ Telephone interview with election law expert John Hardin Young, Partner, Sandler, Reiff, Young & Lamb (May 24, 2011).

if signed by the voter's spouse? What if the spouse has a power of attorney? Must the power of attorney be a blanket power of attorney? What if the power of attorney was obtained for health decisions only? What about distinguishing marks on ballots like signatures that would typically nullify a vote? Overseas and military voters often write passport numbers or military ID numbers on absentee ballots. Should these votes be tossed? If a complete absentee ballot requires a full address, what if the voter leaves off her zip code? What if the voter has moved to a different apartment at the same address but lists the old apartment number on the absentee ballot envelope? What if the voter abbreviates "Rd." or leaves the word "Road" off altogether when stating her address? Literally dozens of such questions hang in the balance in recounts. And that's just with respect to absentee ballots.

Although process disputes are not directly outcome-determinative, this is not to say they matter less. In fact, they matter quite a bit. As we have seen in countless recounts, lawyers on both sides forward impassioned arguments for why ambiguities in statutory process language should be managed one way versus another. Resolving process disputes is tricky business. Each side invariably will argue that even the smallest process decision can have an impact on the final tally. As one prominent recount lawyer explains, "Every procedural call has an advantage and disadvantage that both sides will fight tooth and nail to preserve."⁸² Depending on their assessment of the impact on their client, most election lawyers will admit to alternately forwarding impassioned arguments for strict technical compliance with a vague statutory provision in one instance, and equally impassioned arguments for the idea that technicalities impede acknowledging voter intent in the next.

There are numerous ways in which states attempt to fill procedural gaps in recounts. In Virginia, for example, state statute requires a judge to set forth the specific procedure that will guide the recount process.⁸³ In practice, the state court judge will work with the parties to hammer out a preliminary procedural order followed by a final order.⁸⁴ In other states, a state board of

⁸² *Id.*

⁸³ VA. CODE ANN. § 24.2-802(B) (1950) ("... the chief judge of the circuit court shall call a preliminary hearing at which (i) motions may be disposed of and (ii) the rules of procedure may be fixed, both subject to review by the full court.").

⁸⁴ See, e.g., Goode v. Perriello, Recount Procedural Order, Case No. CL08002666-00 (2008) (specifies the procedures leading up to the recount, the date and time of the recount, the manner of court supervision of the recount, the location of the recount, how the vote tabulators will be programmed, what the testing requirements will be, how recount officials will be selected, rules governing recount observers, training procedures for recount officials, contingencies for inclement weather, and various other procedural

MEDIATION AND POST-ELECTION LITIGATION

elections or the secretary of state's office will facilitate a process to determine the procedural rules of the recount.⁸⁵ At the other end of the spectrum, in some states the authority to fill process gaps left by election statutes falls to individual county election administrators, which, as we know after *Bush v. Gore*, can lead to frustrating results.⁸⁶

Experience has shown that judicial misjudgment in resolving process disputes—either because of unanticipated consequences of a given judicial process decree, or events unanticipated at the time of the ruling—may protract process disputes unnecessarily. Process decisions in post-election disputes—particularly recounts—involve sophisticated and sometimes unknowable variables. Judges, many of whom have never tried election matters before, are seldom equipped to understand the impact of one process decision versus another. They are instead reliant on passionate partisan arguments of campaign attorneys. Even a politically neutral judge who takes her political leanings out of the mix will feel uncertain in this territory. This is to say nothing of the elected, partisan judge who might be called to make process decisions.

In an environment in which judges and state election administrators often lack guidance on procedural details, election attorneys routinely rush to fill the vacuum. Individual campaigns hire nationally prominent, partisan election attorneys to help navigate procedural uncertainties. From *Bush v. Gore* to *Coleman v. Franken*, fierce partisan election lawyering has become the accepted model.⁸⁷ In many recounts, partisan recount experts are often

details. The judge in this case allowed the parties access to the process of establishing procedural rules.

⁸⁵ See *infra* Part VI.B.

⁸⁶ Wisconsin provides a good example of this decentralized approach. Kevin Kennedy of the Wisconsin Government Accountability Board website confirms this characterization by noting that “Wisconsin has the most decentralized election administration in the United States”. The site goes on to note that Wisconsin state law gives each county's Board of Canvassers the primary authority to conduct recounts, and to decide which ballots should and should not be counted. See *Statewide Supreme Court Recount Update*, <http://gab.wi/node/1849>.

⁸⁷ Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 957–59 (2005) (documenting the increase of election-related litigation since 2000); Richard L. Hasen, *Will Armies of Lawyers in Service to Political Parties Determine Election 2008?*, THE LOYOLA LAWYER, Aug. 19, 2008, at 5 (anticipating a number of lawyers—many of them volunteer—deployed in the 2008 election); Susan Greene et al., *Legal Eagles Will Eye Voting: 'Armies of Lawyers' Tapped*, DENVER POST, Oct. 17, 2004, at C1; Kenneth P. Vogel, *Election Lawyers are a Hot Commodity*, POLITICO (Mar. 6, 2007, 5:29 pm),

the only real source of combined wisdom on the subject. Experienced election attorneys who have seen recounts unfold in other states have a huge leg up when dealing with state administrators and judges who lack a multi-state perspective. As the Minnesota case study below illustrates, this phenomenon has the problematic effect of leaving democracy in the hands of whichever side has the more sophisticated lawyer. Even in a case where lawyers are evenly matched, lawyers are by trade zealous and partisan advocates for their client's interests, not the public interest.

What is often missing is a seasoned expert to guide the process and raise flags when process issues arise. Experienced election mediators could perform just such a role. The next section examines the second variable: the model of mediation might be most appropriate in this setting.

B. Which Mediation Model is Appropriate for Mediation?

The question of whether mediators can do a better job than courts in helping resolve post-election process disputes can only be answered by understanding the nature of modern mediation practice and the types of mediation on offer. Many mediators prefer a mediation style in which they do not weigh in on the substance of the dispute, instead facilitating a process through which the parties can reach an agreement that meets their interests. This approach is generally known as "facilitative mediation."⁸⁸ A facilitative mediator refrains from, for example, providing her opinion about which side has made the better argument or has the stronger case, even when pressed by one or both sides to do so (as is common). A facilitative mediator will also refrain from suggesting options for the parties to consider, preferring instead to facilitate a process in which the parties generate their own options.⁸⁹ But just because a mediator adopts a facilitative approach does not mean the mediator cannot be "directive" of the process. In fact, facilitative mediators

<http://www.politico.com/news/stories/0307/3019.html> (finding there is more demand than supply of top-caliber election lawyers).

⁸⁸ Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 943-44 (1997) (facilitative mediation is a "dispute resolution process through which parties are taught how to resolve their own disputes, listen to each other differently, broaden their own capacities for understanding and collaboration, and create resolutions that build relationships, generate more harmony, and are 'win-win.'").

⁸⁹ The philosophical underpinning behind this principle is at least in part, that by suggesting an option the mediator might appear non-neutral, or as if he or she is pushing a resolution on the parties. Doing so flies in the face of a core value in mediation: self-determination. See Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 945 (1997).

MEDIATION AND POST-ELECTION LITIGATION

recognize driving the process as their chief role. So, for example, the facilitative mediator may make decisions about which issue will be discussed when, when (and if) private caucuses should take place, how broadly or narrowly the parties' dispute should be addressed in mediation, and so forth.⁹⁰ By taking control of the process, facilitative mediators enhance the efficiency of dispute resolution, ensure that the full scope of the dispute is addressed, constructively enhance communication between the two sides, and assist the parties in generating realistic options.

At the other end of the spectrum is what is often referred to as "evaluative" mediation.⁹¹ The evaluative mediator weighs in on substance. The evaluative mediator, for example, may give her opinion on the value of settlement, the strength of an argument, or the mediator's opinion of how a court might rule. Evaluative mediators might also suggest options for the parties to consider. Evaluative strategies are often employed to move the mediation forward, typically when the facilitative model reaches an impasse. Often evaluation is solicited by the parties.⁹² Mediators more comfortable with an evaluative role will weigh in on certain matters preemptively. Evaluative mediators view facilitative mediation as too passive, robbing

⁹⁰ Leonard Riskin described a continuum in the role of mediators on the question of "problem definition" between those mediators who take a broad approach versus those who prefer to mediate only the narrow issue presented. See Leonard L. Riskin, *Mediator Orientations, Strategies, and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111, 111 (1994) ("[a] mediator who starts with a broad orientation...assumes that the parties can benefit if the mediation goes beyond the narrow issues that normally define legal disputes. Important interests often lie beneath the positions that the participants assert. Accordingly, the mediator [can]...help the participants understand and fulfill those interests—at least if they wish to do so.").

⁹¹ For a view of the dangers of evaluative mediation, see generally Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); see also Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation Is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996).

⁹² The need for case evaluation has evolved into a specialty commonly referred to as Early Neutral Evaluation (ENE). ENE "was first developed in federal district court in the Northern District of California" as a process by which a party (or parties) to a dispute seeks out an evaluation of their claim from an expert. Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to A Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 13 (2006). ENE is seen as a settlement technique for disputes in which parties are far apart and might benefit from hearing from a neutral party how the law likely applies to their case or hearing an objective assessment of the strength of their case. See American Arbitration Association, *Early Neutral Evaluation: Getting an Expert's Assessment, Practical Guidelines and Steps for Getting Started*, available at <http://www.adr.org/sp.asp?id=35761> (last visited Sept. 21, 2011).

mediators of tools that could be used to move disputes more quickly towards resolution. Such evaluative mediators argue that in certain circumstances mediators better help parties resolve disputes if they selectively address the substance of the dispute where appropriate and/or offer suggestions about how it might be resolved.⁹³

Although many, including this author, remain dedicated to the idea that facilitative mediation is preferable in most instances,⁹⁴ there is growing acknowledgment that in certain kinds of mediations, evaluative techniques may be appropriate.⁹⁵ Mediators who possess substantive expertise in a specific field can use that knowledge and experience to aid the resolution of certain kinds of disputes.⁹⁶ Post-election process dispute resolution, for reasons to follow, falls into this category.

Scholars have pointed to a number of ways an “expert” mediator can be useful. For example, a mediator with substantive expertise can help by educating the parties about ways in which the law may vindicate their rights or ways in which similarly situated parties have resolved their disputes.⁹⁷ Mediators with substantive expertise may also help parties avoid an unfair result.⁹⁸ Mediators with subject matter experience can also raise hidden dangers that parties might not foresee or provide ideas for options that have been useful in other contexts.⁹⁹

⁹³ L. Randolph Lowry, *To Evaluate or Not: That Is Not the Question*, 38 FAM. & CONCILIATION CTS. REV. 48, 55 (2000) (“evaluation is a technique to move parties from positions they have taken that have resulted in impasse to a mutually agreeable position so a settlement then takes place.”).

⁹⁴ Huge concerns about party self-determination, mediator neutrality, and problems associated with quality control of mediator evaluations drives this skepticism. *See supra* note 82.

⁹⁵ It should be noted that facilitative mediation techniques need not be thrown out the window when an evaluative model is adopted. Indeed, the best evaluative mediators recognize the benefits of facilitative principles and work to incorporate them as they mediate, effectively shifting between a facilitative and evaluative approach as the situation dictates. Telephone Interview with Howard Bellman (August 15, 2011).

⁹⁶ Brian Jarrett, *The Future of Mediation: A Sociological Perspective*, 2009 J. DISP. RESOL. 49, 70 (2009) (noting that sector specialization has led in some instances to the beneficial use of a more evaluative approach, Jarrett uses U.N. conciliation efforts as an example in which, “the United Nations provides a kind of practical power politics in its mediation programs that have precious little to do with the objectivity, impartiality, and neutrality associated with the facilitative model.”).

⁹⁷ Scott H. Hughes, *Facilitative Mediation or Evaluative Mediation: May Your Choice Be A Wise One*, 59 ALA. LAW. 246, 247 (1998).

⁹⁸ *Id.*

⁹⁹ Cris M. Currie, *Mediating Off the Grid*, 59 DISP. RESOL. J. 9, 12 (2004).

MEDIATION AND POST-ELECTION LITIGATION

Perhaps the biggest reason an evaluative model may be useful in post-election process disputes has to do with information imbalance. One campaign might hire a sophisticated legal team that understands how various process decisions affect its candidate. If the other campaign has not hired a sophisticated election attorney (or if the attorney hired proves to be less skillful than opposing counsel) this imbalance might prove a great disadvantage. This disadvantage is not just problematic for the candidate, but also for the voters who selected that candidate. In a recount scenario, poor or uninformed lawyering can result in the disenfranchisement of voters. As noted above, state election administrators and judges also vary widely in process sophistication. Over time, should mediation become more widely used in this context, a cadre of "election mediators" might develop. One could imagine that just as Ken Feinberg is now the go-to person for mass disaster claims,¹⁰⁰ specialized and respected election mediators might eventually apply accumulated expertise to resolving post-election process disputes efficiently. Seasoned election law mediators who have developed a track record for helping parties identify and resolve process disputes could prove invaluable towards more efficient resolution of post-election process matters.¹⁰¹

Election mediators might prove useful for a further reason. Parties in mediation have more flexibility in crafting solutions that resolve more aspects of their dispute than the narrow set of issues presented in a court proceeding.¹⁰² This is at least in part because a good mediator will foster a

¹⁰⁰ Ashby Jones, *Ken Feinberg (Who Else?) To Handle Oil-Spill Escrow Fund*, WALL ST. J. L. BLOG (June 16, 2010), <http://blogs.wsj.com/law/2010/06/16/ken-feinberg-who-else-to-handle-oil-spill-escrow-fund>.

¹⁰¹ In an article in which she argues that lawyers should adopt a more problem-solving, less adversarial role, Carrie Menkel-Meadow describes a perspective that could be used in the election dispute resolution context to good effect:

[L]awyer-mediators may use law in their work as facilitators of negotiated solutions to litigational or transactional problems: [they can] help . . . [clients] evaluate the merits of an argument, the legality of a solution, assisting in the drafting of an agreement, or in cases of evaluative mediation, actually predicting what a court might do with a particular case or offering particular substantive resolutions of particular legal issues.

See Menkel-Meadow, *supra* note 74, at 804.

¹⁰² Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 33 (1996) (A facilitative mediator who takes a broad approach to dispute resolution "will help the parties define the scope of the problem to be addressed in the mediation, often encouraging them to explore underlying interests to the extent that they wish to do so." Riskin contrasts this approach with mediators who "accept the obvious problem

process in which all relevant issues—even those not originally contemplated—will be confronted to ensure that the settlement reached is workable, comprehensive, and has staying power. This approach could be of great service in resolving post-election process disputes. Rather than forcing a court to rule on countless micro-process disputes or waiting for those disputes to arise organically down the road, an experienced election mediator might anticipate problems and ensure that the full scope of the dispute—and possible options for resolution—are on the table.¹⁰³ Addressing the full scope of process issues in the early stages of a recount or contest could greatly enhance efficiency.¹⁰⁴

Finally, injecting an experienced mediator into the mix early on could have provided an important educative function. In reflecting on his experiences in the 2008 recount (and the 2010 recount),¹⁰⁵ Minnesota Supreme Court Justice Paul Anderson sees the wisdom of bringing in an

presented” and do not look to resolve any part of the dispute not immediately at the table.)

¹⁰³ Much of this legwork can be done in the context of a “conflict assessment” (sometimes referred to as a “convening assessment,” in which the mediator analyzes and diagnose the dispute, identify stakeholders, map their interests, and assess the scope of the dispute. See FRANK FISHER, GERALD MILLER & MARA S. SIDNEY EDS., *HANDBOOK OF PUBLIC POLICY ANALYSIS: THEORY, POLITICS AND METHODS* 515–16 (2007); see also Laurence Susskind & Jennifer Thomas-Larmer, *CONSENSUS BUILDING HANDBOOK* (1999).

¹⁰⁴ The best argument against mediator evaluation in post-election disputes is that an evaluative mediator may take sides in the course of providing advice on the dispute. This is particularly problematic given the difficulty of finding a nonpartisan mediator. See *infra* Section II.

The problem of impartiality in evaluative mediation is well recognized. See, e.g., Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of ADR and Public Civil Justice*, 47 *UCLA L. REV.* 949, 1092 (2000) (noting that “bias concerns may . . . be heightened in evaluative mediations, in which the mediator is providing an opinion on the merits of the parties’ relative positions, precisely for the purpose of influencing the parties’ settlements”). This concern is, however, allayed by narrowing the category of election dispute to be mediated to process disputes only.

¹⁰⁵ In November 2010, Minnesota underwent another large scale recount, this time between gubernatorial candidates Republican Thomas Emmer, Democrat Mark Dayton, and Independent Tom Horner. A close race (margin of .42%) triggered an automatic recount. It took just over a month to declare Dayton the winner by 8,715 votes with 99.99 percent votes recounted and 765 ballots contested (not enough to secure victory for Emmer). Robert Yoon, *Democrat Dayton Wins Minnesota Gov. Recount*, CNN POLITICS, Dec. 4, 2000, <http://politicalticker.blogs.cnn.com/2010/12/04/democrat-dayton-wins-minnesota-gov-recount/>.

MEDIATION AND POST-ELECTION LITIGATION

outsider to help educate the judiciary and state election administration about process decisions. He explains:

In a recount, the deciding body is inundated by partisanship. If a neutral mediator could narrow the set of disputes that come before the deciding body by working with the parties to eliminate the outliers, the efficiency of the process would be greatly enhanced.¹⁰⁶

Good election attorneys are always thinking two or three moves ahead. Adjudicatory bodies therefore are unable to get input on process matters from attorneys in recounts without also getting a large dollop of partisan maneuvering. Mediators could help educate the judiciary not about which side has the better argument, but about process intricacies and decisions that the adjudicatory body must address in order to arrive at a fair and comprehensive process.¹⁰⁷ Election attorneys will not be fans of the idea. Even still, reigning in the adversarial process in this context might be an important step forward.

Before moving on to examine a case study, an additional mediation model bears mention. One of the initial process questions mediators must confront is whether to “co-mediate.” Co-mediation refers to the common practice of two mediators working together as a team to mediate a dispute.¹⁰⁸ The benefits of co-mediation are multiple. Most of the advantages of co-mediation are practical. The co-mediation model provides another set of eyes and ears to help resolve a dispute. For example, while one mediator is talking, the other can be attentive to verbal and non-verbal cues from the parties. Many mediators also prefer the co-mediation model on the theory that two minds are better than one. When one mediator might be stuck, the other might have ideas about how to proceed. A final practical benefit of co-mediation relates to strategic pairing. For example, a less experienced mediator might be paired with a more experienced mediator for training purposes. Mediators with divergent backgrounds or approaches might also be paired to enhance their ability to handle a complex dispute.

¹⁰⁶ Telephone interview with the Hon. Paul H. Anderson, Associate Justice, Minnesota Supreme Court (May 27, 2011).

¹⁰⁷ Note that any mediator interaction with the court, even if solely educative in purpose, should be handled thoughtfully. A structure in which a mediator is perceived as “reporting back” to the court may adversely impact mediator neutrality. Telephone Interview with Howard Bellman (August 15, 2011).

¹⁰⁸ Lee A. Rosengard, *Learning from Law Firms: Using Co-Mediation to Train New Mediators*, 59 DISP. RESOL. J. 16, 18 (2004).

An additional benefit to co-mediation goes beyond practical advantage. Some mediators find that their neutrality is enhanced through the co-mediation model. One obvious example is the use of a male mediator paired with a female mediator when there is gender imbalance among parties (for example, in a mediation between a divorcing husband and wife). The prospect of enhanced neutrality through co-mediation is interesting to contemplate in the election context, where it could prove quite useful in tempering concerns about partisan affiliation of mediators. Using a co-mediation model could alleviate perceived bias or lack of political neutrality in a post-election dispute. Co-mediators could be appointed in a number of ways to enhance perceived neutrality. A court or other appointing body could tap two mediators generally affiliated with opposing parties in the dispute; for example, one mediator with a known record of supporting Democrats and another with a known record of supporting Republicans.¹⁰⁹ This arrangement, however, might feed fears that the mediation might become overly politicized. A possible solution would be to allow each party to choose a mediator from a list of mediators with known affiliation to the opposing party. This would force each party to choose the most politically moderate mediator it could find.¹¹⁰ Although it is possible to imagine much fretting and handwringing about which mediators are selected, choosing a mediator is a much less difficult project than choosing the members of a tribunal or canvassing board since these bodies, unlike mediators, are called on to make rulings. Mediators, though they may employ evaluative techniques, by definition lack authority to force an outcome one way or the other.

The benefits of using election mediators to resolve post-election process disputes are not just benefits in theory. The next section uses the 2008 Minnesota senate race to examine whether mediation might have played a useful role.

¹⁰⁹ Note that selecting co-mediators on the basis of partisan affiliation alone would be a grave mistake. Indeed more important than perceived partisan affiliation should always be expertise in mediation, particularly co-mediators should be selected from a pool of mediators who are (1) respected within the mediation and election law communities, (2) have a solid track record successfully mediating public disputes, and (3) are able to work effectively with one another as mediators in terms of mediation style and approach. This might be a tall order at present, but the hope is that a cadre of qualified individuals will develop over time. Telephone Interview with Howard Bellman (August 15, 2011).

¹¹⁰ Foley, *supra* note 42, at 378.

MEDIATION AND POST-ELECTION LITIGATION

VI. CASE STUDY: THE 2008 FRANKEN-COLEMAN RECOUNT

There is perhaps no better recent example than the Franken-Coleman recount of 2008 to demonstrate the possibilities of mediation in post-election process disputes. First, the Franken-Coleman recount was religiously documented by the Minnesota Secretary of State's office,¹¹¹ the judiciary,¹¹² and the state and national press, providing a bird's eye view into the process.¹¹³ Second, the process was protracted, lasting eight months from start to finish and featuring multiple "mini-disputes" over the course of the recount and subsequent contest proceedings.¹¹⁴ The scale of the recount offers opportunities to examine which kinds of post-election disputes might be suited to ADR and which are not. Finally, many of the major players in the race are serendipitously friends of my home institution, William & Mary Law School.¹¹⁵ With this in mind, the discussion below examines the Franken-Coleman recount with an eye towards whether mediation might have usefully been injected. Importantly, the 2008 Minnesota recount was in many ways *sui generis*, replete with local oddities and peculiar circumstances that would not likely surface in other post-election disputes. With this in mind, the discussion below examines the Franken-Coleman recount with an

¹¹¹ See 2008 U.S. Senate Race: Recount Information, OFFICE OF THE MINN. SEC. OF STATE, <http://www.sos.state.mn.us/index.aspx?page=1405> (last visited Sept. 21, 2011).

¹¹² See Minnesota Senate Seat '08 Election, MINNESOTA JUDICIAL BRANCH, <http://www.mncourts.gov/?page=3409> (last visited Sept. 21, 2011).

¹¹³ Weiner, *supra* note 62, at 169–70.

¹¹⁴ The initial count ended November 18. The close margin resulted in an automatic, mandatory hand recount. The State Canvassing Board then certified the recount results on January 5 at which point the Coleman campaign filed an election contest. On April 13, a three-judge panel resolved the contest in favor of Franken; the verdict was affirmed by the Minnesota Supreme Court in June 2009. See STEVEN F. HUEFNER, NATHAN A. CEMENSKA, DANIEL P. TOKAJI & EDWARD B. FOLEY, ELECTION LAW @ MORITZ, FROM REGISTRATION TO RECOUNTS REVISITED 15–16 (2011), available at <http://moritzlaw.osu.edu/electionlaw/projects/registration-to-recounts/2011edition.pdf>. For the purposes of this discussion, recount and contest will be used interchangeably.

¹¹⁵ Marc Elias taught a course on Post-Election Litigation in Fall 2011 for William & Mary Law; Ben Ginsberg serves on William & Mary's Election Law Program Advisory Board and has spoken several times at the law school; Secretary of State Mark Ritchie recently traveled to Williamsburg to participate in the 2011 Election Law Symposium on the role of secretaries of state in elections; and the Hon. Justice Paul Anderson of the Minnesota Supreme Court and this author are members of the planning committee for the William & Mary Law School Privacy and Public Access to Court Records Conference, which takes place every eighteen months in Williamsburg, VA (see <http://www.legaltechcenter.net/aspx/conferences.8th-conference-on-privacy-public-access-to-court-records/>).

eye towards disaggregating post-election disputes to analyze when and whether mediation might have been productively injected.

A. Early Attempt to Stop Counting of Ballots

In his engaging book on the 2008 Franken-Coleman recount, Jay Weiner identifies several instances when the parties rushed to court. In one early example, a few days before the statute-mandated manual recount, the discovery of thirty-two uncounted absentee ballots in Minneapolis prompted the Coleman team to file for a temporary restraining order to prevent these ballots (and, reaching for the moon, any other ballots statewide not counted on Election Day) from being counted.¹¹⁶

At a hastily called Saturday morning hearing the day after the Coleman team filed its motion, Ramsey County Chief Judge Kathleen Geiran was extremely hesitant to issue the order, citing concerns about jurisdiction. Minnesota election procedure required election contests to be overseen by an appointed three-judge panel.¹¹⁷ After bipartisan bickering and accusations leveled back and forth, the judge ultimately refused to enter a temporary restraining order or, for that matter, as the Franken side demanded, award \$1,460 in attorney's fees. The motion denied, votes in the end were counted, but not after what is described as a series of press moves calculated to misinform.¹¹⁸ Instructive for these purposes, "[i]n this initial scuffle between

¹¹⁶ Weiner, *supra* note 62, at 28.

¹¹⁷ Judge Kathleen Geiran dismissed the matter because no party had yet filed an election contest lawsuit. Such a lawsuit would be filed in the Ramsey District Court, and would be subject to MINN. STAT. § 209.045 (2008). As prescribed by statute, the case would then be determined in Ramsey County by a three-judge panel appointed by the Chief Justice of the Supreme Court. *See Order in re: Motion for a temporary injunction and/or a temporary restraining order*, Minnesota Judicial Branch, Nov. 8, 2008, available at <http://www.mncourts.gov/default.aspx?page=NewsItemDisplay&item=43582&printFriendly=true>.

¹¹⁸ Coleman's team called a press conference at which it expressed concerns about a later debunked report that the absentee ballots had been riding around in an election official's trunk, suggesting a real possibility of tampering. Weiner, *supra* note 62, at 29. Despite the election official in question confirming that the story was untrue, the story refused to die; (See David Brauer, *Minnesota Election Director Speaks: "Ballots in My Car" Story False*, MINNPOST.COM, Nov. 12, 2008, http://www.minnpost.com/davidbrauer/2008/11/12/4565/minneapolis_election_director_s_peaks_ballots_in_my_car_story_false). See also Paul Schmeltzer, *Fox, with Pawlenty's Help, Continues Spreading Car-Ballot Fiction*, THE MINNESOTA INDEPENDENT, Nov. 13,

MEDIATION AND POST-ELECTION LITIGATION

[the parties' attorneys]," Weiner writes, "the foundations were laid for what was to come."¹¹⁹

Could mediator(s) perhaps appointed at the start of the recount process, have resolved this dispute more effectively? This question can be answered affirmatively in a number of respects. First, the substance of this dispute could have been addressed more directly. In the litigation context, the question of jurisdiction was outcome-determinative, even though irrelevant to whether or not the votes should be counted and under what standard. Judge Gearin refused to issue the restraining order, not based on the merits of the claim, but on the grounds that she lacked jurisdiction to do so. A failure to receive a decision on the merits, not to mention developing standards to fill in the statutory gaps that would govern future similar disputes, further fueled the flames rather than contained them.¹²⁰ With the assistance of skilled mediator(s) the parties might have been able to develop a set of standards for identifying, verifying, and counting neglected or overlooked ballots early on. Doing so may have precluded or at least reduced in scope what turned into a battle that took eight months and cost millions in legal fees.

Second, mediation might have reduced nastiness. A mediated agreement establishing mutual interest in a fair process could have been a feather in the cap of both sides (and in our system of Democracy more generally). Instead, the public experienced yet another dose of aggressive lawyering and candidate posturing.

Third, as a related point, the parties might have been better able to manage the press to prevent misinformation—here, confusion about the existence and location of the missing ballots ensued.¹²¹ Without sacrificing key elements of transparency (i.e., that the mediation happened, what the arguments were on both sides, how the parties resolved the dispute) the two sides might have been able to agree on a mutually beneficial set of terms by which to interface with the media. It would be naïve to think that each side

2008, available at <http://minnesotaindependent.com/17385/recount-hannity-pawlenty-car-ballot-lie>.

¹¹⁹ Weiner, *supra* note 53, at 30.

¹²⁰ Note that Secretary Mark Ritchie doubts whether the Franken camp wanted a decision on the merits at all, but rather used the incident as part of its press strategy. Interview with Secretary Mark Ritchie, Secretary of State, Minn. Office of the Sec. of State (May 25, 2011).

¹²¹ I bore direct witness to the power of misinformation. I was sitting in a garage getting my car fixed in Williamsburg, VA reading Weiner's book when a man in the waiting room said, "Yeah, I remember the Minnesota recount—that's the one where all those ballots got stashed in some lady's trunk."

would give up the ability to alert the press as it saw strategically fit in a recount process. Filing suit plays an important signaling function that campaigns well recognize.¹²² But it could well be that a mediated agreement might have included language limiting efforts to manipulate the press had each side seen enough benefit in stemming the damage the other side might unleash in doing so.¹²³

And finally, rather than rushing to judges strategically in jurisdictions throughout the state (as many state election statutes require), one skilled mediator in charge of helping to resolve all process disputes could provide consistency and moral authority to push the parties towards swift resolution of their differences. The scattered nature of resolving post-election disputes was problem enough for the relatively centralized election administration in Minnesota. But the problem is exacerbated in states that lack a centralized process for resolving recount process disputes. A recent example of this decentralization is the 2011 Wisconsin State Supreme Court recount. The Wisconsin Government Accountability Board oversees recounts generally,¹²⁴ but unlike Minnesota, where the Recount Plan¹²⁵ delineated how the process would unfold in the counties, process decisions not settled by statute in Wisconsin are made in each individual county.¹²⁶ Mediated process disputes could assist in states where election administration is decentralized. Mediators could function as statewide process experts to help counties manage process disputes efficiently and uniformly.¹²⁷

¹²² As Secretary Mark Ritchie describes, "You always get in the newspaper when you go to court. Sometimes candidates in a recount file suit with no intention of finding a solution. It's a means of signaling." Interview with Secretary Mark Ritchie, Secretary of State, Minn. Office of the Sec. of State (May 25, 2011).

¹²³ For an interesting discussion of the role of the media in public disputes, see Linda L. Putnam, *The Media as a Stakeholder in Framing Public Conflicts*, 13 No. 4 Disp. Resol. Mag. 12, 12 (2007).

¹²⁴ *Id.*

¹²⁵ See *infra* Part VI.B.

¹²⁶ See *supra* note 86 (the Wisconsin Government Accountability Board website confirms this characterization by noting that "Wisconsin has the most decentralized election administration in the United States."). The site goes on to note that Wisconsin state law gives each county's Board of Canvassers the primary authority to conduct recounts, and to decide which ballots should and should not be counted. See *Statewide Supreme Court Recount Update*, Gov. Accountability Board, May 6, 2011, 531 U.S. 98 (2000), <http://gab.wi.gov/node/1849>.

¹²⁷ The problem of decentralized state election administration was driven home, of course, in *Bush v. Gore*. Since *Bush v. Gore*, many have argued for centralized state election administration to remedy this problem. See, e.g., Note, *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314 (2005) (includes a

B. The Role of the Secretary of State's Office

The centralized nature of Minnesota's election regime is personified in the secretary of state, who is designated the state's chief election officer.¹²⁸ Secretary Mark Ritchie's role in managing the 2008 recount nicely illustrates a potential place for mediation in post-election disputes. In Minnesota, the secretary of state (an elected position) plays a key role in managing elections in general and recounts and contests in particular.¹²⁹ The Office of Elections is housed within the Office of the Secretary of State (OSS). In Minnesota, the secretary of state serves as one of five members of the state Canvassing Board.¹³⁰ During the early days of the 2008 senate recount, Minnesota secretary of state mediated process disputes between the campaigns (and other interested parties) to establish the recount process. While there are several important ways in which this process differed from a typical mediation, the similarities are instructive.

An early example of Ritchie's mediator-like role came just after Election Day when the need for a recount became apparent. Secretary Ritchie reached

comprehensive view of state modes of election administration and argues for centralized administration to ease efficiency and reduce partisanship); Jocelyn Friedrichs Benson, *One Person, One Vote: Protecting Access to the Franchise Through the Effective Administration of Election Procedures and Protections*, 40 URB. LAW. 269, 273 (2008) (describing the role of secretaries of state as chief election administrators and argues for centralization).

¹²⁸ The Minnesota Constitution grants the secretary of state a central role. See MINN. CONST. art. VII, § 8 ("Election returns to secretary of state; board of canvassers. The returns of every election for officeholders elected statewide shall be made to the secretary of state who shall call to his assistance two or more of the judges of the supreme court and two disinterested judges of the district courts. They shall constitute a board of canvassers to canvass the returns and declare the result within three days after the canvass.").

¹²⁹ See MINN. STAT. §§ 204B.145–46 (redistricting); 204B.27 (election administration); 204B.47 (giving SoS authority to adopt alternative election procedures to permit the administration of any election affected by court orders); MINN. R. 8235.0200 (recounts).

¹³⁰ See MINN. STAT. § 204C.31, subdiv. 2 ("The state canvassing board shall consist of the secretary of state, two judges of the supreme court and two judges of the district court selected by the secretary of state. None of the judges shall be a candidate at the election. If a judge fails to appear at the meeting of the canvassing board, the secretary of state shall fill the vacancy in membership by selecting another judge who is not a candidate at the election. Not more than two judges of the supreme court shall serve on the canvassing board at one time.").

out to the campaigns to hammer out basic procedural issues.¹³¹ He convened a conference call with the Director of Elections Gary Poser, an attorney from the Minnesota Attorney General's Office, and lawyers representing the two campaigns. According to Poser, the OSS circulated a document to both campaigns prior to the call that laid out the basic procedural rules for the recount (a document in final draft titled the Recount Plan).¹³² The draft Recount Plan drew in part from procedures used in prior Minnesota recounts. The stated purpose of the call was to review the draft Recount Plan and answer any process questions or concerns the campaigns might have.

According to Director Poser, right at the start of the call, one of the campaigns circulated a redlined version of the document indicating its desired changes. The other side had not had an opportunity to review this redlined document (nor had Secretary Ritchie, the Director of Elections, or the AG's office). Secretary Ritchie elected to give participants ten minutes to read through the redlined changes. According to Poser, the redlining was not heavy-handed. Many of the comments were small matters such as whether Coleman should be referred to as "Senator Coleman" or whether Franken should be referred to as "Mr. Franken."¹³³ Although some of the matters handled on the call were trivial, a few of the issues discussed, namely the issue of duplicate ballots discussed below, turned out to be quite significant.

How closely did the conference call parallel a mediated process? Secretary Ritchie, holding himself out as a neutral party, convened the call to resolve the contours of a set of procedural issues he knew would be contentious between two parties passionately opposed. The call was intended to educate the parties about the draft Recount Plan, and also to try and work out any differences in advance to avoid disputes down the road. The call was in many ways a delicate mediated dance. As Secretary Ritchie described it, "we wanted to settle on process solutions that would create a balance of administrability, fairness, and agreement from the campaigns. We knew if either campaign was sufficiently dissatisfied with the result, we would end up in court."¹³⁴

¹³¹ Weiner, *supra* note 62, at 58 ("[a]fter a series of meetings and conference calls between both campaigns and Ritchie's office, sixteen ground rules were established for the recount.").

¹³² The third-party candidate, Dean Barkley, was invited to participate on the call but chose not to. Telephone Interview with Gary Poser, Dir. of Elections, State of Minn. (May 26, 2011).

¹³³ Ultimately the document refers to the candidates by their last name only. A copy of the final Recount Plan *available at* <http://www.sos.state.mn.us/index.aspx?page=1405>.

¹³⁴ Interview with Sec'y Ritchie, *supra* note 120.

MEDIATION AND POST-ELECTION LITIGATION

Secretary Ritchie understood the need to facilitate party agreement on issues of concern, in large part to enhance efficiency by avoiding court battles. Secretary Ritchie's office knew it could not heavy-handedly dictate the terms of the Recount Plan. Instead, Ritchie undertook to listen to concerns the parties raised on the call, seek out authority where possible on those issues from the AG representative, generate options to resolve those disputes, and create a final document reflecting agreement reached. Ultimately, the call produced the final Recount Plan that reflected the concerns and interests raised.¹³⁵

Importantly, the conference call featured several characteristics not typical of mediation. First, the campaigns lacked the ability to define the terms of agreement. They could ask questions and make suggestions, but in the end the OSS, working with the AG's office, had the authority to dictate the Plan. Secretary Ritchie could take input and suggestions from the campaigns and rely on legal authority of the AG's office, but ultimately retained control over the document.¹³⁶

A second way that the call differed was the players involved. In most mediations, the parties and/or their attorneys meet privately with the mediator(s). So long as the parties have authority to settle, most mediators do not want others in the room.¹³⁷ In certain kinds of mediations, particularly of public disputes, mediators realize the importance of having a full set of interests represented at the table and will refrain from mediating until all interested parties are present.¹³⁸

¹³⁵ According to Director Poser, the Recount Plan that the Secretary of State's Office submitted to the Canvassing Board represented changes and amendments produced as a result of campaign input during the call. Telephone Interview with Gary Poser, *supra* note 131; Recount Plan, *supra* note 133.

¹³⁶ The State Canvassing Board, which signed off on the document as submitted, retained final authority over the document, but theoretically could have made changes to it. Telephone Interview with Gary Poser, *supra* note 132.

¹³⁷ Note that some mediators prefer to mediate without lawyers in the room in deference to party autonomy and self-determination, and because lawyers often find the problem-solving orientation difficult. In at least two states, mistrust of lawyers in the mediation setting has culminated in statutes giving mediators the power to exclude lawyers from mediation sessions. See CAL. FAM. CODE § 3182(a) (2009); KAN. STAT. ANN. § 23-603(a)(6) (1985). For a thoughtful discussion on the benefits and drawbacks of lawyer representation in mediation, see Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 275-331 (1999).

¹³⁸ Most mediators and court-mandated mediation programs require the presence of individuals on both sides with the authority to settle. In court-ordered mediation, accusations of bad-faith mediation can stem from failure of a party to send an individual

A third way the conference call differed from mediation was Secretary Ritchie's reliance on authoritative input. When the campaigns raised concerns, Secretary Ritchie would often ask the AG's counsel to provide an assessment of what the law dictated on the subject at issue. Likewise, election administrators on the call also served an "expert" function. The campaigns' assertions for certain changes to the process could have huge implications for, for example, election official staffing demands. The voice of election administrators in defining this process was therefore critical. In some instances, particularly in the collaborative mediation model,¹³⁹ mediators rely on participating experts. But for the most part, traditional mediation excludes such input.

A fourth way the conference call differed from traditional mediation was the role of the public interest. A controversial question in mediation circles is whether or not mediators should take the public interest into account when mediating.¹⁴⁰ Many believe that mediators, particularly those mediating large public policy disputes, must keep the public interest in mind even when those interests are not necessarily represented at the table. Arguably, Secretary Ritchie performed this role on the call. Secretary Ritchie understood that an important component of the process was integrity of the system and public confidence.¹⁴¹ With this understanding at the fore, he describes one of his

to mediation with authority to settle. For a review of cases in which inadequate authority resulted in findings of bad faith, see Roger L. Carter, *Oh, Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367, 385 (2002).

¹³⁹ That said, it should be noted that in a relatively new form of ADR called collaborative law, collaborative practitioners commonly bring in outside experts to assist parties in crafting their agreement. See PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 111–14 (2d. 2008).

¹⁴⁰ Carrie Menkel-Meadow, *Professional Responsibility for Third-Party Neutrals*, 11 ALTERNATIVES TO HIGH COST LITIG. 129, 131 (1993) (asking whether, "mediators of large public-policy disputes have any obligation to the public if there is no obvious representation of public interests in a particular dispute?"); see also Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 82–83 (2010) ("For years, scholars and practitioners have questioned whether a mediator should be a mere facilitator of party-initiated outcomes or should assertively prevent agreements that are unfair or favor more powerful parties.").

¹⁴¹ Jocelyn Benson, in a fascinating book about the role of secretaries of state, describes the various hats secretaries of state wear with regard to managing elections. In a chapter entitled, "The Secretary as Voter Advocate," Benson outlines the various ways secretaries of state advocate for the public interest: "[V]oters and sitting Secretaries must form a partnership of collaboration and communication. In doing so, voters are able to inform and bolster a Secretary's ability to voice their concerns and advocate on their behalf." Most of the efforts she describes include election administration reform efforts,

MEDIATION AND POST-ELECTION LITIGATION

main functions on the call as representing those interests.¹⁴² The question of whether a secretary of state can adequately represent the public interest in a mediation setting raises a slew of interesting questions. First, if the secretary of state is an elected official, does this make him or her more or less responsive to the public interest? The answer is not clear. Some scholars have posited that legislatures are a better forum for election disputes because turning to a majoritarian institution resolving election disputes is better than asking the judicial branch to decide (i.e., a political forum for a political question).¹⁴³ This may arguably be true of an elected secretary of state as well—she or he may be quite responsive to the interests of the electorate, as many believe was the case with Secretary Ritchie.¹⁴⁴ At the same time, examples of highly politicized secretaries of state abound—one need look no further than Katherine Harris during *Bush v. Gore*.¹⁴⁵ It is not at all clear that a state's chief election officer can be trusted to represent the public interest across the political spectrum.

In the context of post-election litigation, the question of public voice can be a practical one. In the Franken-Coleman recount, the campaigns each mounted efforts to inject individual voters into the process. During the early phases of the recount, the Franken team methodically gathered data about and affidavits from voters who claimed their votes had been rejected for unclear reasons.¹⁴⁶ Later at trial, a lawyer for Franken, Charlie Nauen, was permitted to intervene on behalf of sixty-one voters whose ballots had been rejected.¹⁴⁷ For its part, the Coleman team organized an ill-fated class-action

get-out-the-vote programs, and so forth. Benson notes that partisan politics often frustrate secretaries of states' efforts to advocate for voters. JOCELYN F. BENSON, *STATE SECRETARIES OF STATE: GUARDIANS OF THE DEMOCRATIC PROCESS* 65 (2010).

¹⁴² Interview with Sec'y Ritchie, *supra* note 120.

¹⁴³ See Huefner, *supra* note 24, at 321.

¹⁴⁴ Weiner, *supra* note 62, at 121. Note that Secretary Ritchie indicated that the next election loomed large for him during the recount as he made an effort to do his best by the people of Minnesota. Interview the Sec'y Ritchie, *supra* note 120.

¹⁴⁵ Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 *YALE L. & POL'Y REV.* 125, 127 (2009).

¹⁴⁶ Weiner, *supra* note 62, at 91.

¹⁴⁷ Weiner, *supra* note 62, at 173. See Petitioners' Memorandum of Law in Support of Motion for Summary Judgment, *Peterson v. Ritchie*, Minn. Dist. Ct., Jan. 21, 2009, No. A09-65, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MNElectionContest-PetersonMemo-1-21-08.pdf> (petition on behalf of the 64 voters); Order, *Peterson v. Ritchie*, Minn. Dist. Ct., Jan. 16, 2009, No. A09-65, available at <http://www.mncourts.gov/Documents/0/Public/Other/2008%20Elections/Order.1.16.09.p>

effort so that the interests of 11,000 aggrieved voters in the state would be represented in the litigation.¹⁴⁸ Despite the effort of the campaigns to incorporate the public interest into their narratives, it remained a partisan effort to do so; the problem of representation of the public's interest therefore persists.

The problem of the public interest brings to light one of the most difficult issues in mediating public disputes: should the parties be able to define the contours of agreement if such agreement fails to take into account the public interest? An issue raised on Secretary Ritchie's conference call is illustrative of this point.

C. Party Agreement and the Problem of Duplicate Ballots

One of the biggest sticking points on the call concerned duplicates. When absentee ballots arrived torn or otherwise mutilated through the postal service, standard election administration practice guided that election officials would make a new ballot that could be fed into the tabulating machines. Original ballots were marked Original and set aside; duplicated ballots were marked Duplicate and also saved. The original Recount Plan stipulated that election officers administering the recount should count the duplicate ballots. But the redlined document took issue with this plan, advocating instead that original ballots be used in the count (on the theory

df (order making the 64-person suit part of the pending litigation between Al Franken and Norm Coleman in Ramsey County).

¹⁴⁸ Weiner, *supra* note 62, at 173. Order Denying Motion for Certification of a Class Peterson v. Ritchie Minn. Dist. Ct., Feb. 23, 2009, No. A09-65, *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Orderdenyingcertificationofaclass.pdf> (denying Coleman's campaign class certification to 11,000 absentee voters). The following are the grounds on which the court denied the class action certification: (a.) MINN. STAT. § 204B.44, which governs the process of seeking a remedy to an error, omission, or wrongful act in the election process, refers to "any individual;" it does not contemplate a class-action suit; (b.) MINN. STAT. § 204B.44 gives Minnesota Supreme Court original jurisdiction over such cases. In this case, Minnesota Rules of Civil Procedure would not govern (as would apply to a district court), but rather Minnesota Rules of Civil Appellate Procedure would apply to the Supreme Court. There is no mechanism for class certification under Minn. R. of Civ. App. Pro.; (c.) If Rule 23 of Minn. R. of Civ. Pro. did apply, Coleman's petition would nevertheless not qualify for class certification on the basis that it lacked commonality, typicality, and adequacy of representation—all requirements under Rule 23. *Id.* at 4, 6–7. First, the court found that Coleman's petition lacked commonality in that although members of the class shared a "common question of law," there were "unique questions of fact." *Id.* at 6. In addition, the class lacked typicality and adequacy of representation in that "Coleman cannot represent the class of absentee voters...because he is not a member of that class." *Id.* at 7.

MEDIATION AND POST-ELECTION LITIGATION

that voter intent would less likely be lost using the original ballot). When the opposing campaign agreed with this change, the Secretary of State's Office consented to what seemed a reasonable agreement among the parties. The final document therefore indicated the agreed upon process:

As the Table Official sorts the ballots, he or she shall remove all ballots that are marked as duplicate ballots and place those duplicate ballots in a fourth pile. At the conclusion of the sorting process, the Table Official shall open the envelope of original ballots for which duplicates were made for that precinct and sort the original ballots in the same manner as they sorted all other ballots.¹⁴⁹

Although the parties readily agreed to this revision on the call (without objection at the time from other participants, including the Secretary of State's Office), those administering the recount came to rue the decision. As election officials put this process into place, a terrible problem became apparent: the number of ballots marked duplicate and original did not always match up.¹⁵⁰

This story demonstrates a problem inherent in letting parties agree to process rules in an election mediation.¹⁵¹ Parties in an election mediation may agree on processes that create huge headaches for recount administrators, are unworkable, or worse, come at the expense of the public interest. What if it is problematic to allow parties too much control in election mediation? This very tension—when and whether to let parties agree to process decisions—became one of the most controversial issues in the 2008 Minnesota recount as the next section relates.

D. *Judicial Deference to the Parties: The December 18 Order*

On December 18, 2008, the Minnesota Supreme Court issued a surprising and contentious opinion accompanied by two vigorous dissents.¹⁵² The order read, *inter alia*, as follows:

¹⁴⁹ Recount Plan, *supra* note 133.

¹⁵⁰ Weiner, *supra* note 62.

¹⁵¹ Note the interesting overlap between the parties' ability to agree on process issues in mediation and recent holdings about the ability of parties to negotiate for dispute resolution processes in arbitration clauses. In *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008), the Supreme Court held that parties cannot agree in an arbitration clause to confer jurisdiction on a federal court to apply an expanded scope of review.

¹⁵² *Coleman v. Ritchie*, 758 N.W.2d 306 (Minn. 2008) (Norm Coleman, a candidate in a disputed election, petitioned the court seeking to prevent county canvassing boards from counting rejected absentee ballots in the pending administrative recount).

Because previously rejected absentee ballots that all agree were rejected improperly should be counted, and in light of the fact that the State Canvassing Board has not yet certified the final results of the recount, we order candidates Norm Coleman and Al Franken and their campaign representative, the Secretary of State, and all county auditors and canvassing boards to establish and implement a process, as expeditiously as practicable, for the purpose of identifying all absentee ballot envelopes that the local election officials and the candidates agree were rejected in error.¹⁵³

As Jay Weiner sums up the order, “if both campaigns . . . agreed on the legality of an absentee ballot, it should be counted. If there’s not agreement, that voter is screwed.”¹⁵⁴

The dissenting justices, Justice Alan Page and Justice Paul Anderson, were nothing short of enraged. Justice Page began his dissent quoting Stalin, who allegedly said, “I consider it completely unimportant who . . . will vote or how; but what is extraordinarily important is this—who will count the votes, and how.”¹⁵⁵ The dissenters argued that the majority had essentially abdicated the public interest to an extrajudicial process.

At first blush, it may seem appropriate to let the political process—i.e., the battle between the campaigns—play out. We might feel comfortable deferring to the parties to duke it out, based on the assumption that at least one of the campaigns (the one that believes a particular voter intended to vote for its candidate) will be a vigorous advocate for the validity of that voter’s ballot. But the interesting twist in this instance is that the majority did not leave it to the parties to battle it out with the best advocate winning; it asked them only to “agree” which absentee ballots were valid. Only once agreement was reached would a ballot count. The majority did not outline how agreement should be reached. It left the process question entirely in the hands of the parties.

Wrote Justice Page in his dissent:

The court’s order may seek the peaceful way out by asking the campaigns to agree on improperly rejected ballots. But the order does not guarantee that the candidates and their political parties will agree on any rejected ballot. Instead, the court’s order will arbitrarily disqualify enfranchised voters on

¹⁵³ *Coleman*, 758 N.W.2d at 308 (emphasis added).

¹⁵⁴ Weiner, *supra* note 62, at 123.

¹⁵⁵ *Id.*

MEDIATION AND POST-ELECTION LITIGATION

the whim of the candidates and political parties without the benefit of the legislatively authorized procedures¹⁵⁶

Justice Page continued,

It is a perverse result, indeed, for political parties and their candidates to determine whether a voter's absentee ballot was properly or improperly rejected. By making the acceptance of an improperly rejected ballot contingent on the candidates' agreement, the court has abdicated its role as the defender of the fundamental right to vote.¹⁵⁷

The dilemma Justice Page identifies engages the problem discussed above. How can mediation play a role in post-election process dispute resolution if we are worried about delegating decisions to the parties?¹⁵⁸ Is a court impermissibly delegating fundamental authority if it allows (or, in this case requires) the parties to resolve election process disputes? Those concerned about this abdication may view this as the straw that breaks the camel's back, invalidating mediation as a viable tool in this context altogether. But the problems associated with the December 18 order offer a perfect setting in which to examine whether a mediated solution is in fact a better alternative, capable of addressing the abdication concern.

Recall the earlier disaggregation of process disputes versus outcome-determinative disputes. What kind of dispute was at issue in the December 18 order? Clearly, the decision to count or not count a contested absentee ballot is outcome determinative. But the dispute over the standard by which such ballots should be identified as valid or invalid is a process dispute to the core. In the former, a campaign would object to a single absentee ballot being counted, effectively retaining veto power over the franchise (the path taken). In the latter, the campaign would be forced to articulate its denial based on an agreed upon standard (the path not taken). The difference is subtle. But

¹⁵⁶ *Coleman*, 758 N.W.2d at 310 (Page, J., dissenting).

¹⁵⁷ *Id.*

¹⁵⁸ Interestingly, this concern has been raised in the context of the judiciary "abdicating" its responsibility to mediators more generally. See Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 135 (2004) (citing Magistrate Wayne Brazil: "mediation . . . [has] democratized the courts 'in potentially profound ways because mediation permit[s], in fact actively encourage[s], the parties to decide for themselves which values were most important to them, then to use ADR to pursue those values.'"). Prof. Welsh goes on to identify instances in which this delegation is problematic, ultimately arguing that court-connected mediation can only be effective and responsible if meaningful accountability mechanisms are put into place. *Id.* at 136-42.

looking at the words the majority order actually used, it is possible that recognition of this subtlety was the impulse, but was lost in translation. The order asked the parties to “to establish and implement a process . . . for the purpose of identifying all absentee ballot envelopes that the local election officials and the candidates agree were rejected in error.”¹⁵⁹

Perhaps the majority neglected to appreciate—but the dissents picked up on—the difference between counting only those ballots that the campaigns could agree on (engaging the outcome-determinative dispute that amounted to a single party veto) versus requiring the parties to agree on a process to determine valid ballots (calling for resolution of a process dispute). The outcome-determinative path is irksome because one side can so easily stonewall for political ends, disenfranchising voters as a strategic ploy. Justice Page recognized this problem in his dissent, noting that the candidates had no obligation to agree to any ballots, “whether reasonable or not.”¹⁶⁰ Had the majority opinion more clearly directed resolution of the process dispute—that the parties should agree upon a standard process to be applied uniformly to identify valid versus invalid absentee ballots, the court’s delegation might have been less troubling. In the end, what is worrisome is not the delegation of the decision to the parties, but the delegation of the outcome-determinative decision.

Would a mediation of the process dispute at issue in the December 18 order have improved matters? What would that mediated process look like? Suppose a mediator (or co-mediators) with substantial recount experience had guided the campaigns in the process of developing standards for identifying valid ballots. Imagine that the December 18 order had not been a vague instruction that the parties “agree” before any absentee ballot would be counted. Imagine instead that the Minnesota Supreme Court had called for a mediation session between the two parties to develop rules for which ballots would be counted and which would not in advance of examining any ballots. The process that unfolded under the “order to agree” involved a clear mismatch of legal sophistication. The Franken side had sophisticated data about the likely content of each of the contested ballots, and used this information to determine which ballots were worth a fight. During the session to examine contested absentee ballots following the December 18 order, Weiner describes the following phenomenon:

¹⁵⁹ *Coleman*, 758 N.W.2d at 308 (emphasis added).

¹⁶⁰ Weiner, *supra*, note 62, at 126 (quoting *Coleman*, 758 N.W.2d at 311 (Page, J., dissenting)).

MEDIATION AND POST-ELECTION LITIGATION

More than once, voting officials and Coleman reps witnessed Franken lawyers check with staff members—"computer geeks" . . . —who sorted through voter data information on their laptops. In a few cases, the staffer with the computer gave a thumbs-down to the Franken lawyer, and a decision was made.¹⁶¹

Is this how democracy should function? Should parties be allowed to choose which votes to fight for, pitting data streams above securing the fundamental right to have all valid votes count? A mediated scenario could well have avoided this outcome by ironing out in advance standards defining process rules for determining which ballots would be deemed valid. Lawyers might have devised a strategy for identifying which kinds of irregularities might swing which way, or might adopt a broader tactic of trying to disqualify as many or as few ballots as possible. But what a mediated agreement before the fact would accomplish is to avoid the type of overt partisan ballot "selection" Weiner describes.

There are (at least) two main criticisms of this idea. First, skeptics might argue that process decisions should not be delegated any more than outcome-determinative decisions. In response to this criticism, it is not clear that the Minnesota Supreme Court is in a better position to have articulated the process standards itself. As the discussion of judicial resolution of process disputes in the post-election context bears out, judges may not be the best resource for resolving process disputes.¹⁶²

A second criticism is that in the instance of the December 18 order, the time for a discussion of standards had already come and gone. The Franken campaign was determined that each ballot "told a story," and had settled on a strategy that refused to lump ballots in cognizable categories.¹⁶³ This strategy largely precludes the idea that a mediator could have facilitated a productive standards discussion at this phase in the Coleman-Franken recount. In the case of the December 18 order, it was almost certainly too late for a mediation on process. However, the moral of this tale is not that mediation is useless in post-election litigation. Rather, it is that had an informed and broad process mediation taken place far earlier in the game, Minnesotans might have avoided this dispute devolving to the law of the December 18 Order.

¹⁶¹ Weiner, *supra* note 62, at 133.

¹⁶² See discussion *supra*.

¹⁶³ That is, other than the category that a ballot was lawfully cast and wrongfully rejected—the so-called fifth pile. Telephone Interview with Marc Elias, Partner, Perkins Coie LLP (July 12, 2011) (Elias represented Senator Al Franken in the 2008 recount proceedings.).

As these examples from the 2008 Minnesota recount bring to light, mediation is no panacea for resolving post-election disputes. The problems go far deeper than the zero-sum nature of elections running at odds with the promise of ADR-induced value creation. Bifurcation of post-election disputes into process versus outcome-determinative disputes is likewise complicated by the problems inherent to delegating process decisions to the parties in an election dispute. As the 2008 Minnesota recount beautifully illustrates, even what might seem to be straightforward opportunity for mediation in a post-election dispute must be approached cautiously and with full appreciation for the potential dangers of its use. Advocates of mediation in post-election litigation should not be too full-throated in their call. Likewise, those who would dismiss mediation in this context should realize that mediation, when approached in a thoughtful and studied manner by mediators with experience in the post-election dispute setting, offers the potential to address some of the many shortcomings of post-election litigation.

VII. CONCLUSION

The question of ADR's role in public disputes has long been of interest.¹⁶⁴ ADR scholars and practitioners urge that stubborn adherence to adversarial processes misses important opportunities for interest-based consensus building. Could ADR help bridge gaps in healthcare reform?¹⁶⁵ Help find workable consensus on difficult issues like immigration, the

¹⁶⁴ See Aric J. Garza, *Resolving Public Policy Disputes in Texas Without Litigation: The Case for Use of Alternative Dispute Resolution by Governmental Entities*, 31 ST. MARY'S L.J. 987, 989 (2000) ("traditional public deliberative processes used to solve disputes are ripe for the introduction of institutionalized mediation as a tool to facilitate the remedy of these disputes.").

¹⁶⁵ Carrie Menkel-Meadow, *Scaling Up Deliberative Democracy as Dispute Resolution in Healthcare Reform: A Work in Progress*, 74 LAW & CONTEMP. PROBS (2011), available at www.law.duke.edu/journals/lcp ("[p]olarization of most political issues . . . makes gradations and variations of views and policy outcomes impossible to recognize and discuss because voting and other political procedures ultimately require binary decisions: yes or no. Although courts must usually come to win or lose binary solutions, true deliberation *before the fact* of legislation or regulation could actually permit more nuanced policy outcomes."). In this article, Menkel-Meadow identifies theoretical justification from thinkers as diverse as Adam Smith and Amartya Sen for "the practical 'third party neutral' or skilled deliberative democracy facilitator, mediator, or moderator." In the words of Adam Smith, an "impartial spectator" who can encourage "critical scrutiny and public discussion." *Id.* (quoting ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie eds., 1976)).

MEDIATION AND POST-ELECTION LITIGATION

environment, or education?¹⁶⁶ Given the intractability of so many public disputes, it seems clear that adversarial, polarized legislative and judicial processes have certain shortcomings that ADR could usefully address. The all-too-common instances of Congressional deadlock, such as the debt-ceiling debacle last summer¹⁶⁷, underscore the need to re-conceptualize democratic dispute resolution design and consider whether even the most intractable public disputes might benefit from ADR's problem-solving techniques.

Election disputes fit squarely on the list of public disputes for which current dispute resolution mechanisms fall short. It is most certainly the case that litigation is best for certain post-election disputes. However, failing to disaggregate election disputes misses an important opportunity to increase the efficiency in resolving them. Ambiguities in election procedures and statutes that give rise to post-election disputes lead to protracted and often unnecessary litigation in which legal arguments can be (and are) manipulated to suit an overall strategic purpose instead of the broader public interest of seeing elections settled fairly, quickly, and with as little involvement of the court system as possible. This reality suggests a need to explore ADR methods in the post-election dispute context. With the help of informed and skilled election mediators, a mediated process could help resolve procedural and standards gaps early on before malleable legal arguments enter the fray. Mediation of post-election disputes warrants careful consideration in a world in which the adversarial process so often disserves democracy.

¹⁶⁶ For an interesting (though slightly dated) overview of the role in ADR in environmental disputes, see Rosemary O'Leary, Tracy Yandle & Tamilyn Moore, *The State of the States in Environmental Dispute Resolution*, 14 OHIO ST. J. ON DISP. RESOL. 515, 517-610 (1999) (documenting the rise of the use of ADR techniques to resolve environmental disputes).

¹⁶⁷ See L. Michael Hager, *Government Gridlock? Try Mediation*, THE HILL'S CONGRESS BLOG (Aug. 1, 2011), <http://thehill.com/blogs/congress-blog/politics/174815-government-gridlock-try-mediation>; David A. Hoffman, *Send Mediators to Washington*, CHRISTIAN SCIENCE MONITOR (Aug. 24, 2011), <http://www.csmonitor.com/Commentary/Opinion/2011/0824/Send-mediators-to-Washington>.